

Testimony of
Future of Music Coalition
On
“The Scope of Fair Use”
Hearing

**House Subcommittee on the Courts, Intellectual
Property and the Internet**

January 28, 2014

House Subcommittee on the Courts,
Intellectual Property and the Internet
2138 Rayburn Office Building
Washington, DC 20515

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Dear Chairman Goodlatte, subcommittee Chairmen Coble and Marino and members of the committee:

We are honored to submit the following testimony for the record in this hearing on the scope of fair use.

Future of Music Coalition (FMC) is a national nonprofit education, research and advocacy organization for musicians. Our work over the past thirteen years has centered on the ability for musicians and composers to reach potential audiences and be compensated for their work. We also pay close attention to artists' ability to access and—depending on circumstances—incorporate existing creative expression as a means of further enriching our culture.

In many ways, current conversations about fair use are emblematic of the space FMC occupies. Our organization and the many artists with whom we engage have first-hand experience with copyright and its allowances and limitations. As artist advocates, performers, recording artists, independent label owners, journalists, academics, technologists and consumers of culture, FMC often finds itself at an intersection of a range of interests. Our comments in this proceeding will reference just some of these intersections—specifically those relevant to musicians and composers.

We must begin by recognizing the importance of fair use to a functional copyright regime that allows for the advancement of culture, even where—under certain conditions—its evolution involves the use of copyrighted material in new works. We believe that the current scope of fair use as outlined in statute is up to the task of serving those who would make use of existing works in new forms of expression, as well as those whose

rights may be infringed upon. Many artists and rightsholders understand the importance of fair use as a limited exception in copyright law, because fair use is part of what allows them—in certain specific instances—to utilize aspects of existing expression in new works. Fair use can also be seen as part of America’s free speech traditions, as it allows for the kind of criticism and commentary that is integral to a democratic society. However, it is important to note that fair use does not give free rein to just take someone else’s expression. Artists and copyright owners are granted limited-time, exclusive rights under the law in part because these rights incentivize the creation of new works, from which the public derives benefit. There will always be uses deemed by the courts to be irreconcilable with the four-factor test laid out in section 107 of the Copyright Act, which are as follows:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

We recognize the establishment of fair use as an affirmative defense against infringement claims, but feel strongly that fair use—even were it to be expanded—is insufficient to address the majority of practical concerns faced by creators in the digital marketplace. Still, there is much to be said for the current process of adjudication that over time results in a more comprehensive understanding of this doctrine and its application. At this point, however, it seems imprudent to modify existing statute around fair use when there remains much to be done to improve how copyright functions within specific environments, such as music licensing and emerging digital business models.

Fair use takes center stage

Recent controversies around the use of unlicensed recordings and compositions have exacerbated tensions between those whose livelihoods depend to no small extent upon the exclusivities granted under copyright law and new users—often commercial—who seek to incorporate some or all of an existing work.

While litigation can serve to provide greater clarity around contested uses, it is not always necessary. Some uses advanced as “fair” may not satisfy the requirements of the four-part test, regardless of how the analysis is weighted. For example, it seems unlikely that the use of a complete lyric by a popular commercial website—even with annotation—is sufficiently transformative enough to satisfy the first factor, while there is a strong case to be made that such a use harms the market for the existing work.¹ Going further, the Copyright Act specifically lists annotation as part of the bundle of activities described as a “derivative” right exclusive to the owner of a work. The music lyric site Rap Genius—which was among the sites that recently came under fire from the National Association of Music Publishers for unlicensed publication of song lyrics²—apparently recognizes that claims to fairness may not hold up under judicial scrutiny and is now securing the required permissions from rightsholders.

Other uses may not be so cut-and-dry. The Beastie Boys’ recent skirmish with upstart toy company GoldieBlox inspired strong public reactions on all sides of this issue, but hasn’t really done much to improve understanding of the fair use doctrine among music fans (or even some copyright attorneys). In this instance, GoldieBlox posted an online advertisement called “GoldieBlox, Rube Goldberg & The Beastie Boys” that used music from the Beastie Boys’ “Girls,” a song loaded with juvenile—and likely tongue-in-cheek—sexism. The GoldieBlox ad replaced the song’s lyrics with more positive messages about girls engaging in physics and engineering. The video subsequently earned millions of views. At the heart of the controversy is whether the company’s use of “Girls” in what was clearly a marketing campaign is sufficiently transformative due to its

¹ "Future of Music Coalition." *Unlicensed Lyric Sites Hit With Takedown Requests*. N.p., n.d. Web. 27 Jan. 2014.

² "NMPA Targets Unlicensed Lyric Sites, Rap Genius Among 50 Sent Take-Down Notices." *Billboard*. N.p., n.d. Web. 27 Jan. 2014.

purported commentary on the viewpoints expressed in the original song. Also at issue is the Beastie Boys' longstanding prohibition of their music being used in any advertisement, as stipulated in the will of deceased band member Adam Yauch. While the incident has elicited heated responses from any number of quarters, it has yet to inform our understanding of the fairness of this particular use as any verdict is still forthcoming.

The law appears conflicted with regard to the ability of a work to be used in such a manner—the most analogous music-world ruling states that advertising should be afforded “lesser indulgence” than other commercial uses (like selling CDs featuring a portion of an existing work).³ This puts the Beastie Boys on much firmer ground. However, there is another case in which a popular photograph was parodied to advertise a movie, and this was ultimately deemed fair.⁴ Another notable aspect of the Goldieblox incident is procedural: the toy company requested judgment from a court regarding the appropriation; typically fair use is invoked as a defense against an infringement claim. Many observers considered this move to be provocative.

We reference these developments not as hard-and-fast examples of fair use in the courts (or even the court of public opinion), but rather to highlight how the application of the doctrine is highly factor-dependent. This is as it should be—each case is different, and outcomes aren't pre-determined. The adaptability of the doctrine to new circumstances is a key to its utility. Determining fair use is not something that should or can be accomplished in broad strokes, yet its provisions remain a crucial part of our copyright law—one that benefits artists as well as the public.

Fair use and remix culture

While it is possible that some uses based around activities commonly known as “remixing” or “sampling” may indeed be deemed fair use should they ever be litigated,

³ “Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994).” *Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994)*. N.p., 07 Mar. 1994. Web. 27 Jan. 2014.

⁴ Judge Newman, Jon O. “Leibovitz v. Paramount Pictures.” *Findlaw*. United States Court of Appeals, Second Circuit, n.d. Web. 27 Jan. 2014.

an expansion of the doctrine is not necessary to ameliorate tensions between remixers and rightsholders. In fact, doing so may make it more difficult to establish a functional marketplace for sampling due to the doctrine's most common application as an affirmative defense, as well as the interdependent analysis of factors necessary to making a determination.

A number of infringement suits have been resolved (sometimes to conflicting ends) without fair use being invoked. Justification for *de minimis* use of compositions in new works can be found in case law,⁵ yet sound recordings have not been afforded this degree of flexibility. As Judge Ralph Guy expressed in *Bridgeport Music v. Dimension Films, et al.* (410 F. 3d 792 [6th Cir. 2005]), "Get a license or do not sample." As the defendant in that case did not invoke fair use, it remains to be seen how a court would respond in a fair use affirmative defense implicating sound recording(s).

Still, the practical result of this ruling is has been that, while a marketplace for sampling exists, it is slanted to favor those who can afford to pay the often-hefty costs of obtaining the necessary permissions. FMC believes that a marketplace for sampling should serve the interests of all parties, including recording artists, composers and those seeking to use elements of existing works in new forms of expression.

As Northwestern University Professor Peter DiCola and University of Iowa professor Kembrew McLeod write in their book, *Creative License: The Law and Culture of Digital Sampling*:⁶

"The Bridgeport court read the section as an extension of the rights of the sound recording copyright holders to everything not explicitly reserved to the public. Yet section 114(b) is better understood as a limitation on rights with respect to sound recordings.... Congress could revise section 114(b) to clarify its meaning. One approach would involve setting a quantitative threshold for *de minimis* use,

⁵ "Newton v. Diamond 349 F.3d 591 (9th Cir. 2003)." *Music Copyright Infringement Resource*. N.p., n.d. Web. 27 Jan. 2014.

⁶ Kembrew McLeod and Peter DiCola, *Creative License: The Law and Culture of Digital Sampling* (Duke University Press, 2011).

such as one second of the sampled recording or 1 percent of its length. Another approach is to allow the federal court to determine the *de minimis* threshold on a case-by-case-based. Outside of the Sixth Circuit, courts need not following the holding of Bridgeport and could apply a more defensible interpretation of section 114. The problem is that most cases never reach a judicial opinion, instead parties tend to settle beforehand because of the high cost of litigation.”

A *de minimus* solution is not the only possible approach to establishing a more functional marketplace for sampling. In recent comments to the USPTO and NTIA in their joint copyright “green paper,” Jeremy Peters of independent music label and publishing company Ghostly International advocates for the removal of the minimum per-song mechanical royalty rate in favor of a time-based approach (a methodology Peters would also extend to the master use).⁷ Peters asserts that this proposal:

“...allows for a commercialization of those original works at a scale that is not currently possible given the unpredictability of a licensing fee... It also takes the process of figuring out these rights and an artificial roadblock to creativity out of the hands of lawyers and consultants whose fees are out of reach for budding creative. In the current model, it is well known that only a small portion of these remixes are appropriately licensed.”

These proposals and others are worthy of exploration, and may be an appropriate place for statutory amendment. As FMC notes in our own comments in the USPTO/NTIA proceeding:

“Access to ownership information is limited; financial costs and transactions costs are prohibitively high; and there is a lack of published, transparent pricing. The challenge in addressing these obstacles is finding a solution that both facilitates a smooth, frictionless market for legitimate sampling and insures that copyright holders are fairly compensated.”

⁷ Peters, Jeremy. "Comments of Ghostly International in USPTO/NTIA 'Copyright Policy, Creativity and Innovation in the Digital Economy'" *National Telecommunications and Information Administration*. Ghostly International, n.d. Web.

All of this is to say that there are a number of ideas worth exploring within the framework of copyright and licensed use before tinkering with the statute that undergirds unlicensed fair use. In addition to a closer examination of Sections 114 and 115, areas in which Congress can play a positive role in the marketplace for copyright include: supporting comprehensive and interoperable registries; setting obligations to compensate creators under fair terms; closing the terrestrial radio royalty exemption; and establishing basic rules of the road for Internet Service Providers to preserve a level online playing field.

UGC and noncommercial exceptions

Every so often the idea is floated that expanding fair use to include non-commercial exceptions may mitigate tensions within copyright and user-focused technologies. While we are sensitive to the fact that millions of Americans have a limited practical understanding of their rights as users of copyrighted material (or even as authors of creative works), we do not believe that magic wand waving will result in favorable outcomes for today or tomorrow's artists. Instead, we encourage experimentation in the licensing space to make it easier for those who would use portions of existing works in user uploaded material, along with a greater acknowledgement on behalf of rightsholders that many of these uses are unlikely to create market harm. As songwriter and recording artist David Lowery mentions in his testimony before this subcommittee:

“There are...several emerging-market and permission-based solutions that allow the public to create amateur and fan remixes while protecting the rights of other creators. YouTube and the National Music Publishers Association currently have a licensing agreement where users can upload videos and remixes incorporating music from a multitude of songwriters without seeking individual permissions. In this arrangement, songwriters and music publishers share the ad revenue that these videos generate.”

Debates over the specifics of compensation within these arrangements aside, such

developments should be seen as positive, at least with regard to technology's ability to facilitate new markets while preserving the exciting dynamics of expression and interactivity that have come to define our networked culture. However, there remain limits to the effectiveness of technology in determining whether a use should be allowed or disallowed under the safe harbor provisions outlined in section 512 of the Digital Millennium Copyright Act. Full reflection on these matters is outside the scope of this testimony, but we would be remiss to not comment on the difficulties in making fair use determinations in an environment where internet services' compliance with takedown notices are increasingly automated.

Conclusion

The scope of fair use is necessarily imprecise, yet properly drawn. Even when it seems to be nothing but nuance, the doctrine remains an important component of US copyright law, one that musicians and other creators frequently utilize. Fair use helps facilitate the creation of new works from which the public draws benefit, and it safeguards the critical discourse and individual expression essential to a democratic society. We appreciate the opportunity to submit this testimony and look forward to engaging in the subcommittee's ongoing review of existing copyright law.

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