Against the Grain

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Cases of Note: Copyright Preempts Invasion of Privacy

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LEGAL ISSUES

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Cases of Note — Copyright Preempts Invasion of Privacy

Column Editor: **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>

DEBRA LAWS V. SONY MUSIC ENTERTAINMENT, INC., dba EPIC RECORDS UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT 448 F.3d 1134; 2006 U.S. App. LEXIS 1283.

Debra Laws, vocalist, and **Spirit Productions (Spirit)** contracted with **Elektra/ Asylum Records** to produce recordings of **Laws'** performances. **Elektra** got "sole and exclusive right to copyright such master recordings" and "exclusive worldwide in perpetuity … to lease, license, convey or otherwise use or dispose of such master recordings." **Elektra** also got the right to use **Laws'** name, likeness and bio.

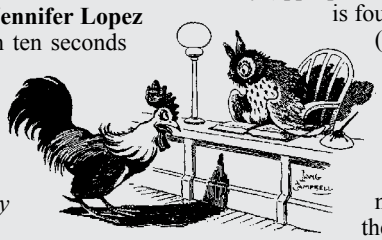
Hmmm. I'm sure they seemed so nice when they showed her the Cities of the Plain.

Next, **Elektra** contracted with **Sony Music Entertainment, Inc.** to grant **Sony** license to use a sample of **Laws'** recording of "Very Special" in the song "All I have." This was performed by **L.L. Cool J.** and **Jennifer Lopez**. **Laws** got no money.

I've listened to the thing, but don't get where her bit was blended in.

Sony then released a **Jennifer Lopez** CD and music video with ten seconds of the same. The song became a mega-hit with a net of forty-million bucks.

And I presume that's after creative music industry accounting.



Laws sued in California state court for the old common law invasion of privacy — appropriation of name and voice.

Sony removed it to the U.S. District Court, saying her claim was preempted by the ***Copyright Act***. And there they won summary judgment.

Appeal

And of course we know the U.S. Constitution gives Congress the power to promote useful Arts and blah blah. Copyright gives the holder the right to control the work and either distribute it or withold it. Or produce derivative works, which I guess this is. Blending it in another song.

Sections 301(a) and (b) of 17 U.S.C. provides preemption. But it does not limit or eliminate state remedies outside copyright.

You can see where this is headed. She signed away her rights. But first, we need a two-part test to determine preemption.

Certainly better than three-pronged.

Laws asserted the common law right to privacy (appropriation of name or likeness) which is found in every state. Someone (1) used her identity; (2) made money off it or got some other advantage; (3) weren't given consent; (4) she's injured.

Sony said this is not ordinarily preempted, but is under the facts of the case.

Now Two-Part Test Part A

Is the misappropriation claim within the subject matter of Copyright? Copyright protects works fixed in a tangible medium of expression. And that includes sound recordings. It's fixed when it can be communicated for more than a transitory period. You sing, sit down and shut up. That's not fixed. **Sony** had a sound recording. Once a voice is part of it, it can be communicated over and over, and falls within the subject of copyright.

Remember **Bette Midler**? Boy, that's showing your age. In ***Midler v. Ford Motor Co.,*** 849 F.2d 460 (9th Cir. 1988), a professional "sound alike" had imitated her voice from "Do You Want to Dance?" **Midler** didn't want to do the commercial, so an ad agency got a license from a copyright holder. A back-up singer who could imitate her voice did the song. And was told to sound like her. **Midler** was not seeking damages from the use of the song, but from the misappropriation of her voice. Her voice was not copyrightable, so this suit was outside of copyright law.

Midler was applied in ***Waits v. Frito-Lay, Inc.,*** 978 F.2d 1093 (9th Cir. 1992). **Tom Waits** sued for "infringement of voice." The question was whether **Waits'** voice was sufficiently distinctive to give him an action for appropriation.

Laws' voice was in a tangible medium, and **Sony** held copyright. The entirety of

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aged firms can, and do, uphold high standards of service. Privately held companies have an advantage in that they do not answer to shareholders or venture capitalists, whose demands for short-term return on investment are generally contrary to the interests of their customers. Additional benefits can be the absence of debt, and ownership of equipment and facilities.

Firms that support their employees benefit from stability. Such staff have reciprocating loyalty, and develop sophisticated skill sets, forestalling the need for constant training and re-training of new hires. Just as is true for libraries, vendors create and sustain organizational cultures. Such cultures are of as much benefit to libraries as to well-managed vendors.

We also maintain that libraries should not be inured to transparent hypocrisy.

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Questions & Answers — Copyright Column

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QUESTION: An academic librarian asks who (or what types of organizations) can apply the fair use principle. Fair use tends to be a defense for educational institutions. Can it apply to non-educational nonprofits?

ANSWER: Every person and business may claim fair use, not just nonprofit educational institutions. The U.S. Supreme Court has said that even for-profit entities may claim fair use. Courts are less likely to find that the use is a fair use when the infringer is a for-profit business, however. Nonprofit corporations are more likely to be found to be fair users than are for-profit ones.

True, many of the fair use cases that are publicized in the library press deal with nonprofit educational institutions, but there are many, many other fair use cases, even in the commercial sector, in which courts find fair use.

QUESTION: A retired university faculty member is dealing with the republication of two of his books, collections of stories of war dating from the days of Arthur of Britain. The first two that will be republished deal with World War II, with other volumes to follow. The publisher has asked for a reasonable number of photographs to accompany the volumes. The author wants to use photographs produced by the United States and the Great Britain during World War II, and a couple are of German origin — both labeled "bild-archiv." Are all U.S. and U.K. government-produced photos of World War II in the public domain?

ANSWER: For photographs produced by the U.S. Government, its agencies and employees, the works are in the public domain. *See* 17 U.S.C. section 105. Another issue is whether wartime photos taken by soldiers are government works. If the soldier's actual job was to take photographs for the War Department or any other federal agency, those would be considered government works and be copyright free. If, however, the soldier took the photo on his or her own time, that soldier is the author. Then the question is when that work enters the public domain. Consult my online chart "When Works Pass into the Public Domain" to help determine whether individual photographs taken by soldiers are in the public domain. *http://www.unc.edu/~unclng/public-d.htm*

Government copyright is more complicated for the United Kingdom. The British Government has Crown Copyright in works produced by its employees within the scope of their employment. Crown copyright expires 50 years after first publication, so photographs taken during World War II by government employees are now in the public domain.

Photographs from the German Bild Archiv may require payment of a fee. For terms of use see *https://www.bild.bundesarchiv.de/index.php?barch_item=en_agb*.

QUESTION: A corporate librarians asks if she purchases permission from the Copyright Clearance Center to use a figure from a published article, does she also need to secure author permission separately or does CCC handle obtaining permission?

ANSWER: There are two possibilities for figures in published articles. (1) The author of the article actually created the figure and therefore, at least initially, owned the copyright because it is a part of the article. The author then likely transferred the copyright to the journal publisher. (2) The figure was first published elsewhere and the author got permission to include it in the published article.

So, in the first instance, the **CCC** permission is enough, and the figure is just part of the article which the publisher permits the **CCC** to license. In the second instance, the **CCC** may be able to acquire permission for the librarian to use the figure.

QUESTION: An academic librarian asks two questions concerning the school's institutional repository. (1) Does the school need to get permission from all authors on co-authored pieces before putting them into the repository? (2) For students' works included in the repository, is their permission required?

ANSWER: (1) It is pretty straightforward that any of the co-authors of an article has the right to give permissions to place the co-authored work in an institutional archive if the authors own the copyright. Permission is not needed from each co-author. Ownership of the copyright is the big issue, however. If the authors have transferred the copyright to a publisher, then the publisher controls whether the work may be placed in an open access repository. Many publishers permit this after an embargo period; other publishers may allow the author(s) to place earlier versions of the article in a repository.

(2) Copyright belongs to the author, and when the author is a student it belongs to that student, not the institution. The only way the institution owns the copyrights in students' works is to have each student execute a written transfer of copyright to the institution for the work. A faculty member can have the class sign a form at the first of the class which contains a transfer of copyright for student work produced during the class.

QUESTION: A college faculty member inquires about the definition of electronic materials. What is included?

ANSWER: Typically, "electronic materials" include everything in digital format. Often, teachers and librarians use the term to mean text materials including blogs, but it certainly includes graphics, movies and music in digital form, music, Webpages, etc.

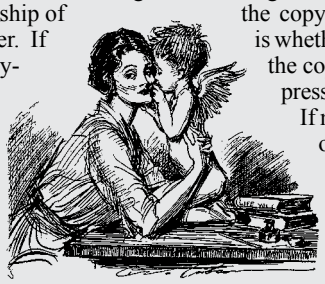
QUESTION: What is the copyright status of Facebook memes?

ANSWER: The copyright status of a meme depends on the source. Assume it is a photograph with a caption; was the photograph taken by the person who posted it? If so, that person owns the copyright and can post it with no problems. But if it is simply a caption on a photograph taken by someone else, posting it without permission is copyright infringement. In other words, the addition of the caption did not transform the photograph into a new work.

In December 2013, Facebook announced that it was going to post links to more articles and allow fewer things to be posted that had been published elsewhere. It is unclear how well this has worked in practice, however.

QUESTION: A college professor asks about working with a state department of public instruction on a study which ultimately resulted in a book published by a university press. The professor is interested in knowing what her assets in the work are.

ANSWER: The answer to this question depends on whether the faculty member had a contract with the state agency and what the contract specified concerning ownership of the copyright. It may be that the state agency requires that all works produced and published with its funding be public domain. Or it might permit the individual author to retain the copyright. Assuming that the faculty author owns the copyright, the next question is whether the author transferred the copyright to the university press that published the work. If not, then the author is the owner of the asset. If so, many university presses return the copyright to the author once the book is out of print.



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the alleged misappropriation was within the fixed medium of the copyright recording.

And Now Part B of Our Test

Is the rights she's asserting the same as those of copyright law? And, of course, it is.

Laws simply objects to having her voice included in the **Jennifer Lopez** recording. Or at least not getting paid for it. But she had signed away copyright.