

Casey Rae is the author of the book “Music Copyright: An Essential Guide for the Digital Age” (Rowan & Littlefield, 2021). This interview with the Library of Congress was conducted on January 16, 2024.



Casey Rae

LC: In a nutshell, what is the purpose of copyright?

Casey Rae: Copyright is there to ensure that authors are able to derive monetary benefit from their expression. That's one part of it. The other part of copyright is that the public benefits from access to that expression which, under a market conception, is part of the incentive of creation in the first place.

However, the framers of the Constitution saw fit that copyright was not enshrined as a permanent right or a permanent monopoly for the author/creator, but rather that it would exist under those protections for limited times. Then they left it up to Congress to determine what those limited times might be. And opinions have varied greatly over the years, and much debate has ensued.

And of course, what copyright was thought to cover has also evolved over the years. And when we're talking about music, we start with the music publishing, which you can think of as notes on paper and written lyrics.

But then, of course, with the advent of recorded technology, we have the possibility of enshrining the author's rights further. Or, in capitalist terms, the owner's monopoly into the other side of music copyright, which is the sound recording itself. And you can think of that as those notes performed or sung and captured, fixed, in a tangible medium like on audio tape or on CD or on a hard drive, et cetera. And so with music, it's about balancing the interests of the creators of the music, the owners of the music, with those of the public.

Then, from time to time, due to the evolution of technology, we find ourselves in situations where some aspects of that original compact in the United States Constitution--article one, section eight, clause eight--that layout the balance needs to be newly addressed.

And so that's it in a nutshell.

But I still believe that the incentive is an important one for public benefit and also for monetary recompense of authors. It's just that the balance has shifted immensely towards the user side because of the low barriers to access to audio music artifacts and also the immense amount of replicative power.

LC: You talking about the reproduction on, say, YouTube and things of that nature?

CR: That's right. Anything where something can be copied or distributed. So this mind-boggling global, or potentially global, scale now exists due to digital technology and the internet.

LC: Such use—for example, over Youtube--does not benefit the copyright owner usually, right?

CR: It depends. I mean, it really depends. The ownership of copyright over the years, partially in response to the digital disruption (i.e. the internet), has been tremendous in the consolidation of music catalogs through mergers and acquisitions. So, on one level, digital technology—or, as the kids know it, “on demand” streaming like Spotify, Apple Music, et cetera--gives record labels that enjoy the exclusive right to distribution with no statutory or compulsory license, which means that the government doesn't set the rates and is not involved in setting the overall terms for negotiation within that marketplace. So that gives the labels tremendous amounts of leverage in what they can actually make from the services in order for these services to access their tremendous catalogs. And so on one level, the technology has benefited those companies. It didn't at first, but it has now in the sense that the three major record labels and the three major publishers control most of the music, in fact, the vast majority of music on planet Earth. And all three are owned by the same corporate parents, multinational companies. And so, in a universe where you have always-on, 24-hour-a-day monetized access to music means that these little micro penny cash registers are always ringing and they don't have high distribution costs anymore either when they can to actually manufacture vinyl records and ship them out. And they're not facing limited shelf space either, so the catalog that they control is like a license to print money in this environment. But the question for music creators, is in terms of the economics of the post-scarcity world. How does that work out for individual creators where it seems that it's a winner takes all environment that rewards scale? Either scale in terms of the platforms, in terms of a technology provider, or scale in terms of the aggregated copyrights that a company would own.

LC: When you talk about consolidation, I don't think most people realize that there's really only three music companies or music labels left in the United States.

CR: Yes, there's three publishers and three labels, and they're owned by the same corporate people.

LC: So you may buy that disc--if people still buy discs or whatever--and it's on such-and-such a label, but that label is owned/under a huge corporate umbrella like Sony. So it is a monopoly almost.

CR: Yes. And the low distribution costs we have now mean that there are favorable deal terms for those companies. They're able to extract more because of the leverage that those catalogs give those three companies. It means that the house always wins.

LC: The terms “trademark” and “copyright” are often used interchangeably, but they are not the same thing. I was wondering if you could elaborate on what the difference is.

CR: Well, I'm not an expert in trademark, so you have to talk to an expert in trademark to get the skinny on today's marketplace. But the difference is that copyright is really an expression, anything that can be expressed into a tangible medium and copyright doesn't apply to the *ideas* that are expressed—it only applies to their arrangement. So, in music, oftentimes you have questions of substantial similarity for example, and other tests that sometimes come up when infringement lawsuits are brought as copyright suits. They happen all the time with pop songs, like so-and-so copied this song.

LC: For example, there was a case a few years ago where Tom Petty or someone in his organization sued Sam Smith because a song Smith wrote and recorded—“Stay With Me”—was similar to a song Petty wrote and recorded, “I Won’t Back Down.”

CR: Yes. Oftentimes they're just settled out of court, sometimes they're not. Katy Perry's case [over the song “Roar”] was not settled out of court. And, again, these cases can be brought on the premise that the sound's copyright, or the performance captured on tape, CD or hard drive, was infringed. Or they can bring a case based on whether the underlying composition, the notes on paper or the lyrics were infringed. And without getting into a really in-depth conversation about what that means, it can mean something different at different times depending on the facts of the case, the jury or the judge, et cetera. But really, with trademark, you're talking about more stuff that relates to the brand and there are protections there, but copyright is really about the right to make copies or derivative works from some form of expression that has been fixed in a tangible medium.

LC: We also hear a lot about the term “public domain” or the phrase that “something has entered into the public domain.” What does that mean?

CR: The life of copyright does have an expiry date and, after which, depending on when that expression was first fixed or published--you have to look at the little details--works do fall into what we call the public domain, meaning they are free to use without payment. Currently copyright has a term of the life of the author plus 70 years, I believe. When copyright was first minted, the very first copyright laws promulgated by the United States Congress had the term at 14 years. So you can see how copyright laws have been expanded over the years by the US government.

One time Jack Valenti, the former head of the Motion Picture Association of America, was testifying before Congress and he was asked directly, how long did he think that copyright should last? And he replied something like “One day less than infinity.”

I'm paraphrasing, but, like I said, “limited times” means different things to different people. But I do think it is culturally important, not just for the general public, but for fellow creators to have access to ideas and information so that it can be repurposed or otherwise utilized in some way. It can be very, I think, healthy for the social and cultural discourse. But people have different opinions about that. I think that one of the things that could help restore a sense of fairness to copyright law would really to take a closer look at what that original compact in the US Constitution was meant to balance; what interests are meant to be balanced there. I don't see anything about copyright owners there [but] I see authors clearly mentioned.

LC: That's an interesting distinction, isn't it?

CR: Yes. For example, in the 1976 Copyright Act, the US Congress felt that as the life of copyright had been extended and was about to be extended again, that it might be sensible to offer authors another bite at the apple. So they created a provision called the Termination of Transfer of Copyright, and that allows authors of works to file to recapture their copyrights after 35 years from fixation or publication date. But that process is complicated, you need to probably find a lawyer to do it. Not everybody even knows that that right exists. A lot of heirs don't know about that. And it's not without controversy because, again, the record labels are keen to assert that all of these albums that were made by these amazing performers were works for hire and that they were employees of the label. But, if that's true, if they're employees, then pay my health insurance!

LC: Is the “life plus 70” statute germane to audio recordings? For example, if I put out an album, would I have ownership of it well after I'm gone?

CR: Yes, assuming that there is an author and that author is the performer, because the way it often works is a band will be, or an artist will be, signed to a label and the contract will say, you're going to make us this many albums for us in this amount of time or something like that. Those rights will automatically transfer then and the label will register the copyright and they'll own it.

But, in this day and age, it can look a lot different because there's a lot of artists who self-release or license their music to third parties for distribution, et cetera, and they remain the copyright owner of the sound recording and possibly also of the music publishing.

LC: Am I correct in saying that, say, should I create an album and start distributing it myself, it is automatically copyrighted to me with that “life + 70” protection?

CR: You would, yes. And the interesting thing about it is we don't have in the United States formalities compelling registration of copyright. The moment that it's fixed in a tangible medium, it is considered under copyright. However, to be eligible for statutory damages in case somebody infringes on your work by distributing it without your exclusive permission or

something along those lines, or makes a derivative work that you didn't authorize, you would need to copyright your work. And that's why we have the United States Copyright Office.

LC: But what then is the value of saying my work is instantaneously or immediately copyrighted?

CR: The point would really only be that this now sets a place from which you can more staunchly defend your authorial rights if they're infringed, to be eligible for damages, for example, in the case of infringement. And there are other rights as well that are better enumerated because it leaves less ambiguity. The Copyright Office, unfortunately, serves only as the body of recordation of copyright, it isn't really designed to be a one-stop licensing shop. So one of the issues that has been really challenging in the music industry overall is figuring out ways to allow licensing to be more efficient, more transparent, and more global. Since the internet doesn't know any territorial restrictions.

LC: What special benefits, if any, do audio works obtain when they're copyrighted?

CR: Well, you can say, "Look, mom, my work's copyrighted!" But, again, the ability to assert ownership of that right is crucial in a marketplace where there's a lot of activity and a lot of folks out there. I mean, it happens to big bands and big artists all the time: people will upload stuff to Spotify that they don't own but being able to assert ownership in that isn't just for monetary damages, but it gives the owner or the author of the copyright a legal basis with which to seek an injunction against the use, or to block all use that they don't like or to compel licensing if they're interested in that. So it is leverage really, and it's also international reciprocity.

The interesting thing about our international copyright spaces is that there are global treaty conventions like the Berne Convention and the Rome Convention that do set international standards for the mutual recognition of copyright across nation states. And I think that that's also important in a global music environment. And you'll find that when the bigger companies have this all figured out, they will register their rights wherever this stuff is released. It's a little bit trickier to manage that for self-released artists. And unfortunately, I think a lot of stuff doesn't actually officially get registered because it should be easier. I think it should be easier.

And I also think there should be more education starting earlier with regard to rights. I mean, why not start at the shallow end of K12? Why not start in kindergarten or first grade? You've got art classes, kids that make things naturally understand that there's an investment of something and not to make them feel proprietary over it necessarily, but to encourage a mutual respect for the nature of authorship because it's only getting more confusing out there with AI.

LC: If copyright restricts certain usages of pieces, without compensation to the author/owner, at the same time, we also have this concept in the law called "fair use," and I'm wondering if you could mention a little bit of what that is.

CR: Fair use is kind of like, I've always thought of it as a First Amendment kind of release valve for expression within the marketplace.

So fair use is essentially a four-pronged test that would be applied by a judge in the case of an infringement lawsuit where the party accused of infringement would invoke fair use as a defense.

Those four prongs are: The purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work (is the original work fictional or factual, is it published or unpublished; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and then the effect of the use upon the potential market for or value of the copyrighted work.

LC: Maybe as an example, the rapper that uses a sample in a song or the professor who uses something in an online video that he's teaching about jazz or something, and maybe he plays a clip or something. These would be good examples, possibly, or at least good place to start, about talking about the concept of fair use.

CR: Yes, absolutely. So we could talk about the nature of the exemptions or the nature of the uses that might qualify for fair use. And the important thing to note here is that the facts of the case are paramount and that those four prongs of evaluation aren't equally weighted. Like a judge might find a fair use argument regarding one or two of those prongs to be sufficient or comprising enough of the nature of the use that it will enable a ruling of fairness. So you have the educational and critical exemption; you have a non-commercial sort of qualifier, you have an attempt to gauge the effect of the allegedly infringing use on the market for the original work; you have how much of that original work is used.

But none of these are set in stone. There's not a magical threshold of any of those. For example, that college professor who's using something to excerpt within a class, and she's making a multimedia sort of presentation for that purpose, that would have a strong presumption of fairness, right? Whereas, legally speaking, there hasn't actually been a really great fair use case on the sound recording side, probably because the labels are afraid of getting an unfavorable ruling out of that precedent.

But [the courts] have a ruling that has nothing to do with fair use--*Bridgeport v. Dimension Films*. Basically, a Parliament Funkadelic song was sampled and released on a soundtrack to a movie. So it was the movie production company that was getting sued for the use. But, anyway, long story short, the judge in that case said, in his opinion, "If you sample, get a license. Period." That's a very bright line, right? But the issue is that fair use was never used as an affirmative defense in that case. So it was never decided by the court along those lines.

And you'll also have parody being a potential use case that could be eligible.

LC: Would that be a Weird Al sort of thing?

CR: Weird Al gets permission from anyone he parodies because I think he just personally feels that it's better that way. He will respect the "no" answer. Though it's entirely likely that Weird Al would qualify for fair use were he to find himself in a position of using it as an affirmative defense.

Fair use is really, really important, but it's kind of clunky, and this is why you get all these weird invocations on YouTube when people upload things—"No copyright intended" or some other mumbo jumbo that's supposed to make it a-okay. And there might be a presumption for fairness with some of those uses. For example, there's a very popular gray-haired, boomer-esque guitar guy on YouTube that does educational videos and he oftentimes really will get into the music theory of a song, the underlying way a song works. And he is great. He has a lot of fans. I really think that people who like him would be inclined to see him as providing a really unique and valuable cultural service. But he's had copyright strikes brought against him through automation on YouTube, and there's really not much that he can do about it. And we're talking for only three seconds of a live performance and it's something just to show as an example. The video that he creates, he's creating his own copyright in that video, but the automated detection software will basically result in that being taken down, and there's a deprivation of his monetary gain, his right to derive monetary benefit from publishing his copyrighted work. So none of this is a black and white issue.

And I do think that fair use should be at the forefront of any conversations regarding automated detection, particularly on user uploaded services that are governed under section 5, 12 of the Digital Millennium Copyright Act. That's a whole 'nother bag of worms—the take-down regime that governs user upload services or sites that allow users to publish content.

LC: There's an argument that I'm reading about of late that says that copyright laws are, today, often being misused: Copyright used to be about ownership and how others cannot make money off something I create but people now seem to using copyright as a battering ram that says "You can't say this about my work," "You can't reference my work," "You can't interpret my work without my approval." Do you see this?

CR: I absolutely do. And I think that's why I call fair use a First Amendment safety valve in a way, because copyright can be used as a cudgel to stifle legitimate speech period, full stop. There's a lot of folks who have been disenfranchised historically from having a means to express themselves and there is a danger that those voices can be not just silenced, but also there's a danger that the economics of copyright as currently constructed create a lot of perverse incentives.

Folks who are creating content for this attention economy where there's no financial benefit to them, really. But the problem with copyright is really that it's not just one thing. It's kind of like sediment--it has been built up over time. And so when I'm teaching this stuff, and I've taught for years these issues, students will be like, "Why can't we just blow it up and start over?" Or do we even need this because of X, Y, or Z market kind of trends. And it's like, "Well, maybe, but it's in the United States Constitution. It provides for limited times protection as described in the Commerce Clause and empowers Congress to make laws around it."

So we're kind of stuck, and since those laws have, like I said, been built up and been built onto one another, and there's all sorts of nip tucks here and there, and every time a new technology comes along that threatens to disrupt a marketplace, we have new tensions within this lattice work of laws. And, for example, AI is the new tricky one. I mean, the way that these machines are scraping and reconfiguring data for an interpretive presentation is deeply transformative. Yet

what they create is original in the sense that it doesn't have a prior basis in the arrangement. And so what do you do with that? There's first the question of who owns it, and then there's a second question of is it even copyrightable?

LC: Copyright is such a huge, complicated issue. What inspired you to write the book on it?

CR: I kind of stumbled into this stuff like I do most things in life. I had been a musician, was active in the '90s and early 2000s. It was in the mid to late 90s, I was running an independent record store right around the time where you were seeing a lot of these shifts start to occur. There was CD burning, and then of course it became file sharing. But there were other things too. Big box stores were having sweetheart relationships with the major labels that controlled the distribution. So music was being used as a loss leader. So you would go into Best Buy for an album...and maybe you'll buy a refrigerator while you're there, or a flat screen TV or whatever. And so that's the music industry at that level of consolidated ownership. And it hasn't changed all that much. It's still about trying to extract as much value from the distribution pipeline before the music ever reaches the listener.

Anyway, what got me into this was some of those shifts. I was noticing on a cultural level, like file sharing for example, but also on a professional level, working in music retail as a buyer and a manager for a store...

Then, after that, I was a music editor at *Alt-Newsweek* for a number of years. So I went into writing and, during that time, it was the rise of blogging and the sort of the disintermediation of the written word and the impact on local news gathering and locally content. And so I was living it at that level. And then I moved to Washington, DC, and I was going to originally take a job at the "Post" as sort of entertainment cultural critic kind of role but then I saw a job at an organization called The Future of Music Coalition; they were looking for a communications director. And they were deeply plugged into all of these issues.

That organization had started, I think in 2000, they were present at birth for the digital disruption. And, because of the position that I took there--and later I ended up running the place--the position that I took there afforded me access to some of the most brilliant minds in music, technology, policy and law and that really gave me a very well-rounded education in the nuts and bolts of how this works. I'm an autodidact, but I'm a fairly quick study and I had really great mentors, but also the future-oriented extrapolation that one might want to do when discussing the evolution of copyright and the entertainment industries. And Sandy Perlman, for example, would be one of those people that is sort of pantheon for me. And somehow Georgetown University asked me if I wanted to write a grad school course for their graduate program, communications, culture and technology.

So I did, and that was on disruption to the creative industries. For it, I looked at everything from telecommunications policy to FCC broadcast regulatory policy to the evolution of technology in the marketplace to copyright and so on and so forth. So I'm one of those people that I kind of learn a lot by teaching as well. And coming up against many of the wonderful questions that students bring to you and their perspectives. So I did that for about ten years, and while doing

that, I started teaching music policy at Berkeley College of Music. And so I think I was kind of on a track to be thinking about these things.

I'm pretty much *emeritus* now. I've walked away from this on the day-to-day. Previously I've been at SiriusXM as the director of music licensing. And so along the way I wrote this book on music copyright just because I was getting asked questions and not just by students and so forth, but by fellow educators and entertainment lawyers. And I was like, I guess before I totally peace out, I should offer this as a gift.