TIM BROOKS

Copyright & Fair Use

The purpose of the Copyright & Fair Use column is to keep readers informed on copyright as it affects the preservation and availability of historic recordings. Questions of general interest regarding copyright are welcome and will be addressed in these pages by an attorney (we cannot, however, offer private legal advice). Comments and short articles describing your own experiences with, and perspective on, copyright matters are also welcome. Please send your questions and submissions to Tim Brooks, Chair, ARSC Copyright & Fair Use Committee (tbroo@aol.com). For general information and reference material visit the Committee's web page at www.arsc-audio.org.

Recent Copyright News

The debate over extending the term of recording copyrights in England (currently 50 years) is developing quickly, and the matter may have been resolved by the time you read this. Andrew Gowers, former editor of the *Financial Times,* was appointed to review the copyright laws and make recommendations. While he has received impassioned input from all quarters (including CHARM, a consortium of universities involved in the preservation and study of recordings), he is widely expected by record companies to back the longer term they want. This could curtail and possibly shut down the English reissue industry, one of the most vibrant in the world. A lengthy article by music hall expert Tony Barker on dangers of term extension appears in *For the Record,* Summer 2006. A letter by this writer alerting Britons to the fact that long terms have resulted in restricting the availability of historic recordings in the U.S. was published in the London *Times* on 11 May 2006 (p.18).

Prime Minister Tony Blair strongly backs term extension, but has come under fire from opposition politicians over his close ties to entertainer Cliff Richard, who has been campaigning for (and would financially benefit from) term extension. Richard, who has an estimated worth of £40 million, has given Blair free use of his Barbados villa for vacations over the past three years (London *Sunday Times,* 30 July 2006). Separately, a consortium of British music industry groups is pressing the government for establishment of a "Value Recognition Right," which would allow them to charge any entity (such as an internet service provider) that "derives value from the sharing or storage of music" (*Daily Variety,* 13 July 2006).

In Australia Attorney General Philip Ruddock has proposed sweeping copyright reforms that would make it illegal to make backup copies of CDs, loan or give away a dub of a recording ("but your friend can listen to your music with you"), or play back an

off-the-air recording more than once (after that it must be destroyed). The latter will of course severely limit the use of VCRs and DVRs. All of this is billed as a great blow for fairness and sensitive to consumer needs. (www.theregister.co.uk/2006/05/16/oz_copyright_reforms/print.html)

In the U.S. the Copyright Office report on orphan works, reported on in the last issue of the *ARSC Journal,* has given rise to the Orphan Works Act of 2006 (H.R. 5439), introduced on 23 May 2006 by Rep. Lamar Smith (R-Tex). This makes it easier to use works for which there is no known owner. A small but positive move (it does not cover pre-1972 recordings), its prospects for passage are thought to be good since it is backed by the entertainment industry. Rep. Smith, a close ally of the industry and one of the leading advocates of a "copyright police state," is also backing a proposed law to greatly expand the reach of the Digital Millennium Copyright Act, one of the more reviled pieces of legislation of recent years. Among other things it would make it a crime to even *attempt* to commit copyright infringement, possess (not necessarily use) encoding-circumvention tools, permit wiretaps in copyright investigations, permit criminal enforcement of copyright violations even if the work was not registered with the copyright office, boost penalties for various offences to as much as 20 years in prison, impound "records documenting the manufacture, sale or receipt of items involved in" infringement (such as ISP traffic logs) , and seizure and destruction of anything used in copyright infringement (i.e., your PC). (http://news.com.com/2102-1028_3-6064016.html?tag=st.util.print)

I've noticed that government and industry announcements about these expansions of copyright are invariably accompanied by stirring words about fairness, respecting artists' rights and economic benefit. Fairness to the consumer, much less to cultural history, is never mentioned. Entertainment companies have slick p.r. departments. We have our work cut out for us.

An interesting feature article titled "Just Whose Idea Is It?" by Marc Porter Zasada was published in the 23 July 2006 *Los Angeles Times*. Built around an interview with copyright expert David Nimmer, the article is subtitled "In the new 'Age of Copyright' dynasties are founded on cartoon characters, lawyers play extreme sports, and we all break the law. It's never been easier to stake a creative claim... or jump one".

The impact of copyright on creativity is the subject of a clever comic book created by three law professors from Duke University and the University of Oregon. *Bound by Law? Tales from the Public Domain* follows a "classically curved and muscled heroine" as she attempts to shoot a documentary about a day in the life of New York City. See it at www.law.duke.edu/cspd/comics.

One of the more frequent questions I get is about rumors that record companies in the past engaged in rampant destruction of their vaults, dumping, burying or even blowing up their older masters. The best source on this subject is an award-winning series of articles by Bill Holland published in *Billboard* in 1998, which can be viewed at www.billholland.net/words/vault.html. Holland, by the way, covered the regulatory and legislative beat for *Billboard* for 24 years until the publication shut down its Washington bureau and fired him in late 2005. He was responsible for many groundbreaking articles, and was sometimes critical of industry practices (he shepherded into print this writer's op-ed piece "Our Recorded Heritage Deserves to Be Heard," published in *Billboard,* 14 May 2005). Perhaps the advertisers who financially support *Billboard* finally got him?

Reader Question

I've noticed that state unauthorized duplication statutes vary in terms of how they identify the "owner" of a sound recording. Some states say it is "the person who owns the master phonograph record...from which the transferred recorded sounds...are... derived" (Connecticut General Statutes, Sec. 53-142b, Georgia State Code Sec. 16-8-60, Hawaii Revised Statutes §482C-1; Illinois Criminal Code 720 ILCS 5/16-7, etc.); others refer to ownership of "the original fixation of sounds... *embodied* in the master phonograph record...from which the transferred recorded sounds are... derived" (Alabama State Code 13A-8-80; Alaska Statutes Sec. 45.50.900, Arizona Revised Statutes Sec. 13-3705, etc.); California has "the original fixation of sounds *upon* a recording from which copies can be made" (Penal Code 653h); and so forth. This all seems pretty straightforward in cases where a company still has possession of an original physical master – a father, mother, stamper, mould, open-reel tape, whatever. However, it's not clear to me how ownership would be established in other cases, such as:

- Early cylinders that were sold to customers as "originals," recorded directly from performances, or that were copied pantographically from soft wax masters that routinely wore out as part of the duplication process.
- Discs pressed from masters that have been physically discarded or (as in the case of American Zonophone) destroyed by court order.

In these cases, there doesn't seem to be any "master recording" – either it never existed at all or it no longer exists today. Would such recordings still receive protection under some or all of these unauthorized duplication statutes, depending on how they're worded? How do these standards compare with those used for determining ownership under common law copyright?

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Response

Yours is a challenging question because you identify two examples where, as you note, the original recording (master or otherwise) has an unusual pedigree. To answer this question, you need to begin by looking at various sources, both primary and secondary. First, do any of the statutes define the words "owner," "ownership" or "recording" generally? Statutes often define specific words or terms, and knowing the definition would be a good way to get a sense of how ownership of these specific sound recordings are determined. Statute reporters also may include notes and/or reported decisions relating to the statute that may be useful. If the statutes do not include such definitions, then you should look to court cases, both state and federal, that might interpret the statute and/or have facts similar to those that you describe. Cases serve as a critical way to determine how courts understand the statutes at issue, which in turn would inform analysis of the questions. If, after a thorough search, you find no cases, then it may be helpful to find states with analogous statutes and see if they've determined the meaning of these words and/or confronted a similar situation. While one state's interpretation of its laws is not, of course, binding on another state, the analogies can be helpful to determine how one state may handle the issue. If all else fails, you can always see if treatises and/or law

review articles have discussed the issue. Of course, you always need to be aware of whether the specific sound recording falls under federal or state law; as a general matter, sound recordings made after 15 February 1972 are subject to federal law. Thus, the referenced statutes may not even be applicable to the referenced recordings if the recording was made in, say, in 1973. If you follow these steps, you should have a better idea what these statutes mean in your specific situation.

The above does not constitute legal advice and does not substitute for consulting an attorney. *David S. Levine, Fellow, Center for Internet and Society, Stanford Law School.*

Book Review

Steal This Music: How Intellectual Property Law Affects Musical Creativity. *By Joanna Demers. Athens, GA: University of Georgia Press, 2006. 178pp (softcover). ISBN 0-8203-2777-8. $19.95.*

Joining the growing popular bookshelf on copyright is this slender volume that focuses largely on the effect of copyright on "transformative appropriation" – "the act of referring to or quoting old works in order to create a new work" (p.4). Building on what has gone before has always been a bedrock element of cultural creativity. Walt Disney didn't dream up the character Snow White on his own, The Beatles owed Elvis and Elvis owed a thousand black musicians (and they freely admitted it), and much of the blues shares common riffs, chords and even lyrics. The idea of the "lone genius" artist creating something totally new out of thin air is nonsense, as Demers points out. Yet that is the core conceit of copyright.

The author maintains that the rapidly expanding reach of copyright law, and new restrictions on fair use, both stifle and in some cases – surprisingly – stimulate musical creativity.

Steal This Music is divided into four efficient chapters. Chapter one, "Music as Intellectual Property," lays out the basics of the law and its historical development. Before you can have any discussion of the effects of copyright you have to have some understanding of what it is, how it developed, and why. Chapter two, "Arrangements and Musical Allusion," gets to the real contributions of the book. There are discussions of what the "Elvis Police" (Elvis Presley Enterprises) will allow and what they won't (oh, that's why those Elvis-on-black-velvet paintings have disappeared!); different types of musical transformation (Walter Murphy's jokey "A Fifth of Beethoven" vs. Walter Carlos' creative "Switched-On Bach"); white covers of black records in the 1950s; specific parody (OK) vs. general satire (not); why Weird Al Yankovic has to apply for licenses to record his raucous take-offs on popular songs, like "Eat It," "Like a Surgeon" and "Smells Like Nirvana"; and various lawsuits over soundalike acts brought by artists including Nancy Sinatra, Bette Midler and Tom Waits. IP law has gotten progressively stronger in banning soundalikes too. These lawsuits often seem to be brought for reasons of pure ego and censorship rather than commercial gain. Modern copyright law encourages censorship.

In Chapter three, "Duplication," Demers talks about more literal duplication of songs and recordings. The Dickie Goodman "Flying Saucer" records of the 1950s, rap sampling lawsuits, and the use of ethnic field recordings in commercial settings are discussed. It is interesting how much of the law in this field is being written by judges from