

## Copyright and the Music Industry

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<http://wendy.seltzer.org/brooklaw/07copyright/>

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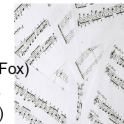
## Two music copyrights



© musical work:

*score and lyrics*

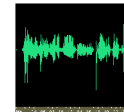
- reproduction (Harry Fox)
- public performance (ASCAP, BMI, SESAC)



Ⓢ phonorecord:

*sound recording*

- reproduction
- *digital* public performance (record labels, SoundExchange)



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## Whose permission?

- 1979: Fekaris & Perren write "I will survive"
- Gloria Gaynor records in 1979
- Cake records "I will survive" remake in 1996



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## Music rights

You buy an album on CD. From whom (if anyone) do you need permission for these activities? What rights are implicated?:

- Listening on your home stereo?
- Lending it to a friend?
- Quoting lyrics in a review?
- "Quoting" clips in a multimedia review?
- Broadcasting it on the radio?
- Webcasting it?
- Synchronizing it as soundtrack to a movie?
- Recording it on your DAT recorder?
- Ripping it to your iPod?

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## § 106. Exclusive rights

- (1) to **reproduce** the copyrighted work in copies or phonorecords;
- (2) to **prepare derivative works** based upon the copyrighted work;
- (3) to **distribute copies or phonorecords** of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, **to perform the copyrighted work publicly**;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, **to display the copyrighted work publicly**; and
- (6) in the case of sound recordings, **to perform the copyrighted work publicly by means of a digital audio transmission**.

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## § 114. Scope of exclusive rights in sound recordings

- (a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106 (4).
- (b) The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording.
- The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.
- The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.

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## § 115. Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords

- In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.
- (a) **Availability and Scope of Compulsory License.**—
  - (1) When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery. ...
  - (2) A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

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## Collective and Statutory Licensors

- Musical works (music publishers)
  - § 106(1),(3) Reproduction, distribution rights:
    - Harry Fox Agency
    - Compulsory cover license § 115
    - AHRA
  - § 106(4) Performing rights
    - ASCAP, BMI, SESAC
- Sound recordings (record labels)
  - § 106(1),(3) Reproduction, distribution
  - § 106(6) Digital audio performance
    - SoundExchange

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## More licensing challenges?

- A bar allows live bands to play. They take requests, including covers.
- Girl Scout camps sing folk songs around the campfire.
- A restaurant plays the radio for its customers.
- Waiters sing “Happy Birthday” to a patron.

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## Audio Home Recording Act

- Statutory licensing scheme for “digital audio recording devices” and media incorporating Serial Copyright Management System
- Pooled compulsory levies on digital audio media, devices
- Prohibition on infringement actions for the “noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings”

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## AHRA

- § 1008. Prohibition on certain infringement actions
  - No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.
- 1001:(3) A “digital audio recording device” is any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use, except for—
  - (A) professional model products, and
  - (B) dictation machines, answering machines, and other audio recording equipment that is designed and marketed primarily for the creation of sound recordings resulting from the fixation of nonmusical sounds.

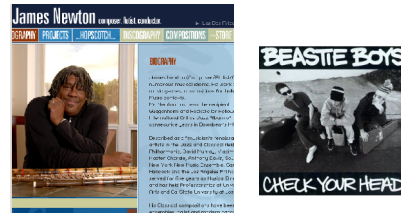
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## § 1002. Incorporation of copying controls

- (a) **Prohibition on Importation, Manufacture, and Distribution.**— No person shall import, manufacture, or distribute any digital audio recording device or digital audio interface device that does not conform to—
- (1) the Serial Copy Management System;
- (2) a system that has the same functional characteristics as the Serial Copy Management System and requires that copyright and generation status information be accurately sent, received, and acted upon between devices using the system's method of serial copying regulation and devices using the Serial Copy Management System; or
- (3) any other system certified by the Secretary of Commerce as prohibiting unauthorized serial copying.

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## Newton v. Diamond



[http://ccnmtl.columbia.edu/projects/law/library/cases/case\\_newtondiamond.html](http://ccnmtl.columbia.edu/projects/law/library/cases/case_newtondiamond.html)

## Newton v. Diamond

- What did the Beastie Boys copy?
  - Sound recording?
  - Composition?
- Could Newton have protected his composition better?
- Any other defenses for the Beastie Boys?

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## Bridgeport Music v. Dimension Films

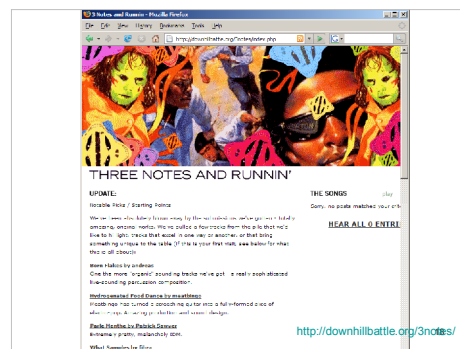


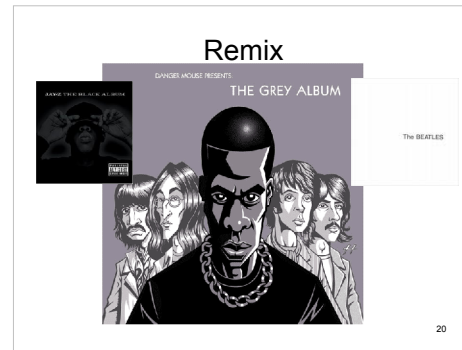
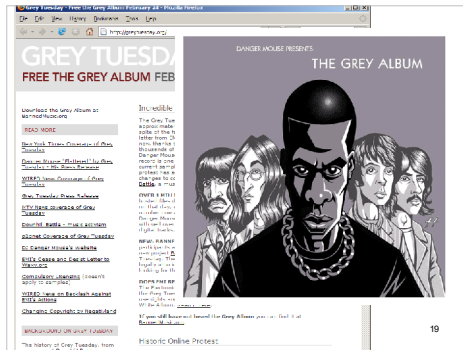
[http://ccnmtl.columbia.edu/projects/law/library/cases/case\\_bridgeportmusicstillntf#wate](http://ccnmtl.columbia.edu/projects/law/library/cases/case_bridgeportmusicstillntf#wate)

## Bridgeport Music

- “Get a license or do not sample.”
- Why isn't sampling of the sound recording *de minimis*?

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## ADMIN

Exam: 8 hour take-home, available any time during the exam period (April 30-May10).  
Open book, closed Google.

Meetings: In-person before April 23  
By email/phone/wiki before April 30

**Copyright roundtable at 1 in the Student Lounge**