The Music Industry

Copyright Law – Professor Grimmelmann
Class 20 – November 9, 2008

today

- the basic distinction:
  - musical works
  - sound recordings
- the players
- the compulsory licenses

supplements

- a more cynical take on the industry:
  - http://www.negativland.com/albini.html
  - http://archive.salon.com/tech/feature/2000/06/14/love/
- the songs from *Newton*:
  - http://cip.law.ucla.edu/cases/case_newtondiamond.html
- the songs from *Bridgeport*:
  - http://cip.law.ucla.edu/cases/case_bridgeportmusicstillnthewaterpublishing.html

music industry players

- talent:
  - songwriter (MW)
  - recording artist (SR)
  - performer (MW)
- indies vs. major labels:
  - publisher (MW)
  - record label (SR)
- licensing agencies:
  - ASCAP/BMI (MW)
  - Harry Fox (MW)
  - SoundExchange (SR)
- distributors
  - radio station (MW)
  - concert venue (MW)
  - music store (MW/SR)
  - online radio (MW/SR)

two basic propositions

- musical work copyrights are subject to a compulsory license (§ 115)
- sound recording copyrights are limited to exact reproductions (§ 114)

the §115 license

- since 1909, Congress has allowed musicians to make sound recordings of any musical works, provided they pay a set royalty
  - a/k/a the "mechanical license"
  - a/k/a a "cover license"
- publishers and songwriters generally have the Harry Fox Agency collect the royalties

“I Will Survive” players

- Dino Fekaris & Freddie Perren: songwriters
  - Polygram: music publisher
- Gloria Gaynor: original recording artist
  - MGM: Gaynor’s record label
- Cake: cover recording artist
  - Volcano/Zomba/BMG: Cake’s record label

“I Will Survive” #s

- 1,000,000 CDs @ 9.1¢ = $91,000
  - Paid by Cake/Volcano per their contract
  - Harry Fox takes 6.75% (=$6,412.50)
  - Polygram takes 50% (=$42,428.75)
  - Leaving $42,428.75 for Ferrakis/Perren
- NB: Neither Gaynor nor MGM see a ¢

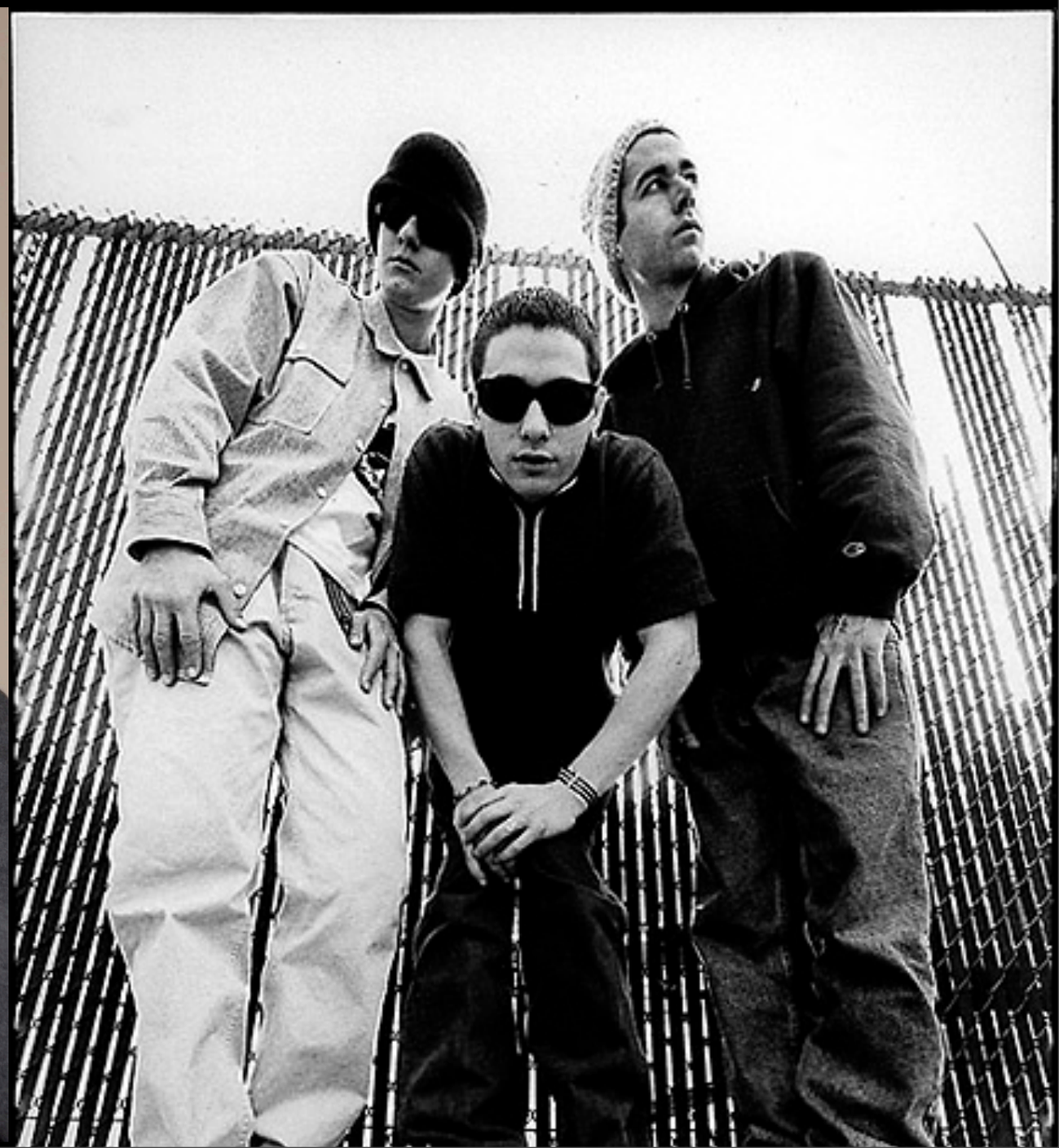
§ 114's limits on sound recording copyrights

- § 114(a): no performance right
- § 114(b): no right against sound-alikes
  - in fact, the § 115 mechanical license says one can't change the "basic melody or fundamental character of the work"
- who benefits from these?

sampling

- *Newton* and *Bridgeport* are parallel cases
  - In each, the defendant got the permission of *one* of the two copyright owners
  - Newton: SR licensed, MW isn't
  - Bridgeport: MW licensed, SR isn't
  - both defendants raise *de minimis* defenses

Newton v. Diamond



Newton

- three notes are probably uncopyrightable
- so Newton argues that the musical work includes the overblowing, the timing,, etc.
- point 1: line between “musical work” and “sound recording” is ambiguous
- point 2: Newton’s score doesn’t show any of these supposed features

Bridgeport

- one reading: all ambiguous features belong to the sound recording copyright
- or: “do not sample” is a bright-line rule
  - very controversial holding
  - NB: fair use issue not raised here
- do these holdings discriminate against certain forms of musical creativity?

Audio Home Recording Act

- compromise bet. music and electronics
  - SCMS anti-copying technology in DATs
  - royalty on DAT devices and media
  - exempts noncommercial home use of digital/analog recording devices
- actual impact has been very limited; e.g., an iPod is not covered by the Act

public performance

- the only copyright player here is the musical work copyright owner
  - in practice, ASCAP, BMI, and SESAC offer blanket licenses to the musical work
  - rates based on type+amount of business
  - (you can also get a license directly from the copyright owner)

other special-purpose provisions

- § 116: the jukebox license
- § 110(5): “homestyle exception”

the Internets

- for musical works, § 115: sets "digital phonorecord delivery" rates for the mechanical license (think iTunes)
- for sound recordings, § 106(6) gives a public performance via "digital audio transmission" right, which is then qualified via an extensiv compulsory license in § 114

who pays for what?

- iTunes: royalties to sound recording owners, who pay mechanical license royalties to musical work owners
- webcasting: hugely complicated, but the basic rule is (a) get a streaming blanket license from ASCAP/BMI/SESAC, and (b) pay statutory royalties to sound recording owners via SoundExchange

next time

direct and secondary liability