

# Music

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# Music

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Music copyright could be a course unto itself. Its doctrines bear the scars of a long and ambivalent history. As you read the chapter, keep three distinctions in mind: between musical works (think sheet music) and sound recordings (think CDs and MP3s), between reproducing a work and performing it, and between state and federal law. Copyright law has explored every possible variation and combination of the three. One does not simply walk into music copyright.

But first, a word on the music industry.

**Steve Albini**

***The Problem with Music***

Whenever I talk to a band who are about to sign with a major label, I always end up thinking of them in a particular context. I imagine a trench, about four feet wide and five feet deep, maybe sixty yards long, filled with runny, decaying shit. I imagine these people, some of them good friends, some of them barely acquaintances, at one end of this trench. I also imagine a faceless industry lackey at the other end holding a fountain pen and a contract waiting to be signed. Nobody can see what's printed on the contract. It's too far away, and besides, the shit stench is making everybody's eyes water. The lackey shouts to everybody that the first one to swim the trench gets to sign the contract. Everybody dives in the trench and they struggle furiously to get to the other end. Two people arrive simultaneously and begin wrestling furiously, clawing each other and dunking each other under the shit. Eventually, one of them capitulates, and there's only one contestant left. He reaches for the pen, but the Lackey says "Actually, I think you need a little more development. Swim again, please. Backstroke." And he does of course. ...

*The Balance Sheet: This is how much each player got paid at the end of the game.*

- Record company: \$ 710,000

References on music copyright and the music business include Al Kohn & Bob Kohn, *Kohn on Music Licensing*, Kohn and Donald S. Passman, *All You Need to Know About the Music Business*, Passman

(1993)

- Producer: \$ 90,000
- Manager: \$ 51,000
- Studio: \$ 52,500
- Previous label: \$ 50,000
- Agent: \$ 7,500
- Lawyer: \$ 12,000
- Band member net income each: \$ 4,031.25

The band is now  $\frac{1}{4}$  of the way through its contract, has made the music industry more than 3 million dollars richer, but is in the hole \$ 14,000 on royalties. The band members have each earned about  $\frac{1}{3}$  as much as they would working at a 7-11, but they got to ride in a tour bus for a month. The next album will be about the same, except that the record company will insist they spend more time and money on it. Since the previous one never “recouped,” the band will have no leverage, and will oblige. The next tour will be about the same, except the merchandising advance will have already been paid, and the band, strangely enough, won’t have earned any royalties from their T-shirts yet. Maybe the T-shirt guys have figured out how to count money like record company guys. Some of your friends are probably already this fucked.

## A Musical Works and Sound Recordings

Robert Brauneis

### *Musical Work Copyright for the Era of Digital Sound Technology*

Throughout history, plenty of music has been made and transmitted from generation to generation without written scores. Musicians working within what might be called folk traditions learn music by listening to performances and imitating them, often repeatedly with the guidance and corrections of a formal or informal teacher, until they have them more-or-less fixed in memory. At another extreme, mechanical musical devices, such as music boxes, musical clocks, and mechanical organs, have existed for centuries. Such musical automata make music without any human performance at all, and the musical patterns are fixed, not in written notation or human memory, but in physical arrangements such as pins placed on a barrel or perforations made on a disc.

During the nineteenth century and into the early decades of the twentieth century, however, the dominant model of musical practice cast music as a two-stage art, necessarily comprised of two fundamentally different activities: composition and performance. Composition was a deliberative activity that allowed rethinking and editing.

Its end product was a written score, a stable, visually perceptible set of prescriptions for musicians to follow. Scores virtually universally used a system of notation – Western staff or stave notation – which is mainly discrete: composers choose between an F and an F sharp, or between a quarter note and an eighth note, instead of setting pitches or durations along a continuum. However, staff notation typically indicates relative rather than absolute pitch and duration, and also gives inexact cues about matters such as dynamics (loudness), articulation (legato and staccato rendering of note sequences), timbre, and so on. Thus, it leaves room for – and requires – interpretive choices in performance.

Performance contrasts with composition in many respects. While a score is stable and visually perceptible, performance is unrepeatable, evanescent, and aural. While composition is a deliberative process that allows for trial-and-error editing, performance is a real-time, low-deliberation, no-editing activity.

As printing costs dropped and pianos proliferated in upper-middle class parlors around the country, printed musical scores began to play an important and profitable role in the dissemination of music into millions of homes. While some of those scores came from the European classical tradition, the biggest sellers were sheet music of popular songs, in simple arrangements that could be performed by a single amateur pianist-vocalist. Most of the music copyright litigation through the middle of the twentieth century was about such popular sheet music, and it is fair to say that the conception of music copyright held by several generations of judges was influenced by sheet music of that type.

#### **White-Smith Music Publishing Co. v. Apollo Co.**

209 U.S. 1 (1908)

The actions were brought to restrain infringement of the copyrights of two certain musical compositions, published in the form of sheet music, entitled, respectively, "Little Cotton Dolly" and "Kentucky Babe." The appellee, defendant below, is engaged in the sale of piano players and player pianos, known as the "Apollo," and of perforated rolls of music used in connection therewith.

Without entering into a detailed discussion of the mechanical construction of such instruments and rolls, it is enough to say that the musical rolls consist of perforated sheets, which are passed over ducts in such manner that the same are kept sealed until, by means of perforations in the rolls, air pressure is admitted to sound the notes. This is done with the aid of an operator, upon whose skill and experience the success of the rendition largely depends. As the roll is drawn, the effect is to produce the melody or tune for which the roll has been cut.

Musical compositions have been the subject of copyright protec-

tion since the statute of February 3, 1831, and laws have been passed including them since that time. The action was brought under the provisions of the copyright act, § 4952, giving to the author, inventor, designer or proprietor of any book, map, chart, dramatic or musical composition the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same.

What is meant by a copy? Various definitions have been given by the experts called in the case. The one which most commends itself to our judgment is perhaps as clear as can be made, and defines a copy of a musical composition to be "a written or printed record of it in intelligible notation." It may be true that in a broad sense a mechanical instrument which reproduces a tune copies it; but this is a strained and artificial meaning. When the combination of musical sounds is reproduced to the ear it is the original tune as conceived by the author which is heard. These musical tones are not a copy which appeals to the eye.

After all, what is the perforated roll? The fact is clearly established in the testimony in this case that even those skilled in the making of these rolls are unable to read them as musical compositions, as those in staff notation are read by the performer. It is true that there is some testimony to the effect that great skill and patience might enable the operator to read his record as he could a piece of music written in staff notation. But the weight of the testimony is emphatically the other way, and they are not intended to be read as an ordinary piece of sheet music, which to those skilled in the art conveys, by reading, in playing or singing, definite impressions of the melody.

These perforated rolls are parts of a machine which, when duly applied and properly operated in connection with the mechanism to which they are adapted, produce musical tones in harmonious combination. But we cannot think that they are copies within the meaning of the copyright act.

It may be true that the use of these perforated rolls, in the absence of statutory protection, enables the manufacturers thereof to enjoy the use of musical compositions for which they pay no value. But such considerations properly address themselves to the legislative and not to the judicial branch of the Government.

### Copyright Office

#### Federal Copyright Protection for Pre-1972 Sound Recordings

The 1909 Copyright Act, passed the following year, granted copyright owners of musical compositions rights with respect to mechanical reproductions of their compositions, for example, in records or piano rolls.

While the 1909 Act provided protection for copyright holders of musical compositions whose works were reproduced in sound

recordings, it included no explicit protection for sound recordings *per se*. As a result, over the subsequent decades the courts and the Copyright Office consistently refused to recognize copyright in sound recordings. In the absence of federal protection, states provided protection against duplication of sound recordings under common law theories, usually unfair competition or common law copyright.

The general copyright revision process became stalled in the late 1960s and early 1970s. Congress, persuaded that the situation concerning sound recordings was becoming urgent, decided to bring sound recordings under the federal copyright law without waiting for the overall revision. On November 15, 1971 it passed the Sound Recording Amendment, which for the first time made sound recordings eligible for federal copyright. The effective date of the Sound Recording Amendment was February 15, 1972, four months after it was passed. It applied to sound recordings first fixed on or after that date.

### Copyright Act

... Works of authorship include the following categories:

- (2) musical works, including any accompanying words;
- (7) sound recordings;

§ 102

*Subject matter of copyright; In general*

“Sound recordings” are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

§ 101

*Definitions*

**Lydia Pallas Loren**

### *Untangling the Web of Music Copyrights*

53 Case W. L. Rev. 637 (2003)

Currently, a sound recording embodies both the work that is protected by the sound recording copyright and the work that is protected by the musical work copyright. In copyright terms, the sound recording is a derivative work based on the musical work.

Courts have recognized that reproducing or publicly performing a derivative work also constitutes a reproduction or performance of the work, or works, on which the derivative work is based. In music, if a webcasting radio station wishes to utilize sound recordings of musical works, the station must obtain permission from both the sound recording copyright owners and the musical work copyright owners.

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To the extent that music copyright is divided between musical works and sound recordings, it becomes necessary to distinguish them and to allocate authorship between them.

### **Newton v. Diamond**

388 F.3d 1189 (9th Cir. 2004)

The plaintiff and appellant in this case, James W. Newton, is an accomplished avant-garde jazz flutist and composer. In 1978, he composed the song "Choir," a piece for flute and voice intended to incorporate elements of African-American gospel music, Japanese ceremonial court music, traditional African music, and classical music, among others. According to Newton, the song was inspired by his earliest memory of music, watching four women singing in a church in rural Arkansas. In 1981, Newton performed and recorded "Choir" and licensed all rights in the sound recording to ECM Records for \$5,000. The license covered only the sound recording, and it is undisputed that Newton retained all rights to the composition of "Choir." Sound recordings and their underlying compositions are separate works with their own distinct copyrights.

The defendants and appellees include the members of the rap and hip-hop group Beastie Boys, and their business associates. In 1992, Beastie Boys obtained a license from ECM Records to use portions of the sound recording of "Choir" in various renditions of their song "Pass the Mic" in exchange for a one-time fee of \$1,000. Beastie Boys did not obtain a license from Newton to use the underlying composition. Pursuant to their license from ECM Records, Beastie Boys digitally sampled the opening six seconds of Newton's sound recording of "Choir." Beastie Boys repeated or "looped" this six-second sample as a background element throughout "Pass the Mic," so that it appears over forty times in various renditions of the song.

The portion of the composition at issue consists of three notes, C—D flat—C, sung over a background C note played on the flute. The score to "Choir" also indicates that the entire song should be played in a "largo/senza-misura" tempo, meaning "slowly/without-measure."

Because the defendants were authorized to use the sound recording, our inquiry is confined to whether the unauthorized use of the composition itself was substantial enough to sustain an infringement claim. Therefore, we may consider only Beastie Boys' appropriation of the song's compositional elements and must remove from consideration all the elements unique to Newton's performance. Stated another way, we must "filter out" the licensed elements of the sound recording to get down to the unlicensed elements of the composition, as the composition is the sole basis for Newton's infringement claim.

In filtering out the unique performance elements from consideration, and separating them from those found in the composition, we



find substantial assistance in the testimony of Newton's own experts, [who] reveal the extent to which the sound recording of "Choir" is the product of Newton's highly developed performance techniques, rather than the result of a generic rendition of the composition. As a general matter, according to Newton's expert Dr. Christopher Dobrian, "the contribution of the performer is often so great that s/he in fact provides as much musical content as the composer." This is particularly true with works like "Choir," given the improvisational nature of jazz performance and the minimal scoring of the composition. Indeed, as Newton's expert Dr. Oliver Wilson explained:

The copyrighted score of "Choir", as is the custom in scores written in the jazz tradition, does not contain indications for all of the musical subtleties that it is assumed the performer-composer of the work will make in the work's performance. The function of the score is more mnemonic in intention than prescriptive.

And it is clear that Newton goes beyond the score in his performance. For example, Dr. Dobrian declared that "Mr. Newton blows and sings in such a way as to emphasize the upper partials of the flute's complex harmonic tone, although such a modification of tone color is not explicitly requested in the score." Dr. Dobrian also concludes that Newton "uses breath control to modify the timbre of the sustained flute note rather extremely" and "uses portamento to glide expressively from one pitch to another in the vocal part." Dr. Dobrian concedes that these elements do not appear in the score, and that they are part of Newton's performance of the piece.

A crucial problem with the testimony of Newton's experts is that they continually refer to the "sound" produced by the "Newton technique." A sound is protected by copyright law only when it is "fixed in a tangible medium." 17 U.S.C. § 102(a). Here, the only time any sound was fixed in a tangible medium was when a particular performance was recorded. Newton's copyright extends only to the elements that he fixed in a tangible medium – those that he wrote on the score. Thus, regardless of whether the average audience might recognize the "Newton technique" at work in the sampled sound recording, those performance elements are beyond consideration in Newton's claim for infringement of his copyright in the underlying composition.

On the undisputed facts of this record, no reasonable juror could find the sampled portion of the composition to be a quantitatively or qualitatively significant portion of the composition as a whole. Quantitatively, the three-note sequence appears only once in Newton's composition. When played, the segment lasts six seconds and

The court seems to be either assuming or asserting that Newton's *musical work* copyright is coextensive with what is in the *written score*. Is that right? Note that musical works can be fixed in sheet music, in phonorecords, or as part of an audiovisual work (e.g. a movie), and the Copyright Office will allow any of these to be used as a deposit copy. See Copyright Compendium § 1509.2(A) (3d ed. 2014). Would Newton have been better off never writing out sheet music for "Choir" at all?

is roughly two percent of the four-and-a-half-minute "Choir" sound recording licensed by Beastie Boys. Qualitatively, this section of the composition is no more significant than any other section. Indeed, with the exception of two notes, the entirety of the scored portions of "Choir" consist of notes separated by whole and half-steps from their neighbors and is played with the same technique of singing and playing the flute simultaneously; the remainder of the composition calls for sections of improvisation that range between 90 and 180 seconds in length.

On the undisputed facts of this case, we conclude that an average audience would not discern Newton's hand as a composer, apart from his talent as a performer, from Beastie Boys' use of the sample. The copying was not significant enough to constitute infringement.

## B Reproductions

### 1 Musical Works

The ordinary rules of copyright mostly apply to the reproduction right in musical works. The notable exception is the statutory "cover version" license in § 115 that allows others to record and sell sound recordings if they pay a fixed royalty to the copyright owner of the musical work.

#### Copyright Act

- (1) When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person ... may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. ...
- (2) A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

Subject to the provisions of this chapter, the functions of the Copyright Royalty Judges shall be as follows:

- (1) To make determinations and adjustments of reasonable terms and rates of royalty payments as provided in sections 112(e), 114, 115, 116, 118, 119, and 1004. The rates applicable under

For historical reasons -- which you can probably guess -- these licenses are known as "mechanicals."

#### § 115(a)

*Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords*

#### § 801(b)

*Copyright Royalty Judges; appointment and functions*

The judges are commonly referred to as the "Copyright Royalty Board" or CRB.

sections 114(f)(1)(B), 115, and 116 shall be calculated to achieve the following objectives:

- (A) To maximize the availability of creative works to the public.
- (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.
- (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
- (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

### Code of Federal Regulations

- (a) *Physical phonorecord deliveries and permanent digital downloads.* – For every physical phonorecord and permanent digital download made and distributed, the royalty rate payable for each work embodied in such phonorecord shall be either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.
- (b) *Ringtones.* – For every ringtone made and distributed, the royalty rate payable for each work embodied therein shall be 24 cents.

37 C.F.R. § 385.3 (2015)  
Royalty rates for making and distributing phonorecords.

### Lydia Pallas Loren *Untangling the Web of Music Copyrights*

53 Case W. L. Rev. 637 (2003)

Most creators of phonorecords do not use the compulsory license mechanism to obtain permission to use musical works. In 1927 the National Music Publishers Company created the Harry Fox Agency, a wholly owned subsidiary, to issue and administer mechanical licenses. Today, most mechanical licenses are obtained through the Harry Fox Agency. The Harry Fox Agency has authority to issue licenses only for those musical works for which Harry Fox has been granted authority by the copyright owner to act on the copyright owner's behalf. However, the number of copyright owners that have entered into such agreements is staggering: Harry Fox represents over 27,000 music publishers, who in turn represent the interests of more than 160,000 songwriters, who own more than 2.5 million copy-

Harry Fox is now owned by SESAC, one of the performing rights organizations discussed below.

righted musical works.

While the creators of most sound recordings do not utilize the statutory provisions for the compulsory mechanical license, the availability of such a license does affect the rate paid under a license granted by Harry Fox and the terms of the license. The parties to the licenses administered by Harry Fox are negotiating in the shadow of the compulsory license that both parties know could be used instead. Thus, for example, it is rare that the agreed license rate exceeds the rate set by the Copyright Office.

512 F.3d 522 (9th Cir. 2008)

### **Leadsinger, Inc. v. BMG Music Pub.**

Karaoke devices necessarily involve copyrighted works because both musical compositions and their accompanying song lyrics are essential to their operation. BMG owns or administers copyrights in musical compositions and through its licensing agent, the Harry Fox Agency, has issued to Leadsinger compulsory mechanical licenses to copyrighted musical compositions under § 115 of the Copyright Act. In addition to the mechanical fee required to secure a compulsory license, BMG has demanded that Leadsinger and other karaoke companies pay a "lyric reprint" fee and a "synchronization fee." Leadsinger has refused to pay these additional fees and filed for declaratory judgment to resolve whether it has the right to visually display song lyrics in real time with song recordings without holding anything more than the § 115 compulsory licenses it already possesses.

Why a fee for printing lyrics? Does this demand make more sense if you remember that recorded music used to be primarily distributed on black plastic discs in cardboard sleeves?

In its complaint, Leadsinger describes the karaoke device it manufactures as "an all-in-one microphone player" that has recorded songs imbedded in a microchip in the microphone. When the microphone is plugged into a television, the lyrics of the song appear on the television screen in real time as the song is playing, enabling the consumer to sing along with the lyrics. Though most karaoke companies put their recordings on cassettes, compact discs, or use a compact disc + graphic ("CD + G") or DVD format, these other karaoke devices, much like Leadsinger's, display lyrics visually when played in a device that is connected to a television.

While it is true that the microchip in Leadsinger's device stores visual images and visual representations of lyrics in addition to sounds, the plain language of the Copyright Act does not expressly preclude a finding that devices on which sounds and visual images are fixed fall within the definition of phonorecords. The definition of phonorecords is explicit, however, that audiovisual works are not phonorecords and are excluded from § 115's compulsory licensing scheme. We need not settle upon a precise interpretation of § 101's definition of phonorecords in this case because Leadsinger's karaoke device meets each element of the statutory definition of audiovisual works and, therefore, cannot be a phonorecord.

As stated above, § 101 of the Copyright Act defines audiovisual works as works consisting of “a series of related images” that are “intrinsicly intended to be shown by the use of machines.” First, the visual representation of successive portions of song lyrics that Leadsinger’s device projects onto a television screen constitutes “a series of related images.” Though Leadsinger suggests that its images of song lyrics are not related, the images bear a significant relationship when examined in context. In its complaint, Leadsinger explained that the purpose of karaoke is for the consumer to sing the lyrics to a song “in real time” as the song is playing. To accomplish this purpose, it is necessary that the images of song lyrics be presented sequentially so as to match the accompanying music and make the lyrics readable.

We hold that Leadsinger’s device falls within the definition of an audiovisual work. As a result, in addition to any § 115 compulsory licenses necessary to make and distribute phonorecords, Leadsinger is also required to secure synchronization licenses to display images of song lyrics in timed relation with recorded music.

## 2 Sound Recordings

### Copyright Act

The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are re-arranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.

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Everyone agrees that under § 114(b), reproductions of sound recordings are to be judged by a different standard of similarity than other types of works. But they disagree on what that standard is.

### Bridgeport Music, Inc. v. Dimension Films

This action arises out of the use of a sample from the composition and sound recording “Get Off Your Ass and Jam” (“Get Off”) in the

“Timed relation” is the crucial operative phrase of the typical “synchronization license” used to license a musical work for use in a movie, television show, or other audiovisual work. The phrase is not in the Copyright Act, but a little thought about the nature of musical and audiovisual works shows why the element of timing is key. The standard phrase used to describe the analogous license for the use of a sound recording as part of an audiovisual work is a “master use license” -- the idea being that the copyright owner allows the licensee to use the “master” recordings, from which the copies sold commercially are made. The phrase is mildly anachronistic in an age of digital production.

17 U.S.C. § 114(b)

*Scope of exclusive rights in sound recordings*

410 F.3d 792 (6th Cir. 2005)



rap song "100 Miles and Runnin'" ("100 Miles"), which was included in the sound track of the movie *I Got the Hook Up* (*Hook Up*). The recording "Get Off" opens with a three-note combination solo guitar "riff" that lasts four seconds. According to one of plaintiffs' experts, Randy Kling, the recording "100 Miles" contains a sample from that guitar solo. Specifically, a two-second sample from the guitar solo was copied, the pitch was lowered, and the copied piece was "looped" and extended to 16 beats. Kling states that this sample appears in the sound recording "100 Miles" in five places; specifically, at 0:49, 1:52, 2:29, 3:20 and 3:46. By the district court's estimation, each looped segment lasted approximately 7 seconds.

Bridgeport and Westbound claim to own the musical composition and sound recording copyrights in "Get Off Your Ass and Jam" by George Clinton, Jr. and the Funkadelics. We assume, as did the district court, that plaintiffs would be able to establish ownership in the copyrights they claim. There seems to be no dispute either that "Get Off" was digitally sampled or that the recording "100 Miles" was included on the sound track of *I Got the Hook Up*.

Although musical compositions have always enjoyed copyright protection, it was not until 1971 that sound recordings were subject to a separate copyright. If one were to analogize to a book, it is not the book, i.e., the paper and binding, that is copyrightable, but its contents. There are probably any number of reasons why the decision was made by Congress to treat a sound recording differently from a book even though both are the medium in which an original work is fixed rather than the creation itself. None the least of them certainly were advances in technology which made the "pirating" of sound recordings an easy task. The balance that was struck was to give sound recording copyright holders the exclusive right "to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording." This means that the world at large is free to imitate or simulate the creative work fixed in the recording so long as an actual copy of the sound recording itself is not made. That leads us directly to the issue in this case. If you cannot pirate the whole sound recording, can you "lift" or "sample" something less than the whole. Our answer to that question is in the negative.

To begin with, there is ease of enforcement. Get a license or do not sample. We do not see this as stifling creativity in any significant way. It must be remembered that if an artist wants to incorporate a "riff" from another work in his or her recording, he is free to duplicate the sound of that "riff" in the studio. Second, the market will control the license price and keep it within bounds. The sound recording copyright holder cannot exact a license fee greater than what it would cost the person seeking the license to just duplicate the sample in the

course of making the new recording. Third, sampling is never accidental. It is not like the case of a composer who has a melody in his head, perhaps not even realizing that the reason he hears this melody is that it is the work of another which he had heard before. When you sample a sound recording you know you are taking another's work product.<sup>12</sup>

This analysis admittedly raises the question of why one should, without infringing, be able to take three notes from a musical composition, for example, but not three notes by way of sampling from a sound recording. Why is there no *de minimis* taking or why should substantial similarity not enter the equation. Our first answer to this question is what we have earlier indicated. We think this result is dictated by the applicable statute. Second, even when a small part of a sound recording is sampled, the part taken is something of value. No further proof of that is necessary than the fact that the producer of the record or the artist on the record intentionally sampled because it would (1) save costs, or (2) add something to the new recording, or (3) both. For the sound recording copyright holder, it is not the "song" but the sounds that are fixed in the medium of his choice. When those sounds are sampled they are taken directly from that fixed medium. It is a physical taking rather than an intellectual one.

This case also illustrates the kind of mental, musicological, and technological gymnastics that would have to be employed if one were to adopt a *de minimis* or substantial similarity analysis. The district judge did an excellent job of navigating these troubled waters, but not without dint of great effort. When one considers that he has hundreds of other cases all involving different samples from different songs, the value of a principled bright-line rule becomes apparent.

### VMG Salsoul, LLC v. Ciccone

824 F.3d 871 (9th Cir. 2016)

In the early 1990s, pop star Madonna Louise Ciccone, commonly known by her first name only, released the song *Vogue* to great commercial success. In this copyright infringement action, Plaintiff VMG Salsoul, LLC, alleges that the producer of *Vogue*, Shep Pettibone, copied a 0.23-second segment of horns from an earlier song, known as *Love Break*, and used a modified version of that snippet when recording *Vogue*. Plaintiff asserts that Defendants Madonna, Pettibone, and others thereby violated Plaintiff's copyrights to *Love Break*.

Plaintiff has submitted evidence of actual copying. In particular, Tony Shimkin has sworn that he, as Pettibone's personal assistant, helped with the creation of *Vogue* and that, in Shimkin's presence,

<sup>12</sup>The opinion in *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991), one of the first cases to deal with digital sampling, begins with the phrase, "Thou shalt not steal."



Pettibone directed an engineer to introduce sounds from Love Break into the recording of Vogue. Additionally, Plaintiff submitted reports from music experts who concluded that the horn hits in Vogue were sampled from Love Break.

Plaintiff argues that even if the copying here is trivial, that fact is irrelevant because the de minimis exception does not apply to infringements of copyrighted sound recordings. Plaintiff urges us to follow the Sixth Circuit's decision in *Bridgeport*, which adopted a brightline rule: For copyrighted sound recordings, any unauthorized copying – no matter how trivial – constitutes infringement.

We squarely held in *Newton* that the de minimis exception applies to claims of infringement of a copyrighted composition. But it is an open question in this circuit whether the exception applies to claims of infringement of a copyrighted sound recording.

A straightforward reading of the third sentence in S 114(b) reveals Congress' intended limitation on the rights of a sound recording copyright holder: A new recording that mimics the copyrighted recording is not an infringement, even if the mimicking is very well done, so long as there was no actual copying. That is, if a band played and recorded its own version of Love Break in a way that sounded very similar to the copyrighted recording of Love Break, then there would be no infringement so long as there was no actual copying of the recorded Love Break. But the quoted passage does not speak to the question that we face: whether Congress intended to eliminate the longstanding de minimis exception for sound recordings in all circumstances even where, as here, the new sound recording as a whole sounds nothing like the original.

We disagree [with *Bridgeport*'s "physical taking" analysis] for three reasons. First, the possibility of a "physical taking" exists with respect to other kinds of artistic works as well, such as photographs, as to which the usual de minimis rule applies. See, e.g., *Sandoval v. New Line Cinema Corp.* (affirming summary judgment to the defendant because the defendant's use of the plaintiff's photographs in a movie was de minimis). A computer program can, for instance, "sample" a piece of one photograph and insert it into another photograph or work of art. We are aware of no copyright case carving out an exception to the de minimis requirement in that context, and we can think of no principled reason to differentiate one kind of "physical taking" from another. Second, even accepting the premise that sound recordings differ qualitatively from other copyrighted works and therefore could warrant a different infringement rule, that theoretical difference does not mean that Congress actually adopted a different rule. Third, the distinction between a "physical taking" and an "intellectual one," premised in part on "saving costs" by not having to hire musicians, does not advance the Sixth Circuit's view. The

*Sandoval*: 147 F.3d 215 (2d Cir. 1998)

Supreme Court has held unequivocally that the Copyright Act protects only the expressive aspects of a copyrighted work, and not the “fruit of the [author’s] labor.” *Feist*. Indeed, the Supreme Court in *Feist* explained at length why, though that result may seem unfair, protecting only the expressive aspects of a copyrighted work is actually a key part of the design of the copyright laws. Accordingly, all that remains of *Bridgport’s* argument is that the second artist has taken some expressive content from the original artist. But that is always true, regardless of the nature of the work, and the de minimis test nevertheless applies.

We hold that the “de minimis” exception applies to actions alleging infringement of a copyright to sound recordings.

## C Performances

If the only quirk of music copyright were the division between composition and performance, there would be no need for this chapter. Other arts also routinely distinguish between source text and performance: theater, dance, television, and film all routinely split authorship between writer and performer. But music copyright is unique in the degree to which reproduction and performance are governed by startlingly different rules. So we start with a quick hit on the technical difference between reproduction and performance according to the Copyright Act.

### **United States v. American Society of Composers, Authors, and Publishers**

Yahoo! and RealNetworks offer their customers the ability to download musical works over the Internet. It is undisputed that these downloads create copies of the musical works, for which the parties agree the copyright owners must be compensated. However, the parties dispute whether these downloads are also public performances of the musical works, for which the copyright owners must separately and additionally be compensated. The district court held that these downloads are not public performances, and we agree.

The downloads at issue in this appeal are not musical performances that are contemporaneously perceived by the listener. They are simply transfers of electronic files containing digital copies from an on-line server to a local hard drive. The downloaded songs are not performed in any perceptible manner during the transfers; the user must take some further action to play the songs after they are downloaded. Because the electronic download itself involves no recitation, rendering, or playing of the musical work encoded in the digital transmission, we hold that such a download is not a performance of that work, as defined by § 101.

On performances and copyright, see generally Rebecca Tushnet, *Performance Anxiety: Copyright Embodied and Disembodied*, 60 J. Copyright Soc’y 209 (2013); Michael W. Carroll, *Copyright’s Creative Hierarchy in the Performing Arts*, 14 Vand. J. Ent. & Tech. L. 797 (2012).

627 F.3d 64 (2d Cir. 2010)

Some podcasting apps let you start listening to an episode before it is completely downloaded. Reproduction, performance, or both?

The Internet Companies' stream[ing] transmissions, which all parties agree constitute public performances, illustrate why a download is not a public performance. A stream is an electronic transmission that renders the musical work audible as it is received by the client-computer's temporary memory. This transmission, like a television or radio broadcast, is a performance because there is a playing of the song that is perceived simultaneously with the transmission. In contrast, downloads do not immediately produce sound; only after a file has been downloaded on a user's hard drive can he perceive a performance by playing the downloaded song. Unlike musical works played during radio broadcasts and stream transmissions, downloaded musical works are transmitted at one point in time and performed at another. Transmittal without a performance does not constitute a public performance.

## 1 Musical Works

The general rule is that permission of the copyright owner is required to perform a musical work. But in practice, most uses – including broadcasting – are covered by a blanket license issued by one of the "performing rights organizations" (PROs): ASCAP, BMI, and SESAC. Musical-work copyright owners sign up with one of the three PROs, if they wish, which then issues public-performance licenses for all of the works in its "repertory," i.e., one license allows the licensee to perform any musical work available through that PRO. The copyright owners still control the licensing of their other rights, and they are free to negotiate public-performance licenses individually as well. We first discuss the scope of public-performance rights in musical works, then focus on the role of the PROs, and finish with a few miscellaneous cases: jukeboxes and music stores.

### a Broadcasting and Receiving

#### **Buck v. Jewell-LaSalle Realty Co.**

These suits were brought in the federal court for western Missouri by the American Society of Composers, Authors and Publishers, and one of its members, against the Jewell-LaSalle Realty Company, which operates the LaSalle Hotel at Kansas City. The hotel maintains a master radio receiving set which is wired to each of the public and private rooms. As part of the service offered to its guests, loud-speakers or head-phones are provided so that a program received on the master set can, if desired, be simultaneously heard throughout the building. Among the programs received are those transmitted by Wilson Duncan who operates a duly licensed commercial broadcasting station in the same city. Duncan selects his own programs and broadcasts

them for profit. There is no arrangement of any kind between him and the hotel. Both were notified by the plaintiff society of the existence of its copyrights and were advised that unless a license were obtained, performance of any copyrighted musical composition owned by its members was forbidden. Thereafter, a copyrighted popular song, owned by the plaintiffs, was repeatedly broadcast by Duncan and was received by the hotel company and made available to its guests.

Although the art of radio broadcasting was unknown at the time the Copyright Act of 1909 was passed, and the means of transmission and reception now employed are wholly unlike any then in use, it is not denied that such broadcasting may be within the scope of the Act. The argument here urged, however, is that since the transmitting of a musical composition by a commercial broadcasting station is a public performance for profit, control of the initial radio rendition exhausts the monopolies conferred – both that of making copies (including records) and that of giving public performances for profit (including mechanical performances from a record); and that a monopoly of the reception, for commercial purposes, of this same rendition is not warranted by the Act. The analogy is invoked of the rule under which an author who permits copies of his writings to be made cannot, by virtue of his copyright, prevent or restrict the transfer of such copies. *Compare Bobbs-Merrill*. This analogy is inapplicable. It is true that control of the sale of copies is not permitted by the Act, but a monopoly is expressly granted of all public performances for profit.

The defendant next urges that it did not perform, because there can be but one actual performance each time a copyrighted selection is rendered; and that if the broadcaster is held to be a performer, one who, without connivance, receives and distributes the transmitted selection cannot also be held to have performed it. But nothing in the Act circumscribes the meaning to be attributed to the term "performance," or prevents a single rendition of a copyrighted selection from resulting in more than one public performance for profit. While this may not have been possible before the development of radio broadcasting, the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured to the composer. No reason is suggested why there may not be more than one liability. And since the public reception for profit in itself constitutes an infringement, we have no occasion to determine under what circumstances a broadcaster will be held to be a performer, or the effect upon others of his paying a license fee.

### Copyright Act

17 U.S.C. § 110  
*Limitations on exclusive rights: Exemption of certain performances and displays*

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

- (5) (A) except as provided in subparagraph (B), communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless
- (i) a direct charge is made to see or hear the transmission; or
  - (ii) the transmission thus received is further transmitted to the public;

(B) allows "establishments," i.e. businesses open to the public, of less than 2,000ft<sup>2</sup> (3,750ft<sup>2</sup> for restaurants and bars) to play the musical works in radio and TV broadcasts using any equipment. Larger establishments can use up to 6 loudspeakers or 4 screens of no more than 55".

## b The Performing Rights Organizations

### **Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.**

441 U.S. 1 (1979)

Since 1897, the copyright laws have vested in the owner of a copyrighted musical composition the exclusive right to perform the work publicly for profit, but the legal right is not self-enforcing. In 1914, Victor Herbert and a handful of other composers organized ASCAP because those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that as a practical matter it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses. ASCAP was organized as a "clearing-house" for copyright owners and users to solve these problems associated with the licensing of music. As ASCAP operates today, its 22,000 members grant it nonexclusive rights to license nondramatic performances of their works, and ASCAP issues licenses and distributes royalties to copyright owners in accordance with a schedule reflecting the nature and amount of the use of their music and other factors.

BMI, a nonprofit corporation owned by members of the broadcasting industry, was organized in 1939, is affiliated with or represents some 10,000 publishing companies and 20,000 authors and composers, and operates in much the same manner as ASCAP. Almost every domestic copyrighted composition is in the repertory either of ASCAP, with a total of three million compositions, or of BMI, with one million.

Both organizations operate primarily through blanket licenses, which give the licensees the right to perform any and all of the compositions owned by the members or affiliates as often as the licensees desire for a stated term. Fees for blanket licenses are ordinarily a percentage of total revenues or a flat dollar amount, and do not directly depend on the amount or type of music used. Radio and television broadcasters are the largest users of music, and almost all of them



hold blanket licenses from both ASCAP and BMI.

The complaint filed by CBS charged various violations of the Sherman Act and the copyright laws. CBS argued that ASCAP and BMI are unlawful monopolies and that the blanket license is illegal price fixing, an unlawful tying arrangement, a concerted refusal to deal, and a misuse of copyrights.

The Department of Justice first investigated allegations of anti-competitive conduct by ASCAP over 50 years ago. In separate complaints in 1941, the United States charged that the blanket license, which was then the only license offered by ASCAP and BMI, was an illegal restraint of trade and that arbitrary prices were being charged as the result of an illegal copyright pool. The Government sought to enjoin ASCAP's exclusive licensing powers and to require a different form of licensing by that organization. The case was settled by a consent decree that imposed tight restrictions on ASCAP's operations. Following complaints relating to the television industry, successful private litigation against ASCAP by movie theaters, and a Government challenge to ASCAP's arrangements with similar foreign organizations, the 1941 decree was reopened and extensively amended in 1950.

Under the amended decree, which still substantially controls the activities of ASCAP, members may grant ASCAP only nonexclusive rights to license their works for public performance. Members, therefore, retain the rights individually to license public performances, along with the rights to license the use of their compositions for other purposes. ASCAP itself is forbidden to grant any license to perform one or more specified compositions in the ASCAP repertory unless both the user and the owner have requested it in writing to do so. ASCAP is required to grant to any user making written application a nonexclusive license to perform all ASCAP compositions, either for a period of time or on a per-program basis. ASCAP may not insist on the blanket license, and the fee for the per-program license, which is to be based on the revenues for the program on which ASCAP music is played, must offer the applicant a genuine economic choice between the per-program license and the more common blanket license. If ASCAP and a putative licensee are unable to agree on a fee within 60 days, the applicant may apply to the District Court for a determination of a reasonable fee, with ASCAP having the burden of proving reasonableness.

CBS would prefer that ASCAP be authorized, indeed directed, to make all its compositions available at standard per-use rates within negotiated categories of use. But if this in itself or in conjunction with blanket licensing constitutes illegal price fixing by copyright owners, CBS urges that an injunction issue forbidding ASCAP to issue any blanket license or to negotiate any fee except on behalf of an individ-

ual member for the use of his own copyrighted work or works. Thus, we are called upon to determine that blanket licensing is unlawful across the board. We are quite sure, however, that the per se rule does not require any such holding.

The blanket license, as we see it, is not a naked restraint of trade with no purpose except stifling of competition, but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use. As we have already indicated, ASCAP and the blanket license developed together out of the practical situation in the marketplace: thousands of users, thousands of copyright owners, and millions of compositions. Most users want unplanned, rapid, and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. Indeed, as both the Court of Appeals and CBS recognize, the costs are prohibitive for licenses with individual radio stations, nightclubs, and restaurants, and it was in that milieu that the blanket license arose. ASCAP, in short, made a market in which individual composers are inherently unable to compete fully effectively.

With this background in mind, which plainly enough indicates that over the years, and in the face of available alternatives, the blanket license has provided an acceptable mechanism for at least a large part of the market for the performing rights to copyrighted musical compositions, we cannot agree that it should automatically be declared illegal in all of its many manifestations.

### ASCAP 2010 Radio Station License Agreement

Available on the ASCAP website

**1**  
*Term*

The term of this Agreement commences as of January 1, 2010, and ends on December 31, 2016, unless earlier terminated as hereinafter provided.

**2**  
*Definitions.*

A. "ASCAP Repertory" means musical works for which ASCAP has the right to license for public performance now or hereafter during the term of this Agreement. All compositions written and copyrighted by ASCAP members and in the repertory on the date this Agreement is executed are included for the full term of this Agreement. Compositions written or copyrighted by ASCAP members during the license term are included for the full balance of the term.

**3.**  
*ASCAP Grant of Rights and Limitations.*



- A. ASCAP grants LICENSEE a non-exclusive Through-to-the-Audience License to perform publicly in the U.S. Territory, by Radio Broadcasting or New Media Transmissions, non-dramatic performances of all musical works in the ASCAP Repertory during the Term.
- B. If you elect to pay a license fee on the blanket basis for your Radio Broadcasting, subject to the election provisions of Paragraphs 6.A and 6.B below, you agree to pay us a license fee of 1.7% of your Revenue Subject to Fee from Radio Broadcasting for each year 2012 through 2016 of the Agreement.
- G. Minimum Fee. In no event shall your total annual license fee be less than \$588.
- H. Annual Reports. You will submit a report of the license fee due for each year 2012 through 2016 of this Agreement, by April 1st of the following year, by fully completing the Statement of Account that will be made available on ASCAP's website. For the avoidance of any doubt, all Annual Reports must be submitted using the electronic format and Internet-based delivery transmission methodology to be developed by ASCAP.

A "through-to-the-audience" license is defined in the ASCAP consent judgment: it covers each intermediary in privity with LICENSEE until the transmission reaches its audience.

**4.**  
*License Fee; Minimum Fee; Taxes. ...*

**Range Road Music, Inc. v. East Coast Foods, Inc.**

East Coast owns and operates the Roscoe's House of Chicken and Waffles chain of restaurants in Southern California. The co-defendant, Herbert Hudson, is the sole officer and director of East Coast.

The Long Beach Roscoe's opened in 2001. Attached to the restaurant is a bar and lounge area called the "Sea Bird Jazz Lounge." Though the parties dispute whether East Coast owns the Long Beach Roscoe's, as it does the other locations, Hudson submitted a signed liquor license application for the Long Beach Roscoe's to the California Department of Alcoholic Beverage Control in 2001, which named the applicant as "East Coast Foods Inc."

Shortly after the Long Beach Roscoe's opened, ASCAP contacted East Coast to offer it a license to perform music by ASCAP members at the restaurant and lounge. East Coast did not purchase a license, and between 2001 and 2007 East Coast ignored repeated requests from ASCAP to pay licensing fees. In 2008, ASCAP engaged an independent investigator, Scott Greene, to visit the Long Beach Roscoe's, make notes of his visit, and prepare a detailed investigative report indicating whether copyright infringement was occurring at the venue. Greene, who considers himself knowledgeable about every genre of music "except heavy metal and explicit rap," had conducted over 300 investigations for ASCAP when he was retained for the Roscoe's job.

668 F.3d 1148 (9th Cir. 2012)

Greene visited Roscoe's on May 30, 2008. During his visit, he surreptitiously noted the musical compositions performed by that night's live musical act, Azar Lawrence & the L.A. Legends, as well as songs played from a CD over the lounge's sound system. During the live performance, he was able to personally identify the jazz compositions "All or Nothing at All," "It's Easy To Remember," "My Favorite Things," and "Be-Bop," all popularly associated with John Coltrane. In several cases, the band leader announced the titles of the songs before playing them. Greene also identified four songs by the jazz-fusion group Hiroshima that played on the venue's CD player: "Bop-Hop," "Once Before I Sleep," "One Fine Day," and "Only Love." He did not personally recognize the Hiroshima songs, but he approached the CD player and transcribed the titles directly from the CD jewel case as the songs played.

After Greene submitted his investigative report, ASCAP confirmed that the Music Companies own validly registered copyrights to all eight of the songs Greene identified. The Music Companies sued East Coast and Hudson for eight counts of copyright infringement, corresponding to the eight songs Greene heard publicly performed at the Long Beach Roscoe's.

We agree with the district court that East Coast and Hudson are jointly and severally liable for the infringement. Overwhelming evidence showed that East Coast and Hudson exercised control over both the Long Beach Roscoe's and the Sea Bird Jazz Lounge, and derived a financial benefit from the musical performances in the lounge.

### **Robert Stigwood Grp., Ltd. v. Sperber**

457 F.2d 50 (2d Cir. 1972)

Timothy Rice wrote the libretto for *Jesus Christ Superstar* and Andrew Lloyd Webber composed the score of the opera's overture and 22 songs which depict the last seven days in the life of Christ. The Robert Stigwood Group Limited ("Stigwood") acquired the rights for stage productions and dramatic presentations of the opera, and its rights are those allegedly infringed.

Each Original American Touring Company ("OATC") so-called concert consists of 20 of the 23 songs from *Jesus Christ Superstar*, sung sequentially with one exception, and three additional religious works.

OATC's claim that its productions do not infringe Stigwood's rights is based upon the usual and customary agreement between the American Society of Composers, Authors and Publishers ("ASCAP") and Leeds Music Corporation, an ASCAP member. ASCAP is authorized by its members to license only nondramatic performing rights of compositions in its repertory. Consequently, pursuant to the standard ASCAP agreement utilized here, ASCAP was authorized by

Leeds to give:

1. (b) The non-exclusive right of public performance of the separate numbers, songs, fragments or arrangements, melodies or selections forming part or parts of musical plays and dramatico-musical compositions, the Owner reserving and excepting from this grant the right of performance of musical plays and dramatico-musical compositions in their entirety, or any part of such plays or dramatico-musical compositions on the legitimate stage.

Thus, while ASCAP licensees can perform the individual songs from *Jesus Christ Superstar*, paragraph 3 of the standard license indicates that it does not extend to presentations of:

- (a) Oratorios, choral, operatic, or dramatico-musical works . . . in their entirety or songs or other excerpts from operas or musical plays accompanied either by word, pantomime, dance or visual representation of the work from which the music is taken; but fragments or instrumental selections from such works may be instrumentally rendered without words, dialogue, costume, accompanying dramatic action or scenic accessory and unaccompanied by any stage action or visual representation (by motion picture or otherwise) of the work of which such music forms a part.

The facts before us vividly paint the dramatic nature of OATC's performance. 20 of 23 *Superstar* selections are performed in defendant's concert, all but one in identical sequence as in the copyrighted opera. The conclusion is inescapable that the story of the last seven days in the life of Christ is portrayed in the OATC performances substantially as in *Superstar*. One might appropriately ask why, if OATC did not intend that the same story be told, would it insist on preserving the sequence of the songs presented in *Jesus Christ Superstar*, which when performed in that fashion, tell the story even in the absence of intervening dialogue? As *Rice v. American Program Bureau* instructed, the lack of scenery or costumes in the OATC production does not ipso facto prevent it from being dramatic. Indeed, radio performances of operas are considered dramatic, because the story is told by the music and lyrics. here can be no question that the OATC concerts, in which singers enter and exit, maintain specific roles and occasionally make gestures, and in which the story line of the original play is preserved by the songs. How does the court know that the full "score" of *Jesus Christ Superstar* takes 87 minutes to perform? Won't it depend on the performers? which are sung in almost perfect sequence using 78 of the 87 minutes of the original copyrighted score, is dramatic.

Does this language, and how the court interprets it, tell us anything useful about when a musical work is "nondramatic" within the meaning of the 1976 Copyright Act?

In industry parlance, OATC needed "grand rights" -- a license for a dramatic performance -- but ASCAP and other PROs only issue "small rights" -- licenses for nondramatic performances.

*Rice*: 446 F.2d 685 (2d Cir. 1971)

## c Miscellaneous

### Copyright Act

#### § 116(b)(1)

*Negotiated licenses for public performances by means of coin-operated phonorecord players*

Any owners of copyright in [any nondramatic musical work embodied in a phonorecord] and any operators of coin-operated phonorecord players may negotiate and agree upon the terms and rates of royalty payments for the performance of such works and the proportionate division of fees paid among copyright owners, and may designate common agents to negotiate, agree to, pay, or receive such royalty payments.

From the JLO website

### History of the Jukebox License Office

Before 1978, "coin-operated phonorecord players," commonly referred to as jukeboxes, generally were not licensed by ASCAP, BMI, SESAC or the U.S. Government. However, due to revisions of the Copyright Law, a provision was included for a compulsory license from the U.S. Copyright Office for any publicly performed non-dramatic musical works by means of a "coin-operated phonorecord player" (jukebox). This act was placed into effect in 1978. At that time jukebox operators submitted payments to the Licensing Division of the U.S. Copyright Office in Washington D.C. Fees were structured on a flat per-box rate.

Berne's strong preference for negotiated licenses is reflected in the current § 116.

In 1989, the United States joined an international copyright treaty named the Berne Convention. One aspect of the Berne Convention is to offer "negotiated" licenses as opposed to "compulsory" licenses. Consequently, ASCAP, BMI and SESAC negotiated a license with the Amusement & Music Operators Association (AMOA), the largest trade association representing jukebox operators.

The result of these negotiations was the 1990 creation of the Jukebox License Office (JLO) and the Jukebox License Agreement, which is administered by the JLO. This agreement provides jukebox operators total access to all songs in the ASCAP, BMI and SESAC repertoires. The Jukebox License Agreement is a single, economical, music license that provides the authorization required under the U.S. Copyright Law to publicly play virtually every copyrighted song on a coin-operated jukebox.

The original Jukebox License Agreement was re-negotiated by ASCAP, BMI, SESAC and the AMOA in 1999 and again in 2001. A new Jukebox License Agreement is now in effect as of January 1, 2007.

#### 17 U.S.C. § 110

*Limitations on exclusive rights: Exemption of certain performances and displays*

### Copyright Act

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

- (7) performance of a nondramatic musical work by a vending establishment open to the public at large without any direct or indirect admission charge, where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work, or of the audiovisual or other devices utilized in such performance, and the performance is not transmitted beyond the place where the establishment is located and is within the immediate area where the sale is occurring;

## 2 Sound Recordings

Most performances of sound recordings – including performances in person and traditional “terrestrial” radio broadcasts – are not covered by federal copyright law and do not require permission from the copyright owner. But there *is* an exclusive right to control the performance of a sound recording via “digital audio transmission,” which is subject to an immensely complicated statutory licensing system.

### Copyright Act

The exclusive rights of the owner of copyright in a sound recording do not include any right of performance under section 106(4).

17 U.S.C. § 114(a)  
*Scope of exclusive rights in sound recordings*

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

17 U.S.C. § 106  
*Exclusive rights in copyrighted works*

- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

### Copyright Office Copyright and the Music Marketplace

(report of the Register of Copyrights  
2015)

In the 1995 The Digital Performance Right in Sound Recordings Act (DPRSRA), Congress gave sound recording owners an exclusive public performance right, but one limited to digital audio transmissions, and created the section 114 statutory license for noninteractive subscription providers, including satellite radio, engaged in digital performances. In 1998, Congress extended the section 114 compulsory license to expressly include webcasting as a covered activity. Traditional over-the-air broadcasts, however, were expressly exempted from the sound recording performance right.

Congress drew this legal distinction based on perceived differences between digital and traditional services, believing at the time

that traditional broadcasters posed “no threat” to the recording industry, in contrast to digital transmission services. A longstanding justification for the lack of a sound recording performance right has been the promotional effect that traditional airplay is said to have on the sale of sound recordings. In the traditional view of the market, broadcasters and labels representing copyright owners enjoy a mutually beneficial relationship whereby terrestrial radio stations exploit sound recordings to attract the listener pools that generate advertising dollars, and, in return, sound recording owners receive exposure that promotes record and other sales.

The section 114 statutory license allows different types of non-interactive digital music services – free and paid internet radio services, “preexisting” satellite radio services, and “preexisting” music subscription services – to perform sound recordings upon compliance with the statutory license requirements, including the payment of royalties as determined by the CRB. In addition, recognizing that such digital services must make server reproductions of sound recordings – sometimes called “ephemeral” copies – to facilitate their digital transmissions, Congress established a related statutory license under section 112 to authorize the creation of these copies. Rates and terms for the section 112 license are also established by the CRB.

The section 112 and 114 licenses for sound recordings are subject to a number of technical limitations. For instance, services relying on the section statutory license are prohibited from publishing an advance program schedule or otherwise announcing or identifying in advance when a specific song, album or artist will be played. Another example is the “sound recording performance complement,” which limits the number tracks from a single album or by a particular artist that may be played during a 3-hour period.

Payment and reporting of royalties under the section 112 and 114 licenses are made to a single non-profit agent: SoundExchange. SoundExchange was established by the RIAA in 2000 and in 2003 was spun off as an independent entity. The Copyright Act specifies how royalties collected under section 114 are to be distributed: 50% go to the copyright owner of the sound recording, typically a record label; 45% go to the featured recording artist or artists;  $2\frac{1}{2}\%$  go to an agent representing nonfeatured musicians who perform on sound recordings; and  $2\frac{1}{2}\%$  to an agent representing nonfeatured vocalists who perform on sound recordings. Section 112 fees are paid by SoundExchange directly to the sound recording owner. Prior to distributing royalty payments, SoundExchange deducts the reasonable costs incurred in carrying out its responsibilities.

The statutory licensing framework applies only to noninteractive (i.e., radio-style) services; interactive or on-demand services are not covered. The distinction between interactive and noninteractive ser-



vices has been the matter of some debate. The statute provides that an interactive service is one that enables a member of the public to receive either “a transmission of a program specially created for the recipient,” or “on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient.”

The statutory definition leads to the question of whether so-called “personalized” or “custom” music streaming services—services that tailor the music they play to individual user preferences—transmit programs that are “specially created for the recipient.” In *Arista Records LLC v. Launch Media, Inc.*, the Second Circuit held that one such service that played songs for users based on users’ individual ratings was not interactive because the service did not displace music sales. Following the *Launch Media* decision, personalized music streaming services such as Pandora and Rdio have obtained statutory licenses as noninteractive services for their public performance of sound recordings. The CRB-established rates do not currently distinguish between such customized services and other services that simply transmit undifferentiated, radio-style programming over the internet.

*Launch Media*: 578 F.3d 148 (2d Cir. 2009)

Notably, under section 114, the rate standard applicable to “pre-existing” satellite radio and music subscription services (i.e., those services that existed as of July 31, 1998) differs from that for other services such as internet radio and newer subscription services. This distinction is a legislative artifact.

Accordingly, because of the staggered enactment of the section 112 and 114 licenses, royalty rates for a limited set of older services – Sirius XM, as the only preexisting satellite service, and Music Choice and Muzak, as the only preexisting subscription services – are governed by the four-factor standard in section 801(b) of the Act. Meanwhile, for all internet radio and other newer digital music services, and for all ephemeral recordings regardless of the service, the CRB is to establish rates and terms “that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.”

In general, the CRB (like the CARP before it) has adopted “per-performance” rates for internet radio, rather than the percentage-of-revenue rates that are typical in PRO licenses. That per-stream approach has proven controversial. After the CRB’s “Webcasting II” decision in 2007, a number of internet radio services and broadcasters complained that the per-performance rates were unsustainable. These concerns led Congress to pass legislation giving SoundExchange the authority to negotiate and agree to alternative royalty schemes that could be binding on all copyright owners and others entitled to royalty payments in lieu of the CRB-set rates.



In the wake of Congress' actions, SoundExchange reached agreement with a number of internet radio services, in general adopting royalty rates that were more closely aligned with the services' revenues. For example, in 2009, SoundExchange negotiated rates with large commercial "pureplay" internet radio services (i.e., services like Pandora that only transmit over the internet). Under that agreement, those services agreed to pay the greater of 25% of gross revenues or specified per-performance rates.

A streaming service that does not fall under the section 112 and 114 licenses – i.e., an interactive service – must negotiate a license with a record company in order to use the label's sound recordings. Since direct licenses are agreed upon at the discretion of the copyright owner and the potential licensee, the license terms can be vastly different from those that apply under the statutory regime. It is common for a music service seeking a sound recording license from a label to pay a substantial advance against future royalties, and sometimes an administrative fee. Other types of consideration may also be involved. For example, the major labels acquired a reported combined 18% equity stake in the on-demand streaming service Spotify allegedly based, at least in part, on their willingness to grant Spotify rights to use their sound recordings on its service.

## D State-Law Protection for Pre-1972 Sound Recordings

As noted above, Congress did not federalize the copyrights in already existing sound recordings when it added them to the Copyright Act. States are free to apply their own law to such sound recordings until 2067. This bifurcation raises significant questions about the scope of those rights – such as whether there is a public performance right – and about whether familiar features of federal copyright law – such as fair use and § 512 – apply to them. The dearth of caselaw does not help.

### Copyright Act

17 U.S.C. § 301(c)  
*Preemption with respect to other laws*

With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. No sound recording fixed before February 15, 1972, shall be subject to copyright

under this title before, on, or after February 15, 2067.

### **RCA Mfg. Co. v. Whiteman**

The dispute is as to whether W.B.O. Broadcasting Corporation, as the purchaser of phonographic records prepared by RCA Manufacturing Company, Inc., of Whiteman's orchestral performances, may broadcast them by radio. Whiteman's performances took place in studios of RCA Manufacturing Company, Inc., which arranged for their reproduction upon ordinary phonographic disc records, and which, with the consent of Whiteman, sold the records to the public at large. Of the nine records here in question five were sold between November, 1932, and August 15, 1937, during which period every record bore the legend: "Not Licensed for Radio Broadcast".

It is only in comparatively recent times that a virtuoso, conductor, actor, lecturer, or preacher could have any interest in the reproduction of his performance. Until the phonographic record made possible the preservation and reproduction of sound, all audible renditions were of necessity fugitive and transitory; once uttered they died; the nearest approach to their reproduction was mimicry. Of late, however, the power to reproduce the exact quality and sequence of sounds has become possible, and the right to do so, exceedingly valuable; people easily distinguish, or think they distinguish, the rendition of the same score or the same text by their favorites, and they will pay large sums to hear them. Hence this action.

Copyright in any form, whether statutory or at common-law, is a monopoly; it consists only in the power to prevent others from reproducing the copy-righted work. The records at bar embodied Whiteman's "common-law property" – his contribution as a conductor – in precisely the same way that the record of such a score would embody his composition. Hence the question is no different from whether he might disseminate a musical score to the public at large, but impose a limitation upon it that buyers should not use it to broadcast for profit. It will hardly be argued that if it was a "publication" in the sense that that destroys the "common-law property", the restriction upon the use of the record would be valid notwithstanding. If "the common-law property" in the rendition be gone, then anyone may copy it who chanced to hear it, and may use it as he pleases.

Certainly when the "common-law property" is in a work which the Copyright Act covers, there can be no doubt; Congress has created the monopoly in exchange for a dedication, and when the monopoly expires the dedication must be complete. If the records were registrable under the act, the restriction would therefore certainly not limit the dedication. The fact that they are not within the act should make no difference. That being true, we see no reason why the same acts that unconditionally dedicate the common-law copy-

114 F.2d 86 (2d Cir. 1940)  
(Learned Hand, J.)

right in works copyrightable under the act, should not do the same in the case of works not copyrightable. Otherwise it would be possible, at least pro tanto, to have the advantage of dissemination of the work at large, and to retain a perpetual though partial, monopoly in it. That is contrary to the whole policy of the Copyright Act and of the Constitution.

Whiteman and the plaintiff also rest their case upon the theory of unfair competition. In the case at bar if Whiteman and RCA Manufacturing Company, Inc., cannot bring themselves within the law of common-law copyright, there is nothing to justify a priori any continuance of their control over the activities of the public to which they have seen fit to dedicate the larger part of their contribution.

### Copyright Office

#### Federal Copyright Protection for Pre-1972 Sound Recordings

The states provide protection for pre-1972 sound recordings through a patchwork of criminal laws, civil statutes and common law. Early cases relied on common law, principally the tort of unfair competition, to protect sound recordings from unauthorized duplication and sale. By the 1950s, record piracy had become a serious problem, with pirates openly competing with record companies. For that reason, attention shifted to legislation imposing criminal sanctions starting in the 1960s.

In the 1960s, states began to pass laws making it a criminal offense to duplicate and distribute sound recordings, without authorization, for commercial purposes. New York was the first such state in 1967; California was the second, in 1968. Several other states followed, and after the Supreme Court ruled in *Goldstein v. California* in 1973 that state law protection of sound recordings was constitutional, many additional states passed such laws.

Most state criminal laws prohibit, at a minimum, duplication and sale of recordings done knowingly and willfully with the intent to sell or profit commercially from the copies. Many have express exceptions for activities such as broadcasting, archiving, and personal use. It is unclear how many cases are brought under these statutes, but they inform the protection for sound recordings under state law and provide a backdrop for commercial transactions.

The formulation of prohibited activities varies from state to state. Almost all states prohibit the act of duplicating without authorization (often referred to as “transferring the sounds”). Most states also prohibit advertising or offering for sale, and selling or otherwise distributing the unauthorized recordings. Some states also criminalize activities such as transporting sound recordings within the state (or possessing them) with knowledge that they are unauthorized, with intent to sell them.

(2011)

*Goldstein*: 412 U.S. 546 (1973)

A number of states have civil laws that address protection for pre-1972 sound recordings, directly or indirectly. Section 980(a)(2) of the California statute provides civil protection of pre-1972 sound recordings and is a good example:

The author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership therein until February 15, 2047, as against all persons except one who independently makes or duplicates another sound recording that does not directly or indirectly recapture the actual sounds fixed in such prior sound recording, but consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate the sounds contained in the prior sound recording.

The few cases decided under § 980(a)(2) have viewed the section as conferring an intangible property interest in the sound recordings that can be protected in a misappropriation, conversion or unfair competition claim. They have distinguished the property interest protected by this statute from copyright protection which, under California law, terminates upon publication. Some states specifically provide that there is a private right of action for violation of the state criminal piracy provision.

Most states also have some form of non-statutory civil protection, although the precise nature of that protection varies from state to state. The two most prevalent theories for providing protection are common law copyright and misappropriation/unfair competition, but courts have also protected sound recordings under other legal theories, such as conversion.

The most notable case in recent years involving pre-1972 sound recordings was *Capitol Records, Inc. v. Naxos of America, Inc.*. At issue were recordings of classical music performances by Pablo Casals, Edwin Fischer and Yehudi Menuhin, originally made in the 1930s. Capitol, with a license from EMI, the successor of the original recording company, remastered the recordings, and was distributing them in the United States. Naxos obtained and restored the recordings in the UK, where they were in the public domain, and began marketing them in the United States in competition with Capitol. The New York Court of Appeals held that foreign sound recordings remain protected under “common law copyright” in New York until 2067, even though they may be in the public domain in their home country.

In *EMI Records Ltd. v. Premise Media Corp.*, a New York trial court, ruling on a motion for a preliminary injunction, considered the applicability of the fair use defense to a claim for infringement of common

*Naxos*: 4 N.Y.3d 540 (2005)

*Premise Media*: No. 601209/08, 2008 WL 5027245 (N.Y. Sup. Aug. 8, 2008)

law copyright in a sound recording. Defendants had used an excerpt of John Lennon's "Imagine," a pre-1972 sound recording, in a documentary film entitled "Expelled." The film attempts to counter criticism of the theory of intelligent design. The 99-minute documentary used a 15-second excerpt from Lennon's 3-minute sound recording.

Plaintiffs argued that under common law copyright, any unauthorized use of a sound recording is actionable. Defendants argued that only a reproduction of the complete recording was an infringement. The court rejected both claims, but ultimately concluded that plaintiffs had established a prima facie claim of common law copyright infringement. The court observed that New York cases have acknowledged the existence of a fair use defense to common law infringement claims but that no case had actually applied fair use in that context. The court recognized that fair use was generally unavailable as a defense with respect to unpublished works, principally to protect the copyright owner's right of first publication. In the case of sound recordings, however, common law copyright protection exists regardless of publication, reasoned the court. "Thus, the erosion of the publication distinction in the context of sound recordings vitiates the underlying rationale preventing application of pre-publication fair use." Accordingly, the court held that fair use was available as a defense to plaintiffs' copyright infringement claim.

The court turned for guidance to the federal law of fair use and specifically to the fair use factors in 17 U.S.C. § 107 and the cases interpreting them. The court ruled that defendants were likely to prevail on their fair use defense, primarily because the use of the sound recording excerpt in the film could be seen as transformative, conveying a critical message about the song and the viewpoint it represents, and because there was little likely market effect from defendants' use.

62 F. Supp. 3d 325 (S.D.N.Y. 2014)

#### **Flo & Eddie, Inc. v. Sirius XM Radio, Inc.**

Flo and Eddie is a California corporation, wholly owned by its principals, Mark Volman and Howard Kaylan. Volman and Kaylan are two of the original members of The Turtles, a 1960s rock group whose hits included "Happy Together" and a cover of Bob Dylan's "It Ain't Me Babe."

Master recordings of the Turtles' performances – all of which were made prior to February 15, 1972 – were transferred to the Turtles' members as part of a legal settlement. Volman and Kaylan purchased the remaining Turtles' members' interests in the recordings, and ultimately transferred all ownership interests in the recordings to Flo and Eddie.

Sirius is a Delaware corporation engaged in the satellite radio business. Sirius provides digital audio content to its subscribers, who

pay a periodic fee. Sirius acknowledges that it “performs” sound recordings, including pre-1972 sound recordings, by broadcasting them over its satellite radio network and streaming them over the internet. The pre-1972 sound recordings Sirius has performed include Turtles recordings.

For all the copying it does do, it’s worth noting what Sirius does not do. Sirius does not currently allow users to download and store complete copies of any recordings. In this way, Sirius differs from file-sharing services such as Napster and Limewire. Nor does Sirius allow users to listen to a particular recording whenever they choose to do so. In this way, Sirius differs from some internet radio services like Spotify. Users can customize the programming they receive to a limited extent using the “My SXM” feature. For example, a user could choose to emphasize folk music and deemphasize rock music on a 70s channel. But that user could not choose to listen only to Bob Dylan, much less a particular Bob Dylan recording, while excluding anything by Led Zeppelin.

Sirius has moved for summary judgment. It argues that New York common law copyrights in pre-1972 sound recordings do not afford an exclusive right of public performance.

I conclude that the New York Court of Appeals would recognize the exclusive right to public performance of a sound recording as one of the rights appurtenant to common law copyright in such a recording. The common law typically protects against unauthorized reproduction of copies or phonorecords, unauthorized distribution by publishing or vending, and unauthorized performances. New York courts have long afforded public performance rights to holders of common law copyrights in works such as plays and films. The Second Circuit concluded over three decades ago that New York would recognize a public performance right in compilations of film clips.

Sirius principally argues that no such right exists because New York case law contains no discussion of public performance rights in sound recordings. But the exact same argument could have been made (and undoubtedly was made, and rejected) in *Naxos* – a case decided only in 2005, more than a century after sound recordings were invented. The very fact that *Naxos* was decided in favor of the common law copyright holder, after more than a century of judicial silence, means that this court can infer nothing – certainly not that the common law copyright in sound recordings does not encompass all of the rights traditionally accorded to copyright holders in other works, including the right of public performance – from the fact that this is the first case to raise the issue.

An arguably stronger argument can be made that years of judicial silence implies exactly the opposite of what Sirius contends – not that common law copyright in sound recordings carries no right of public



performance, but rather that common law copyright in sound recordings comes with the entire bundle of rights that holders of copyright in other works enjoy. No New York case recognizing a common law copyright in sound recordings has so much as suggested that right was in some way circumscribed, or that the bundle of rights appurtenant to that copyright was less than the bundle of rights accorded to plays and musical compositions.

I question whether the investors would be truly surprised if Sirius were to have to pay royalties in order to perform pre-1972 sound recordings. Sirius, which broadcasts exclusively in non-analog form, must pay royalties under federal law in order to broadcast post-1972 sound recordings. All Flo and Eddie seeks here is the right to receive royalties under state law for the digital broadcasting of its pre-1972 recordings – hardly a shocking development in the world of digital broadcasting.

#### **Flo & Eddie, Inc. v. Sirius XM Radio, Inc.**

No. 13-cv-23182, 2015 WL 3852692  
(S.D. Fla. 2015)

At the onset of this litigation, Flo & Eddie recognized that its property rights were a matter of state law and therefore filed three different actions in Florida, New York, and California. Of the three actions, this one is relatively unique. California's copyright statute has a specific provision that addresses pre-1972 recordings. The New York district court did not have the benefit of legislation, however, it was able to rely on several cases interpreting New York law to find that Flo & Eddie had an exclusive right to publicly perform the sound recordings.

Florida is different. There is no specific Florida legislation covering sound recording property rights, nor is there a bevy of case law interpreting common law copyright related to the arts.

If this Court adopts Flo & Eddie's position, it would be creating a new property right in Florida as opposed to interpreting the law. The Court declines to do so. While the Court regularly interprets Florida law to resolve claims in diversity jurisdiction, it is not the Court's place to expand Florida common law by creating new causes of action. Federal courts are entrusted to apply state law, not make it. The Court finds that the issue of whether copyright protection for pre-1972 recordings should include the exclusive right to public performance is for the Florida legislature.

Indeed, if this Court was to recognize and create this broad right in Florida, the music industry—including performers, copyright owners, and broadcasters—would be faced with many unanswered questions and difficult regulatory issues including: (1) who sets and administers the licensing rates; (2) who owns a sound recording when the owner or artist is dead or the record company is out of business; and (3) what, if any, are the exceptions to the public performance right. The Florida legislature is in the best position to address these



issues, not the Court. Accordingly, the Court finds that Florida common law does not provide Flo & Eddie with an exclusive right of public performance in The Turtles' sound recordings.

**UMG Recordings, Inc. v. Escape Media Group, Inc.**

107 A.D.3d 51 (N.Y. App. Div. 2013)

Defendant Escape Media Group, Inc. developed, owns and operates an Internet-based music streaming service called Grooveshark. Users of Grooveshark can upload audio files (typically songs) to an archive maintained on defendant's computer servers, and other users can search those servers and stream recordings to their own computers or other electronic devices.

Plaintiff UMG Recordings, Inc. is the owner of the rights in many popular sound recordings that have been uploaded to Grooveshark. Many of those recordings were made prior to February 15, 1972 (the pre-1972 recordings). Defendant concedes that it cannot ensure that each work uploaded to its servers is a non-infringing work. However, it has operated Grooveshark with the assumption that it is shielded from infringement claims by copyright owners by 17 USC § 512, popularly known as the Digital Millennium Copyright Act (DMCA).

Initially, it is clear to us that the DMCA, if interpreted in the manner favored by defendant, would directly violate section 301(c) of the Copyright Act. Had the DMCA never been enacted, there would be no question that UMG could sue defendant in New York state courts to enforce its copyright in the pre-1972 recordings, as soon as it learned that one of the recordings had been posted on Grooveshark. However, were the DMCA to apply as defendant believes, that right to immediately commence an action would be eliminated. Indeed, the only remedy available to UMG would be service of a takedown notice on defendant. This is, at best, a limitation on UMG's rights, and an implicit modification of the plain language of section 301(c). The word "limit" in 301(c) is unqualified, so defendant's argument that the DMCA does not contradict that section because UMG still retains the right to exploit its copyrights, to license them and to create derivative works, is without merit. Any material limitation, especially the elimination of the right to assert a common-law infringement claim, is violative of section 301(c) of the Copyright Act.

For defendant to prevail, we would have to conclude that Congress intended to modify section 301(c) when it enacted the DMCA. However, there is no reason to conclude that Congress recognized a limitation on common-law copyrights posed by the DMCA but intended to implicitly dilute section 301(c) nonetheless. Such an interpretation is disfavored where, as here, the two sections can reasonably co-exist, each in its own field of operation. Congress explicitly, and very clearly, separated the universe of sound recordings into two categories, one for works "fixed" after February 15, 1972,

to which it granted federal copyright protection, and one for those fixed before that date, to which it did not. Defendant has pointed to nothing in the Copyright Act or its legislative history which prevents us from concluding that Congress meant to apply the DMCA to the former category, but not the latter.

Finally, we reject defendant's argument that the very purpose of the DMCA will be thwarted if it is deemed not to apply to the pre-1972 recordings. The statutory language at issue involves two equally clear and compelling Congressional priorities: to promote the existence of intellectual property on the Internet, and to insulate pre-1972 sound recordings from federal regulation. Defendant's concerns about interpreting the statutes in the manner advocated by UMG are no more compelling than UMG's concerns about interpreting the statutes in the manner advanced by defendant. Under such circumstances, it would be far more appropriate for Congress, if necessary, to amend the DMCA to clarify its intent, than for this Court to do so by fiat.

#### **Capitol Records, LLC v. Vimeo, LLC**

Defendant Vimeo, LLC<sup>1</sup> is an Internet service provider, which operates a website on which members can post videos of their own creation, which are then accessible to the public at large. Plaintiffs are record companies and music publishing companies, which own copyrights in sound recordings of musical performances. Their complaint alleges that Vimeo is liable to Plaintiffs for copyright infringement by reason of 199 videos posted on the Vimeo website, which contained allegedly infringing musical recordings for which Plaintiffs owned the rights.

The first question we consider is whether the district court erred in granting partial summary judgment to Plaintiffs, rejecting the availability of the DMCA's safe harbor for infringement of sound recordings fixed prior to February 15, 1972. On this question, the district court accepted without discussion the position taken by the United States Copyright Office in a report prepared in 2011 that the safe harbor does not protect against liability for infringement of pre-1972 sound recordings.

The Pre-1972 Sound Recordings Report arrived at its conclusion that § 512(c)'s safe harbor applies only to post-1972 sound recordings by the following reasoning: The term "infringement of copyright," which is employed in § 512(c), "is defined in section 501(a) as the violation of 'any of the exclusive rights of the copyright owner as provided by sections 106 through 122.'" Therefore, that term, when used in § 512(c), "only refers to infringement of rights protected under title 17, and does not include infringement of rights protected under [state] law."

—F.3d —, 2016 WL 3349368

This is the Pre-1972 Sound Recordings report excerpted above.

While we unhesitatingly acknowledge the Copyright Office's superior expertise on the Copyright Act, we cannot accept its reading of § 512(c). It is based in major part on a misreading of the statute. A literal and natural reading of the text of § 512(c) leads to the conclusion that its use of the phrase "infringement of copyright" *does* include infringement of state laws of copyright. One who has been found liable for infringement of copyright under state laws has indisputably been found "liable for infringement of copyright." In this instance, Congress did not qualify the phrase "infringement of copyright" by adding, as it did in other circumstances, the words, "under this title." See, e.g., § 106 ("Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following ...."); § 201(a) ("Copyright in a work protected under this title vests initially in the author or authors of the work."). To interpret § 512(c)'s guarantee that service providers "shall not be liable ... for infringement of copyright" to mean that they may nonetheless be liable for infringement of copyright under state laws would be, at the very least, a strained interpretation – one that could be justified only by concluding that Congress must have meant something different from what it said.

To construe § 512(c) as leaving service providers subject to liability under state copyright laws for postings by users of infringements of which the service providers were unaware would defeat the very purpose Congress sought to achieve in passing the statute. Service providers would be compelled either to incur heavy costs of monitoring every posting to be sure it did not contain infringing pre-1972 recordings, or incurring potentially crushing liabilities under state copyright laws. It is not as if pre-1972 sound recordings were sufficiently outdated as to render the potential liabilities insignificant. Some of the most popular recorded music of all time was recorded before 1972, including work of The Beatles, The Supremes, Elvis Presley, Aretha Franklin, Barbra Streisand, and Marvin Gaye.

## E Bootlegging

The Copyright Clause allows protection only for "writings." Under the 1909 Copyright Act, a live performance was not subject to federal copyright; there was nothing to publish with notice of copyright or to register to secure protection. This left a substantial hole, one that states sometimes filled.

The 1976 Copyright Act mostly carried forward the exclusion of live performances, this time because they are not considered "fixed." There was one exception: a work is considered "fixed" if it is being simultaneously recorded and transmitted, thus allowing copyright protection for live broadcasts of concerts, sporting events, etc.

See 17 U.S.C. § 101. Does this exception suffice for the Met's live Saturday afternoon opera radio broadcasts, which continue to this day?

Again, states partially filled the gap with so-called anti-bootlegging statutes. Congress followed their example with the 1994 Uruguay Round Agreements Act, which (among other things) added civil anti-bootlegging provisions to Title 17 and criminal anti-bootlegging provisions to Title 18.

199 Misc. 786 (N.Y. Sup. 1950)

### **Metropolitan Opera Assoc. v. Wagner-Nichols Recorder Corp.**

Metropolitan Opera is an educational membership corporation. Over a period of sixty years it has, by care, skill and great expenditure, maintained a position of pre-eminence in the field of music and grand opera. By reason of this skill and pre-eminence it has created a national and world-wide audience and thereby a large market for radio broadcasts and phonograph recordings of its performances.

Metropolitan Opera has sold the exclusive right to broadcast its opera performances during the 1949–50 season to American Broadcasting, for which Metropolitan Opera receives \$100,000. Under the contract for the 1949–50 season, American Broadcasting broadcast Metropolitan Opera performances of eighteen operas between November 26, 1949, and March 25, 1950.

Since November 26, 1949, the defendants have recorded these broadcast performances of Metropolitan Opera and have used their master recordings to make phonograph records of Metropolitan Opera performances. The defendants have advertised and sold these records as records of broadcast Metropolitan Opera performances.

That defendants' piratical conduct and practices constitute unfair competition both with Metropolitan Opera and Columbia Records is made abundantly clear by the record. Plaintiff Metropolitan Opera derives income from the performance of its operatic productions in the presence of an audience, from the broadcasting of those productions over the radio, and from the licensing to Columbia Records of the exclusive privilege of making and selling records of its own performances. Without any payment to Metropolitan Opera for the benefit of its extremely expensive performances, and without any cost comparable to that incurred by Columbia Records in making its records, defendants offer to the public recordings of Metropolitan Opera's broadcast performances. This constitutes unfair competition.

The performance of the opera in the opera house and the broadcast of the opera performance over the network of American Broadcasting under an exclusive broadcasting contract with Metropolitan Opera did not abandon the plaintiffs' rights to this performance. At common law the public performance of a play, exhibition of a picture or sale of a copy of the film for public presentation did not constitute an abandonment of nor deprive the owner of his common-law rights. The care with which the Metropolitan Opera made its limited grants,

Does the 1976 Copyright Act's treatment of live broadcasts as "fixed" if they are fixed simultaneously with their transmission suffice for the Met's live Saturday afternoon opera radio broadcasts, which continue to this day?

granting exclusive right to a single network and restricting the latter's right to record and granting exclusive rights to record to Columbia Records, again reserving the right to approve all records before their release, shows clearly no intent to abandon but, on the contrary, an attempt to retain effective control over the broadcasting and recording of its performances. The fact that performances today can take place over the radio as well as in the theatre and thereby reach a wider audience does not change the principle involved.

### Copyright Act

Anyone who, without the consent of the performer or performers involved –

- (1) fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation,
- (2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance, or
- (3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States,

shall be subject to the remedies provided in sections 502 through 505, to the same extent as an infringer of copyright.

17 U.S.C. § 1101(a)  
*Unauthorized fixation and trafficking  
in sound recordings and music videos*

### United States v. Martignon

This appeal presents a recurring issue in constitutional law: the extent to which Congress can use one of its powers to enact a statute that it could not enact under another of its arguably relevant powers. Here the statute involved is Section 2319A of Title 18 which prohibits the unauthorized recording of performances as well as the copying, distribution, sale, rental, and trafficking of these bootlegged phonorecords.<sup>1</sup>

492 F.3d 14 (2d. Cir. 2007)

On October 27, 2004, a grand jury charged Martignon, the proprietor of Midnight Records in Manhattan, with one count of violating Section 2319A by reproducing an unauthorized phonorecord and by distributing and selling and offering to distribute and sell phonorecords of performances which had been recorded or fixed without the consent of the performer or performers. Martignon

<sup>1</sup>17 U.S.C. § 1101(a) provides that copyright remedies shall be available against persons who commit the same acts. Unlike Section 2319A, Section 1101 does not require any particular mens rea or that the act be performed for commercial gain or private financial gain.



moved to dismiss the indictment, arguing that Section 2319A violated the Copyright Clause because live performances are not "Writings" within the meaning of the clause and because live performances were given protection for perpetuity rather than for a "limited Time[]". Martignon also claimed that the statute violated the First Amendment.

Because the government concedes Congress could not have enacted Section 2319A pursuant to the Copyright Clause, we must determine whether the Copyright Clause's limitations also limit Congress's power to regulate creative works under the Commerce Clause.

Section 2319A does not create and bestow property rights upon authors or inventors, or allocate those rights among claimants to them. It is a criminal statute, falling in its codification between the law criminalizing certain copyright infringement and the law criminalizing "trafficking in counterfeit goods or services." It is, perhaps, analogous to the law of criminal trespass. Rather than creating a right in the performer him-or herself, it creates a power in the government to protect the interest of performers from commercial predations. Section 2319A does not grant the performer the right to exclude others from the performance — only the government can do that. Neither may the performer transfer his or her interests under Section 2319A to another. Section 2319A only prevents others from doing something without the authorization of the protected person. It may therefore protect the property interests an individual holds by virtue of other laws, but it does not itself allocate those interests. Section 2319A is not a law "secur[ing] ... rights," nor is it a copyright law. We therefore conclude that it was not enacted under the Copyright Clause. We have no need to examine whether it violates limits of the Copyright Clause and proceed instead to an examination of its sustainability under the Commerce Clause.

It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality. A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends. Section 2319A has substantial commercial and economic aspects. Indeed, regulation of bootlegging is necessary at the federal level because of its interstate and international commercial aspects. Without this scope, bootlegging could be adequately regulated, as it has been in the past, by the states. Given the nexus between bootlegging and commerce, it is clear that absent any limitations stemming from the Copyright Clause, Congress would have had the power to enact Sec-



tion 2319A(a)(1) & (3) under the Commerce Clause. Further, Section 2319A regulates only fixing, selling, distributing, and copying with a commercial motive, activities at the core of the Commerce Clause.<sup>8</sup> It would have been eminently reasonable for Congress to conclude that the sale and distribution of bootleg phonorecords will have a substantial interstate effect on the sale and distribution of legitimate phonorecords. Because Section 2319A is not a copyright law and its enactment was well within the scope of Congress's Commerce Clause authority, it is constitutionally permissible unless some other constitutional provision prevents its enforcement.

### Questions

1. The folk singer-songwriter Richard Shindell released the song "The Next Best Western" on his 1997 album *Reunion Hill*. The musical work copyright (registration no. PA0000967996) is owned by Amalgamated Balladry and is part of the ASCAP repertory. The sound recording copyright (registration no. SR0000297971) is owned by Shanachie Records. For each of the following uses, what licenses (if any) would you need, from whom, and how could you obtain them?
  - Playing "The Next Best Western" from a *Reunion Hill* CD on WTWP, a broadcast radio station.
  - Streaming "The Next Best Western" live on the Internet as it plays on WTWP.
  - Turning on the radio to WTWP in your home as "The Next Best Western comes on.
  - Turning on the radio to WTWP in the coffeeshop you run as "The Next Best Western comes on.
  - Using the *Reunion Hill* version of "The Next Best Western" in a TV commercial.
  - Recording a hard-rock cover of "The Next Best Western" which you sell on CDs.
  - Selling your hard-rock cover as downloadable MP3s.
  - Using your hard-rock cover in a commercial.
  - Playing "The Next Best Western" live on guitar at a sold-out concert at Carnegie Hall.
  - Recording your sold-out Carnegie Hall concert and selling CDs.

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<sup>8</sup>This commercial purpose distinguishes Section 2319A from Section 1101. A person who recorded a concert for her personal enjoyment would not violate Section 2319A. Further, because no commercial motive is required for a Section 1101 violation, we specifically limit today's holding to Section 2319A and express no opinion on Section 1101's constitutionality.

- Playing the entirety of *Reunion Hill* live on guitar at a sold-out concert at Carnegie Hall.
  - Playing "The Next Best Western" on guitar in Central Park on a warm spring day.
  - Playing "The Next Best Western" from a *Reunion Hill* CD on a boombox in Central Park on a warm spring day.
  - Singing "The Next Best Western" as you walk down the street.
  - Playing "The Next Best Western" from a CD of *Reunion Hill*
  - Setting "The Next Best Western" as your cellphone ringtone.
  - Selling ringtones of "The Next Best Western" to other people.
  - Sampling "The Next Best Western" from a CD of *Reunion Hill* and using the sample in a hip-hop track.
  - Selling karaoke DVDs that include "The Next Best Western" and its lyrics, set to pictures of trucks and highways.
  - Putting a *Reunion Hill* CD in a folk-music-only coin-operated jukebox.
  - Running a streaming-music service that includes the *Reunion Hill* version of "The Next Best Western" as one of the 3,000,000 tracks users can stream.
  - Running a streaming-music service that includes a hard-rock cover of "The Next Best Western" as one of the 3,000,000 tracks users can stream.
  - Running a streaming-video service that includes a movie in which the *Reunion Hill* version of "The Next Best Western" appears on the soundtrack.
2. Which of your answers to the previous question might change if "The Next Best Western" had been released in 1967 rather than 1997?
  3. How many distinct types of licenses have you encountered in this chapter? Which of these license types would be necessary features of any well-functioning copyright system, and which of them are accidents of history?
  4. Is there anything good that can be said about how United States copyright law deals with music? Or should we burn the whole thing to the ground and start again?