Are the Courts and Congress Singing A Different Tune When It Comes to Music.

Prof Michael Landau
Georgia State University
16 May 2014
Laws

• **Different Laws for Musical Compositions and Sound Recordings.**

• (e.g. “Motion pictures” are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds.)

• The Anti-bootlegging statutes apply to only live musical performances, without a fixation requirement of a durational requirement. They were upheld under the Commerce Clause, not the copyright clause!
Law – cont’d

• Compulsory Licenses under § 115 apply, without veto power, so long as you do not change the fundamental nature. But, what is the fundamental nature of the song?

• Pre-1972 sound recordings are not covered by federal copyright law. They are covered by state law.

• A performance is not a publication. A sound recording is a “fixed performance.”
• A tape or a record of a musical performance was not a “copy” until 1978. Therefore, one could not register a tape or a record as a musical composition.

• I will concentrate now on Music Sampling of sound recordings and show how sound recordings are treated differently from all other kinds of works.
Courts are hostile toward music sampling.

- Gilbert O’Sullivan’s “Alone Again Naturally” about 4 seconds of it.


Judge Duffy started the opinion with, “Thou shalt not steal” with a citation to Exodus, Chapter 20, verse 15.
Sampling (cont’d)

- The defendants argued, “everyone does it, we should do it, too.”

- The court did not buy it, and said “Defendant is violating the Seventh Commandment an the law of this country.”

- Surprisingly, Judge Duffy also referred the matter to the U.S. attorney for the SDNY for consideration of prosecution of the defendants under 17 USC § 506 and 18 USC § 2319.
That was before Campbell v. Acuff-Rose (1994).

- The 2 Live Crew “Pretty Woman” case.
- Probably the most miscited case. It does not stand for the proposition “Parody is Fair Use.” It stands for the proposition that “Parody May Be a Fair Use.”
- The case was remanded because the Sixth Circuit committed legal error regarding commercialism, the extent of the copying, and the market effect.
- Then the case settled.
But....

• The Cambell court said:

  • “The more transformative the new work, the less will be the significance of the other factors, like commercialism, that may weigh against a finding of fair use”

• There is no more Sony presumption, and commercialism does not matter.

• Defendants is future cases cite the “Mantra” of fair use in almost all cases.
OK, sampling again.

- The difference between the sound recording and the musical composition in sampling.....but no fair use.

- Bridgeport Music Inc. v. Dimension Films, 410 F.3d 792 (6\textsuperscript{th} Cir. 2005).
Bridgeport Music

• Plaintiffs had 800 songs and 500 defendants

• The judge divided the case into 476 cases, stayed all of them except for 1 case.

• The defendants did not get any licenses: no sound recording license and no musical composition licenses.

• The judge created a “new rule” with respect to sound recordings.
Bridgeport Music

- Again, about 4 seconds of music was used and looped.

- “If you are going to sample, get a license”

- No de minimis use.
- The case had no fair use.

- § 114 of the act only allows the replication of the entire song, not a very small excerpt.
Newton v. Diamond, 388 F.3d 1189 (9th 2004)

- The Beastie Boys sampled a song “Choir” by James Newton.
- A three note arpeggio over a held note.
- The Beastie Boys obtained a Sound Recording “sampling” license for $1000.
- They did not have a musical composition license.
- The court held that the taking was “de minimis.”
Sound Recordings v. Musical Compositions

• Sound Recordings – There is per se rule that if you sample a sound recording, you must get a license.

• You may not include an excerpt or a sample no matter how small.

• Musical Compositions - A court will consider de minimis takings. There are no sampling cases of which I am aware involving fair use.
What about transformative uses?


• 15 seconds of “Imagine” by John Lennon used in a film about “Intelligent Design” was found to be a “Transformative” and therefore “fair use.”

• Music used in a film.
A complete taking is transformative.

- Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003)
- Perfect 10 v. Amazon, 508 1146 (9th Cir. 2007)
- Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006)
- Bill Graham Archives v. Doring Kindersley Ltd, 448 F.3d 605 (2d Cir. 2006).
- Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013).
Why isn’t transformative use applied to sampling?

• Should it be?

• Have a statutory license for sampling?

• Apply fair use to sampling?

• Or...keep it different from other content?