

## Memorandum

TO: Senior Lawyer

FROM:

DATE: March 1, 2010

RE: Fair use defense in future Universal litigation

### Issue

How should the fair use defense be crafted in future litigation in light of the ruling in *Bridgeport Music, Inc. v. UMG Recordings* and where did the previous litigation strategy fail?

### Brief Summary of the Argument

In future cases, we must argue that the licensing market protected by the fourth factor is not threatened by sampling. We must show that not all forms of licensing practices are automatically protected by the fourth factor. Additionally, our firm will need to present better evidence of the sampling artist's intent to honor the original artist through homage.

### Facts

Our client Universal has hired our firm after losing in the case of *Bridgeport Music, Inc. v. UMG Recordings*. In that case, Bridgeport sued Universal for copyright infringement stemming from the sampling of Bridgeport artist George Clinton's "Atomic Dog" by a Universal artist. "Atomic Dog" is considered to be one of the most important songs of the Funk genre and an important influence on certain forms of hip-hop music. Universal tried to raise the affirmative defense of fair use. This defense failed, because the court found that allowing the infringement would deprive Bridgeport of significant income by making its licensing program useless. Bridgeport was awarded \$88,980 in statutory damages. Universal will have to defend several similar cases in the same circuit in the future.

### Discussion

There are four statutory factors that must be analyzed in fair use defenses. The first two likely will not be in contention in future litigation. In the third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole is considered. *Bridgeport Music, Inc. v. UMG Recordings*, 585 F. 3d 267, 278 (6<sup>th</sup> Cir. 2009). This could entail either an examination of what percentage of the work was used or how important that percentage was. Despite to small amount of copying, the court held that because the most famous phrase was used, the third factor weighed in favor of Bridgeport. *Id.* The fourth factor is often the most contentious and looks at the effect of the use upon the potential market and derivative use market for or value of the copyrighted work. *Id.* The plaintiff in *Bridgeport* had an active licensing program in effect for George Clinton's work. "Given the fact that 'Atomic Dog' is one of the most frequently sampled compositions of the Funk era, Bridgeport could lose substantial licensing revenues if it were deprived of its right to license content such as that used by UMG." *Id.*

There are two ways that we can improve the argument for an affirmative defense of fair use. First, we must argue that the licensing market protected by the fourth factor is not threatened by sampling. We must show that not all forms of licensing practices are automatically protected by the fourth factor. Second, we must make a better evidentiary showing at trial of an intended homage by Universal's artist and that, in many cases, the copied phrase or sound is not as culturally recognizable as Clinton's phrase.

### **1. The licensing market protected by the 4<sup>th</sup> factor is not violated by sampling**

A supplementary argument to the homage argument is the idea that Bridgeport and George Clinton have too much power in the licensing market. That is, the copyright holder, if given an absolute power in controlling who may create homage, can stifle creativity. In *Bill*

*Graham Archives v. Dorling Kindersly, Ltd.*, the Second Circuit discussed their fear of an overbroad implementation of the fourth factor. “[W]ere a court automatically to conclude in every case that potential licensing revenues were impermissibly impaired simply because the secondary user did not pay a fee for the right to engage in the use, the fourth fair use factor would *always* favor the copyright holder.” *Bill Graham Archives v. Dorling Kindersly, Ltd.*, 448 F. 3d 605, 614 (2d. Cir. 2006). In that case, the defendant copied and shrunk entire movie posters for inclusion in a book. The book was considered to be a new form of art by finding a new use for the posters. The Second Circuit held that a copyright holder could not block transformative uses of the work. In order to use this argument, we must show that the licensing market for “Atomic Dog” and other Bridgeport songs more likely encompasses the right to use a portion of the exact composition rather than the right to use a small piece of the composition. That is to say, instead of copying a few seconds of “Atomic Dog,” because Public Announcement took a few lyrics comprising a small percentage of the total composition, Public Announcement found a new use for the lyrics. We must persuade the Sixth Circuit to adopt the Second Circuit’s logic and find that licensing rights for the production of homage is a different type of licensing market than the one typically protected by the fourth factor and relied on by Bridgeport.

## **2. There are two areas where a better evidentiary showing must be made**

If we can show that the copied song was not as culturally important or as popular as “Atomic Dog,” we could reduce the weight given to the third factor. The phrase that was used in *Bridgeport* is rather famous and easily attributable to George Clinton. But in cases where there is not the same level of high familiarity with the plaintiff’s works, the factor becomes more traditional in looking simply at the amount that was copied rather than the substantiality. It seems that the court would merely look at the small percentage of the song in question that was copied

if we can argue that the copying was insubstantial. Bridgeport will not always be able to secure expert testimony to afford the same high cultural value to the copied song. This evidentiary showing would help to mitigate against the third factor.

The Court noted that “UMG failed to introduce any evidence that would have explained why the songwriter chose to include elements of “Atomic Dog” to honor George Clinton, nor was the purported tribute acknowledged in the credits or liner notes to the album.” *Bridgeport* at 278. Simply put, at the trial level we must put together a better compilation of evidence that will show that the defendant’s intended an homage. This is particularly true with famous works, like “Atomic Dog.” The court found that “Atomic Dog” was a very important song in the development of African-American musical composition. Given that importance, than the purported homage should feel almost intuitive. We should make sure to prove our client was influenced by the song. If the sampled song was unpopular, then we can show that our clients were aware of it and liked it.

### **Conclusion**

The key to future litigation will be to lessen the weight given to the fourth factor. The best way to do this is to persuade the court to adopt the Second Circuit’s narrowing of the fourth factor’s protections. By showing that licensing markets in the music industry are focused more towards use of a segment of a complete composition instead of individual pieces of the composition, we can shift the balance. This in turn will force the court to accord more weight to the transformative nature of the copying work. Additionally, with better evidence at the trial stage, we should be able to make a more convincing argument that the copying was homage or that the copied portion was not substantial enough to merit protection. If we can succeed in both areas, we will have an improved chance of victory.