THE SOUNDS OF Silence

How Copyrights Affect Composition

BY JEFFREY RICHARDSON

The fundamental concept required to navigate many music-based legal issues is the ability to distinguish between rights in the sound recording and those rights in the underlying composition. Not only is this distinction necessary to define and divide your client's income sources, but a practitioner must be aware of the different standards of copyright infringement for these assets. Recently, a dispute occurred in England concerning the American modernist composer John Cage.[1] This dispute provides a framework to expose the difference between these infringement standards.

> *LONDON, England—A bizarre legal battle over a minute's silence in a recorded song has ended with a six-figure out-of-court settlement.*
>
> *British composer Mike Batt found himself the subject of a plagiarism action for including the song, "A One Minute Silence," on an album for his classical rock band The Planets.*
>
> *He was accused of copying it from a work by the late American composer John Cage, whose 1952 composition "4'33" was totally silent.*
>
> *On Monday, Batt settled the matter out of court by paying an undisclosed six-figure sum to the John Cage Trust.*
>
> *Batt, who is best known in the UK for his links with the children's television characters The Wombles, told the Press Association: "This has been, albeit a gentlemanly dispute, a most serious matter and I am pleased that Cage's publishers have finally been persuaded that their case was, to say the least, optimistic."*
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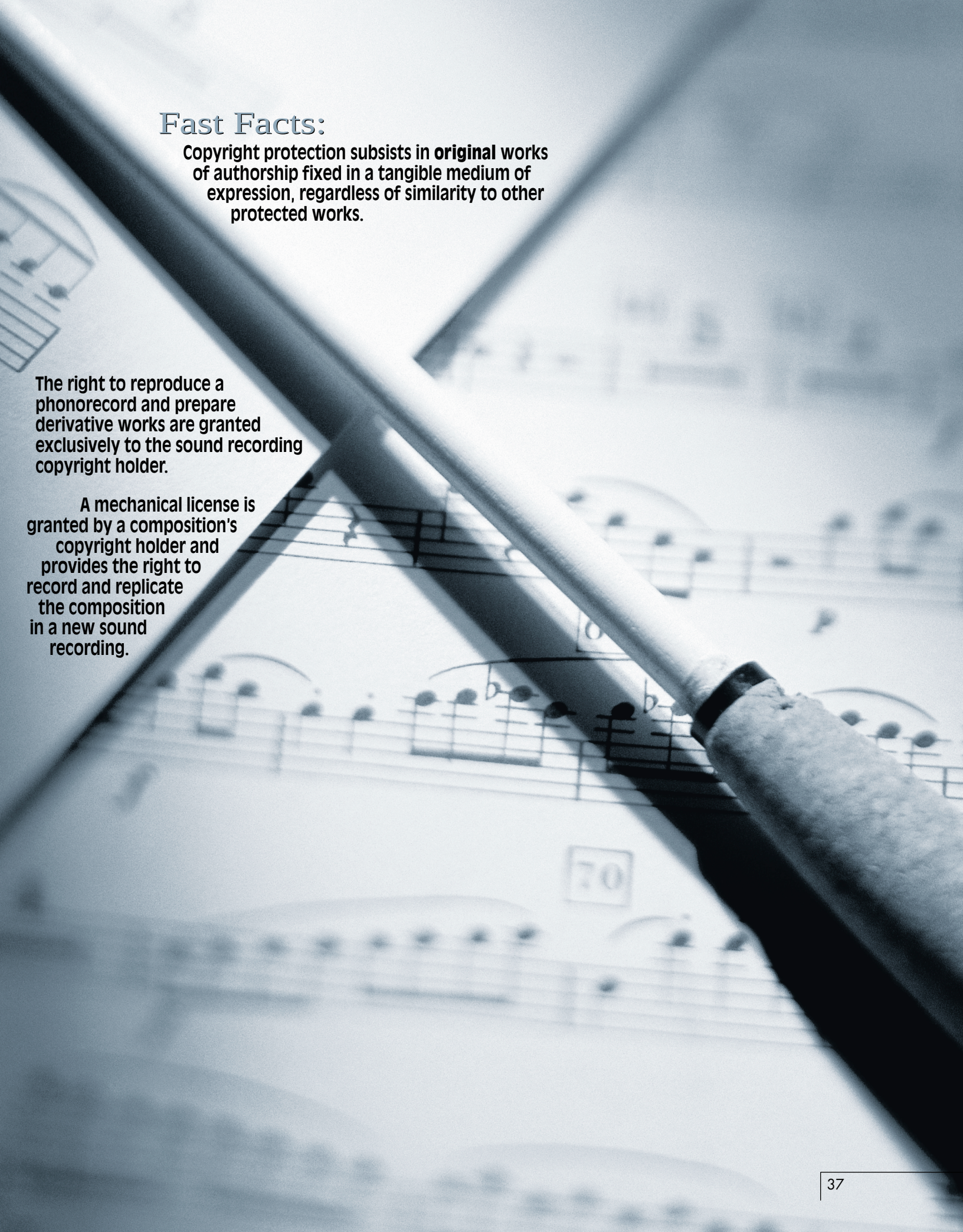
> *"We are, however, making this gesture of a payment to the John Cage Trust in recognition of my own personal respect for John Cage and in recognition of his brave and sometimes outrageous approach to artistic experimentation in music."*



Fast Facts:

Copyright protection subsists in **original** works of authorship fixed in a tangible medium of expression, regardless of similarity to other protected works.

The right to reproduce a phonorecord and prepare derivative works are granted exclusively to the sound recording copyright holder.

A mechanical license is granted by a composition's copyright holder and provides the right to record and replicate the composition in a new sound recording.

Batt credited "A One Minute Silence" to "Batt/Cage."

Before the start of the court case, Batt had said: "Has the world gone mad? I'm prepared to do time rather than pay out. We are talking as much as £100,000 in copyright."

"Mine is a much better silent piece. I have been able to say in one minute what Cage could only say in four minutes and 33 seconds."

Batt gave a cheque to Nicholas Riddle, managing director of Cage's publishers Peters Edition, on the steps of the High Court, in London.

Riddle said: "We feel that honour has been settled."

"We had been prepared to make our point more strongly on behalf of Mr. Cage's estate, because we do feel that the concept of a silent piece—particularly as it was credited by Mr. Batt as being co-written by 'Cage'—is a valuable artistic concept in which there is a copyright."

"We are nevertheless very pleased to have reached agreement with Mr. Batt over this dispute, and we accept his donation in good spirit."

"A One Minute Silence" has now been released as part of a double A-side single.[2]

Composition Infringement

To prove copyright infringement of a composition one must show copyright ownership in the composition and that the alleged infringer has copied that composition. The former issue follows traditional analysis requiring the fixation of an original work of authorship in a tangible medium of expression.[3] The latter issue requires one to show that the alleged infringer had access to the allegedly infringed work and that the resulting work is substantially similar.[4] Substantial similarity is both a qualitative test and a quantitative test. The qualitative test is determined by the dissection and de minimis analysis, while the quantitative test is subject only to the de minimis standard.

Fixation of an Original Work

Fixation occurs upon a work's embodiment into a "sufficiently permanent or stable form to permit it to be perceived, reproduced, or otherwise communicated for a period of time longer than a transitory duration."[5] Originality is rooted in the concept of independent creation. "Separate works which are alike in every respect can be copyrighted without denial of anyone's rights because the copyright does not give a monopoly of ideas but the second song must be innocently and independently composed."[6] If the composition was independently created, a new identical composition can be copyright protected, even if the resulting work is identical to an existing work. Mr. Batt makes no claim of originality in authorship and blatantly endorses John Cage's influence.

A "Certificate of Registration only creates a rebuttable presumption of originality applicable to a defendant's attack on the originality applicable to a defendant's attack on the validity of a plaintiff's copyright."[7] In this case, John Cage's work "4'33" is registered.[8] Given the artistry and originality of John Cage's written compositions, as well as the historical significance of this piece, intimating insufficient originality for registration is futile. The more powerful tactic is to focus on the protected element's substantial similarity by specifically listing and isolating those items appropriated from the original composition.

Access and Substantial Similarity

Access

Access exists upon exposure; access may also be inferred by striking similarity. The circuit courts differ on a test, with the Seventh requiring "extraordinary similarity of nonbanal music, plus some possibility of access and the Second requiring extraordinary similarity plus no possibility of independent creation."[9] In the infamous case involving George Harrison and the composition "My Sweet Lord," simple awareness was the requirement. Awareness of the allegedly infringed song, "He's So Fine," was achieved by its position on the Billboard chart. The charting was conterminous with the charting of a Beatles composition.[10]

Access was not an issue in the Batt/Cage conflict. Anyone with knowledge of modern art music is aware of John Cage's composition "4'33." However, if it becomes necessary to prove access one could easily look to Mr. Batt's credit of John Cage as a co-writer for his composition "A One Minute of Silence."[11] Mr. Batt explicitly listed John Cage as the co-author of the composition in the piece's linear notes. By crediting John Cage in this way, he is, at the least, memorializing his knowledge of the piece and respect for its historical significance. He is certainly showing the simple awareness necessary to move beyond the access requirement.

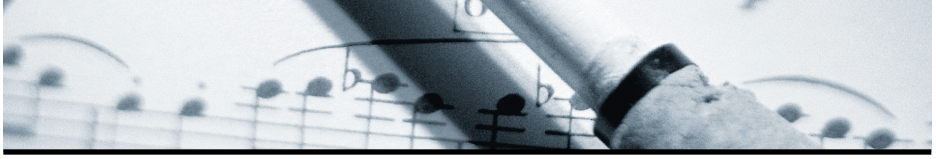
Substantial Similarity

Although the law of substantial similarity is a collection of soft abstractions with little concrete guidance, fundamental principals can still be isolated:

> *To constitute infringement it is not necessary that the whole, or even a large portion, of the work shall have been copied, and on the principle of "de minimis non curat lex"*[12] *it is necessary that a material and substantial part of it shall have been copied; it being sufficient that mere words or lines have been extracted. Between these extremes no precise and definite rules can be cited. If so much is taken that the value of the original is sensibly diminished, or the labors of the original author are substantially and to an injurious extent appropriated by another, that is sufficient in point of law to constitute piracy. The question is one of quality rather than quantity, and is to be determined by the character of the work and the relative and the relative value of the material taken. It has been said that in deciding questions of this sort the court must look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which this may prejudice the sale, diminish the profits, or supersede the objects of the original work.*[13]

The case law supporting a qualitative approach to substantial similarity is extensive; the case law providing the consistent application of this specific test is not.

The following two tests are common in substantial similarity analysis. The first test compares whole to whole: the fact finder compares substantial similarity with respect to the whole of the copied portions of the plaintiff's work, which includes items not eligible for copyright protection. The second test compares part to whole: the fact finder removes from the whole, items that are not copyright protected, comparing the remnants to the allegedly infringed whole.[14] In either test, the compared parts are judged by



If a sound recording infringement issue exists, err on the side of a strict liability presumption. If a composition issue exists, proceed through the access and substantial similarity analysis.

"whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is being composed, that defendant wrongfully appropriated something that belongs to the plaintiff."[15]

A showing that the work was physically copied may be achieved given the explicit acknowledgement by Mr. Batt; however, the showing that the copying was illicit may be dependent upon which substantial similarity test is used. If the whole to whole comparison approach is chosen, John Cage's position is stronger. Certainly substantial similarities exist when the whole of these two compositions are compared, and the explicit credit given to John Cage as a co-author of the composition should carry some weight.

However, if the part to whole approach is chosen, John Cage's position becomes more precarious: "Copyright protection extends only to those components of the work that are original and non-trivial."[16] In assessing protected elements, courts must be "mindful of the limited number of notes and chords available to composers."[17] As recent case law demands, the practitioner should explicitly review the composition searching for discrete copied elements explicitly shown in the score.[18] The isolated elements should be listed and compared to the allegedly infringing composition; the stronger the link between the list and the infringing piece, the stronger the case for substantial similarity.

If copying is shown, then the alleged infringer may rebut the claim by showing that the copying is de minimis: the alleged infringer must demonstrate that the protected material falls "below the quantitative threshold of substantial similarity, which is always a required element of actionable copying."[19] Furthermore, quality may still be questioned at this stage: "where there unquestionably is copying, albeit of only a portion of a plaintiff's song, . . . the constituent elements of the work that are original such that the copyright rises to the level of an unlawful appropriation"[20] De minimis means that an insufficient amount, in both quantity and quality, was taken from a work to sustain an infringement action. This argument is viable in the Batt/Cage conflict, with the conclusion hinging upon the specificity of the elements taken by Mr. Batt from John Cage's written composition.

Sound Recording Infringement

The right to reproduce a phonorecord and prepare derivative works are granted exclusively to the sound recording copyright holder.[21] The copying of an entire sound recording or an entire composition on a sound recording presents an infringement scenario, however, "sampling" has become customary in some popular music genres. The code tends to suggest strict liability in these cases:

> *The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.*[22]

By excluding the class of sound recordings that "consists entirely of independent fixation," it is argued that Congress intended that a resulting sound recording containing any sounds of a protected recording constitute infringement.[23]

Recently, however, a judicially-created de minimis exception to sound recording infringement was applied in *Bridgeport v Dimension Films*.[24] This does comport with existing copyright policy, and certainly makes sense, especially if the resulting work is not substantially similar to the original copied work. Practitioners can avoid this entire issue by simply licensing the sound recording. Generally, it can be easier to obtain a sound recording license than a composition license. The sound recording is usually owned by a single record label, whereas compositions often have complex ownership groups. Given the limited precedent for this decision and the possibility of strict liability associated with unauthorized sound recording use, practitioners may chose to license the sound recording, even when they are willing to litigate the composition infringement issue.

In *Newton v Diamond*[25] the Beastie Boys licensed the sound recording for "Pass the Mic" from ECM Records. The Beastie Boys did not approach James W. Newton, Jr. to license the underlying composition "Choir." The portion of the composition captured in the licensed sound recording consisted of a flute playing a drone C and vocalizations of C-Db-C. The composer sued for copyright infringement and lost. "Neither Plaintiff nor his experts identify any elements of the musical composition itself, as opposed to those related to the sound recording, that make the three-note sequence distinctive or qualitatively significant."[26] In other words, upon dissection by the court, no protected elements of the composition were appropriated. The sound recording license was legally sufficient to protect the derivative work authors.

There is no sound recording claim in the Batt/Cage dispute. Mr. Batt's recording was a wholly original independent creation. However, if the composition is found to be copied, Mr. Batt must acquire a mechanical license. A mechanical license is granted by a composition's copyright holder and provides the right to record and replicate the composition in a new sound recording. If a song has been previously published, then a mechanical license is a statutory right.[27] Mr. Batt, however, will not qualify for this statutory protection, since he violated the statute by releasing the record before securing the license. However, in practice, publishers will often use the statutory rate as a benchmark price, thus reducing transactional costs.

Conclusion

Distinction and dissection are required to resolve composition and sound recording infringement claims. First, determine whether a composition, sound recording, or compound copyright issue exists. If a sound recording infringement issue exists, err on the side of a strict liability presumption. If a composition issue exists, proceed through the access and substantial similarity analysis. Finally, always review with your client the

existing licensing options and possible statutory and non-statutory liability exposure. ✦

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Footnotes

1. John Cage (1912–1992).
2. "Composer Pays for Piece of Silence," http://europe.cnn.com/2002/SHOWBIZ/Music/09/23.uk.silence/index.html.
3. 17 USCA 102(a).
4. Al Kohn and Bob Kohn, Kohn on Music Licensing, 1291 (Aspen Law and Business, 1996, 2001).
5. 17 USCA 102(a).
6. *Northern Music Corp v King Record Distrib Co,* 105 F Supp 393, 398 (SD NY 1952).
7. *Smith v Jackson,* 84 F3d 1213, 1219 (CA 9, 1996).
8. http://www.copyright.gov/records/cohm.html.
9. Robert A. Gorman and Jane C. Ginsburg, Copyright for the Nineties, 400 (The Michie Company, 1993, 1998).
10. *Bright Tunes Music Corp v Harrisongs Music, Ltd,* 420 F Supp 177 (SD NY 1976).
11. http://www.theplanets.org.uk/classical_graffiti.cfm.
12. *Black's Law Dictionary* 431 (6th ed. 1990) de minimis non curat lex: The law does not care for, or take notice of very small or trifling matters.
13. *M. Witmark & Sons v Pastime Amusement Co,* 298 F 470 (ED SC 1924).
14. Robert A. Gorman and Jane C. Ginsburg, Copyright for the Nineties, 426 (The Michie Company, 1993, 1998).
15. *Arnstein v Porter,* 154 F2d 464, 473 (CA 2, 1946).
16. *Feist Publ'ns, Inc v Rural Tel Serv Co,* 499 US 340, 348–351 (1991).
17. *Gaste v Kaiserman,* 863 F2d 1061, 1068 (CA 2, 1988).
18. *Newton v Diamond,* 204 F Supp 1244, 1255 (CD CA 2002).
19. *Sandoval v New Line Cinema Corp,* 147 F2d 215, 217 (CA 2, 1998).
20. *Jarvis v A&M Records,* 827 F Supp 289–291 (D NJ 1993).
21. 17 USCA 106(1), (2).
22. 17 USCA 114(b).
23. Al Kohn and Bob Kohn, Kohn on Music Licensing, 1294 (Aspen Law and Business, 1996, 2001).
24. *Bridgeport Music Inc v Dimension Films LLC,* 3:01-0412 (MD Tenn 2002).
25. *Newton v Diamond,* 204 F Supp 1244 (CD CA 2002).
26. Id. at 1259.
27. 17 USCA 115.