

February, 2023

A Case of Copyright Infringement and Fair Use: The Rights to Music in the Age of Streaming Media

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There are two types of copyrights under which musical recordings may be protected: musical work and sound recording. Musical work encompasses the notes and lyrics; sound recording covers the recording of a particular performance by a particular artist. For example, the lyrics and notes of "The Sound of Silence" is Simon & Garfunkle's "musical work" copyright. The sound recording would also be theirs, as a "sound recording" copyright, but covers by others, such as by the band Disturbed would also be their "sound recording" copyright. A sound recording copyright does not typically include sounds accompanying a motion picture or other audiovisual works.

Sound recording was at issue in *ABKCO Music Inc. v. Sagan* ("ABKCO"), 50 F.4th 309 (2022), where several music publishers alleged copyright infringement after the defendant published recordings of live performances on his website.

In 2002, William Sagan, president, CEO and sole shareholder of Norton LLC, acquired live recordings of well-known bands, such as the Rolling Stones, The Who, and the Grateful Dead. Four years later, Sagan made these recordings available for a fee through digital download and streaming services. In 2015, several music publishers brought suit under the Copyright Act, seeking \$30 million in damages – up to \$150,000 per work – and a permanent injunction to cease the continued use of these recordings.

On summary judgment, the district court held that the defendant did not have valid licenses to use and sell these live recordings and thus infringed on each of the 197 musical works. The court further held William Sagan personally liable. As for damages, the court denied plaintiffs' request for a permanent injunction. Upon a jury trial on damages, the plaintiffs were awarded \$189,500 in statutory damages, near the minimum for statutory damages. The plaintiffs then moved for a new trial, and – though the court denied this motion – it awarded the plaintiffs approximately \$2.4 million in attorneys' fees.

On appeal, the Second Circuit affirmed the rulings in the summary judgment order as to the defendant's failure to obtain a license for audiovisual recording, infringement of the audiovisual works, defendants' lack of a valid affirmative defense and declination of plaintiffs' request for a permanent injunction. However, the court vacated the district court's ruling that the defendants infringed the 51 musical works used in the audio-only recordings because the plaintiffs failed to comply with section 115's substantive requirements.

Section 115 of the Copyright Act applies when a person seeks to "duplicat[e] a sound recording fixed by another." The defendants argued that "the sound recordings they sought to duplicate were fixed by their predecessor, and thus, not 'by another'," and the court agreed, vacating the holding that the defendants' actions constituted copyright infringement as to the 51 audio-only recordings.

The Second Circuit remanded the case back to the district court to reevaluate its infringement findings for all audio-only recordings. The docket sheet of the case at the district court, however, shows that the plaintiffs elected to not proceed further on this issue, but instead to proceed with collection efforts against the defendants based upon the awards that were upheld by the Second Circuit. See SDNY Docket No. 15-cv-04025 docket entries 464 et seq.)

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