

Taylor Swift is dealing with "The Man" yet again.

The "Lover" singer had planned to perform some classics from her discography at the American Music Awards on Nov. 24 in celebration of her Artist of the Decade honor. The setback: Big Machine Records' Scott Borchetta and Ithaca Holdings' Scooter Braun own those earlier Swift masters and, according to Swift, will not give her access to perform them on stage or allow Netflix to use those archives in an upcoming documentary.

This is in conjunction with an agreement made when she signed with Republic Records and Universal Music Group in 2018 that would allow Swift to re-record her original songs starting in November 2020. Swift says Borchetta told her team that he and Braun would make an exception if Swift does not "re-record copycat versions of [her] songs next year" and if she stops "talking about him and Scooter Braun."

"I feel very strongly that sharing what is happening to me could change the awareness level for other artists and potentially help them avoid a similar fate," Swift wrote on Thursday. "The message being sent to me is very clear. Basically, be a good little girl and shut up. Or you'll be punished."

Masters? Publishing? Copyright? Oh my! If you are at all confused about what all this music law jargon means, you need to calm down, because we've broken it down, step by step:

Authorship vs. ownership

Since Taylor Swift wrote the melody and the lyrics for her music, she is the author of the composition and has reserved that right under a publishing deal. But she does not own the rights to usage of songs from her first six albums because the songs were recorded under her old label, Big Machine Records.

As U.S. copyright law stipulates, "Copyright protection gives the owner of copyright in a musical composition the exclusive right to make copies, prepare derivative works, sell or distribute copies, and perform or display the work publicly. The owner of copyright may also authorize others to exercise the exclusive rights." This is why Braun and Borchetta were allegedly able to veto Swift's rights to perform her old songs on the AMAs and in the upcoming Netflix doc.

Administrative vs. co-publishing deal

It is imperative to differentiate between a publishing deal and record deal. The decision of whether an artist owns their masters happens in negotiations with a record company, but Swift's status as an "author" of her work falls under a deal with a publishing company.

Just like in a record deal, a publishing company will attempt to entice artists with their influence and rapport with collaborators like record companies, producers, and other songwriters who artists can work with in exchange for partial ownership. This is a co-publishing deal. While in an administrative deal, an artist will have more control over their work, as they are given complete publishing ownership. However, they may not get as many hands-on resources from the publishing company depending on the nature of the negotiation.

Whoever owns the master is the master

A master recording is the original recording of an artist's original work. This recording sets precedence for all other "derivative works" of a song. Plain and simple: the entity that owns the master has lordship over the song's life after the recording (like usage in visual media and live performances). In this case, Big Machine Records owns Swift's masters, and Braun now owns Big Machine Records through his company, Ithaca Holdings, as outlined by Billboard.

We know what you're thinking: why would an artist willingly sign over something they created in the first place? Well, for an artist just starting out (Swift was a teenager when she signed her Big Machine deal), the resources and clout that comes with a major record label can propel them to stardom. But this ownership can last for years and be used as a bargaining chip when record companies are bought out, sometimes by entities an artist may not like.

Swift's new deal with Republic Records and Universal Music Group allows her to re-record her old songs exactly a year from now. Since Swift is now a megastar, she was able to negotiate ownership over all her work with her new labeling, starting with *Lover*.

Fair Use Factors

(1) Purpose & Character

- Has the material you have taken from the original work been transformed by adding new expression or meaning?
- Was value added to the original by creating new information, new aesthetics, new insights, and understandings?

(2) Nature of the Original Work

- How creative was the original work? How much ingenuity did the author invest in the original?
- Was the original work published or unpublished prior to being used?

(3) Amount & Substantiality of the Original Work Used

- Did the new work use more than necessary to get the author's point across?
- Did the new work use the "heart" of the original?

(4) Impact of the New Use on the Original Work's Market

- Does the new use deprive the original author of income?

Emily Ratajkowski's "forever mood" is getting her sued. The model-splash-actress has been hit with a copyright infringement lawsuit after posting a photo of herself on her Instagram account, making her the latest celebrity to be the target in a growing trend of similar cases that has landed stars – ranging from Justin Bieber and Ariana Grande to Jennifer Lopez and Victoria Beckham – and fashion brands, alike, on the receiving end of infringement suits.

According to a complaint filed in a New York federal court on Wednesday, photographer Robert O'Neil claims that Ratajkowski and her corporate entity Emrata Holdings LLC ran afoul of federal copyright law when the 28-year old posted one of his photos to her Instagram story. O'Neil asserts that he is the "author of the photograph, and has at all times been the sole owner of all right, title and interest in and to the photograph, including the copyright thereto," making Ratajkowski's Instagram post a violation of his exclusive rights as the copyright holder, including his exclusive right to [publicly] display or authorize others to display the photo.

While O'Neil appears to have licensed the photo to the Daily Mail (in exchange for a fee), he claims that Ratajkowski "did not license the photo from [him]" before posting it on Instagram, and did not have his "permission or consent to publish the photo." As a result, the photographer is seeking "actual damages and profits, gains or advantages of any kind attributable to [Ratajkowski's] infringement of the photo; or alternatively, statutory damages of up to \$150,000 per copyrighted work infringed."

As for the photo at issue, one of Ratajkowski obscuring her face with a bouquet of flowers while on the street in New York, it is worth noting that it does not matter – from a copyright perspective – that Ratajkowski is in the photo and that it may have been taken without her authorization.

Source: Emily Ratajkowski is the Latest Celeb to be Sued in Growing Number of Instagram-Centric Copyright Cases, The Fashion Law (Oct. 23, 2019), <https://www.thefashionlaw.com/emily-ratajkowski-instagram-copyright-lawsuit/>.

Fair Use?

(1) Purpose & Character

(2) Nature of the Original Work

(3) Amount & Substantiality of the Original Work Used

(4) Impact of the New Use on the Original Work's Market

Other Considerations?

“United State of Pop 2020” vs. “Lose You to Love Me / Sorry” Mashup

“United State of Pop 2020”, DJ Earworm

Fair Use?

- (1) Purpose & Character
- (2) Nature of the Original Work
- (3) Amount & Substantiality of the Original Work Used
- (4) Impact of the New Use on the Original Work’s Market

Other Considerations?

“Lose You to Love Me / Sorry (Mashup)”, Andy Wu

Fair Use?

- (1) Purpose & Character
- (2) Nature of the Original Work
- (3) Amount & Substantiality of the Original Work Used
- (4) Impact of the New Use on the Original Work’s Market

Other Considerations?

Harper & Row Publishers, Inc. v. National Enterprises (SCOTUS, 1984).

In 1977, former President Gerald Ford contracted with Harper & Row, Publishers, Inc. to publish his memoirs. Harper & Row negotiated a prepublication agreement with Time Magazine for the right to excerpt 7,500 words from Ford's account of his pardon of former President Richard Nixon. Before Time released its article, an unauthorized source provided [read: leaked] The Nation Magazine with the unpublished Ford manuscript. Subsequently, The Nation, using approximately 300 words from the 500-paged manuscript, scooped Time. The portion published was verbatim and an important part of the biography.

Harper & Row sued The Nation, alleging violations of the Copyright Revision Act of 1976.

With a partner, assign roles (attorneys for plaintiff or defendant) and discuss the outcome.

Fair Use?

(1) Purpose & Character

(2) Nature of the Original Work

(3) Amount & Substantiality of the Original Work Used

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Other Considerations?