

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. We solicit your questions of general interest regarding copyright, and will endeavor to have them addressed in these pages (we cannot, however, offer private legal advice). Comments and short articles describing your own experiences with copyright are also welcome. Please send questions and submissions to Tim Brooks, Chair, ARSC Copyright & Fair Use Committee at tim@timbrooks.net. For general information and reference material visit the Committee's web page at www.arsc-audio.org.

Launching a Coalition

At its fall 2008 meeting the ARSC Board voted to establish a coalition to pursue our copyright reform goals of promoting preservation and access to historical recordings. It is called the Historical Recording Coalition for Access and Preservation (HRCAP). Shortly thereafter, the Music Library Association became the second member of the coalition, and we are inviting other organizations to join us in guiding and funding the initiative. A great deal of time was spent over the winter constructing a website, which is now online at www.recordingcopyright.org. Please visit the site, sign the petition, and send us your comments.

A Copyright Stockholm Syndrome?

In the book reviewed below Prof. James Boyle makes the point, almost in passing, that too-easy acceptance of the increasing demands of rights holders can in fact contribute to making those restrictions legally enforceable and permanent. This is because courts often look at prevailing “customs and patterns” in making their decisions. Every time a lawyer tells you to take the most conservative approach, rather than a risk assessment approach, and to comply with whatever fair use, preservation or access restrictions a rights holder demands, no matter how questionable they may be, are they in fact contributing to the legitimization of those demands?

This sounds a bit like the famous “Stockholm Syndrome,” in which hostages bond with and even defend their captors.

Book Review

The Public Domain: Enclosing the Commons of the Mind. By James Boyle. New Haven: Yale University Press, 2008. 315pp. \$28.50.

Another academic takes a crack at explaining the “intellectual property range wars” of recent years, as rights owners (notice how we never talk about actual creators or authors anymore?) continue to encroach on what used to be public property. They do this with the acquiescence of uncomprehending legislators and arrogant judges who hand out favors to the powerful. Boyle wouldn’t put it that way, of course, he’s much too diplomatic, but that is the image that comes through rather clearly from this book.

The first few chapters are truthfully rather dry, as the author goes through the necessary steps of explaining what copyright law is and why we have it. Much of this is in the form of tightly-reasoned logical arguments as opposed to a recounting of facts, and rarely are alternative points of view cited, at least with any sympathy. The author is particularly fond of stating a question and then answering it, as if he’s conducting a conversation with himself. This of course leads to softball questions. It’s not that I disagree with his conclusions – his reasoning is impeccable – however it does make you feel as if you are in a closed room (a classroom?), somewhat divorced from the economic/political realities that might explain *why* copyright law has become so heavily skewed toward corporate rights holders. Understanding that, as opposed to simply expressing outrage, might be a first step toward doing something about the situation. A little more real world, and a little less theory, would help this book.

Nevertheless the author does come up with some interesting insights and constructs. A recurring theme is what he calls “The Jefferson Warning,” Thomas Jefferson’s caution, enunciated in a 1813 letter, against extending state-enforced monopolies such as copyright except where, and for as long as, it is absolutely necessary. Monopolies, he reminded us, exact a considerable cost. Jefferson also famously explained why ideas should not be treated the same as physical property. “He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me” (p.20).

The author has also unearthed a delightful eighteenth century poem that seems to bear on how the powerful gobble up rights, then complain vociferously when people try to “steal” back what they have taken (p.42).

*The law demands that we atone
When we take things we do not own
But leaves the lords and ladies fine
Who take things that are yours and mine.*

ARSC Journal readers will perhaps be most interested in Chapter Six, which deals with copyright and music. Most musical innovation rests on borrowing from and adapting the past, practices frowned upon by modern copyright law. Jazz might well be illegal if it were invented today. The author tells the story of one of the great innovators of modern soul, Ray Charles, whose seminal “I Got a Woman” (1954) was lifted bodily from the spiritual “I Got a Savior.” “This Little Girl of Mine” came from “This Little Light of

Mine.” And so on. Today the lawyers would be all over him, and we all would be the poorer. The modern practice of “sampling” depends not on taking pieces of songs but of actual records (much like collage), and the courts really hate that. Sample two notes and you’re “stealing.” Whatever happened to fair use?

Musical borrowing is of course not new. My favorite recorded example is a droll 1903 sketch on Victor 2507 called “Nothing New Under the Sun,” in which Len Spencer surprises a skeptical S.H. Dudley by demonstrating that a whole series of popular songs are practically identical to earlier, and sometimes famous, songs – sometimes to two or three of them. Dudley finally shuts him up by launching into a current monster hit, at which Spencer wails “Oh Sam, oh, oh, don’t play that! I’ll buy the cigars if you’ll only stop ‘Hiawatha!’”

Later chapters deal with copyright excesses in biotechnology and networked computers, and a passionate defense of Creative Commons, the innovative licensing mechanism which Boyle helps run. True to his beliefs, he has made this book available free online under a generous Creative Commons license (<http://yupnet.org/boyle>).

A rather amusing chapter deals with the “evidence free zone” in which much intellectual property legislation is passed, pointing out that many of the corporations that wail the loudest about the rights they say they need in order to survive in fact survive quite well without them. Some justification studies turn out to be “voodoo economics.” Did you know that the Europeans once surveyed companies to which they had given monopoly rights to ask them if they found those rights useful, and then used the responses to justify having given them the rights? “Voodoo research!”

The author also makes the interesting point that buckling under to rights holders’ threats and intimidation (for example not asserting fair use, or not challenging dubious rights claims) creates new “ordinary and customary” business practices that courts will then deem as acceptable in future judgments. “The hypertrophied permissions culture starts as myth, but it can become reality” (p.132). Overly cautious users may themselves be to blame for some of copyright’s expansion.

The final chapter finally gets around to the author’s principal recommendation, which could have served as a theme for the entire book. It is that proponents of a more balanced copyright regime should learn from the environmental movement, which first had to “sell” the notion that there was a problem, and then brand it as “environmentalism,” before starting to make headway on solutions.

The Public Domain is a useful addition to the literature on copyright, long on reasoning but a little short on new ideas or concrete suggestions about how to fight copyright creep. Recordings are dealt with only tangentially. Perhaps I’m setting the bar a bit high, but we still await the *Silent Spring* or *Unsafe at Any Speed* of the copyright reform movement. *Reviewed by Tim Brooks.*

Works on Copyright and Recordings Previously Reviewed in the ARSC Journal

Besek, June. *Copyright Issues Relevant to Digital Preservation and Dissemination of Pre-1972 Commercial Sound Recordings by Libraries and Archives*. Washington, DC: Council on Library and Information Resources, 2005. (2006;37(1):49-51).

Brooks, Tim. *Survey of Reissues of U.S. Recordings*. Washington, DC: Council on Library and Information Resources, 2005. (2006;37(1):100-101).

Demers, Joanna. *Steal This Music: How Intellectual Property Law Affects Musical Creativity*. Athens, GA: University of Georgia Press, 2006. (2006;37(2):212-213).

Frith, Simon, and Lee Marshall. *Music and Copyright (Second Edition)*. New York: Routledge, 2004. (2005;36(2):227-229).

Lessig, Lawrence. *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. New York: Penguin Press, 2004. (2004;35(2):244-248).

Vaidhyathan, Siva. *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity*. New York: New York University Press, 2001. (2005;36(1):53-55).

Guidelines for Discographies in the ARSC Journal

As a scholarly publication, the *ARSC Journal* strives to provide its readers with accuracy and detail in its articles. While there are well-accepted standards for the formatting and sourcing of scholarly articles and books, discographies have long lacked such guidelines.

The content and format of discographies may need to differ according to the purpose of the work, as well as the information available to the compiler, and variations of the new guidelines may be discussed with the Editor. Discographers, however, are asked to make every effort to incorporate as many as possible of the elements that are detailed in the guidelines, which can be downloaded at:

<http://www.arsc-audio.org/DiscographicalGuidelines.pdf>

The guidelines also appear in Vol. 37, No. 1 (2006) of the *ARSC Journal* (pages 14-20).