

Outline of Presentation

Music Session

The Business School - CIPPM

Copyrights, Contracts and Creativity

University of Bournemouth

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Introduction

I would like to concentrate on four main areas.

- (1) What problem are we trying to solve with copyright/contracts?
- (2) The efficiency/output versus equity (or fairness/morality) issue
- (3) Bargaining Power
- (4) Prospects for Research

1. What problem are we trying to solve with copyright/contracts?

Any form of legal protection will alter the balance between firms, final consumers and the suppliers of labour to firms. Any proposal for change could be intended to improve the welfare of one of these groups or it could simply be designed to minimize the administrative costs of operating the system. In traditional Pigouvian welfare economics, the economist would expect a decision-maker (such as a politician) to attempt to maximize a social welfare function (SWF). The SWF would weight the utilities of the different groups concerned. For example, if the dominant intention was to maximize the well-being of end consumers then a system where there are many creative suppliers driving down their rate of return, to ensure large variety and low prices, might be adjudged to be a good one.

(2) The efficiency/output versus equity (or fairness/morality) issue

It seems unlikely that there is any evidence in support of the 'Killing the Goose that Lays the Golden Eggs' argument. That is, unfavourable contract and copyright terms are unlikely to dissuade people from entering a musical career. One reason for this is that the variance of return is already very high (with a large tail of low return), as is also the case with acting, yet there is no shortage of supply of performer/writers of music. Thus it is difficult to make a case for a meaningful output effect of changing terms even though mathematical economists can readily make models in which such effects do occur.

Some seemingly unfair situations could be rationalised as efficient by theoretical economic models. Specifically, if buyers of musical labour are less risk averse than suppliers of musical labour, then it may be beneficial to have a contract where the suppliers are on a lump-sum payment (such as session musicians or band members who are effectively employed as labourers within a partnership owned by band leaders) and only the buyers received profit shares. This is the standard point applied in the classical theory of the firm in all markets.

Going back to our first question, this system is the source of waste (overhead costs) if it is allowed to become contestable where the rules are unclear and/or are applied in an inconsistent manner. Typically this occurs where people on fixed payments at the time seek retrospective entitlements in a work which has generated a very large level of income making it to a degree a 'jackpot' or 'windfall' to the assigned owners.

(3) Bargaining Power

In the music industry, the regular performing and recording musician is probably much less susceptible to the type of power imbalance that took place in the past. That is, they would not be signing the types of contracts assigned by the Chess record label or some of those involved with rock bands in the 1960's. However, the person supplying programme music such as library music for sample libraries (or direct production of theme or background music for specific works) is in a weak position due to the operations of buyers and the high degree of competition in the field. Thus they will often effectively sign away more or less all of their rights for a fairly meagre fixed payment. This also entails waiving moral rights. For example, providers of library music will not be in a position to object whether the same composition (or loop) is used in a daytime tv magazine programme, a porn film or a piece of racist propaganda.

We may return to point 1 now. If there is serious concern over unfair exploitation of creative workers then it is not necessarily best solved by assigning or extending rights in the creative output especially if they are not the sole contributor. Where such rights exist they can readily be attenuated by strategies from the dominant bargaining agent. It follows that other means could be used to redress bargaining imbalance. For example, redistributing income from the powerful and successful authoring agents (such as U2 and JK Rowling) who have strong bargaining power to the rank-and-file in their fields. Or, providing direct subsidies to them from other sources.

(4) Prospects for Research

We can identify three types of research in this area;

- Useless research
- Impossible research
- Useful research

Useless research is not uncommon in arts related fields. It may not be useless in some contexts but it is useless as research. That is, the mere collection of peoples opinions reproduced in some kind of document does not constitute a piece of research. To be a piece of research some kind of question needs to be being asked which could possibly lead to a variety of different outcomes. That is, not just a prelude to a statement of how terrible things are and a plea for something to be done about it.

Impossible research is research which seeks to fortify claims which are inherently untestable. In music, many advocate shortening the term of ownership as being almost certainly an improvement. It is not possible to empirically confirm or deny such a claim unless we could access data where the proposed change has been in operation for a sufficiently long time for comparisons to be made. As always, purely theoretical models can be made to determine the outcome of proposed changes. These will however be speculative and categorical depending on such things as the degree of differences in risk aversion between the contracting parties.

Useful research in this area would seem to require some kind of taxonomical neo-Darwinian strategy to categorize formal and informal processes in a constructive way. To put this in Darwinian context, we might seek to explain why people have earlobes if these do not currently seem to serve any particularly useful process. In the same light, we would view contracts and copyright as evolving organic units (or 'Institutions' as many economists would have it) that may exhibit adaptive and fitness enhancing traits or they may contain redundant components.

Comparisons could be made across different areas of music and between music and other sectors. One factor that could be looked at is the wider social context of specific sectors. A useful comparison can be made between music and comedy. Comedy has units of production (jokes, sketches) akin to those in music (songs, compositions) yet so far little attempt has been made to copyright jokes. Obviously collections of jokes and sketches may be

copyrighted as a composite work. Despite the lack of copyright in jokes, there is a historic tradition of non-writing comedians forming stable paying relationships with non-performing writers. This contrasts with the situation which tended to evolve in music.

Yet it might be said that both music and comedy exist within a paradigm of theft to some extent as emerging from folk culture. Classical composers borrowed from traditional folk music, the formerly enslaved black American population had its music exploited by archivists and white rock bands. Currently we have the newest popular music formations (broadly the many sub-genres of 'dance' or 'urban' music) borrowing/stealing from the accretion of past popular recorded music. This particular theft has been attenuated at various times by decisions in favour of copyright holders but this is subject to erosion by innovation. With the advent of widespread digital copying and sharing of music files, we now have 'theft' by the consumers instead of between authors. This is leading the musical composer into the same situation as comedy Authors. Songs are to be traded as everyday items without sale in the same way as jokes. This is driving the musical composer/performer into the same strategy as the comedy composer/performer which is to rely more on live performance. Although, it should be noted that the rank-and-file in both fields would have historically been in this position due to lack of any copyrighted material.

A detailed analysis could look at whether music and comedy might have been expected to become more alike (due to their origins in a folk culture and evolution to a 'paradigm of theft') and less like visual arts. Or, whether the differences in copyright and contract across the sectors is to be attributed to other features.

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