

MEMORANDUM

To: Senior Lawyer
From:
Date: March 1, 2010
Re: Defense Strategy in Clinton Lawsuits

QUESTION PRESENTED

How can our fair use defense strategy be strengthened in light of the decision in *Bridgeport Music, Inc. v. UMG Recordings*, 585 F.3d 267 (6th Cir. 2009)?

BRIEF ANSWER

The *Bridgeport Music* court was not convinced that “D.O.G. in Me” was transformative enough to outweigh its finding that the other three factors favored Bridgeport. In future defenses, more evidence should be presented showing that this kind of work is highly transformative and creative. Stronger arguments should also be made that in similar cases the other three factors should have less weight and that at least some of these other factors actually favor the defense.

FACTS

After losing the *Bridgeport Music* case, U.G.A. has hired us to represent it in future cases. We need to develop a strategy to argue that sampling in songs like “D.O.G in Me” is fair use.

DISCUSSION

Several arguments can be made as to why the analysis in *Bridgeport Music* should not be applied to similar factual situations. That court’s application of § 107 appears to be based on a mistaken assumption that all four statutory factors should be given equivalent weight in all cases. Although the court acknowledges that the factors must all be weighed in light of the purposes of copyright, its final decision seems to be based on a mere tallying up the score from the winner of

each factor. *See Bridgeport Music*, 585 F.3d at 278. Ironically, the court seems to be engaging in the “mechanistic enforcement” which it acknowledges can “repress creativity.” *Id.* at 277. Future defenses should stress that the court’s analysis of precedent in the context of the four factors was incomplete.

There is room to argue that the first factor weighs more heavily in favor of artists like Public Announcement. The Supreme Court has indicated that the more transformative a work, the less significance should be placed on other factors. *Campbell v. Acuff Rose Music, Inc.*, 510 U.S. 569 (1994). It could be argued that “D.O.G. in Me” and songs like it are even more transformative than the parody described in *Campbell*. Future fair use defenses should stress that blending a sample of some components into an entirely new melody and tone is highly transformative and therefore exactly the kind of new and different creative works meant to be given “breathing space” in copyright law. *See Campbell*, 510 U.S. at 579. Evidence should be offered regarding the complex and creative aspects of songs laid over sampled tracks. Moreover, sampling can be characterized as a sort of commentary on the original work. UGA’s defense should have stressed that the inclusion of the “Atomic Dog” sample was more than just an homage, but also a nod to the song’s iconic nature and influence over an entire genre of music. The *Bridgeport Music* court itself acknowledges that “Atomic Dog” is one of the most heavily sampled songs in its era. *Bridgeport Music*, 585 F.3d at 278. In a recent case, the Second Circuit ruled that thumbnail images of concert posters in a pictorial biography of the Grateful Dead was fair use, in part because the images were not used to increase commercial marketability but to better tell the story with a collage of text and images. *Bill Graham Archives v. Dorling Kindersley Limited*, 488 F.3d 605 (2d Cir. 2006). Artists that sample can likely show that their work borrows from and is influenced by various sources, which can be highlighted as a sort of

musical collage and not an attempt to piggyback on the commercial success of another artist. Evidence could also be offered showing that sampling is an extremely widespread practice, particularly in the rap genre. This could form the basis of an argument that, from a policy perspective, over-enforcement seriously inhibits creativity.

Future defenses can argue that the second factor should have little or no weight in this kind of case. The *Bridgeport Music* court placed an unduly high degree of emphasis on the second statutory factor, saying that the second factor in *Bridgeport*'s favor in effect cancels out the finding for UMG under factor one. *See Bridgeport Music*, 585 F.3d at 278. The court cites *Campbell* to support its assertion that the original Clinton work is within the core of copyright protection, *Id.* at 277-288, but it fails to note that the *Campbell* court gave almost no weight to the second factor in that case. *See Campbell*, 510, U.S. at 586 (“parodies almost invariably copy publicly known, expressive works.”). Although sampling is not exactly the same as parodying, evidence should be offered that it is almost invariably well-known works being sampled.

An argument can be made that the third factor favors fair use given the highly transformative nature of songs like “D.O.G. in Me.” In *Campbell* the Supreme Court considered the amount and quality used in light of the purpose of the use, as well as what else the alleged infringer did “besides go to the heart of the original.” *Campbell*, 510 U.S. at 589. The Court also noted that a parody must necessarily use enough of the original to make it recognizable. *Id.* at 588. If a court can be persuaded that the transformative nature of sampling is at least somewhat analogous to parody, it can be argued that a song like “D.O.G. in me” samples only enough to accomplish its purpose.

The *Bridgeport Music* court's application of the facts to the fourth factor is a bit circular. The court notes that the harm done to the market for derivative works must be considered. See

Bridgeport Music, 585 F.3d at 277. It points to *Castle Rock Entertainment v. Carol Publishing Group, Inc.*, 150 F.3d 132 (2d Cir. 1998), noting that an homage or tribute “may nevertheless weaken the market for licensed derivative works.” *Bridgeport Music*, 585 F.3d at 277. Future defenses must stress, however, that the Second Circuit in *Castle Rock* based much of its factor four analysis on its finding of little to no transformative value under factor one. *Castle Rock*, 150 F.3d at 145. That court cautioned that a copyright holder cannot preempt exploitation of transformative markets just by licensing uses that would otherwise be considered fair. *Id.* at 146 n.11. It should also be emphasized that the Second Circuit reiterated this position in *Bill Graham*, suggesting that since thumbprint images were sufficiently transformative, the copyright holder did not suffer market harm due to the loss of license fees. *Bill Graham*, 488 F.3d at 615. The *Bridgeport Music* court indicates that the fourth factor falls in UGA’s favor merely because it could lose substantial revenues if denied “its right to license content such as that used by UMG.” *Bridgeport Music*, 585 F.3d at 278. This seems to say little more than that a copyright holder has a right to license certain content because it has a right to license that content. Future fair use defenses should argue that this kind of reasoning is not only dangerous to legitimate fair use but also to the purposes of copyright as a whole because of its potential for over-broad application.

CONCLUSION

Future fair use defenses should emphasize that sampling is highly transformative and offer evidence that factors two through four should thereby be given less emphasis or even favor defendants.