

Bootlegs

Intellectual Property and Popular Culture

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A wide variety of cultural, and even natural, artifacts are treated as intellectual property: computer software, genetic codes, books, movies, slogans, and live music performances. The role of popular culture in the economy of the United States, and the ephemeral nature of celebrity, combine to make the protection of the intellectual property rights of pop artists a major concern of law enforcement officials. Profit potential and fleeting celebrity fuel an illegal industry devoted to increasing the supply of artifacts by the latest celebrities. Bootleggers profit by making live performances and unreleased studio sessions available to mass audiences. And desktop computer technology allows the reproduction and sale of both legitimate and illegitimate releases at a nominal cost. The major organization devoted to protecting the property rights of musical artists is the Recording Industry Association of America (RIAA.)

One way to approach the questions of the nature and legitimate extent of intellectual property rights is to focus on the creativity of the author. James Boyle calls our attention to the primacy of the concept of romantic authorship in laws dealing with copyright and locates the notion in the work of the German Romantic Philosopher Gottlieb Fichte¹. The insight and creativity of the producer of an artifact becomes the source for property rights. And creativity is demonstrated by the imaginative form, not the content, of what is produced.

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Those who would like to limit or annul such property rights are quick to point out the debts of authors as diverse as Shakespeare and Prince to a cultural commons. And, given the ultimately conservative nature of popular culture, the latest phenomenon on the road from celebrity to obscurity is sure to have obvious debts of inspiration. Certainly the Spice Girls should be making contributions to the retirement funds of the Village People.

By concentrating on musical artifacts rather than computer software, news stories, and pharmaceuticals, I hope to illustrate the aesthetic argument against restrictive intellectual property rights. And I also hope to drive a wedge between cultural artifacts that are primarily information orientated and those that are valued for beauty, encouraging society to begin to treat such items differently. Popular, or media, culture is the social glue that provides a semblance of unity in society in which individuals have come to feel an absence of common values and is a powerful source of tools for building individual identity and acculturating values conducive to the interests of a society's elite.² The use and control of such property is more than just an economic issue.

Pirates and Bootleggers

News items detailing the operations of the RIAA and law enforcement efforts to defend the intellectual property of artists and recording companies can be found on the web pages of the RIAA and Grayzone Newsletter and the USENET group devoted to trading music bootlegs.³ It is easy to confuse pirating and bootlegging. Pirating is akin to counterfeiting. It is the unauthorized reproduction for sale of legitimate releases. Sometimes pirated items are practically indistinguishable from real releases; but often the packaging is such a perfunctory approximation that its derivative nature is noticeable. And many pirates make no effort to provide packaging. An unauthorized duplication of a popular film on videocassette such as *Titanic* is a pirated edition whether it is supplied by a professional who duplicates the box of the legitimate issue or sold with no case at all over the Internet by someone who has hooked up several home video cassette recorders. Bootlegs are unauthorized issues of unreleased live performances as well as outtakes from studio sessions that may include both unreleased songs and alternative versions of released material. The unreleased songs might be offered by other artists and are generally copyrighted by someone. It is bootleggers, not pirates, who look for buried treasure in the music industry. An alternative term for bootleg is Recording of Illegitimate Origin (ROIO.)

Artistic integrity is not always violated by illegitimate releases nor preserved by legitimate ones. Recording companies alter track length, cover design, lyrical content, the order of selections, and even the selections included. It is

not unusual to find double or triple albums reduced in size, whether they are live performances or studio efforts, for marketing purposes. Prince's *Black Album*, a complete album withheld from release by the artist at the last minute with no explanation, and the Rolling Stones documentary film *Cocksucker's Blues* directed by Robert Frank are interesting examples. Since the *Black Album* was a best selling bootleg album, Prince's action raises the issue of the weight of audience interest in determining ownership. A faithful audience supports Prince's artistic efforts and has a reasonable expectation of receiving a continued product supply. And it identifies significantly with the artist's continued creativity. Such identification is cultivated by artists and corporations and is certainly not trivial in multicultural societies where the major social glue is provided by media culture.⁴

Bootleg releases pit an author's property rights and critical judgment against the standards of taste of the audience.⁵ The Rolling Stones blocked release of a valuable documentary about rock and roll and the drug culture focused on the 1972 Stones tour by a respected filmmaker from fear of bad publicity. Frank is a respected member of the American school of filmmaking known as *Cinema Verite* and his work includes the respected documentary *Salesman*. Here economic interests of artists who were already rather well off financially, and well known as drug users, trumped the aesthetic interests (and more prurient interests) of the general public.

ROIOs are not pirated albums, knockoffs of legitimate releases. But ROIOs often blur the distinction between pirating and bootlegging by including pirated material. The marketability of an ROIO is enhanced by the inclusion of a performance of an artist from a compilation or a single not collected on a legitimate album. The current popularity of movie soundtracks means that record corporations can profit from several audiences within a fragmented culture through inclusion of songs from artists with different market shares. *Hope Floats* contains one legitimate release from a band I enjoy. The remaining cuts are of no interest to me. Many people purchase such compilations for one or two songs. Devotees of bootlegs know that the desired tracks will appear as filler on a concert album. It is also not uncommon for bootleggers to copy someone else's boot product. Since bootleggers do not have property rights in the bootleg products, pirated bootlegs should be considered bootlegs. And it would perhaps be simpler to consider any bootleg that includes any pirated material an instance of piracy.

ROIOs are marketed in a variety of ways, some of which seem rather benign. There is a free library for Bob Dylan bootlegs that asks only for patience, blanks, postage, and a return mailer. The Trade web site currently includes listings for almost two hundred bands. Most traders exchange show for show or, if someone does not have a show to offer, provide a show on one tape in exchange for two blanks. There are also small time entrepreneurs who sell tapes

for about six dollars and CDRs for twelve. Finally, commercial web sites in North America and Europe charge about twenty-five dollars per bootleg CD. The price for a single Japanese bootleg CD can go as high as fifty dollars. Some commercial sites claim that they deposit artist royalties as adequate compensation in trust accounts.⁶ This offer should not be taken lightly. Adequate compensation could be as little as twenty-five cents a unit if it is fixed at the amount an artist generally receives from a legitimate release after compensation to the record company. Bootleg companies might indeed be willing to compensate artists in exchange for legitimacy.

Technology contributes to the growth of the gray area music business in several ways. The markets for bootleg material from artists such as Bob Dylan, Garbage, Hootie and the Blowfish, and Alanis Morissette are large. Bootlegs of live performances by other artists might fail to find a sizable, and hence significantly profitable, audience. The Internet, however, is free from the restrictions of both time and space for the advertisement of such items. It allows a bootlegger to piece together an audience for performers such as Emmylou Harris or Townes Van Zandt with little financial risk. Advertisement in specialty print media was more time consuming and directed at an audience that subscribed to a particular, and specialized, periodical. The Internet brings these advertisements to newsgroups and web pages devoted to particular artists. And the CDR medium provides for quality reproductions at such a minimal cost that even a sale of fifty CDRs is financially rewarding. It is not uncommon to find postings such as, "Rolling Stones performance in Buenos Aires transferred from stereo cable television broadcast to two CDRs and limited to fifty copies complete with color artwork available for thirty dollars a set. Email to reserve your copy now."

The Internet facilitates the formation of an artist orientated specialty market, sale and distribution of a product, and anonymity for the product source when the bootlegger engages in minimal precautions and does not become too greedy. CDR technology allows anyone with a personal computer, a CDR Writer, and a laser printer to open a recording company. CDRs are increasingly popular in the gray music business since CDRs do not have a traceable code physically stamped on each unit like CDs.⁷ A bootlegger does not even need access to record company vaults or live performances. It is easy enough to buy one new unit at full price from an established bootleg company and reproduce the CD on a CDR burner. And the artwork can be scanned and then reprinted on a color laser printer. One bootlegger who specializes in Rolling Stones concerts simply remixes and releases bootlegs from other companies.

There are other ways in which the Internet contributes to the growth of bootlegging and piracy. For instance, music enthusiasts frequently place MP3 music files on the Internet. These compressed files can be downloaded to hard disk or to a CDR with sound quality only slightly inferior to normal CD

releases. The same technology that would facilitate the business of Columbia House by eliminating the use of the postal services to distribute CDs also allows bootleggers to service customers and the more generous collectors to distribute unreleased tracks virtually free of charge.

When I started writing this paper I was prepared to claim that for the foreseeable future the CDR would be the medium favored by both pirates and bootleggers. Yet MP3 distribution sites have become increasingly popular on the Internet. What fuels the MP3 revolution is the ease with which unknown bands can bring a product to the public. MP3 sites allow consumers to sample the music of unknown bands without having to buy anything or even leave home for the local record store. And small record companies seem to feel that placing a few songs from an artist's latest release on the Internet does not hamper sales. The major recording companies are resisting MP3 technology, pressuring small companies and artists not to place selections on the Internet, and working on alternative delivery systems that would build financial charges into music downloads. It is increasingly common to see postings on bootleg bulletin boards followed up with queries as to why the bootlegger does not just post MP3s for free downloading.

Differences in copyright laws allowed bootleggers to easily find safe havens for the production of ROIOs until the mid-1990s when the efforts of RIAA and the effects of the standardization fostered by the European Economic Community began to close protection gaps.⁸ Some nations had treated live recordings differently from other ROIOs, regarding live performances as essentially abandoned artwork that belongs to the public. German law protected German artists from unauthorized release of live performances and extended this protection to other European Community artists only for performances in Germany. In 1993, the European Court of Justice ruled that all European Community artists were entitled to the same protection. As recently as 1988 British residents were recognized to have the right to import single copies of items that infringed copyright for personal use. And it was also permissible to record live performances for personal and private use provided that it was not expressively forbidden at the time that the consumer purchased a ticket.

In the United States, the RIAA has recently shown greater interest in policing Internet sites that offer live tapes for cost or blanks. In January of 1998, the RIAA targeted an Internet site with a university (edu) address that offered live tapes, primarily by Bruce Springsteen, for six dollars. The site's owner stated that he used to trade one tape for two blanks to cover postage and switched to the six-dollar charge because he had too many blanks. But the RIAA sees a financial charge as indication of a profit making arrangement. The RIAA was satisfied when the site's author, a university employee, shut it down.

It is unclear whether the RIAA originally targeted the site before or after it switched from offering tapes for blanks to tapes for six dollars. But a good

single Maxell tape, the favorite medium of tape traders, costs about two dollars and forty cents in the United States. Add the cost of two cassettes to ninety cents for return postage and thirty-five cents for a cushioned mailer and the six-dollar charge seems reasonable. This was not as significant a profit-making site as those places that charge twenty-five to fifty dollars for bootleg CDs and CDRs. But, unfortunately for tape traders and music lovers, there is an argument that the RIAA could use to justify such action.

Imagine that someone gave you a cassette copy of a rare Muddy Waters's concert because you love the blues. Perhaps it is the 20 October 1976 concert in Warsaw, Poland. You might feel like sharing that concert with other blues lovers. It would certainly be very selfish to keep it just for yourself. But once you pass that tape on for blanks or cost or as a gift you have lost control over what happens to the tape. Traders know this; they are not ignorant of how duplicated tapes circulated privately eventually make their way to bootleg release. And even the person who gives a tape with the warning that if the show ever ends up as a commercial release he will hunt you down and make your Internet life miserable knows that he has lost control over what happens to that concert. A not-for-profit live music site has often been the source for bootleg releases.

In 1997, the No Electronic Theft Act redefined financial gain as the receipt of anything of value in amending Section 101 of Title 17 of the United States Code. This means that receipt of money or blank tapes is considered financial gain. Criminal infringement of copyright is redefined in amending Section 506(a) of title 17 "... by the reproduction or distribution, including by electronic means, during any 180 day period, of one or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000." So tape traders may run afoul of the law either by making copies of works judged to have a market value greater than one thousand dollars or receiving items such as tapes of other concerts also judged to exceed that financial limit. And complaints may be brought by "producers and sellers of legitimate works affected by conduct involved in the offense, holders of intellectual property rights in such works, and the legal representatives of such producers, sellers, and holders."⁹ Intellectual property rights now have very strong legal protection in the United States and the emergence of a new technology that can convey intellectual property such as MP3 and CDRs will provoke immediate response from regulatory agencies and major corporations.

Common Defenses of ROIOs

There are several common defenses of the morality of ROIOs. First, some people argue that because bootlegs do not attain the same quality of recording

or packaging as official releases that they do not compete with legitimate releases. But contemporary bootlegs match legitimate releases in sound quality and packaging. The four CD set, *Voodoo Brew*, issued on the bootleg label Vigatone, of alternative cuts and outtakes from the studio sessions for the Rolling Stones 1994 release *Voodoo Lounge* illustrates the contemporary state of bootlegging. It comes in a nice box, includes four picture discs, and has sound quality that rivals legitimate releases.

There have actually been cases where an artist purchased a bootleg copy of his own live performance and included it on a legitimate live release. But even when the ROIO does not match what passes for quality sound in legitimate releases, the ROIO still competes. This is really a second argument to consider: that bootlegs do not compete with legitimate releases when the bootlegs are inferior in quality in some way valued by the mass market.

The very things that make official releases superior in the eyes of some consumers to bootlegs make them inferior for others: overdubs, remixes, coloring, substitution of songs from another performance and editing. Many hardcore fans prefer an authentic historical recording to a polished artificial concert, especially when it is a concert the fan attended. So bootlegs of inferior quality do compete successfully with legitimate releases.

A third argument is that bootlegs are only purchased by faithful fans who already own all the commercial releases. This argument has some intuitive sense because finding a bootleg is like finding a new release for a dedicated fan. When your favorite band issues an album every three years and not every year, or they have gone to Rock and Roll Heaven, or disbanded in some other way, a bootleg of outtakes feels like a new release. But they are also seen as better releases. Many fans prefer unprocessed live recordings to the commercial release of the same live performance. And commercial live performances often include bits and pieces of various concerts. This may seem to a commercial producer as a good technique for producing the best possible live album. But it is not popular with a consumer who desires a record of a particular concert. This is understandable in a market where a consumer pays fifty dollars or more for a concert admission and would prefer a souvenir of that concert and not an anthology made from concerts all over the world. The commercial live "anthologies" often take the process to a ridiculous or even insulting extreme. The Rolling Stones live album *No Security* contains fifteen seconds of crowd applause and a brief greeting in Polish tacked on to the end of a song performed in South America. It also is just one CD, about half the length of a real concert.

Bootlegs also compete successfully with legitimate releases for the attention of new fans when a band has a long enough history to have gone through personnel and style changes. A fan of the blues who likes the Stones is more likely to purchase Mick Jagger's *The Nature of My Game*, an unreleased 1992

blues album with the Red Devils, or *Sweet Home Chicago*, which captures an impromptu session in Buddy Guy's Legends in which three of the Rolling Stones performed several songs with Muddy Waters and Buddy Guy, than the psychedelic *Their Satanic Majesties Request*. The legitimate release of "2120 Michigan Avenue," named for Chess Studios where it was recorded in 1964, stops at just over two minutes—exactly where Muddy Waters joined in on guitar. The full recording is only available on bootleg. As to studio recordings, just as some bootleggers provide better mixes of live concert albums than others, bootleggers often can provide a better mix or fuller version of an official release. Both live bootlegs and studio bootlegs compete with legitimate live and studio releases. What the major defenses of bootlegs have in common is the assertion that bootlegs are harmless, that they are not viable competing products. But that claim is false.

Ethical Criticisms of ROIOs

Bootlegs sometimes invade an artist's personal privacy through inclusion of studio chatter. For instance, bootleggers know that fans are often as interested in an artist's comments on drugs and other musicians as in studio outtakes. A copy of Keith Richards singing the Beatles' "Please Please Me" would thrill some fans. Others will be more delighted hearing Richards mumble that he could have written that song better. A bootlegger will include the comment to make the product attractive to a wider audience. But, at most, protection of privacy would justify editing the comment, not suppressing the outtake. I say at most because an artist's comments on another artist are important for appreciation of published works.

Artists often use the studio to experiment and to fuel the song writing process by playing old favorites. And so a release of an artist's covers of his favorite blues and country songs amounts to shortcutting the artist's creative process. It is a publication of work in progress, despite the fact that the songs may sound finished, that the artist prefers to direct to a different final incarnation. One thing to notice about this line of argument is that it supposes that the covers are not intended for release. It is a very different thing to issue studio outtakes intended for eventual release than it is to issue songs directed to the vaults. When the outtakes are destined for eventual release a bootlegger violates a property right. This is closer to pirating than to bootlegging. When the outtakes are destined for the vault, for an artist's personal collection, or conceived as expressions for the moment (either as intrinsic expressions of creative play or instrumental moments conducive to an eventual production but not meant for preservation in the current form), then the objection to bootlegging will be more properly along the lines of personal privacy, aesthetic control, and aesthetic judgment.

The issuing of outtakes of work in process is akin to the publishing of notebooks and letters as illustrations of the creative process that enhances our understanding of the influences on the final work. This often leads to heightened aesthetic appreciation. The primary arguments against bootlegging are that it violates property rights when the material is intended for eventual release (and property rights include those of the artist, the record company, the producers, and their heirs and beneficiaries); that it invades personal privacy when it includes material lacking aesthetic relevance; that it overrides the aesthetic judgment of either the artist or another interested legitimate party such as the record company or the producer by issuing material judged, at least temporarily, to be more fit for the vaults.

I want to emphasize here that I am not arguing for the morality of issuing bootlegs that appeal to merely prurient interests. For instance, the fact that thirty fans were trampled to death at a Who concert does not justify issuing the concert recording against the will of the artists and others with financial interests in the band's public image. Of course, it also does not justify withholding the performance if it measures up to the performance standards of other bootlegs of the same artist.

Bootlegs of interviews can be interesting for aesthetic, historical, and sociological purposes.¹⁰ This means that restriction of bootlegs to music and elimination of studio chatter and interviews is not a workable solution to balancing aesthetic interests and personal privacy. Yet there are clear cases such as the inclusion of studio chatter with an artist's spouse and children, or the issuing of original member of the Rolling Stones Brian Jones fooling around with a guitar that violate the artist's personal privacy. But these invasions happen rarely and so do not count against most bootlegs.

Aesthetic Argument

There is an interesting and well-known anecdote about Muddy Waters being asked after a live performance by a young fan if he had ever performed Mick Jagger's "Mannish Boy." (This is a song Waters recorded and performed long before Jagger.) This anecdote could provoke speculations about the racism of American society in which African-American music requires a white interpreter for popularity. But it also demonstrates the restricted aesthetic appreciation of the young fan. The particular type of pleasure occasioned by aesthetic objects is heightened by historical knowledge, general familiarity with a genre, and knowledge of the process of artistic production including the development of a particular artistic product. Bootlegs are a means of access to the influences on an artist that facilitate interpretation and greater aesthetic appreciation.

When one discovers the extent of influence from a common, or a more

specialized ethnic or race-based heritage, this suggests to advocates of the author-property approach to ownership that the artist's or record company's property rights should not be absolute. Even if one artist gives a different stylistic expression to a traditional song, such stylistic variation still demonstrates a debt. The distinction of form from content, of idea from expression, does not wipe out the traces of aesthetic influence. In fact, the distinction is often to little avail when we recognize that expressive form, stylistic innovation, is also often borrowed. The artist is shown to have drawn from a common cultural fund. And so it is easier to justify the view that an artist ought to return something to the commons or to the cultural source.

But artistic debt does not in any obvious way justify issuing ROIOs. An artist can repay a creative debt by arranging for guest appearances, contributing to a foundation, and making public statements. Bootlegs are only one way of demonstrating the debt of an artist. It is more enjoyable to hear a favorite rock performer play a blues standard like "Salty Dog" or watch a video of an impromptu performance in a club with Muddy Waters. But public statements and guest appearances more effectively repay roots artists financially and communicate a creative debt to the public. If there is an argument in favor of bootlegging, then it must be the aesthetic one.

Imagine that someone owns a small painting by the artist Ferdinand Leger. (If a Leger does not have obvious aesthetic value for you then substitute a work of art which does.) Leger produced cubist paintings as well as flat, often comic-book-like, depictions of happy workers and circus people. This person prefers Leger's flat happy machine people to his cubism, but it is a cubist painting that she has acquired, perhaps through inheritance. For twenty years the painting hung in her living room. She has given up trying to appreciate it. Now it is relegated to a wall on the stairway to the attic. She is moving and desires to be done with the cubist Leger permanently. She deposits it in the trash.

You walk by the Leger owner's house and spy the Leger in the trash. And of course you attempt to rescue it. But the Leger owner stops you, asserts her property rights, and states that she wants it destroyed. You reply that placing the item in the trash constitutes legal abandonment. She has returned the item to the commons from which you may legally retrieve it. But you are checked again by her remark that the trash has not been placed at the curb but is still on her property. Perhaps she will put it in a vault; or perhaps she will just burn it in the fireplace.

Not only does placing an object with aesthetic value in the trash seem objectionable to most people, but also placement of such an object in inappropriate places such as along the attic stairway indicates a lack of care and proper appreciation. In contexts where we believe an object has instrumental value we are more inclined to vest unlimited property rights in an owner. My lack of care for my late model automobile might show a flaw in my character,

but the same lack of care shown toward a 1963 Chevrolet Belair would mark me an unfit caretaker of a valuable cultural artifact.

Now it might seem that I am going to argue that objects with intrinsic aesthetic value should be treated in ways that trump individual ownership rights. I do believe that. But to take that particular line of argument would simply overburden this paper by requiring an analysis of intrinsic value and an argument that items of media culture possess this quality. Instead it seems more feasible to note that property rights are not absolute. You may have bought the journal in which this article appears yet you may not Xerox a copy of the journal. You own your stereo, your body, and your automobile. Yet you cannot do anything you want with those items. You cannot play your stereo loudly after midnight in the campground. You cannot sell your kidney or your fetus to pay your tuition. You cannot set your automobile on fire in the desert. There are legal restrictions that limit the use that can be made of property, which are rooted in widely held beliefs about morality. One of these beliefs is that authors must be given property rights to assure continued artistic production. Another belief is that access to information important to successful competition and a fully human existence is significant enough to limit the extent of property rights.

These legal limitations sometimes reflect the belief that property is ultimately in our trust and that some actions reveal that we are incompetent trustees from whom the property must be rescued. This approach is probably at the bottom of laws governing the sale of fetuses. Another reason for limiting property rights is conflict with the rights of others. I do not desire my view of the desert to be affected by the sight of your burned automobile. Nor do I much care that the Spice Girls sound better really loud and that their live concert from the Hollywood Bowl is playing at midnight tonight on the BBC. And there are also choices that people make about property that reveal a general mental incompetence or disrespect for human life. Perhaps selling a kidney is an example of the first and selling a child into prostitution is an example of the latter.

If the operative reason for limiting property rights is respect for human life then the reason appeals to some degree of presumptive or intrinsic value. If, on the other hand, the reason is the utilitarian interest of others to sleep as a component of a relaxing vacation, then there is no need to introduce intrinsic values to the discussion. Whether the values invoked are intrinsic or instrumental, property rights are limited. Only someone who held that the only rights were property rights would be able to always and automatically trump aesthetic value (understood as either intrinsic or instrumental) as a reason for limiting property rights. And it would be exceedingly strange to argue for intrinsic value and then limit that value to one instance — property. If intrinsic value belongs to those objects worthy of being valued as ends in themselves, then aesthetic objects would seem to be prime candidates for that role. And property

rights are usually seen as belonging to persons who have value rather than in property conceived as valuable in itself. Property rights are intimately connected to the right to life. Aesthetic value is just the sort of value that is appropriate to balancing property rights since aesthetic experience is as crucial to human flourishing as property.

If the owner of the Leger cannot do just whatever she desires with the painting, then it does not seem to be the case that her particular relationship to the author of the painting is a trump either. Perhaps she is Leger's daughter. She acquired the painting from his will. If the painting has aesthetic value she would indeed be a selfish person to destroy it rather than donate it to a museum. The case does not seem to be all that different if the owner is Leger himself. If the painting has value, intrinsic or instrumental, in the eyes of others what good is served by destroying it? It might be argued that Leger, like Prince, has decided that the painting lacks aesthetic value or completeness. But then artists may be poor judges of an object and willing, like Kafka, to commit it to the flames.

Now the Leger painting differs from bootleg concerts in an important respect. The painting can have, by definition, just one spatio-temporal location. If the Leger owner appreciates the painting it is hard to criticize her for not sharing the painting with others outside the security of her home. But if the painting were requested as a temporary loan for an important major retrospective we would probably think her unduly selfish if she refused to lend it for several months. ROIOs are capable of mass reproduction. There is no good reason to keep an ROIO private. And there are two good reasons to make ROIOs more widely available.

Consider an audiocassette made of Dr. John at the Warsaw Jazz Festival from the stereo broadcast on Polish Radio III in December 1998. It not only seems to me that I ought not to destroy this tape I made to allow repetition of an aesthetic experience, but since this object has aesthetic value I ought to care for it. And care would include making extra copies in case the original deteriorates. The object is also valued by others who did not have the opportunity to tape it off the air. I would be exceedingly selfish if I kept the tapes for my appreciation only. And I would increase the survival chances of this work by copying it for storage at different sites. In other words, I should enlist other people to care for these performances by making copies and they should entrust copies of concerts to me. Now one might argue that the Dr. John tape should be sent to an archive, perhaps to a museum. But this suggests that such items should only be enjoyed by an elite few and ignores the point that what is valuable about the tape is ultimately the aesthetic pleasure it occasions, a pleasure that should be multiplied.

Now you might be tempted to remark that Dr. John is not Mozart. By appealing to Leger and Kafka (or someone else with obvious aesthetic value to

the reader) I am trading on intuitions about legitimate works of art to justify the preservation of pop artists. Dr. John is just a funky blues artist. He is no Mozart. But this remark would support the aesthetic argument. To the extent that one values an object aesthetically one is willing to override or limit property rights to foster preservation of artistic objects and the increase of human pleasure. One should remember that bootlegging is not incompatible with providing financial compensation to the authors. Nor is the profit a bootlegger makes from product sales a consideration that eliminates the good occasioned by the wider availability of the product. So-called collectors are often very animated about the selfish bootleggers who make a profit from tapes that should have remained restricted to serious collectors. Such elitism is truly puzzling when it is found conjoined to objects that mean so much to so many people.

Case Study

The cultural commons is a creative product that serves as an influence in a further creative process. Among blues artists there is a recognition that the musical sources of the blues belong to them in general and not to particular blues artists. This leads to a much more relaxed attitude toward authorship in blues. And supporters of ROIOs feel that they contribute to an artist's creative success. The role of the faithful audience is analogous to that of a patron or promoter providing the financial support needed to allow the opportunity for continued creativity. Some bootleggers would argue that appearing on a bootleg enhances a band's chance for success. And so it is easy to develop a sense of ownership in a product that has been fostered by financial contributions and other forms of support. The cultural commons and the faithful audience both foster the creativity of an artist. In any case, there are two ways in which responsibility for an artwork extends beyond the individual artist—financial and creative. And my concern here is with creative contributions.

Covering blues songs does not mean that Eric Clapton is a bluesman. The fact that Sid Vicious of the punk rock band the Sex Pistols covered "My Way" does not make him a Sinatra imitator. You have to hear it to tell. This also applies to ROIOs. You have to hear them to understand the creative process that results in a commercial album. You have to hear an artist play, live or in the studio, to understand the extent of a genre's influence.

On a commercial album, non-artistic considerations interfere with a final product. For instance, there will be only one tribute song to minimize the number of royalties paid to someone else. Bootlegs give the full picture of creative debts. And you have to hear the performances to know that the Stones version of "Drift Away" is the same song as the Dobie Gray title and that it is rhythm and blues and not punk like their version of "Hound Dog."

In 1990, Howery Pack took up the task of documenting the extent of blues influence on pop artists. Yet in his informative *Living Blues* article he states without explanation that he avoided bootlegs.¹¹ *Living Blues* published an update of the same article in 1997 in which no reference to ROIOs occurs. The Jimmy Reed section in the original article included no mention of the Stones; but there were quite a few Jimmy Reed numbers they had covered. And if what I have found in researching Stones bootlegs is an indication of the work of other rockers, then Pack has seriously underestimated the influence of blues on pop by avoiding bootlegs.

Conclusion

Although I have argued that bootlegs compete with legitimate releases, the legitimization of bootlegs would not ruin popular artists financially. Some bootleg companies already deposit reasonable compensation in trust accounts. Companies that issue gray area material deemed insignificant by the artist or recording corporations would find compensation agreements a small price to pay for a greater visibility that would expand market share. A bootleg company would rather have its product in the rack at Tower Records than in a string of small unaffiliated independent record stores.

Nor would greater legitimacy of bootlegs dry up the supply of live concert recordings or outtakes. Artists would be less likely to leave material in the vaults if the material could be acquired and issued without artistic consent or supervision. Of course, an artist would protect financial interests by issuing more material. The major recording corporations will maintain various advantages over bootleg companies that should translate into superior production values and more efficient distribution. Many bootleggers could do a credible job of mixing a session tape. But the legitimate record company has access to the artists for consultation on the mix, background information helpful in marketing the product, and an established distribution network. Competition from a bootlegger would encourage release of such material and superior production values. This seems to me to be a desirable turn of events.

Recognizing that property rights are not absolute still leaves room for financial compensation to artists. But there are other reasons why artists and recording companies desire to maintain control over what material is issued. One reason is simple economic efficiency. A major tour could lead to the production of a hundred live bootlegs. And while a major corporation would not desire to compete with the small entrepreneurs who would issue these concerts, it would still have access to all those tapes to create a single release under the best circumstances. The corporation could not recreate the local color that draws many to purchase otherwise inferior products. But this is just a relatively

small share of the market. Competition from independent bootleggers would lead to better official products, and more of them.

In addition to efficiency, the desire to construct and preserve a predictable marketplace, and the enforcement of a marketing plan for their artists, it also must be recognized that artists desire to maintain a semblance of control over creations. But here it is also helpful to remember that artists make mistakes in judgment about what should be released. Prince and Kafka are useful examples. Artistic control over creations is also one value among many and has no claim to always trump aesthetic value. When a study of bootlegs is necessary to adequately understand the influence of blues on classic rock, then aesthetic and sociological considerations should override property rights.

Finally, access to bootlegs makes the reflective thoughtful music lover aware of the gap between artistic intention and the product marketed for mass consumption. The distinction is similar to that between director and production cuts in the cinema. It is hypocritical of artists to withhold a product on the ground of artistic control when artists lose so much artistic control to recording corporations in the search for profit. In an increasingly fragmented and specialized mass culture that requires increasing attention to marketing plans, certainly an artist should find solace in an audience that appreciates director's cuts?

Notes

1. James Boyle, *Shamans, Software, and Spleens* (Cambridge: Harvard University Press, 1996), pp. 54–55.

2. Douglas Kellner, *Media Culture* (New York: Routledge, 1995), pp. 33–34; argues for the use of “media” rather than “popular” culture.

3. Here are the current Internet addresses for the sources cited in the text: www.riaa.com, www.grayzone.com, and alt.music.bootlegs. There are many other sites that include discussions of bootlegs. Given the speed with which sites advocating or engaging in freeing music are being closed, the best advice I can give for finding additional information is to use a search engine such as Altavista and keywords such as “bootlegs,” or “free music philosophy.” Most search engines allow you to place a plus sign before each keyword as a means of restricting references to joint occurrences of keywords.

4. The *Black Album* was eventually given a commercial release. And Bob Dylan's acoustic folk and controversial electric amplified performances billed as *Royal Albert Hall* were issued as the fourth volume of his bootleg series. I am not a Dylan fan and have not heard either the bootleg or commercial releases. But I have heard both releases of the Prince album and prefer the bootleg version, which has a less processed sound.

5. Recording companies have discovered that the sales of specialty artists are enhanced by the presence of mainstream guests. A good example is BB King's recent *Duets*, which includes songs with Bonnie Raitt, the Rolling Stones, and Van Morrison. Expect to find King's performances, which such guests pirated, as bonus tracks on bootlegs.

6. Robespierre Records Srl, Via Toscolano 1/B, 20138 Milano, Italia is an example.
7. Many CD plants already stamp their products with a SID code that is unique to every individual CD plant mold used to manufacture CDs.
8. Clinton Heylin, *Bootleg: The Secret History of the Recording Industry* (New York: St. Martin's Press, 1996), pp. 349-350.
9. HR 2265 RH, 105th Congress, 1st Session, Report No. 105-339, October 23, 1997.
10. *Static in the Attic*, Midnight Beat CD. This Rolling Stones bootleg opens with an early seventies interview in which Mick Jagger expresses approval of bootlegs
11. Howery Pack, "The Blues Had a Baby," *Living Blues*, March/April (1990), p. 70.

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