

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



The 11th Annual Intellectual Property Scholars Conference
DePaul University College of Law · August 11-12, 2011

Tracy L. Reilly, Associate Professor
University of Dayton School of Law
Program in Law & Technology

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 creation 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 fixed 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 UrhG



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

