

meiea[®]

MUSIC & ENTERTAINMENT INDUSTRY
EDUCATORS ASSOCIATION

Journal of the
Music & Entertainment Industry
Educators Association

Volume 12, Number 1
(2012)

Bruce Ronkin, Editor
Northeastern University

Published with Support
from



Unfair? The Unique Status of Sound Recordings under U.S. Copyright Law and its Impact on the Progress of Sample-Based Music

Reynaldo Sanchez
University of Miami

Introduction

On June 3, 2005 in a United States federal courtroom in Nashville, Tennessee, seven words disrupted the age-old, natural cycle of musical development: “Get a license or do not sample.”¹ At the heart of the case was a sample² of a common, three-note guitar riff³ from the introduction to the George Clinton funk song *Get Off Your Ass and Jam*. The sampled portion was sonically altered and repeated five times in the background of the song *100 Miles and Runnin’* by the hip-hop group N.W.A. *100 Miles* was also featured on the soundtrack to the film *I Got the Hook Up*. In this pivotal case, the Sixth Circuit Court reversed a lower court ruling that the use of the sample was *de minimis*⁴ and established a bright-line rule⁵ for digital sampling. The three-judge panel concluded, “We do not see this as stifling creativity in any significant way.”⁶ This article intends to show that while the court was technically correct in its assessment of the Copyright Act in relation to Sound Recordings,⁷ the decision exposed a flaw in the Act itself. Namely, as currently defined, Sound Recordings are fundamentally different from other categories of works⁸ in that they do not, and in fact cannot, meet the same minimal creativity requirement⁹ for copyright. The “idea/expression dichotomy”¹⁰ is not relevant to Sound Recordings because unlike every other category of works, they are not the result of an expression of ideas fixed in tangible form. They are strictly the result of fixation regardless of the nature, quality, and originality (or lack thereof) of the sounds embodied therein. Authorship of Sound Recordings is problematic since they are not the result of any individual’s expression and thus cannot be infringed upon save by the physical duplication of a material object. Therefore in contrast to all other categories of copyrightable works, ideas cannot be freely extracted from them to be used as the building blocks for new, independent creations. The historical record shows that Sound Recordings were afforded copyright protection for a singular

economic reason: to combat record piracy. Owners exercise a complete monopoly over any reproduction and derivative of Sound Recordings for the full term of copyright. While enormously effective in battling record piracy, this broad statutory stranglehold continues to impact the naturally transformative cycle of musical development in regards to sample-based music. The court was legally right: sampling requires copying.¹¹ But the court was musically wrong: transformational copying is the heart of musical innovation and development. Creativity has been significantly stifled.

A Brief History of Copyright in Sound Recordings in the United States: 1900-1970

Law typically follows innovation; an axiom exemplified throughout the history of recorded music. By the turn of the twentieth century, emerging audio recording technology had already made an indelible mark on the music industry. Three major labels (Edison, Victor, and Columbia) were selling three million records per year in the United States by 1900.¹² Yet federal copyright protection was not made available to producers of recordings until 1972. Why? Lawmakers in the U.S. were reluctant to define recordings, then known as phonograms, as “writings.” The U.S. Constitution states that “Congress shall have the power... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹³ The Copyright Act of 1909 specified in Section 4, “...the works for which copyright may be secured under this Act shall include all the *writings of an author*”¹⁴ (emphasis added). In 1908 the Supreme Court in the landmark case *White-Smith Co. v. Apollo Co.* concluded that because the pattern of perforations on piano rolls¹⁵ were not *visually* perceivable as music, the objects were not copies of musical works (i.e., not *writings*),¹⁶ authors could not control their use.¹⁷ The legal consensus leading up to the Act of 1909 was that recordings were not writings but mechanical reproductions.

Between 1909 and 1970 a number of bills related to copyright in Sound Recordings were submitted to Congress. The Perkins Bill (1925) was the first to include Sound Recordings as a category of copyrightable works.¹⁸ During deliberations, J.G. Paine of the Victor Co. testified that the recording manufacturers were not sure they wanted statutory protection at all as they already had protection under the common law theory of unfair competition.¹⁹

The growing use of recordings in radio broadcasts was among the issues discussed in 1932 during hearings before the House Committee on the Judiciary. For the first time, the recording industry pressed for full copyright protection, including performance rights for recordings. Broadcasters stood in opposition arguing that small radio stations would be hurt.²⁰ The result of these hearings were a series of general revisions known as the Sirovich Bills²¹ that included copyright protection for recordings as well as arrangements, adaptations, and compilations. A representative for ASCAP²² argued that recordings were not copyrightable under the constitution and that the provision “will result in a duplication of remedy, a multiplicity of suits, and possible bankruptcy of even an innocent infringer.”²³

The Daily Bill (1936) included performers as authors for the first time, defining copyrightable works as “...all the writings of an author, whatever the mode or form of their expression, and all renditions and interpretations of a performer and/or interpreter of any musical, literary, dramatic work, or other compositions, whatever the mode or form of such renditions, performances, or interpretations.”²⁴ Contending that new technology (radio) was unfairly exploiting them, performers with support from the American Federation of Musicians and others argued that only copyright could protect their creative expressions. At the same time, recording companies maintained that “...a record is an artistic creation and that protection should vest in the record producer.”²⁵ As with the previous bills, the opposition included radio broadcasters, music publishers, and ASCAP arguing that performances were too vague to be copyrightable and that granting protection to recordings would create “...practical difficulties in having to obtain licenses from more than one copyright holder.”²⁶

One of the most interesting chapters in the history of copyright in Sound Recordings is the period between 1938 and 1940. Professor James T. Shotwell of Columbia University, then chair of the National Committee of the United States of America on International Intellectual Cooperation, formed a group to explore revising copyright law to conform to the Berne Convention. The Committee for the Study of Copyright met with all interested parties including recording companies, broadcasters, authors, publishers, and motion picture producers, soliciting statements from each that delineated their positions on changes in the copyright law. The responses were not surprising. Record companies contended that, like motion pictures, records should also be protected by copyright. Authors, publishers, and broadcasters insisted that manufacturers were not authors and records

were not copyrightable works of authorship (writings). Motion picture producers supported the record companies with an interesting twist: while they saw no practical difference between visual and audio recordings in regards to copyright, they maintained that "...protection should extend solely to the actual reproduction of a recorded performance, and that there should be no rights against imitators or mimics."²⁷ However, there was no mention at all of copyright in Sound Recordings when the Shotwell Committee Bill was finally introduced in 1940. Executive Secretary Edith T. Ware explained in a memorandum in the Congressional Record that "...there is considerable opposition to giving copyright in recordings for they are not commonly creations of literary or artistic works but uses of them."²⁸

There was a flurry of legislative activity between 1942 and 1951 in response to the landmark *RCA Mfg. Co. v. Whiteman* ruling,²⁹ a case where the Supreme Court refused to consider a Court of Appeals decision denying copyright to performers. Six similar proposals known as the Acoustic Recording Bills were introduced during that period in an attempt to amend the copyright law to extend protection to performers. While the bills also provided for copyright protection of recordings, they were not supported by the recording industry. Reasons included opposition by the manufacturers to any copyright protection for performers and to provisions requiring the permission of authors as a condition of copyright for recordings.³⁰

The Copyright Office prepared a series of studies of the Copyright Law starting in 1955 for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate's Committee on the Judiciary covering a broad range of issues. Study number 26 on the Unauthorized Duplication of Sound Recordings was completed in 1957 by the then Assistant Chief of the Examining Division (and later Register of Copyrights) Barbara A. Ringer. It was distributed to a number of scholars and finally printed with their commentaries appended in 1961.³¹ The comprehensive study detailed the issues surrounding "...the rights of performers and record producers to prevent unauthorized duplication of their own contribution to the record."³² Ringer concluded, "It is generally recognized that unauthorized dubbing³³ constitutes a problem in the sound recording industry, and that some legal protection against it is desirable."³⁴

The Copyright Office was now on record recommending a limited copyright in sound recordings. Several more legislative attempts were

made in 1967, 1969, and 1970 to amend the copyright law in favor of sound recordings. The 1969 bill even included a performance right for record companies and performers in addition to protection against unauthorized duplication.³⁵

All of the preceding efforts failed to extend copyright to recordings. The opposition consistently argued that recordings were not creative “writings” but rather mechanical objects—reproductions of musical or literary works.³⁶ However, the historical record also shows that virtually no one opposed protection against the unauthorized duplication of recordings.

1971-1972

The 1971 Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (also known as the Geneva Phonograms Convention) was an important impetus for the United States to finally assign copyright protection to recordings. Ten years earlier the U.S. had declined to sign the Rome Convention³⁷ treaty in part because, while it included international protection for sound recordings for the first time, the U.S. could not agree to the scope of protection the treaty offered performers. By contrast, the Geneva Convention was singularly focused on protecting sound recordings, leaving any protection for performers up to the discretion of individual nations.³⁸ By 1971 U.S. lawmakers were eager to enter into an international treaty protecting sound recordings and thus domestic protection would be desirable. According to a statement included in the House Report on the Sound Recording Amendment of 1971, “The Department of Commerce is also vitally interested in this bill from the international trade standpoint. Unauthorized reproduction abroad of sound recordings is resulting in losses to U.S. record manufacturers [*sic*], not only in export sales, but in royalties. A proposed international ‘Convention for the Protection of Phonograms Against Unauthorized Duplication’ designed to remedy the international piracy situation is scheduled for negotiation in Geneva, next October. *Enactment of the bill would enhance the United States Delegation’s negotiating position at this revision conference in efforts to achieve effective international protection for sound recordings*”³⁹ (emphasis added).

The breakthrough for the recording industry finally came on February 8, 1971 when Senator John L. McClellan of Arkansas introduced S. 646. Record piracy had become rampant and “...the need for special remedial action became apparent.”⁴⁰ S. 646 passed the Senate in April and the

companion bill, H.R. 6927 passed the House in early October. President Richard M. Nixon signed Public Law 92-140 on October 15, 1971, amending the copyright law to grant limited protection and additional sanctions for infringement to sound recordings. The act, effective on February 15, 1972, "...was enacted to combat the widespread and systematic piracy that had seriously jeopardized the market for legitimate tapes and discs."⁴¹

The newly revised copyright law defined Sound Recordings as "... works that result from the fixation of a series of musical...sounds, but not including the sounds accompanying a motion picture."⁴² It labeled the material objects in which the sounds are fixed as "Reproductions of Sound Recordings."⁴³ The law also required a notice of copyright appear on all reproductions of sound recordings consisting of the letter P in a circle (©), the year of first publication, and the name of the copyright owner.⁴⁴ The latter was in conformity to a requirement of the Geneva Phonograms Convention treaty, also signed by the U.S. in 1971 and ratified in 1973.

1976

The revision of 1972 was the last leg of the journey resulting in the first major overhaul of copyright law in almost seventy years. On October 19, 1976, President Gerald R. Ford signed Public Law 94-553, an Act for the General Revision of the Copyright Law (Title 17 of the United States Code)⁴⁵—the Copyright Act of 1976. It included a number of significant modifications relative to Sound Recordings.

First, the Copyright Act of 1976 abandoned the use of the term "writings" in favor of "works of authorship." Under the 1909 Act, "all the writings of an author" were protectable by copyright. The 1976 Act specifies that all "original works of authorship" are copyrightable. This term was purposely left undefined. "In using the phrase 'original works of authorship,' rather than 'all the writings of an author'... the committee's purpose is to avoid exhausting the constitutional power of Congress to legislate in this field, and to eliminate the uncertainties arising from the latter phrase."⁴⁶ The choice was made to give Congress more latitude and to remove the ambiguity historically connected to "writings."

Second, the term "phonorecords" replaced "reproductions of Sound Recordings" as the material objects in which Sound Recordings are embodied. The letter P in a circle (©) from the 1972 revision was retained as the proper notice for phonorecords to avoid a "likelihood of confusion if the same notice requirements applied to sound recordings and to the works

they incorporate.”⁴⁷

Third, the scope of the exclusive rights of owners of Sound Recordings remained limited to the reproduction and distribution of phonorecords, and to the preparation of derivative works from the Sound Recordings. Owner’s exclusive rights specifically did not extend to any other Sound Recording “...that is an *independent fixation* of other sounds, even though such sounds *imitate or simulate* those in the copyrighted recording”⁴⁸ (emphasis added). A performance right for digital performances was added in 1995.⁴⁹

Fourth, the Act of 1976 extended the duration of copyright to life of the author plus 50 years, or the lesser of 75 years from publication or 100 years from creation for anonymous or pseudonymous works for all works, including Sound Recordings. The U.S. was now in line with the minimum duration specified in the Berne Convention,⁵⁰ which the U.S. ultimately joined in 1989. Duration of copyright was extended by 20 years overall in 1998 by the Copyright Term Extension Act (the Sonny Bono Act). As a result of the Act of 1976 and subsequent extension, the minimum 95 year duration of copyright for Sound Recordings in the U.S. now stands in sharp contrast to the 50 to 70 year term in effect today in most other countries.

An Analysis of the U.S. Copyright Act Regarding Sound Recordings

The Idea/Expression Dichotomy

The Copyright Act states that “copyright protection subsists...in *original works of authorship* fixed in any tangible medium of expression...”⁵¹ (emphasis added). It goes on to state that, “In no case does copyright protection for an original work of authorship extend to any *idea... regardless of the form in which it is...embodied in such work*”⁵² (emphasis added). In other words, copyright can only protect a particular *expression* of an idea, not the idea itself. This is also known as the “idea/expression dichotomy.” As Justice O’Connor expressed in the landmark Feist ruling, “The key to resolving the tension lies in understanding why facts are not copyrightable. The *sine qua non*”⁵³ of copyright is originality. To qualify for copyright protection, a work must be original to the author... and that it possesses at least some minimal degree of creativity.”⁵⁴

Ideas are the building blocks of all art forms. A songwriter starts with

a concept, maybe a simple, common phrase like “with or without you.” He picks up his guitar and plays a simple I-V-vi-IV⁵⁵ chord progression over and over to a simple eight-note rhythm pattern at a medium tempo. He comes up with a simple, conversational lyric describing a painful relationship. It is sung to a simple, not unfamiliar melody. As of this writing there are 57 musical entries with the title *With or Without You* registered with the U.S. Copyright Office, 17 of which are dated prior to 1985 when Bono of U2 began to write his rendition. The I-V-vi-IV progression is one of the most common in popular music; it’s used in numerous hit songs including *Can You Feel The Love Tonight* (Elton John), *Don’t Stop Believing* (Journey), *Let It Be* (The Beatles), *Man In The Mirror* (Michael Jackson), and countless more. Lyrics about hurtful relationships are ubiquitous. But when all of those common, everyday elements come together in a U2 record, something very uncommon happens: art. U2’s *With or Without You* memorialized on a recording is the expression of an idea fixed in tangible form, an original work of authorship. But it’s important to note that it is the *musical work*, *With or Without You*, that is the product of those common, un-protectable ideas creatively assembled by its author. The protectable Sound Recording resulted from the fixation of a *performance* of the musical work. It is also, by its very nature, a *derivative* of the musical work. All of the underlying, non-protectable ideas are one generation removed from the Sound Recording, embodied within the musical work itself.⁵⁶

Sound Recordings as Works

The Copyright Act lists eight categories of copyrightable works, five of which are defined in Section 101. “The three undefined categories—‘musical works,’ ‘dramatic works,’ and ‘pantomimes and choreographic works’—have fairly settled meanings.”⁵⁷ However, in the case of the other items, including Sound Recordings, “...definitions are needed not only because the meaning of the term itself is unsettled but also *because the distinction between ‘work’ and ‘material object’ requires clarification*”⁵⁸ (emphasis added). Section 101 defines Sound Recordings as “...works that *result from the fixation* of a series of musical, spoken, or other sounds, ...regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied” (emphasis added). In other words, a Sound Recording is *not* a series of recorded sounds but is the *result* of their fixation. The sounds themselves are not the Sound Recording. It is curious to note that the other categories are described with

present tense verbs such as “is” and “are,” not with an intransitive verb like “result:” “An ‘architectural work’ *is* the design...A ‘computer program’ *is* a set of statements... ‘Literary works’ *are*...expressed in words... A ‘work of visual art’ *is* a painting, ...”⁵⁹

Authorship and Sound Recordings

If in fact Sound Recordings are defined in terms of fixation, their authorship must by necessity be different from that of other works. With Sound Recordings, the act of fixation *is* authorship. A dramatic example of this difference becomes apparent when contrasting Sound Recordings to what at face value appears to be a visual equivalent—motion pictures. “Motion pictures are audiovisual works *consisting of a series of related images* which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any”⁶⁰ (emphasis added). In motion pictures, the series of related images *are* the work. The word “related” implies minimal creativity—someone has to relate them to each other: the author. In motion pictures, the work is separate and distinct from any material object. As such, it is quite possible to infringe on the copyright of a motion picture without ever duplicating a material object. Elements such as storylines, characters, dialog, costumes, etc. are protected as part of the work and may be the subject of infringement if improperly taken. By contrast, it is *not possible* to infringe on the sonic elements embedded in a Sound Recording without *physically duplicating the material object*. “The exclusive rights of the owner of copyright in a sound recording...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*”⁶¹ (emphasis added). The ability for anyone to appropriate any of the elements embodied in a Sound Recording by imitation, no matter how realistic or accurate, *is codified*. As the Bridgeport court stated, “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.”⁶² One result of this current legal climate is the thriving industry of *sample recreation*. Companies such as Rinse Productions (rinseproductions.co.uk), Replay Heaven (replayheaven.com), and Scorccio (samplereplay.com) specialize in reproducing highly accurate recreations of popular records for the sole purpose of sampling by circumventing the Sound Recording copyright owner(s).⁶³ This is impossible to do with mo-

tion pictures or any other type of copyrightable work.

As of this writing there is considerable interest in termination rights⁶⁴ in Sound Recordings. Artists, producers, record companies, and their attorneys are gearing up for what promises to be a contentious legal battle to answer one simple question: who is the author of a Sound Recording? Since the only statutory standard for U.S. copyright in Sound Recordings appears to be independent fixation, it stands to reason that authorship will likely vest in the originator of the fixation.

The Unique Character of Sound Recordings

There are a number of differences between Sound Recordings and other categories of works. Of these, three are significant:

1. The scope of exclusive rights in Sound Recordings 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 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.”⁶⁵ And, “In the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”⁶⁶
2. The work and the material object are in practice, indivisible. Sound Recordings “...result from the fixation of a series of musical, spoken, or other sounds...” and, “The term ‘phonorecords’ includes the material object in which the sounds are first fixed.”⁶⁷ According to a footnote from the Bridgeport ruling, “...it seems like the only way to infringe on a sound recording is to re-record sounds from the original work... Then the only issue becomes whether the defendant rerecorded sound from the original.”⁶⁸ And finally this quote from a 1978 U.S. House report, “It is interesting that, although fixation is an important concept throughout the law, sound recordings *are the only ‘works of authorship’ actually defined in terms of fixation*”⁶⁹ (emphasis added).
3. There can be no practical minimal creativity require-

ment for copyright in Sound Recordings if they are exclusively the result of fixation. In fact the creative or qualitative nature of the actual sound fixed is irrelevant. "...There may be cases (for example, recordings of birdcalls, sounds of racing cars, et cetera) where only the *record producer's contribution* is copyrightable"⁷⁰ (emphasis added). This fact is at the heart of the Bridgeport decision. The creative nature of the content was not a factor at all. "In most copyright actions, the issue is whether the infringing work is substantially similar to the original work...The scope of inquiry is much narrower when the work in question is a sound recording. The *only issue* is whether the actual sound recording has been used without authorization. *Substantial similarity is not an issue...*"⁷¹ (emphasis added).

Unique Notice and Material Object

It seemed from the outset that Congress intended to provide a separate, but somewhat equal, type of copyright protection for Sound Recordings—parallel provisions. "It is also true under existing [*sic*] law that the protection given to owners of copyright in musical works with respect to recordings of their works is *special and limited*...the bill creates a limited copyright in sound recordings, as such, making unlawful the unauthorized reproduction and sale of copyrighted sound recordings"⁷² (emphasis added). Evidence of this treatment is the fact that Sound Recordings were ascribed two proprietary elements of copyright: their own copyright notice symbol and a distinct material object.

The standard symbol for a copyright notice, the letter "C" in a circle (©) does not apply to Sound Recordings. Instead, Congress adopted the formality originally set forth in the 1961 Rome Convention:⁷³ the letter "P" in a circle (©). A Senate report from 1975 states, "There are at least three reasons for prescribing use of the symbol "(P)" rather than © in the notice to appear on phonorecords of sound recordings. Aside from the need to avoid confusion between claims to copyright in the sound recording and in the musical or literary work embodied in it, there is also a necessity for distinguishing between copyright claims in the sound recording and in the printed text or art work appearing on the record label, album cover, liner

notes, et cetera. The symbol “(P)” has also been adopted as the international symbol for the protection of sound recordings...⁷⁴

All copyrightable works must be fixed in some tangible form. “The two essential elements—original work and tangible object—must merge through fixation in order to produce subject matter copyrightable under the statute.”⁷⁵ Phonorecords are the material objects⁷⁶ that embody Sound Recordings. “Phonorecords’ are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”⁷⁷ By definition, phonorecords must exclusively contain “sound.” The embodied works may only be perceived aurally. In contrast, “copies” may contain visual material (books, magazines, etc.) or both visual and aural material (movies, games on DVD). A Sound Recording may be embodied in a “copy” if there are also visual elements present (music video, recording in movie soundtrack, etc.). However, a recorded performance is not a *copy* of a musical or literary work. Under the current definition, a copy must have a visual component. Phonorecords typically contain three distinct elements: 1) a musical or literary work, 2) a rendition or performance of the work, and 3) a Sound Recording.⁷⁸ Only two of these elements currently receive copyright protection in the United States⁷⁹ (see Figure 1).

The Bridgeport Effect on Sample-Based Music

The Transformative Cycle of Musical Development

In the early 1940s, Minton’s Playhouse in Harlem was filled with the innovative sounds of a handful of young musical pioneers. At late-night jam sessions, Charlie Parker, Dizzy Gillespie, Thelonious Monk, Charlie Christian, and Kenny Clarke forged a new sound unlike anything else of the time. “These forerunners of the new music...began exploring advanced harmonies, complex syncopation, altered chords, and chord substitutions.”⁸⁰ They *transformed* popular songs of the day such as *Back Home Again in Indiana* and Gershwin’s Broadway hit *I Got Rhythm* into new tunes such as *Donna Lee* and *Anthropology*,⁸¹ sophisticated settings for their soaring improvisations. Bebop was born.

In December of 1945, an audience at the Ryman Auditorium in Nashville witnessed musical history in the making. Band leader and mandolin

Sound Recordings	Other Copyrightable Works
The “work” results strictly from the act of fixation. Fixation <i>is</i> authorship.	Results when “works of authorship” are fixed in tangible form. Authorship is separate from fixation.
Exclusive rights are limited to reproduction, derivative works, and digital performance.	All exclusive rights are in force.
The “work” and the material object are in practice inseparable and indistinguishable.	The “work” and material object are separate and distinct.
The “work” cannot be infringed without physical reproduction of a material object. (The copyright law specifically allows for recreation of embodied elements in whole or in part.)	The “work” can be infringed without physical reproduction of a material object. (Recreation of embodied elements could be infringement.)
“Minimal creativity” and “independent creation” not required for copyright—only “independent fixation.” There is no idea/expression dichotomy.	“Minimal creativity” and “independent creation” required for copyright. The idea/expression dichotomy is in operation.
Unique copyright notice: ©	Common copyright notice: ©
Unique material object: <i>phonorecords</i> .	Common material object: <i>copies</i> .

Figure 1. Contrasting Sound Recordings with other copyrightable works.

player Bill Monroe, along with fiddler Chubby Wise, guitarist Lester Flatt, bassist Howard Watts (a.k.a. Cedric Rainwater) and twenty-one year-old banjo prodigy Earl Scruggs unleashed a furious new sound that will forever be associated with the band the Blue Grass Boys. “In retrospect, this lineup of the Blue Grass Boys has been dubbed the ‘Original Bluegrass Band,’ as Monroe’s music finally included all the elements that characterize the genre, including breakneck tempos, sophisticated vocal harmony arrangements, and impressive instrumental proficiency demonstrated in solos or ‘breaks’ on the mandolin, banjo, and fiddle.”⁸² They *transformed* the old-time music⁸³ of Appalachia into a vehicle for unabashed virtuosity. Bluegrass was born.

The evolution of bebop and bluegrass, contemporaneous styles separated by geography and culture, showcase how musical styles develop and proliferate—by transformational copying. The two styles have much in common: they developed at roughly the same time; their sound was influenced by, but quite unlike, any previous styles; they were both considerably more sophisticated and complex than earlier styles; performing either style entailed a high degree of musical and improvisational skill; and improvising and composing in either style *required adopting the unique musical vocabulary* originally developed by their founders. It is not possible to play bebop or bluegrass without appropriating large swaths of the musical *expression* of their originators. Aficionados spend countless hours listening to recordings to learn the nuances of the styles. They transcribe improvisations in order to incorporate them into their own music. Composer David Cope writes, “I argue that while plagiarism certainly cannot fall within the boundaries of creativity, many of the most renowned artists and composers of history have borrowed extensively from their predecessors.”⁸⁴

The cycle of copying and transforming is at the heart of every musical style and genre. Idea leads to expression. Expression, appropriated and repeated enough times by enough people, eventually transforms back to idea. In other words, original expression, subject to cycles of transformational copying, eventually loses its originality and reverts to the realm of ideas, and as such the building blocks for new expression. While the cycle necessarily begins with copying, in the hands of creative individuals the music begins to evolve and transform into altogether new expression. Bluegrass as we know it originated with Monroe’s band. Those that followed played similar music with similar elements, adding originality along the way. Every subsequent generation of bebop musicians share a common musical ancestry with Parker, Monk, and Gillespie. Over time styles evolve into new styles: cool, hard bop, newgrass, and so on. The Bridgeport decision denies the sampling musician access to the very first step in this natural cycle: copying.

The Development of Sample-Based Music

The use of recordings as source material to create new music arguably predates both bebop and bluegrass. In 1930, composers Paul Hindemith and Ernst Toch premiered three new works in Berlin using a technique they dubbed *Grammophonmusik*. Using multiple turntables, “Novel

sounds and textures were created by altering the speed and direction of discs during playback; passages performed at different times were juxtaposed and superimposed.”⁸⁵ (Sound familiar?) In the early 1940s, French composer Pierre Schaeffer began to experiment with sound-based composition. “Another important influence on Schaeffer’s practice was cinema and the techniques of *recording and montage*, which were originally associated with cinematographic practice, came to serve as the substrate of *musique concrète*”⁸⁶ (emphasis added). The influence of the *musique concrète* movement eventually made its way into the music of artists such as The Beatles and Frank Zappa. There’s even a small reference to this type of sample-based music in a 1975 Senate report in a section discussing definitions under Section 101: “There is no need, for example, to specify the copyrightability of electronic or *concrete music* in the statute since the form of a work would no longer be of any importance...”⁸⁷ (emphasis added). Mashup⁸⁸ artists Buchanan & Goodman⁸⁹ had a number of hit records in the late 1950s and early 60s. Since the 1970s, the use of recordings as source material has been widespread in popular music. With the advent of inexpensive digital samplers and personal computers in the 1980s, the technique has become foundational to styles such as hip-hop and electronica.

Recordings by their sheer proliferation have not only accelerated the natural cycle of music development, but have also introduced a wholly new element: the permanent performance. Judge Learned Hand wrote in 1940, “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 had become possible, and *the right to do so, exceedingly valuable...*”⁹⁰ (emphasis added). Recordings capture, memorialize, and create potential value in unique performances. The nature of the performance itself now has intrinsic value, both creative and economic. With today’s technology, a sampled performance in the hands of a creative musician can spawn ideas that lead to altogether new expression, the essence of transformation.

Sampling before Bridgeport

In the late 1970s, a struggling record producer named Sylvia Robinson, after first hearing rap music at a Harlem nightclub, was inspired

to record this new musical phenomenon. She convinced three unknown rappers from New Jersey to improvise their rhymes over a fifteen-minute track featuring a recurring portion of the popular dance song *Good Times* by Chic. They became known as the Sugar Hill Gang and the song *Rapper's Delight*, the first commercially successful hip-hop record, went on to sell more than eight million copies.⁹¹ It also attracted the attention of *Good Times* co-writers Nile Rodgers and Bernard Edwards who sued for copyright infringement. They settled out of court for joint authorship of *Rapper's Delight* and a "...large cut of the royalties."⁹² Ironically, by Rodgers' own admission, the lyrics to *Good Times* were appropriated from two Depression-era songs, *Happy Days are Here Again* and *About a Quarter to Nine*.⁹³

After *Rapper's Delight*, a slew of hip-hop records hit the market, many if not most featuring sampled portions of other songs. A number of infringement lawsuits followed. Many were settled out of court, including Vanilla Ice's dispute with Queen and David Bowie.⁹⁴ A notorious pre-Bridgeport case involved rapper Biz Markie's use of a 1970s iconic song, *Alone Again (Naturally)* by Irish singer/songwriter Gilbert O'Sullivan.⁹⁵ Markie sampled the song's highly-identifiable, but rather common piano introduction and looped it continually throughout his track. He also repeated the phrase "alone again naturally." Judge Duffy began his now infamous opinion by quoting from the Ten Commandments: "Thou shalt not steal." In ruling against the defendants, he went as far as to recommend that Markie and his label Warner Brothers be charged with criminal infringement. The opinion has also been widely criticized: "Duffy's opinion...betrays an iffy understanding on the part of this judge of the facts and issues before him in this case."⁹⁶

The Bridgeport Bright-Line

Two factors, one musical and one legal, make Bridgeport Music v. Dimension Films different from previous sampling cases: 1) the sampled portion was not readily identifiable, and 2) the court abandoned the substantial similarity test⁹⁷ altogether, instead focusing on the act of sampling itself.

Unlike *Rapper's Delight*; *Ice, Ice, Baby*; or *Alone Again* where prominent portions of prominent songs were featured repeatedly throughout the tracks, the use of a sample from a George Clinton track in N.W.A.'s *100 Miles and Runnin'* would have likely never been discovered had there

not already been a prior understanding between Bridgeport Music and the owners of *100 Miles* for the use of samples.⁹⁸ “After listening to the copied segment, the sample, and both songs, the district court found that no reasonable juror, even one familiar with the works of George Clinton, would recognize the source of the sample without having been told of its source.”⁹⁹ In other words, the sample was not readily identifiable.

A *bright-line rule* is a clear legal standard, the purpose of which is “...to produce predictable and consistent results in its application.”¹⁰⁰ In the Bridgeport case the three-judge panel that included Judge Ralph Guy who issued the original *de minimis* opinion at the district level, reversed the lower court’s decision by applying a bright-line rule to sampling. Judge Guy’s reassessment focused wholly on the nature of Sound Recordings, to the total exclusion of the underlying work. He writes, “The analysis that is appropriate for determining infringement of a musical composition copyright, is not the analysis that is to be applied to determine infringement of a sound recording. We address this issue only as it pertains to sound recording copyrights.” And also, “We think this result is dictated by the applicable statute...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*”¹⁰¹ (emphasis added). The result of this “new rule” as Judge Guy referred to it,¹⁰² is that all sampling requires permission of the copyright owner(s) of a Sound Recording because all sampling requires copying.

The Bridgeport Effect on Sample-Based Music

The Bridgeport decision, while hailed by the recording industry, was widely criticized by many others. “Most copyright scholars think the decision is both activist and bogus—in the words of leading commentator William Patry, ‘Bridgeport is policy making wrapped up in a truncated view of law and economics.’”¹⁰³ The Court’s insistence that it did not see a licensing requirement for sampling as “any barrier to creativity” is particularly troubling as licensing erects both financial and creative obstacles to producing sample-based music.

Judge Guy stated that “...the market will control the license price and keep it *within bounds*”¹⁰⁴ (emphasis added). Within whose bounds? “A sound recording license fee for a three-second sample used only once in a new major label work may cost US\$1,500 as an advance on future

royalties from album sales. For a looped sample of three seconds or less, the fee varies from \$1,500 to \$5,000, while a looped sample greater than three seconds can run into the tens of thousands of dollars.”¹⁰⁵ The cost of sample licensing is prohibitive for most fledging artists. “For an independent artist, the price for clearing a single sample can run more than an entire album’s recording budget. With an album or single that sells fewer than 10,000 units, the cost of clearing the sample is almost never recouped by the album’s sales. This creates a barrier to entry for independent or developing acts.”¹⁰⁶

An equally formidable obstacle is the inertia a licensing requirement places on the creative process from the beginning. Sampling is an essential component of the musical vocabulary of certain genres. When a hip-hop producer is “beat-mining”¹⁰⁷ obscure vinyl records, he’s looking for that special musical clip that will hopefully inspire a whole new work. Spontaneity is essential. The producer finds a sample immediately adds it to a track to see if it will work musically. Maybe it does, maybe it doesn’t. A producer can’t possibly license a sample *before* it’s put into use. The musical decision always comes first. The process is not unlike a jazz musician transcribing records for material to use in her own improvisations. She’ll work through a number of transcribed solos looking for portions to adapt to her own playing. Samples are as much a part of the musical vocabulary of hip-hop as ii-V patterns¹⁰⁸ are for jazz players. What would have happened to jazz if bebop musicians had been required to get a license every time they performed a variation of the ii-V pattern found in measures 15 and 16 of Charlie Parker’s *Donna Lee*?¹⁰⁹ The sampling musician is caught in a catch-22. The notion of having to license a sample prior to completing the creative process is absurd. However, the time, effort, and expense invested in producing a track only for a license request to be turned down is equally illogical. The current situation has resulted in two economic classes of musicians: a minority that can afford the license fees and due to their stature are reasonably sure they can clear the samples; and the majority who can’t afford it and/or don’t have the stature. The latter simply break the law.

Conclusion

This author concludes that sampling is first and foremost the appropriating of a desired musical performance embodied in a phonorecord for the purpose of creating an altogether new musical work. The inevitable

consequence is the copying of a Sound Recording. While in practice indivisible, a Sound Recording and its underlying recorded musical performance are not one and the same.¹¹⁰ If it were, the law could not allow for, much less encourage, the imitation of the embodied performance no matter how similar; it would be infringement.

The Bridgeport ruling exposed a critical flaw in the Copyright Act; the current standing of Sound Recordings continues to adversely impact musical styles that rely on sampling for their creative building blocks. The statutory pendulum has swung to the opposite extreme of where it once was following the 1908 *White-Smith v. Apollo* ruling when recorded music was not deemed to be protectable as “writings.” Sound Recordings today effectively enjoy *more* protection than other categories of works—*any* use no matter how minimal or insignificant *must* be licensed. With apologies to Orwell, all copyrights are equal, but Sound Recordings are more equal than others. Bridgeport is not the problem, the law is. The legislative history shows that lawmakers and the recording industry were only concerned about one thing: stopping record piracy. In 1972, Congress essentially created a second copyright system of a primarily economic nature to govern Sound Recordings, in some ways similar to neighboring rights.¹¹¹ However they failed to foresee, and thus account for, the use of portions of Sound Recordings as the creative building blocks for new works—the idea/expression dichotomy present in the remaining seven categories.

What is the solution? The Bridgeport ruling hinted at a possible fair-use work-around, “Since the district judge found no infringement, there was no necessity to consider the affirmative defense of ‘fair use.’ On remand, the trial judge is *free to consider this defense...*”¹¹² (emphasis added). It would obviously be beneficial if there ever happens to be a sampling equivalent to the *Campbell v. Acuff-Rose Music* decision, a definitive case for the fair use of musical works. However a fair use case is an expensive proposition and something both sides would likely be hesitant to pursue.¹¹³

A more elegant solution should ultimately be reached by means of the legislative process. As Judge Guy wrote, “If this is not what Congress intended or is not what they would intend now, it is easy enough for the record industry, as they have done in the past, to go back to Congress for a clarification or change in the law. This is the best place for the change to be made, rather than in the courts, because as this case demonstrates, the court is never aware of much more than the tip of the iceberg.”¹¹⁴ The stated goal of U.S. copyright law is to promote the progress of art and science

by allowing for a temporary and limited monopoly of exclusive rights to a work.¹¹⁵ Any change in the law must strive to balance conflicting interests by continuing to protect producers of Sound Recordings against piracy while encouraging creative expression and the production of new works.

How could the law be changed to achieve this elusive equilibrium? This author believes that equity could be realized by rethinking the very nature of Sound Recordings. In particular:

1. Redefining Sound Recordings in a manner similar to motion pictures, acknowledging the fact that they are at the core derivative works;
2. Recognizing a recorded performance (i.e., the production) as the expression that is fixed to create (not “result” in) a Sound Recording;
3. Identifying the actual creator(s) of the work as the author(s) of the Sound Recording;
4. Granting all exclusive rights to Sound Recordings, not just the current subset; and
5. Conceding that rights in Sound Recordings are not intrinsic, but rather inherited from and through their underlying musical or literary work and the performance thereof.

In short, Sound Recordings would be treated under the law as inherently intertwined with the underlying work. The mimicking portion of the current statute would effectively be invalidated and literal imitation would then be considered infringement. The end result would be that Sound Recordings would become subject to the idea/expression dichotomy and thus available to be excavated for the creative building blocks that result in new works and musical styles. Sampling would be just another creative technique to draw from. Sound Recordings would possess the same level of protection against piracy as all other works. Under this scenario, non-transformative sampling such as in the Biz Markie or Vanilla Ice cases would still be infringement while the highly-transformative Bridgeport sample would not. Cases would be decided on their individual merits; there would be no bright line. Finally, implied in this model is a performer’s right¹¹⁶ that would ultimately recognize and account for the rights of the musicians, producers, and engineers whose contributions are the true objects of sampling.

Endnotes

1. *Bridgeport Music, Inc. v. Dimension Films*, 410 F. 3d 792, 8 (6th Circuit 2005).
2. Sampling is the term used to describe the taking of a small portion of one recording and reusing it in another recording.
3. A riff is an expression common among musicians that denotes a short musical idea or motif.
4. *De minimis* in copyright means insignificant.
5. A bright-line rule is a clear, objective standard.
6. *Bridgeport Music, Inc. v. Dimension Films*, 410 F. 3d 792, 8 (6th Circuit 2005).
7. When capitalized throughout this article, the term Sound Recording(s) refers to the copyrightable work “Sound Recording” as defined in the U.S. Copyright Law, 17 USC §101. When spelled in lower case, sound recording(s) refers to the generic understanding of the term, synonymous with recording, record, etc.
8. Throughout this article the terms “work” and “works” refer to the legal classifications of copyrightable works as defined in the U.S. Copyright Law, 17 USC §101.
9. *Feist Publications, Inc. v. Rural Tel. Servs. Co.*, 499 U.S. 340, 18 U.S.P.Q.2d (BNA) 1275 (1991). This ruling highlighted the notion that works of authorship must possess a “minimal degree of creativity.”
10. The “idea/expression dichotomy” is a concept in copyright law that states that an idea is not protectable, only its expression. The 1879 *Baker v. Selden* case (101 U.S. 99) highlighted the concept.
11. *Bridgeport Music, Inc. v. Dimension Films*, 410 F. 3d 792, 9 (6th Circuit 2005).
12. David Morton, “Recording History—The History of Recording Technology—The First Peak, 1900-1925,” 2006, accessed May 24, 2012, <http://www.recording-history.org/HTML/musicbiz2.php>
13. *U.S. Constitution*. Art. I, Sec. 8, Cl. 8.
14. “Act of March 4, 1909 (in effect July 1, 1909),” *Copyright Law of the United States*. Sect. 4. Pub. L.60-349, 35 Stat. 1075 (Mar. 4, 1909; repealed Jan. 1, 1978).
15. Piano rolls are continuous rolls of perforated paper used by player pianos to perform music.

16. 209 U.S. 1 (1908).
17. The Compulsory Mechanical License provision of the 1909 Act was a legislative response to the White-Smith decision, compensating copyright owners for all such mechanical reproductions including piano rolls and records.
18. Barbara A. Ringer, *The Unauthorized Duplication of Sound Recordings, Study No. 26 in Copyright Law Revision, Studies Prepared for the committee on Patents, Trademarks and Copyrights of the Comm. on the Judiciary*, U.S. Senate, 86th Cong., 2d Sess., 1957 (Comm. Print 1961), 21.
19. *Ibid.*, 22. The common law theory of unfair competition prevents a business from profiting unfairly at the expense of a competitor.
20. *Ibid.*, 25.
21. *Ibid.*, 27.
22. The American Society of Composers, Authors, and Publishers.
23. Barbara A. Ringer, *The Unauthorized Duplication of Sound Recordings, Study No. 26 in Copyright Law Revision, Studies Prepared for the committee on Patents, Trademarks and Copyrights of the Comm. on the Judiciary*, U.S. Senate, 86th Cong., 2d Sess., 1957 (Comm. Print 1961), 27.
24. *Ibid.*, 28.
25. *Ibid.*, 29-30.
26. *Ibid.*, 30.
27. *Ibid.*, 34. (It is ironic that the notion there should be not protection against mimicking a sound recording seems to have originated with the motion picture industry, a concept they would certainly resist in relation to their own works.)
28. *Ibid.*
29. *RCA Mfg. Co. v. Whiteman*, 114 F. 2d, 86 (2nd Circuit, 1940).
30. Barbara A. Ringer, *The Unauthorized Duplication of Sound Recordings, Study No. 26 in Copyright Law Revision, Studies Prepared for the committee on Patents, Trademarks and Copyrights of the Comm. on the Judiciary*, U.S. Senate, 86th Cong., 2d Sess., 1957 (Comm. Print 1961), 36.
31. Joseph C. O'Mahoney, foreword to *The Unauthorized Duplication of Sound Recordings, Study No. 26 in Copyright Law Revision, Studies Prepared for the committee on Patents, Trademarks and Copyrights of the Comm. on the Judiciary*, by Barbara A. Ringer,

- US. Senate, 86th Cong., 2d Sess., 1961 (Comm. Print 1961), III.
32. Barbara A. Ringer, *The Unauthorized Duplication of Sound Recordings, Study No. 26 in Copyright Law Revision, Studies Prepared for the committee on Patents, Trademarks and Copyrights of the Comm. on the Judiciary*, U.S. Senate, 86th Cong., 2d Sess., 1957 (Comm. Print 1961), 1.
 33. The term *dubbing* appears throughout the legislative history and refers to the physical reproduction of a sound recording. Unauthorized dubbing is synonymous with what is at this time commonly called piracy.
 34. Barbara A. Ringer, *The Unauthorized Duplication of Sound Recordings, Study No. 26 in Copyright Law Revision, Studies Prepared for the committee on Patents, Trademarks and Copyrights of the Comm. on the Judiciary*, U.S. Senate, 86th Cong., 2d Sess., 1957 (Comm. Print 1961), 47.
 35. U.S. House, The Committee on the Judiciary, *The House Report on the Sound Recording Amendment of 1971*, (H. Rpt. 92-487) 22, September 1971.
 36. Barbara A. Ringer, *The Unauthorized Duplication of Sound Recordings, Study No. 26 in Copyright Law Revision, Studies Prepared for the committee on Patents, Trademarks and Copyrights of the Comm. on the Judiciary*, U.S. Senate, 86th Cong., 2d Sess., 1957 (Comm. Print 1961), 37.
 37. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. Done at Rome on October 26, 1961 (Also known as the Rome Convention).
 38. World Intellectual Property Organization, *Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms*, Art. 7, Sec.2, 29, October 1971.
 39. U.S. House, The Committee on the Judiciary, *The House Report on the Sound Recording Amendment of 1971 (to accompany S. 646)*. Statement of William N. Letson, General Counsel, Department of Commerce, (H. Rpt. 92-487) Washington: Government Printing Office, 1971.
 40. Barbara A. Ringer, Register of Copyrights, *Annual Report of the Register of Copyrights for the Fiscal Year Ending September 30, 1977* (1977, Print 1978), 5.
 41. George D. Cary, Register of Copyrights, *Annual Report of the*

Register of Copyrights for the Fiscal Year Ending June 30, 1972 (1973), 1.

42. USC 17 §26. *Copyright Law of the United States*, (Rev. to Jan. 1, 1973; repealed Jan. 1, 1978).
43. *Ibid.*
44. *Ibid.*, §19.
45. Barbara A. Ringer, Register of Copyrights, *Annual Report of the Register of Copyrights for the Fiscal Year Ending September 30, 1977* (1977, Print 1978), 1.
46. U.S. Senate, The Committee on the Judiciary, *Copyright Law Revision Report together with Additional Views (to accompany S22)*, (S. Rpt. 94-473) Washington: Government Printing Office, 1975, 50.
47. U.S. Senate, The Committee on the Judiciary, *Copyright Law Revision Report together with Additional Views (to accompany S22)*, (S. Rpt. 94-473) Washington: Government Printing Office, 1975, 127.
48. *Ibid.*, 88.
49. The Digital Performance Right in Sound Recordings Act of 1995.
50. The Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, amended on September 28, 1979.
51. USC 17, §102 (a).
52. USC 17, §102 (b).
53. A Latin term meaning “an essential condition.”
54. *Feist Publications, Inc. v. Rural Tel. Servs. Co.*, 499 U.S. 340, 18 U.S.P.Q.2d (BNA) 1275 (1991).
55. A common chord progression consisting of the 1, 5, 6m, and 4 chords in a given key: C-G-Am-F in the key of C.
56. A “production” is not synonymous with a Sound Recording. What is commonly understood as the record production is actually a part of the performance of the musical work embodied in a Sound Recording. Elements such as instrumentation, microphone choices and placement, effects, equalization, panning, mix, etc. are but some of the non-copyrightable “ideas” that make up the recorded musical performance.
57. U.S. Senate, The Committee on the Judiciary, *Copyright Law Revision Report together with Additional Views (to accompany S22)*, (S. Rpt. 94-473) Washington: Government Printing Office, 1975, 52.
58. *Ibid.*, 52-53.
59. USC 17, §101.

60. Ibid.
61. USC 17, §114 (b).
62. *Bridgeport Music, Inc. v. Dimension Films*, 410 F. 3d 792, 7 (6th Circuit 2005).
63. The Rinse Production website states, “We are the original music production company that specialises with problematic copyright issues. We have produced over 300 sample recreations and sound-a-likes for all types of music.” Scorccio, an international company with studios in the U.S., U.K., and Spain, claims to “remake any style of music and produce sound-a-like vocals—to match any original recording as closely as possible...”
64. The Act of 1976 includes a termination clause that gives the author(s) the option to recapture a copyright between the 35th and 40th year after an assignment of copyright.
65. USC 17, §114 (b).
66. USC 17, §106 (6).
67. USC 17, §101.
68. *Bridgeport Music, Inc. v. Dimension Films*, 410 F. 3d 792, 8 (6th Circuit 2005) (See endnote 13).
69. U.S. House, The Committee on the Judiciary, *Performance Rights In Sound Recordings*, (H. Rpt. 22-046) Washington: Government Printing Office, 1978, 27.
70. U.S. Senate, The Committee on the Judiciary, *Copyright Law Revision Report together with Additional Views (to accompany S22)*, (S. Rpt. 94-473) Washington: Government Printing Office, 1975, 53-54.
71. *Bridgeport Music, Inc. v. Dimension Films*, 410 F. 3d 792, 5 (6th Circuit 2005) (See endnote 6).
72. U.S. House, The Committee on the Judiciary, *The House Report on the Sound Recording Amendment of 1971 (to accompany S. 646)*, (H. Rpt. 92-487) Washington: Government Printing Office, 1971.
73. The U.S. is still not a party to the Rome Convention. The same formality was specified in the 1971 Geneva Convention, which the U.S. ratified.
74. U.S. Senate, The Committee on the Judiciary, *Copyright Law Revision Report together with Additional Views (to accompany S22)*, (S. Rpt. 94-473) Washington: Government Printing Office, 1975, 128.
75. Ibid., 16.

76. Material objects include physical devices such as CDs, vinyl records, and cassettes, as well as audio sound files of any kind including MP3s, AACs, and WAVs.
77. USC 17, §101.
78. U.S. House, The Committee on the Judiciary, *Copyright Law Revision – Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, (H. Rpt. 61-62) Washington: Government Printing Office, 1961, 17. This concept has been acknowledged throughout the history of copyright in sound recordings. Exceptions would be cases where embodied material was not copyrightable such as nature sounds, traffic sounds, birdcalls, etc.
79. Individual performances are protected in countries that are signatories to the Rome Convention through neighboring rights.
80. Wikipedia contributors, “Bebop,” *Wikipedia, The Free Encyclopedia*, accessed June 1, 2012, <http://en.wikipedia.org/wiki/Bebop>.
81. These and many other jazz compositions from this era are known as “contrafacts”—works that consist of new melodies written over the same harmonies as other popular songs.
82. Wikipedia contributors, “Bill Monroe,” *Wikipedia, The Free Encyclopedia*, accessed June 1, 2012, http://en.wikipedia.org/wiki/Bill_Monroe.
83. Wikipedia contributors, “Old-time Music,” *Wikipedia, The Free Encyclopedia*, accessed June 1, 2012, https://en.wikipedia.org/wiki/Old_time_music.
84. David Cope, *Computer Models of Musical Creativity* (Boston: MIT Press, 2005), 12.
85. Mark Katz, “Hindemith, Toch, and Grammophonmusik,” *Journal of Musicological Research* 20, no. 2 (2001): 161.
86. Wikipedia contributors, “Musique concrète,” *Wikipedia, The Free Encyclopedia*, accessed June 1, 2012, http://en.wikipedia.org/wiki/Musique_concrète.
87. U.S. Senate, The Committee on the Judiciary, *Copyright Law Revision Report together with Additional Views (to accompany S22)*, (S. Rpt. 94-473) Washington: Government Printing Office, 1975, 52.
88. A musical Mashup is a work created by mixing two or more other songs.
89. See http://www.rockabilly.nl/references/messages/bill_buchanan.htm and http://en.wikipedia.org/wiki/Dickie_Goodman.

90. *RCA Mfg. Co. v. Whiteman*, 114 F. 2d, 86 (2nd Circuit, 1940).
91. James C. McKinley Jr., "Sylvia Robinson, Pioneering Producer of Hip-Hop, Is Dead at 75," *New York Times*, September 30, 2011, accessed June 1, 2012, http://www.nytimes.com/2011/09/30/arts/music/sylvia-robinson-pioneering-producer-of-hip-hop-dies-at-75.html?_r=2.
92. Wikipedia contributors, "The Sugarhill Gang" *Wikipedia, The Free Encyclopedia*, accessed June 1, 2012, http://en.wikipedia.org/wiki/The_Sugarhill_Gang.
93. "EMP Oral History Videos, Category: Black History Month, Video Title: Happy Days Are Here Again" EMP Museum, accessed June 1, 2012, <http://www.empmuseum.org/programs/index.asp?articleID=613>.
94. See <http://www.benedict.com/Audio/Vanilla/Vanilla.aspx> for a comparison of both songs and a brief history of the dispute.
95. *Grand Upright v. Warner*, 780 F. Supp. 182 (S.D.N.Y., 1991).
96. Commentary on "Grand Upright v. Warner 780 F. Supp. 182 (S.D.N.Y. 1991)," UCLA School of Law, Music Copyright Infringement Resource, accessed June 1, 2012, <http://cip.law.ucla.edu/cases/1990-1999/Pages/granduprightwarner.aspx>.
97. Substantial similarity is a legal standard for determining if one work was copied from another.
98. The opinion shows that Bridgeport Music had previously entered into an agreement with the owners of *100 Miles* granting a sample use license.
99. *Bridgeport Music, Inc. v. Dimension Films*, 410 F. 3d 792, 4 (6th Circuit 2005).
100. Wikipedia contributors, "Bright-line Rule," *Wikipedia, The Free Encyclopedia*, accessed June 1, 2012, http://en.wikipedia.org/wiki/Bright-line_rule.
101. *Bridgeport Music, Inc. v. Dimension Films*, 410 F. 3d 792, 8,9 (6th Circuit 2005).
102. *Bridgeport Music, Inc. v. Dimension Films*, 410 F. 3d 792, 9 (6th Circuit 2005).
103. Tim Wu, "The shady one-man corporation that's destroying hip-hop," *Slate.com*, November 16, 2006, accessed June 1, 2012, http://www.slate.com/articles/arts/culturebox/2006/11/jayz_versus_the_sample_troll.single.html#pagebreak_anchor_2.

104. *Bridgeport Music, Inc. v. Dimension Films*, 410 F. 3d 792, 8 (6th Circuit 2005).
105. Josh Norek, “‘You Can’t Sing without the Bling:’ The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System,” *UCLA Entertainment Law Review* 11, vol. 1 (2004): 89.
106. *Ibid.*, 91.
107. Beat-Mining is a common term among producers for the process of listening through old and often obscure records for portions suitable for sampling. Many producers are known for the quality of the beats they mine.
108. The ii-V-I chord progression is the most common harmonic element in jazz. Players memorize numerous melodic patterns to play over those chord changes when improvising.
109. The pattern referred to is a commonly used series of musical notes in Bebop style jazz improvisation.
110. An example of this principle would be a Grateful Dead concert recorded by several different individuals at the same time. The band historically allowed fans to record its performances. Each recording would result in a separate and distinct Sound Recording of *the same, identical performance*. However, each resulting Sound Recording would be owned by each respective “producer.”
111. Neighboring (or Related) Rights are used in many countries to protect works such as phonograms, performances, broadcasts, and other works not defined by the Berne Convention as “literary and artistic works.” The U.S. is not a signatory to the Rome Convention, the primary international treaty governing neighboring rights.
112. *Bridgeport Music, Inc. v. Dimension Films*, 410 F. 3d 792, 11 (6th Circuit 2005).
113. It is this author’s personal belief that the fear of a landmark fair-use ruling is a possible reason why the recording industry has not pursued an infringement action against mash-up artists such as Girl Talk as of this writing.
114. *Bridgeport Music, Inc. v. Dimension Films*, 410 F. 3d 792, 11 (6th Circuit 2005).
115. U.S. Const. art I, sec. 8, cl 8.
116. Performer’s rights are recognized by countries that are signatories to the Rome Convention, the only major international copyright treaty the U.S. has not yet agreed to.

REYNALDO SANCHEZ is an educator, producer, songwriter, and guitarist. He holds degrees in music theory/composition and studio writing & production from the University of Miami where he chairs the Department of Music, Media and Industry. Sanchez directs the Bruce Hornsby Creative American Music Program, an inter-disciplinary performing-songwriting program at the Frost School of Music. He has worked with EMI Music Publishing, Sony Music, Universal Music, and others. Sanchez has a series of educational guitar books published by FJH Music Publishing and is a voting member of the Recording Academy. He was also the long-time musical director for Latin superstar Chayanne.

