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Why Legally Downloading Music is Morally Wrong

Tim Anderson

Old Dominion University, tjanders@odu.edu

D. E. Wittkower

Old Dominion University, dewittkow@odu.edu

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Why legally downloading music is morally wrong

Tim Anderson

Associate Professor of Communication and Theatre Arts
Old Dominion University

D.E. Wittkower

Associate Professor of Philosophy
Old Dominion University

We've all done it. We certainly have, and we will again. But paying for and legally downloading music is morally wrong.

Buying music from labels or retailers in our current intellectual property rights regime and copyright-based industry context (1) fails to appropriately support artists, (2) acts against artists' autonomy, (3) hinders the development and accessibility of culture, and (4) reinforces a relationship to art, music, creation, and creativity which is commodified rather than active, and thereby stifles human potential by diminishing the quality of life in our societies. In other words, paying into the copyright industries, as they currently exist, means being complicit in undermining everything that copyright law is meant to promote, and thus means being complicit in acting against the explicit intention of the constitutional basis of copyright law in the United States.

These are serious moral claims, and we hope that after going through arguments for these four interconnected claims, you'll agree that buying and legally downloading music contributes to significant problems. After making this case, though, it's another question entirely what to *do* about it! Rather than spring this on you at the end of this essay, we'll tell you up front: we don't think *illegally* downloading music is a moral alternative.

What are we supposed to do then? One option is to refrain from supporting existing legal systems of retail and distribution. In this scenario one would listen only to live music or to recordings that have been properly "copylefted" with Creative Commons licenses, or works that are in the public domain. However, this option sets an impractically high moral standard that would effectively restrict listening to a very exacting and non-popular repertoire. It's also kind of beside the point. As Lierre Kieth argues in *Earth at Risk*, "the task of an activist is not to navigate around systems of oppression with as much personal integrity as possible, it's to dismantle those systems." Similarly, if you agree with our arguments, your conclusion should not be that it is morally obligatory to refrain from buying music. While it's good to seek out ways of fixing or avoiding the many problems existing systems of retail and subscription generate, it is even more important to seek out ways to support reform and replacement of these systems. In concrete terms, we recommend (A.) engaging in direct support of artists whose work you care about, including going to shows, buying recordings directly from them, or crowdfunding their work; and (B.) supporting pro-artist, pro-art, and pro-public reform in copyright law. Ethical music

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consumers could exert tremendous power if they demanded that their music, like their coffee, be part of a certified Fair Trade system of production, distribution, and payment that was transparent and ethical.

1. Buying music in the current market fails to appropriately support artists

In the past the system of record production involved labels, distributors, and retailers. Like book publishing, the expenses accrued because of a necessary “value chain”—those linkages that connected producers with advertisers and shops that brought value to records and books by making them known and available to the general public. These significant investments were required: the total expenses of recording, pressing, distributing, and housing discs and artwork could not be avoided. These upfront costs were huge and very risky. Indeed, few artists or authors could have tried to find an audience if they had had to pay for printing and distribution by themselves, and to do so up front, prior to any sales. In this system, publishers and labels shouldered this risk and used the profits of successful titles to both defray the costs of failure and to fund the publication of new works. Under this system, it clearly benefitted the public to ensure that publishers could make a robust profit, since these profits funded cultural research and development. The argument was that a label that barely survived couldn’t afford to take risks with new musical styles and artists. On the other hand, a publisher awash in funds was more likely to help create and support a diverse and inclusive cultural ecosystem of new musical expressions.

However, in the last twenty years the significant material infrastructure that justified this system has eroded to the point where many artists no longer need these expenditures. It is no longer necessary to press great numbers of CDs and LPs. With the arrival of multiple online listening and distribution platforms, the need for a system of trucks, warehouses and physical retailers has disappeared, and the cost of getting the music into the hands of consumers has plummeted. At the same time, recording and production have radically cheapened as well, with ever-cheaper high-quality hardware and cheap or free software like GarageBand and Audacity. Indeed, even the cost of promotion is decreasing, as more and more artists take to social media as a means of getting the word out about upcoming releases and tours.

This does not mean that labels and publishers have gone away. They will continue to retain their role as gatekeepers, particularly to multinational markets where the many legal and cultural issues key to distributing and performing may be too much for the average musicians to negotiate. It’s much more difficult to access large consumer markets without the logistical machinery of a major label.

Yet the question at hand is not about supporting a now-unnecessary and costly system, but rather finding sustainable alternatives. Because of the many tools and practices that did not exist even 15 years ago, most artists today will simply never need the services that labels and retailers can provide. Indeed, today only a small percentage of the most famous musicians are able to earn enough from selling downloads and CDs to make a secure living

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for themselves and their families. Even in the past, the label system was considered suspicious by some of its greatest successes. For example, Prince once compared the label-contract system to slavery and indentured servitude. If this system of investment and distribution is no longer necessary for most artists, then reflexively supporting these systems is problematic at best and, at worst, unjustifiable, due to the way it allocates an excess of resources to intermediaries rather than artists.

But even labels themselves have changed. For example, the relatively long-term support and nurturing of emerging artists—one of the forms of support that the label system once offered musicians—is no longer the norm. Indeed, labels expect others, particularly artists themselves, to make these vital investments. Digital streams and piracy have also forced labels to rethink what products they are willing to finance. Major labels used to make all of their money from their investment in records. Now new contract agreements, called “360 deals,” demand percentages from every moneymaking aspect of a musician’s career, including merchandise and live performances. As the saying goes, labels are no longer investing in bands so much as they are investing in brands.

This is why many musicians give away downloads. Those not in 360 agreements make their money playing shows and selling t-shirts. Knowing full well that when the marginal cost of reproduction—the amount it costs to make each copy of each album—is zero, many musicians see downloads as calling cards that are better exchanged for fans’ emails. Musicians would often rather have a means of contacting audiences to let them know when they are preparing to tour or when they have a new piece of merchandise to sell than place their bets on minimal royalty statements. It is possible that musicians could make a lot of money in the current copyright industries. Yet as it stands, what the best systems are in this new atmosphere remains unclear, particularly as legal streaming alternatives and their very small per-stream-residual rates are quickly outpacing the option of purchased downloads and their wider margins as a consumer choice. The problem is that we have yet to see what new systems work best for musicians.

2. Buying music in the current market acts against artists’ autonomy

The first thing that one has to realize about the label system is that its support comes on the basis of substantial commercial considerations. When a label invests in a musician it is not necessarily investing in their music. Rather, labels wish to produce commercially oriented goods for exchange. Historically, this has meant that objects like records and CDs were produced for a marketplace. In all cases what labels perceived as the limits of a marketplace often compromised what and how much a musician could produce. Artists could be gently coaxed or forced to produce music in styles outside their strong preferences simply for the sake of sales. In some cases, musicians such as Prince, who produced substantially more music than the typical artist, would not see their works released for fear that the label would oversaturate a market.

Perhaps the most substantial restrictions placed on artists have come in the arena of promotions and marketing. In some cases, artists as weighty and influential as Johnny Cash

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and LL Cool J criticized their labels for not promoting works they firmly believed in. OK GO's own elaborate videos were restricted from being easily shared by fans by their then-label, EMI-Capitol, because the company wanted to use the promotions as an income stream. Amanda Palmer ran into substantial problems with her label when an executive asked her to cut a few shots from a promotional video because he thought she looked fat.

As we will discuss later, in the cases of Amanda Palmer and OK GO, both have been able to secure some form of independence and have become responsible for their careers' successes and mistakes.

3. Buying music in the current market hinders the development and accessibility of culture

Constitutional law scholar Lawrence Lessig estimates that only 2% of the books published between 1923 and 1942 (the first twenty years still covered by copyright law) are commercially viable and remain in print today. In other words, 98%, the overwhelming majority of written culture produced in those eventful twenty years, is basically inaccessible. Worse, its influence and value is likely to be lost because its circulation has been made illegal. Many works, in fact the majority of works, no longer have a presence in the marketplace because publishers no longer bother to seek profits from them, and others are prevented from distributing them by laws that guarantee publishers' exclusive rights to do so.

One of the sources of this problem is the length of time that rights holders can claim an exclusive right to their intellectual properties. Whether they be song lyrics, patents, or logos, Article I, Section 8, Clause 8 of US Constitution grants Congress the ability "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." In essence, copyright protection is an incentive for more creativity: by securing an exclusive property right for authors and inventors, they are incentivized to create and innovate. However, in the US context, the optimal duration of the exclusive copyright protection has always been unclear. Article 1 does not provide any guidance as to the ideal length of a copyright. Initially, the duration of the exclusive right lasted just 14 years. Today, under the extreme protections of copyright authorized by the Sonny Bono Copyright Term Extension Act of 1998 (CTEA)—often called the "Mickey Mouse Protection Act," as it was passed by the US Congress just before the character Mickey Mouse would have entered the public domain—authors are granted their lifetime plus 70 years; corporations who commission works are granted exclusive rights to that work for 95 years. What this has meant is that an environment exists where a great deal of creative and cultural work is kept from public use in order to protect publishers' profits. Other artists who might wish to access, remix, work with, or even listen to and be inspired by a song or record may not be able to do so because (and despite the fact that) companies owning rights over these works have decided that it is not worth their while to keep these works in the marketplace. Worse yet, if the systematic extension of copyright continues, as one can expect from a Congress subject to

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heavy industry lobbying pressures, songs and records may effectively continue to remain inaccessible to many potential consumers in perpetuity.

To be clear, we do believe that the authors of songs and records should be compensated if they wish to place them in a marketplace. We worry that in an atmosphere where songs and compositions are limited by how and who can share and profit from them, a majority of cultural works will simply become lost and forgotten. If we continue to deny the public the opportunity to harvest the creative wealth of previous works, those works will lie fallow and slowly become irrelevant. Imagine what would happen if every classroom had to pay substantial fees to a corporation when its students were assigned to read Shakespeare or Homer. Simply put, some authors and their ideas contain values that exist beyond the needs of a marketplace. Subjected to the demands of a market, teachers may look elsewhere for cheaper and less valuable works to utilize in educating their students. Just as we believe that the lessons of the Bard and Odysseus should be accessible to all, we believe that there must be a critical examination of the system that effectively supports and promotes songs and records only as insofar as they are private property and not as part of our cultural heritage and inheritance.

This last point can be seen clearly in comparison to patent law. Patents are granted for a term of 20 years. This is meant to strike a balance between inventors' (and corporations') interests and the interests of consumers, with an eye to maximally benefitting the public. If the patent term is shorter, it reduces the incentive that inventors and corporations have to invest in innovative technologies, pharmaceuticals, and so on, and this may slow the progress of science and technology. If the patent term is longer, this means that inventors and corporations can sequester the technology and charge monopoly prices for longer. The result is that it takes longer for other innovators and corporations to be able to create more affordable generic versions to benefit more users and to be able to build on the patented invention to create new and further innovations. Innovation is slowed and public benefit is lessened if the term is either too long or too short. We are skeptical that 20 years is the right balance for patents—four or five years might be more appropriate, given the rapid pace of technological development—but it is far more reasonable than the 95 years of artificial monopoly guaranteed to copyrighted works under the CTEA.

The balance with copyright is similar to that with patents: if we want cultural development and innovation, we need to ensure that artists and creators can make a living when they produce valuable work that benefits the public. But we also need to ensure that work enters the public domain when it is still relevant, so that other artists and creators can learn from, rework, and build upon it. The current copyright industrial environment utterly fails to strike the proper balance among these interests; indeed, it fails to effectively support *either* end of the “copyright bargain.” As we discussed above, it does not support artists appropriately, and it *also* fails to return work to the public domain while it is still relevant, instead withholding it until (in most cases) it becomes not only irrelevant, but lost altogether.

The possible values of creative reuse and remix are easy to underestimate, since the examples we usually see are very limited, due to our restrictive intellectual property laws.

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We might think of the use of samples in rap and hip-hop. Think instead about the huge cultural wealth that Disney has appropriated and masterfully transformed—traditional fairy tales and public domain short stories that form the basis of *Snow White and the Seven Dwarfs* (based on the Brothers Grimm story), *Cinderella* (based on Charles Perrault’s story), *Alice in Wonderland* (Lewis Carroll), *Peter Pan* (J.M. Barrie), *Sleeping Beauty* (Charles Perrault/Brothers Grimm), *The Little Mermaid* (Hans Christian Andersen), *Beauty and the Beast* (Jeanne-Marie Leprince de Beaumont), *Aladdin* (The Arabian Nights), *Mulan* (木蘭辭), *The Princess and the Frog* (Brothers Grimm), *Tangled* (Brothers Grimm), and *Frozen* (Hans Christian Andersen). Disney has creatively and masterfully reworked and reimagined its public domain cultural inheritance, but has not replenished the well—others do not have the rights to similarly reimagine and rework Disney’s cultural contributions.

To get a good idea of the first steps of what this reimagining and reworking would look like in the realm of music, beyond the short samples which can be used legally, search for Girl Talk’s *All Day*, or DJ Dangermouse’s *Grey Album*, a remix of Jay Z’s *Black Album* and the Beatles’ *White Album*. These works are blatantly copyright-infringing, but remain widely accessible, for two reasons. First, the artists created these works outside of the copyright industries and without seeking profits. Second, their popular and critical reception has been so positive that labels seem to have determined it not to be in their best interest to bring a suit against these artists, even though they clearly have the right to do so.

4. Buying music in the current market reinforces a relationship to art, music, creation, and creativity that is commodified rather than active, stifling human potential and diminishing the quality of life in our societies.

We live in a unique moment in the history of our species’ relation to music. Until very recently, with the availability of technologies of recording and replay, music was almost entirely part of humans’ lives when they themselves were participating in making it. Music was created in communities and families, and drumming, singing and playing was a part of work, play, and praise, rather than an object of more passive enjoyment as an audience—with the exception of aristocrats who had or could attend parlor performances, concerts, or operas. It was only in the 20th century, along with the rise of music industries and their accompanying modes of production and distribution, that most of the music most humans ever heard—at least in advanced industrial societies—became something that was done largely by specialists. Singing and playing music have become, for us, newly a matter of choice and study rather than everyday parts of family and community life.

Along with this shift from participation to spectatorship, not unlike the move away from playing active games with one another to the spectacle of spectator sports, what used to be simply matters of our own cultures and histories became an object of production in what Theodor Adorno and Max Horkheimer termed “The Culture Industry.” “Culture” is no longer predominantly who we are and how we keep our diverse traditions alive through the generations. Instead, culture is predominantly envisioned as a mass-produced, marketed good, through which we are encouraged to identify ourselves. Thus, we talk of music and identities in terms of distinct genres. Whether listeners love country music, are

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hip-hop fans, jazz aficionados, or self-described punks, each segment is researched and addressed by companies as a group whose members have their own meaningful taste culture and identity. Indeed, with some exceptions—for example, the context of religious practice—we no longer sing and play the songs of our ancestors. Instead, we purchase, listen to, play, and sing works produced by profit-centered, market-oriented industries.

This represents a massive and wholesale squandering of our cultural inheritances. It is one that threatens a mass extinction of cultural memory and traditions. We stand to lose how our cultures participate in the creation of music and the unique joys communities generate in how they create musical beauty and a sense of belonging and meaning. The experience of choral singing, to use an example many readers will have at least some familiarity with, is a transcendent and deeply powerful experience. Choir members often report that their musical practices create bonds of care and connection with others. We believe that this has not been completely eradicated. However, we worry that seemingly interminable copyright laws could restrict future community expressions if, in the near future, a group must raise capital, hire lawyers, and pay for permission any time it seeks to record and release its interpretation of a 20th century repertoire piece. It is because a choir does not need to go through such machinations that they have the ability to choose from composers from Byrd to Palestrina to both perform and record. It strikes us as absurd that in the relatively near future of 2060 a similar choir may not be similarly free to choose compositions from composers such as McCartney or Strayhorn. We worry that allowing art to remain a private good for unprecedented amounts of time not only restricts music, writing, and other forms of cultural production to specialists, but further restricts cultural production only to those specialists who can afford to access a controlled, privatized, industrially-produced repertoire of cultural expressions.

This, of course, applies equally well to illegal and legal downloading: either way, we are consuming the products of the culture industry rather than participating in and furthering our own cultures by creating music from within our own communities, motivated by our own expressive needs and intentions, and building up and strengthening our communities through this collective creation and heritage. Illegal downloading has at least the virtue of not materially contributing to the culture industry's profitability, but only at the expense of creating a freerider problem—it is predicated on others' having paid into the system, and does nothing to contribute to an alternative.

For those without enough interest to become participants in music making, a better compromise is to participate as an active audience member rather than a passive consumer. Go to shows! The experience of a crowd moved by music's emotional communication creates bonds and meaning for us in a way that standing among hundreds of others, each with her own set of earbuds, cannot.

What are we supposed to do?

We hope to have convinced you that you should have serious and significant moral concerns about legally downloading music in our current legal and industrial

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environment—that legally buying or streaming music, in most cases, fails to properly support and nurture artists and creators and instead supports a system of cultural production that stifles innovation and diminishes creativity and cultural development. Illegal downloading, as we've also noted, is not a clearly preferable alternative, as it also doesn't support artists and does little or nothing to replace the system of cultural production with anything that might be any better. What, then, ought we to do?

In the fourth argument above we have already indicated some positive actions that can be taken. In short: Consume less, participate more, understand your restrictions, and resist. The best way to do this is to simply make music. Whether you play covers or produce original content, the more you do so, the more you will begin to feel these limitations, understand the injustice of their restraints, and begin to become more critical of these systems and less dependent upon them. The next step is to become politically active. In the United States, activist groups such as Creative Commons, the Electronic Frontier Foundation, and the Future of Music Coalition are open to your participation as they search to create more just, less restrictive systems that better support musicians.

If you are a fan, engage in direct support of artists whose work you care about. Go to their shows. Go to their websites. Buy as directly from them as possible. Ask and find out what kind of engagement and support they want from you. The beauty of the Internet and its many peer-to-peer capacities is that the need of intermediation has drastically lessened. Meet them where they are. Finally, respect their own judgments about how they want to create music and what relationship they want to have with fans.

For example, the relatively new practice of crowdfunding capital to create and distribute work is a kind of direct support that many artists are increasingly interested in. It can allow artists to create through a much more direct engagement with their audiences, it avoids the intermediaries of labels, and allows for a less constrained mode of production and distribution. As such, more and more artists are finding that crowdfunding better supports them financially as well as creatively. By no means is it perfect, though. Not every artist wants the responsibility of connecting with potential backers or feels comfortable asking for money. However, this option has allowed a freer form of expression for those artists who prefer to take on these tasks themselves and who are willing to accept the risk of losing time or face in this uncertain process.

Finally, we believe that these points are moot without lobbying for the reform of industry in a continual search for more just legal structures. Many artists and listeners believe that current copyright laws are excessive, and are implemented in ways that benefit corporations at the expense of artists. Of course, it is the industry rather than musicians that have the ear of our legislators, but as artists gain more power through technological development, new efforts like Tidal and Kickstarter are beginning to shift the balance of power. As fans we should seek to support artists' reforms and to help to find a fairer, freer way of creating and enjoying music.