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ARTICLES

Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right

David Nimmer 189

Copyright protects various species of works, including musical compositions and sound recordings, as well as literary works, sculptures, and a host of other productions. As to almost all of those works, the Copyright Act of 1976 accords five exclusive rights: reproduction, adaptation, public distribution, public performance, and public display. Instead of simply including sound recordings within the public performance right protected by the 1976 Act, Congress added a new sixth right to the Act. That right, unlike the five rights that preceded, is limited to one type of work — sound recordings. In addition, unlike the other five rights, it is not a general right; instead, it is limited to the domain of “digital audio transmission.” The vehicle that Congress chose to effect that change bears the ponderous caption of Digital Performance Right in Sound Recordings Act of 1995. Congress revisited the terrain again in 1998, amending that 1995 amendment via the Digital Millennium Copyright Act. The resulting framework is frightfully complex. This article describes the twists and turns in that right of digital audio transmission. The very process of doing so will illustrate how tortured this application is. In future installments to this series, the impact on the public interest will be explicitly weighed. For the present, the enterprise is to grasp the impact of this most complex statutory scheme.

Still Dancing: An Article on *Astaire v. Best Video* and its Lasting Repercussions

Scott L. Whiteleather ••••• 267

In *Astaire v. Best Film & Video Corp.*, the Ninth Circuit Court of Appeals strictly interpreted California's right of publicity statute according to the plain meaning of its terms. In so doing, the court ruled that a 93-second film clip of legendary dancer Fred Astaire inserted into an instructional dance video, was exempt from the protections afforded to the unauthorized use of a deceased personality's name, voice, signature, photograph, or likeness, simply because it was shown on an exempted medium: film. However, the Ninth Circuit's over-emphasis on the actual media enumerated as exceptions by the statute was a critical error, and led the court to an illogical result, which favors form over the function of an infringing use. Based upon an examination of the development and evolution of the right of publicity laws around the United States, this Article suggests that the *Astaire* court's approach omits consideration of a crucial factor in the right of publicity analysis: the function and purpose of the famous personality within the medium in which it is used. The Article argues and concludes that, even with the 2000 amendments to the California right of publicity statute, the right of publicity laws will continue to be weakened and exploited until courts adopt an analysis which recognizes the fundamental importance of the content and objective of an alleged infringing use.

THE RECORDING ACADEMY® ENTERTAINMENT LAW INITIATIVE 2000 LEGAL WRITING CONTEST WINNERS

The UCLA Entertainment Law Review presents the five winning essays from the National Academy of Recording Arts & Sciences' second annual Entertainment Law Initiative writing competition.

Grand Prize Winner

New Uses and New Percentages: Music Contracts, Royalties, and Distribution Models in the Digital Millennium

Corey Field ••••• 289

The fusion of copyright law, contract, and digital transmission of sound recordings is the new alchemy that turns music into money on the Internet. This comment examines how relationships between copyright law, business and licensing organizations, and performing musicians are changing following passage of the Digital Performance Right in Sound Recordings Act and the Digital Millennium Copyright Act, and the widespread onset of digital distribution of sound recordings. The com-

ment provides an overview of the new media licensing obligations for webcasters and examines how digital distribution of sound recordings brings about a new commercial convergence of separate rights under copyright. The roles of licensing organizations in the age of the Internet and the new digital music performance licensing landscape are also analyzed. From the perspective of the musician, the comment asks whether the Internet shift in commercial models indicates similar shifts in royalty percentages. Finally, the issue of whether new and pre-existing performing artists contracts include rights to the new digital transmission exploitations is discussed in light of "new use" copyright case law. Practical solutions proposed include proactive examination of existing and future recording contracts to confirm they include new use rights.

Finalists

Music in the Digital Millennium: The Effects of the Digital Millennium Copyright Act of 1998

David Balaban ••••• 311

The expansion of the Internet has begun a shift in the music industry from the sale of physical recordings of music to the distribution of music over the new medium in the form of sound files, such as MP3s. However, performers have encountered difficulty in receiving compensation for songs transmitted over the Internet. This Comment examines the Digital Millennium Copyright Act of 1998 (DMCA), recent legislation that further limits the liability of Internet Service Providers (ISPs) for their participation in the transfer of music. However, the DMCA does extend important protection to the owners of sound recordings in its "black box" provision, which protects technological methods, such as watermarking, that may be used to track and identify illegal copies of music distributed over the Internet.

The No Electronic Theft Act: The Music Industry's New Instrument in the Fight Against Internet Piracy

Karen J. Bernstein ••••• 325

Recently, federal prosecutors gained their first conviction under the 1997 No Electronic Theft Act, which makes it a crime to upload more than ten digital copies of phonorecords regardless of profit motive. The conviction, which fell short of jail time, may not have been enough to deter Internet pirates who do not derive private financial benefit or commercial gain (the so-called "non-profit" Internet pirate). This Note argues that money is not enough to deter non-profit Internet pirates. Accordingly, an increase in the base offense level for a NET Act violation may be the only way. Moreover, the music industry can take a more proactive approach by (1) lobbying the Sentencing Commission to increase the base offense level under the NET Act, (2) funding training programs so prosecutors will more effectively convict Internet pirates, and (3) educating the public about Internet piracy.

MP3: Second Verse

Lidia Pedraza343

New technology usually brings with it fear that things as we know them will change or be replaced. In 1980, The Buggles released the song "Video Killed the Radio Star" which satirized the emergence of music video as an eventual replacement of music radio. Now, the music industry faces new technology that it fears will do more than supplement its status quo. The amazing growth of the Internet is introducing new technology to people worldwide who can "download" the latest program with the simple click of a mouse button. Never before have so many types of music been so easily and freely accessible. But is all this information really "free"?

The Global Response to Digital Music Piracy

Liz Robinson357

Technology now allows digital music files to transfer easily and quickly over the Internet. Newly available devices allow Internet users to store, copy, and replay digital sound recordings whether copyrighted or not. Because of the global nature of the Internet, domestic copyright legislation is ineffective against the Internet music pirate. This article briefly discusses multilateral copyright treaties and the United States' use of trade sanctions to discourage international copyright infringement. This article suggests that these mechanisms are no longer sufficient to combat music piracy in the age of digital music on the Internet. Proposed solutions include mandated civil remedies as well as levies on recording media to be used to offset lost royalties and finance global enforcement.

COMMENT

Bowie Bonding in the Music Biz: Will Music Royalty Securitization be the Key to the Gold for Music Industry Participants?

Teresa N. Kerr 367

Musicians are heading to Wall Street in droves. No they are not looking for new real estate property, they are looking to raise capital. These musicians have come to realize that the old ways of raising capital in the music industry - advances from record companies and waiting for royalty checks to trickle in - are just not appealing anymore when there are millions to be made on the Street. Rock legend, David Bowie, spear-headed the music industry's new found love affair with Wall Street, after netting \$55 million (up front and in one lump-sum) from the first ever asset securitization of music royalty future receivables. This comment provides an

overview of music royalty securitization, with a particular emphasis on how copyright law makes such deals more complex than the securitization of tangible assets. The author concludes that while there are indeed millions to be made in the capital markets, very few musicians have a secure enough copyrightable interest in their royalties or a proven track record to make it on the Street.

