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Musicologica Brunensia. 2023, vol. 58, iss. 2, pp. 93-113

ISSN 1212-0391 (print); ISSN 2336-436X (online)

Stable URL (DOI): <https://doi.org/10.5817/MB2023-2-8>

Stable URL (handle): <https://hdl.handle.net/11222.digilib/digilib.79282>

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Access Date: 17. 02. 2024

Version: 20240122

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When the Music Changes, so Does the Dance: Do We Still Need Copyright Collectives?

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Abstract

The tremendous growth of digitization in recent years has raised again the question of the functionality and necessity of the original structure of copyright protection, the copyright collectives. Especially music markets have transformed to such an extent that earlier arguments in favour of the existence of copyright collectives are questionable. The transition from monopolistic and oligopolistic structures to more individual and competitive market is accelerated by the digital economy forces. Even more, the new organisation of the music market has the potential to establish a new stability. The final product of the transformation will be a simpler and shorter creator-consumer chain that will render the market more flexible and competitive, with lower prices and a greater selection. Digital service providers can efficiently collect fees from various music uses. In such world the role of current form of copyrights and copyright collectives can be considered a part of the problem rather than solution.

Key words

copyright collectives, digital markets, music, competition

Introduction

This paper seeks to answer the question of whether the role of copyright collectives¹ is essential to the functioning of emerging music markets. Over the past years, music markets have transformed by digitalization so markedly that earlier arguments in favour of the existence of copyright collectives have, in many respects, lost their relevance.²

Most of the publications on copyright revolve around the idea that protection of the owners' rights provides a necessary support to new pieces of work in artistic and creative spheres.³ The above then justifies the existence of copyrights and copyright collectives as the most suitable way of ensuring adequate reward to the authors for their creative work; the existence of the monopoly position of copyrights and copyright collectives in creative markets,⁴ in turn, gives rise to the oligopolistic structures in creative industries.⁵ Distortions are also being caused by the accumulation of copyrights in the hands of a few large companies.⁶ These market dysfunctions constituted as a *consequence* (not cause) the ubiquitous piracy,⁷ which can only be curbed effectively through maximising the market's flexibility and competitiveness.⁸

This paper considers the question of copyright collectives in theory and practice. First, it asks the question, whether the music market (or other creative industries) need copyright at all? Then, given the context of the last 200 years, it asks whether the exist-

1 In this paper, the term copyright collectives includes both Collective Management Organizations and Performing Rights Organizations.

2 E.g. MENELL, Peter S. *A Remix Compulsory Licensing Regime for Music Mashups*. The Routledge Companion to Copyright and Creativity in the 21st Century, edited by Michelle Bogre & Nancy Wolff. New York: Routledge. 2020, or WARD, Francine. *Self-Publishing Revolution: Copyright Pitfalls for Writers Who Go It Alone*. The Routledge Companion to Copyright and Creativity in the 21st Century, edited by Michelle Bogre & Nancy Wolff. New York: Routledge. 2020.

3 e.g., ERGO, Richard W. *ASCAP and the Antitrust Laws: The Story of a Reasonable Compromise*. 1959, Duke Law Journal, vol. 2, p. 259; Hurt, Robert M., and Schuchman, Robert M. The Economic Rationale of Copyright. *The American Economic Review*, 1966, vol. 56, n. 1/2, p. 421; Park, Walter G. The Copyright Dilemma: Copyright Systems, Innovation and Economic Development. *Journal of International Affairs*, 2010, vol. 64, n. 1, p. 53).

4 Most typically exemplified by the music market, the said deformations exist in other cultural areas, including the book and film industries. For a more detailed characterization of copyright collections as a natural monopoly, see, e.g., BESEN, Stanley M., Sheila N. KIRBY, and Steven C. SALOP. An Economic Analysis of Copyright Collectives. 1992, *Virginia Law Review*, vol. 78, n. 1, p. 383–411.

5 GAROFALO, Reebee. From Music Publishing to MP3: Music and Industry in the Twentieth Century, 1999, *American Music*, vol. 17, n. 3, p. 325.

6 The three largest record labels - Universal Music Group (32% market share), Sony Music Entertainment (20%), and Warner Music Group (16%) - hold a 68% share of the music recording market. Similarly, the three largest music publishers - Sony (25%), Universal Music Publishing (21%), and Warner Chappell Music (12%) - maintain a 58% share of the music publishing market. See Music & Copyright: *Recorded-music market share gains for SME and the indies, publishing share growth for UMPG and WCM* (2022). Retrieved June 20, 2022 from <https://musicandcopyright.wordpress.com/tag/market-share/> *Music & Copyright*.

7 YU, Peter K. Four Common Misconceptions About Copyright Piracy. *Loyola of Los Angeles International and Comparative Law Review*, 2003, vol. 127, n. 26, p. 143–4; CHIANG, Eric P. and ASSANE, Djeto. Estimating The Willingness To Pay For Digital Music. 2009, *Contemporary Economic Policy*, vol. 27, n. 4, p. 514–5.

8 BOLDRIN, Michele, and David LEVINE. *Against intellectual monopoly*. Cambridge University Press: Cambridge, 2008.

ence of copyrights necessarily requires the existence of copyright collectives? Then, given the context of the last 100 years, it asks whether the current transformation of music markets could be a significant opportunity to transform ‘copy’-right to ‘author’-right,⁹ eliminate the role of copyright collectives (and corporate copyright holders) and eradicate a piracy?

Such a new viewpoint will precipitate the understanding of the current situation, in which market forces bypass the existing inflexible monopoly of copyright collectives, transforming the market regardless of legislation. The transition from monopolistic and oligopolistic structures to more competitive market is accelerated by the digital economy forces. The music market is undergoing a particularly noticeable transformation, which will be discussed in greater detail here.

To aid the understanding of the transformation process, three questions will be elaborated upon:

- 1) Is universal copyright protection of author’s works really necessary and all-beneficial?
- 2) Can we substantiate the role of copyright collectives on music market nowadays?
- 3) What are the opportunities of the changing music market for artists and consequences copyright collectives?

Answering the above questions will shed light on the current radical transformation of music markets, which extends far beyond a couple of “technical improvements” and has the potential to create a completely new system. The final product of the transformation could be a simpler and shorter creator-consumer chain that will render the market more flexible and competitive, with lower prices and a greater selection.

Methodologically, the study is based on economic models of creative industries and market structure analysis. Part 1 discusses the general question of the justifiability of the existence of copyright protection and frames arguments of the different approaches in a market structure analysis.

Part 2 describes functioning of copyright collectives and analyses their effectiveness in history and today, particularly in the context of the radical transformations of the market from the early 20th century to the present day. A synthesis of the economic and legal implications leads to possible policy solutions, taking into account technological transformations of the music market.

Part 3 follows the ongoing changes in the music market and argues for a competitive market structure with a direct relationship between authors as sellers on the one side and consumers (buyers) on the other, using a theoretical analysis based on the classical economic market model.

9 PARC, Jimmyn, and Patrick MESSERLIN. The true impact of shorter and longer copyright durations: from authors’ earnings to cultural creativity and diversity. *International Journal of Cultural Policy*, 2021, vol. 27, n. 5, p. 607–620.

1. Is universal copyright protection of author's works really necessary and all-beneficial?

The arguments in favour of copyright protection as a driving force for creativity are essentially twofold, with the first approach emphasizing the **author's right to the protection** of their work and **to the resulting material benefits**.

Thus, this conception can be seen as dividing author's rights in a manner similar to that of most countries' legislation, namely, into **personality rights**, which ensure inviolability of the work (the right to be recognised as the author of the work; the right to protect the integrity of the work by objecting to distortions of the work or the introduction of undesired changes to the work; publication right, i.e., the right not to publish (frequently violated in the case of celebrities)), and **property rights** (the right to earn income from the work). These two rights can be independent of each other.¹⁰

The other approach focuses on supporting "**the common good**"; the practice of protecting works with copyright (typically through guaranteeing a time-limited monopoly enforced by the state) is believed to encourage innovations.¹¹ The reasoning behind this second approach is that while difficult to invent or create, scientific, artistic and technical innovations are easy to copy.¹² The advocates argue that with no intellectual property protection, copyright pirates will be "fare dodgers on the train of creativity", discouraging the creators from investing their efforts and money into new inventions and creations. Copyright measures, on the other hand, will ensure appreciation and payback of the author's investments, from which the whole society will benefit in the end.¹³

Disregarding for now the antagonistic nature of both arguments (for the stronger the protection, the slower and more limited the propagation of the work *and* the less of the "common good" there is), we will address each of them separately and describe their main weaknesses.

10 See RIGAMONTI, Cyrill P. The Conceptual Transformation of Moral Rights. *The American Journal of Comparative Law*, vol. 55, no. 1, 2007, pp. 68. The very existence of personality protection can incite further questions, e.g., whether copyrights are always to be fully attributed to be first creator of the work. For instance, let us consider the following: Schubert set some of Goethe's poems to music, which might never have happened if Goethe decided not to give permission for his work to be musicalised. Could that be considered beneficial for the society? Thus, the topic of personality protection is also linked to the question of whether copyright should apply to works that are entirely different (see O'HARE, Michael. Copyright: When Is Monopoly Efficient? *Journal of Policy Analysis and Management*, 1985, vol. 4, n. 3, p. 413).

11 TOWSE, Ruth. Why has cultural economics ignored copyright? *Journal of Cultural Economics*, 2008, vol. 32, n. 4, p. 243–259.

12 see RAUSTIALA, Kaul, and Christopher SPRIGMAN. The Piracy Paradox: Innovation and Intellectual Property in Fashion Design. *Virginia Law Review*, 2006, vol. 92, n. 8, p. 1688.

13 SCHUMPETER, Joseph. *Capitalism, Socialism and Democracy*. 2003.

1.1. Author's right to the protection of the work and material benefit

The first argument, which emphasises the need for copyright, holds that the owner has a right to enjoy the benefits of ownership. The problematic aspect consists in that it is unclear what exactly classifies as claimable intellectual property; in other words, what determines that copyright (i.e., the right to some regular payment as a result of the monopoly on benefits) can be exercised by the author of a book or a piece of music, but not by someone who develops new mathematical techniques, or new methods of inventory management. The reality shows that the creation of various collectively useful “externalities” is rewarding for the authors even in the absence of financial compensation. When a large manufacturing company builds a plant in a new area, it can boost the profits of many small businesses, and it would certainly be possible (though not necessary) to attempt to devise a mechanism through which the large manufacturer could collect money in reward for the benefits accrued by the presence of the plant; yet, no one has ever undertaken such a procedure.¹⁴ No man will stop an activity that provides a benefit to him merely because that activity provides a benefit to someone else.

Aside from the topic of whether such a scheme is possible or necessary, the main issue is related to the question of whether government assistance should be provided in enforcing the collection. In other words, “a special case for a monopoly for publishers cannot rest on the general proposition that if businessmen are enabled to make monopoly profits, some of them will be devoted to good works”.¹⁵

The argument of the necessary compensation to the creator is further weakened by the fact that for many artists, the incentive of profit may be overridden by that of public presentation of their talent.¹⁶ Studies on royalties have shown that numerous artists create without receiving any remuneration for their work. Towse points out that in Denmark, Sweden and the UK, over half the performers tend to receive below £90 per annum from the public performance right, which is probably less than a street musician earns in a day. Copyright earnings were a minor source of income for 23% of composers and 18% of writers in Australia.¹⁷

Writing was found to be the main source of income for less than a half of the 25.000 writers in Germany and GB, and the income of a professional German writer was below the median wage in Germany¹⁸, which is 1/3 lower than the national median in the UK. Some artists are actually willing to pay to have their authorial work published.¹⁹

14 HAMPL, Mojmír. Trojí přístup k veřejným statkům. *Finance a úvěr*. 2001, vol. 51, n. 2, p. 117.

15 HURT, Robert M., and SCHUCHMAN, op. cit., p. 423.

16 This is confirmed by statements by some of the musicians themselves; for instance, Pete Seeger is credited with saying the following: “*I write a song because I want to. I think the moment you start writing it to make money, you're starting to kill yourself artistically.*”

17 TOWSE, op. cit. p. 251.

18 KRETSCHMER, Martin and HARDWICK, Philip, *Authors' Earnings from Copyright and Non-Copyright Sources: A Survey of 25,000 British and German Writers*. 2007.

19 Many well-known writers self-published their first books, such as Mark Twain, George Orwell, and Ernest Hemingway, and nowadays self-publishing is rising. See CASSELL, Kay Ann, *Do Large Academic Libraries Pur-*

Another argument against long-term copyright protection as a means of encouraging artistic creation asserts that while copyright protection had been non-existent for centuries, an array of outstanding musical and literary works were created. Indeed, some studies even suggest that artists may be more apt to create in times of material uncertainty than with a fixed income at hand, for instance, in the form of patronage.²⁰ Before the institution of intellectual property, an opera would be sold for a fixed fee, with the composer ceding their rights to an impresario. The market functioned well even without copyright protection, and new works kept being created. Though receiving a one-time payment only, the artist was able to survive in the competitive market.

Paradoxically enough, the reality of today's intellectual protection practices is, in many important aspects, history writ large: It is not uncommon for an artist to sign up with a creative industry company, which will often require that copyright (i.e., the right to decide about reproduction, distribution and public presentation) be transferred to it in exchange for a royalty. If the work was created in an employer-employee agreement, the copyright belongs to the employer.²¹ Arguably, copyright is more valuable to larger companies than smaller businesses, creating assets for firms, which leads to mergers and acquisitions and the creation of large international oligopolies that control not only the music industry, but also film, publishing and broadcasting industries. The above makes the bargaining position of the individual artist very weak;²² the institution of copyright protection thus has an adverse effect in the form of severe market distortions.²³ After all, copyright was created to protect the interests of copyists, not authors.²⁴

A question then arises about the effectiveness of copyright as an incentive to artists, in the face of the domination by large companies that control the market. Is, then, copyright protection a service to the author, or a tool in building monopolies and oligopolies in the market? Perhaps the markets in creative industries as well as artists themselves could benefit from the absence of copyright more than from its existence?

This provocative yet convincing thesis was proposed by O'Hare²⁵, who illustrates his statement by comparing the British and American book markets in the 19th century. At that time, the works by British authors were not protected by copyright in the US, but

chase Self-Published Books to Add to Their Collections? *Self-Publishing and Collection Development: Opportunities and Challenges for Libraries*, edited by Robert P. Holley, Purdue University Press, 2015, p. 27.

20 KING, Timothy. Patronage and Market in the Creation of Opera Before the Institution of Intellectual Property. *Journal of Cultural Economics*, 2001, vol. 25, n. 1, p. 42.

21 TOWSE, op. cit. p. 250.

22 The fact that the current form of copyright protection primarily benefits corporations rather than authors is demonstrated, among other things, by the UK Parliament's proposal "expand creator rights by introducing a right to recapture works and a right to contract adjustment, ... which should occur after a period of twenty years, which is longer than the periods where many labels write off bad debt but short enough to occur within an artist's career." See *Report Economics of music streaming*, 2021.

23 TOWSE, op. cit., p. 252.

24 PARC, op. cit., p. 610.

25 UK in 1870: 5,829 GDP per capita, population: 31.4 million; USA: 4,803 GDP per capita, population: 40.2 million (US dollar 2011). (BOLT, Jutta and Jan LUITEN VAN ZANDEN. *Maddison Project Database, version 2020*). See also O'HARE, op. cit., p. 408; HURT, Robert M., and SCHUCHMAN, op. cit., p. 427.

they did enjoy such protection in the UK. Yet, British authors profited more from their US-published works. While the strategy of the US publishers was to flood the book market with large volumes of cheap editions, with the aim to saturate the market and render piracy unworthy of the effort, British publishers would publish small and expensive editions. British authors could achieve significant profits by secretly selling the manuscripts of their works to US publishers before the books were published in Britain. The money thus earned would often exceed the remuneration from the British publishers, despite the comparable size and lower solvency of the US population. If a pirated edition did occur, the original publisher would strike back with a dramatically below-cost edition to make the pirated copy unsellable. Though defying the short-term, profit-centred interests of the publishers, such an approach was highly efficient in keeping piracy at bay.²⁶

As evidenced above, a market with no copyright protection could turn out more profitable; moreover, the absence of copyright encouraged the propagation of the work at a lower price. The 19th century book market offers another valuable lesson to be learnt: though unshielded by copyright, the publisher did exercise a short-time monopoly on the work; therefore, it was in his interest to sell as many copies at the lowest price possible, so that piracy would be unprofitable. The risk of piracy prevented the publisher from enjoying the privileges of a monopoly, i.e., maximizing the margin between the total income and total costs. Paradoxically, then, non-existent copyright protection and the risk of piracy functioned as an automatic price regulator that led to larger editions.

Drawing on the above evidence about American publishing of British authors, we might venture to conclude that copyright protection may, in fact, hinder the propagation of intellectual property because the publisher, armed with a legally guaranteed monopoly, can take the liberty of offering smaller, more expensive editions; on the other hand, the absence of copyright incites fast publication of large and cheap volumes of books, thus helping to propagate the work. If it is true that large and cheap editions are published in the absence of copyright protection, the social value of copyright might even be considered to be negative. From the above viewpoint the risk of piracy is a positive factor because it regulates, in a natural manner, the monopoly legally conferred upon the publisher, thus lowering book prices and expanding editions far more efficiently than any legislative measure could. In a situation where property rights are institutionally protected, the existence of monopolies brings about higher prices and smaller editions.

1.2. Promoting the common good

The second argument, which holds that copyright protection is an asset for the society,²⁷ has a few weaknesses as well. According to Park, copyright laws exert a weaker influence on productivity growth than patents; the impact of copyright and trademark protection

26 A similar strategy was proposed by Chiang & Assane, 2009, op. cit., p. 515, or LAHIRI, Atanu, and Debabrata DEY. Effects of Piracy on Quality of Information Goods. *Management Science*, 2013, vol. 59, n. 1, p. 256.

27 BOYER, Marcel. Competitive Market Value of Copyright in Music: A Digital Gordian Knot. 2018, *Canadian Public Policy / Analyse de Politiques*, vol. 44, n. 4, p. 413; ERGO, Richard W., op. cit., p. 259.

on the economics is debatable and sometimes it is even described as negative.²⁸

In addition, Park's study confirms the intuitive assumption that in developing countries, piracy helps to accelerate economic growth.²⁹ The above supports the conclusion that the society would benefit from significantly loosened or even abolished copyright laws,³⁰ which is by no means an isolated opinion. In his study of the 19th century German book market, Eckhard Höffner³¹ argues that while the advanced copyright protection in the then UK made books a rare and expensive treat for the moneyed classes, the German book market with no copyright laws flourished greatly and provided much cheaper books for a much wider population. Also, it is worth noting that a large portion of this unrestrained market was taken up by academic materials and manuals related to a vast range of science fields, from mechanical engineering to medical science. Höffner sees the resulting increase in the education level of the society as the main driver of the rapid industrial expansion of Germany, which in the 19th century began to quickly catch up on Britain's industrial lead; according to him, weak intellectual property protection boosted the economic development of the country.

A similar argumentation can be applied to the fashion market. Fashion companies represent a global industry which supplies creative goods to a market far exceeding that with books, music or films, and has no intellectual property protection. Despite the extensive copycat in the fashion industry, the amount of competition, innovations and investments keeps growing. The fashion industry has a great dynamism and turnover.³² As in other creative industries, the fashion market perpetually generates creative content (design) with no legal protection at all; in fact, the practice of drawing inspiration from other designers in terms of patterns, material and colours determines fashion trends. While fashion firms take significant steps to protect their trademarked brands, copying is largely allowed to run wild. Instead of hampering creativity and innovation, as the standard argument described above holds, extensive copying has the opposite effect of speeding up the innovative process³³. The absence of intellectual property protection actually serves the interests of both the creators and consumers, which Raustiala³⁴ calls the "piracy paradox", which consists in that low copyright protection benefits the industry more than strong protective measures.

Creative industries with little or no intellectual property laws are quite common. Devoid of any legal protection are, for instance, culinary creations. While a particular

28 PARK, 2010, op. cit., p. 63; PARK, Walter G. Do Intellectual Property Rights Stimulate R&D and Productivity Growth? Evidence from Cross-national and Manufacturing Industries Data. In *Intellectual Property Rights and Innovation in the Knowledge Based Economy*, edited by J. Putnam. Calgary: University of Calgary Press. 2005, p. 34.

29 Similar results were obtained by Lahiri & Day, 2013.

30 PARK, 2005, op. cit. p. 30.

31 HÖFFNER, Eckhardt. *Geschichte und Wesen des Urheberrechts*, Band 2. Verlag Europäische Wirtschaft: München, 2010.

32 Over USD 1,300 billion in 2019, GAZZOLA, Patrizia., Enrica PAVIONE, Roberta PEZZETTI, and Daniele GRECHI. Trends in the Fashion Industry. The Perception of Sustainability and Circular Economy: A Gender/Generation Quantitative Approach. 2020, *Sustainability*, vol. 12, n. 7, p. 1–19.

33 RAUSTIALA, Kaul, and Christopher SPRIGMAN, op. cit., p. 1760.

34 Ibid. p. 1691.

wording of a recipe can be protected, the recipe itself or the resulting food cannot enjoy such protection, although charging a fee for using a recipe in a restaurant is equivalent to music licensing needed to play live or recorded music there; both the music and the food are a part of customer service. Other creative spheres with very rare copyright protection include furniture design, hairdressing services (hairstyles), perfumes, fireworks, and magic tricks. The fact that all of the above keep developing implies, at the very minimum, that a lack of intellectual property protection does not prevent innovations and investments in a given industry.

Based on the above examples, copyright protection appears to bring less benefit to the originators or the society than the traditional views hold. Because intellectual property laws cannot be said to necessarily boost the production of the protected values (thus increasing the benefits accrued to the society), the main purpose of the “common-good” argument seems to consist in obtaining financial assets for the creator; the implications for the society tend to be negative or at least disputable. In other words, the argument is simply a way of defending royalties and their distribution within oligopolistic market structures.

The last objection to the argument of supporting the common good through copyright protection is speculative, but nevertheless worth mentioning. Let us assume for now that copyright laws are indeed a prerequisite for the creation of new goods. How can we know if the copyrighted goods are valued more by the consumers than those that would have been created with no investments in the literary, musical or other creative production areas?

2. Can we substantiate the role of copyright collectives on music market nowadays?

For most of the human history, many various uses of copyrighted goods were of a relatively low value for the user and extracting royalties for them was uneconomical for the copyright owner; thus, copyright ownership for creative goods (e.g., music and books) was often sold together with the work itself, similarly to when an artist sells a painting, or a residential designer sells a house plan. Copyright litigations were complicated and costly.

No later than at the beginning of the 20th century, however, a view started to prevail that creative works deserve better protection, and that royalties should be collected for every use. The above tendency is well illustrated by the example of musical works. Gradually, copyright collectives began to emerge which enjoyed a stronger bargaining position than individual artists and could not only perform larger-scale control of musical works, but also enforce copyright and initiate copyright litigations.³⁵ As a result, it became economically meaningful to monitor a much larger range of uses of protected works to financially maintain both the authors and the copyright collecting structures.³⁶

35 ERGO, Richard W., *op. cit.*, p. 258.

36 BESEN, Stanley M., Sheila N. KIRBY, and Steven C. SALOP, *op. cit.*, p. 383.

An example for such process is establishing of the oldest copyright collective in the music industry in USA - the American Society of Composers, Authors and Publishers (ASCAP); its beginnings can be traced back to 1913, when the American composer Victor Herbert heard an unlicensed performance of his Broadway-staged music while having a dinner with Giacomo Puccini the Italian composer, in a New York City restaurant. When pointing out to the owner that copyright law³⁷ prohibited such unauthorized use of copyrighted works, Herbert was informed that since no fee was charged at the entrance, the copyright law did not apply.³⁸ During the ensuing dispute, copyright owners realised that it was impossible for them, both physically and financially, to enforce their rights individually; their weak bargaining position became even more apparent when hotel, restaurant and cabaret owners formed their own collective defending the rights of music consumers. Composers and music publishers answered by creating ASCAP, whose membership at first numbered 170 authors and composers and 22 music publishers.³⁹ The results of the first litigations upheld the right of the author to compensation for public performance of their work, at first in restaurants and hotels (1917); later, the concept of public performance was extended to include radio broadcasts (1925), performances in dance halls (1929), and the reproductions of radio broadcasts in hotel lobbies (1931). Thanks to the above court decisions, membership in ASCAP was seen as highly attractive, and, as a result, the organisation grew rapidly in numbers.⁴⁰

The policy of the organisation consisted in providing blanket (universal) licenses to use the entire repertory of ASCAP in exchange for an annual fee, which eliminated competition between the authors⁴¹. Net revenues were split in half between the authors and publishers, with each group receiving 50 % of the money.⁴²

37 Copyright law for music composition in US has been approved in 1831 (CUMMINGS, Alex S. From Monopoly to Intellectual Property: Music Piracy and the Remaking of American Copyright, 1909–1971. 2010, *The Journal of American History*, vol. 97, n. 3, p. 661).

38 ERGO, Richard W., op. cit., p. 259. There is a similar anecdote about the creation of SACEM in 1847 in France after a successful lawsuit by Ernest Bourget and other composers with popular Parisian Cafe.

39 ERGO, Richard W., op. cit., p. 259–60; ROTHENBERG, Stanley. *Copyright and public performance of music*. The Hague: Martinus Nijhoff, 1954. p. 29. Since neither authors nor publishers were able to enforce copyright protection or collect royalties individually, it appeared reasonable to bring the interests of the two groups together, forming an association of authors and publishers (ASCAP).

40 Initially, eligible for membership was any author who had had regular publication of “five or more works with a substantial number of performances, as was any publisher of music whose repertory was used by ASCAP licensees” (ERGO, Richard W., op. cit., p. 261).

41 ERGO, Richard W., op. cit., p. 261.

42 The individual authors' share was calculated based on the amount of commercial performance, the length of membership in ASCAP, and the quality of the composition. While the first criterion has never been questioned, the length of membership was a point of contention between new and old members; likewise, the third standard, assessing the subjective quality of music works, led to the allegations that it allowed privileged insiders and unproductive writers to obtain an unfair share of ASCAP's revenues, which are deemed to be the proceeds of the “commercial use” of the musical works. Therefore, a change in the distribution of revenues took place in 1941, according to which the only relevant criteria included the number, character, prestige and commercial popularity of the compositions created by each member, and the length of time for which a work has been in the ASCAP repertory (ERGO, Richard W., op. cit., p. 263).

ASCAP has gradually undergone a strategy change in relation to new distribution channels. At first, when radio broadcasting was still in its infancy, ASCAP licensed radio stations for free, or a minimum charge, to encourage the development of a potentially good customer; however once radio became a commercial success, ASCAP began to seek a share of the profits. In the 1930s, following heated disputes, the two parties reached an agreement, stating that ASCAP would receive a fixed fee *and* a certain percentage of the radio station's revenue.

In 1940, ASCAP proposed a significant reduction in the annual fee in exchange for a 7.5% fee on the stations' income, insisting, that the significant increase in profit to radio stations could largely be attributed to their use of ASCAP music, and that the losses incurred to ASCAP members by the increased popularity of radio broadcasting far exceeded the compensation received from the broadcasters (the rise in radio and TV broadcasting is estimated to have cut sheet music sales, the primary source of music authors' income, by 90%).⁴³ Another argument was that the main financial burden would be placed upon large companies, rather than small ones; however, these greatest players in the market also had the strongest voice and decided to fight back, forming their own collective, BMI⁴⁴. BMI had a smaller and less valuable repertory, but it was cheaper. During the year of conflict, the radio stations broadcast freely available and BMI music, which led to a significant reduction in the revenues of ASCAP authors. The resulting increase in the popularity of some of BMI songwriters and weakening of ASCAP's bargaining position made ASCAP reduce its license fee; in the meantime, though, BMI had already established itself in the market.⁴⁵

The above conflict revealed a fundamental downside of copyright collectives: once the creators unite themselves into a single body, exercising a monopoly over the offering of their music to third parties (e.g., radio stations), this artificially created supply-side monopoly virtually eliminates competition. Negotiation of a single price means that the individual collective members cannot compete in terms of price. Supply-side monopolies of copyright collectives are perceived as highly undesirable.

The emergence of performance rights organisations at the beginning of the 20th century radically changed the character of the music market. The former market with abundant supply and demand transformed into that comprising a monopoly-holding copyright collective on the one hand, and a number of customers on the other. The upside for the authors was an increase in the numbers of paying users, for a monopoly could easily impose a royalty even on those uses that were hard to control individually; their disadvantage consisted in suppressed competition, which is the most prominent effect of the existence of copyright collectives. The number of performance-rights organisations in a market with copyright management (such as the music market) makes no difference because an artist can only be a member of a single association; in Europe, it is more common to have a single collective, while the US music market features multiple

43 ERGO, Richard W., op. cit., p. 262.

44 GARCÍA, Kristelia A. Facilitating Competition by Remedial Regulation. 2016, *Berkeley Technology Law Journal*, vol. 31, n. 1, p. 195.

45 BESEN, Stanley M., Sheila N. KIRBY, and Steven C. SALOP, op. cit., p. 401.

associations (ASCAP, BMI and SESAC). But these multiple organisations are complementary in nature rather than substitutive; therefore, a customer (for instance, a radio station) wishing to cover all the artists needs to negotiate with all the copyright collectives, each of which can act as a monopoly.

The nascent intellectual property-protection structures typically addressed the problems of ownership, copyright length, and copyright enforcement organisation. Nevertheless, the very existence of copyright collectives is problematic and may well bring more costs than benefits; thus, in the case of copyright protection, the “medicine” appears to be worse than the illness.

R. Coase⁴⁶ demonstrates the nature of the problem using an example of a herd of stray cattle which destroy crops on a field. Fencing is only worthwhile if the economic loss due to the damage exceeds the cost of the fence. From the point of view of the amount of the crop produced (given zero transaction costs), it is immaterial if the cattle-raiser is liable to pay for the damage or not; the farmer will not build the fence unless it is economically worth it, for tolerating the damage is the cheaper option.⁴⁷ Clearly, though, as the above account shows, no such economic evaluation was carried out prior to the establishment of ASCAP, to determine if the loss avoided (the gain made) thanks to its existence would exceed the costs.

Some guidance on when copyright collectives are economically justifiable (i.e., the fence is worth building) can be found in a study by O’Hare⁴⁸, which investigates copyright protection in different markets. According to the above study, the question of copyright efficiency has no universal answer based on which all-purpose legislation could be formed to cover the idiosyncrasies of all the market types. Creative markets tend to differ greatly; therefore, copyright protection should either be tailored to the nature and characteristics of the intellectual property, or avoided altogether, depending on how the particular market works.

46 COASE, R. The Problem of Social Cost. 1960, *Journal of Law and Economics*, vol. 3, n.1, p. 1–44.

47 A typical example of disadvantageous legislative protection is the above-mentioned fashion industry. Though fashion can be covered with design patents, their use is limited to truly “original” fashion products, which raises the question of where the boundary between the new and the reworked is (this would be an analogy to where precisely a fence between the farmer’s and cattle-raiser’s lands should be constructed). Another problem consists in the fact that the patent acquisition procedure is lengthy (more than 18 months, on average) and costly, coupled with the low chances of efficient patent enforcement (the fence is fragile and can easily be damaged or circumvented) and of being granted the patent in the first place (RAUSTIALA, Kaul, and Christopher SPRIGMAN, op. cit., p. 1704). In 1932, the US fashion industry created a nationwide cartel in an attempt to curb design piracy (though copying the designs of Parisian houses was apparently considered acceptable; RAUSTIALA, Kaul, and Christopher SPRIGMAN, op. cit., p. 1697). The “Fashion Originators’ Guild” registered American designers and their drawings, prompting manufacturers and sellers to sign a declaration of cooperation; uncooperative retailers were boycotted. The efforts of the guild paid off: By 1936, over 60 % of women’s clothing priced above \$10.75 (\$145 in 2005’s prices) was sold by Guild members. Later, however, the Guild got entangled in the net of anti-trust laws and was abolished, with the argument that an “original” design is, more often than not, too slightly different from a known idea to justify granting of a monopoly to the creator. Moreover, the Guild’s practices, like that of other cartels, violated economic competition laws.

48 O’HARE, op. cit., p. 417.

In general, copyright is only worth enforcing where the cost of entering the sector is high and the variable costs are low. Another requirement says that the work must be valuable in derivative forms (e.g., a screenplay for a film based on a book). All in all, O'Hare is pessimistic about the universal efficiency of copyright protection, stating that the specifics of each particular market need to be considered. In relation to the music market, the findings by O'Hare can be applied in two ways.

The first one concerns pricing and interprets piracy as the result of a poor pricing policy in sectors with specific cost structures. The fundamental question asks to what extent, if at all, copyright can prove effective in areas where many copies per pirate can be expected due to the low fixed costs of a single copy. According to such reasoning, piracy results, by way of a side-effect, from an overboard copyright cost. By creating a market for pirated copies, albeit inferior in quality, copying satisfies the demand for the product in sectors with distorted pricing. The manufacturer of the original product can encourage legal purchases by reducing the market price.⁴⁹

The other sphere of application of O'Hare's findings covers the characteristics of the goods and the related costs. Over the past centuries, the music industry has seen four turning points with respect to the concept of music as a marketed commodity. In the 1890s, the majority of the industry's revenues came from licensing of musical compositions (i.e., sale of sheet music). This is the situation in which ASCAP comes into being. During the Great Depression in the 1930s, sheet music sales declined and were replaced by public performance revenues resulting from the growing popularity of radio. Royalties from public performances kept the lead from after the WWII until the surge in rock-and-roll album sales in the 1960s, when consumers again turned towards owning physical media, thus increasing the royalties earned on sound recordings during the 1960s and 1970s.⁵⁰ The last (and probably ultimate) change occurred in 2014, when streaming and downloads first outsold physical media.

Technological advancements have shifted the music market from one with high fixed costs, where it is possible to protect rights through copyright collectives, to one with low fixed as well as variable costs of the first and subsequent copies. Starting with the distribution of cassettes and massive manufacturing of cassette reproduction facilities, the transformation was complete after the arrival of digitization, when the music industry began to sell a service instead of a product. Thus, musical works have become **information goods**, or assets,⁵¹ which (unlike the traditional goods) are non-rivalrous, non-exclusive, subject to no wear and tear, and, once produced with any fixed costs, they can be used simultaneously or subsequently by all. The fixed and variable costs of copies are negligible as well, facilitating the distribution of illegal copies. Digitization and downloading will not only lead to a dramatic reduction in the dissemination costs of music, but it will also cut the prices for end customers. Digitization has also reduced to virtually zero the costs associated with controlling the use of music in this distribution

49 CHIANG, Eric P. and Djeto ASSANE, *op. cit.*, p. 515.

50 GARCÍA, *op. cit.*, p. 196.

51 BOYER, *op. cit.*, p. 413.

channel, significantly weakening the transaction cost argument for the existence of copyright collectives.

The transformation of music into an information good or asset poses an obstacle for the existence of oligopolistic holders of copyrights and copyright collectives in music industry, but much less so for the music market itself, which was quick at finding a way to price a good that costs next to nothing. The only economically viable solution involves payment for services providing music content; part of the revenues from these services is then used to compensate music creators for their work.

Today's streaming services can be seen as a logical outcome of the changes in the fixed and variable costs in the music market, and pirate music platforms such as Napster were quick to jump at the chance, charging negligible fees for accessing extensive music databases. Prior to digitization, distribution costs of music were significant; now they have dropped to nearly zero. While in 2001, 98% of the total revenues of the industry was made up of physical media sales (USD 22.9 billion in total), the numbers hit the rock bottom in 2014, when the total revenues amounted to USD 14 billion, of which only 42% (USD 5.9 billion) was comprised by music media sales. From 2014 onwards, however, the music industry income has gradually risen thanks to the rapidly increasing revenues from streaming and other digital services; for 2020, the total revenues reached USD 21.5 billions, of which 62,3% (USD 13.4 billions) was comprised by streaming revenues and only 19,5% (4.2 billions) were revenues from physical media sales (see IFPI, 2020).

3. What are the opportunities of the changing music market for artists and consequences copyright collectives?

It needs to be realized that the emergence of copyright collectives coincided with the era of physical music media, when the costs of entry into the music market and the costs of copies were very high; however, with the advent of new technologies, decreasing both fixed and variable costs, the existence of copyright collectives became part of the problem rather than solution.

We live in an age when streaming and other digital services account for most of the music industry revenues. Nowadays it's possible for vast numbers of music creators to make their work available all over the world, and to gain income from their recordings and compositions in a way that was not possible before the advent of music streaming.⁵² Thanks to digital services, the music market is no longer national but global. Global digital service providers can efficiently collect fees from various music uses (creator royalties, mechanical royalties, artist's profit) and transferred them directly to copyright holders, who may be the artists themselves.⁵³ This way the music market can make full use of the

52 HESMONDHALGH David, Richard OSBORNE, Hyojung SUN, and Kenny BARR. *Music Creators' Earnings in the Digital Era. Project Report*. Intellectual Property Office, Newport. 2021, p. 15.

53 The introduction of the Mechanical Licence Collective through the MMA in the USA represents a step backwards from a technological and market perspective. Prior to the introduction of The Modernization Music Act, it was primarily copyright owners who negotiated directly with digital music services. The MMA moves

supply-and-demand mechanism without any other intermediaries and their fees.⁵⁴ The market is moving in this way both by improving data management⁵⁵ and by the simultaneous development of automated control mechanisms.⁵⁶

In view of the above, national copyright collectives on such global market may rightly appear redundant and corporate copyright holders are becoming obsolete. Direct licensing is available for most of the music market, includes not only streaming, but also traditional domain of blanket license, as radio, cable and television. With digital playlists and Automatic Content Recognition technology, with streaming accounts for small businesses it is possible minimised general licensing and makes compensations for authors more fair and cheaper. It is becoming easier and cheaper to control and charge for the use of songs, as evidenced by the rapidly decreasing overhead costs of copyright collectives.⁵⁷

Streaming has already affected the music market in two ways that are likely to intensify in the future. It is already confirmed that streaming has improved the bargaining position of artists vis-à-vis record labels and changed the proportion of profit share.⁵⁸ A growing number of music creators also remain right holders.⁵⁹ Label services⁶⁰ offer creators more favourable conditions and thus compete with established record labels. Legislative proposals to shorten the duration of the contract also strengthen authors' rights.⁶¹ The individualisation of the market is likely to further strengthen the bargaining position of creators vis-à-vis record labels by allowing them to keep the copyrights entirely in their own hands and not share them with other intermediaries.

If we look at the revenue structure of copyright collectives from an economic perspective, we find that it is already a structure that is hard to justify. For example, BMI reports

away from the principle of licensing on a song-by-song basis and replaces it – again – with a blanket licensing system. In the current form of the law, another intermediary is created – the Mechanical Licensing Collective (LYONS, Frank, Hyojung SUN, Dennis P. COLLOPY, Kevi CURRAN, and Paul OHAGAN. *Music 2025 – The Music Data Dilemma: Issues Facing the Music Industry in Improving Data Management*. Intellectual Property Office Research Paper. 2019, p. 78). However, its tasks can easily be divided among private companies – databases are already being created through the activities of private companies such as Gracenote or MusicBrainz, and the control of the use of musical works and the transfer of royalties can be left in the hands of the service providers and the artists themselves.

54 For example, YouTube and payments via PayPal account. HESMONDHALGH David, Richard OSBORNE, Hyojung SUN, and Kenny BARR, op. cit., p. 15.

55 In particular the unification of ISRC and ISWC identifiers.

56 E.g., Content Verification Tool or Copyright Match Tool on YouTube.

57 BMI, for example, had administrative expenditures of 14% in 2010, 13.4% in 2015 and only 5.5% of the total amount collected in 2021. BMI Annual reports 2009–10, 2014–15, 2020–21.

58 SCHERER, Dana A. *Money for something: Music licensing in the 21st century*. Congressional Research Service. 2021, p. 9.

59 In UK, just over half (52%) of musicians usually self-release their recordings. 18% go through record companies for releases while 23% report a mix of the two (HESMONDHALGH David, Richard OSBORNE, Hyojung SUN, and Kenny BARR, op. cit., p. 15). In USA 28 % self-release musicians has income from streaming more than 10 000 USD.

60 Companies such as Awal, Absolute or Believe.

61 The right to a right to recapture works and a right to contract adjustment after a period of twenty years, which is longer than the periods where many labels write off bad debt but short enough to occur within an artist's career. See Report Economics of music streaming.

that of the total 2021 revenues of US\$ 1.409 billion, revenues from the digital segment will account for US\$ 448 million, media licensing US\$ 469 million and international revenues US\$ 365 million. General licensing sector, the first area of interest of copyright collectives, consisting of public establishment like bars, restaurants, brings only 127 million, while the total cost of running the organization is 78 million USD.⁶²

The dynamics of legal streaming platforms with downloadable content shows the way to a music market that can strike a balance between the interests of the authors, consumers and digital service providers, potentially in the absence of copyright collectives (competitive markets and antitrust legislation protect all market participant), at the same time eliminating piracy thanks to the low prices; indeed, practical experience reveals that cutting prices drives the consumers of pirated content back to the legal market.⁶³ Several studies report willingness in customers to pay small amounts of money for information goods (services), rather than participate in an illegal market for free.⁶⁴ It also confirms that even if average per-stream rates fall, total revenues can rise.⁶⁵

Today, the revenues generated by the legal market with digital music services are so significant as to render it uneconomical to impose a fee on any other uses of recorded music. Thanks to the transformation of the market, it seems no longer be necessary or efficient to put up Coase's "fence", which protect mostly copyright collectives themselves. However, it needs to be realised that (however unpleasant that may sound to the authors of music) having become information goods, musical works themselves are less the subject of the fees charged for their use than the streaming services providing them. Music streaming providers pay little attention to the content of their platforms as long as it sells their services. At the same time, though, these platforms can provide the authors with the freedom to do their own pricing, deciding, for instance, on an above- or below-average price, discount or surcharge for a replay of a song within an hour, or on varying the price in time.

The development of streaming services makes it possible to eliminate the monopolistic structures of intermediaries and build a standard market structure with abundant supply and even greater demand. The market-competitive principle relies on the consumer's appreciation of music and their willingness to pay for it.

Although copyright on a musical work is a monopoly of a kind, it also faces strong competition in the form of the compositions by other authors. Rather than from the very existence of these "monopolies", the risks for the market and competition have always sprung from the fact that the (short-term) monopolies were aggregated into a

62 BMI Annual reports 2020–21.

63 The above effect of price reduction on piracy is exemplified not only by the situation in the global music market, which is now experiencing a dynamic increase in revenues from streaming royalties, but also by the Dutch market back in the 2012, when streaming was in its infancy. Even then, streaming payments accounted for 31% of the recorded music market revenues, despite the fact that piracy was not yet punishable (Handke, Balazs, & Vallbé, 2016; Chiang & Assane, 2009).

64 HANDKE, Christian, Bodo BALAZS, and Joan-Josep VALLBÉ. Going Means Trouble and Staying Makes It Double: The Value of Licensing Recorded Music Online. 20016, *Journal of Cultural Economics*, vol. 40, n. 3, pp. 227–59; CHIANG, Eric P. and Djeto ASSANE, 2009.

65 HESMONDHALGH David, Richard OSBORNE, Hyojung SUN, and Kenny BARR, op. cit., p. 17.

single copyright collective with a monopoly position towards buyers. In other words, intellectual property as such does not constitute an economic monopoly (just like a single novel by a particular author does not exercise a monopoly over the whole genre, which features great competition); however, intellectual property aggregation makes competition impossible. Therefore, it may appear useful, or even necessary, to limit the structures aggregating intellectual property rights, and provide the authors with the freedom, to as great an extent as possible, to offer their compositions on an individual basis and negotiate about the price, including an increase as well as a decrease.⁶⁶ The above limitation (or abolition) will be enabled by the current development of the music market, which draws most of its revenues from digital services. A direct relationship between the authors as sellers on the one hand and the consumers (buyers) on the other will render copyright collectives redundant and also weaken the role of record labels and publisher houses.

Conclusion

For centuries, artists such as composers have sold their works to impresarios or publishing houses for a one-time fee or a certain percentage of the profit; thus, the relationship between the creator and the consumer was indirect, through an intermediary. Both ways of selling a creative work (i.e., via one-time and regular royalties) are still possible; however, the practice of streaming music decreases the importance of intermediaries, especially copyright collectives, with a new conception of music market emerging which has the potential of introducing among artists both the freedom of pricing, and competition.

The fact that music has become an “information good”, independent of its physical carriers, has two consequences. First, neither supply nor demand are defined by the amount of the goods provided. An economist considering the neoclassical categories of quantity (Q) and price (P) might be tempted to say that the steady increase in the amount of music being created should drive its price down; however, that would indicate misunderstanding of the essence of information goods, whose value is, according to the Austrian School of Economics, determined by the subjective choices of individuals, both on the side of supply and demand⁶⁷. The price can vary depending, for instance, on personal taste changes; pricing is entirely subjective and unrelated in any way to the quantity of music produced. The “optimum” amount of music on the market would be difficult to determine anyway, given that music can be consumed simultaneously and indefinitely.

The second consequence of the transformation of music into an information good consists in that no resource exhaustion can occur: Information goods are a “commons”

66 The authors wishing to establish themselves in the marketplace can set their prices lower, or even trade their royalties for free air-time in radio (GOLDSTEIN, Paul. Commentary on “An Economic Analysis of Copyright Collectives”. 1992, *Virginia Law Review*, vol. 78, n. 1, p. 415).

67 The Austrian School of Economics, which holds that prices are determined by subjective factors and rejects the marginal cost curve, is particularly suitable for investigating today’s music market.

that can be used freely by everyone. The number of streaming services utilizing a single platform is unlimited, with sufficient competition being ensured by the differences in services and costs.

Thus, the role of copyright collectives in the newly emerging structure of the music market comes to be marginal. Questioning the economic efficiency of Coase's "fence" in the form of copyright collectives appears reasonable, in particular, because streaming and downloading, the two areas of music industry in which copyright collectives can be easily circumvented, already account for 2/3 of the music industry's revenues, and the share of the other areas in the industry's income is rapidly decreasing. The functioning of copyright collectives is built on two inherently opposite democratic principles: protection of the artist and their income on the one hand, and, on the other hand, protection of the possibility to use works of art in the freest possible way and with as few restrictions as possible, without creating market-destructing monopolies. The transformation of the music market makes it possible to find a new balance between these two principles.

However, with the elimination of the monopoly position of the copyright collectives, it is necessary to abandon the idea, which was at the birth of collective managers, that through the monopoly the creator will get a much higher price for the performance of his works than on the competitive market, or the idea that the revenues will be so high that they will represent a kind of rent for the author⁶⁸. In a competitive market, prices will necessarily be lower, but market prices, corresponding to the real demand for a particular recording.⁶⁹ Revenue from digital services will, as before, be only a supplementary income, not the primary source of the artist's earnings.

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68 This kind of thinking still survives in the music community, as shown by the constant recalculation of streaming revenues into average or median wages (e.g. <https://mixmag.net/read/music-streaming-minimum-wage-artists-data-news?next>)

69 HESMONDHALGH David. Is music streaming bad for musicians? Problems of evidence and argument, *New Media & Society*. 2021, vol. 23, n. 12, p. 3593–3615.

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When the Music Changes, so Does the Dance: Do We Still Need Copyright Collectives?

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