Good Fences Make Good Neighboring Rights: The German Supreme Court Rules on Digital Sampling of Sound Recordings



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Digital Sampling

- Recording of a sound or portion of a previously existing recording with the aid of a device that can store the recording in binary form in the memory of a computer
- Can constitute multiple CR infringement
 - Composition



Sound Recording



Sampling: The Issue

Is digital sampling "appropriationist art" that should not be subject to copyright infringement law?

OR is it "theft" of another musician's prior created art?

Sampling: The Technology

Fairlight Series III Synclavier Digital Music System (\$70-300,000)

E-mu Systems Emulator (\$2,600)



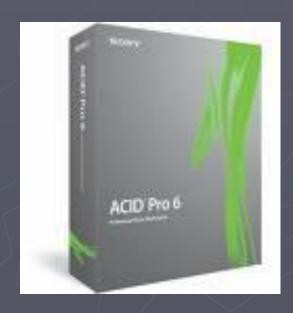
Casio SK-1 (\$100)



Sampling: The Technology

► Software for the "at home" sampler





Importance of Copyright Law

► The "Public Goods" Problem:



Led Zeppelin – "When the Levee Breaks" – 1971

Cost of <u>creation</u> is HIGH but cost of reproduction is LOW





Copyright Infringement?

► Enigma "Return to Innocence" – 1998



"Return to Innocence" Lyrics

Love - Devotion Feeling - Emotion Love - Devotion Feeling - Emotion Don't be afraid to be weak; Don't be too proud to be strong; Just look into your heart my friend, That will be the return to yourself; the return to innocence.



U.S. Copyright Protection

- ▶ 17 U.S.C. §102(a)(7)
 - Original works of authorship <u>fixed</u> in any tangible medium of expression, now known or later developed, including sound recordings
- Exclusive Rights to Author (§106)
 - Reproduce/Distribute/Make Derivative Works

Bridgeport Music v. Dimension Films

Publisher sued film companies for use of George Clinton Jr.'s "Get Off Your Ass and Jam"









Bridgeport Music v. Dimension Films

"Get a license or do not sample."

"When you sample a sound recording you know you are taking another's work product."

"Even when a small part of a sound recording is sampled the part taken is something of value."

German Neighboring Rights Protection

- verwandte Schutzrechte
- "Related right" protection for sound recording to PRODUCER/ENGINEER for financial and technical effort
- ▶ §85 of the UrgH

Kraftwerk v. Moses Pelham

German electronica band sues for use of "Metall Auf Metall" sample in defendant's song "Nur muir"





Kraftwerk v. Moses Pelham

- "even the partial unauthorized reproduction ... of the audio recording... interferes with the rights of the producer of the phonogram."
 - Quality or quantity of plaintiff's song is irrelevant
 - Recognizability of plaintiff's song in defendant's song is irrelevant

The Devil is in the Defenses

- Bridgeport Music Fair Use available to sampling defendant
 - No guidelines given
- Kraftwerk Free Use available to sampling defendant UNLESS defendant:
 - Can reproduce the sounds himself; or
 - Sampled a recognizable melody



The Solution: Recognizability

Refine Fair Use/Free Use tests in sampling cases to require defendant to prove that the sample is NOT recognizable

