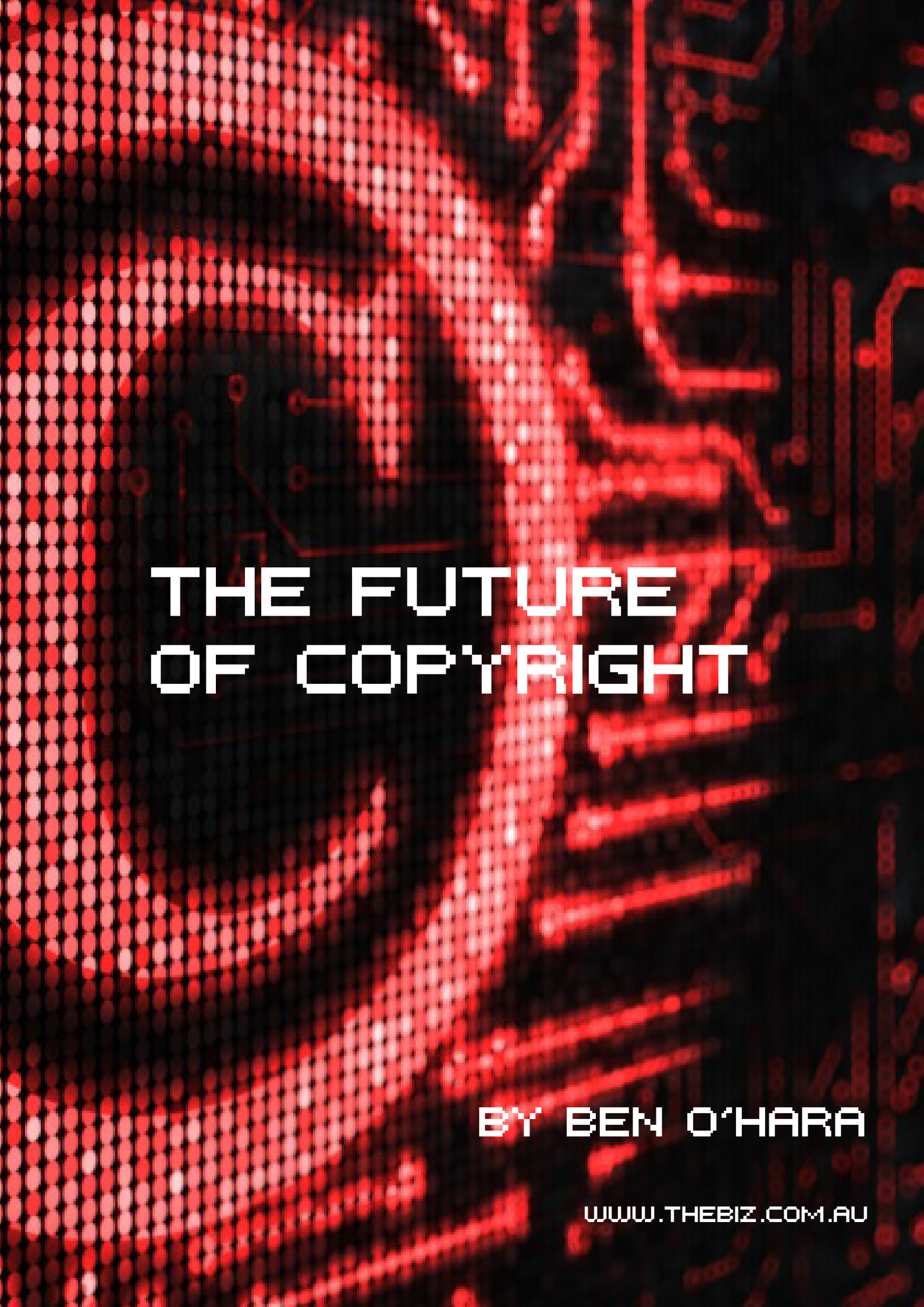
THE FUTURE
OF COPYRIGHT
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What if the system we imagined was better than the system we created?

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For the past ten or so years I have been teaching the principles of copyright to music students at various TAFE, RTO and Universities. When teaching copyright it is difficult not feel like I am acting on behalf of the 'copyright police'. Every year I witness a room full of people looking at me in disbelief as I explain to them that any number of the activities that they engage in are probably illegal (even more so prior to the introduction of fair use in Australian copyright law.) I can almost hear the jaws drop and hit the ground as I explain to Hip-Hop or Mash-up artists that the way they are engaging in sampling is most probably illegal, or to a guitarist that 'referencing' their favourite riff in their own song is cause for concern. DJ's also struggle with to come to terms with concepts of adaptation being the exclusive right of the copyright owner. (Does that mean I can't legally mix two songs together? They ask.) These students are the next generation of artists and creators. Just as the next generation of consumers has a very different view of what copyright is and how it should function, the next generation of creators and copyright owners see the current system (which is supposed to promote creativity) as actually hindering their artistic endeavours.

Every year I am asked the same questions...'What about Hip Hop? The whole art form is built on a world of artists co-opting work from others.' 'What about Mash-ups and the world's most famous Mash Up artist Girl Talk? Surely if what he was doing was so illegal he would be in jail by now?' 'What about this song that sounds almost exactly like that song, it's all derivative of something anyway?' There are only 12 notes surely there is going to be some cross over?' These all seem like reasonable points to me, but the questions are easily answered by anyone with a basic understanding of copyright law and my job is to put the students straight on the points that they find so abhorrent. The bottom line in all the questions above is that there are likely to be infringements of copyright taking place in every example.

One of the first lessons in my set of copyright lectures is to ask students about common copyright 'myths and misconceptions.' The myths below are the ones that the majority of students respond to as being true.

- If something has the © symbol on it then it is copyright protected, if there is no © it is not copyright protected
- You can sample up to 7 seconds (or 4 bars, or 13 seconds or something similar) of a work, without having to pay for it or ask permission for the use.
- You can use any works in any way you wish, as long as you are not making money from it.

These myths (or similar ones at least) also appear in the Shane Simpson book 'Music Business' as a list of common misconceptions

It would appear that the myths are designed to make a lot of the infringements listed above, legitimate. Artists and creators are so keen to embrace the myths because to do so makes their activities appear to be free from infringement. They all want to believe that there is a legal way to create music using someone else's copyright protected work as a building block for their new work.

So what would happen if these myths were actually true? Is the system that we imagine actually better than the system that we have created? Could we possibly implement some of the commonly held myths to help create a better system for creators and owners of copyright?

This essay shall explore the possibilities of embracing the myths and will look at the practical measures that would need to be in place for the myths to become part of the law. The aim is not to just allow copyright protected works to be dealt with in the ways suggested by the myths, but to consider the possibilities of inserting them alongside the current rules and systems, so that they could both function together. I will consider each myth separately and look at how that myth could be embraced in a fair way.

Myth 1 - If something has the © symbol on it then it is copyright protected, if there is no © it is not copyright protected.

This myth seems to have arisen from the Universal Copyright Convention that the USA was the major player in. The (C) symbol was required for the work to be protected by copyright under this system. In Australia this is not the case. The (C) symbol holds no actual protection. It simply serves as a warning to others that the work is protected by copyright.

The Creative Commons movement suggests an alternative to the © symbol. They believe that their ⓒ symbol can work alongside the traditional ©. They say that the © stands for –all rights reserved: the ⓒ means – some rights reserved. The problem with the idea of 'some rights reserved' is that it just adds another layer of complexity. If you see a work with the ⓒ attached how do you go about working out which rights are reserved? You have to contact the rights holder and find out their intention. This doesn't really help the Hip Hop artists

working from home taking samples from here and there – mostly from other Hip Hop artists who more than likely believe that being sampled by someone else is an honour and all part of the Hip Hop creative community. In the documentary film 'Good copy, Bad Copy' the mash-up artist Girl Talk suggests that the problem for him is not just one of the enormous cost in clearing all of the samples, but also in the amount of time taken to make that happen. Creative commons licences don't speed anything up, they may remove the cost (at times) but not the effort involved in clearing up to 40 samples per song.

The next generation of artists in many genres don't see protecting and enforcing their own copyright rights as being very important to their careers. They happily post their tracks into cyberspace; they actively encourage file sharing of their works and use measures of piracy as measures of success. Surely they would be equally impressed by others co-opting their work. For the new generation of creators obscurity is a bigger threat than piracy. They see other income streams as being important. They think they can make an income from live performance, merchandise sales and other innovative money earning methods. The complete control and protection of copyright in music and lyrics and sound recordings are less important to them than to previous generations of creators and authors.

So, if we were to implement the myth how would that help the system and what would it look like? There would be three options available to copyright owners. There would be two symbols.

1. © All rights reserved – i.e. this work is fully protected under the 'old' system and the owner/creator doesn't want you to use it in any circumstances; so don't even bother asking.

2. 🅭 some rights reserved. The owner/creator may allow certain uses; you will need to contact them to find out what is permitted and what is not.

Finally, no symbol at all, or if you really need something how about (-)? Which means 'I have no intention of enforcing my rights, you can use this work as much as you want without my permission?'

This system would probably see more people embrace the middle ground of the 🅭 option, with fewer copyright owners wanting 'all rights reserved' , which would probably been seen as the more heavy handed approach. While only a few would want the third option no copyright approach.

Would this system be an improvement? I believe, yes. If the aim of copyright is to encourage creativity, why penalise someone whose creativity is driven by appropriating the work of someone else who actually wanted it to be used by others anyway.

Could this system work? Again I believe the answer is yes. It would be no less confusing than the current system where we have a symbol that has no practical meaning.

Myth 2 - You can sample up to 7 seconds (or 4 bars, or 13 seconds, or something similar) of a work, without having to pay for it or ask permission for the use.

This myth is very common in almost every class that I run there is at least a handful of students who truly believe this to be entirely true, and it's not just samples but instrumental riffs, vocal licks and all sorts of musical references.

Obviously this is not the case. The 'substantial part' rule basically states that as soon as something is recognisable as having come from somewhere else an infringement may have occurred. It can be both qualitative and quantitative. As long as it is recognisable you may have a case to answer.

What would the copyright landscape look like if this myth were true? You are permitted to use up to 7 seconds of something without gaining approval for the use. (I will use 7 seconds as it seems to be the most commonly held myth.) Let's call 7 seconds or less an 'unsubstantial portion'. Artists can use 7 seconds or less in any way they wish. This suddenly makes sampling really easy and makes all of those musical references legal. Examples like the recent case with Larrikin music taking action against the owners of 'Down Under' for a portion of 'Kookaburra' in the songs main riff would be totally acceptable. It means that sample artists don't need to clear samples and the intention of the copyright owner (whether they allow sampling or not) becomes irrelevant. Sampling becomes very easy.

The problem with this idea is clearly that the original copyright owner should have the right to be paid for the use. The first time someone has a huge hit with a song that samples up to 7 seconds without paying, the law suits would fly. So why not introduce a simple payment method for samples of 7 seconds or less?

The principles of the AMCOS mechanical licence scheme could apply. A statutory, compulsory sampling licence scheme could be introduced. The mechanicals payable for the sale of a mechanical device could be automatically shared between the new artists and the original creator of the sample. So if the song has one sample the creator of the original shares in the 8.7% of PPD (or 6.25% of RRP) payable to AMCOS anyway. It is just a simple matter of setting a fixed rate and requiring a compulsory licence. So using a sample is not all that different from performing a cover.

Some ideas for sharing the mechanical royalty:

- The Mechanical rate is 8.7% of PPD on CDs (and other mechanical devices) under the AMCOS/ARIA agreement.
- If there are no samples or musical references- 100% of the mechanicals are paid to the composer.
- If there is a sample or musical reference - 50% of the mechanical is paid to the new composer and 50% to the original composer whose work is being used.
- If there is more than one sample, the original composer's 50% is applied pro-rata by the number of samples.
- You can still continue to use samples that are unrecognisable as much as you like.

AMCOS can administer the licence and the payment system. APRA can do something similar with the registration and payment of the song for the live performance and communication royalties.

Less simple to resolve is the payment for the sampling of the original sound recording. The obvious choice would be to allow the PPCA to collect a compulsory sound recording royalty on all mechanical devices, the same model as AMCOS and mechanical royalties. This would be more difficult to implement but following the AMCOS model should be possible.

This model suggests that two simple compulsory licences be introduced, one for the sound recording and one for the publishing rights. If you want to use someone else's song, the process is very simple. Just register the details with the relevant collection societies to ensure that your income from the work is shared. It is much the same as releasing a cover version of a song but sharing the copyright royalties between the new creator and the original creator.

The works are still protected by moral rights so the original composers are credited as songwriters and they have the right of integrity, i.e. the right to take action if the sample treats the original work in derogatory way, so samplers will still have to show some respect in the way they use the sample or reference.

Myth 3 - You can use any works in any way you wish, as long as you are not making money from it.

This is another commonly held myth. The principle being that if I am just making music for myself, in my bedroom for nobody but for me, my friends and family, why should I have to pay to use someone else's music. The rebuttal to this argument is that it is the exclusive right of the copyright owner to approve (and be paid for) certain uses of their music, reproduction rights included. The reason we don't allow a system where you can use anything you like is really a blanket policy that says 'no uses are acceptable unless they are approved'. This stops very minor infringements, like school kids sampling, re-mixing copyright protected music into their own work and sharing the new recording with their friends and it also stops someone reproducing thousands of copies of the latest hit CDs and selling them in dodgy shops or at local markets. The blanket approach of this law is the problem.

Since 2006 the Australian Copyright Act has included some provisions for 'fair use'. There are provisions for Time Shifting and Format Shifting, why not add a provision for 'non commercial use'. The definition could be very tight as to exclude anything that could be perceived as even potentially commercial. But at least it would provide for the completely non commercial to occur unencumbered.

I was apposed to the inclusion of the 'fair use' provisions at the time of their introduction; not the concepts of format shifting and time shifting, but the term 'Fair Use' itself. Students now see this term and think that it means 'I can use anything as long as I am not making money from it.' – That sounds like fair use to me. It was easier when we could say 'there is no provision for Fair Use in Australia'; at least you could be constant in applying blanket rules.

Most users of music ignore the requirement to pay for or to get permission to use copyright protected works for non commercial uses anyway. Cover bands are unlikely to apply to AMCOS for a licence to produce a CD demo to send to potential agents, or an event manager making a mix CD of background music to play at an event and countless other uses that by the letter of the law require an AMCOS licence, (and/or a PPCA licence.)

The reality is that if all the users of music in these ways actually tried to pay for the uses, the administrative systems of these relatively small organisations would just over load. They are happy to accept payments from the minority who do go ahead with these payments and obtain licenses, but even the collection societies admit (off the record) that they are dealing with the minority. I would suggest that even an event manager from AMCOS would probably not even get an AMCOS licence when making a mix CD to play at an event!

Conclusions

Is the system that we imagine actually better than the system that we have created?

There are clearly going to be pros and cons for all of the ideas that I have explored in this essay. My argument would be that they are at least worth exploring. I am not a fan of Hip Hop music or of Mash-Up's but can see that they are legitimate art forms for their creators and for the audiences that enjoy them. Our world would be worse off for missing out on these art forms. These new forms of music making are clearly the result of skill and labour on behalf of the creator and should be treated with the same regard as any other music creation.

The introduction of copyright in its earliest form was really just a reaction to new technology – the printing press. Changes in copyright law have always been in reaction to changes in technology, there is nothing new here. What's more 'sampling' and mash-ups have been around since the 1950s and 60s with beat poets cutting up words and rearranging them into new works and the music concrete movement. It is just that the more recent uses of technology make the samples more noticeable and recognisable. Hip-Hop has been a popular art form since the 1980s, twenty or thirty years of music making in this style has been largely on the edge of committing copyright infringement. Music software packages like Pro Tools and Audio Logic make it so easy to make sample loops from imported music and music fans are so used to hearing samples and riffs imbedded into new works. These are all great reasons to reconsider at the current system and examine options for updating the laws. After all, being about twenty or thirty years behind the creators is about the average length of time for copyright laws to catch up with artists and their uses of technology.

The current system is not working for a whole new generation of creators, not only in music but also film, photography, art and so on. Our ability to appropriate the works of others is greater than it has ever been and this opens up new frontiers of creativity that have never before been available. The current system is failing these creators; the suggestions I have made in this essay serve to work alongside the current system, without undermining it. They are only suggestions for further discussion, but I believe are well worth considering.

About Ben O'Hara

Ben O'Hara has taught music industry business at a number of institutions across Australia including the Sydney Institute of TAFE Ultimo, EORA College, and JMC Academy in Sydney and Melbourne. He is currently the senior educator in Music Business at Box Hill Institute in Melbourne.

Ben has a broad range of experience in the music industry, having worked in music publishing and licensing as well as event and artist management. He has also been a performer for over 15 years, and runs his own booking agency, Flower Pot Entertainment Productions, specialising in children's and family entertainment. Ben holds a Bachelor Arts in contemporary music (Honors) from Southern Cross University and a Masters of Business in Arts and Cultural Management from The University of South Australia.

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