

**PROTECTING AN ARTIST'S LEGACY THROUGH ESTATE
PLANNING, PROBATE AND POST-DEATH ADMINISTRATION OF
AN ARTIST'S RIGHTS**

Presented by:

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PROTECTING AN ARTIST'S LEGACY THROUGH ESTATE PLANNING, PROBATE AND POST-DEATH ADMINISTRATION OF AN ARTIST'S RIGHTS

I. 2009-2010 ESTATE CASES OF INTEREST

Fact is always better than fiction. The cases outlined below are to provide the practitioner a starting point on how copyright law and state probate laws are interpreted. The Michael Jackson Estate case has been covered in a separate document in this Chapter of the course materials.

II. PLANNING THAT FAILS

Amazingly enough, some times even the best laid estate plan fails.

a. Estate of James Brown

James Brown, the Godfather of Soul, died Christmas Day 2006 from congestive heart failure resulting from complications of pneumonia. Problems with Brown's estate came to the surface when it was clear that his wife at the time of his death, Tomi Rae Hynie, and the child from that relationship, were not included in his will that was executed in 2000. Also in 2000, Brown created the "I Feel Good Irrevocable Trust" which included the bulk of his musical copyright assets and real estate assets. The beneficiary of the trust is a charitable organization.

To add to the exciting mix, Brown was separated from Hynie at the time of his death and there are legal questions as to the validity of their actual marriage. Under South Carolina Law, Hynie and the child from that relationship are entitled to an inheritance so long as they were not specifically disinherited in the will.

The family members reached a Settlement Agreement in 2007, which the court rejected. On April 6, 2009, the judge wrapped up hearings on the matter and subsequently approved a settlement deal allocating one quarter of the estate to Hynie Brown and her son James Brown II, one quarter to Brown's six adult children and the remaining half to a charitable trust.

More spin on the estate came to light also on April 6, 2009 when a former publicist of James Brown, Jacque Hollander, sued for a stake of the "I Feel Good" trust. Hollander

alleged the trust was illusory and the assets from the illusory trust were instead property of a partnership between her and Brown that was established in 1987 and never dissolved. *Hollander v. Estate of James Brown*, 09 CV 2147 (E.D. Ill 2009). Hollander's case was dismissed for lack of personal jurisdiction over the defendant.

b. Estate of Jack Kerouac

When author Jack Kerouac died in 1968, he left everything to his mother, Gabrielle. When she died five years later, she in turn left everything via her will to Kerouac's third wife, Stella Sampas. For the next 19 years the Sampas family controlled Kerouac's estate.

Pursuant to a Florida court ruling in 2009, Gabrielle's will has now been deemed a forgery. *Estate of Gabriella Kerouac*, 73004767ES (Pinellas Co. Probate Ct.). The Court did not declare who forged the will, just that evidence was sufficient to show Gabriella was not in good enough health to have executed the will.

Jan Kerouac, Jack's daughter by his second marriage lead the charge to challenge Gabriella's will 1) after seeing a copy of the will and questioning the authenticity; 2) after speaking with John Steinbeck, Jr. --- who told her about copyright renewals.

As of August 2010, the Kerouac case is on appeal. For in-depth information on this case read *The Battle for Jack Kerouac's Estate*, TELEGRAPH (visited Aug. 30, 2010) <http://www.telegraph.co.uk/culture/books/booknews/6396321/The-battle-for-Jack-Kerouacs-estate.html>.

c. Estate of Darrell "Wayne" Perry

Country songwriter Darrell "Wayne" Perry died in 2005 but his estate was not resolved until July 2010. Perry wrote songs including Tim McGraw's number one country hit, "Not A Moment Too Soon." Perry's children sued their aunt, the executor of the estate, for wrongful death of their father in addition to mismanagement of the estate assets.

I have been unable to pull from the court records any of the court documents but provide this link to the case for reference. *Estate of Darrell W. Perry*, PE05-06-0659 (Butler Co. Ohio Probate Ct. decision July 26, 2010).

News reports state that Perry's sister, Darlene Bishop, was appointed executor. This could have been via a will or the court may have made the appointment. Based on the animosity Perry's children have openly displayed against Ms. Bishop, I am assuming there was a simple will involved that appointed Ms. Bishop the executor.

Whatever planning there was on Mr. Perry's part pre-death, the court found the best plan was taking Mr. Perry's royalty income and placing that in trust for his children's benefit. *Court Settles Estate of Songwriter Darren 'Wayne' Perry, USA TODAY* (visited on Sept. 1, 2010) http://www.usatoday.com/life/music/news/2010-07-26-songwriter-estate_N.htm (note the article title references Mr. Perry's name incorrectly).

III. FAILURE TO PLAN

There are always those cases where there was no estate plan at all.

a. Estate of Bobby Fischer

Robert James "Bobby" Fischer died in Iceland from kidney disease on January 17, 2008 at the age of 64 without even a simple will. Now the Icelandic courts are trying to determine his heirs between a Japanese woman who claims she was his wife, a Filipino woman who claims she is the mother of his only child, two estranged nephews, and the U.S Government. In August 2010 it was reported that after exhuming his body, DNA testing shows that Fischer is not the father of the Filipino child. For Bobby Fischer, the Drama Won't Die, *The New York Times* (visited Aug. 30, 2010) http://www.nytimes.com/2010/07/25/fashion/25fischer.html?_r=1&pagewanted=all.

IV. TERMINATION AND RENEWALS

The goal of this paper is to provide you a guideline for planning for continuity of your client's assets post-death. If your client created anything during his lifetime that is protected by copyright, you may need to be prepared to discuss with your client copyright terminations and copyright renewals. Copyright termination provisions are found in both the 1909 and 1976 U.S. Copyright Acts whereas Copyright Renewals will only apply to works created and published prior to January 1, 1978. This section will not go in-depth on terminations and renewals, but has been included to give you a point of reference in the

event these issues arise and to keep you abreast of current cases.

V. COPYRIGHT TERMINATION

Copyright terminations pursuant to 17 USC §§ 203 and 304 are hot topics in the news and at the courthouse the past 12 months. 2013 will be the first year that terminations can be effective under 17 USC § 203.... if notice of termination was proper. When termination will occur comes into play in planning the administration and maintenance of a catalog and specifically the potential income change once a termination or renegotiation of rights occurs. Some of the copyright terminations cases gaining recent attention include:

a. Estate of John Steinbeck

The U.S. Supreme Court declined to hear an appeal of the recent John Steinbeck estate. The Second Circuit overturned a lower court's decision and maintained copyrights assigned to Penguin Book Group from Steinbeck's widow. This extremely fact specific case turned on the fact that Steinbeck's wife terminated and renegotiated Steinbeck's 1939 agreement with Penguin. This renegotiation in 1994 "cut-off" the rights of Steinbeck's children from his first marriage. *Penguin Group (USA) v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008), *cert. denied* 2009.

b. Estate of Jack Kirby

A Southern District of New York judge ruled the heirs of comic artist Jack Kirby, were subject to transactional jurisdiction under a New York statute by sending copyright transfer termination notices pursuant to 17 USC 304(c). *Marvel Worldwide, Inc. v. Kirby*, 2010 WL 1655253 (April 14, 2010).

c. Estate of Jerome Siegel

The heirs of Jerome Siegel - the creator of Superman - sent a 546 page termination notice to Warner Bros. to terminate, pursuant to 17 USC § 304(c), Siegel's assignment of copyright to Warner Bros. The termination notice did not specifically mention two week's worth of cartoon strips that were key to the Superman storyline. The Court held the omission of the title, name of one author, date copyright was secured and the copyright registration number for the two weeks' worth of comic strips was harmless error because of the existence of a catch-all phrase in the

termination notice, the unique nature of the copyrighted work, and its seventy years of exploitation in many media. *Siegel v. Warner Bros. Entertainment, Inc.*, CV-04-8400-SGL (RZx), 2009 WL 2512842 (C.D. Cal 2009).

d. Charlie Daniels

Charlie Daniels' hit song "The Devil Went Down to Georgia," was written in 1979, but copyright termination could be subject to songwriter agreements he signed with Universal Music Publishing Group pre-1978. This possible "gap" in the copyright law between Section 203 and Section 304 is under review at the Copyright Office. *Possible Gap In Termination Provisions*, U.S. Copyright Office Reply Comments (visited Aug. 23, 2010) <http://www.copyright.gov/docs/termination/comments/2010/reply/>.

VI. COPYRIGHT RENEWALS

Under the 1909 Copyright Act there were two terms of copyright. The original term of 28 years and a renewal term of 28 years. In order to save the work from the public domain, the renewal application must have been timely filed in the 28th year.

In 1992, the 1976 Copyright Act was amended in regards to works registered or published between 1964 and 1977 such that a renewal application was no longer required to be filed to keep the work out of the public domain.

a. Estate of Roger Miller

For years, the estate of Roger Miller has battled with Sony Music over the ownership of the copyright in songs written by Miller in 1964. In 1964 Miller was under contract with Tree Publishing, which eventually became part of Sony Music. Pursuant to his exclusive songwriter agreement, Tree owned the copyright for the initial 28 year term and for the 28 year renewal term in the songs Miller wrote.

The renewal provisions under the 1909 U.S. Copyright Act were created to give songwriters, authors (other creators) the ability to recapture rights for their family that they may have transferred away. Interpretation of 17 U.S.C. 304 in relationship to what happens if the songwriter dies during the 28th year, prior to the renewal term starting in the 29th year, has been difficult. The Roger Miller estate is in the thick of the issue.

Miller died in 1992, the 28th year after writing songs such as "King of the Road" and "Dang Me." After the Sixth Circuit Court of Appeals ruled on the ownership of songs created before 1964 and after 1964, the Appeals Court remanded the question of who owns the songs written in 1964. Does Sony own the renewal copyrights because a renewal application was filed prior to Mr. Miller's death in the 28th year or do Miller's heirs own the renewal copyright because he died prior to the commencement of the 29th year? *Roger Miller Music v. Sony/ATV Pub'l, LLC*, 477 F. 3d 383 (6th Cir. 2007).

In April 2010, a federal district judge ruled that Mary Miller and Roger Miller Music, Inc. own the copyrights to the songs the songwriter published in 1964. Those songs include: "Dang Me," "Chug-A-Lug" and "You Can't Roller Skate In A Buffalo Herd." The district court concluded that that with the author's death, Section 304(a)(1)(c) vests the copyright with the author's kin. *Roger Miller Music, Inc. v. Sony/ATV Pub'l, LLC*, 3:04-1132 Doc. No. 103, filed March 18, 2010).

Sony/ATV filed an appeal to the April 2010 decision on August 24, 2010. *Roger Miller Music, Inc. v. Sony/ATV Pub'l, LLC*, 10-5363 (M.D. Tenn. 2010).

SONG/MASTER CATALOG ADMINISTRATION INTAKE LIST

- Legal services agreement
- Signed current W-9 for client
- Change of address HFA
- Change of address ASCAP
- Change of address BMI
- Change of address SESAC
- Change of address record labels
- Change of address foreign associates
- Letter of direction for HFA
- Letter of direction for ASCAP
- Letter of direction for BMI
- Letter of direction for SESAC
- Join ASCAP
- Join BMI
- Join SESAC
- Letter of direction for record labels
- Letter of direction for foreign associates
- Review client generated song file list
- Review and compare BMI/ASCAP/SESAC generated song file list
- Review ALL MUSIC cut/release/song list
- Review physical song files for copyright; renewal; assignments; contracts
- Review and print listing from Copyright office records
- Compile and create song docket
- Compile and create renewal/termination docket
- Compile and create master/sound recording docket
- Filings with Copyright Office to reflect current ownership
- Assignment documents
- Death Certificate
- Probate/Letters Testamentary
- Trust Agreement
- Will
- Corporate Entity Docs Reviewed
- Potential heirs/copyright owners identified
- Sound Exchange: masters; producer; artist

**Harry Fox Agency, Performance Rights, Sound Exchange
"Estate" Department Contact Information**

HARRY FOX AGENCY

<http://www.harryfox.com/public/EstateTransfer.jsp>

Harry Fox main number: (212) 834-0100

ASCAP

<http://www.ascap.com/estates/estatescopyrights.html>

ASCAP Estates & Claims Dept: 212-621-6280

Email: EstatesClaims@ascap.com

BMI

<http://www.bmi.com/estates/?link=navbar>

BMI Estate Help Line: 212-220-3088

Email: estates@bmi.com

SESAC

www.sesac.com

SESAC main number: 615-320-0055

Teresa Pitt, Director Business Affairs

SOUND EXCHANGE

www.soundexchange.com

Sound Exchange Membership number: 202-646-5858

Email: info@soundexchange.com

List key words such as "estate," or "deceased artist," or "heirs" in your email to be routed to the correct department.

**LETTER OF DIRECTION
REFLECTING COPYRIGHT ASSIGNMENT FOR SONG CATALOG**

Date

Comment [TB1]: Insert licensee/recipient of notice such as BMI or Harry Fox.

Re: Notice of Assignment of Copyrights

Ladies and Gentlemen:

Please be advised that we have sold and assigned to _____, Inc. (BMI) (hereafter, "_____"), all right, title and interest, including the copyright and the right to renew the same as well as all exclusive worldwide administration and collection rights in and to all of the musical compositions and portions thereof with respect to all musical compositions and portions thereof which are owned or controlled by us (hereafter, the "Subject Compositions"). Accordingly, from and after the date set forth above, you are hereby authorized and directed to address all correspondence, inquiries, royalty statements and payments (regardless of when such monies were earned) in respect of the Subject Compositions to _____, at the following address:

_____ Music (BMI)

Comment [TB2]: List the Assignee here.

Please acknowledge receipt of this notification by signing the enclosed copy and returning it to _____ (Attention: _____) at the address noted above.

Sincerely,

Comment [TB3]: Entity that is the Assignor.

ACKNOWLEDGED AND AGREED this _____ day of _____, 2010.

By: _____
Title: _____

Comment [TB4]: Licensee acknowledging the change in ownership.

_____ **Music**

Address
Address

Date: _____

BMI
Publisher Administration Department
10 Music Square East
Nashville, TN 37203

Comment [TB1]: Letter of direction to BMI (can be used for ASCAP/SESAC) in the event a third party publishing company administers the catalog.

To Whom It May Concern,

This is to advise BMI that we have entered into an agreement with another BMI publisher for the administration of our catalogue **for the World**, and that BMI's records should be marked to reflect the agreement as follows:

1. Name of BMI publisher acting as our Administrator is _____ Music

Comment [TB2]: Insert administration company name.

2. Effective Date of Agreement: _____

_____ Immediately, including all royalties now payable or which hereafter become payable, regardless of when performance took place

_____ Effective with performances on and after _____, 2010. (Must be as of the beginning of a calendar quarter, i.e., January 1, April 1, July 1 or October 1)

3. Checks for all our BMI royalties should be made payable to the Administrator and should be sent together with statements and all other correspondence to the Administrator at its BMI address on BMI records.

We understand that BMI cannot mark its records at this time so as to indicate the termination date of the administration agreement and that, therefore, the above information will continue to be reflected on BMI's records until such time as we or the Administrator notifies BMI that the administration agreement is about to terminate.

Very truly yours

_____ **Music**

IPI # _____

Comment [TB3]: This is the Estate/Licensor.

By: _____

Print name: _____

Title: _____

APPENDIX A

