

3 Dead Rats and Sound Recordings: Authorship, Ownership, Technological Protections and Digital "Private" Copying

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3 Dead Rats, an immensely popular rock music group, recorded its signature song, "Greed is Awesome," for Death Jam Records on October 31, 1999. Death Jam executives had the composer-performers sign a contract effecting a total assignment of copyright in the music and the recorded performance, and stating that their work was "for hire" under the 1976 Copyright Act. [1]

Death Jam also records other artists, notably The Brutish Boys, a group made famous by their extensive and provocative use of "samples" of other performers' recordings. Death Jam and other record producers have entered into a series of cross license agreements to authorize sound sampling. The Brutish Boys' most recent recording, "Straight from the Sewer," includes samples of "Greed is Awesome," made with Death Jam's permission, but not with 3 Dead Rats'. The members of 3 Dead Rats, Robert Rodent, Victoria Vermin and Melvin Mouse, are in fact very unhappy with the Brutish recording, which they contend distorts and demeans their music. [2]

As a forward-looking producer, Death Jam Records is exploring ways to make its current and future catalogue of music recordings, and the individual songs from the albums, available over the Internet. Technologies like Napster, however, have persuaded Death Jam that any music it releases for digital dissemination must be accompanied by technological protection measures. One possibility would be to make the music available in streaming-only format, but Death Jam would also like to make the music available for downloading on a variety of bases – provided it can be reasonably confident that customers who, for example, pay for a week's worth of listening, or who pay to make one copy in addition to the downloaded copy, will not be able to bypass the protection and make (and send) unlimited copies for an unlimited period.

Death Jam Records accordingly has begun to "watermark" each recorded song to identify itself as the copyright owner, and to set forth the terms under which it permits use of the songs. [3] Death Jam Records also has cooperated with other record producers and hardware producers on developing a standard access protection protocol that restricts play of protected works to approved devices. These devices permit the

making of one additional retention copy of a recorded song from a prerecorded source or download, but none thereafter. [4]

Despite these efforts, young Jack Ripper and other gleeful teenage hackers have devised a program to neutralize the access protection protocol. They distribute the program, which they call Prankster, for free over the Prankster.com website. [5] (Despite the “.com” suffix, Prankster.com does not charge for the program, takes no advertising, and does not purport to have a business plan other than to amuse its operators and audience.) Computer users who install Prankster can play the protected songs on equipment that does not comply with the access protection standard. Prankster also ignores the copy-protection information encoded onto the recorded songs; as a result, Prankster users can copy and disseminate the recorded songs. [6] Another feature of Prankster facilitates sharing of files among Prankster users: any time a file is accessed through Prankster, a “.pnk” suffix is attached. Because Prankster includes a file-sharing protocol, Prankster users can explore “.pnk.” files on each others’ hard drives and import those files to their own hard drives. Although “.pnk” files initially were devised for recorded music, computer users have discovered that adding a “.pnk” suffix makes any kind of file exchangeable. As a result, Prankster is now widely used to share a broad variety of works, many of them distributed with their creators’ permission. Moreover, the Prankster program has become so popular, it has proliferated across many websites. [7]

Death Jam is considering taking legal action, but is no longer sure against whom. Robert Rodent of 3 Dead Rats, by contrast, has resorted to self-help by making available virus-infected “.pnk” files of 3 Dead Rats and other songs. Any Prankster user who copies and tries to access one of these files soon finds that her hard drive has been erased. [8]

ISSUES

- [1] Sound recordings as works for hire, were they before the 11/29/99 amendment adding sound recordings to the list of commissioned works capable of being works made for hire? What is the effect of that amendment? What is the effect of the subsequent repeal of the amendment?
- [2] Even if Death Jam owns the copyright and has authorized “Straight from the Sewer,” does 3 Dead Rats have any kind of moral rights claim to protect the integrity of their work, enforceable under the Lanham Federal Trademarks Act, or other state or federal law? What about the laws of other countries, such as France, where moral rights are more vigorously protected?
- [3] DMCA Section 1202 (protection of copyright management information): Should Death Jam be listing Rodent, Vermin, and Mouse as the authors, too? What kinds of acts will the watermarked information be protected against?

- [4] Are the protocol and devices protected under DMCA Section 1201(a) and (b) provisions against the circumvention of access and copy-protection controls?
- [5] Do the Prankster program and its authors and users violate the Section 1201(a)(1) and (2) provisions against circumventing access controls, or providing devices that circumvent those controls?
- [6] Do the authors and distributors of the Prankster program violate the section 1201(b) prohibition against distributing devices that circumvent anti-copy controls?
- [7] Are Prankster users engaging in copyright infringement? Are the authors and website distributors of Prankster contributorily liable for copyright infringement?
- [8] Has Rodent violated any laws by engaging in this form of self-help? Is there a better, practicable, way to promote compensation for recording artists and copyright holders?

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