

# Current Issues in Music Law

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**IRWIN IP**

INTELLECTUAL PROPERTY LITIGATION

# Overview

- ▶ Importance of Maintaining Complete Records as demonstrated by “*Happy Birthday To You*” case
- ▶ Infringement of Musical Works as demonstrated by the “*Blurred Lines*” and “*Stairway to Heaven*” cases
- ▶ Infringement of Sound Recordings as demonstrated by “*Vogue*” case
- ▶ Infringement of **Pre-72** Sound Recordings as demonstrated by The Turtles and CBS cases
- ▶ Applicability of DMCA Safe Harbors to Pre-72 Sound Recordings as demonstrated by *Vimeo*
- ▶ Obligation to evaluate fair use before sending DMCA Take Down Notices as demonstrated by “*Let’s Go Crazy*” case

# Importance of Maintaining Records

## *Marya v. Warner/Chappell Music Inc. Overview*

- ▶ Warner/Chappell claimed ownership of copyright in “*Happy Birthday to You*” and collected millions each year enforcing song rights
- ▶ Plaintiff recorded “*Happy Birthday to You*” in 2013 and paid royalties after WC claimed infringement
- ▶ Plaintiff files a class action lawsuit to invalidate the copyright, rescind license agreements, obtain damages for unfair competition, etc.



# Importance of Maintaining Records

## “Happy Birthday to You” History

1893 - “Good Morning to All” written by Hill Sisters, assigned to Summy.

1921 - Copyright in “Good Morning to All” renewed

1949 - Copyright protection for “Good Morning to All” expires



1911 - “Happy Birthday to You” lyrics published

1934 - Lawsuit filed for using “Happy Birthday to You” in a play. Lawsuit asserted infringement of “Good Morning to All” melody.

1935 - Summy registered a copyright for “Happy Birthday to You” arrangement, claimed it covered lyrics

**\*Copyright properly filed in 1935 and renewed would expire in 2030\***

# Importance of Maintaining Records

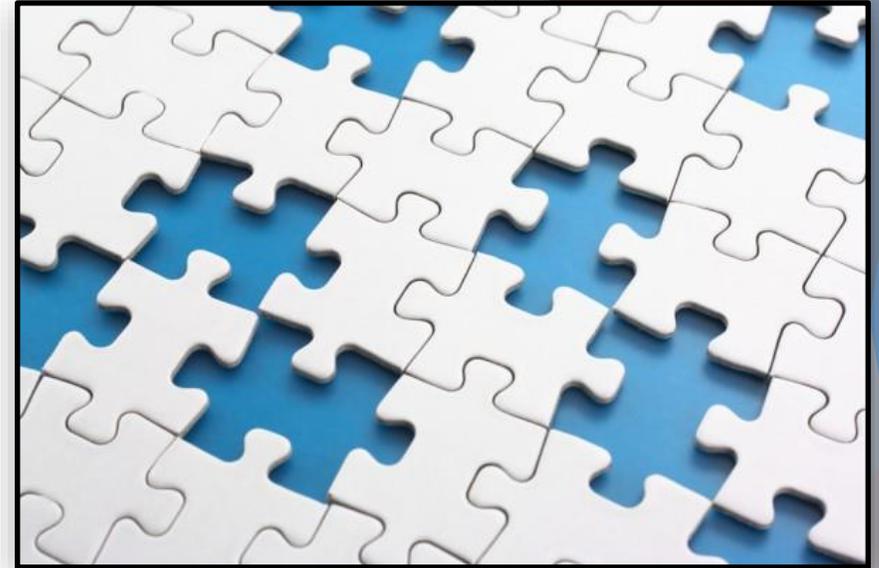
## *“Happy Birthday to You”* Lyrics Copyright Term

- ▶ Under 1909 Act,
  - ▶ Federal copyright term did not begin until federal copyright protection began
  - ▶ Federal copyright protection began with registration or authorized publication with notice
    - ▶ Publication without notice resulted in abandonment
- ▶ While lyrics published in 1911, 1922, etc., WC argued lyrics were not published with consent of author, so federal copyright protection did not begin and copyright term did not begin until 1935 registration was filed

# Importance of Maintaining Records

## “Happy Birthday to You” - Key Issues

- ▶ Key Issues
  - ▶ Who wrote “Happy Birthday to You” lyrics?
  - ▶ Were the lyrics registered?
  - ▶ Were the lyric rights transferred to WC?
- ▶ Court’s determinations
  - ▶ Fact issue as to who wrote the lyrics
    - ▶ Could have been WC predecessor (one or more of the Hill Sisters)
  - ▶ Fact issue as to whether 1935 registration was to the lyrics or new arrangement
    - ▶ Deposit copy lost
  - ▶ ***No evidence of transfer of Happy Birthday lyrics from Hill Sisters***
    - ▶ Three agreements between Hill Sisters and Summy, none of which evidence a transfer of the copyright in the “Happy Birthday to You” lyrics



# Importance of Maintaining Records

## *“Happy Birthday to You”* - Take-aways

- ▶ 1. Get your copyrighted work properly registered
  - ▶ Maintain record of copyright deposit
- ▶ 2. Retain and store all relevant documentation



# Importance of Maintaining Records

## Copyright Registration

- ▶ Copyright registration still not required, but highly recommended
- ▶ Benefits:
  - ▶ Prima facie proof of facts set forth in registration, i.e. who wrote the song
  - ▶ Must register before filing a copyright infringement lawsuit
  - ▶ Statutory damages
  - ▶ Attorney fees
  - ▶ Needed for mechanical compulsory license royalties
- ▶ Registration is cheap and easy
  - ▶ Single registration for multiple compositions and/or recordings if commonly owned, and
    - ▶ If works have been published, they were published together
    - ▶ If works have not been published, they share a common author

# Infringement of Musical Works

# Infringement of Musical Works

## Exclusive Rights

### ▶ Exclusive Rights in Musical Works

- ▶ Reproduce and distribute
- ▶ Prepare derivative works
- ▶ Publicly Performance

### ▶ Exclusive Rights in Sound Recordings

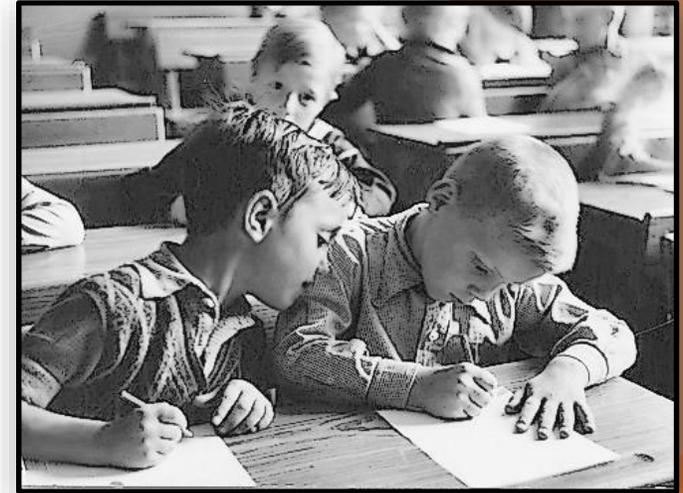
- ▶ Directly or indirectly recapture actual sounds
- ▶ Prepare a derivate work in which actual sounds in the sound recording are rearranged, remixed, or otherwise alter in sequence or quality
- ▶ Public Performance by means of digital audio transmission



# Infringement of Musical Works

## Legal Standards for Infringement

- ▶ Striking Similarity
  - ▶ 9<sup>th</sup> Circuit:
    - ▶ No “possibility of independent creation”
    - ▶ “in human experience it is virtually impossible that the two works could have been independently created”
- ▶ Access and Substantial Similarity
  - ▶ 2d Circuit:
    - ▶ Sliding scale between access and similarity
      - ▶ The stronger proof of similarity, the less proof of access required



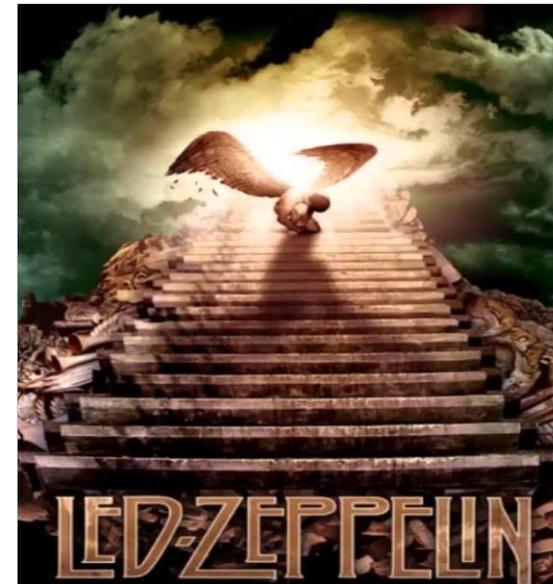
# Infringement of Musical Works

## Similarity Analyses in Two Recent Cases

“Blurred Lines”  
2015



“Stairway to Heaven”  
2016



# Infringement of Musical Works

## *Williams v. Bridgeport Music - “Blurred Lines”*

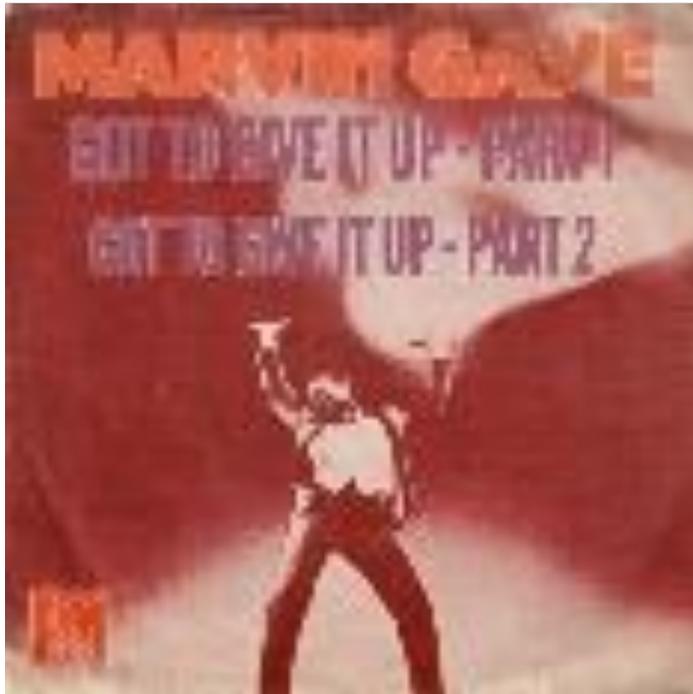
- ▶ *“Got to Give it Up”* by Marvin Gaye
  - ▶ Registered with the Copyright Office in 1977 by Jobete Music Company

*versus*

- ▶ *“Blurred Lines”* by Robin Thicke and Pharell
  - ▶ Released in March 2013 as a single, and on Blurred Lines album in July 2013

# Infringement of Musical Works

*“Got to Give it Up”* v. *“Blurred Lines”*



# Infringement of Musical Works

## *Williams v. Bridgeport Music - “Blurred Lines”*

- ▶ *“Got to Give it Up”* lead sheet that was deposited with the CO was prepared by unknown person
  - ▶ Lead sheet did NOT include percussive parts and backup vocals
  - ▶ Debate as to whether it included keyboard parts and bass lines

# Infringement of Musical Works

## Initial “Constellation” of Alleged Similarities

1. Signature phrases
  - ▶ GTGIU: I Used to Go Out to Parties v. BL: And That’s Why I’m Gonna Take a Good Girl
2. Hooks
  - ▶ GTGUI: Keep on Dancin’ v. BL: Good Girl
3. *Hooks sung with backup vocals*
4. Theme X - note pattern
5. Backup hooks
  - ▶ GTGIU: Dancin Lady v. BL: Hey, Hey, Hey
6. Bass lines\*
7. Keyboard parts\*
8. *Percussion parts*

### *Additional Similarities*

(Noted in italics: those elements ruled as not present in the deposit copy)



# Infringement of Musical Works

## Similarity #4 - Theme X Pattern

- ▶ Theme X is basically a note pattern
  - ▶ Mid-point descent, followed by a half-step ascent (“chromatic feature”)
- ▶ This theme was allegedly “core material” for Blurred Lines
  1. *If you can't hear...*
  2. *If you can't read...*
  3. *Okay now he was close...*
  4. *But you're an animal...*
  5. *And that's why I'm...*
  6. *But you're a good girl...*
  7. ....



**Musical Example 4A: “Give It Up” Backup Hook - Theme X**

3:13 Dan-cin<sup>#</sup> la - dy Dan-cin<sup>#</sup> la - dy Dan-cin<sup>#</sup> la - dy

**Musical Example 4B: “Blurred” Theme X (Verse 1, Phrases 1 and 3)<sup>16</sup>**

in reverse order R R R R  
3 #2 3 3  
:18 If you can't hear If you can't read

**Musical Example 4C: “Blurred” Theme X (Verse 2, Phrases 1 and 3)**

3 3 #2 3 #2 3 3 3 #2 3 #2 3  
:34 O-kay, now he was close But you're an an - i - mal

# Infringement of Musical Works

## *Williams v. Bridgeport Music - “Blurred Lines”*

- ▶ Jury Findings:
  - ▶ “*Blurred Lines*” infringed “*Got to Give it Up*”
  - ▶ Defendants ordered to pay over \$7M to Marvin Gaye’s Estate
- ▶ On appeal in the 9<sup>th</sup> Circuit
- ▶ Appellant opening brief is set to be filed in October of 2016

11 Question No. 2: Do you find by a preponderance of the evidence that the  
12 **Thicke Parties** infringed the Gaye Parties' copyright in the musical  
13 composition “Got to Give It Up” in “Blurred Lines”?  
14 Please answer “yes” or “no” for each of the following Thicke Parties:  
15 Pharrell Williams and More Water From Nazareth Publishing, Inc. (the  
16 “Williams Parties”)  
17 Answer: Yes    
18 No   
19 Robin Thicke  
20 Answer: Yes    
21 No   
22 Clifford Harris, Jr.  
23 Answer: Yes    
24 No   
25 Interscope Records, UMG Recordings, Inc., Universal Music  
26 Distribution, and Star Trak Entertainment (the “Interscope Parties”)  
27 Answer: Yes    
28 No

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# Infringement of Musical Works

## *Skidmore v. Led Zeppelin* Overview

- ▶ Exclusive Rights in the Musical Work
  - ▶ Reproduce and distribute
  - ▶ Prepare derivative works
  - ▶ Publicly Performance

# Infringement of Musical Works

## *Skidmore v. Led Zeppelin Overview*

- ▶ Michael Skidmore was the trustee for Spirit's front man, Randy "California" Wolfe
- ▶ Spirit recorded the song Taurus in 1967 (allegedly)
- ▶ Led Zeppelin's U.S. debut was opening for Spirit on December 26, 1968 in Denver, CO
- ▶ Led Zeppelin and Spirit performed at two of the same festivals in 1969
- ▶ Led Zeppelin recorded Stairway to Heaven between December 1970 and January 1971
- ▶ Michael Skidmore files suit 43 years after the first release of Stairway to Heaven



# Infringement of Musical Works

*“Taurus”* v. *“Stairway to Heaven”*



# Infringement of Musical Works

## “Taurus” v. “Stairway to Heaven” Spirit’s Expert Testimony (Pre-Trial Proceedings)

### Similarities

- ▶ “A” sections: 80% of the pitches of the first 18 notes match along with their rhythms and metric placement
- ▶ A sections are separated by long “B” section
- ▶ Songs use similar repetition of A and B sections:
  - ▶ Taurus: AABAAB
  - ▶ Stairway: AABAABAA

Taurus	Stairway to Heaven
0:00 Intro	0:00 A (instrumental)
00:45 A	0:13 A (instrumental)
00:58 A	0:26 B
1:12 B	0:53 A (vocal)
1:37 A	1:06 A (vocal)
1:50 A	1:20 B
2:04 B	1:47 A (vocal)
	2:00 A (instrumental)
	2:14 End of relevant portion

### Differences

- ▶ “Taurus” contains a 45-second introduction
- ▶ “Stairway to Heaven” continues for 6 minutes after allegedly similar portions
- ▶ “B” Section is seven measures in “Taurus” but eight in “Stairway to Heaven”

# Infringement of Musical Works

## Led Zeppelin's Motion for Summary Judgment

- ▶ Court found Stairway could have been independently created, not strikingly similar
- ▶ Court found issue of fact regarding substantial similarity
  - ▶ Access
    - ▶ Direct Access (actually heard song) - not sufficient evidence
    - ▶ Wide dissemination - not viable as “*Taurus*” was not sufficiently commercially successful
    - ▶ **Chain of events - Interactions at festivals creates a triable issue of fact**
  - ▶ Substantial Similarity
    - ▶ Only the composition as reflected in sheet music was protected
    - ▶ Plaintiff’s expert testimony improperly relied on performance elements not found in the sheet music, such as “fingerpricking style”, “acoustic guitar” and “classical instruments”
    - ▶ **Spirit still raised a triable issue of material fact for substantial similarity**
      - ▶ “Summary Judgment is not highly favorable” for substantial similarity analysis

# Infringement of Musical Works

## *Skidmore v. Led Zeppelin* Trial Proceedings

- ▶ Jury's findings:
  - ▶ Michael Skidmore is the valid owner of the musical composition in "Taurus"
  - ▶ Led Zeppelin did have access to the musical composition before "Stairway to Heaven" was created
  - ▶ Elements of the musical composition are not substantially similar to "Stairway to Heaven"
- ▶ Court has since denied Zepellin's request for attorney fees
- ▶ On appeal in the 9<sup>th</sup> Circuit (although no JMOL was filed)

# Infringement of Musical Works

## *“Blurred Lines”* v. *“Stairway to Heaven”*

- ▶ *“Blurred Lines”*

- ▶ Seemingly difficult case for plaintiff - plaintiff wins

- ▶ *“Stairway to Heaven”*

- ▶ Seemingly good case for plaintiff - plaintiff loses

# Infringement of Musical Works

## “Blurred Lines” Defendants’ Statements

### ▶ Statements After “Blurred Lines” Release:

- ▶ Thicke, May 7, 2013 to *GQ*: “Pharrell and I were in the studio and I told him that one of my favorite songs of all time was Marvin Gaye’s ‘*Got to Give it Up*.’ I was like, ‘Damn, we should make something like that, something with that groove.’”
- ▶ Williams, March 2013, to *XXL*: “... I was trying to pretend that I was Marvin Gaye and what he would do...”
- ▶ Weinger, email to UMG executives: “Blurred Lines” is “utterly based on” “*Got to Give it Up*,” that it “copied / sampled” it

### ▶ Subsequent Statements:

- ▶ Thicke, in his deposition:
  - All of his public statements were untrue, and he only mentioned Marvin Gaye to sell records
- ▶ Williams, in his deposition:
  - Q: “Did Marvin Gaye’s ‘*Got to Give it Up*’ ever cross your mind at all at any time while you were creating ‘Blurred Lines’?”
  - A: “No.”

# Infringement of Musical Works

## “*Stairway to Heaven*” Defendants’ Actions

- ▶ Led Zeppelin band members playing “air instruments” (even during Spirit’s song)
- ▶ Robert Plant’s trial testimony:
  - ▶ “I didn’t remember it then, and I don’t remember it now.”
- ▶ Jimmy Page’s trial testimony:
  - ▶ He “rather enjoyed Spirit,” but did not recall ever hearing the group live and only became aware of “*Taurus*” in recent years
  - ▶ Reports of jury laughing while he teased opposing counsel

# Infringement of Musical Works

## *“Blurred Lines”* and *“Stairway to Heaven”* Take-aways

- ▶ Counsel clients as to importance of originality
- ▶ Counsel clients as to importance of avoiding inconsistencies in their story
- ▶ Prepare witnesses properly and as likeable people
- ▶ Use sound recording as deposit copy
  - ▶ In *Blurred Lines* and *Stairway to Heaven* certain elements that would have been considered part of the composition were excluded because they were not in the deposit copy

# Infringement of Sound Recordings

# Infringement of Sound Recordings

- ▶ Exclusive Rights in Sound Recordings
  - ▶ Directly or indirectly recapture actual sounds
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  - ▶ Public Performance by means of digital audio transmission



# Infringement of Sound Recordings

## *Bridgeport Music, Inc. v. Dimension Films* (6<sup>th</sup> Cir. 2005)

- ▶ “Get off your Ass and Jam” included a 3 note 4 second guitar riff
- ▶ Infringing song used 2 seconds, looped it to constitute 16 beats lasting 7 seconds
- ▶ Court held this sampling violated exclusive right of copyright holder of the sound recording
  - ▶ The *de minimis* exception does not apply to sound recordings
- ▶ “Get a license, or do not sample.”

# Infringement of Sound Recordings

*Bridgeport Music, Inc. v. Dimension Films* (6<sup>th</sup> Cir. 2005)

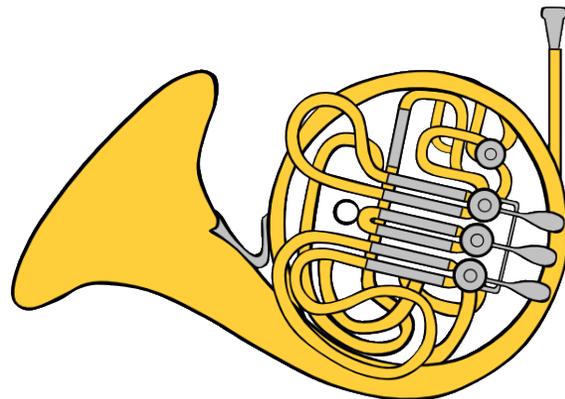
## ▶ Court's Rationale

- ▶ Easy rule to follow
- ▶ Fee is limited by the costs to duplicate
  - ▶ If you do not want to pay the fee, copyright law does not stop you from independently recreating the sound
- ▶ Sampling is never accidental, unlike a melody which can be from memory
- ▶ “[T]he part taken is something of value,” or it would not have been taken

# Infringement of Sound Recordings

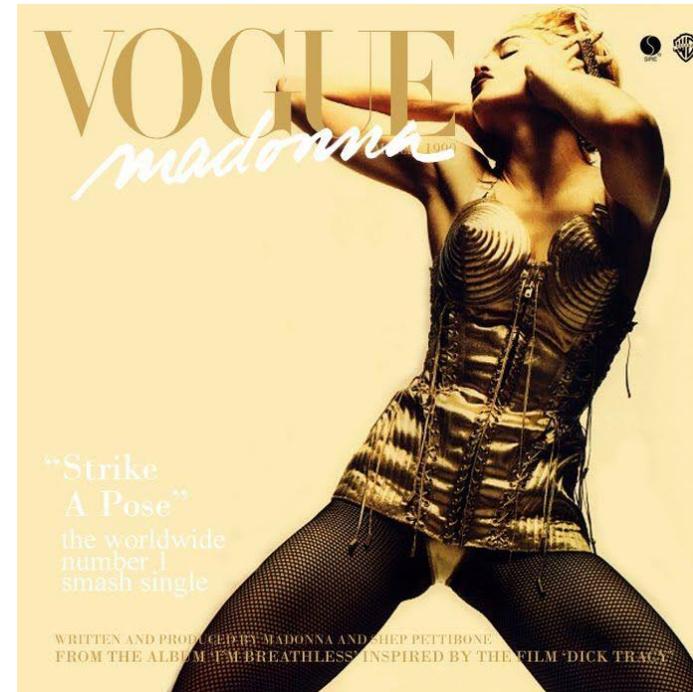
## *VMG Salsoul, LLC v. Madonna*

- ▶ Plaintiff, Salsoul, claims a 0.23 second horn-blast in Madonna's "Vogue" is copied from "Love Break"
- ▶ "Vogue" producer had previously remastered "Love Break"
- ▶ Plaintiffs worked with producer on production of Vogue
- ▶ After Vogue released, Plaintiffs purchase rights to "Love Break" and file suit



# Infringement of Sound Recordings

“Love Break” v. “Vogue”



# Infringement of Sound Recordings

## “Love Break” v. “Vogue” Salsoul’s Expert Testimony

### “Love Break”

- ▶ “Single” Horn Hit
  - ▶ Occurs 27 times
- ▶ “Double” Horn Hit
  - ▶ Occurs 23 times

### “Vogue” - Compilation Version

- ▶ “Single” Horn Hit
  - ▶ Occurs 1 time
- ▶ “Double” Horn Hit
  - ▶ Occurs 5 times

# Infringement of Sound Recordings

## *De minimis* exception

- ▶ *De minimis* exception - “average audience would not recognize the appropriation.” *Newton v. Diamond*, 388 F.3d 1189, 1193 (9<sup>th</sup> Cir. 2004).
  - ▶ “appropriation would be recognized by anyone familiar with the original” *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986).
- ▶ *Bridgeport* Rule - the *de minimis* exception does NOT apply to sound recordings.



# Infringement of Sound Recordings

## *VMG Salsoul, LLC v. Madonna* Court Opinions

- ▶ District Court
  - ▶ Sampling of the horn hit was *de minimis*
- ▶ 9<sup>th</sup> Circuit: Affirmed
  - ▶ “We hold that the ‘*de minimus*’ exception applies to...copyrighted sound recordings, just as it applies to all other copyright infringement actions.”
  - ▶ Reasonable juror could not conclude an average audience would recognize the appropriation of the horn hit.
    - ▶ 1. The horn hit is very short
    - ▶ 2. The horn hit occurs only a few times
    - ▶ 3. The horn hits are easy to miss
    - ▶ 4. Horn hits in “Vogue” were modified from the “Love Break” horn hits

# Infringement of Sound Recordings

## *VMG Sasoul, LLC v. Madonna Take-aways*

- ▶ Circuit split as to whether *de minimis* copying of sound recordings is allowable
  - ▶ 6<sup>th</sup> Circuit - no
  - ▶ 9<sup>th</sup> Circuit - yes
- ▶ *Certiorari?*
  - ▶ Deadline is roughly September 2, 2016

# Infringement of Pre-72 Sound Recordings

# Infringement of Pre-72 Sound Recordings

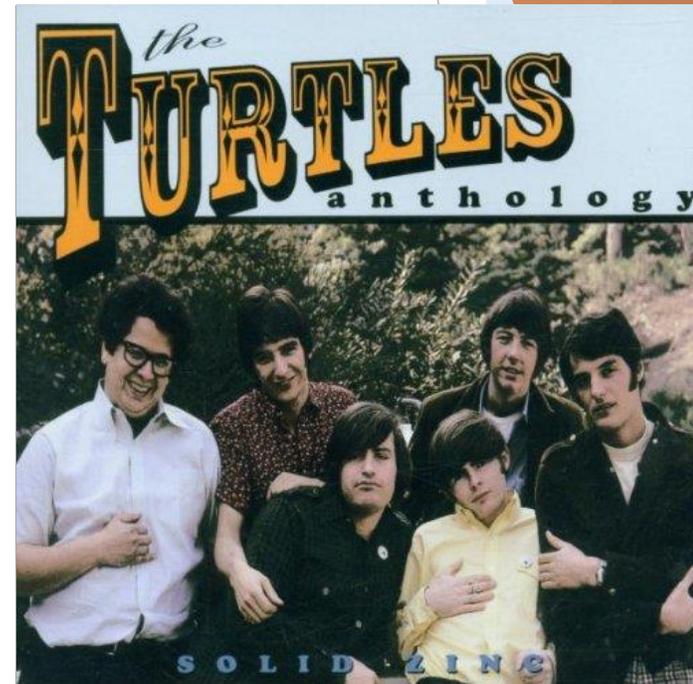
## Pre-72 Sound Recordings Background

- ▶ Not covered under the federal Copyright Act until 1972
  - ▶ Some states provide statutory or common law protection
  - ▶ But, commonly accepted that recordings could be publicly performed
- ▶ In '72 recordings became exclusively protected under federal copyright law, but they were not afforded any public performance right (essentially duplication and distribution prohibited)
  - ▶ 1995 - a limited **digital audio transmission** public performance right granted (still no public performance right in analog transmissions)
- ▶ Issue: Do pre-72 sound recordings have a public performance right under state law?
- ▶ Landmark Cases
  - ▶ *Flo & Eddie v. Sirius*
  - ▶ *ABS Entertainment v. CBS Corporation*

# Infringement of Pre-72 Sound Recordings

## *Flo & Eddie v. Sirius* - Overview

- ▶ Flo & Eddie allegedly owns the recordings of The Turtles
- ▶ All of The Turtles recordings are pre-72
- ▶ Sirius XM radio has a subscriber base of more than 25 million performs Turtles' recordings
- ▶ Flo & Eddie file lawsuits in various district courts against Sirius for infringement
  - ▶ California
  - ▶ New York
  - ▶ Florida



# Infringement of Pre-72 Sound Recordings

## *Flo & Eddie v. Sirius* - California District Court

- ▶ California enacted a statute giving authors “exclusive ownership” of sound recordings
  - ▶ Issue was what constituted “exclusive ownership”
  - ▶ Court found “exclusive ownership” had plain and ordinary meaning - exclusive right to use and possess
  - ▶ Court noted the state legislature was presumably aware of federal limitations and did not adopt them
- ▶ Impact: This would seem to prohibit analog public performances and give pre-72 recordings greater protection than post-72 recordings
- ▶ Case proceeding to trial
- ▶ Parallel case against Pandora on appeal, oral argument schedule for November 2016

# Infringement of Pre-72 Sound Recordings

## *Flo & Eddie v. Sirius* - New York

- ▶ District Court granted summary judgment to Flo & Eddie, ie sound recordings do have a public performance right
  - ▶ Unlike California, decision based entirely upon rights inherent in “property”
  - ▶ Court relied upon case law granting public performance rights to plays
- ▶ 2d Circuit certified question to the NY Court of Appeals on 4/13/16:
  - ▶ Is there a right of public performance for creators of sound recordings under New York law and, if so, what is the nature and scope of that right?

# Infringement of Pre-72 Sound Recordings

## *Flo & Eddie v. Sirius* - Florida

- ▶ District Court granted Summary Judgement to Sirius, ie there is no public performance right in sound recordings
  - ▶ The court did not want to create a new property right in Florida
- ▶ 11th Circuit certified question to the Supreme Court of Florida on 6/29/16
  - ▶ Whether Florida recognizes common law copyright in sound recordings and, if so, whether that copyright includes the exclusive right of reproduction and/or the exclusive right of public performance?

# Infringement of Pre-72 Sound Recordings

## *ABS Entertainment Inc. v. CBS Corporation*

- ▶ ABS filed a class action suit against CBS for infringement of pre-72 sound recordings.
- ▶ Plaintiffs' pre-72 Sound Recordings were originally recorded in an analog format
- ▶ Plaintiffs had their pre-72 Sound Recordings remastered

# Infringement of Pre-72 Sound Recordings

## *ABS Entertainment Inc. v. CBS Corporation* Court

### Opinion

- ▶ Court found no infringement of the pre-72 sound recordings because there was originality and “perceptible changes” made to the pre-72 Sound Recording during the remastering process:
  - ▶ “CBS performed a post-72 version of Plaintiffs’ pre-72 Sound Recordings which contained federally-copyrightable original expression added during the remastering process.”
  - ▶ “there is no genuine dispute of material fact that the sound recording performed by CBS contained an entirely different performance of the underlying musical composition than Plaintiffs’ pre-72 version.”

# Infringement of Pre-72 Sound Recordings

## DMCA Safe Harbors

- ▶ If Pre-72 Recordings have a public performance right, do OSPs qualify for DMCA protection?

# Infringement of Pre-72 Sound Recordings

## DMCA Safe Harbors

DMCA: Online Service Provider (OSP) Liability Limitations, 512

- ▶ Four possible “safe harbors”:
  - ▶ 1. Conduit
  - ▶ 2. System caching
  - ▶ 3. **System storage**
  - ▶ 4. Linking
- ▶ Must develop, implement and disseminate a policy for terminating repeat offenders
- ▶ Must accommodate protection measures

# Infringement of Pre-72 Sound Recordings

## DMCA Safe Harbor - System Storage

- ▶ OSP not liable for “infringement of copyright” for allowing user’s to store infringing material on their site information when they do not know there is infringement and the infringement is not apparent, if:
  - ▶ They act expeditiously to remove infringements
  - ▶ They designate agent for infringement notifications
  - ▶ When they exercise control over infringing activity, they do not direct benefit financially from infringement
- ▶ Is violation of state law right of public performance of a sound recording, “infringement of copyright”?

# Infringement of Pre-72 Sound Recordings

## *Capitol Records v. Vimeo*

- ▶ Vimeo - website for storage and exhibition of videos
- ▶ Approximately 43,000 videos are uploaded to Vimeo each day
- ▶ Capitol Records sues Vimeo for direct, contributory, and vicarious copyright infringement
- ▶ Complaints identified 199 videos with recordings of the plaintiffs' copyrighted music

# Infringement of Pre-72 Sound Recordings

## *Capitol Records v. Vimeo* Court Opinions

- ▶ District Court
  - ▶ Concluded that the DMCA Safe Harbor only protects against liability under the federal copyright law; therefore, there is no protection for pre-72 sound recordings
- ▶ Second Circuit
  - ▶ Safe Harbor DOES apply to pre-72 Sound Recordings

# Fair Use and the DMCA

# Fair Use Defense and the DMCA

## Overview of Fair Use Defense

- ▶ DMCA authorizes copyright owner to send take down notices
- ▶ To qualify for immunity, OSPs must implement policies for addressing infringement
- ▶ Do copyright holders have an obligation to evaluate fair use before sending DMCA take down notices?

# Fair Use Defense and the DMCA

## *Lenz v. Universal Music Corp.* - Overview

- ▶ Stephanie Lenz recorded a 29-second home video of her son dancing to Prince's "*Let's Go Crazy*" and posted it on YouTube
- ▶ Universal was Prince's publishing administrator responsible for enforcing his copyrights
- ▶ Universal sent a take down notice to YouTube, who then removed the video and sent an e-mail to Lenz notifying her of the removal
- ▶ Lenz sent a counter-notification which Universal protested
- ▶ Lenz filed suit against Universal under the DMCA for misrepresentation
  - ▶ Alleged that copyright holders have been abusing extrajudicial takedown procedures by declining to first evaluate whether content qualifies as fair use

# Fair Use Defense and the DMCA

## The Dancing Baby



Source: <https://www.youtube.com/watch?v=N1KfJHFWlhQ>

# Fair Use Defense and the DMCA

## Overview of Fair Use Defense

- ▶ Section 107 - Use of copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship or research, is not an infringement of copyright
- ▶ Four Factor Test
  - ▶ 1. The purpose and character of the use
    - ▶ Is the new work transformative (i.e. parody, satire)
  - ▶ 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
    - ▶ Is it proportional to the intended use of the work?
    - ▶ Looks not only at the quantity of copied material, but the importance of the copied material
  - ▶ 4. The effect of the use upon the potential market for or value of the copyrighted work

# Fair Use Defense and the DMCA

## *Lenz v. Universal Music Corp.* - Cross-Motions for Summary Judgment

- ▶ District Court
  - ▶ Copyright holder is not required to make a full-blown fair use analysis, however, they must at least make an initial assessment
- ▶ 9th Circuit affirmed
  - ▶ Statute requires copyright holders to consider fair use before sending a takedown notification
  - ▶ Triable issue as to whether Universal formed a subjective good faith belief that the use was unauthorized by law
- ▶ Both parties are filing petitions for *writ of certiorari*

# Questions



Thank you for listening

**IRWIN IP**

INTELLECTUAL PROPERTY LITIGATION

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