

*'Carnival Time' Ripoff Tale Offers Rich Copyright Caution*

by Tommy Santora, Associate Editor for New Orleans *CityBusiness*

"Carnival Time" has been a Mardi Gras music staple for more than 40 years. However, original composer and performer Al Johnson could not legally claim his work until 1999.

Johnson, who failed to copyright "Carnival Time," was awarded copyright by the courts 39 years after he wrote the song in 1960. Johnson said he never received any royalties for the numerous recordings by other groups who released his song on compilation albums, cassettes and CDs.

"I didn't know much about copyright back then so I just wrote it, put the song out there for people to enjoy during Mardi Gras," Johnson said. "When I wasn't receiving any money for the song, I ended up asking the wrong people for help who took advantage of me."

An entire generation of New Orleans musicians of 30 to 40 years ago have stories similar to Johnson's, said George Hutchinson Jr., an intellectual property and entertainment lawyer at Adams and Reese.

"They had raw talent but didn't have any business savvy, and they ran into these guys who would take advantage of them and make money off their work," Hutchinson said. "Even though (Johnson) won the copyright to it, he can't go back and retrieve his royalties because half the guys are bankrupt by now.

"Licenses floated from owner to owner and licenses were issued that had no business being issued by people who laid claims to the songs."

Though these kinds of copyright cases were prominent 30 years ago, New Orleans lawyers say musicians and artists still need to know about copyright laws to protect their work.

A copyright restricts unauthorized copying and reproduction of an original expression such a literary work, movie, music, painting or software. It costs \$30 to register a copyright through the Library of Congress. A copyright exists from the time of creation regardless but

registering a copyright provides legal evidence of ownership to the work's creator.

The Entertainment Law Legal Access project is a free weekly legal advice program for musicians and artists held on Fridays at the New Orleans Music Office Co-Op, sponsored by New Orleans Arts Council, Tipitina's Foundation, Music Co-Op office and Tulane Law School.

ELLA attorneys help with copyright situations, intellectual property disputes, contract reviews, business incorporations and licensing issues.

"We see an increasing awareness of necessity to obtain copyright," said Ashley Keaton, supervising attorney with ELLA and an entertainment lawyer with Eveline Davis & Phillips in New Orleans. "We address issues to reduce the risk of litigation in the future because once it gets to litigation, it doesn't matter if the artist is right or wrong because it could be costly either way."

Scott Aiges, head of the music business development in the city arts and entertainment office, said the "poor man's copyright" is a common myth among musicians.

"People think if you write a song, tape it and mail it to yourself to get a postmark date, then that signifies the time of creation. That's not something that would stand up in the court of law," Aiges said.

Registering the work is required for an author to bring an infringement action to court, said Elise Stubbe, an associate with Hardy, Carey and Chautin in Metairie, and author of "Copyright Registration Practice for the Non-Copyright Attorney" in the Louisiana Bar Journal.

If the work is unregistered, the author can seek expedited service on the copyright, which takes 10 to 15 business days at a cost of \$580.

"The biggest misconception is I have to do something to get this copyrighted. You have rights from the minute you put it on the tape but getting written rights, registering for a copyright, is always better,"

Stubbe said. "If it gets to court and there's no paperwork, then a case of he said, she said ensues."

Professor George Frazier, intellectual property chairman for the Louisiana State Bar Foundation and a professor at Loyola University School of Law, has a client who composed many songs for a local group. When his client left the band, the group appeared at the New Orleans Jazz and Heritage Festival and played the songs without attributing them or paying him royalties. Frazier would not disclose the name of his client or the group due to future litigation.

"Fortunately, he has his notes and drafts, and I will register the songs shortly. But he will have to pay me to send a cease-and-desist letter informing the group that suit will be filed unless it stops playing the music or pays reasonable royalties each time it performs a song," Frazier said. "I have no doubt my client will be successful, but he could have saved a lot of money had he taken the time to file as soon as he wrote the songs."

Marjorie Esman, partner and chairwoman of the intellectual property section at Milling Benson Woodward, represents a wide range of artists from those who know "absolutely nothing about copyright law to those who are ready to sign contracts making sure they have everything in place."

Esman said copyright law needs to accommodate the changes in technology. The future of copyright law will focus more on peer-to-peer file-sharing software, a process by which people send or receive music or movies over the Internet.

The courts transformed Napster from a free Web site where music could be downloaded at will into a subscription-base site. Grokster, an international software company, may be the next Web site affected in the case of Metro-Goldwyn-Mayer Studios versus Grokster. Hollywood record and film companies are suing Grokster, which allows users access to an advanced peer-to-peer file sharing program that enables users to share any digital file including images, audio, video, reports and documents.

“It’s like going after gun makers as opposed to people who are pulling the trigger,” Esman said. “But if they invalidate peer-to-peer, then somebody will just come up with something else. It seems like the copyright law needs to eventually adapt to technology because technology always seem to be ahead of the law.”

Stubbe said the digital era made copyright work more accessible and harder to police. As a result, companies are finding it harder to make copyrights profitable for their artists.

“You will always have two ongoing sentiments clashing with each other — consumers rights to have access to inexpensive entertainment and artists’ rights to making their work profitable. And that’s where copyright law is trying to draw the line.”