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Music

Musical copyright could be a course unto itself. We will settle for a chapter.¹

A Prelude

Music is a kind of sound; we perceive sounds that have well-defined pitch and rhythm as being musical. This has two important implications. First, most non-musicians experience music only when it is *performed* by turning it into audible sounds. Second, these performances take place in real-time. Music can be played faster or slower, but there is no way to take in all of a song in an instant.

From one perspective, copyright came to the concert extraordinarily late. The first known musical instruments are at least 30,000 years old, which makes music on the order of a hundred times as old as copyright. From another perspective, musical copyright is positively ancient. It predates records, radio, synthesizers, digital audio, and streaming. It also predates studio recording, sampling, mashups, karaoke, and DJing. The story of musical copyright is the story of its continual struggle to adapt an preexisting conceptual framework to new technologies and new practices.

In particular, the doctrinal distinction between a *musical work* and a *sound recording* is absolutely fundamental to musical copyright under United States law. Music far predates recording, and copyright law does not treat them the same. To understand why this distinction takes the form it does, a few pages of history are instructive.

1 A Brief History of Musical Copyright

The inordinately complicated doctrines of modern musical copyright bear the scars of a long and ambivalent history. Music entered United States copyright law when the Copyright Act of 1831 added “musical composition[s]” to the list of protectable types of works. This meant sheet music, because at the time *there was no other way to capture music in tangible form*. Copyright protected (only) against unauthorized reproduction and distribution, because those were the rights it gave to any copyright owner.

1. References on music copyright and the music business include AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING* (2018); DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* (2019).



The Fellowship of the Ringtone (2001)



Stephen Foster, *Hard Times Come Again No More* (1854)

The consequence was that a particular artistic model became part of the copyright system. That model, which is tied to the Western European musical tradition, distinguishes sharply between *composition* and *performance*. As Robert Brauneis explains:

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.²

As Brauneis notes, this was one specific way of making music, and hardly the only one. People have been singing songs and playing instruments for millennia without writing anything down first.

The sale of sheet music has also never been the only way that musicians make a living. Indeed, the sale of a few copies of sheet music will never come anywhere close to recapturing the immense creative effort required to write an 45-minute symphony for a 70-piece orchestra. Some musicians were supported by wealthy patrons. Others held concerts and charged admission, or played for tips, or were paid to provide entertainment. And, of course, billions of people have made music, alone and together, for the sheer pleasure of it. The sale of sheet music captured some of value of that pleasure; most of the buyers were amateurs playing piano for fun and singing along with friends. But the pleasure itself, along with the entire concert-hall tradition, was entirely outside of the copyright system for most of the 19th century.

In 1897, Congress added a public performance right for musical works. The new system maintained the two-stage distinction between composition and performance, and only provided copyright for composers. The difference was that now copyright-owning composers could control both stages of the process: composition (via the reproduction and distribution rights) and performance (via the performance right). Congress had done something similar in 1856 by creating a public-performance right for plays, so the 1897 amendment could have

2. Robert Brauneis, *Musical Work Copyright for the Era of Digital Sound Technology*, 17 TUL. J. TECH. & INTELL. PROP. L. 1 (2014).

become the start of a unified treatment of the performing arts.³ Instead, in the face of a new technology, the Supreme Court zigged and Congress zagged, setting music on its own distinctive path. That technology was the player piano.

A player piano uses air pressure to play piano keys. The music is marked on a roll of paper by punching holes for the notes. As a hole in the paper passes over a corresponding hole in the front of the piano, a little air can escape from a pressurized chamber inside the piano, causing a valve to open, which releases more air into another mechanism that moves the key.

From a modern perspective – and from the perspective of the music publishers who sued player-piano manufacturers – a player-piano roll looks like a copy of a musical work. The work of punching holes in a paper roll is like the work of engraving notes on a plate to print sheet music. And the result of playing a roll on a player piano is like the result of playing sheet music on a regular piano: a performance of a recognizable song.

The Supreme Court, however, disagreed. In *White-Smith Music Publishing Co. v. Apollo Co.*, it held that player piano rolls were not infringing copies.⁴ Quoting a previous case, it explained:

They are not made to be addressed to the eye as sheet music, but they form a part of a machine. They are not designed to be used for such purposes as sheet music, nor do they in any sense occupy the same field as sheet music. They are a mechanical invention made for the sole purpose of performing tunes mechanically upon a musical instrument.⁵

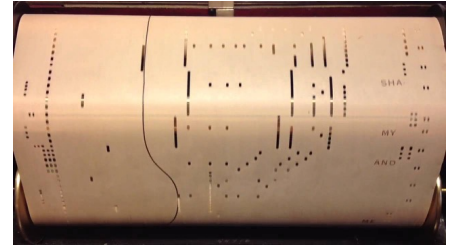
On this way of thinking, the sheet music *is* the musical work. A perforated roll is “not a copy which appeals to the eye”; it is “not intended to be read as an ordinary piece of sheet music.”

White-Smith was decided in 1908. In the very next year, Congress completely overhauled the copyright system in the Copyright Act of 1909. It could have responded to *White-Smith* by endorsing the Supreme Court’s reasoning and allowing free reproduction of musical works in piano rolls. Or it could have repudiated *White-Smith* and held that they were infringing reproductions. Instead, it split the difference, bifurcating the musical copyright system into one set of rules for familiar musical compositions and another set of rules for new technological ways of making music.

Under the 1909 Act, musical copyright owners had a new exclusive right to “reproduce mechanically” the copyrighted work, as in piano rolls. However, once the owner had made its own mechanical reproductions of the work, anyone else who wanted to could obtain a *compulsory license* to do the same and make their own piano rolls by paying a royalty of two cents per roll.

The ink was barely dry on the 1909 Act before its framework was challenged by another new technology: the phonograph, a/k/a record player. Now musicians could record the *actual sounds* of a particular per-

3. 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).



A player-piano roll

4. *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1 (1908).

5. *Id.* at 12.

formance, which would be recreated and repeated (more or less) when the record was played. The courts converged on a solution that effectively treated records like piano rolls: second-class instantiations of the real work, which existed in Platonic form in sheet music. Thus: (1) copyright would prevent the unauthorized recording and sale of records of a musical work, but (2) records could be made without the copyright owner's permission under the compulsory mechanical license, and (3) the copyright in a musical work included only the details of the *composition* and not any of the details of the *performance*.

If you know anything about the history of music, or if you have been alive at any time in the last century, you know that recordings of musical performances are kind of a big deal. We are awash in recorded music, people will pay to listen to it, and musicians want to get paid for making it. The treatment of records as mechanical reproductions was deeply frustrating to record companies, particularly once straight-up record piracy – pressing unauthorized duplicates of existing records – became widespread.

With the door to federal copyright law closed off, the music industry successfully lobbied *states* to provide copyright or copyright-like rights for records. Through a mixture of new statutes and new uses of common-law theories like unfair competition, they secured rights in many states against the unauthorized reproduction of records and other sound recordings. By the late 1960s, however, the limits of this system had become painfully apparent. State law was a patchwork and could be difficult to wield effectively against interstate operations. The inconsistencies between different states' laws created uncertainty.

Thus, in 1971, Congress *federalized* the protection of sound recordings by adding them to the Copyright Act. But in a decision that would reemerge years later like a buried, forgotten, and leaking barrel of toxic waste, Congress only fully brought *new* sound recordings – those created on or after February 15, 1972, into the federal system. States remained free to provide their own protection for existing sound recordings. This dual system led to significant litigation, especially over streaming technologies, in the 2010s. Finally, in the Music Modernization Act of 2018, Congress fully federalized sound recording copyright, preempting all state-law rights. In numerous small and mostly inexplicable ways, however, Congress created special-purpose rules applicable only to sound recordings and to no other type of copyrighted works.

Finally, for our purposes, the Copyright Act of 1976 codified sound recordings as one of the eight types of copyrightable subject matter. The problem of overlapping copyrights in recordings of performed works is inevitable: if a band records a version of an existing song, the recording (a sound recording) is a derivative work of the song (a musical work), just as a filmed version of a Broadway play (an audiovisual work) is a derivative work of the play (a dramatic work). But the legacy of the player piano is that the ordinary rules of derivative works, as seen in the Copyright chapter, do not apply. Instead, sound recordings receive vastly different treatment than musical works, in ways we will consider

in detail in the rest of this chapter.

2 Musical Works vs. Sound Recordings

According to the Copyright Act, both a “musical work” and a “sound recording” are copyrightable subject matter.⁶ Just to be confusing, that object is called a “phonorecord” rather than a “copy.” A sound recording consists of the actual “series of musical, spoken, or other sounds” as fixed in a tangible object.⁷ The definition carves out “the sounds accompanying a motion picture or other audiovisual work.” The point is not that these sounds are not copyrightable – they are – but rather that they are *part* of the copyright in the audiovisual work.

Remarkably, a musical work is not defined in the Copyright Act, as though everyone knows what one is. The distinction between musical and non-musical works is mostly unproblematic, and not all that much usually hinges on it. But the definition of a “musical work” becomes important when *distinguishing one from a sound recording*. In many cases, a sound recording is a derivative work of a musical work: if the Roosevelt String Quartet records a performance of Phillip Glass’s “Company,” the recording embodies both the musical work (copyright by Glass) and the sound recording (copyright by the RSQ). As with other types of derivative works, permission of both copyright owners – or some other license or defense – will be required to reproduce or perform the recording in its entirety.

But now suppose that someone copies only a portion of the recording. Which copyrights are implicated? The answer may depend on how the authorship is allocated between the musical work and the sound recording. This was the situation presented in *Newton v. Diamond*.⁸ As the court described the facts:⁹

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.” . . .

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 dig-

6. 17 U.S.C. § 102

7. 17 U.S.C. § 101.

8. *Newton v. Diamond*, 388 F.3d 1189 (9th Cir. 2004).

9. *Id.* at 1191.



James W. Newton



Beastie Boys

itally 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.¹⁰

Because the Beastie Boys had a license (from ECM) to the sound recording, but not a license (from Newton) to the musical work, they infringed if and only if the six-second sample copied substantially *from the musical work*. The court reasoned that it did not. The sample consisted of a three-note phrase, so this was a *de minimis* similarity. Newton argued that the sample also copied his unique playing style, including the use of subtle breathing variations to change the overtones (higher notes sounded simultaneously) produced by the flute. But the court held that these were elements of his performance belonging to the sound-recording copyright, not elements of the composition belonging to the musical-work copyright.

This is a standard distinction between the two copyrights. It draws the line in the same place that a 19th-century court would have drawn it: the musical work copyright encompasses everything that is written in the sheet music – or, for works that are fixed only in phonorecords or as part of an audiovisual work, the elements that would commonly be written in the sheet music. This rule maps cleanly onto 19th-century compositional style. It is less clear that it is a good fit for modern musical styles that depend more heavily on improvisation, on expressive timbre, on vocal ornaments, and on other fixtures of jazz and R&B. This is one manifestation of a general pattern: the United States copyright system more reliably protects the creativity of musicians who work in traditionally European styles, such as classical and “American Songbook” standards, than it does the creativity of musicians who work in more traditionally African-American styles, such as blues and rap.

Substantial similarity in music-copyright cases can be challenging because there are so many different ways in which two songs can be similar, including lyrics, melody, harmony, rhythm, instrumentation. Joseph Fishman argues that courts have tended to focus primarily on melody to the exclusion of other elements.¹¹ But in a recent and controversial case, *Williams v. Gaye*, the Ninth Circuit upheld a jury verdict that Robin Thicke’s “Blurred Lines” infringed on Marvin Gaye’s “Got To Give It Up,” although the similarities were more in the keyboard and bass lines than in the lyrics or melody.¹² If you are interested, Adam Neely’s video Adam Neely, *Did Dua Lipa ACTUALLY Plagiarize Levitating?* (Mar. 6, 2022), <https://www.youtube.com/watch?v=HnA1QmZvSNs> is nice general introduction to how difficult it can be to identify similarities that are truly due to copying.¹³

10. The songs can be heard and compared at the [Music Copyright Infringement Resource](#).

11. Joseph P. Fishman, *Music as a Matter of Law*, 113 HARV. L. REV. 1861 (2018).

12. *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018). The songs can be heard and compared at the [Music Copyright Infringement Resource](#)

13. Adam Neely, *Did Dua Lipa ACTUALLY Plagiarize Levitating?* (Mar. 6, 2022), <https://www.youtube.com/watch?v=HnA1QmZvSNs>.

B Musical Works

Now we turn to a review of the modern system of music copyright. Our goal is to fill in a two-by-two grid. Along one axis are musical works and sound recordings. Along the other are reproductions and performances.

Musical-work copyrights are generally held by music publishing companies. Despite the name, they are mostly in the business of licensing uses of musical-work copyrights, rather than in the business of publishing copies of sheet music. Some are massive arms of media giants, like Warner Chappell, a division of Warner Music Group, which is one of the “Big Three” recording companies. Others are small specialty operations.

1 Reproductions

The ordinary rules of copyright mostly apply to the reproduction right in musical works. The most notable exception is the statutory “cover version” or *mechanical license* in Section 115 that allows others to record and sell sound recordings if they pay a fixed royalty to the copyright owner of the musical work. In addition, a few types of license are so conventional in the music industry that they might as well be part of the Copyright Act. The most important are the *print rights license* for publishing sheet music and lyrics, and the *synch license* for putting music on soundtracks.

a Mechanical Licenses

The license includes the rights “to make and distribute phonorecords,” i.e. the reproduction and distribution rights for music sold as sound recordings.¹⁴ It does not cover the public performance right. It does not cover lyrics, or music sold as sheet music or in some other non-recorded form. And it does not cover movies, TV commercials, or other audiovisual works.

The mechanical license is only available after “phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner.”¹⁵ So you can only cover a song that someone else has already released for sale.

The licensee must pay a royalty at a rate set by the Copyright Royalty Judges (informally known as the Copyright Royalty Board) within the Copyright Office.¹⁶ The current rate is “9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger” for physical and digital sales of a track,¹⁷ and 24 cents per ringtone.¹⁸

The mechanical license interacts the derivative work right in an interesting way. It “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,”¹⁹ so a cover version can truly be a *cover*. At the same time, “the arrangement shall not change the basic melody or fundamental character of the work,”²⁰ so it can’t be too radical a change. But note that a truly radical cover version might well qualify for fair use, so it is a little unclear exactly how much

14. 17 U.S.C. § 115(a)(1).

15. 17 U.S.C. § 115(a)(1).

16. 17 U.S.C. § 801(b)(1) (listing factors the CRB must consider in setting the rate).

17. 37 C.F.R. § 385.3(b)

18. 37 C.F.R. § 385.3(b)

19. 17 U.S.C. § 115(a)

20. 17 U.S.C. § 115(a)

work this restriction does. In addition, works recorded under this license “shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.”

In practice, this last restriction never matters, because no one uses the statutory license. Lydia Pallas Loren explains:

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.²¹ 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 copyrighted 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.²²

Harry Fox dominates the mechanical licensing business, because it is cheaper and faster to use its online systems than to file the paperwork required by the statutory mechanical license in Section 115.

b Synch Licenses

A synch license is the industry term for the license needed to incorporate a musical work into an audiovisual work, like a movie or TV show. An audiovisual work is a “series of related images,”²³ and to “perform” one is to “show its images in any sequence.”²⁴ The crucial operative phrase in a typical synch license is that it conveys the right to use the musical work in “timed relation” to the audiovisual work, which nicely captures the “synchronization” that gives a synch license its name. If you want to play an indie folk-rock song over a montage at the end of an episode of a prestige TV drama, you need a synch license from the publisher. Same goes if you want to use a soulful Motown classic in a fast-food commercial. These licenses are typically individually negotiated, and depend heavily on the details of the use.

You can’t get around the need for a synch license by hiring someone else to record a cover version, because you are still using the musical work. Your cover is, umm, covered by the mechanical license. But all

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

22. Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RESRV. L. REV. 673 (2003).

23. 17 U.S.C. § 101.

24. 17 U.S.C. § 101.

that lets you do is to make and sell the cover version as a sound recording. Whether statutory or through Harry Fox, the mechanical license does not cover audiovisual works.

Karaoke is a fun example of a boundary case involving synch rights. Music publishers have repeatedly sued the makers of karaoke discs and equipment, claiming that a typical karaoke track is a copy of an audiovisual work requiring an individually negotiated synch license, rather than a phonorecord of a sound recording for which the much cheaper and compulsory mechanical license suffices. The courts have mostly agreed. As one such court explained:

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.²⁵

If the karaoke disc also includes background images that change as the song progresses, the argument that they are audiovisual works is even stronger.

c Print Rights Licenses

Music publishers typically license out the right to print copies of a musical work in musical notation – good old sheet music – as a "print rights" license. There is no one set of terms for print rights because the category includes so many different uses. Want to sell guitar tabs for Metallica's top hits? That's a print rights license. Want to run a lyrics site? That's a print rights license, too. Want to arrange Beatles songs for four-hand piano duet? That's a print rights license as well.²⁶

2 Performance

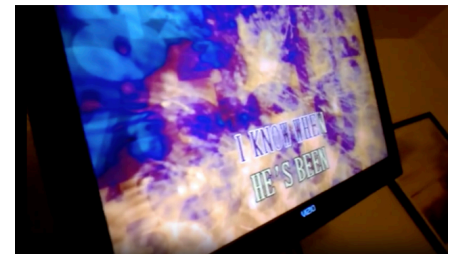
In theory, the general rule since 1897 has been that permission of the copyright owner is required to perform a musical work. There are a few important statutory exceptions and licenses. But in practice, most uses – including broadcasting – are covered by a blanket license issued by one of the "performing rights organizations" (PROs): ASCAP, BMI, SESAC, and GMR.

a Performance Licenses

Musical-work copyright owners sign up with one of the four 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



The Leadsinger device



The Leadsinger lyrics display

25. Leadsinger, Inc. v. BMG Music Pub., 512 F.3d 522 (9th Cir. 2008).

26. Recall that a musical-work copyright includes "any accompanying words." 17 U.S.C. § 102(a)(2).

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.

Here is a summary of the history of the PROs, courtesy of the Supreme Court:

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 Department of Justice first investigated allegations of anticompetitive 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 AS-

CAP'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.²⁷

Today, there are two more major PROs. Unlike ASCAP and BMI, these new organizations, SESAC and GMR, do not operate under consent decrees. But they also offer blanket repertory licenses on a blanket basis, and their licenses have basically the same scope.

Even though the licenses are offered on a repertory basis as to the works covered, there is a lot of variation among the licenses based on the type of use. For example, ASCAP offers distinct licenses for radio stations, websites and apps, television stations, restaurants and bars, gyms, dance studios, churches, wineries, and more, with different royalty models. A roller rink, for example, pays a license fee based on its highest admission price and its square footage: a rink that charges \$5 and has a 5,000 square foot surface owes \$864 a year. On the other hand, a concert venue pays a royalty as a percentage of its gross ticket sales, with the percentage being based on its seating capacity (e.g., a 4,000-seat venue pays a flat .40% of its gross ticket revenue).

The PROs have some of the most extensive enforcement arms of any players in the copyright system. Although they occasionally sue large

27. *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 4-5, 10-11 (1979).

companies in disputes over license scope, the vast bulk of their legal work consists of pursuing small businesses that either didn't realize they needed a public-performance license or tried to skate by without one. Here is a fairly typical description of events from one of these lawsuits:

East Coast [Foods] 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.

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.²⁸

Utterly unsurprisingly, East Coast and Hudson were found liable for vicarious copyright infringement. The only puzzle about these cases is



The Seabird [sic] Jazz Lounge

28. *Range Rd. Music, Inc. v. E. Coast Foods, Inc.*, 668 F.3d 1148, 1151–52 (9th Cir. 2012).

why so many defendants litigate them.

b Grand Rights Licenses

There is one important exception to a typical PRO license. It covers only *nondramatic* performing rights.²⁹ Here is the relevant language from the current ASCAP license:

- (c) This license is limited to non-dramatic performances, and does not authorize any dramatic performances. For purposes of this Agreement, a dramatic performance shall include, but not be limited to, the following:
 - (i) performance of a "dramatico-musical work" in its entirety;
 - (ii) performance of one or more musical compositions from a "dramatico-musical work" accompanied by dialogue, pantomime, dance, stage action, or visual representation of the work from which the music is taken;
 - (iii) performance of one or more musical compositions as part of a story or plot, whether accompanied or unaccompanied by dialogue, pantomime, dance, stage action or visual representation;
 - (iv) performance of a concert version of a "dramatico-musical work".

The reasoning is straightforward. The PROs only license *musical work* copyrights, so one looking to license *dramatic work* copyrights must go elsewhere, e.g., to one of the dramatic licensing services, like Dramatists Play Service or Concord Theatricals. Why this division of labor? The business model for licensing plays and musicals is, pardon the pun, dramatically different than the business model for music. In industry parlance, the PROs offer *small rights*, and the dramatic licensing services offer *grand rights*.

There aren't many cases on the small/grand line, but *Robert Stigwood Grp., Ltd. v. Sperber* is a nice illustration.³⁰ The Original American Touring Company put on a "concert" or "oratorio" of songs from Timothy Rice and Andrew Lloyd Webber's *Jesus Christ Superstar*. Each concert consisted of 20 out of the 23 songs from the musical, sung almost exactly in order, plus three other religious songs. OATC had an off-the-rack ASCAP license, which the court held was insufficient.

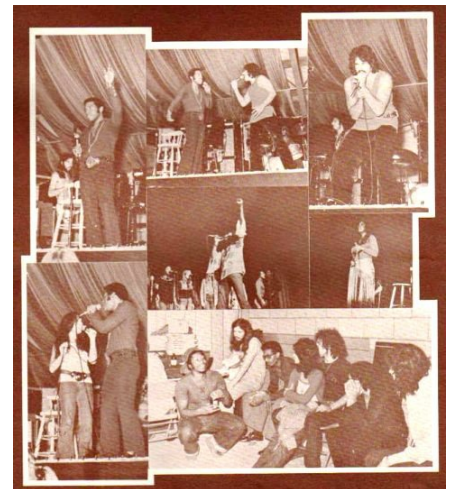
The conclusion is inescapable that the story of the last seven days in the life of Christ is portrayed in the OATC performances substantially as in *Superstar*. One might appropriately ask why, if OATC did not intend that the same story be told, would it insist on preserving the sequence of the songs presented in *Jesus Christ Superstar*, which when performed in that fashion, tell the story even in the absence of intervening dialogue? . . . [T]he lack of scenery or costumes in the OATC production does not ipso facto prevent it from being dramatic. Indeed, radio performances of operas are

29. In a few places, the Copyright Act makes a similar distinction.

30. *Robert Stigwood Grp., Ltd. v. Sperber*, 457 F.2d 50 (2d Cir. 1972).



Jesus Christ Superstar (original Broadway production)



Photographs from the *Superstar: The Original American Touring Company* tour

considered dramatic, because the story is told by the music and lyrics. There 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 which are sung in almost perfect sequence using 78 of the 87 minutes of the original copyrighted score, is dramatic.³¹

31. *Id.* at 55.

This is clear enough, and if you buy the dramatic/nondramatic distinction at all, OATC was on the dramatic side of the line. But there is something slightly off about that last sentence. 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? As in many other musical-work cases, the court is allowing elements of the sound-recording copyright to influence its thinking.

c Jukeboxes

Jukeboxes in restaurants and bars are a nice example of a use that was arguably not an infringing performance for profit under the 1909 Act but were definitely a public performance under the 1976 Act. Thus, as with player pianos and cable television, jukebox operators received a statutory license in Section 116 of the new Copyright Act for "operators of coin-operated phonorecord players."³² The Copyright Office administered it, just as it administers the statutory mechanical license. In 1989, however, the PROs negotiated a deal with the Amusement & Music Operators Association (AMOA), a jukebox trade association. They all went back to Congress, which blessed the deal, amended Section 116 to defer to privately negotiated licenses, and set up the Jukebox Licensing Organization to administer the newly negotiated jukebox license. Operators file paperwork with the JLO and pay a royalty based on how many jukeboxes they operate.



A jukebox. At the top are records; at the bottom are buttons to select which record to play.

32. 17 U.S.C. § 116.

d Record Stores

There is also a statutory exemption in Section 110(7) for record stores and electronics stores, "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."³³ The collapse of record stores as a Thing That Exists has rendered this exemption mostly irrelevant.

33. 17 U.S.C. § 110(7).

C Sound Recordings

Both the reproduction and performance rights in sound recordings are sharply limited. This treatment is legacy of the history of how sound-recording copyright developed, and of the idea that performances and recordings are secondary to composition and musical works.

1 Reproductions

The only thing protected in a sound-recording copyright is the *actual sounds* fixed in the recording, and only against copying those sounds *from the recording*. To quote the statute:

- [The reproduction right] 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 adaptation right] is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.
- [The reproduction and adaptation rights] 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.³⁴

An important licensing consequence of this rule is that a cover version recorded under the mechanical license does not need to worry about any sound-recording copyrights in previous versions. Indeed, the musicals can deliberately try to sound as much like a previous version as possible – which is common in karaoke versions and parody reworkings of the lyrics.

a Master Use Licenses

When a sound recording is used with permission in an *audiovisual work*, the industry jargon is that this is a *master use license*. The idea is 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. Master-use licenses are almost always individually negotiated, because the value of a recording varies based on the context. The use of Eric Clapton’s “Layla” during the assassination montage in *Goodfellas* is iconic; the same song playing on a jukebox in the background of a bar scene in another movie might be far less significant.

b Sample Licenses

Under Section 114(b)’s “actual sounds” language, reproductions of sound recordings are judged by a different standard of similarity than other types of works. Unusually for the rest of copyright, liability depends on the *means* by which a work is imitated, rather than just by the degree of similarity. But the courts disagree on what the standard of similarity for sound recordings is.

The issue comes up primarily in sampling cases. In *Bridgeport Music, Inc. v. Dimension Films*, the rap group N.W.A.’s single “100 Miles and Runnin’” sampled a guitar riff from “Get Off Your Ass and Jam” by George Clinton and Funkadelic.³⁵³⁶ The three-note, four-second riff

34. 17 U.S.C. § 114(b) (bullet points added). Why was it not necessary to mention the other exclusive rights?

35. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005). According to Clinton’s autobiography, the guitar part was laid down by an unknown “smack addict” who had “wandered into the studio” and “wanted to know if he could play with us and pick up a little cash in the process.”

36. The songs can be heard and compared at the [Music Copyright Infringement Resource](#).



Funkadelic



N.W.A.

was pitch-lowered, looped, and used at five places in "100 Miles and Runnin'."

The *Bridgeport Music* court held that the history and structure of sound-recording copyright dictated a bright-line rule that any sampling, no matter how brief, infringes. There is no *de minimis* exception, and substantial similarity is not required. "Get a license or do not sample." It reasoned,

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.³⁷

Moreover, the court observed that there is no risk of subconscious infringement for a sample:

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.³⁸

Another sampling case, *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, is even sharper. It begins, "Thou shalt not steal."³⁹

But not all sampling cases adhere to *Bridgeport Music's* bright-line rule. In *VMG Salsoul, LLC v. Ciccone*, Madonna's "Vogue" sampled a quarter-second horn hit from the Salsoul Orchestra's "Chicago Bus Stop (Ooh, I Love It) (Love Break)."⁴⁰ The court rejected the *Bridgeport Music* rule, reasoning that while section 114(b) says that recording sound-alikes is *not* infringement, it says nothing about whether sampling is infringement.

We disagree [with *Bridgeport Music'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. 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 dif-

37. *Bridgeport Music*, 410 F.3d at 801–02.

38. *Id.* at 801.

39. *Grand Upright Music Ltd. v. Warner Bros. Recs., Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991).

40. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871 (9th Cir. 2016). The songs can be heard and compared at the [Music Copyright Infringement Resource](#). "Love Break" was produced by Shep Pettibone, who also co-produced "Vogue" with Madonna, and who actually copied the horn hit from the one recording to the other.



The Salsoul Orchestra



Shep Pettibone and Madonna

fer 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 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*. . . . [T]he 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.⁴¹

41. *Id.* at 885.

When a sound recording is used with permission in another *sound recording*, the industry jargon is that this is a *sample license*. The phrase comes from the common use case of taking a short sample for use in creating the sonic landscape of another work, as the Beastie Boys did with the short snippet from James Newton’s “Choir.” Sample licensing again must be negotiated, which can be a protracted and expensive process for sample-heavy works. Record-industry practice is now almost always to obtain licenses for any samples. Some observers think this practice has inhibited creativity and made it harder for musicians without major-label budgets to compete.

Remember also that neither *Bridgeport Music* nor *Ciccone* speaks to fair use. Some remix and mashup artists forego licensing entirely and rely on fair use. This type of sampling, however, tends to happen outside of record-industry channels. Gregg Gillis (a/k/a GirlTalk) and Eric Keptone (a/k/a The Kleptones) have released their work primarily online on self-distributed sites like Bandcamp, and make their living primarily by DJing rather than as *recording* artists. This is not a coincidence. Their mashups draw on their skills in finding unlikely but successful sonic combinations – precisely the same skills on display in a DJ set. The recordings are advertisements for their concerts. But then again, this is true of many major-label artists, too.

2 Performances

Most performances of sound recordings are not covered by federal copyright law. Section 106(4) excludes sound recordings from the list of works covered by the public performance right,⁴² and Section 114(a) reiterates the point.⁴³ So performances in person (e.g. playing music at a dance club) and traditional “terrestrial” AM or FM radio broadcasts do not require permission from the sound-recording copyright owner. They require permission from copyright owner of the underlying musical work, but most of the time that permission can be obtained using a blanket license from one of the PROs.

But “most” is not “all.” Section 106(6) provides, for *sound recordings only*, the exclusive right “to perform the copyrighted work publicly by

42. 17 U.S.C. § 106(4).

43. 17 U.S.C. § 114.

means of a *digital audio transmission*.”⁴⁴ That excludes in-person performances (which travel via sound waves) and AM/FM radio broadcasts (which travel via *analog* transmission). But it includes Internet radio, digital satellite radio like Sirius XM, and streaming services like Spotify.

This public-performance-by-digital-audio-transmission right, however, has always been qualified by an important set of statutory licenses. In brief:

- AM/FM radio stations can freely retransmit their programs digitally over the Internet.⁴⁵ So the traditional exemption of FCC-licensed radio from sound-recording public-performance rights carries over online. Indeed, as over-the-air radio stations transition to digital rather than analog broadcast signals (as over-the-air TV has already done), they will continue to be exempted.⁴⁶
- *Interactive* digital transmissions, in which the user can select which song to hear, generally require permission of the copyright owner, which must be negotiated. Spotify, Apple, Amazon, Tidal, etc. have to strike deals with sound-recording copyright owners. There are a few constraints here – large copyright owners cannot strike exclusive deals with streaming services, due to competition concerns⁴⁷ – but by and large, this is up to the market.
- In between are *noninteractive* services, which are generally subject to bewilderingly complex statutory licenses at terms and rates set by the Copyright Royalty Board.⁴⁸ This category includes Pandora, which lets users pick genres and skip songs they don’t like, but not to pick individual songs.⁴⁹ It includes pure online radio stations that broadcast only over the Internet. And it includes SiriusXM satellite radio. These services are subject to immensely detailed restrictions to keep them from surreptitiously offering music on demand, and the ratemaking proceedings are contentious matters governed by nebulous factors that vary even within this category. The royalties are administered by an entity called SoundExchange, which distributes them according to a complicated formula: 50% to the sound recording copyright owner, 45% percent to the featured recording artists, 2.5% to non-featured musicians, and 2.5% for nonfeatured vocalists.

Making things even more complicated, *performing* a sound recording digitally often requires making *reproductions* along the way, as various computers create and cache copies of the music as it wends its way to the listener. Thus, the Section 114 statutory digital performance licenses are generally accompanied by a statutory license under Section 112 for “ephemeral” reproductions, with rates set by the CRB as well.⁵⁰

A 2015 report from the Copyright Office, U.S. Copyright Off., explains the rationale for this Rube Goldberg system, as well as some of the relevant rules:

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

44. 17 U.S.C. § 106(6) (emphasis added).

45. 17 U.S.C. § 114(d)(2)(B).

46. 17 U.S.C. § 114(d)(2)(A).

47. 17 U.S.C. § 114(d)(3).

48. 17 U.S.C. § 116(f).

49. *Arista Records LLC v. Launch Media, Inc.* held that a Pandora-like system that let users rate songs to hear more (or fewer) songs like them in the future was non-interactive. 578 F.3d 148 (2d Cir. 2009).

50. 17 U.S.C. § 114.

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 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. . . .

In general, the CRB . . . 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.⁵¹

3 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. Instead, it left states free to apply their own law to such sound recordings until 2067, which they did with an eclectic mix of statute, common-law

51. U.S. COPYRIGHT OFF., *COPYRIGHT AND THE MUSIC MARKETPLACE* 44, 46, 51–52 (2015).

copyright, misappropriation, and other bodies of law.

This dual-track system pattered along for close to fifty years before encountering severe challenges in the 2010s. There were two principal sources of trouble. First, it was highly controversial whether there was a public performance right in pre-1972 sound recordings, and if so, how far it extended. Second, lawsuits asked whether familiar features of federal copyright law – such as fair use and § 512 – apply to pre-1972 sound recordings.

The performance-right issues were raised in a series of high-stakes lawsuits against major digital services like Sirius XM. The services argued that there were no such public-performance rights, but if they were, they ought to be subjected to the same defenses as contemporary sound recordings. In a national digital market, the federalism arguments for state-level protection for old music came to seem weaker and weaker.

In 2018, Congress bit the bullet and federalized copyright protection for these pre-1972 sound recordings in the Classics Protection and Access Act, a part of the Music Modernization Act.⁵² Or rather, it subjected them to a new system of copyright protection, one that is in many ways identical to the system that governs contemporary sound recordings, but has numerous idiosyncratic variations. The details are not of interest in a survey course, but anyone dealing with music needs to be aware – and beware – of them.

D 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. In a world without recording and broadcast technology, this wasn’t much of an issue, because performances were localized in both time and space.

But the development of the phonograph and radio left a substantial hole in the copyright scheme, one that states sometimes filled. In *Metropolitan Opera Assoc. v. Wagner-Nichols Recorder Corp.*, for example, New York’s Metropolitan Opera allowed ABC Radio to broadcast its performances live.⁵³ Wagner-Nichols recorded the broadcasts, made phonograph records of the performances, and sold the records to the public. The Met also licensed recordings to Columbia Records, but note that Wagner-Nichols was not copying from Columbia’s records. This was *bootlegging* the performances, not piracy of the records. Nonetheless, the court held that this bootlegging was prohibited under New York state unfair-competition law.

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

52. For the gory details, see 17 U.S.C. § 1401, and Tyler Ochoa’s [summary of the new rules](#).

53. *Metro. Opera Assoc. v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786 (N.Y. Sup. 1950). The Met still broadcasts its Saturday matinees on radio stations around the country. If you’re an opera fan, it’s a lovely tradition.

of Metropolitan Opera's broadcast performances. This constitutes unfair competition.⁵⁴

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. This works for the Met, *provided that it is recording either the concert or the broadcast*. But it doesn't work for musicians who have no idea that someone in the audience is recording the set. Maybe the secret bootlegger is a fan with a tape recorder, or maybe it's a member of the stage crew with access to the sound board.

States partially filled this 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 the Copyright Act, and criminal anti-bootlegging provisions to the federal criminal code. Section 1101 of the Copyright Act covers the gist:

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.⁵⁵

These look a lot like the usual exclusive rights, but they don't depend on the existence of a copyright – indeed, there often is none, if the performance has not been fixed under the authority of the performers. For the civil provision, there is no mental-state threshold, and no requirement of commerciality.

Notably, however, the courts have held that the *criminal* anti-bootlegging provisions in 18 U.S.C. § 2319A are *not* copyright statutes subject to the various restrictions of the Copyright Act.⁵⁶ Like the anti-circumvention provisions in section 1201, the anti-bootlegging provisions in section 2319A are paracopyright. Thus, for example, the fact

54. *Id.* The court was also careful to note that the Met's exclusive contract with ABC didn't constitute an abandonment of its state-law rights, just as Dr. King's performance of his "I Have a Dream" speech was not an abandonment of his rights.

55. 17 U.S.C. § 1101.

56. *United States v. Martignon*, 492 F.3d 14 (2d. Cir. 2007).

that performers' rights under section 2319A are perpetual is not a constitutional problem, the way that a perpetual copyright would be. Anti-bootlegging is regarded as an exercise of Congress's Commerce Clause powers, not its Copyright Clause powers.

Problems

Musical Creativity Problem

Describe each of the following in terms of musical works and sound recordings, and in terms of reproductions and performances. Do not worry about the exclusive rights or about licensing. Just spot the different copyrights, and identify the reproductions and performances.

- An orchestra plays a symphony for a live audience. A classical record label has microphones in the concert hall, which it uses to make a "live version" that it sells on CDs.
- A DJ mixes tracks and samples on the fly in a packed club.
- A folk singer in a coffee shop plays a traditional ballad passed down from one musician to another.
- A jazz combo practicing in a rehearsal room improvises around the melody and chords of a standard written down in a **lead sheet**.
- A rapper performing on stage freestyles while a drummer lays down a beat.
- A rock band in the studio experiments with different fragments of song ideas until they find one they like, which they then record in parts (drums, bass, guitar, vocals, backing vocals, synths, etc.) and mix. The song is made available as a single on streaming services.
- A video-game composer uses a computer to make a chiptune track by entering notes on a virtual staff. The game is sold via download, as is the soundtrack.

Next Best Western Problem

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 *Reunion Hill* version of "The Next Best Western" live on the Internet as it plays on WTWP.
- Turning on the radio to WTWP in your home as the *Reunion Hill* version of "The Next Best Western" comes on.

- Turning on the radio to WTWP in the coffeeshop you run as the *Reunion Hill* version of "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.
- 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* in your apartment.
- Setting the *Reunion Hill* version of "The Next Best Western" as your cellphone ringtone.
- Selling ringtones of the *Reunion Hill* version 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 a sound-alike cover of "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.

Policy Questions

1. 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?
2. Your cousin, an extremely talented drummer, is considering trying to make a career in music. Do you have any advice for them?
3. 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?