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A Plea for Piracy

When copyright owners stop selling older works, maybe pirates deserve some legal cover.

By Peter Gutmann

Bob Wills was a true giant among American musicians. His Texas Playboys band not only defined Western swing but exposed rural audiences to a vast range of musical styles by amalgamating superb renditions of hot jazz, slow blues, hillbilly fiddling, pop crooning, folk songs, big-band arrangements, mariachi, polkas—indeed, just about everything short of grand opera. In the 1930s and 1940s, Wills' eclectic concerts, broadcasts, and recordings exemplified the essence of America's diverse culture. His collected work is a national treasure.

Modern enthusiasts can fully appreciate the magnitude of Wills' achievement only by hearing a wide array of his hundreds of records. Yet the only way to do that today is to seek out imports from England (a 109-cut four-CD set on the Proper label) or Germany (all 300 sides from his prime years on 11 Bear Family CDs). Here, in Wills' own country, his work is relegated to skimpy compilations that barely suggest the depth of his art.

Classical buffs fare no better when they try to deepen their historical insight. In the 1940s the brash energy and

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excitement of American orchestras—including Fritz Reiner and the Pittsburgh Symphony Orchestra, Dmitri Mitropoulos and the Minneapolis Symphony Orchestra, and Artur Rodzinski and the Cleveland Orchestra—offset the refinement of European ensembles and substantially advanced the evolution of modern style. Yet you'd never know it from current domestic CDs. All were Columbia artists, but Sony, the inheritor of that extensive catalog, has reissued only a handful of that wealth of recordings and apparently plans no further releases. Dozens, though, are available on the French Lys label.

Why should Americans have to turn to Europe to recoup our own cultural heritage? As Wills might have said, "Somethin' ain't right."

That "somethin'" is copyright law.

Copyright was designed to balance the rights of artists to control their own works against society's ability to enjoy and build upon artistic creations. But over the years, Congress and the courts have utterly failed to protect society's interests, and the balance has shifted too far in favor of copyright owners.

The result of this shift, aggravated by the failure of copyright owners to keep so many 20th-century works in print, is to deprive students, artists, and other Americans of the cultural legacy of their own forebears.

Life Everlasting

Our Constitution specifically grants Congress the power "to promote the Progress of Science and useful Arts . . . by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries." At first, Congress wisely set the term of copyright at 14 years plus one similar extension, which was long enough for the typical artist and his family to benefit from his work. After that, material entered the public domain, where all others were free to use it. This was a sensible accommodation between rewarding innovation and encouraging growth.

The copyright term first was doubled in 1909 and has been pushed upward several times since. Most recently, the Sonny Bono Copyright Term Extension Act of 1998 added yet another 20 years. With each extension, protection was preserved for all works that were about to enter the public domain.

Today the "limited time" of most copyrights extends for the life of the artist plus 70 years. And does anyone seriously doubt how Congress, dazzled by showbiz glitter and afloat in donations from the entertainment industry, will act when the next deadline approaches? It's safe to predict that nothing will ever again enter the public domain in America.

The Lost Works

The effectively perpetual nature of copyright, combined with the unavailability of so much 20th century material, has exacted a heavy societal toll. These difficulties were aired in *Eldred v. Ashcroft* (2003), although the Supreme Court rejected the plaintiff's constitutional challenges to the Sonny Bono Act.

In dissent, Justice Stephen Breyer detailed the acute social and artistic costs of withholding works from the public. Amicus briefs presented voluminous evidence of archivists unable to compile comprehensive databases, scholars lacking essential research tools, restorers unable to rescue precious but deteriorating artifacts neglected by the owners' heirs, and artists inhibited by concern over inadvertent infringement of earlier work.

Needless to say, record labels, movie studios, and other major players insist they can afford to invest in new projects only if they are assured very long-term returns. (It's highly ironic that the Walt Disney Co., one of the most outspoken advocates of copyright extension, made its fortune on public-domain fairy tales.)

Fortunately, in much of the rest of the world, copyright for sound recordings is far more reasonable: 50 years, and that's it. Where America won't provide Wills or Reiner fans with access to the artists' lifework, Europe and Asia have been able and willing to oblige. (So have American retailers, who readily stock unlicensed imports alongside legitimate products, often at a far lower price.)

The only losers are American copyright holders, who forfeit the royalties they could be collecting.

Follow the Money

Enabling artists and producers to derive an economic benefit from their creativity and investment is a fair price to support the creation of art. As the Supreme Court has recognized, however, the primary purpose of copyright is not to boost private profit but to increase public knowledge and resources, both by encouraging creativity and by assuring that the results can be widely shared after a reasonable period.

Fair-use concepts under copyright law could have been used to assuage this problem of competing interests. Unfortunately, they have not.

The fair-use doctrine, as developed by the courts, was intended to temper the strength of copyright protection with a measure of practicality and reason by allowing some otherwise unauthorized uses that are deemed justified by social need. In codifying fair use in 1994, Congress acknowledged the propagation of our artistic heritage as a legitimate purpose for fair use.

But Congress limited the statutory scope of fair-use protection to narrow realms of education, archiving, and preservation. Other activities remain subject to the vagaries of ad hoc fair-use analyses and potentially massive liability.

In judging whether a particular activity qualifies as fair

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use, courts weigh four primary factors. The most decisive is the effect upon the work's market value. Courts tend to assume a lucrative potential for reissued or derivative work over the long course of copyright protection. On occasion this is justified, as rediscovery of a neglected artist's work can spawn formidable commercial demand. Consider the massive royalties earned by bluesman Robert Johnson's work decades after he died in obscurity (although his belated success ultimately set off an absurd legal battle between an alleged illegitimate son and the estate of one of his 11 half-sisters).

The vast majority of musicians, however, must rake in as much income from copyright royalties and licensing arrangements as quickly as possible after their work's first publication. Indeed, studies document that the bulk of the value of most copyrights is generated within the early years of protection. (And even artists whom fame eludes and who get duped into signing away their rights are driven mainly by a burning creative impulse, not by the prospect of posthumous royalties.)

After those early years, the copyright owners' incentive to keep works available drops dramatically, and many works effectively disappear from the marketplace.

It's Only Fair

Here's my proposal: If a copyright owner won't continue to issue a work in a readily available format at a fair market price, then at some point the public's entitlement should take over and the law should no longer bar others from stepping in.

In prior times, publication in small quantities was expensive and impractical. If there was little demand for a work, it was unreasonable to expect the copyright owner to incur the expense of keeping it available. Nowadays, though, any work can be digitally preserved and distributed with the push of a few buttons. If an American seeks a copy of a protected domestic work, the copyright owner has a moral obligation either to republish or not to interfere with republication by others.

For an initial period of, say, 10 years, a copyright owner's power would remain absolute, ranging from the right to suppress a work to the right to demand excessive licensing fees. But after that, if a copyrighted work has not been readily available at a reasonable price during the prior five years, the rules would change to permit publication of the work by others.

Anyone else seeking to republish the work would first have to conduct a reasonable search to determine the copyright owners and serve upon them a notice of intention to publish. The owners could respond by making the work reasonably available at a sensible price within one year of the notice. But if the owners declined to do so or if the search failed, then the proposed publication could proceed, immune from liability for infringement. Appropriate standards for searches, requests, availability, and pricing would be set by statute or the U.S. Copyright Office.

In fairness to "orphan" works with hard-to-find owners, and to previously unfound owners seeking to benefit from a belated or renewed popularity that arises from others' exploitation of the work, lapsed rights could later be reasserted through supplemental registration and notice to all known unauthorized distributors. But no publication occurring up to two years after that reassertion would be actionable. Thus, owners' rights, even if they were allowed to fall dormant, would be protected, while those who were responsible for creating value where none had existed before would have an incentive to act and an opportunity to recoup their investment. All would benefit, including, most important, the public, who now suffer at the whim of neglectful or avaricious private interests and the copyright law that shelters them.

One Way or Another

The decisive argument for such a change is perhaps as much practical as it is legal. Digital technology has altered the basic assumptions of copyright law.

Once, the dissemination of works could be restricted by limiting the tangible copies of paper, magnetic media, or celluloid. Unauthorized reproductions were noticeably substandard. But today, digital copies are exact duplicates of the originals, and their distribution is invisible, cheap, and instantaneous.

Given a viable choice, consumers will prefer an authorized copy. But if none is available, then the law can be very easily sidestepped. After all, pixels are immune to shipping manifestos and customs inspections. If a book, CD, or DVD can't be obtained conveniently and economically, then the only practical constraint on illicit replication and delivery is the consumer's own conscience, which (we already know) is easily stifled by an unfulfilled desire.

Legally or otherwise, domestically or from overseas, flawless copies can and will be obtained. And the modern European pirates who retrieve and share our cultural gold—gold that the owners had forsaken—are not scoundrels who defy the law but heroes who advance its ultimate aim.

By all means, let those who control copyrights benefit fairly from their ownership should they so choose. But burying valuable works thwarts the very "Progress" that the Constitution seeks to promote. If copyright owners decline to exercise their rights constructively, then others must be free to do so. Whether through intent or indifference, copyright owners must not deprive Americans of our precious artistic heritage.

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