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Mark Avsec

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COMMENT: COPYWRONGS WILL NOT MAKE COPYRIGHT

Mark Avsec[†]

I want to thank Professor Nard for inviting me. This is a little new for me. I am not as used to participating in these debates as my colleagues on the panel are, but I am nevertheless proud to be a part of this panel. What I am going to try to do, in the hope that I add something to the discussion, is to offer some commentary from somebody who actually made a living as a songwriter, producer, and artist before he became a lawyer.

I acknowledge that Internet radio is a mess. This past week I was working on a deal for a company that has an Internet radio-type business model. Aside from the fact that advertising-based business models, such as Internet radio, are currently having a hard time, Internet radio-type businesses are also challenged by the complexity of copyright law. The complexity of copyright licensing and, in particular, the layers of copyright proprietors are barriers to moving forward. In some ways, perhaps Professor Lange, whose comments I enjoyed very much, has the right idea: perhaps we should do away with copyright law.¹ However, at the end of the day, I ultimately disagree with Professor Lange, for I am a copyright optimist.

Although I am a copyright optimist, I would like to think that I am open to new paradigms. I was telling Professor Loren over dinner last night that I tried to keep an open mind while reading her paper. I tried to be open to her ideas. Today I listened to Professor Lange discuss Grateful Dead concerts and how the Grateful Dead encouraged the copying of their concerts.² Thus, one realizes that the world does not have to be as it is, a world with copyright law. We can live in a different world. Copyright laws are person-made laws. I would add, however, that with respect to the

[†] Attorney, Benesch, Friedlander, Coplan & Aronoff LLP, Cleveland, Ohio. Before becoming a lawyer, Mr. Avsec earned a living as a studio musician, producer, and songwriter, writing over 300 songs and producing more than 25 sound recordings for various artists. He is an American Music Award winner and has been nominated for two Grammy Awards.

¹ David Lange, *A Comment on New York Times v. Tasini*, 53 CASE W. RES. L. REV. 653 (2003).

² *Id.*

Grateful Dead, they wrote their own material. Therefore, if the Grateful Dead encouraged people to tape their concerts and distribute the tapes, you did not have third party composers who were not getting compensated. With respect to the theory that copyright owners do not need the incentive of a copyright monopoly to produce because bands such as the Grateful Dead benefit from more frequent personal appearances and opportunities to sell merchandise, such a theory does not work for a "pure" songwriter who chooses to make a living composing works for others. That songwriter does not get the benefit of enhanced concert fees or enhanced merchandising revenue if he or she does not get mechanical royalties or public performance fees. And, for the most part, there was essentially only one musical composition performed at each Grateful Dead concert anyway.

I have now been a lawyer for about seven years. Before I became a lawyer I made a living as a songwriter, a producer, and a recording artist. As stated earlier, I was with Wild Cherry. I also wrote and produced songs and recordings for Donnie Iris, and I wrote a song for Bon Jovi as well. I am an example of somebody who was able to derive a middle class existence from writing and recording music on a full-time basis. Still, because of an experience I had, and in an effort to earn more money for a growing family, I was driven to the law. I would warn all of the lawyers here not to tinker too much with copyright law. If you succeed in watering it down or eradicating it entirely, we are going to have thousands of more lawyers in the world because neither musicians nor artists are terribly good at science. I think that if you force them to go into other occupations that they are definitely headed for the law. And pretty soon, we will have a world full of lawyers and nothing to talk about.

About a week ago, I read Professor Loren's very thoughtful article.³ I also read some of the underlying commentary that she referenced in her article. In truth, Professor Loren's approach is quite positive. She is not out to do away with copyright. I think that she has tried to come up with some sort of solution that works for everybody. And here we are, ready to burst the balloons that she has floated.

I came to the law because I was sued for copyright infringement. It was a frivolous case. I co-wrote a song for Donnie Iris called "Ah! Leah!" and it became a bit of a hit record. It was the first time I was going to make some real money. I was the sole

³ Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673 (2003).

support for a family of four, and I essentially made a living writing songs and playing shows. So, not unlike Mr. Tasini or the other plaintiffs in *New York Times Co. v. Tasini*,⁴ I was a middle class person who made a living off of the copyright law's monopoly. Then I received a Summons and Complaint that I was being sued because I had allegedly stole someone else's song. Although I won the lawsuit, it cost over \$100,000 to litigate the case. Even though I had contribution from the publisher and from Donnie Iris, the experience changed my life. Initially, the experience left me quite down on the law. I felt completely raped by the whole process because I knew that I did not do anything wrong. Eventually, though, I found my way to law school because it was cheaper than therapy, although not by much.

I was sitting in my copyright class, having experienced what I experienced, and my copyright professor, who I suspect would completely agree with Professor Lange's point of view, lectured that copyright is an evil monopoly, that we should not have it, and that creators will be sufficiently compensated in other ways, such as by being the first to market, etc. I was almost jumping out of my seat. "You lawyers are charging me \$100,000, and then you are going to tell me that it is bad for society if I earn eight cents a copy!" It still makes me jump out of my seat.

The purpose of copyright law, as set forth in all of the cases that we have discussed today, and as set forth in the United States Constitution, is to act as an incentive for authors to produce. It is a monopoly, and monopolies are inherently evil. However, the thinking goes that society is better off with copyright's evil monopoly, provided that it is for a limited time. Copyright's monopoly should not last any longer than is necessary to incent authors to produce. We do not have copyright because it is "fair." We want access to author's works. We want the works as cheaply as we can get them. Is that not the party line? Having said that, I am not sure if deep down inside everyone in this room believes that. I have heard the word "fair" more than once today. I think that we heard the word "fair" here today because, although copyright may have the effect of offering an incentive to creators to produce, copyright is also about what kind of world we want to live in.

Last Sunday I was re-reading Professor Ray Ku's article, which Professor Loren had cited in her paper, as well as other well-known papers by those who suggest that we should do away with copyright law.⁵ I read an excerpt from the British historian,

⁴ 533 U.S. 483 (2001).

⁵ Loren, *supra* note 3.

McCawley, who called copyright an "author's tax." Professor Ray Ku stated that the people who were using Napster were not the thieves; the authors themselves were the thieves! Suddenly, I started feeling very badly. I mean, who are these authors? Where are they, these thieves? We should find them, root them out, and lock them up. Only we would not treat them as garden variety thieves. No, we want access to what they have. We would come home after a hard day of lawyering, I presume. The authors would have been in their little cages all day, writing and producing, and we would demand, "Okay, what do you have for us today? 'Moonlight Sonata.' Okay, good." (Moves to the next author.) "What do you have for us today? 'Jeremiah Was a Bullfrog?' What is this drivel? No soup for you!" And if one author produces because he is in love with a woman or because he wants to be famous, we would not need to give that author money as an incentive. Hyperbole aside, is that the kind of world we want?

Moreover, the incentive of copyright purportedly exists in order to promote the "progress" of the arts and sciences. However, if it is supposed to be about "progress," read the "Billboard Top Ten." I have actually brought a copy, although I will not bother to read it. I do not think that copyright law is necessarily about "progress." Again, I think that it is about what kind of world that we want to live in. In fact, I think that some of the greatest music being written today is not supported by the market and, therefore, is not supported by copyright's monopoly. We have to figure out other ways of compensating composers of classical and jazz music. We need those people and organizations who patronize the arts where copyright's monopoly fails to support them, so that we truly do have new ideas, *i.e.*, so that we truly do have progress. Otherwise, we will only have the dumb-downed, homogenized culture that copyright law supports. No, I do not think that we necessarily have copyright to promote progress.

Professor Loren has suggested that we abolish the compulsory mechanical license.⁶ At first blush, this sounds like it would not be a bad thing. If something is not compulsory, I do not have to do it. It sounds like it gives artists more freedom.

The initial goal of the compulsory license, as Professor Loren pointed out in her paper, was to prevent a monopoly of a piano roll company in the early twentieth century from cornering the market on certain piano rolls.⁷ Today, the compulsory mechanical license

⁶ *Id.*

⁷ *Id.*

effectively prevents any record company from having a monopoly respecting a particular musical composition, as I will explain.

If the compulsory license is abolished, it may mean that a publishing company that is affiliated with a major label would be able to corner the market on a particular song. For example, you might imagine that one record label would have the right to record and issue all sound recordings of "New York, New York" or "Yesterday." There are thousands of recordings of these songs on many different labels. If you abolish the compulsory license, there might only be one recording. I am not afraid of that happening, and I do not even know if that would be a bad thing, but I raise the issue nonetheless.

Another problem with abolishing the compulsory license is that it may be the end of the Muzak business model. There will likely be no more Muzak without the compulsory license, because I submit to you, facetiously, that Muzak exists solely because there is the compulsory license.

What kind of progress has occurred because we have the compulsory license? The compulsory license arguably has encouraged cover recordings of musical compositions. What has been the effect of that? How many cover recordings of compositions are actually better than the original recordings of those compositions? I can think of two: "You Keep Me Hanging On" by The Vanilla Fudge, arguably better than the Supremes' original version; and "With A Little Help From My Friends" by Joe Cocker, arguably better than the Beatles' original version. There are a few more, but not many.

With respect to the statutory rate associated with the compulsory license, eighty cents is a really cheap price for a record company to pay for all that content. When you consider that the suggested retail list price of a CD is \$15.98 or more, a record company can, for eighty cents, license all of the underlying content. Thus, without the compulsory license cap, a proprietor of a musical composition can perhaps do better. Therefore, maybe it is a good thing to abolish the compulsory license.

However, when you combine Professor Loren's multiple suggestions that (1) the compulsory license be abolished, (2) the various section 106 divisible rights be collapsed into one unified right to "commercially exploit the expression," and (3) derivative work independence⁸ be employed, I believe that musical composition writers will be much worse off.⁹ I tend to think that writers of mu-

⁸ In 1990 this doctrine was rejected in *Stewart v. Abend*, 465 U.S. 207.

⁹ Loren, *supra* note 3.

sical works will not make good bargains when they are negotiating. I think that in many cases they will receive \$2,000 and just give away their rights. Many songwriters and artists are desperate to get recording contracts. Thus, they are vulnerable to overreaching deals. However, something close to the statutory rate has at least been sacrosanct. The rate has historically not been adjusted below a three-quarter rate, which is fairly standard. So, at least if an artist/writer does not receive a good deal as a recording artist, he or she will still receive a fairly standard rate for the songs that he or she writes for the albums, plus performance rights and synchronization fees, if applicable. The three-quarter mechanical rate, in a weird sort of way, acts as a floor. In addition, the writer continues to receive other income streams associated with the tangled web of rights he or she owns: public performance monies for performances on the radio or through the Internet; monies derived from selling sheet music; and synchronization fees derived from commercials, television shows, and films. In Professor Loren's world, writers of underlying musical compositions will not nearly fare as well.

In Professor Loren's world of derivative work independence, the abolishment of the compulsory license, and the collapse of the divisible section 106 rights into one unified right to "commercially exploit the expression," the record companies will obtain all of the rights they need to "commercially exploit the expression" of a song immediately, *i.e.*, a buy-out: they will get mechanical rights, public performance rights, and synchronization rights; they will get to take that derivative work, the sound recording, and use it in a commercial later on, and they will obtain the right to do so at the outset. Perhaps the song ultimately will be a huge hit. "Play That Funky Music, White Boy" was used in an Intel spot on Super Bowl Sunday about three or four years ago, and the synchronization fee for that was enormous. You cannot predict what a negotiated rate will be years after the fact. There is no way a writer is going to get that kind of money up front before a song is proven.

However, my most important criticism of Professor Loren's thesis has to do with respect to a writer's right to terminate a transfer. Professor Loren's suggestions in her paper will effectively eviscerate the termination of transfer right for authors.

The copyright law provides for a right to terminate a transfer and recover a copyright.¹⁰ For copyrights transferred on or after January 1, 1978, the author may terminate any transfer thirty-five

¹⁰ Copyright Act of 1976, 17 U.S.C. §§ 203, 304 (1988).

years after the date of the transfer.¹¹ The Congressional intent in granting this right for an author to terminate a transfer of copyright was to give an author, including a songwriter, a chance to recapture a copyright, in this case a musical composition, and enjoy the rewards of the creative work at a time in the future when he or she is in a better position to assess the musical composition's value.¹² Termination gives authors a "second bite of the apple" and protects him or her from transfers for which he or she was inadequately compensated because it is quite often not possible to properly evaluate a creative work's true value until it has been exploited.¹³

For example, when I am older, I look forward to taking back most of my copyrights from the publisher to whom I initially transferred them. Once I do that, either my own publishing company will then earn those public performance royalties and mechanical royalties, or I can make a brand new deal with a Warner Chappel or an EMI, one of the 800 pound gorilla publishing companies, for a substantial advance, and one of those companies can co-publish my musical compositions with my publishing company. When I terminate transfers, my income from my older musical compositions, if they are still being exploited, will exponentially grow, and I will earn an advance upon consummating new publishing deals respecting new transfers of those older musical compositions at a time when I am better able to assess the value of those copyrights. The initial publishing company to whom I made the initial transfers will have had the opportunity to earn money from those copyrights for the first thirty-five years. However, in my golden years, my family and I will have the opportunity to earn more money, as I should from those copyrights, at a time when I need the money the most. What is more important is that, if the initial transfers were improvident, I will get a "second bite of the apple."

Professor Loren's multiple suggestions of derivative work independence, the abolishment of the compulsory license, and the collapse of the divisible section 106 rights into one unified right to "commercially exploit the expression" will destroy my second chance. As I said, under the present scheme, when I terminate the transfer to an initial publisher of a copyright, my publishing company in 2015, or a new publishing company that I make a deal with in 2015, will then receive all of the royalties (mechanical, public

¹¹ *Id.* § 203.

¹² *See, e.g.,* Marc Stein, *Termination of Transfers and Licenses under the New Copyright Act: Thorny Problems for the Copyright Bar*, 24 UCLA L. REV. 1141 (1977).

¹³ *Id.*

performance, and synchronization) derived from a hit sound recording that incorporated that musical composition in 1980. The record company or its successor in 2015 would still have to pay for that underlying content, but the payee would change (no longer the old publishing company, now my new publishing company). My composition in 2015, thirty-five years after the initial transfer to the initial publisher in 1980, will still be recognized as an independent underlying work, with an economic potential for future exploitation vis-à-vis reproductions, the creation of other derivative works, and public performances.¹⁴

I cannot terminate the transfer my initial publishing company made to the initial record company, i.e., the initial permission to make the derivative work, that 1980 sound recording. Under the Copyright Law, there is a derivative work exception that protects the owners of derivative works, such as sound recordings, from having to renegotiate rights in the underlying works, such as musical compositions, when an author terminates rights to the underlying works.¹⁵ The 1980 sound recording continues to be sold and publicly performed. However, once I terminate the rights to the old publisher of the underlying music composition, without considering the effects of Professor Loren's suggestions, the record company has to recognize me or my designee as the musical composition's new proprietor and must pay me or my designee mechanical royalties to continue to exploit it beyond 2015. I, or more particularly, my publishing company designee, will likely also receive additional public performance fees from ASCAP, BMI, or SESAC, as the case may be. This was exactly Congress's intent. The termination of transfer permits me to enjoy the fruits of that hit record thirty-five years later, admittedly not during the hit record's peak period, but nevertheless at a time when I can still participate in a steady stream of income derived from repackaging, etc. I stand in the shoes of the original publishing company to whom I initially transferred that musical composition.

If Professor Loren's multiple suggestions of (1) derivative work independence, (2) the abolishment of the compulsory license, and (3) the collapse of the divisible section 106 rights into one unified right to "commercially exploit the expression" are employed, I would still be able to terminate my improvident 1980 transfer to the initial publisher in 2015. However, the only hit recording that will likely ever exist in which that musical composition is embod-

¹⁴ The copyright owner controls a bundle of rights that are divisible into different types of uses. See 17 U.S.C. § 106 (2000).

¹⁵ 17 U.S.C. §§ 203(b)(1), 304(c)(6)(a).

ied will not yield any money for me at a time when I may need it the most. This is because (remember) the record company back in 1980 may have bought up all of my rights to that musical composition for a \$2,000 flat fee, with no future obligation to pay mechanical royalties, synchronization royalties, or anything else.

Understand, because the record company's recording of the musical composition is a derivative work, that marriage of song and sound recording cannot be undone, and I am not suggesting that it should. Indeed, the Copyright Act provides a derivative works exception to the termination of transfer right. I am only suggesting that thirty-five years later the record company, and any other exploiter of that underlying musical composition, including, without limitation, a terrestrial radio station or a digital music service such as a celestial jukebox, ought to have an obligation to continue to pay consideration to the copyright proprietor of that musical composition for the continuing right to exploit it. Otherwise, the right to terminate a transfer is to a great extent illusory and meaningless, contravening Congress's clear intent. If Professor's Loren's suggestions are employed, something that is most important to authors is inadvertently contravened.

I acknowledge that challenges face the recording industry and the music publishing industry in the years ahead. Admittedly, technology has again forced us to rethink copyright law. But new technology, including Gutenberg's printing press, has always forced society to do that periodically. The Internet and digital technology have forever changed the entertainment business, that is for sure. New business models must emerge as a result. However, at the end of the day, copyright will survive. My small point here today is that copywrongs will not make copyright. If this seminar has taught us anything it is that we must be very careful untangling the web of copyright, for when we pick up one end of the stick, we pick up the other. It is a tangled web indeed.

