

Steal This Music: How Intellectual Property Law Affects Musical Creativity

By Joanna DeMers

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Copyright has been the modern way of protecting works of art. Nowadays there are several online businesses which offer affordable services to assist musicians in copyrighting their musical works. This book speaks of the evil of excessive monitoring of artistic works – especially in musical compositions – which can result in stifling the artistic freedom of musicians. The book talks about our current Intellectual property laws with a special emphasis on copyright and trademark. It criticizes the fact that our laws allow copyright holders to enjoin public performances, sharing of music and making sound recordings of any medium. The author emphasizes that Intellectual property Laws were originally developed to protect musicians from plagiarism but that it has turned into a tangled web of prohibitions that threaten musicians with threats of litigation. It is our current reality that if a particular song is remotely recognizable, even a short reproduction of it can be a potential infringement of copyright laws. And litigation costs can easily soar to the hundreds of thousands when the matter is taken to court.

The author points out that the recording industry and not musicians mostly control copyright in musical works, and the industry is famous for using contract law, trademark law and common law unfair competition suits to limit listening practices and the creative use of music, to those who are not willing to pay the hefty fees that have been set up. Our current legal atmosphere has created a musical culture that favors corporate intellectual

property holders, and unfortunately the musical culture is being shaped by conditions established by corporate entities. The author particularly laments the fact that public school systems and non-profit groups cannot afford to pay royalties to entertainment corporations and are among those who are suffering the most. It seems that extreme controls over copyright, trademark, and patents are blocking society's access to valuable cultural resources for the next generation.

The author goes on to explain why musicians need to be able to freely sample the music of other musicians to be able to create new music. Although no other artistic form relies more heavily on appropriation and allusion (borrowing and imitating music), sampling and intertextual commentary than music, these artistic expressions are inaccessible to those who are not willing to pay the price. The book states that in 2003, Metallica, a well-known heavy metal group, filed a lawsuit against Unfaith, a Canadian group, for using E chords followed by F chords without their permission, which was a harmonic progression Metallica claimed to have trademarked. The media took the matter seriously and expressed public outrage, that Intellectual property laws which were originally designed to protect musicians was being abused. Two days after the report of the lawsuit, Unfaith's singer confessed that it was a hoax to generate publicity and was meant to be a satire of Metallica's notoriously litigious behavior. The fact that this story was taken seriously by the media and the public demonstrates that the music industry has gone too far in terms of protecting musical creations that should be a part of the public domain.

The book goes on to explain what transformative appropriation is, which is the act of referring to older works in creating new works. Transformative appropriation is a

method that musicians have historically been using as a key element in creating music. It seems that nowadays, transformative appropriation is deemed to be an unauthorized use of protected works and is no longer allowed as a legitimate method of creating new music. This stifles the creative work of musicians who rely heavily on old works to create new rhythms and sounds. It is the sad reality that corporate entities have been using Intellectual property laws as a valid way to charge fees for things that were freely available in the past. Fees associated with sampling and borrowing songs are staggering and are enough of a threat to stop young, struggling musicians from borrowing music altogether. Unfortunately, courtroom ideologies and corporate bullies are undermining the balance of Intellectual property law. When punishing young musicians in their endeavor to create new music, courts need to realize that there is a difference between transformative appropriation (sampling a song without permission), plagiarism (copying music) and piracy (burning a compact disc and sharing it with others). The author explains that musicians are trained to listen to different kinds of sounds and separate them from their origins when they are composing original pieces. The author argues that it is crucial for judges and legislators to consider the legitimacy of transformative appropriation since the origins of samples might be less important than the ways in which artists use them to create new works.

Transformative appropriation is the most important technique that is available to composers and songwriters, but nowadays musicians are unable to use this method because the cost of legally licensing master recordings is staggering, while unauthorized appropriation carries a risk of lawsuits, monetary penalties and criminal punishment. Intellectual property law has created a chilling effect on musical creativity, ultimately

stifling a musician's ability to create original music. The author quotes Lawrence Lessig, the author of *Free Culture*, to emphasize that our present system allows only the very rich or the very obscure to appropriate music without the fear of lawsuits. Fortunately, many artists are rebelling against the excessive enforcement of Intellectual property laws by coming up with innovative and creative ways to get around the current legal system.

The author suggests that it is crucial for the development of music to allow musicians to participate in determining copyright disputes. The author explains that in the 1960s, judges presided over every aspect of divorce trials, from alimony to child support and visitation rights. But as family law developed, the legal atmosphere provided a framework from which parties could negotiate outside of a courtroom. The author hopes that the development of Intellectual property laws will bring about a similar result and allow musicians more freedom in negotiating copyright disputes. This is a sensible outcome since musicians are the experts in their field and can determine best what should be considered illegal activity.

The author explains the anomalies in the way current Intellectual property laws protects copyright owners. The American Society of Composers, Authors, and Publishers (ASCAP) and the Broadcast Music Incorporated (BMI) were created to enforce performance rights by collecting royalties for public performances or for copyrighted works. But ironically performance rights only guarantee royalties for the copyright holder, who is usually the publisher and not the songwriter. Royalties are not paid for performers who play the work either. The 1976 Copyright Act protects new works of art the moment it is fixed into a tangible medium. This produces the unintended result of undermining the ink-to-paper composition by viewing it as less as an expression and more as an idea. Thus

publishers who release a sheet music version of a song can prevent others only from imitating its melody and lyrics while every other musical aspect can be copied. Unlike ink-to-paper compositions, sound recordings are treated as expressions of an idea and thus every sound is protected.

The author compares entertainment corporations to “land grabbers”, where they acquire cultural products to charge excessive fees for its use. It seems the music industry is outraged at the intrusion of Intellectual property law in everyday life, from licensing fees to increasing copyright protection terms, and lawsuits to intimidate musicians, which result in the abandoning of projects. Key examples of musical appropriation and litigation demonstrate that excessive Intellectual property protections are harmful not only to musicians but to the entertainment industry as a whole. It is fortunate that many musicians are challenging Intellectual property laws through innovative forms of musical appropriation and by using samples that are free, cheap and obscure. But it is important to be aware that our current Intellectual property laws have a grave potential of silencing and deadening our future musical culture.
