

CURIOUS LAWYER

U2 – WHERE THE LAW'S STREETS HAVE NAMES

Through U2's Music, a Fun Exploration for Both Non-IP and IP Lawyers of Copyright, Infringement, Sampling, Compulsory Licenses, Fair Use, Public Performance Rights . . . and Searing Cross-Examinations of Celebrities.

TRACK LISTING

1. *A Sort of Homecoming* – Copyright and Idea/Expression line of protectability.
2. *The Fly* – Copyright infringement.
3. *Where the Streets Have No Name* – Compulsory license in sound recordings and how it works.
4. *Ultraviolet* – Copyright & Fair Use.
5. *New Year's Day* – Sampling in Music.
6. *The Wanderer* – Co-authorship.
7. *Stand By Me* – Public Performance Rights.
8. *Sunday Bloody Sunday* – Copyright in Titles.
Coda Weird Al parodies U2
9. **Encore...**

1. A SORT OF HOMECOMING IDEA-EXPRESSION

"To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

Art. I, Sec. 8, cl. 8

- Copyright protects **original works** of authorship **fixed** in a tangible medium.
 - **Originality**: minimal creativity → courts do not like to look behind the art and make artistic decisions.

"It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At one extreme, some works of genius would be sure to miss appreciation... At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).
 - **Fixation** means permanent recording
 - **Works** refers to tangible expression as opposed to intangible ideas. 17 U.S.C. 102.
 - An author's work sends its underlying ideas to the world so those ideas may in fact be readily used and borrowed. ($E=mc^2$)

1. A SORT OF HOMECOMING

IDEA-EXPRESSION

“Poetry is a sort of homecoming.”

Homecoming by Paul Celan

Snowfall, denser and denser,
dove-coloured as yesterday,
snowfall, as if even now you were
sleeping.

White, stacked into distance.

Above it, endless,
the sleigh track of the lost.

Below, hidden,
presses up

what so hurts the eyes,
hill upon hill,

invisible.

On each,

fetches home into its today,

and I slipped away into dumbness:

wooden, a post.

There: a feeling,

blown across by the ice wind

attaching its dove- its snow coloured

cloth as a flag.

A Sort of Homecoming by U2

And you know it's time to go, Through the sleet and driving snow
Across the fields of mourning, Lights in the distance
And you hunger for the time, Time to heal, desire, time
And your earth moves beneath, Your own dream landscape...
Tonight, A high road, A high road out from here
The city walls are all come down, The dust, a smoke screen all around
See faces ploughed like fields that once, Gave no resistance
And we live by the side of the road, On the side of a hill
As the valley explode, Dislocated, suffocated
The land grows weary of its own...
The wind will crack in winter time, This bomb-blast lightning waltz
No spoken words, just a scream...
Tonight we'll build a bridge, Across the sea and land
See the sky, the burning rain, She will die and live again
Tonight, And your heart beats so slow
Through the rain and fallen snow, Across the fields of mourning
Lights in the distance, Oh don't sorrow, no don't weep
For tonight, at last, I am coming home, I am coming home

1. A SORT OF HOMECOMING IDEA-EXPRESSION

Idea-Expression Analysis: Bono borrowed the line for the title of a U2 song and the song riffs on the poem itself using many of the themes/ideas. The song has echoes of the poem reverberating through it. Some key parts where there are echoes of similarity to listen o also highlights the distinct original creation of U2 as compared to the only written word (:25-:57 & 1:15-1:30 & 1:53-2:18)

https://www.youtube.com/watch?v=D1qKECV_IY8

But the song is truly distinct in every material way:

- (1) No literal copying of the poem's language;
- (2) Similarities are in the themes, feelings, emotions, solitude, loneliness, desire to find a way home.

So did U2 go too far?...

1. A SORT OF HOMECOMING IDEA-EXPRESSION

Infringement? No.

- (1) As to song title, too fragmentary and thin given removal of “poetry” from his speech’s line – cannot monopolize a short set of words like “sort of homecoming” when used in a different medium like this even though those 3 words are actual expression; and
 - (2) The loose borrowing from the poem itself is more of ideas than any actual expression.
- This idea-expression line is a fundamental precept to copyright and ideas cannot be monopolized through copyright. Only specific expressions.
 - Constitutional value: utilitarian goal as expressed through Copyright Clause to reward authors BUT ALSO incent others to create and build upon works:
 - This is the perfect example then of a work that took a spark of inspiration from another and built its own original unique work of authorship → **promotion of progress of arts.**

2. THE FLY

COPYRIGHT INFRINGEMENT ANALYSIS/TEST

- **Substantial similarity Test:** asks whether an ordinary observer, unless he set out to detect the disparities between the works, would be disposed to overlook them, and regard their aesthetic appeal in actual expression as the same.
- **Rule:** In music, test requires comparing the constituent elements: melody, harmony, rhythm, pitch, tempo, phrasing, structure, chord progressions, lyrics, the shifted cadence, the instrumental figures, the verse/chorus relationship, fade ending.
- For music cases in particular, the actual music must be dissected, often by experts to contextualize the issues.

E.g., *Swirsky v. Carey*, 376 F.3d 841 (9th Cir. 2004); *Skidmore v. Led Zeppelin*, 905 F.3d 1116 (9th Cir. 2018) (*Stairway to Heaven* case).

2. THE FLY

COPYRIGHT INFRINGEMENT ANALYSIS/TEST

- *Rose v. Hewson*, 2018 WL 626350 (SDNY Jan 30, 2018) Facts:
 - Pltf's 1989 song was an extended instrumental called "Nae Slappin" with no lyrics and no structure upon repeat melody and hence no clear beg/mid/end
 - *Fly* released in 1991
 - In 2017 pltf sued and alleged 3 similarities that resulted in infringement comparing 13 seconds of his song to a 12 second segment of the *Fly* alleging: (1) note for note reproduction of guitar line; (2) tambourine to reinforce beat; and (3) same drum/percussion/bass line.
- Comparison here: (all 1:34 long)
- <https://www.youtube.com/watch?v=3LNMY3UIbRk>
- **Held...**

3. *WHERE THE STREETS HAVE NO NAME* COPYRIGHT'S COMPULSORY LICENSING STRUCTURE

- Copyright/IP in general does not grant any license rights to others to use author's work by operation of law independent of consent, except in case of musical sound recordings where there is a **compulsory license structure** (and some other non-music cases).
- **Compulsory license:** For non-dramatic musical compositions, there is a right of anyone to create a new version of an existing published-to-the-public work, and although it does not have to be 100% identical it must keep the basic melody (no fundamental changes to sheet music) and character of the original work. Pre-set royalty rates per copyright panels. **This right exists independent of the original author's permission.**

3. *WHERE THE STREETS HAVE NO NAME* COPYRIGHT'S COMPULSORY LICENSING STRUCTURE

- Compare Original *Streets*: (2:42—3:12)

<https://www.youtube.com/watch?v=GzZWSrr5wFI>

- With Pet Shop Boys cover of *Streets*: (0:13-:43)

<https://www.youtube.com/watch?v=YX3Zpks05Ns>

- **Comparative Analysis:** Same basic musical structure/lyrics, thus within compulsory license.
- **Result:** Once U2 released to the public their song, anyone else could cover it for the fixed royalty amount and thus share profits on those new versions with U2. Pet Shop Boys version did not change the fundamental sheet music melody or nature of song, even though it was an electronic synth version, and so netted monies to Pet Shop Boys and U2.
- **Contra** to rest of Copyright Law: I can't release a same-basic-version of Star Wars and simply pay Disney a royalty...

4. *ULTRAVIOLET* COPYRIGHT AND FAIR USE

- What is the much mentioned “Fair Use” right: It is a statutory defense to infringement based generally upon freedom of expression and First Amendment principles
- **Fair Use 4-Factor Test:**
 - (1) transformative purpose-character of your use;
 - (2) nature of copyrighted work;
 - (3) amount/substantiality taken; and
 - (4) effect on market.

17 U.S.C. 107

4. ULTRAVIOLET

COPYRIGHT AND FAIR USE

- Raymond Carver wrote the (super) short story *Suspenders* with the line “The quiet that comes to a house where nobody can sleep”
- Lyrics to Ultraviolet include the line: “There is a silence that comes to a house where no one can sleep.”

<https://www.youtube.com/watch?v=TUD4CQT33w4>

(1:45-2:30)

- **Legal Question:** Under four factors, is it fair use?



5. *NEW YEAR'S DAY* COPYRIGHT AND SAMPLING

- Copyright law history and sampling.
- Legal rule in effect: Sampling another's work is infringement -- you are reproducing another's work. Thus, absent a fair use defense it is unlawful.

5. NEW YEAR'S DAY COPYRIGHT AND SAMPLING

- Relevant non-lyric, musical part of U2's original work, *New Year's Day*: (beg-:20)

<https://www.youtube.com/watch?v=vdLuk2Agamk>

- Now listen to the sample here by Kiss AMC: (2:40-3:05)

<https://youtu.be/pYLibupDG5o>

Analysis? Do they need a license?

1. Is what was taken too ephemeral or small to be original expression? No.
2. Is it substantially the same? Yes, so it infringes absent a legal defense.
3. Is it fair use? No. Just a use in a new song is not fair use.
4. Thus, the sample needs permissions from U2 to be used.

6. THE WANDERER

COPYRIGHT CO-OWNERSHIP

- **General Rule:** Copyright belongs in first instance to authors who give birth to the creation. Can be joint where prepared by two or more individuals, with the intention that their separate contributions be merged into a single work. No need to have given equally to joint work's creation. Each can allow 3d parties to use work on nonexclusive basis with accounting obligation to co-author 17 U.S.C. 101.

The Wanderer (beg-:35)

<https://www.youtube.com/watch?v=d-dZvQxYX1g>

- **Analysis:** Musical composition written by U2; but sound recording (in effect a derivative work of the musical composition) is done by U2 (instruments) and Johnny Cash (lyrics/guitar).
- **Query:** Absent a contract, US copyright law says what about who owns what here?
- **Answer:** Each intended to merge his contribution to make the sound recording, thus Cash and U2 would own joint and equally. 17 U.S.C. 101; *Bencich v. Hoffman*, 84 F. Supp. 2d 1053 (D. Az. 2000).

7. *STAND BY ME*

PUBLIC PERFORMANCE RIGHTS

- **Rule:** Copyright Act gives right to third parties to publicly perform others' musical works. Not true for books, plays, movies, etc. Set royalties must be paid via blanket license deals such as ASCAP/BMI (so each individual author does not have to be tracked down for every unique public performance) that the venue gets a blanket license from so people can play live music of others; ASCAP/BMI collect monies and distribute to their class of authors who have granted ASCAP/BMI the right to license venues the right of others to play a work. (Authors are paid based on random sampling techniques to see who is entitled to what amount of the total).

- Original *Stand By Me*: (0:15-:50)

<https://www.youtube.com/watch?v=hwZNL7QVJjE>

- U2's public performance of *Stand By Me*: (6:34-7:26)

<https://www.youtube.com/watch?v=1o9-174wKMQ>

Legal Question: If U2 added that portion of *Stand by Me* to their actual song *I Still Haven't Found What I'm Looking For* and then sold the song as a recorded one (thus not just a public performance now), would that be a sampling that requires license or authorization from owner of musical composition to *Stand By Me*?

- **Answer...**

8. *SUNDAY BLOODY SUNDAY* COPYRIGHTS IN TITLES

General rule on copyrights in titles: No protection for the title of a song as it is normally too small and fragmented word wise, and lacking in originality generally. Also, by virtue of using a song name, no trademark rights attach to it. Madonna example.

- Thus, John Lennon's *Sunday Bloody Sunday* about events in N Ireland in 1972 (0:28-0:54)

<https://www.youtube.com/watch?v=m0uLfO2ksQQ>


- U2's similarly titled song of 1983 about the same events (0:25-:56)

<https://www.youtube.com/watch?v=EM4vblG6BVQ>

Similarity analysis: Only similarity is title and underlying **idea** of singing about the Bloody Sunday events. U2 had every right to do this, no possible claim by Lennon. Back to **Idea-expression** issue. And as to title, no monopoly by Lennon to the title even though it was for the same exact subject matter.

CODA: WEIRD AL PARODIES U2

- U2's original song, *Hold Me, Thrill Me, Kiss Me, Kill Me: (beg—:40)*
- https://youtu.be/Y9_EjgspOd4
- Weird Al's Cover called *Cavity Search: (beg—:40)*
- <https://youtu.be/WAc0D3zBrXY>
- Fair Use Analysis if U2 Sued:



*9. ENCORE: BAD
SEARING CROSS-EXAMINATIONS,
BONO ON TRIAL*

- U2 v. Shawman Trial Facts

9. *ENCORE: BAD* *SEARING CROSS-EXAMINATIONS,* *BONO ON TRIAL*

- Bono at trial on direct from press accounts:
 - Supremely confident
 - Arrives in flashy purple shades that he puts on witness stand
 - Holds court as he speaks, center of attention
 - States claims in excessive terms about the damage/loss
 - Vilifies the defendant
 - Says she took the materials from U2 archives
 - Materials are very important and valuable to U2
 - Says she had no right to any of them

9. ENCORE: BAD SEARING CROSS-EXAMINATIONS, BONO ON TRIAL

- Bono on cross-examination:
 - Concedes the materials are really trinkets juxtaposed against their staggering wealth
 - Concedes he was angry that she wrote an unauthorized book about the band given her inside knowledge of what they did
 - Concedes that his claims they were critical to their archive were actually untrue in part as they had no archive even when she had the materials
 - Admits some of the materials (shoes) she was inf act given by other band members
 - **Bono now sweating profusely, slouching in chair, mumbling answers**
 - Barrister removes his own wig, hikes his trousers, puts his Stetson boots on counsel chair and is now running over Bono in cross-x, lawyer has become center of all attention and Bono reduced to a potted plant in effect.
 - Bono then admits he feels a little foolish suing her...

9. ENCORE: BAD SEARING CROSS-EXAMINATIONS, BONO ON TRIAL

- (1) *If you twist and turn away, if you tear yourself in two again...surrender:* Don't let your client do it. Twisting and bending the truth of the situation to fit a narrative is always fatal when a skilled lawyer crosses your client. You'll wish you could surrender.
- (2) : *If I could through myself, set your spirit free:* Set your client free by preparing them fully, no matter who they are. This is not just mega celebs but also powerful/successful/wealthy biz folks who resist guidance in litigation. You need to throw the lifeline, even if it seems lifeless!
- (3) *To let it go and so, to fade away:* Strategic calls on front end of the litigation for mega celebrities, famed companies or individuals. The upside of the celebrity/famed entity gets you over certain hurdles, but always raises other questions about overkill or abuse of the smaller party. Should this suit have even been filed really?
- (4) *Wide awake, I'm not sleeping:* The result of a brutal cross-examination on the jury is to awaken the jury to a key moment in the case amidst the broader narrative that is often murky and overwhelming. Each side confronts the dangerous reality of awakening the sleeping giant. Cross-examination still is where so much hinges.

COPYRIGHT CONCLUSIONS

- Constitution's demand to promote the arts and permit only protection for true expression is a key cornerstone to the creative flourishing we have in our arts. Idea-expression line in copyright is no small phrase.
- Infringement substantial similarity analysis in music is very complex.
- Fair use is a very difficult defense whenever significant expression is taken. Best practice is to always simply not borrow anything and avoid risk. Fair use law, because it is so unclear, has acted to chill others' expression and so acts as a counterweight to the freedom the idea-expression line creates.
- Public performance and compulsory license sound recording cover rights in music space are unique in IP realm compared to other IP areas.
- Skilled cross-examination is still the core art of litigators
- (Go to a U2 concert too!)

CODA: LED ZEPPELIN

- Led Zeppelin *Stairway to Heaven* case facts:
 - Appeared together as bands very early on so pltf argued they had to have heard and known of their song
 - Defense was that any similarities are because the chord structures and riffs were common to all music
 - Jury not permitted to hear each song as originally recorded; rather an expert musician play each song based on original sheet music
 - Jury verdict for Led Zeppelin; REVERSED → should have allowed jury to hear the songs. *Skidmore v. Led Zeppelin et al.*, No. 16-56057 (9th Cir. Sep. 28, 2018)
- Returning to a jury, so decide for yourself... (all :55)
https://www.youtube.com/watch?v=c_GTbH7H3Pc

CODA

BEASTIE BOYS

General Rule: A “*de minimis* use” is one that is so minor that the law disregards it; acts as an affirmative defense to a copyright claim. A work is deemed *de minimis* if it is so trivial, meager, or fragmentary that an average listener would not recognize it as copying the original.

Beastie Boys Case in Ninth Circuit facts: three note, six-second sample used by Boys.

Original work of Jazz Musician James Newton, *Choir*:

<https://www.youtube.com/watch?v=9N968-coFmc>

Beastie Boys work *Pass the Flute*:

<https://youtu.be/NpsvBvwRuf0>

Held: The three note, six-second sample comprised two percent of the approximately five minute song, “Choir.” The Beastie Boys “looped” this sample as a background element of its work “Pass the Mic,” so that the sample was heard repeatedly throughout. Beastie Boys did not appropriate “the overall essence or structure” of the composition such that the average audience would recognize Newton’s work. Instead, the court held that the sequence constituted only a minimum percentage of the entire work of Choir and that the three-note sequence was “simple” and “generic,” – not unique.

Newton v. Diamond, 204 F. Supp. 2d 1244 (C.D. Cal. 2002).

CODA: MADONNA, MATERIAL GIRL

- Madonna's song Material Girl in mid-1980s.
- In 1990s, a company began selling clothes under the fashion label "Material Girl."
- In 2000s, Madonna launched with Macys a fashion line called "Material Girl."
- Legal questions:
 - (1) Could company began using name to sell clothes?
 - (2) What trademark-based rights if any did Madonna have in Material Girl to stop clothing company from doing business?
- Litigation, and summary judgment ruling in C.D. Cal *held* clothing company had superior rights and Madonna lacked trademark rights in clothing; titling a song does not give monopoly over title for products where person does not engage in commerce with that slogan.