This Land Belongs to All of Us

JibJab controversy puts Woody Guthrie song on edge of public domain

By Peter Irvine & Kohel Haver

1. The Controversy: Who Owns the Song?

In the summer of 2004, two animators known as JibJab Media posted online a short film poking fun at presidential candidates George Bush and John Kerry. The soundtrack for the film is a version of the Woody Guthrie song *This Land is Your Land*. In July, Ludlow Music, who control the rights to Guthrie's music publishing, sent a letter to JibJab, insisting that use of the song was copyright infringement that must be stopped. In August, the Electronic Freedom Foundation, representing JibJab, determined that not only was the song now in the public domain, but even if it was not, the use should be allowed under the Fair Use copyright doctrine. Ludlow then backed down, asserting that *This Land* was protected by copyright, but agreeing not to pursue JibJab.[1]

This incident raises several questions for musicians: When can you use "old songs?" How do you know who "owns" them? What if you want others to copy your songs? Isn't parody a fair use? How can we fairly balance the traditions of folk music with the interests of the songs owners? How can allowable uses of old songs be clarified? This article addresses these points, and suggests some actions to take to simplify potential future conflicts.

Copyright law often flies in the face of musicians' practices. Part of making music is to build on and rearrange preexisting material. Asserting a copyright on an arrangement of a traditional song takes your contribution out of that creative process, blocking others from reinterpreting your version. On the one hand, musicians want fair compensation for their work, and on the other, maximum access to reinterpret existing songs. The ambivalence of folk musicians to copyright is summed up in a quote attributed to Guthrie: "This song is Copyrighted in U.S., under Seal of Copyright # 154085, for a period of 28 years, and anybody caught singin it without our permission, will be mighty good friends of ourn, cause we don't give a dern. Publish it. Write it. Sing it. Swing to it. Yodel it. We wrote it, that's all we wanted to do."[2]

2. Determining Copyright Status of Older Songs

Copyright protection has a life. Under the current American law, that life ends 70 years after the death of the composer (or a total of 95 years if the song was owned by a corporation). After a song, or any protected work, is no longer protected by copyright it is in the public domain. If a song was published before 1923, it is in the public domain and anyone can do anything with it. For example, the words to the *Star Spangled Banner* were composed in 1814, and published with the indication to sing to the existing tune, *Anacreon in Heaven*. [3] Since publication occurred before 1923, both words and music are now in the public domain. If you want to record, perform, or re-write the *Star Spangled Banner*, words or music or any combination thereof, you may do so.

If a song was published more recently it might be protected by copyright, but it is impossible to know definitively until you research its status. Some, but not all, copyright registrations can be searched online at www.copyright.gov, and searches of the performing rights societies can be enlightening.[4] Under the 1909 Copyright Act, authors had to put a notice, the familiar "c in a circle" with the date and author's name, on their published works to prevent the work from entering the public domain. In the 1940s, when *This Land* was composed and, arguably, published, the life of a copyright was 28 years, plus an additional 28 years if a timely renewal was filed. If the legal conditions had been met, the song would still be protected by copyright. Ludlow Music asserts that they met the legal conditions. JibJab asserts that the conditions were not met, so even though there is a copyright registration on file, it is no longer valid. So even if you find an existing registration, it might be invalid.

3. Was Guthrie's Copyright Interest Valid?

To have a valid copyright interest, an author must create an original work. At issue in the JibJab controversy is a musical work, with both words and a melody. Guthrie composed the words to *This Land is Your Land* in 1940.[5] A mimeographed broadside dated 1945 is in the Library of Congress.[6] A copyright

registration for the “words and music” was obtained in 1956, and renewed in 1984.[7] There is no dispute that Guthrie composed the phrases “this land is your land, this land is my land” and “from California to the New York island,” and that if JibJab used the work without permission they infringed the copyright through its use of those lyrics, although such an infringement might be allowed under a Fair Use defense.

The validity of Ludlow’s claim to a copyright can be questioned in two ways. First, it appears that Guthrie published the song at least as early as 1945 and when no copyright renewal was filed after 28 years, the song entered the public domain. Second, the melody Guthrie used was apparently borrowed from an earlier source, so he had no copyright claim to the music.

In the broadside found at the Library of Congress, Guthrie prints the words and music to *This Land.* Significantly, he also put a copyright notice and price on the cover, asserting his rights to the song. Under the law then, “publication” triggered the beginning of the 28 year copyright term.[8] Ludlow argues that this mimeographed broadside was merely a “limited publication,” insufficient to trigger the 28 year term. However, precedents exist for a single sale of a work to be sufficient, “as general publication depends on the author making the work available to those interested, and not on the number of people who actually express an interest.”[9] Thus the mimeographed songbook appears to be a general publication that fixes the beginning of Guthrie’s copyright as 1945. Since the copyright was not renewed in 1973, the song then entered the public domain. This decisive argument led to Ludlow agreeing to drop its disagreement, but they have not yet declared the song to be public domain.

Any claim by Ludlow to the music is weak because Guthrie apparently “borrowed” the tune to the song from an earlier Carter family song.[10] This does not even address the possibility that the Carter Family themselves learned the tune from another source, or that the music is public domain. While typically there is a copyright in the combination of original words with original music, if the music is not protected all that remains for Ludlow to claim are the two lyrical phrases above. Also, note that by changing the rest of the words, JibJab avoids a claim of infringement on the rest of Guthrie’s words.

4. The Fair Use Defense

If JibJab infringed Ludlow’s copyright by making unauthorized use of the song, JibJab can then raise a fair use defense. Fair use is a free speech concept that was specifically incorporated into the last major revision of the copyright law. The intent is to balance the First Amendment doctrine—to encourage freedom of expression by allowing the public to make certain uses of protected works— with the proprietary rights of copyright owners. Political speech, commentary, scholarly works, journalism and parody are among the forms of use considered more fair, but it is important that “fair use” is merely a defense to a claim of copyright infringement, it is not a guarantee that a use is allowed. Because fair use is a balancing test, there are no hard and fast rules—you can never really know if a use is fair until a court decides.

The fair use doctrine requires a court to examine four overlapping factors:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work[11]

In applying the first factor, transformative and non-commercial uses have been found to be more “fair.” JibJab’s use appears to be both transformative (changing the lyrics) and non-commercial (initially distributing the movie for free). Transformative use appears to require some reflection and parody of the original work.

Parody is distinguished from “satire,” with the requirement that parody make fun of, and “conjure up,” the original work, while satire makes fun of society in general rather than the specific work from which it borrows.[12] No court has yet provided a bright line rule, or specific number of notes, to say which use is fair and which foul. Some decisions say that no more than necessary should be taken, and that the parody should not supplant the underlying work, while others give more leeway.[13] Labeling art as “parody” aids a fair use defense, but is not determinative. A commentary on the O.J. Simpson murder trial done in the style of Dr. Seuss titled *The Cat Not in the Hat*, was held to be unfair because it was a general satire, rather than a comment on the original source material.[14] Since no court has ruled that satire is fair use, Ludlow’s position was that JibJab’s movie is satire and thus copyright infringement.

The second fair use factor would weigh against JibJab, since creative works are more protected than less creative works (such as a phone book). The third factor is mixed: JibJab did not use all the original words, but the ones they used are at the "heart" of the original, and therefore less fair. The fourth factor would only weigh against JibJab if a court found that JibJab's use had somehow hurt the potential for Ludlow to license *This Land is Your Land* for use in another setting, such as licensing the song for use in another movie.

What guidance does this leave for you as a songwriter and parodist? Seek out pre-1923 published versions of songs that are not protected by copyright. Unless you are convinced that your version of someone else's song is a fair use and you have the means to defend your opinion, it is prudent to seek permission.[15] Without a license, you may find yourself the recipient of a cease & desist letter, and the subsequent legal costs of resolving the situation. If you want to create parodies, you may need legal assistance to analyze whether a particular version is defensible.

5. Cooperative Solutions for Determining Song Usage Rights

There are sensible reasons, including royalty collection, licensing fees, and piracy prevention, to register copyrights in arrangements of songs. In the philosophy of copyright, someone who reworks an existing song into a new original form deserves a measure of compensation for that contribution to our culture. Copyright law provides an economic incentive to reinvigorate old works. If you add original elements, such as a new verse, to a public domain work you need to let people know what contribution you claim. We also need a way to know exactly what is in the public domain.

Arrangements of copyrighted songs that are done with permission can receive copyright protection as derivative works, depending on the agreement between the copyright owners. Arrangements of public domain songs are paid a reduced rate by public performance royalty collectors such as ASCAP, BMI, SESAC and SOCAN, but there is at least some income to be had if you make a claim. Potentially more lucrative than public performance royalties are license fees for movies, but the filmmakers will need assurances (more than just your good word) that you have authority to grant them a clear copyright license.

Registration with the US Copyright Office gives others a means to find you, provides notice to the world of your claim, and allows two powerful tools for defending your rights: statutory damages for infringements and the possibility of recovering attorney's fees in a lawsuit.[16] It is up to the copyright owner to decide whether or not to pursue infringers, so you have the choice of whether or not to allow others to copy your songs. If you do want to prevent copying, your position is much more convincing when the alleged infringer faces the prospect of paying your attorney's fees and the statutory damages.

If you want to encourage others to make use of your works, it helps to let people know. Creative Commons has established a number of sample licenses to use to make your work available, including the means to embed the license in an mp3 file.[17] A Creative Commons license lets others make the uses you allow, without the need to contact you (or, eventually, your heirs).

Guthrie's copyright quote can be interpreted as an open license to perform and publish that song. A copyright holder is free to license their works in whatever fashion they choose. The problem is often that of finding the owner to ask permission. The solution is for owners to make license terms and contact information readily available. In Guthrie's case, Ludlow Music controls the copyright. The job of a music publisher is to maximize the earnings for a song, so Ludlow is, under business principles, doing the right thing in attempting to stop an infringing use, and deter others from future infringements. If Guthrie were alive today, perhaps he would have attached a Creative Commons license to his songs that would allow everyone to publish, sing and yodel them. As things currently stand, you need a compulsory mechanical license to cover Guthrie songs that are not in the public domain. Ludlow Music settled their dispute with JibJab, so although the facts indicate, and the Electronic Freedom Foundation believes, that *This Land* is in the public domain, no court has declared the song's emancipation.[18] Ludlow could still sue someone else for using the song, at which point the defendant would need to raise a defense, most likely by bringing in the EFF.

The JibJab incident is a sign of the current climate of rigid copyright enforcement. While the Internet has been a boon for musicians, enabling easier distribution of music, increased exposure leads to decreased privacy. A casual posting of an unauthorized cover song can easily come to the attention of a zealous and angry copyright owner. Manufacturers and distributors are increasingly asking musicians to

verify copyright ownership, so musicians need to be aware of the sources of their material and check that they are not infringing someone else's copyright.

Musicians can also make use of the available tools both to ensure that proper compensation is paid to creators and to maximize potential collaborations. Because of the Sonny Bono Copyright Extension Act that added twenty years to copyright duration, no new works will enter the public domain en masse until 2017. Meanwhile, by dedicating works to the public domain, such as through a Creative Commons license, musicians can make the raw materials of their creations available to others to use to create new works. Whether or not Guthrie would have approved of JibJab's "parody" is mere speculation. In contrast to that uncertainty, musicians today have the opportunity to clarify how their creations should be used in the future.

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[1] Electronic Freedom Foundation, *This Song Belongs to You and Me,* Aug. 24, 2004, http://blogs.eff.org/deeplinks/.
[2] Numerous Internet sites relate that Pete Seeger said in 1967 that Guthrie wrote this notice in a mimeographed songbook, e.g. http://www.themomi.org/museum/Guthrie/index_800.html. Michael Smith from the Woody Guthrie Archive says that Seeger made the statement in Seeger's book *The Incompleat Folksinger*, and that, although it seems "likely" that Guthrie made the statement, the Archive has been unable to verify it. Email from Michael Smith, August 18, 2004.
[3] See the broadside at the Smithsonian Museum web site, http://americanhistory.si.edu/ssb/6_thestory/6b_osay/fs6b.html
[4] Add a ".com" to ASCAP, BMI, or SESAC to find each web site.
[5] See the manuscript at http://www.geocities.com/Nashville/3448/thisl1.html
[6] The location of the find was reported in the San Jose Mercury News, http://www.mercurynews.com/mld/mercurynews/news/breaking_news/9495377.htm and the manuscript is available at http://www.eff.org/IP/20040823_Jibjab_Copyright_Scans.pdf
[7] The 1956 registration was renewed in 1984 as RE-201-665.
[8] 17 U.S.C. § 24 (1909 Act).
[9] Burke v. National Broadcasting Co., Inc., 598 F.2d 688, 691 (1st Cir 1979).
[10] For a link to the Carter Family recording, *When the World's on Fire,* see Electronic Frontier Foundation, http://www.eff.org/deeplinks/archives/001779.php.
[11] Copyright Act, 17 U.S.C. § 107, available at www.copyright.gov.
[12] The leading parody case is Campbell v. Acuff-Rose Music, Inc. 114 S. Ct. 1164 (1994), regarding 2 Live Crew's version of *Oh, Pretty Woman*.
[13] E.g. Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978) (underground cartoon using Disney characters were an excessive use); Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986) (*When Sunny Sniffs Glue* parody of *When Sunny Gets Blue* did not supplant original); Leibovitz v. Paramount Pictures, 137 F.3d 109 (2d Cir. 1998) (amount taken is less relevant when other factors favor finding fair use).
[14] Dr. Seuss Enterprises, L.P. v. Penguin Books U.S.A., Inc., 924 F. Supp. 1559 (S.D. Cal. 1996).
[15] Weird Al Yankovik obtains licenses, and subsequently royalties, for his parodies and satires of popular songs. Interview with Marian Liu, San Jose Mercury News, Aug. 7, 2004 at http://www.mercurynews.com/mld/mercurynews/entertainment/music/9338145.htm
[16] Note that registration with the Copyright Office is separate from registering your works with a performing rights organization—do both!
[17] Creative Commons, http://creativecommons.org/.
[18] As of August 31, 2004, the Harry Fox website still had *This Land* available to be licensed, and indicated that over 1000 licensed versions exist. www.songfile.com.