

# Unbounded Opus: Creative Commons and the Composer

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Computers have changed everything. They have altered the way composers think about, create and listen to music. There have been many positives with the changes computers have brought about: the ability to create clean, easy to read notation; the ability to utilize *musique concrète* and sound collage techniques without requiring access to a tape studio; the ability to store and index thousands of recordings for recall with a few simple mouse clicks; and access to databases and libraries of recordings through Naxos and other online services that allow for the study and enjoyment of more music than any one library could possibly afford to maintain.

However, computers have not made all aspects of being a living composer easier. Issues of copyright and distribution reign large in the media and on the minds of every creator of intellectual property. Current computer technology allows the user, whether



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or not he or she is the owner of the intellectual property, to create perfect copies of digital media—where the duplicate is of the same quality as the original. When copyright was first written into law one of its purposes was to ensure that the publisher and author could control who made copies and how many were made. The way the internet works, every time a file is accessed a copy is created. Does this violate the copyrights of the author?

Current U.S. copyright law is outdated and written to deal with technologies that are decades, if not centuries old. As Stanford Law School professor Lawrence Lessig said, “The problems that the law creates for us as a culture are produced by insane and unintended consequences of laws written centuries ago, applied to technology that only Jefferson could have imagined. The rules may well have made sense against a background of technologies from centuries ago, but they do not make sense against the background of digital technologies.”<sup>1</sup> Congress has attempted to deal with the development of the internet and the power of the personal computer by instituting the Digital Millennium Copyright Act, or DMCA, of 1998. Still, technology always precedes copyright law.

The U.S. Copyright law, or the Intellectual Property Clause, of Article I, §8, Clause 8 states, “Congress shall have the power ... to promote the progress of science and useful

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<sup>1</sup> Lawrence Lessig, *Free Culture: How big media uses technology and the law to lock down culture and control creativity*, New York: The Penguin Press, 2004, 284.

arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” Clearly the original intent of this law was to promote further creativity for a larger societal and cultural good. Copyright expert Jessica Reyman makes the distinction clear in her book *The Rhetoric of Intellectual Property: Copyright Law and the Regulation of Digital Culture*:

Protection of creators’ rights is not an end in itself but rather serves the purpose of providing incentive for the creation of more works, as a means for incentivizing the future creation. It is this intended balance between individual ownership of rights and public good that often gets overlooked or misconstrued in the digital copyright debate. Too often participants in the debate rely on the assumption that the end goal of copyright is to reward creators for their contributions, as commonly argued by the movie and music industry representatives in the digital copyright debate over peer-to-peer file sharing. However, the purpose for granting ownership rights, as suggested in the Constitution, is to stimulate future creation that will lead to societal progress.<sup>2</sup>

Copyright laws have historically produced two results: first, they ensure that the author of a copyrightable work receives income from that work and that guaranteed income is an *incentive* for further creativity; second, they make certain that works enter the public domain for the benefit of future creators through the use of limited terms. Twentieth century lawmakers extended copyright from an initial fourteen years to life

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<sup>2</sup> Jessica Reyman, *The Rhetoric of Intellectual Property: Copyright law and the regulation of digital culture*, New York: Routledge, 2010, 47.

plus seventy. This boils down to one thing: the works of intellectual property in our culture (music, art, poetry, software codes, and many others) are locked down for all of our lifetimes, plus that of our children. We have, in essence, locked the creative output of our culture away from others, and ourselves.

The current tendency to mark all of ones intellectual property with a copyright symbol allegedly to ensure financial return for the creative effort has lead to what culture and copyright critics are calling a “permissions culture.” There are numerous stories of ridiculous lawsuits over real and perceived copyright infringement. Two very recent examples are:

- Just last month the publisher of the *Las Vegas Review-Journal* sued Anthony Curtis for posting excerpts of the article on his personal blog. The irony is that Curtis did the primary research for the content of the article and gave it to the publisher for free and was sued for promoting the article and publication on his personal web site.<sup>3</sup>
- In 2007 U.S. Yoga instructors had moved to lock up thousands of years of knowledge from one of India’s sacred practices by claiming 150 yoga-related copyrights, and 134 yoga accessory patents. Yogis and cultural historians in India are now cataloging and working to find evidence that many of the yoga-

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<sup>3</sup> Wendy Davis, “Publisher Sued For Reposting Article Based On His Own Research”, *The Daily Online Examiner*, June 28, 2010. Accessed online at [http://www.mediapost.com/publications/?fa=Articles.showArticle&art\\_aid=131043](http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=131043).

related copyright objects have been in existence and practice for centuries if not millennia.<sup>4</sup>

A permissions culture creates a problem for creators, though. Historically it has been that copyrighted works have certain legal uses within a culture: these include scholarly reference, quotations and excerpts for journalistic purposes and parody.<sup>5</sup> Another, even more important use of copyrighted material to the composer is the idea of transformative appropriation—the reworking of previous material into something new. Works of creativity, especially music, are not created in a vacuum. They are the result, conscious or not, of all the composer’s previous listening, performing, and composing experience. Igor Stravinsky is quoted as allegedly saying that, “Good composers borrow, but great composers steal,” and this is from a man who got burned by U.S. Copyright law by Walt Disney himself.

Lastly, computers have changed the way we do business. I am not simply referring to the basic parts of commerce: supply and demand coupled with the ease, and anonymity of purchasing items over the internet. I am speaking of business models—paradigms of business. More than ever before intellectual property can be traded over the internet without any tangible medium. Take any item bought or sold before the early 1990s and it had to be in a palpable, physical, form. Despite intellectual property’s

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<sup>4</sup> Mike Masnick, “American Yoga Teachers Still Trying To Lock Up Yoga Moves With IP”, *techdirt*, July 13, 2010. Accessed online at <http://techdirt.com/articles/20100713/09445210190.shtml> on July 19, 2010.

<sup>5</sup> For a very thorough explanation of the legal theory behind parody see Chapter 8 “Fair Use—Part Two: Borrowing, the Art of Parody and Other Exercises in Fair Use” in Ronald S. Rosen, *Music and Copyright*, New York: Oxford University Press, 2008.

intangible form it does have economic value. In a book published eight years ago Alexander Poltorak and Paul Lerner claim, “Intangible assets now represent almost 75% of the total market value of the Standard and Poor’s (S&P) 500 companies, double what it was 10 years ago.”<sup>6</sup>

Contemporary composers have the methods of distribution and sale that have always been available to authors: traditional publishing, the sale of printed scores and parts and the sale of CDs. Yet they also have the power of the internet, which has democratized the process and made it easier for those of us who are not John Adams or Joan Tower to see the sale of scores, parts, recordings, and most importantly secure performances. Using a business model based upon that of the open software movement composers can take advantage of these technological changes without fear of copyright hassles.

This is not a paper on the catastrophe of current U.S. copyright law or how the system fails to do what it claims: foster creativity and guarantee future income for authors. There is plenty of reading material readily available on the subject. Instead I intend to present to a body of composers—creators of intellectual property—some alternatives to the current system that may enable, or increase, the sales of scores and recordings, future performances, public exposure and commissions.

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<sup>6</sup> Alexander Poltorak and Paul Lerner, *Essentials of Intellectual Property*, New York: John Wiley & Sons, Inc., 2002, xiii-xiv.

As composers we need to rethink the need for total copyright control and embrace business paradigms that are built around the technology that we use every day and that is driving our society. Using tools created by Creative Commons it is possible for the composer to navigate these obvious minefields and I hope to show you both how and why.

## **Rethinking Total Copyright Control**

It is time for composers to reassess the need for total copyright control. What are we gaining by insisting on maintaining complete copyright control? For most composers, there is little to no financial gain as we find it difficult enough to sell scores, let alone secure performances. Most of us recognize, albeit grudgingly, that many of our scores and parts might be photocopied for future performances without our permission.

Is it possible that by relinquishing some of the perceived control over our intellectual property that copyright grants us we might see an increase in performances? In the sale of scores and parts? And in the sale of recordings? The surprising answer to these questions is yes!

A story told by the 1970s recording artist Janis Ian brings the point home. In an article she wrote for *Performing Songwriter Magazine* in May 2002 she claims:

Let's take it from my personal experience. My site ([www.janisian.com](http://www.janisian.com)) gets an average of 75,000 hits a year. Not bad for someone whose last hit record was in 1975. When Napster was running full-tilt, we received about 100 hits a month from people who'd downloaded *Society's Child* or *At Seventeen* for free, then decided they wanted more information. Of those 100 people (and these are only the ones who let us know how they'd found the site), 15 bought CDs. Not huge sales, right? No record company is interested in 180 extra sales a year. But ... that translates into \$2,700, which is a lot of money in my book. And that doesn't include the ones who bought the CDs in stores, or who came to my shows.<sup>7</sup>

As a result of the research Ian conducted while writing her article and the conclusions she came to, she now offers songs that she owns the copyright to for free download from her website. In a followup article published a couple of months afterward she insists that by giving away portions of her copyrighted material she is seeing a net increase in revenue. She claims merchandise sales increased 25% after posting her article (with previous sales being averaged over twelve months). Even more amazingly, once she began offering free music downloads her merchandise sales went up 300%.<sup>8</sup>

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<sup>7</sup> Janis Ian, "The Internet Debacle—An alternative view", *Janisian.com*, May, 2002. Accessed online at [http://www.janisian.com/article-internet\\_debacle.html](http://www.janisian.com/article-internet_debacle.html) on June 26, 2010. Originally published in *Performing Songwriter Magazine*, May 2002.

<sup>8</sup> Janis Ian, "Fallout—A follow up to The Internet Debacle", *Janisian.com*, August 1, 2002. Accessed online at <http://www.janisian.com/articles-performing/Fallout%20-%20rev%2011-23-05.pdf> on July 15, 2010.

What about piracy? Isn't it the cause of the decline of CD sales and the implosion of the recording industry? Actually, it isn't. In 2004 Harvard Business School professor Felix Oberholzer-Gee and co-author Koleman Strumpf concluded that there was no relationship between the amount of illegally obtained music through downloading with album purchases<sup>9</sup>. Some of the conclusions of the paper state that most downloading is performed over peer-to-peer networks by teenagers and college students—a demographic that does not have much money, but has much time. These are people who probably would not have bought the downloaded album anyway. According to the Harvard researchers, this means there was no actual loss of sale. A second demographic highlighted in this paper are referred to as samplers—older people who download a taste of this or that and if they like what they hear, they go out and buy the album. This second demographic is boosting album sales, and this is exactly what Janis Ian was experiencing.

One thing becomes clear: by giving away some piece of intellectual property there was a strong chance of increased sales, general interest, concert attendance and radio play. Several recording artists are using this philosophy to great effect. Take noisetrade.com, for instance. This website allows you to download entire albums by independent recording artists in exchange for a handful of email addresses of your friends letting them now about the album, the artist, and the website. These artists are

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<sup>9</sup> Sean Silverthorne, "Music Downloads: Pirates-or customers?" Harvard Business School Working Knowledge, June 21, 2004. Accessed online at <http://hbswk.hbs.edu/item/4206.html> on June 26, 2010.

experiencing exactly what Janis Ian described above. I know, I follow a few of them.

Here are few other examples of musicians and composers giving their intellectual property away with positive results:

- The record label Magnatune ([www.magnatune.com](http://www.magnatune.com)) sells subscription memberships for \$15/month that allow you to download an unlimited number of albums and to give each album you download away to three friends. There are hundreds of high quality albums the label puts forward and many of them are in the “classical” genre.
- A group of composers and musicians active on the social networking site Second Life led by Jonathan Coulton have performed “public” concerts of their music with audio and video feeds. The concerts are being released under Creative Commons licenses.
- The American industrial band Nine Inch Nails have begun releasing all their albums under Creative Commons licenses that allow listeners to give away, remix and rerelease their own versions. They continue to make money and sell out shows.
- Electro-acoustic pioneers, composers, and record producers David Byrne and Brian Eno rereleased two tracks from their collaborative 1981 album *My Life in the Bush of Ghosts* under Creative Commons licenses allowing fans and other musicians to download the original studio tracks in order to remix and share the music.
- Japanese composer and musician Ryuichi Sakamoto has released a composition called *Rokkasho* under the Creative Commons NonCommercial Sampling Plus

license to encourage people to remix, sample and remodel his track as a protest against the opening of a nuclear reprocessing plant in Japan.

- The online classical music label OnClassical ([onclassical.com](http://onclassical.com)) uses Creative Commons licenses integrally in its business plan. OnClassical features artists who have recorded on Decca, EMI and Deutsche Gramophone.

There are many more examples of authors and artists succeeding by giving their music away and working within the system made possible by computers and the internet. Composers as a group are, for the most part, unaware of these options or possibilities.

Many composers become extremely uncomfortable when discussing these options, as I'm sure most you are right now. Most wonder why they should give away anything that cost them time and resources to create. It is a valid question. My argument is that to remain competitive as business men and women (composers today are that if anything else) in today's economy, and in our technologically driven culture, composers need to adapt and change their stance on extreme copyright control so that we can benefit from the changes computers and the internet have brought about.

Without having to become an expert at copyright law, or spend money on lawyers composers can use the licenses Creative Commons has created to operate in this digital marketplace.

## Creative Commons

Creative Commons' website says it best:

Creative Commons is a nonprofit corporation dedicated to making it easier for people to share and build upon the work of others, consistent with the rules of copyright.

We [Creative Commons] provide free licenses and other legal tools to mark creative work with the freedom the creator wants it to carry, so others can share, remix, use commercially, or any combination thereof.<sup>10</sup>

In his book *Free Culture* Creative Commons founder Lawrence Lessig provides this explanation:

[Creative Commons'] aim is to build a layer of *reasonable* copyright on top of the extremes that now reign. It does this by making it easy for people to build upon other people's work, by making it simple for creators to express the freedom for others to take and build upon their work. Simple tags, tied to human-readable descriptions, tied to bullet-proof licenses, make this possible.<sup>11</sup>

In one of the handful of compelling videos about Creative Commons and how it works available on the CC website, one person says that, "Creative Commons is

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<sup>10</sup> Creative Commons, "About", *creativecommons.org*. Accessed online at <http://creativecommons.org/about/> on July 16, 2010.

<sup>11</sup> Lawrence Lessig, *Free Culture: How big media uses technology and the law to lock down culture and control creativity*, New York: The Penguin Press, 2004, 282.

designed to save the world from failed sharing.”<sup>12</sup> One of the aims of Creative Commons, or CC for short, is to help people build and maintain a shared culture. The view is that to create and sustain a culture a large group of creative individuals sharing, remixing, and building upon the work of others is required. Current U.S. copyright law is continually getting in the way of this type of societal and cultural endeavor.

Creative Commons aims to achieve culture building by providing a middle road to creators of intellectual property. Between the “All Rights Reserved” paradigm of total copyright control and the “No Rights Reserved” of the public domain CC allows authors to label their work with “Some Rights Reserved.” To be clear: the licenses Creative Commons provides are not an alternative to copyright. The licenses apply on top of copyright in order to satisfy the needs of the author. For instance, the author can pre-clear certain rights to the user such as remixing, or sharing.

With assistance from the Duke Law School’s Center for the Public Domain Creative Commons was founded in 2001. The board of directors includes cyberlaw and intellectual property experts, an MIT computer science professor, lawyers, documentary filmmakers, educators, and entrepreneurs. Creative Commons worked extensively with intellectual property experts in countries around the world to ensure that their licenses would be legal and enforceable globally.

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<sup>12</sup> Jesse Dylan, “A Shared Culture”, video, *creativecommons.org*. Accessed online at <http://creativecommons.org/videos/a-shared-culture> on July 16, 2010.

The process for licensing a work with a Creative Commons license is extremely easy. On the Creative Commons website, [creativecommons.org](http://creativecommons.org), the author selects what rights he or she would like to grant the user and the website provides a legal license, a human-readable description, and a machine readable HTML code that can be embedded into a digital file and any symbology and terminology you would like to use on the work.

One of the most useful aspects that a Creative Commons license provides is the human-readable description. The description outlines in every day language the conditions of the license. These licenses are not whimsical, for alongside the human-readable descriptions are lengthy (three- to four-times the length of the human-readable description) legal codes.

There are six primary licenses available for use by an author provided by Creative Commons with varying uses depending upon four conditions. The four conditions and their descriptions for a Creative Commons license are:<sup>13</sup>

1. **Attribution:** You let others copy, distribute, display, and perform your copyrighted work—and derivative works based upon it—but only if they give credit the way you request.
2. **Share Alike:** You allow others to distribute derivative works only under a license identical to the license that governs your work.

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<sup>13</sup> Creative Commons, “About: Licenses”, *creativecommons.org*. Accessed online at <http://creativecommons.org/about/> on July 16, 2010.

3. **Non-Commercial:** You let others copy, distribute, display, and perform your work—and derivative works based upon it—but for non-commercial purposes only.
4. **No Derivative Works:** You let others copy, distribute, display, and perform only verbatim copies of your work, not derivative works based upon it.

The six licenses ranging from the least restrictive to the most restrictive, based upon the conditions above, and their descriptions are:

1. **Attribution:** This license lets others distribute, remix, tweak, and build upon your work, even commercially, as long as they credit you for the original creation. This is the most accommodating of licenses offered, in terms of what others can do with your work.
2. **Attribution Share Alike:** This license lets others remix, tweak, and build upon your work even for commercial reasons, as long as they credit you and license their new creations under the identical terms. This license is often compared to open source software licenses. All new works based upon yours will carry the same license, so any derivatives will also allow commercial use.
3. **Attribution No Derivatives:** This license allows for redistribution, commercial and non-commercial, as long as it is passed along unchanged and in whole, with credit to you.
4. **Attribution Non-Commercial:** This license lets others remix, tweak, and build upon your work non-commercially, and although their new works must also acknowledge you and be non-commercial, they don't have to license their derivative works on the same terms.

5. **Attribution Non-Commercial Share Alike:** This license lets others remix, tweak, and build upon your work non-commercially, as long as they credit you and license their new creations under the identical terms. Others can download and redistribute your work just like the Attribution Non-Commercial No Derivatives license, but they can also translate, make remixes, and produce new stories based upon your work. All new work based on yours will carry the same license, so any derivatives will also be non-commercial in nature.
  
6. **Attribution Non-Commercial No Derivatives:** This license is the most restrictive of the Creative Commons six main licenses, allowing redistribution. This license is often called the “free advertising” license because it allows others to download your works and share them with others as long as they mention you and link back to you, but they can’t change them in any way or use them commercially.

So how can Creative Commons help the composer? To answer this question I sent an email out to the Society of Composers, Inc. listserv. In the email I asked four questions: 1) Are you self-published, or do you have a publishing deal? 2) Does the sale of scores, parts, and/or recordings constitute a significant portion of your income (more than 10% of your monthly/yearly budget)? 3) Before reading this email, had you heard of Creative Commons? and 4) If you had heard of Creative Commons, do you license your scores or recordings using their licensing agreements? I received thirty-seven replies. Thirty-two people claimed to self-publish their work while only eighteen have a publishing deal. Many of the respondents have at least a handful of compositions under publication with a publishing house as well as self-publishing. Only one person

did not self-publish. Fifteen respondents had heard of Creative Commons before I sent the email, but no one was using the Creative Commons licenses.

One individual explained his philosophy on giving music away:

I sometimes sell my music to prospective performers, but most often I simply give it away. It depends on the circumstances: if it's a band/orchestra piece being performed by an established ensemble, I will charge them for score/parts; I don't do rentals, because managing that is a lot of work and a huge hassle. If it's a chamber piece or a choral piece that they will photocopy for themselves, I usually give it to them for free rather than risk scaring off a potential performance by charging for a perusal score. (I do that mostly for situations where I'm pursuing a performer; if the performer is pursuing me, I will often charge a nominal fee, simply to recoup my costs of copying/ mailing.)

I do this because I'm likely to recoup my investment by earning ASCAP royalties from performances; in the long run, I think I make more from performance royalties than from sales.

This composer's experience sounds very similar to that of Janis Ian. If what I learned from my admittedly small survey that most composers (almost 92%) do not make a significant portion of their income from the sale of scores, why not give it away? Wouldn't it be better to get the music into the hands of performers with the potential for more performances, than to insist on the handful dollars you might make selling the score?

It appears that most composers are self-publishing currently. One of the major reasons is that composers are tired of only receiving 5–10% of the publishing royalties. To make matters even more dire, many small publishers are no longer even printing music! One of my friends, and an extremely gifted composer, just signed with a small publisher that specializes in jazz choral arrangements. His agreement gives him only 10% of the sale, while the publishing company only has to host the PDF file on their servers. When bought, the publisher sells the right to make however many printings or copies of the file as were paid for.

Creative Commons licenses would allow my friend, or his publishing company, to sell his vocal score with the pre-granted right to photocopy either an unlimited, or limited number of copies. Just as the record label Magnatune allows its members to give any music they have bought away up to three times, the same kind of stipulation could be imposed on the sale of the score. For sure, there is no way to monitor the amount of times the recording or the score have been copied and given away, but as Magnatune's website claims they believe that most people want to respect the artist and honor the agreement.

On the information page of Magnatune’s website the question is asked in an F.A.Q. style format “Aren’t you worried I’ll abuse [the right to copy and give copies away]?”<sup>14</sup>

The answers are:

- No, because you’ve always had the technical capability to copy anything from Magnatune (since we don’t use DRM): we don’t believe in copy protection and we think you’re honest, otherwise you wouldn’t be bothering to read this!
- Dishonest people can always abuse the system. Rather, we want to reward all the honest people who truly want to do the right thing.
- If you abuse our generosity, we’re not going to break down your door and throw you in jail. We just want you to feel a little guilty about it.

For people like the composer who is already giving some of his music away Creative Commons licenses would clear away any confusion on the part of the performers as to the permission to photocopy or perform from the scores. His point about selling to established ensembles versus giving the music away to amateur or unknown ensembles is valid. One solution would be to offer printed material for sale while allowing a PDF to be distributed, printed, and shared for free—there are many ensembles that do not want to take the time or expense to print and bind a score. Another option would be to give the score away under a Creative Commons license, but sell the parts.

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<sup>14</sup> Magnatune, “Information: Give 3 Free Copies to Your Friends”, *magnatune.com*. Accessed online at <http://magnatune.com/info/give> on July 20, 2010.

This is only a handful of suggestions, and I have been speaking primarily about printed music. All the above can apply to recordings. Why aren't there more than a handful of contemporary composers putting their music at sites like noisetrade.com, maganatune.com, or onclassical.com; or simply publishing the recordings with Creative Commons licenses? Perhaps it is because of our fear of the unknown and our fear that by sharing some of our rights in a "Some Rights Reserved" paradigm we will lose control.

## **Conclusion**

It should be clear that embracing a business model that accounts for digital mediums and file sharing via the internet is critical for the contemporary composer. By using Creative Commons licenses composers can get their music into the hands of performers with greater ease than ever before. For the benefit of performers composers can remove the legal red tape surrounding issues of copying, remixing and sharing their intellectual property.

U.S. Copyright law was instigated as a means for benefiting society by providing incentive to authors. It did this by guaranteeing to the author the right to copy, print and distribute their work. The law, its interpretation, and its implementation has shifted towards viewing copyright law as a means for generating income solely. Any

benefits to society and culture at large have been abandoned to secure copyright related income for over an enormously long period of time.

Composers have a middle road that works alongside copyright that gives the copyright holder increased freedom and flexibility in the exercise of his or her rights with Creative Commons licenses. Even by implementing the most restrictive of the Creative Commons licenses composers will be contributing to the public good by giving society at large greater access to their work. More importantly, it is my belief that by giving some music away the benefits of increased performances, performance royalties, exposure and general interest will result in the demand for even more music. This is the type of incentive copyright law was designed to create. This is the type of incentive composers can generate for themselves.

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