

MEMORANDUM

TO: Senior Partner
FROM: ABC
RE: Defense Strategy in Clinton Lawsuits
DATE: March 1, 2010

QUESTION PRESENTED

How can a successful fair use defense for Universal be prepared against copyright infringement claims from Bridgeport Music regarding the works of George Clinton? What went wrong for the defendant at the Sixth Circuit Court of Appeals, and what are the different arguments, pieces of evidence, and attack strategies that will lead to a positive result for Universal?

BRIEF ANSWER

For Universal to have a successful fair use defense, it must be shown that homage and tribute are statutorily allowable forms of fair use. An analogy between homage and parody must be made to prove that the portions of “D.O.G. in Me” in question were meant as a specific comment on “Atomic Dog.” In order for it to be a proper tribute, Public Announcement had to use the most recognizable portions of “Atomic Dog.” It must be argued that Bridgeport will be able to continue licensing Mr. Clinton’s work to artists who intend to directly sample “Atomic Dog” or use the licensed material as more substantial pieces of less transformative work.

FACTS

Bridgeport Music, Inc. successfully sued the hip-hop group Public Announcement for copyright infringement in response to their use of portions of George Clinton’s song “Atomic Dog” in their song, “D.O.G. in Me.” The portions in question are the rhythmic panting of the word “dog” in a low voice and the “Bow wow” refrain that appear in both songs. Bridgeport has

licensed Clinton's work to other hip-hop artists for profit. Public Announcement's distributor, Universal, has retained the services of our firm after losing their appeal to the Sixth Circuit.

DISCUSSION

The fair use exception to the rights of copyright owners is codified in the Copyright Act of 1976, stating, “. . . the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . ., scholarship, or research is not an infringement of copyright.” 17 U.S.C. §107 (1976). Four balancing factors are set forth in the statute, identified by Congress as being especially relevant in determining whether a use was fair. The factors are not to be treated in isolation, and should be weighed together when their guidance is being sought. *Campbell v. Acuff-Rose Music Inc*, 510 U.S. 569, 578 (1994).

The Court in *Bridgeport v. Universal* rejected Universal's fair use defense on the factor two grounds that “Atomic Dog” is “clearly within the core of copyright protection,” factor three grounds that the parts of the original used by Public Announcement were distinctive and recognizable, and factor four grounds that there was an adverse effect on the market of the copyrighted work. 585 F.3d 267, 278 (6th Cir. 2009). Universal failed to frame the issues effectively, attack Bridgeport's claims properly, and offer evidence that could have lead to a favorable outcome.

The Supreme Court has held that “parody, *like other comment or criticism*, may claim fair use under §107.” *Campbell*, at 579 (emphasis added). Universal did not convince the Court that homage or tribute should be viewed with parody as a statutorily approved “comment.” Universal needed to compare Public Announcement's actions to those of other artists making a statement about previous work. This would place the song into the acceptable “other comment” category discussed in *Campbell*. Universal failed to introduce evidence explaining how Public

Announcement's use of portions of "Atomic Dog" paid tribute to George Clinton. *Bridgeport*, at 278. In future litigation, Universal needs to have hip-hop and cultural experts testify that using the "dog" rhythmic panting and the "Bow wow" refrain in "D.O.G. in Me" is consistent with other legal tributes in hip-hop. The defense should also have the experts testify that it is not routine to acknowledge all tributes in the liner notes of albums, as the Court thought.

In *Rogers v. Koons*, the Ninth Circuit held that a sculpture made by the defendant based on a copyrighted photograph was not a form of fair use. 960 F.2d 301 (9th Cir. 1992). Koons' fair use defense failed because the sculpture was a comment on society at large, not on Rogers' original work. *Id.* at 310. For the "parody as a comment" fair use defense to be effective, "the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work." *Id.* at 310. Public Announcement's use of "dog" and the "Bow wow" refrain as comment is distinguishable from Koon's infringing use of the photograph for his sculpture. Testimony from the band members will confirm that the title "D.O.G. in Me" was inspired by the line "Nothin' but the dog in me" from "Atomic Dog." This is evidence that Public Announcement's use was intended as comment on Mr. Clinton's specific work, not society at large. Using pieces of an original work in a derivative to comment on the original is precisely the type of use the *Rogers* Court has interpreted the relevant law to allow. *Id.* Universal should make a *Rogers* comparison in all of its future fair use litigation.

The *Campbell* Court held that 2 Live Crew's extensive use of the main riff from Roy Orbison's "Oh, Pretty Woman" may be considered fair use, even though the "portion taken was the original's heart." 510 U.S. 569, 579 (1994). For a parody to be effective, it must use a portion of the original work familiar enough to conjure up "at least enough of that original to make the object of its critical wit recognizable." *Id.* at 588. Universal failed to make the argument that this

also holds true for tributes. A tribute's effectiveness similarly depends on the recognizability of the use of the original. If Public Announcement did not use the most recognizable parts of "Atomic Dog" to comment on that work, their intended comment would have been imperceptible, as 2 Live Crew's parody would have been without the main riff from "Oh, Pretty Woman." This analysis will put Universal in a strong position when the third balancing factor, a quantitative and qualitative inquiry, is being examined. 17 U.S.C. §107(3) (1976).

Universal failed to offer an effective counterargument to Bridgeport's factor four claims that a judgment of fair use would harm their economic interests. *Bridgeport*, at 278. The Court held, "Bridgeport could lose substantial licensing revenues if it were deprived of its right to license content such as that used here by [defendant]." *Id.* Universal should have used the Court's own factor one finding that "D.O.G. in Me" was transformative to develop its "market effect" defense. Public Announcement sang a new version of the "Bow wow" refrain with distinctive vocal effects and used the word "dog" to create a completely different rhythm than in "Atomic Dog." If these were deemed fair use, it would not "destroy, usurp, or substitute" the market for licensing Mr. Clinton's work for direct samples or as the basis of a longer part of a less transformative derivative. *Castle Rock v. Carol Publishing*, 150 F.3d 132, 145 (2nd Cir. 1998). This would leave Bridgeport with substantial control over most derivatives, consistent with the *Castle Rock* ruling "that copyright law must respect the creative and economic choice." *Id.* at 145.

CONCLUSION

By using these new defense strategies and arguments, Universal's likelihood of future successful fair use defenses will be greatly enhanced.

