Public Comment

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Copyright Office
[Docket No. 2014–03]

Music Licensing Study
Notice of Inquiry
*See* 79 FR 42833 (July 23, 2014); 79 FR 44871 (Aug. 1, 2014)

Submitted by Gary Rinkerman

## Introduction

The following comments are submitted to expand upon some of the comments I originally provided during the series of Copyright Office Music Licensing Study Roundtable Discussions held in New York City on June 23 and 24, 2014. The comments correct some transcription errors and provide additional, detailed background information and analysis. The comments are solely my own and not submitted on behalf of any organization or client. They are based on my experiences as a musician, record producer, intellectual property law practitioner and lecturer on U.S. copyright law both in the U.S. and abroad.

The first part of this set of comments proposes a form of *march in* rights when: (1) the sound recording rights in a recorded work are not being commercially exploited by the owner of those rights or the exploitation is, in effect, *de minimis*; and (2) the owner of the "non-exploited" right is someone other than the work's creator(s). The second part of these comments addresses the application of broader fair use concepts to sampling recorded works, such as music and spoken word recordings. Both of these topics entail a form of licensing and/or appropriation. Finally, the comments in the third part of the discussion address some recent thoughts concerning digital performance royalty rights for "legacy artists" whose pre-February 15, 1972 recordings are not subject to federal copyright laws.

## I. Recording Artists' *March In* Rights

Even in an era of ubiquitous streaming, the recorded works of many artists are, effectively, "out of print." Even if they are available somewhere for digital download, lack of promotion, lack of (to the owner of the copyright) significant commercial potential or other factors can create a situation in which the recording artist or the artist's estate must sit on the sidelines while a particular work languishes in cult status or in relative obscurity. Works by such recording artists as Jim Carroll, Jobriath, Moby Grape and multitudes of others either fit into this category or at one point languished in this category until efforts by someone other than the original rightsholder pulled them out.

Unfortunately, I have seen recording artists blocked from making and selling copies of their "out of print" works at their concerts, via their websites and through other means while the owner of the rights in the recording did nothing or virtually nothing to exploit those rights.

These types of situations hurt not only the artist, but also deprive the public of effective, lawful access to the artists' works. The stories of recording artists living day-to-day or in poverty while their recorded works languish in the hands of an inactive rightsholder are known to every participant in the music industry. Even without the added element of financial need, it is still difficult to see why an artist should not have a straightforward legal mechanism to push for remunerative access to his or her prior recorded works if practical circumstances and the public interest favor such access. Of course, termination rights use a thirty-five year term to mark the availability of a full reversion of certain rights. Nonetheless, the *march in* rights that form the conceptual core of this discussion need not be total, irrevocable or tied to a particular term which would, nonetheless, be less than thirty-five years.

There are several models that may be considered under the proposed *march in* concept (which is borrowed, in part, from *march in* remedies available in the field of government-funded research). For example, where the rightsholder is a defunct company or the ownership of the rights in the unexploited recorded work may be, as a practical matter, impossible to discern, it is unclear why the original recording artist(s) should not be able to exercise a relatively cost-free "self-help" remedy to obtain distribution rights free and clear of any restriction. Even if the original masters are long gone, digital technologies and a good copy of even a vinyl record can produce a serviceable, if not perfect, new master. If there is an identifiable rightsholder who has effectively abandoned or is simply holding the recording in limbo, then the artist(s) should be able to purchase those rights at a reasonable cost or reverse the situation, *i.e.,* the artist(s) can dedicate efforts to promoting and distributing the works while the original rightsholder is paid a reasonable royalty. In some cases with which I am familiar, artists who struggled with everyday financial obligations would have been highly incentivized to exploit rights in prior works that were, in effect, no longer in print or lost in the digital dustbin of works that are no longer promoted. Currently, even if the artist could secure some fan-investor interest in re-releasing the work for direct promotion by the artist, the legal costs and present industry environment make the outcome of such efforts doubtful.

Part of the difficulty in advancing a general *march in* right is that standard industry practices, even for smaller record companies, derive from a cluster of similar form contract terms that do not address the "out of print" situation, as do many contracts in the book publishing industry. These differences in approach arise from differences in business culture, not necessarily from equity or any reflection upon the artists' emerging capabilities to promote and distribute their own recorded works. In short, it may be sufficiently profitable or otherwise rewarding for an artist to dedicate efforts to promoting his or her works at concerts, via website and otherwise, while such efforts would not be sufficiently profitable for a third-party rightsholder in light of its current focus, scope of portfolio, financial resources or overhead.

Unless the artist has particular leverage or the record company is of a rare type, there will be no provision for the artist's rights if the record company decides to shelve the recorded work – either literally or figuratively – after its initial release. I have written the agreement terms for one of those rare record companies that voluntarily provides for the reversion of master rights after a relatively short term of exploitation. The agreement has been labeled in the media as the "Anti-360 Deal," but no one expects the concept to take the recording industry by storm. That would likely require legislative or judicial action. Therefore, in the context of the music

licensing discussion, and the potential reform of the Copyright Act, at least some additional consideration should be devoted to this subject.

It is also worth noting that properly formulated *march in* rights would not constitute a free ride on the efforts of the recording industry or stifle the industry's efforts to locate and dedicate resources to new artists. Rather, the thought is to level the playing field so that the interests of recording artists, and the interests of the public, are well served. In some instances disregarded recordings become, in effect, orphan works, even to their original creators. This situation provides no economic, social or cultural benefit. A *march in* type licensing structure, if not a full reversion, would help to properly address such situations.

## II. Fair Use: Migrating Visual Art Fair Use Principles Into The Music Space

For the purposes of this discussion, "sampling" is defined as the practice of taking a previously recorded sound or sequence of sounds and placing them in a different recording. The "sample" lifted from a previous recording may simply be "dropped" into a new recording as a single event, repeated, or manipulated via distortion, reversing the sequence or other types of processing that change the character of the sampled piece. Legal difficulties may arise when rights in the sampled recording are held by a third party whose permission has not been secured. There may be copyright rights in the prior recording, copyright rights in its underlying composition (if it has one), union contract concerns and even rights of publicity, trademark rights and rights against false association if the sampled sound or sequence has a strong association with a particular artist, organization, product or service.

For those interested in the subjects treated in this fair use discussion, a more in-depth, illustrated version will be published shortly.

### A. Background

Prior to the "digital age," advances in recording and editing capabilities that accompanied advances in magnetic recording tape technology made it less cumbersome to create and use "break ins" or samples from prior recordings to construct new recorded works. For example, as early as 1956, samples of other recorded songs appeared in *Flying Saucer Part 1 and 2* by Buchanan and Goodman. This earlier form of music sampling required, however, some skill (if not just patience) and access to studio technology to produce a commercially viable result. With the advent of, and more general availability of, digital music technologies and editing software, there was an explosion of audio sampling simply because the "library" of prior music was so vast and reuse and repurposing were simply a "few clicks" away.

As with the development of traditional Irish music, blues jazz, reggae country music and other music genres that relied heavily on "borrowing" from prior works, the availability of readily-accessible sampling technologies signaled the potential advent of a new "digital folk music." Recordings of homemade, collage compositions circulated in the non-mainstream dance clubs of New York City, Ybor City and elsewhere. Notes, phrases and even hooks cycled and recycled through both blatant copies and transformative manipulations. Nationally released and promoted works, especially in the rap and hip hop genres, pushed these practices into the mainstream of the music industry.

Ever vigilant, the holders of rights in prior recordings quickly realized the "free riding" and income-generation potential of such practices and the benefits of vigorously pursuing controls and limitations on "sampling." Therefore, in a burst of aggression that might make present-day "patent trolls" seem lackadaisical, some owners (or alleged owners) of rights in recorded music rallied to combat the emerging artists and record companies that used sample-collage techniques in their records. As in the earlier case-by-case development of restrictions on the unlicensed performance of musical works, a trend of threatened and actual litigation against unauthorized "samplers" developed as standard practice. The result is that there is generally a "paralysis" when record companies and content distributors are asked to accept music that includes unauthorized samples. Even if there is an apparent or likely fair use of an unauthorized sample, the balance of risk versus gain rarely tips in favor of the use. Predictably, the segment of the creative community most affected by such restrictions are artists who are rich in inventiveness and aesthetic sensibilities, but lack the funds to secure licenses even if such licenses are available.

Creativity that would likely be considered transformative uses under the visual arts cases discussed below was stifled as groups such as Public Enemy were forced to change their "sample-collaging" approach to composition due to threats of litigation and harsh judicial precedent. In other words, a vibrant and emerging compositional style that often treated short recorded segments as a more traditional composer might treat notes on a keyboard was restricted and generally treated as "piracy." As Chuck D of Public Enemy put it, in explaining how culpable copying was confused with and treated as indistinguishable from transformative uses of samples: "The lawyers didn't seem to differentiate between the craftiness of it and what was blatantly taken." *See How Copyright Law Changed Hip Hop – An Interview With Public Enemy's Chuck D and Hank Shocklee* by Kembrew McLeod, STAY FREE!, Issue No. 20, at http://www.stayfreemagazine.org/archives/20/public_enemy.html. Yet, some recent developments in the area of the static visual arts might offer an alternative direction or a basis to reconsider some of the more restrictive approaches to music sampling.

B. Current Considerations

*Scream Icon* is an original, copyrighted work created by visual artist, Dereck Seltzer. Green Day is a very popular (and presumably very profitable) music group that performs and records music that has been described as "punk rock," "pop rock" and "alternative rock." During a series of concerts by Green Day, an entire, *albeit* modified, image of *Scream Icon* was used as a prominent part of a video that served as the backdrop for the band's performance of its song, *East Jesus Nowhere.* Green Day did not receive permission from Seltzer for the use and did not pay for the use. Images and videos of Green Day's performance, including the portion that used Seltzer's work as part of the video backdrop, became readily accessible as *Green Day's East Jesus Nowhere Official Music Video.*

Green Day's video producer appropriated *Scream Icon* and used it as a key part of a background collage to enhance the effect of the band's live performance of *East Jesus Nowhere*, a song that includes, among other things, an apparent condemnation of hypocrisy. Set within this new video context, Seltzer's work was replicated, modified and reproduced over and over again

to create a theatrical effect that either augmented the message or mood conveyed by the song – or simply provided a visually stimulating backdrop to the band's performance.

Ironically, however, if you use a sample of *East Jesus Nowhere* in your own recording, you'll likely be told by music industry lawyers that you will be liable for damages or license fees, assuming you can get permission to use the sample. Failure to secure the permission can cause you to be classified as one of those infringing "pirates" who, without conscience and to the detriment of the creative process in the music industry, seek to reap where they have not sown. There might also be the looming possibility of enhanced damages for intentional infringement. Yet, in *Seltzer v. Green Day,* 725 F.3d 1170 (9th Cir. 2013), the U.S. Court of Appeals for the Ninth Circuit held that Green Day's total appropriation of Seltzer's visual artwork is sheltered by copyright law's fair use doctrine.

There seems to be a "disconnect" here. If the band Green Day uses (or samples) a visual artist's work to amplify or assist in the expression of a "message" in, or the mood of, *East Jesus Nowhere* – or for no discernible reason at all – and then resists paying for the use, is this a species of hypocrisy or simply a reasonable divergence that illustrates how "fair use" should be applied differently in different fields of artistic endeavor? The key question is: why can't music be readily sampled, collaged and repurposed, while visual art like *Scream Icon* is "fair game" even for musicians who would likely insist that they should be paid for sampling of their own work, assuming they are willing to grant permission for the use? This also raises the question of whether the doctrine of fair use should be applied more restrictively with regard to recorded music and less restrictively with regard to visual arts, such as painting and graphic design.

The Ninth Circuit's *Green Day* opinion, and the Second Circuit's opinion in *Cariou v. Prince,* 714 F.3d 694 (2d. Cir. 2013), (cited favorably in *Green Day*), are potentially, as discussed below, a set of "Trojan Horse" visual arts cases that can also change the landscape for fair use in music sampling. At least in the *Green Day* case, this is likely not what the recording-artist defendants had in mind when they argued for such a broad and liberal application of "fair use" principles to excuse their wholesale taking of Mr. Seltzer's creative work.

As noted by the *Green Day* Court, the bedrock for the Supreme Court's approach to fair use in *Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 577 (1994), can be found in Second Circuit Judge Pierre Leval's 1990 article in the Harvard Law Review, *Toward a Fair Use Standard,* which contains the following statement about whether a use should be characterized as transformative: "The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story's words, it would merely 'supersede the objects' of the original. If, on the other hand, the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society." *See* 103 Harv. L.Rev. 1105, 1111 (1990).

Read too broadly (or, some might argue, appropriately broadly), it seems that the above guidance from Judge Leval could put an end to liability for creating derivative works where the

original work, or a part of it, is used as "raw material" for an alternative expression that does not usurp the market for the original work. In *Campbell*, the accused work, *Pretty Woman* by 2 Live Crew, at least appeared to be an attempt to create a comic twist on the sentimentality of Roy Orbison's *Oh, Pretty Woman*. Something critical or humorous was likely being said about the perceived absurdity or naiveté of the original work. In *Green Day*, the band's comment on *Scream Icon* seems to be (at least as permitted by the Court) "this is a really good image for us to use for free." And as long as the use is "transformative," *i.e.,* used in a context that includes other, non-trivial creative expression, Green Day's appropriation morphs into a presumption of fair use.

The *Green Day* Court's brand of transformative use is simply an appropriation and modification of an original work to place it in a new aesthetic context without any comment on the nature, quality or meaning of the original work. In the Court's words: "[a]n allegedly infringing work is typically viewed as transformative as long as new expressive content or message is apparent. This is so even where – as here – the allegedly infringing work makes few physical changes to the work or fails to comment on the original." 725 F.3d at 1177, *citing, e.g., Cariou v. Prince*, 714 F.3d 694, 708 (2d Cir. 2013). Again, although Green Day modified Seltzer's work and placed it, as a dominant element, in a video collage backdrop to the performance of *East Jesus Nowhere*, Green Day's new expression, meaning or message might be characterized as simply being, "I've added some new elements to a really cool work that I would like to use for free to express my unidentified message."

In fairness to Green Day, however, when we are dealing with visual rather than semantic elements or semiotic elements that have clear linguistic analogs, the "message" of a visual work might not exist or might not be capable of articulation. Yet, this can also be said about music or, at least, instrumental music, single words or short phrases from lyrics and unintelligible sounds made by vocalists. This again, brings us back to the questions of whether the *Green Day* and *Cariou* opinions open the door for a reexamination of the applicability of fair use factors to sampling and whether a more liberal standard should be used when determining whether samples have been used in a transformative manner sheltered by the fair use defense.

In *Bridgeport Music, Inc. v. UMG Recordings, Inc.,* 585 F.3d 267 (6th Cir. 2009), the Sixth Circuit Court of Appeals adopted a "fragmented literal similarity" approach that is potentially more benign than a zero tolerance rule or could simply be another way of imposing "strict liability" for most sampling. The "fragmented literal similarity" test isolates and determines whether the sampled portion of the original work qualifies for copyright protection as being, *e.g.,* sufficiently original. Distinctiveness and the qualitative significance of the sampled portion of the original work within the overall context of the original work can be important factors in determining whether copyright protection will apply. If the sampled portion of the original work qualifies for copyright protection, the court then compares it with the sample(s) present in the accused work in order to determine if there is substantial similarity to the sampled portion of the original work. Notably, this is an infringement test, but it does not really say much about whether the accused use is transformative – although, as the *Bridgeport* Court opined, it may have a lot to do with the licensing market for the samples.

In *Bridgeport,* the Court found that the accused use of samples from the recorded song, *Atomic Dog*, was transformative, but held that the other fair use factors favored the plaintiff. In addition to finding that distinctive portions of the original recording had been the target of the sampling, the Court opined that: "[g]iven the fact that *Atomic Dog* is one of the most frequently sampled compositions of the Funk era, Bridgeport could lose substantial licensing revenues if it were deprived of its right to license content such as that used by UMG." 585 F.3d at 278. In other words, if a specific work has already proven to be an established "cash cow" for licensing, this becomes an important if not determinative factor in deciding whether an unlicensed, transformative use is a fair use. This does not bode well for audio artists who want to quote and transform culturally and/or commercially significant segments of previously recorded works. We are fortunate that early blues, jazz and country music compositions were not encumbered by such vigorous policing and judicial protection.

An equally disquieting way to phrase the message of the *Bridgeport* Court is that the more famous and commercially successful a recorded work is, the less likely samples from its distinctive features will qualify as fair use, even when the accused use is admittedly transformative. To the more cynical, the *Bridgeport* message might be, at least in part: sample the works of obscure and struggling artists because they have less likelihood of being able to show injury to a secondary licensing market. Perhaps the more famous (or notorious) a recording artist is, the less likely it is that a sampler will be able to convincingly argue that a secondary licensing market has not been impacted. In such instances, it seems that the sampler might be well advised to at least comment on or criticize the sampled artist or work. This may contravene a basic principle of both the *Green Day* and *Cariou* cases. But in light of the *Campbell* case, this type of transformative use is at least readily comprehensible (if not always accepted) by the courts. Still, the question persists: Are there enough resources on the part of the artist who uses samples in a transformative manner to withstand the legal barrages of *Bridgeport* type plaintiffs?

George Clinton, legendary founder of Parliament Funkadelic and the recording artist whose work was sampled by the defendants in the above-discussed *Bridgeport* case, has some strong views on sampling and the enforcement efforts of the third-party rightsholders to his recorded music. According to Clinton: "We never minded them sampling, or covering a song. There's a small amount that you're supposed to pay, but you're not supposed to get sued all over the place for doing it. We'd rather do it together. But the people that stole . . . [the rights to] . . . our . . . [music] . . . is suing people all over the world and almost killing the concept of sampling, which is important for a lot of music. But we still are out there fighting for that right." *See, George Clinton: We Never Minded Them Sampling*; *How Arguably The Most-Sampled Musician Ever Finds His Fountain Of Youth In The Recording Studio*, Interview of George Clinton by Jeremiah Alexis (May 14, 2013),http://www.redbull.com/us/en/music/stories/1331590648362/george-clinton-on-samples-youtube-and-youth; (Bracketed text added; also, apologies to George for replacing his more expressive four-letter word with the five-letter word, "music," in the second bracket).

In the final analysis, there appears to be no well-tested reason for protecting owners of rights in musical recordings more strictly or paternalistically than the owners of rights in visual images. Such discriminatory protection would express a cultural or commercial preference for

audio as opposed to visual works – and, at least based on the records developed in prior fair use cases, there is no apparent or persuasive reason to discriminate in such a manner. If fair use is to be treated differently in different segments of the artistic community, then the burden should be on the plaintiffs and, perhaps, the legislature and courts to clearly explain why this is so or should remain so. As we go forward and consider music licensing in general, the compulsory license created by the fair use defense should also be re-examined in the context of sampling and the recorded arts.

## III. Legacy Artists' Digital Performance Royalty Rights

On May 29, 2014, Representatives George Holding (R – North Carolina) and John Conyers (D – Michigan) introduced the "Respecting Senior Performers as Essential Cultural Treasures Act" or "RESPECT Act." The RESPECT Act seeks to amend the Copyright Act to require "digital music services (certain services providing digital transmissions of music by Internet radio, cable, or satellite) that transmit sound recordings under the statutory license provided under federal copyright law to pay royalties for sound recordings fixed before February 15, 1972, in the same manner as they pay royalties for sound recordings protected by federal copyright that are fixed after such date." *See* https://beta.congress.gov/bill/113th-congress/house-bill/4772. The 1976 Copyright Act left protection of these recordings to the various states, the result being a number of state laws and precedents that vary in nature and scope of protection.

The RESPECT Act seeks to create a limited, federal performance-based royalty right without pre-empting other common law rights provided under state law. Some commentators have maintained that the RESPECT Act merely tries to shelter digital music services from having to worry about or deal with the potential for state-imposed royalty obligations that could exceed current rates for works recorded after February 15, 1972. Whether this should be characterized as an accurate criticism or a well-deserved compliment can be left to the different segments of the industry considering the issue. My view is that the core focus should be on where any new revenue stream is ultimately directed.

Proposals to provide piecemeal royalty rights or any rights under federal copyright law, without the attendant termination rights, fair use defenses and other aspects of federal copyright law that are intended to protect creators and the public interest, has raised a number of objections. On the other hand, there are also objections to disturbing established state law rights which generally last much longer than federal copyright protection and are arguably outside the safe harbors of the Digital Millennium Copyright Act. Therefore, among the objections to a pre-emption of state law are: (1) there is no substantiated policy justification for usurping state authority over sound recordings fixed before February 15, 1972; and (2) it would be an improper taking to interfere with those state law rights (upon which numerous private contracts are based). The result of the differing points of view and economic interests has been confrontation, confusion, delay and indecision.

This situation presents a type of Gordian Knot best addressed by quoting Mark Twain: "When you don't know what to do, do the right thing." It seems fair that the blues, rock, jazz and other artists who recorded works before February 15, 1972 should enjoy at least some sort of performance-based royalty right that acknowledges their contributions and puts those earlier

works on a par with works recorded on or after February 15, 1972. If, as some have complained, the granting of retroactive rights does not comport with the forward-looking goal of copyright to promote the progress of science and the useful arts, then other bases for the right – such as the Commerce Clause – might be considered. Irrespective, however, of the basis for the right, we should keep in mind that the primary goal is to provide a financial acknowledgement of the artists' creative efforts, not a windfall for record companies or a fragmentation of copyright law to satisfy the interests of a particular industry segment. In short, it is questionable whether these artists or their heirs will really enjoy the full benefits of the revenue stream if it is filtered through the accounting departments of third-parties who might claim that prior contracts with the artists should be interpreted to encompass this new right. Therefore, the right should be conferred quickly, but there should be an acknowledgement of control by the artists or their heirs, not by a record company or some other third party who is seeking a windfall.

The record companies likely did not anticipate such rights as an incentive to manufacture and distribute the early recordings, so, as between the company and the creative artist, it seems that the balance should tip in favor of the artist. This does not, however, preclude an allocation of some portion of the revenue to a record company or other third party; it just posits that the record company should not enjoy the lion's share of the revenue or otherwise have the opportunity to whittle down the artist's share. Of course, there might be some objection that earlier contracts that convey all rights to someone other than the recording artist would be impermissibly disturbed if Congress designated the recording artist as the sole or prime beneficiary of the new right. Therefore, as a condition of creation of this new and unanticipated right, provision should be made in the text of the law (or at least the legislative history) that transfers or licenses entered into before the date of the right's creation should not be read to include the right. The right should vest directly in the artist or the artist's heirs.

In short, whether the RESPECT Act or some variant of it is proposed, it seems that equity and public policy should encourage us to move rapidly to at least get the benefits of such rights for legacy artists and their heirs. Ultimately, the entire edifice of common law copyright may fall or simply fade away. But, at the moment, there is no reason to delay at least some measure of equity and acknowledgement for recording artists who happened, through the circumstances of timing, to fall short of the February 15, 1972 date which, for current purposes, should have no significance.

Respectfully submitted,

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