Uptempo Fair Use: Applying Fundamental Principles in a Rapidly Changing Musical Environment

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Enforcing Copyright

- Own a valid copyright
  - Own exclusive rights in minimally creative expression that is original to the author

- Do not own creative ideas
- Do not own facts
- Do not own genre or creative conventions that define a particular style
Copyright Infringement

- Own a valid copyright
- Unauthorized exercise of one of the copyright owner’s exclusive rights
  - Reproduce in copies
  - Prepare derivative works
  - Publicly distribute copies
  - Publicly perform
  - Publicly display
  - Publicly perform SR by digital audio transmission
Defenses to Infringement

- Sections 107 – 122 are limitations on exclusive rights.
- Some of these are very targeted:
  - E.g. 17 U.S.C. 110(6) “performance of a nondramatic musical work by a governmental body or a nonprofit agricultural or horticultural organization, in the course of an annual agricultural or horticultural fair or exhibition conducted by such body or organization”
  - Translation = Organizers of state fairs can play music without paying performance licenses
Defenses to Infringement

- Sections 107 – 122 are limitations on exclusive rights.
- If the copyright owner can show *prima facie* infringement, ask if the limit applies.
- If so, the conduct is non-infringing.
- Section 107 codifies the broadest limitation -- fair use.
Fair Use

- **Purpose and character of use.**
  - Commercial/non-commercial?
  - “Transformative” use or “slavish” copying?
- **Nature of copyrighted work.**
  - How much original expression involved.
- **Amount and substantiality of portion used.**
  - Has defendant taken a substantial portion?
  - Even if not, has defendant taken the “heart” of the work?
- **Effect on the potential market for or value of copyrighted work.**
  - Direct substitution?
  - Lost plausible licensing opportunities?
  - Have to consider aggregate effects if others make the same use as defendant
The Donaldson Translation

- In the case of use of music in documentary film, for example:
  - Does the music illustrate or support the creator’s point in the new work?
  - Is the amount used reasonably appropriate for illustrating or supporting the point?
  - Does the average viewer make the connection between the use of music and the point it is being used to illustrate or support?

Use of Music in New Music

- Using the “musical work” – underlying composition (including lyrics)
- Using “sound recording” – the creativity that went into rendering the musical work in a particular recording (e.g. performers, producers, sound engineers)

- Music sampling uses both – see Michael Landau’s presentation
Use of Copyrighted Music in New Music

- Fair use is relatively narrow set of the disputes that result in a court opinion
Music copyright cases

- Soured business relationships
  - Authorship/ownership disputes (including heirs)
  - Licensing breakdown
  - Scope of the license / breach of contract
- Sour grapes?
  - Successful work sued for “stealing”
- Indirect liability
  - Internet service providers, etc.
- Fair use
Music copyright cases

- Sour grapes – cases
  - What was taken?
    - Idea/theme
    - Conventional elements
    - Or original expression?
  - Legal standard – is the infringing work “substantially similar” to the original work.
  - Focus is on similarity of the expression in both works.
    - Many music cases dismissed because the second work borrows or shares ideas/themes/conventions or other aspect not created by the author of the original work.
Music copyright cases

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Music copyright cases

- E.g., *Peters v. (Kanye) West*, (7th Cir. 2012)
  
  - West’s single *Stronger* uses theme of “what does not kill me, makes me stronger” (Friedrich Nietzsche 1888), which was theme of Peters’ song (also entitled *Stronger*) shared with Kanye’s business associate in 2006.
  
  - Plaintiff says infringing similarity is:
    - Use of the stronger theme
    - Use of similar rhyming pattern in the chorus
    - Lyric that references Kate Moss
  
  - Court agrees that the case should be dismissed because these elements are not Peters original expression.
Robin Thicke, Pharrell Sue Over 'Blurred Lines'

Preemptive action seeks to protect song from claims by Marvin Gaye's estate, Funkadelic
Music copyright cases

- "The intent in producing 'Blurred Lines' was to evoke an era. In reality, the Gaye defendants are claiming ownership of an entire genre, as opposed to a specific work, and Bridgeport is claiming the same work."
Music copyright cases

- Many other cases, where similarities found not to be to original expression. Why?
- Popular music involves many constraints on creativity
  - Genre conventions
    - 12-tone scale
    - Standard chord progressions, e.g. I, IV, V
    - Standard melodic lines
- As a result, not get to the question of fair use, because that only arises when original expression taken.
Music copyright cases

- Music sampling takes original expression.
  - Courts have created the market for samples that limit scope of fair use.
  - Quotation is classic fair use.
    - Jazz musicians free to quote prior works in solos
    - Skeptical treatment of hip hop quotation by sample
Music copyright cases

- Sampling to parody is fair use
  - Campbell v. Acuff-Rose
  - But Weird Al chooses to license.
Creative License: The Law and Culture of Digital Sampling

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Illegal Art is a record label pushing the limits of sample-based music since 1998. We are comprised of artists such as Girl Talk, Junk Culture, Touch People, Okapi, People Like Us, The Bran Flakes, Steinksi, and more.

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About DJ Earworm

Basically, what I do is take a bunch of songs apart and put them back together again in a different way. I end up with tracks called mashups, which I post to this website.

I also DJ with my laptop.

If you're curious how this all works, I wrote a book on mashup construction.
Music copyright cases

- Divergence between fair use analysis of hip hop sampling and mash ups.
- Limits on what copyright owner owns plus ability to monetize uses of music in samples, ring tones, etc. gives fair use a more circumscribed role in cases involving new music using pre-existing music.
- Broader role for fair use when music is used in other media – e.g., documentary film.
Code of Best Practices in Fair Use for Online Video

centerforsocialmedia.org/remix

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