BACKGROUND

Music in Sports Sampling, Copyright Law and the Infringing Gymnast

As her daughter nervously stretches and warms-up with her teammates, the copyright lawyer chats with the other parents in the bleachers awaiting the start of the gymnastics meet. Her daughter, as are most fourteen year olds, is a huge music fan. She spends hours creating and listening to mix CDs with her friends. The gymnastics meet begins and the lawyer’s daughter is first up on the floor. The gymnast takes her position and the music cues. The copyright lawyer gasps, recognizing the music blasting through the arena as the mix CD her daughter and friends made last week. Unable to concentrate on her daughter’s performance, she strains to count the samples of different songs in the mix, rapidly calculating how many copyrights her daughter may have infringed.

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Wildly popular, “mixes” are made by downloading digital files of songs from iTunes (or other digital music vendors), copying pieces — known as “samples” — of various songs and stringing the samples together. The creation and use of mixes, as well as getting the proper use licenses, are cutting edge copyright issues. This article examines these issues and offers tips on how to enjoy the creation and use of mixes in routine-oriented athletic performances without falling off the balance beam and into the net of copyright infringement.

Most people are aware that creating and distributing unauthorized copies of a song infringes the owner’s copyright, but the exclusive right to reproduction is only the tip of the treacherous music law iceberg. Failure to understand music law can be costly. Under the Copyright Act, the unwary infringer risks statutory damages up to $150,000 per infringement, being enjoined from the infringing activity, and the impoundment or destruction of infringing copies. The successful copyright plaintiff may also be awarded court costs and attorneys fees. Like it or not, it’s best to have at least a basic understanding of this complex area of music law before clicking “download.”

Creating and recording music for publication takes a lot of people. And each of these people has rights in a single track of music. For recorded music, two separate works are created by copyright law for one musical track: first, the musical work (i.e., the composition of music and lyrics) and second, the phonorecord or sound recording (i.e., the recording of a particular performance of the song). The owner of the sound recording may be the artist performing the song, but more likely it is the record label under contract with the artist, or a record producer that substantially directed and added copyrightable material to the recording of the performance. The owner of the musical composition is usually the composer or his or her music publishing company. Singer-songwriters can own both the musical work and a sound recording of the work.

Under §106 of the Copyright Act, the owners of each copyrighted work, i.e., the musical composition and sound recording, are accorded certain exclusive rights in the work, such as the right to reproduction, the right to create derivative works, and certain exclusive rights to publicly perform their works. Where the gymnast, or other routine-oriented athletes, desire to perform an athletic routine to Jerry Lee Lewis’ “Great Balls of Fire” in an arena or stadium permission to perform the work must be obtained from the song’s composers, Jack Hammer and Otis Blackwell, and probably their music publisher, Hal Leonard. Permission does not need to be obtained from Jerry Lee Lewis or his record label because he only owns the sound recording.

Traditionally, sound recording owners did not enjoy the exclusive right to public performances of their works. Sound recording owners’ rights are more limited than those of composers. For example, exclusive rights to reproduction and to create derivative works are limited to use of the actual sound recording. Despite millions of performances of the sound recordings, Jerry Lee Lewis never received any royalties for public performances of “Great Balls of Fire” until enactment of the Digital Performance Rights in Sound Recording Act of 1995, which provides sound recording owners with an exclusive right to the public performance of their sound recordings by digital transmission, codified under §106(6). Now permission must also be obtained and performance royalties paid to sound recording owners for streaming digital transmissions of their sound recordings, such as occur in satellite radio, webcasting and digital cable radio.

Determining where to obtain such rights is challenging. Generally, the label controls the reproduction and distribution rights in a sound recording under a recording contract with the performers. Publishing companies may own certain rights in a musical work under a license agreement with its composer. Labels and publishing companies split royalties with the artists and composers under such agreements. Royalty agencies collect and pay royalties to the rights holders from public performance of musical works under §106(4) and public performance of sound recordings by digital transmission under §106(6). The composers and their publishing company generally transfer their rights to collect royalties for public performances of the musical work to a performing rights society such as ASCAP, BMI and SESAC. Owners of sound recordings may similarly work with a new performing rights society called Sound Exchange to collect royalties for public performances of their sound recordings by digital transmission.

Another licensing rights organization, Harry Fox, provides a convenient mechanism for labels to purchase reproduction and distribution rights necessary for the creation and distribution of a musical work under the compulsory license provided by §115. These rights are known as “mechanical” rights. When a group records several musical works for a new album, they need not directly negotiate for permission from the composers or their publishing companies. Harry Fox handles the transactions to obtain the mechanical rights for the rights owners.

For short routines, as found in gym-
nastics competitions, floor exercise music may be comprised of several short musical sequences chosen from various popular songs to fit the athletic routine. Sometimes sound effects and voice tracks are mixed in to add punch to the routine. Each snippet, or sample, in the mix is a little slice of a full track of a sound recording, with all its concomitant rights. Each sample multiplies the possible number of owners, rights, rules and royalties.

Many people believe that, if the sample is less than 30 seconds, there is no infringement. This is nothing more than urban legend. In Grand Upright Music Ltd. v. Warner Brothers Records, Inc., the Southern District of New York recognized that samples, although often only a tiny portion of another work, can still infringe the rights of others. Admonishing rapper Biz Markie, “thou shall not steal,” the Grand Upright court held that Biz Markie’s sample of the song “Alone Again (Naturally)” infringed Gilbert O’Sullivan’s original 1972 sound recording.

On the other hand, some uses do not rise to the level of copyright infringement. Copying a qualitatively and quantitatively tiny portion of a copyrighted work may be considered de minimis, meaning that the amount copied is so small that it does not rise to the level of a copyright use. A copy of a musical work that consists of a standard musical phrase like “do-re-me” or other stock material will similarly not violate copyright law. Following Grand Upright, the Ninth Circuit developed a test to determine whether or not a sample is infringing. In Newton v. Diamond, the Ninth Circuit held that a sample, which is so similar to the original material that an average audience would recognize the copying, is infringing. Because samples of sound recordings are generally identical copies, the Newton court reasoned that such samples will likely be infringing.

Samples of musical works may not infringe, according to Newton, “if the similarity is only as to nonessential matters, then a finding of no substantial similarity should result.” “Nonessential matters” refers to the scope of copyright restricting protection for ideas, processes, concepts or systems under §106(b) of the Copyright Act, including standard musical phrases or other stock material essential to the creation of musical works; in such cases, no copyright violation may be found. In Newton, the Beastie Boys copied 3 notes played by jazz flutist James Newton. The Beastie Boys paid for a license to use the sound recording of Newton’s performance, but not the underlying musical work. The court found that the copying of the 3 note phrase was de minimis because the phrase consisted of 3 notes on a scale and any creative expression in the phrase existed only in the sound recording for which the Beastie Boys had acquired a license.

Thus, contrary to the 30-second myth, the length of the sample has no bearing on whether it is infringing. Sampling only the word “Help” from the Beatles’ famous song by the same name would likely constitute infringement because, although tiny, that bite from the sound recording is so distinctive that the average audience would immediately recognize the sampled work; however, the phrase from the underlying musical work is likely not a copyright protectable element.

Copyright law regarding sampling is rapidly evolving. Recently, in Bridgeport Music, Inc. v. Dimension Films, the Sixth Circuit limited the doctrine of de minimis use to apply only to musical works. The Sixth Circuit reasoned that, because a sample of a sound recording is identical, there is no need to determine substantial similarity, because the owner of a sound recording has the exclusive rights under §114 of the Copyright Act to reproduce, distribute and create derivative works from the sound recording. Therefore, the Bridgeport court held that samples of sound recordings are per se infringing — even if modified, because modifications of original works create derivative works. Thus, no sample of a sound recording can be determined to be de minimis.

Samples are not subject to compulsory licenses, whether for mechanical royalties under §115, for licenses for public performances to composers from ASCAP, BMI or SESAC, or for statutory licenses for public performance by digital transmission of sound recordings under §114. To clear a sample, each of these rights must be directly negotiated with the respective rights holders. For the amateur athlete, permission to use samples of various works may be impossible to negotiate because the labels and publishing companies have the right to withhold permission. Professional athletes and large sports arenas have the bargaining power to obtain such rights. A system to provide compulsory licenses for samples through Harry Fox or some new organization would make the system fairer to the little guy. Such a practice may develop in the future.

Samples are increasingly being used as “ringtones” to announce incoming calls on mobile telephones. On October 16, 2006, the Copyright Office issued an opinion that certain ringtones constitute digital phonorecord deliveries under the Copyright Act and therefore, are subject to the compulsory licensing provisions of §115 for mechanical rights. The ringtone decision may provide a
basis for compulsory rights for samples in the future.

Each of these rules requires the copyright lawyer watching her daughter’s floor routine to do some mental gymnastics. So how has her daughter infringed the copyrights of others? Step One: she downloaded songs from iTunes. No problem there, downloading songs from iTunes provides the downloader with a license to use the music in several different ways, so long as it is for personal use.

Step Two: her daughter combined the samples to make a mix track for her floor routine. Still no problem, as long as the mix is for her personal use. That works for her private (and maybe team) practice if the gym doesn’t charge any entrance fees. Step Three: playing her mix during her floor routine at the gymnastics meet in front of at least a hundred people. Jackpot.

This likely qualifies as a public performance. Under §101, “public performance” is defined as performing in a place open to the public or at any place outside the family social circle. Purchasing a song from iTunes does not provide a right to perform that song publicly and the gymnast did not obtain permission from the owners of the musical works. The arena must have the necessary licenses with ASCAP and BMI for public performance of the mix. Without them, her performance of the mix infringes the exclusive right to publicly perform held by the owners of the musical compositions in each song sampled in her mix. But it gets worse...

As a dutiful mother, the copyright lawyer videotaped her daughter’s performance at the meet. If the video is for personal use, i.e., the proud parent showing the video to friends and family, the use is likely covered by the iTunes license or protected under the personal use theories set forth by the Supreme Court in Sony Corp. of Amer. v. Universal City Studios, Inc. The Sony court recognized that there are situations where permitting even an unproductive use would have no effect on the author’s incentive to create, that is, where the use would not affect the value of, or the market for, the author’s work. Photocopying an old newspaper clipping to send to a friend may be an example; pinning a quotation on one’s bulletin board may be another. In each of these cases, the effect on the author is truly de minimis. Thus, even though these uses provide no benefit to the public at large, no purpose is served by preserving the author’s monopoly, and the use may be regarded as fair.

If, however, the video is used for anything other than personal use, the gymnast must obtain a master use agreement with each owner of each sound recording sampled in the mix, and a synchronization or “synch” license for each musical work sampled in the mix for permission to use the music in timed connection with the live action on the video.

Happily, the young gymnast did a fine job and received a high score on her floor exercise, earning a gold for her routine. While the copyright lawyer was busy making dinner, her daughter proudly uploaded the video of her performance on YouTube so her friends could see her great routine. The mix plays in the background of her performance. Every time the video is streamed on the video file-sharing website, the gymnast has caused a public performance by digital transmission, infringing the rights of all of the music owners in all of the songs sampled in her mix. The sound recording owners are now entitled to collect royalties for the public performance of their work by digital transmission. The license from iTunes does not provide any right to publicly perform the work by digital transmission or otherwise.

As with performance of a floor routine, the business establishment is responsible for payment of public performance royalties due under §106(4) to composers and, under §106(6), to sound recording owners. Whether or not an establishment is required to pay royalty fees for performances of music during a sporting event depends on whether the work is “performed publicly.” Not every sporting moment requires payment of performance royalties. Under the §101 definition, a work is also performed publicly when it is transmitted to the public whether the transmission is viewed by an audience or in separate locations over a receiving unit like a radio, television or computer. A broadcast of a sports clip with music during network news requires payment of performance royalties — even if the music is barely audible over the routine and sports commentary. In Coleman v. ESPN, Inc., the Southern District of New York dismissed ESPN’s argument that background music was not a public performance. In a typical Coleman situation, the performance royalties would be paid to the composers by the broadcaster. When the video of the gymnast’s performance is posted on YouTube, YouTube — as the business establishment — is liable for payment of performance royalties. However, if the infringing gymnast had read YouTube’s Terms of Service Agreement, she would have learned that YouTube requires users posting video files to represent that they own or have obtained all rights necessary
to post the video. If not, the user posting the video indemnifies YouTube for the results of infringement of any such rights. Recently, YouTube entered into an agreement with Warner Music so that YouTube users will have access to the entire Warner catalog for incorporation of Warner music into the videos uploaded on YouTube. In return, Warner gets a part of the revenue from advertising on Warner music videos and user-uploaded videos.

As might be expected, it gets even worse...the video is such a hit on YouTube that the infringing gymnast’s friends and gymnasts from all over the world want copies of the mix used in the floor routine. Pleased by her success, the infringing gymnast makes fifty copies of the mix and gives copies to her friends and sells copies to other gymnasts. Because she did not obtain mechanical rights, master use rights of the right to create a derivative work from the owners of each of the samples, she faces copyright infringement claims from all parties.

The infringing gymnast should have negotiated the appropriate licenses to reproduce, create a derivative work, synch to video and distribute the mix track. Royalties and fees required by the sample clearance process are expensive. Fees vary tremendously depending on how large a sample is intended for use, the commercial value of the music sampled, and the manner in which the sample will be used in the song. (e.g. is the sample a key phrase of the song?). Often, flat fees for use of the sound recording fall between $1,000 and $2,000 per sample for a certain number of copies. Further, while mechanical licenses for use of the musical works are compulsory and relatively easy to obtain, sound recording licenses must be individually negotiated. If the infringing gymnast plans to use merely the mix for a performance in an arena, she should ensure that the arena’s music policies permit such use of mixes. As for broadcasting a performance on YouTube, the gymnast should consider mixes of Warner Music.

The gymnast’s allowance money will likely be shy of the cost of licensing fees required to use the samples in her mix. A better solution would be for the gymnast to use royalty-free music in her mixes. Music libraries such as royaltyfreemusic.com, killertracks.com, and iamusic.com provide easier access to licensed music for her mix track. Subscription to a music library will keep our gal from infringing others’ copyrights and will not break her piggy bank. No infringement and a cost savings? A perfect 10.