**‘The value of creative assets is systematically being taken away from artists and music companies’**

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By Music Business Worldwide

The following MBW blog comes from **Darius Van Arman** (pictured) – the founder of the independent record label Jagjaguwar, whose artist partners include Bon Iver, Angel Olsen, Jamila Woods, Dinosaur Jr., Sharon Van Etten, and Unknown Mortal Orchestra. Van Arman is also founder and co-owner of Secretly Group – an independent label group that includes Dead Oceans, Jagjaguwar, The Numero Group and Secretly Canadian – and co-owner of Secretly Distribution, Fort William Artist Management (representing artists such as Grizzly Bear, Fleet Foxes, Beirut, The War on Drugs and Grouplove), Secretly Publishing and Independent Record Pressing.

So-called “safe harbor” laws pertaining to internet services such as YouTube and SoundCloud need revision.

The whole music industry is advocating for this, and the independent music community in particular has offered many thoughtful criticisms and proposed remedies. I touched on some of them in my testimony to U.S. Congress in 2014 about the state of music licensing, made on behalf of the American Association of Independent Music and independent music companies such as the ones I am a part of, Secretly Group.

In a nutshell, the problem we have is labor-related. Laws which allow consumers or services to use intellectual property without permission or without paying an agreed price undermine the very marketplace that artists and music companies rely on to justify their labor and investment.

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The result is that the value of creative assets — the fruits of creative labor — are systematically being taken away from artists and music companies and transferred to internet services without fair compensation in return.

Music industry revenues are now growing again, due to the emergence of properly licensed music streaming services such as Spotify, Apple Music and Amazon, to name a few.

However, the music industry is still less than half the size it was in 1999. What happened in the last two decades? Well, as we all know too well, disruption.

The internet bloomed in the early 90’s, compressed audio file formats such as the MP3 and the internet sharing of audio and video became popular with consumers in the late 90’s, and consumers became more comfortable sharing music without paying for it.

U.S. Congress endeavored to update copyright laws to keep up with the dizzying transformation of how users accessed and utilized copyrighted content online.

The Digital Millennium Copyright Act (DMCA) was passed in 1998, and it became even easier for consumers to access music for free with the advent of DMCA-compliant ad-supported services such as YouTube and Pandora.

Viewed initially as a compromise between copyright owners and service providers, to enable the growth of internet-based service providers’ platforms free of the constant threat of litigation, the DMCA and its international analogs are now viewed as naïve and anachronistic. The authors of the DMCA didn’t foresee the extent to which digital platforms such as YouTube and Soundcloud would take advantage of safe harbors to build businesses on the backs of, and at the expense of copyright owners.

How bad is this imbalance? One could look at some isolated numbers and paint a compelling picture of the inequity. YouTube is now earning in excess of $10 billion a year in worldwide revenues, and growing as much as 40% a year (according to RBC Capital analyst Mark Mahaney).

By comparison, the global recorded music industry is estimated to be earning approximately $15 billion a year (according to the IFPI). And of the top 30 videos of all time on YouTube, approximately 90% of them are music videos. YouTube would be a shadow of the service it is if it weren’t able to utilize recorded music copyrights.

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However, such a facile analysis misses the point. You can’t look at a limited set of numbers like the ones above, and their relative magnitudes, and make a reasonable determination of what is a fair way to cut up the pie of revenues between services and creators. You need an actual, fair marketplace to do that. And that is exactly the heart of the problem; the DMCA is obstructing such a digital music marketplace from existing.

Imagine a world where on Sundays you have the legal right, as a consumer, to go to a farmer’s field and pick whatever produce you want, at a price you determine (or for free). That would undermine the marketplace on Monday through Saturday as the price of produce would be lower as there would be less demand on those days. Especially when a consumer knows she or he can wait until Sunday to refill their refrigerators.

The “safe harbors” implemented by the DMCA have exactly the same effect on the marketplace; YouTube is not acquiring rights to the content it distributes in an actual, fair marketplace.

It is leveraging the existence of “safe harbors” to be able to make use of content at well below market cost. Even if you gave farmers some protections, i.e. they had the right to approach each and every interloper not to pick the produce, this would represent an expensive and unfair burden on farmers.

In the music universe, smaller companies, especially independent ones or artists without a label, simply don’t have the resources to constantly police their property. And in the current DMCA context, nothing requires services to make such a process reasonably burden-free for copyright owners.

Radio broadcasters in the United States have an even more egregious imbalance in their favor; by law they pay nothing for the use of recorded music.

In a recent conversation I was a part of, a respected broadcaster representative provided the following analogy: radio is the cake that consumers want, and music is only one ingredient, the flour.

They say they are selling an integrated product. They say they deserve their extraordinary earnings without sharing any substantial part with recording artists or recording copyright owners, because their integrated product — packaged with the contributions of their contracted on-air personalities (who are getting a market rate for their services) and their secret sauce curation is what consumers actually come to radio for.

This is similar to an analogy I heard recently coming from a YouTube executive who, more charitably than the broadcasters, shared that YouTube has recently evolved its perspective, and that YouTube executives are now catching on that music is not the optional sunroof of the sports car they are selling, but that in fact music is the wheels of the car. Absolutely essential, but still far less than the whole of the car.

But this is all just inexact and magical thinking. It’s what companies and industries resort to, defensively, when there’s no readily available actual, fair marketplace to establish what the cost should be for constituent components.

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In the market-based real world, cake-makers and car manufacturers don’t get their food ingredients or parts for free, or at prices they set, or by government fiat, or based on a function of the advertising revenue they receive (assuming there’s enough advertising inventory to go around). They enter into willing-buyer, willing-seller contracts to buy what they need for their products. That is what establishes a fair market and a fair market price. This is what flour makers, wheel makers and music makers deserve.

In the end, almost everyone would agree – whether leaning socialist, capitalist, libertarian, pro-business or pro-market – that a foundational premise of our shared economy is that laborers, working for themselves and absent of any contract they’ve agreed to, control the value of the fruits of their labor. Anything else is slavery.

Creators of copyrighted material are laborers, whether they are musicians, songwriters, video directors, producers, screenplay writers, photographers, cinematographers, writers, poets or book cover designers. Laws that, in effect, too casually transfer the value of laborer’s work without their permission work against one of our most fundamental economic premises, no matter what political perspective you are coming from. They urgently need revision to support the growth of a fair market for all.

If a revised compromise is to be had, it is perhaps this: provide all creators, regardless of size, a reasonably burden-free way of opting out their works from DMCA safe harbors. The smartest companies in the world can surely figure out how to do so (YouTube may not be far off, capability-wise), and when any of them do, let it be their competitive advantage over all the others; they are allowed to leverage “safe harbors” because they can do so responsibly while truly honoring the independence of all creators.Music Business Worldwide