5-15-2023

It's a bitter sweet symphony: Licensing complexities and copyright law in the music industry.

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It's A Bitter Sweet Symphony:

Licensing Complexities and Copyright Law In The Music Industry

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Spring 2023

Presenting May 2nd, 2023

Graduating May 15th, 2023

Abstract

Historically, there has consistently been tension in the music industry between the ideas of ownership and accessibility. This past semester, I researched the history of copyright law and how it has evolved in regard to the licensing of musical works. I have conducted a content analysis of The U.S. Copyright Act in the last century to gain insight into its evolution and advancements. After I gathered an adequate understanding of intellectual property law within the realm of the music industry, I focused my case study research on one milestone example of copyright law's relationship to issues of licensing and ownership rights within the music industry.

I analyzed The Verve v. The Rolling Stones dispute surrounding the popular song, "Bitter Sweet Symphony," and how this case study highlighted copyright infringement complications involved when ownership is called into question after sampling. The case also exemplifies the hypocrisy of certain musicians walking the fine line between musical inspiration and copyright infringement. This case research then led me to inquire more about the repercussions of high-profile cases and the difference between being inspired by musical style and directly copying it. My research process and content analysis have cemented my hypothesis that the music industry has been significantly impacted by the complexities of licensing. If different concepts of U.S. copyright law interpretations had been applied, the outcome of the aforementioned case study infringement would have differed or would not have occurred in the first place.

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Introduction

The music industry is one that has advanced so much over the years from the eruptions of innovation and high standards set by truly visionary creators. However, the law that regulates this industry is frequently challenged by the ambiguous nature of the music licensing process and the ownership disputes that follow. The current legal process of securing the proper licensing for a musical work has the potential to steer industry players into unfair and unclear situations that could potentially threaten the ownership of their intellectual property. This study aims to show that the music industry still has a ways to go when it comes to protecting both the economic and moral copyright of musical works and the opportunity for creators to use musical inspiration in their original works.

Unintentional infringement due to the use of sampling and improper licensing has a detrimental effect on all parties involved. To better understand the lengths to which this influence extends within the music industry, this study has reached far back into the early notions of copyright law and has detailed how intellectual property was defined and protected throughout the years, specifically in the United States. The literature below illustrates the journey that copyright law has taken since its advent and how the complex nature of licensing, and the increased prevalence of sampling within the music industry, have pushed copyright regulations to shift accordingly.

Literature Review

The Evolution of Copyright Law

Copyright law as we know it originated in the late fifteenth century when the printing press was introduced to England, and authorities wanted to take control over the publication of printed materials. A group of printers in England was granted monopolistic permission to publish books there. The Licensing Act of 1662 confirmed this monopoly, establishing a register of licensed books to be administered by a group of printers with the authority to censor publications (Bulgrien, 2020). This group was known as the Stationers' Company, and their control was short-lived, as the 1662 Licensing Act lapsed in 1695. In 1710, Parliament passed the Statute of Anne, which addressed the concerns coming from booksellers, printers, and authors. These concerns, which were centered around private parties having control, arose after the 1662 act lapsed in 1695 and a period of lax government regulation occurred. This 1710 act set the principles of the author's ownership of the copyright and of a fixed term of protection of copyrighted works (Bulgrien, 2020). The statute created a "public domain," effectively preventing the formation of a monopoly on the part of the booksellers. The benefits of the act were minimal, however, as the author had to assign the copyright to a bookseller or publisher in order to be paid for their work.

The Statute of Anne was enacted almost 300 years ago and since then, there have been multiple significant revisions that have encompassed a broader scope of copyright protections. An example of modern advancement in copyright legislation can be found in the United States Constitution, which stated that "the Congress shall have power . . . 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" (U.S. Const. art. I, § 8). Then, in 1790, the First Congress implemented a specific provision within the Constitution called The Copyright Act of 1790, the Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books to the Authors and Proprietors of Such Copies. This new provision was modeled after the Statute of Anne (1710), and it granted authors the right to print, re-print, or publish their works for a period of 14 years, with the option to renew for another fourteen. The Copyright Act of 1790 was created to incentivize authors, artists, and scientists to create original works because it provided them with a monopoly over their work. Simultaneously, the author's monopoly of their work was limited due to Congress's promotion of the idea of the "public domain." In 1831, the Copyright Act was revised, and the term of protection of copyrighted works was extended to 28 years, kept the 14-year extension, and was applicable to both future works and non-expired works. Congress revised the act to keep the U.S.'s copyright policies on par with those in Europe (Bulgrien, 2020).

The Protection of Musical Works

The concept of music copyright law was introduced in 1575 when Queen Elizabeth gave a patent to composer Thomas Tallis for music printing due to his frequent musical writings for the church. The late 1770s saw a rise in music printing arriving in the North American colonies from Europe and by the early 1800s, more than 10,000 pieces of music were being printed by music publishers. Within the U.S., musical works were not protected under U.S. federal law until the 1831 Revision of the Copyright Act. Until then, musical knowledge was distributed throughout the country mostly by word of mouth and traveling minstrels. Copyright protection was largely ignored because of the absence of need. Stephen Foster, songwriter of classics like "Camptown Races" and "Beautiful Dreamer," was one of the first songwriters to attempt to make

a living by writing songs for others. He lived mostly in poverty due to the fact that royalty rates were nominal and there was almost no copyright enforcement available (Lykens, 2013).

In 1886, the Berne Convention was called to provide the basis for mutual recognition of copyright between sovereign nations and to promote the development of international norms in copyright production. European nations gathered to establish a mutually satisfactory and uniform copyright law to replace having to register separately in every country. The seminal agreement granted protection to works such as novels, short stories, poems and plays, drawings, paintings, sculptures, and architectural works. Most notably, the act bestowed protection upon musical works such as songs, operas, musicals, sonatas, and symphonies (Bulgrien, 2020).

Since 1886, the Berne Treaty has been revised five times, most notably in 1908 and 1928. In the 1908 revision, the Berlin Act established the duration of copyright to the life of the author plus another 50 years. It also widened the coverage of the act to include new technology and restricted formalities as a prerequisite for copyright protection. In 1928, the Rome Act was the first to recognize the moral rights of authors and artists. It also constructed the right for authors to object to modifications of a work or the destruction of a work in ways that might prejudice or decrease the artists' reputations. The U.S. was not a Berne signatory until 1988 (Bulgrien, 2020).

The turn of the 20th century also brought along a boom of music publishers after the massive success of Charles K. Harris's "After The Ball," which sold one million copies of sheet music in 1893. The profound impact copyright had on the value of music publishing had finally been noticed, and business people began to see the future revenue streams from music ownership (Lykens, 2013). "Tin Pan Alley" was a street in New York City that saw a concentrated amount of music publishers and songwriting activity at the turn of the 20th century. These publishers eventually banded together to create the Music Publishers Association of the United States. This

organization, which is still active in American publishing concerns, provided the foundations for future performing rights groups such as BMI and SESAC (Wooley, 2011). At the height of its power, Tin Pan Alley produced thousands of songs a year for the amateur music public, and its most successful production was Harris's "After The Ball." New promotional business models were born out of Tin Pan Alley and helped advance the popularity of music sales in that time period (Wooley, 2011).

Another major revision of the U.S. Copyright Act occurred in 1909 when the scope of categories protected was broadened. The 1909 revision of the U.S. Copyright Act determined that all works of authorship were included under its protection and the term of protection was expanded to 28 years with a possible renewal of another 28. At this point in the history of copyright law within the U.S., Congress felt pressure to balance both the public's best interest and the rights of proprietors. In response to this and to rectify the poor recognition of international copyright protection, the American Society of Composers, Authors, and Publishers was formed in 1914 (Bulgrien, 2020).

Copyright law did not experience any significant updates or clarification until 1976 when a major Revision of the U.S. Copyright Act was undertaken. This revision occurred due to the fact that technological developments over the years had outpaced the law. How works could be copyrighted and what constituted an infringement on those copyright protections were in question before the Copyright Act of 1976 was established. The revision occurred, in part, in anticipation of Berne Convention adherence by the U.S. (who previously did not adhere to those conventions.) The U.S. Copyright Act needed dire updating to reflect the current advancement of the music industry in the 1970s and to bring the U.S. into accord with the rest of the world's international copyright policies. The Copyright Act of 1976 preempted all previous copyright

law, making it the newest revision to extend the term of protection to the author's life plus 50 years, and was fairly comprehensive in its updates (Bulgrien, 2020).

The Basic Principles of U.S. Copyright Law

A succinct legal definition of copyright is "a limited duration monopoly" and its purpose is to promote the progression of "useful arts" by giving creators exclusive rights to their works (Passman, 2021, p. 211). These exclusive rights allow the creator or author to use their work, gain profit from it, and be credited for it, among additional derived rights. Two general rights also accompany copyright protection in most countries: an economic right and a moral right (Stav, 2014, p. 5). The economic right of copyright permits the creator to use the work and receive benefits from it. These rights are the reproduction of copies, preparation of derivative works, distribution of copies, and public performance and display. In the case of sound recordings, the transmission of the work is also protected (General Revision of Copyright Law, 1976). In addition to these economic rights, a moral right to be credited for work and to keep the work's integrity exists. For example, a composer may allocate all of the economic rights to their song to a third party, but they will still remain listed as the song's composer (Stav, 2014, p. 5). Maintaining ownership over the moral right of original works is important to all creators, and musicians in particular. Stav notes that a moral right basically says: "Talent and especially the reputation obtained through talent are not for sale" (p. 6). The moral right of copyright, just like a musician's right to their talent and reputation, is a fundamental right to creators. This right applies the personal and ethical dimensions of creativity to copyright law, protecting them.

In order for something to be copyrightable, the work must be original and not directly copied from something else. There also must be "sufficient creativity" to constitute a work. This amorphous term is a rather low threshold that a creator must cross in order to establish the work

as copyrightable (Passman, 2021, p. 211). With no specific test to know what is copyrightable or not, each work is determined on a case-by-case basis (Passman, 2021, p. 212). As soon as a creator makes a tangible copy of something, they have the right of ownership to that copy. In addition to a work being original and not directly copied from something else, the work must be tangible to be copyrighted. As clarified in the Copyright Act, tangible work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

An important aspect of copyright law within the music industry is the discussion of fair use. After the 1976 revision, the U.S. Copyright Act covered the scope and subject matter of works covered and exclusive rights. Copyright terms, notice, registration, and infringement were also under the umbrella. For the first time in U.S. copyright practice, fair use and first sale doctrine were codified into law. As stated in the Copyright Act of 1976, "the fair use of a copyrighted work, including such reproduction in copies or phonorecords or by any other means specified that section, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright" (17 U.S.C. § 107). There are four ways to determine if any particular case falls under fair use. First, the purpose and character of the use are considered, and this includes whether the use is commercial in nature or is for nonprofit educational purposes. Then the nature of the copyrighted work is considered, along with the amount and substantiality of the portion being used in relation to the copyrighted work as a whole. Finally, the effect of the use upon the potential market for or value of the copyrighted work is considered (17 U.S.C. § 107 (1-4)).

Fair use was a significant update in copyright law because it allows artists, educators, and creators to use copyrighted musical works in their own work without worry of infringing on the rights of the original copyright owner. If the copyrighted work passes the aforementioned fair use

tests, there is no need to seek permission from the owner of the copyright or to pay a licensing fee. Without the implementation of fair use, the music industry would be subject to more rigid copyright laws that would make it challenging for artists and other creators to use copyrighted music in their work. This would stifle artists and limit their ability to self-expression. Innovation in new music and technology also has the potential to be suppressed. Fair use is critical in making sure that copyright law strikes a balance between protecting the rights of copyright owners and allowing for the free flow of ideas and creativity in the music industry.

Licensing: The Exceptions to the Absolute Monopoly Rule

There are five major exceptions to the absolute monopoly rule of copyright known as compulsory licenses and they are cable television rebroadcasts, Public Broadcasting Systems, jukeboxes, the digital performance of records, and the use of non-dramatic musical compositions in streaming, digital downloads, and phonorecords. The last compulsory license listed is the one most used in the music industry and is called a compulsory mechanical license (Passman, 2021, p. 214). To fully understand how a compulsory mechanical license can be utilized for a musical work, it is first important to define the concept of mechanical royalties.

Mechanical royalties (or mechanicals) were conceived back in the 1909 Copyright Act and were referred to as payments for devices that served to mechanically reproduce sound. While the money paid to copyright owners for the manufacture and distribution of records are mechanical royalties, the rights to reproduce songs in records are known as mechanical rights. Section 115 of the Copyright Act states that once a song has been recorded and released to the public, the owner of the copyright has to issue a compulsory mechanical license to anyone that wants to use it in a phonorecord. Additionally, only a specific payment established by the law can be charged for the license (Passman, 2021, p. 215). Compulsory mechanical licenses are only

necessary to invoke if a voluntary license (a deal agreed upon by both the copyright owner and licensee) is not reached. The copyright owner, however, is only required to administer a compulsory mechanical license if certain stipulations are followed.

First, the song must be a non-dramatic musical composition (Passman, 2021, p. 216). The definition of a dramatic musical composition is not clearly explained, so it can be insinuated that "drama" refers to the compositions as narrative musical works most likely used in opera or musicals. The unclear nature of this stipulation leaves room for a variety of interpretations, which has the potential to be both positive and negative regarding the proper protection of intellectual property. This murky definition is just the tip of the iceberg of assumed and complex licensing understandings. Fortunately, the second and third stipulations for the issuance of a compulsory mechanical license are much more explicit in how they're meant to be understood. They make it so that it is impossible to receive a valid compulsory license for the first recording (specifically public) of a song. Only if the work has been previously recorded and publicly distributed can a compulsory license be issued (Passman, 2021, p. 216). The fourth stipulation notes that a compulsory license is only available for phonorecords. Defined in the Copyright Act of 1976, phonorecords are equivalent to audio-only recordings. The final "No Major Changes" stipulation means that licensees are prohibited from changing the basic melody or fundamental character of the musical work. For example, no new lyrics or additions of melody would be allowed if a compulsory license was granted. However, a licensee is allowed to arrange the musical work "to conform it to the style or manner of interpretation of the performance" (17 U.S.C. § 115(a)(2)). The language of this stipulation is, again, not the most succinct. The verbiage of the Copyright Act of 1976 in this section uses subjective language, for the "fundamental character" of the musical work being licensed is subjective to each interpreter. If

the above conditions are met and all parties are agreed, then a license can be granted and anyone who wants to use a musical work in phonorecords can do so by filing a notice and paying the statutory rate fee (Passman, 2021, p. 216).

Once a song has begun the distribution process, royalties are earned any time it is reproduced or publicly performed. Performance royalties, like mechanical royalties, are another aspect of the licensing and publishing operation that has the potential to cause strife between music publishers and artists. These royalties differ from mechanical ones because they are generated from live performances, terrestrial (FM/AM) radio plays, TV, film, advertising usage, and streaming. Performance royalties are also divided and paid out into a writer's share and a publisher's share. (Schoonmaker, 2018).

There are two primary deal types when it comes to the publishing and licensing of musical works: a songwriter agreement (also known as a co-publishing agreement) and an administration (also known as co-administration) deal. A songwriter agreement is a deal between a creative songwriter and a publisher who handles the business side of licensing. Historically, a "songwriter agreement" meant that the publisher received 100% ownership of the copyright in exchange for the writer getting 50% of the income (Passman, 2021, p. 277). A situation where the publisher has no ownership is called an administration agreement. Balancing the writer's share and the publisher's share depends on each individual deal and the parties involved, but publishers usually have the exclusive right to the copyright (Passman, 2021, p. 299).

The Impact of Sampling Technology

In the early 20th century, jazz musicians created an innovative technique of "sampling" bits and pieces of melodies, hooks, licks, and progressions from their fellow peers and incorporated them into their own musical creations. As more musicians "borrowed" from each

other, the bits of recognizable music became kind of an "inside joke" among the musicians and grew in popularity for audiences (Joe, 2019). Early sampling was done out of respect and admiration for peer compositions and live performances, but these freeform tributes were short-lived as producers began to use pre-recorded samples as a means of expression in the recording room.

Sampling evolved over the next two decades through instruments like The Chamberlin and the Mellotron; keyboards that, when triggered, played tape-loops of many different pre-recorded instruments. In the 1970s, DJs from the South Bronx in New York City revolutionized the hip-hop genre and culture by creating samples live with masterful vinyl manipulation. 1976, in addition to being the infamous year of the U.S. Copyright Act Revision, was the year of the first monophonic digital sampler. It was called the Computer Music Melodian and it shot to popularity among the biggest stars of the 70s and 80s after it was used by Stevie Wonder on his 1979 album *Journey Through The Secret Life of Plants* (Joe, 2019). This machine was incredibly ahead of its time as it combined polyphonic technology with a digital synthesizer and a digital audio workstation. Portable digital samplers also were all the rage in the 1980s due to their increased accessibility of sampling (Joe, 2019). As the innovations in electronic and sample-based music grew in prevalence in the industry, the number of copyright infringement cases and lawsuits grew too. Innovations in sampling technology, like fair use protection in copyright law, promoted both creativity and opportunity for infringement.

For example, in 1994, the Supreme Court of the United States ruled in favor of the sampler, causing a new precedent to be set in regard to fair use and sampling within the industry. In *Campbell v. Acuff-Rose Music, Inc.*, 2 Live Crew, a popular rap music group, released a parody of Roy Orbison's "Oh, Pretty Woman," titled "Pretty Woman," and was promptly sued by

Acuff-Rose Music, who owned the original copyright of Orbison's song. 2 Live Crew's version was intended to satirize the original song through comical lyrics and before 2 Live Crew initially released "Pretty Woman," 2 Live Crew's manager informed Acuff-Rose Music that a parody based off of "Oh, Pretty Woman" would be released. 2 Live Crew said that they would afford all credit for ownership and authorship to Acuff-Rose, William Dees (co-songwriter with Roy Orbison), and Orbison. 2 Live Crew even expressed that they were willing to pay a fee for the use. Acuff-Rose's agent refused permission, and 2 Live Crew released records, cassette tapes, and a compact disc of "Pretty Woman" anyway − with Orbison and Dees as noted authors and Acuff-Rose as publisher.

Acuff-Rose sued 2 Live Crew nearly a year later and the lawsuit eventually made its way in front of The Supreme Court where they rules that "Pretty Woman" was transformative enough from Orbison's original song, "Oh, Pretty Woman" (Campbell v. Acuff-Rose Music, 1994). It was the Court's opinion that the work was transformative enough that it added new meaning and a new message to the original song. In addition, the ruling determined that the concept of fair use can be applied to commercial works that use copyright material with the stipulation that the original work must be transformed in a significant way. *Campbell v. Acuff-Rose Music, Inc.* was the first case to establish this and altered the relationship between copyrighted works and fair use. It is important to consider this case when examining the evolution of copyright law in the music industry and the overarching complexities of ownership because it underlines the importance of promoting the progress of useful, transformative works while still making the attempts of rightful crediting.

Methodology

This study was inspired by a pre-existing interest in copyright law and the music industry. As the literature review demonstrates, licensing and publishing complexities within the music industry have the potential for disruption and copyright infringement. The legal field of musical plagiarism has developed in the United States more than in any other country (Stav, 2014, p. 10). Consequently, this study was completed by the implementation of a thorough content analysis on The U.S. Copyright Act, with specific reference to The American Copyright Act of 1976, and additional support from U.S. case law to demonstrate the evolution of copyright law generally and within the music industry. A specific case study analysis was also included to further demonstrate how the intricacies of music licensing have impacted industry players and answer the question, "*How has the music industry been impacted by complexities in licensing and what are the copyright law reverberations as the field evolves?*" In order to grasp the full extent of music licensing protocol and its relation to copyright law, it was necessary to dive deep into the origins of copyright protections and the history of music publishing.

"Bitter Sweet Symphony" Copyright Tracker: Tracing It All Back

Song Name	Artist Name	Release Year	Name of Songwriting/ Musical Work Copyright Owners	Name of Publishing Rights/ Sound Recording Owners
"This May Be The Last Time"	The Staple Singers	1954	Roebuck Staples	Vee-Jay Records
"The Last Time"	The Rolling Stones	1965	Mick Jagger & Keith Richards	Allen Klein (ABKCO)
"The Last Time"	The Andrew Oldham Orchestra	1965	Andrew Oldham & Jagger/Richards	Decca Records
"Bitter Sweet Symphony"	The Verve	1997	1997: Richard Ashcroft 1997-2019: Jagger/Richards/Ashcroft 2019-future: Richard Ashcroft	ABKCO Music & Publishing (sole publisher)

To retain a better understanding of how the music industry has been impacted by instances of improper licensing, I chose to conduct a case study analysis on a multi-layered infringement issue that has spanned the last half-century. This infamous case of copyright infringement comes from a sampling and ownership dispute from The Verve's "Bitter Sweet Symphony." Within the tracks of the song, The Verve included a short sample of Andrew Oldman's Orchestral version of The Rolling Stones' "The Last Time." The reinterpretation of the song was not even The Stones' original version, yet the critical inclusion of that sample caused a ripple effect of lawsuits that robbed The Verve of seeing any royalties from one of the biggest rock anthems of the 1990s. This case is a distinguished example and demonstrator of the fact that licensing within the music industry is an inherently troublesome subject to navigate when the use of sampling is involved, especially if the musicians themselves have been misled, sampled without permission, or have not received permission from every affiliated party involved in the original subject matter being sampled.

Results

The Verve v. The Rolling Stones

In 1954, one of the most adored American gospel groups, The Staple Singers, recorded a version of one of the most well-known gospel songs in history, "This May Be The Last Time." Their 45 RPM single rendition of the song, which is also known as "This May Be My Last Time," became the basis for The Rolling Stones' third single to reach number one on the UK singles chart. "The Last Time" was written by lead vocalist Mick Jagger and guitarist Keith Richards in January 1965 (Roberts, 2006, p. 176). It was the Stones' first original song to be released as an A-single in the UK (Rice, 1982, p. 89). Even though the song is credited as being

written by Jagger and Richards, the song was written with the knowledge that the chorus and many of the melodic phrases in their song came from The Staple Singers' hit version of the traditional gospel song. (Arase, 2012, p. 3)

Keith Richards is quoted in the band's book, According to the Rolling Stones, saying, "We didn't find it difficult to write pop songs, but it was very difficult – and I think Mick will agree – to write one for the Stones. It seemed to us it took months and months and in the end, we came up with 'The Last Time,' which was basically re-adapting a traditional gospel song that had been sung by the Stapel Singers…" (2003, p. 92). At the time, many believed that The Staple Singers should have received compensation for The Stones' hit. (Arase, 2012, p. 3) The other school of thought on the issue is rooted in the belief that even though The Staple Singers were the first to record it, "This May Be The Last Time" had existed in the common pool of gospel music classics. Richards himself agreed with this sentiment that the song existed in the public domain stating, "... but luckily the song itself goes back into the mists of time." (According to the Rolling Stones*, 2003,* p. 92) When copyright expires, the musical work goes into the public domain (also called the p.d.) and can be utilized without the worry of infringement (Passman, p. 310).

Within a year of "The Last Time" being released, The Andrew Oldham Orchestra released an album of instrumental versions of popular Rolling Stones songs called *The Rolling Stones Songbook* (Arase, 2012, p. 3). It was published in 1965 and the standout song from the album was Oldham's rendition of "The Last Time." Andrew Loog Oldham was the manager of The Rolling Stones from 1963 to 1967, partially responsible for their initial rise to stardom, and fully involved with the creation of the Andrew Oldham orchestra. Oldham's other significant contribution to The Rolling Stones was his initial hire of Allen Klein as business manager in

1965 (Ankeny). Oldham eventually left the management of The Stones to Klein in 1967 when Jagger and Richards were arrested for drug possession (Goodman, p. 138-141). Because of Oldham's abandonment of the band, he was forced to resign later that year and sell his rights to the group's music to Klein's publishing company, ABKCO Music & Records Incorporated (Goodman, p. 144-151). This transfer of rights proved to be monumental for the trajectory of Allen Klein's and The Rolling Stones' careers and rightful ownership would later be contested for over two decades (Newman, 2015).

In 1997, The Verve, a British alternative rock band, was in the process of creating their third studio album, *Urban Hymns*, when leading Verve singer-songwriter Richard Ashcroft first heard the Andrew Oldham Orchestra version of "The Last Time." Ashcroft thought it could be "turned into something outrageous," and so the Verve took a sample to use in one of their songs. The song in question, "Bitter Sweet Symphony," was created using the sample and looping of just four bars off of Oldham's "The Last Time" and included many more tracks consisting of additional strings, guitar, and percussion (Frickle). The Verve thought that they had done their homework and were in the clear to use the sampled section after they acquired a license from Decca Records.

Decca Records was the label that had released The Andrew Oldham Orchestra album and owned the publishing rights of the album that the sample came from. The license from Decca allowed The Verve to use a few notes of the string melody from the Oldham instrumental version of "The Last Time" in exchange for half of The Verve's royalties on "Bitter Sweet Symphony" (Tsioulcas, 2019). However, The Verve was not in the clear and their permission for the use of a four-second sample was not enough. In Goodman's biography of Klein, the publishing rights for the underlying composition, Jagger-Richard's "The Last Time," had not been acquired, only the

license from Decca. ABKCO Music & Publishing owns and administers the publishing for all of Jagger-Richards' musical works from the years 1963 to 1971. The publishing copyright for the original Stones version of “The Last Time” was therefore under the ownership of ABKCO and Allen Klein, who was famously and fiercely opposed to the ideas of musical sampling. The Verve’s label, EMI/Virgin, realized their blunder and tried to get publishing clearance from Klein, but “Bitter Sweet Symphony” was already a hit and large quantities of *Urban Hymns* CDs had been created. ABKCO took offense and instigated legal proceedings for the rights to the song. (Smirke, 2019).

“Bitter Sweet Symphony” shot to success after The Verve dropped *Urban Hymns*, but celebrations were put on hold when the lawsuit was filed by Klein. He argued that “too much” of the sample was being used in the song and sued for 100% of the royalties (Arase, 2012, p. 4). ABKCO Music & Records filed the plagiarism suit on behalf of Klein himself, Mick Jagger, and Keith Richards (Runtagh, 2016). In an interview with The (Toronto) Star late that year, Verve bassist Simon Jones commented on the Klein lawsuit expressing, "We were told it was going to be a 50/50 split [with Decca Records], then they [ABKCO Music & Publishing] saw how well the record was doing. They rang up and said we want 100 percent or take it out of the shops, you don't have much choice” (Powell, 1997). The songwriting royalties and publishing rights for “Bitter Sweet Symphony” ended up being forfeited to ABKCO in an out-of-court settlement (Runtagh, 2016). 100% of the song’s publishing and Ashcroft’s rights as composer and lyricist went to ABKCO in traditional songwriter agreement fashion. Despite neither of them writing a single word for the song, songwriting credits reverted from Ashcroft to Jagger/Richards/Ashcroft (Arase, 2012, p. 4). Even though the lyrics of the song were written by Ashcroft, at that point in time, The Verve retained no ownership over their most popular song to date.

Unfortunately for The Verve, this was not the end of the copyright battle over the sample used in “Bitter Sweet Symphony.” Andrew Oldham slithered back into the picture two years later and used The Verve in 1999 for $1.7 million in mechanical royalties. Oldham contended that he himself owned the orchestral recording of “The Last Time” from *The Rolling Stones Songbook* because of his creator and producer credit on the project. This lawsuit came after “Bitter Sweet Symphony” sold over a million copies, which may have prompted Oldham to enter the infringement fold. He was quoted by Rolling Stone magazine in 1999 saying, “I’m looking for royalties and damages for the illegal use of my recording that was copied or stolen or however you want to put it.” While The Verve initially declined to comment, a spokesperson for the band was also quoted in the Rolling Stone article stating, “Money has been paid out that Loog Oldham hasn't received, and that's what the problem is.”

Due to songwriting credit and royalties no longer being owned by The Verve, it seemed that Oldham’s qualms were with Allen Klein, ABKCO, Jagger, and Richards (O’Connor, 1999). In the end, The Verve lost any semblance of control over their music. Ashcroft said in a later year, “I’m still sick about it,” when asked about this time period for the band. The final sting landed when “Bitter Sweet Symphony” was nominated for a Grammy in 1999 and the ballot for “Best Song” listed Mick Jagger and Keith Richards as the only songwriters (Runtagh, 2016). In 1999 when Keith Richards was asked if he believed The Verve had been treated unfairly, Richards answered, “I’m out of whack here, this is serious lawyer [stuff].” Richards then added, “If the Verve can write a better song, they can keep the money” (Savage, 2019). The only publishing money that Ashcroft received from “Bitter Sweet Symphony” is $1,000 from the settlement deal (Smirke, 2019).

Onward and Upward

The Verve v. The Rolling Stones case is now considered to be one of rock music's most famous ownership injustices. For 22 years, The Verve did not make a single cent from their smash hit "Bitter Sweet Symphony" (Savage, 2019). The song's popularity was severe, as it entered the music scene in the late 90s on the British chart at the #2 spot, reached #12 on the *Billboard* Hot 100, and effectively became one of the biggest rock anthems of the 1990s. *Urban Hymns*, with the crucial inclusion of "Bitter Sweet Symphony" as the intro, went on to sell over 10 million copies worldwide. "Bitter Sweet Symphony" established The Verve as one of the biggest groups of the post-Britpop era (Smirke, 2019).

Steve Kutner and John Kennedy took over the management of Richard Ashcroft in early 2018 and, like others before them, began to look for a resolution to Ashcroft's ownership dispute for "Bitter Sweet Symphony." Kennedy called the settlement deal that was brokered by Klein, "one of the toughest deals in music history. There were a million albums manufactured around the world. I suspect everyone [at the label] was fairly desperate. They thought it would be easy to do a sensible deal. It wasn't…I think he [Ashcroft] was hoping I'd be able to work some magic, but there was no legal magic to be worked" (Smirke, 2019). From a legal standpoint, the wasn't anything to be done to change the result of the out-of-court settlement Klein created with The Verve. This left Kutner with limited options and it took the death of Allen Klein, the transfer of ABKCO reins to his son, several cold calls, and speaking directly to representatives of Mick Jagger and Keith Richards for any progress to occur. After relaying Ashcroft's wishes, the Rolling Stones manager, Joyce Smyth, relayed that Jagger and Richards "completely agree" with Ashcroft's request and would sign over their share of the songwriters' royalties from "Bitter Sweet Symphony" to its rightful composer (Smirke, 2019).

The rightful rewards for the musical work were not received by Richard Ashcroft until 2019. Ashcroft was receiving a lifetime achievement award and during his acceptance speech at the Ivor Novello Award ceremony Ashcroft announced, "As of last month, Mick Jagger and Keith Richards signed over all their publishing for Bitter Sweet Symphony, which was a truly kind and magnanimous thing for them to do." Ashcroft continued to express his gratitude to Jagger and Richards for finally acknowledging that he was responsible "for this [expletive] masterpiece." Ashcroft even noted that his anger was not directed towards The Rolling Stones, but rather to their former manager, Allen Klein. He expressed his stance on blame stating, "I've never had a personal beef with The Stones. They've always been the greatest rock and roll band in the world" (Savage, 2019). Not only did this publishing transfer result in Ashcroft receiving future royalties for "Bitter Sweet Symphony," but it affirmed that the song was, in all respects, Richard's creative work. The Rolling Stones songwriters came a long way from their original, cool indifference on the subject of owning the songwriting credit for "Bitter Sweet Symphony" in the late 1990s to the eagerness to sign the credit back to Ashcroft in 2019. Jagger and Richards even called for Allen Klein and ABKCO to "make a reciprocal gesture" (Smirke, 2019).

Discussion

Music and Copyright Law Implications

There are two main forms of copyrightable subject matter within the music industry: musical works (the words and instrumental components) and sound recordings (captured performance). Musical works may be fixed in mediums such as musical notations written on paper and sound recordings may be fixed in mediums like a phonorecord, for example. A sound recording that is embodied will most often contain the underlying musical work for the sound

recording as well (Claflin, 2020, p. 105). When sampling is being used in the creation of a new original musical work, it can implicate both the musical work and sound recording copyrights. This means that the artist using a sample would have to obtain two separate licenses for the legal use of the sample (Claflin, p. 102).

In the case of The Verve v. The Rolling Stones, The Verve received a license from Decca Records for the use of a string sample from the Oldham orchestral version of "The Last Time." While The Verve believed that they had received the proper permission and license from the publisher for a sample of the original work being sampled, they did not. The Verve had only received a compulsory license for the use of the sound recording from the record label that published the song. They did not receive a compulsory license, however, for the use of the musical work. Decca Records only owned the copyright for the sound recording of Oldham's orchestral version and not the musical work copyright, and therefore was not the only party to consider when obtaining a license to use the sample. Because Oldham's orchestral version was a cover song off of an album of The Rolling Stones covers songs, additional copyright owners of the Stones' "The Last Time" should have been consulted in the use of the orchestral version as a sample in a new original work.

Even though The Verve's label eventually realized its licensing mistake and attempted to make it right with Allen Klein, there was not enough copyright protection for Ashcroft's new work using the sample due to its inclusion. Klein took advantage of The Verve and their label's licensing mistake and reaped the rewards of the copyright law interpretation to his benefit. Because his company, ABKCO Music & Publishing, held the copyright to "The Last Time," Klein exploited how easy it was to incorrectly license a musical work and at first glance, was legally in the right for reclaiming the publishing rights of the original work being referenced by

the sample. This lapse in licensing considerations resulted in a serious monetary loss to Richard Ashcroft and a long-held grievance over the ownership of "Bitter Sweet Symphony." In its present condition, ABKCO remains the sole publisher of the song (Smirke, 2019.)

In a theoretical circumstance, the concepts of U.S. Copyright Law could have inspired a different outcome for The Verve in their initial legal troubles with Klein and ABKCO. Even though this development in fair use is only applicable in the U.S., it is worth mentioning and the concept of transformative use in musical works has a large-scale application in the global music industry and copyright law. *Campbell v. Acuff-Rose Music, Inc.* dealt with the concept of transformative parody, but nonetheless, the Supreme Court's interpretation of the Copyright Act of 1976 was expanded due to the issue surrounding ownership when musical inspiration is involved. This understanding of fair use and shifting of copyright law due to an issue of ownership could be applied to the defense of The Verve's use of sampling in "Bitter Sweet Symphony." The sampling added new meaning in the form of lyrics to the Oldham orchestral version and a new message for The Rolling Stones' version of "The Last Time." The three most basic characteristics of a musical piece are (1) melody: the theme of the song; (2) harmony: the set of chords that accompany the melody; and (3) rhythm: the dimension of music that has no relation to tonal aspects (Stav, p. 8) The Verve's incorporation of layers and layers of harmony over the melody sampled from the Oldham orchestral record, and Oldham's instrumental interpretation of "The Last Time" itself, is so different from The Rolling Stones' original version that it surpasses the transformative threshold.

The Question of True Ownership

While the above interpretations of copyright law support Allen Klein's lawsuit and subsequent ownership transfer, they are not the only ownership issues to consider in this case. In

James Porter's *Intertextuality and the Discourse Community*, he brings up a slew of challenging questions related to a contributor's freedom within their discourse community. "Is any writer doomed to plagiarism? Can any text be said to be new? Are creativity and genius actually possible?" He also highlights the notion that "genuine originality is difficult within the confines of a well-regulated system. Genius is possible, but it may be constrained (Porter, 1986, p. 40). It is easy to apply these positions to a musician's freedom within their discourse community (the music industry) and detect the truth in these sentiments. Is any musician doomed to plagiarise, either willingly or unwillingly, a past musical work? Can any musical composition be said to be new when there are thousands of years of music already composed? Are creativity and genius actually possible within the modern music industry, which is so saturated with the sampling of previous musical creativity and genius?

Because musical preference, appreciation, and comprehension are subjective and individual experiences, when it comes to copyright law within the music industry, a certain degree of natural subjectivity exists in each interpretation of infringement. Richard Ashcroft was not the only musician to have felt musical inspiration and acted upon it directly. As a matter of fact, Keith Richards himself owned up to the musical inspiration he and Jagger felt when writing "The Last Time." Richards directly stated in *According to the Rolling Stones* that the chorus of their song came from "This May Be The Last Time," yet the pair did not credit any songwriting copyright to The Staple Singers. Richards claimed that the song itself "went back into the mists of time." Whether or not "This May Be The Last Time" exists in the public domain ties in Porter's disbelieving notions of "genuine originality" and begs the question, who should really be credited for the "The Last Time?"

One school of thought is in line with a basic interpretation of the Copyright Act of 1976. The Revision included the creation of federal copyright protection for every work as soon as it is created, specifically when it is first fixed in a tangible medium of expression (General Revision of Copyright Law, 1976). In the case of "Bitter Sweet Symphony," this interpretation could be used to bolster Allen Klein's initial lawsuit, due to the fact that the instrumental version of the song sampled was originally based on The Rolling Stones' "The Last Time." However, because The Stones' "The Last Time" is particularly influenced by The Staple Singers' "This May Be The Last Time," the technical first time the song was fixed in a tangible medium of expression would be in The Staple Singers' version. In this interpretation, there should be writing songwriting credits attributed to The Staple Singers and potential copyright protections awarded.

The Real Victims of Infringement

The string line taken from Andrew Oldham's instrumental version of "The Last Time" in the offending snippet used in "Bitter Sweet Symphony" was not penned by the hands of Mick Jagger or Keith Richards, but rather by David Sinclair Whitaker (Senior, 2001). When asked his thoughts on the matter in an interview with Sound on Sound, Whitaker remembers, "I did a set of arrangements with Andrew Oldham of the Rolling Stones' songbook, and it was my high string line from the arrangement of a song called 'The Last Time' that was pinched by The Verve for 'Bittersweet Symphony'... The whole thing just makes one a bit sick, really" (Senior, 2001). Whitaker's contribution as an arranger was completely overlooked by the legal disputes, even though he has a significant claim to the musical work copyright of Oldham's orchestral version of "The Last Time." If the songwriting credit of "Bitter Sweet Symphony" was going to credit any other composer outside of Richard Ashcroft, it should credit David Whitaker as the composer of the string sample used. Again, if modern U.S. copyright laws were applicable in this

situation, Whitaker's arrangement added the most transformative new meaning and messaging to the Stones' "The Last Time," so much so that you have to play it at twice its speed to hear the similarity in song. This hypothetical argument and application of transformative fair use add another layer to the "Bitter Sweet Symphony" saga.

Another interpretation of copyright law that underscores Whitaker's wrongful copyright exclusion and the general complexity of ownership within the industry involves the discussion of moral rights. Whitaker, as the arranger and composer of, specifically, the string section used in the sampling of Oldham's orchestral "The Last Time, " has the moral right to the sample used in "Bitter Sweet Symphony." Even though this is not an economic right, or the right to use the work and receive all benefits from it, it is still important for creators of original works to be credited as their composers. Richard Ashcroft's managers emphasized the importance of a moral right to copyright and possessing ownership over intellectual property when they were discussing their win for Ashcroft in 2019. Even though ABKCO remains the sole publisher of "Bitter Sweet Symphony," Kennedy notes that, "The most important thing is that Richard's song is back with him. He'll get some money from it now, but of greater importance is that he gets the full recognition that this masterpiece was truly his song" (Smirke, 2019).

Conclusions

"Music and Law are two distinct realms, often perceived as contradictory to one another" (Stav, 2014, p. 2). It is this study's aim to demonstrate the importance of tying these two realms together in the name of protecting intellectual property and advancing the opportunity for creative innovation. It is increasingly important for copyright law to accurately and properly protect IP in this modern age of increased music sampling. Sampling pre-existing musical recordings without the permission of the author, composer, creator, or record company violates

copyright law (Wilson, 2002). Despite this, copyright law has not changed much in relation to the changes music samples have made to the significant innovations sampling technology has brought to the music industry. Unauthorized sampling is not an insignificant issue and it does warrant the attention of the legal system, but the overarching complexity of the licensing process in regards to sampling begs more attention.

Licensing has played a significant role in shaping copyright law in the music industry. While licensing has increased access to music for consumers due to its linkage to music sampling, it has also led to complex legal issues and disputes regarding the complex nature of ownership and copyright. Without the licensing dispute in *Campell v. Acuff-Rose Music, Inc.* in 1994, the music industry would not have its broadened fair use interpretation and opportunity for creators to use copyrighted material in their own innovative, transformative, and original works without a license. As the music industry continues to evolve with advances in technology, it is likely that licensing will continue to be a significant factor in copyright law disruptions. As such, it is important for all industry stakeholders, including copyright owners, licensees, and consumers, to remain aware of the legal issues and challenges surrounding licensing in order to ensure an equitable, accessible, and sustainable music industry for all

The Verve's "Bitter Sweet Symphony" ownership dispute serves as a prominent example of the legal issues and debates that can arise in licensing within the music industry. The case highlights the complexities of copyright law and fair use in music, as well as the importance of obtaining proper permissions and licenses for the use of copyrighted material and crediting the rightful creators of musical work. Ultimately, the case demonstrates the potential consequences of failing to do so, as Richard Ashcroft and The Verve were forced to forfeit all royalties and publishing rights to their hit song. The Rolling Stones' modern change of heart signaled the

sweet end to a bitter ownership standoff, but as ABKCO Music & Publishing still owns 100% of the publishing rights, this case will continue to be cited and discussed in legal circles as an example of the challenges and complexities surrounding licensing and copyright law in the music industry. In the words of Richard Ashcroft himself, “Cause it’s a bittersweet symphony, that’s life. Tryin’ to make ends meet, you’re a slave to money then you die.”

References

Ankeny, Jason. (29 January 1944). "Andrew Loog Oldham | Biography". AllMusic. Retrieved April 3, 2023, from http://www.allmusic.com/artist/andrew-loog-oldham-mn0000034759/biography.

Arase, Michael, Digital Sampling & the Mash-Up: A 'Grey' Area for Copyright Law (May 8, 2012), http://dx.doi.org/10.2139/ssrn.2160020

Bulgrien, A. (2020, December 18). *Copyright timeline: A history of copyright in the United States*. Association of Research Libraries. Retrieved March 10, 2023, from https://www.arl.org/copyright-timeline/#:~:text=The%20First%20Congress%20implemented%20the,Statute%20of%20Anne%20(1710).

Campbell v. Acuff-Rose Music (92-1292), 510 U.S. 569 (1994).

Claflin, S. (2020). How To Get Away With Copyright Infringement: Music Sampling As Fair Use. *Boston University Journal of Science & Technology Law*, *26*(1), 101–130.

General Revision of Copyright Law, 17 U.S.C. § 101 (1976). https://www.copyright.gov/history/pl94-553.pdf.

Goodman, Fred (2015), *Allen Klein: The Man Who Bailed Out the Beatles, Made the Stones, and Transformed Rock & Roll*, Houghton Mifflin Harcourt, New York, p. 138-151

Jagger, Mick; Richards, Keith; Watts, Charlie; Wood, Ronnie (2003). *According to the Rolling Stones*. Chronicle Books. p. 92. ISBN 0811840603. https://archive.org/details/accordingtorolli00jagg/page/92/mode/2up.

Joe. (2019, July 5). *A brief history of sampling*. Thonmann Music. Retrieved 10 March 2023, from https://www.thomann.de/blog/en/a-brief-history-of-sampling/.

Lykens, A. (2013, September 4). *A brief history of copyright law*. American Songwriter. Retrieved 10 March 2023, from https://americansongwriter.com/songwriter-u-a-brief-history-of-copyright-law/.

Newman, M. (2015, July 29). *Allen Klein, the man who changed the Beatles' and Rolling Stones' careers for better or worse*. Forbes. Retrieved 10 April 2023, from https://www.forbes.com/sites/melindanewman/2015/07/29/allen-klein-the-man-who-changed-the-beatles-and-rolling-stones-careers-for-better-or-worse/?sh=2d0daf8c4b6e.

O'Connor, C. (1999, January 11). The Verve Sued Again Over 'Bitter Sweet Symphony'. (J. Finlayson, Ed.) *MTV News*. https://www.mtv.com/news/k7ak3v/the-verve-sued-again-over-bitter-sweet-symphony.

Passman, D. S., Organ, C., & Glass, R. (2021). *All You Need to Know About the Music Business* (10th ed.). Penguin Books. pp. 211-310.

Porter, James E. "Intertextuality and the Discourse Community." *Rhetoric Review*, vol. 5, no. 1, 1986, pp. 34–47.

Powell, Betsy. (1997, November 6). Bitter, Sweet Success. *The Toronto Star*.

Rice, Jo (1982). *The Guinness Book of 500 Number One Hits* (1st ed.). Enfield, Middlesex: Guinness Superlatives Ltd. pp. 89–90.

Roberts, David (2006). *British Hit Singles & Albums* (19th ed.). London: Guinness World Records Limited. p. 176.

Runtagh, J. (2018, June 25). *Songs on trial: 12 landmark music copyright cases*. Rolling Stone. Retrieved 10 April, 2023, from https://www.rollingstone.com/politics/politics-lists/songs-on-trial-12-landmark-music-copyright-cases-166396/vanilla-ice-vs-queen-and-david-bowie-1990-61441/.

Savage, M. (2019, May 23). *The bitter sweet symphony dispute is over*. BBC News. Retrieved 11 April 2023, from https://www.bbc.com/news/entertainment-arts-48380600.

Schoonmaker, H. (2018, March 27). *Mechanical vs Performance Royalties*. Song Royalty Tips | Songtrust. Retrieved April 25, 2023, from https://blog.songtrust.com/mechanical-vs-performance-royalties

Senior, M. (2001, January). *DAVID SINCLAIR WHITAKER: Sweet Symphony*. Sound On Sound. Retrieved April 13, 2023, from https://www.soundonsound.com/people/david-sinclair-whitaker-sweet-symphony.

Smirke, R. (2019, June 24). *A bitter sweet saga: How Richard Ashcroft Lost and won back the songwriting rights to his signature tune*. Billboard. Retrieved April 26, 2023, from https://www.billboard.com/pro/bitter-sweet-symphony-saga-richard-ashcroft-lost-won-songwriting-rights/

Stav, Iyar. "Musical Plagiarism: A True Challenge for the Copyright Law." *DePaul Journal of Art, Technology & Intellectual Property Law*, vol. 25, no. 1, 2014, pp. 1–53. https://via.library.depaul.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1002&context=jatip.

Tsioulcas, A. (2019, May 23). *Not bitter, just sweet: The Rolling Stones give royalties to the verve*. NPR. Retrieved April 10, 2023, from https://www.npr.org/2019/05/23/726227555/not-bitter-just-sweet-the-rolling-stones-give-royalties-to-the-verve.

U.S. Const. art. I, § 8.

Wilson, S. R. (2002). Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense? *Journal of High Technology Law*, *1*(1), 179–193.

Wooley, N. (2011). *The history of Tin Pan Alley*. Sound American. Retrieved March 10, 2023, from https://soundamerican.org/issues/big-band/history-tin-pan-alley.