

Analog Laws in the Digital Age: Licensing Reform in the 21st Century

By: Nicholas DeVuono

The number of issues of copyright infringement, with respect to the digital age, has grown exponentially to new levels. The Recording Industry Association of America (RIAA) is the trade organization that supports and promotes the creative and financial vitality of the major music companies¹ both here and abroad. They are also heavily involved in lobbying efforts and litigation on behalf of the music industry, and in the past have gone to extremes to enforce such laws, including raids, property seizures and heavy fines. These moves designed to crack down on copyright infringement use valuable time and resources.

The use of compilations, or mixtapes in the music industry are not to be confused with an illegal duplication operation for financial gain. Rather, they're a vital tool a Disc Jockey can use to gain regional and national exposure. The problem lies within the law. These samples of songs used in a compilation format for promotional use are protected under federal statute 17. U.S.C. § 501. In order to use a copyrighted work and follow the law, one would have to obtain multiple licenses.

The required licensing fees could be too costly for an individual to pay to promote their name. Without the correct financial backing, following the rule of law could be a problem instead of a safeguard. Furthermore, it is short sighted to assume anyone can purchase a license to use the recorded work.

The following proposal would solve the problem: Relax copyright infringement lawsuits against Disc Jockeys who are using a compilation with copyrighted music as a promotional tool provided full credit is disclosed where applicable, and the copyrighted work was used for promotional purposes only.

Webster defines the following terms:

- a Disc Jockey is a person who plays popular recorded music on the radio or at a party or nightclub.
- A musician is defined as a person who writes, sings, or plays music.
- The word promote is defined in part as something that is done to make people aware of something and increase its sales or popularity.
- An MP3 is defined as a computer file format for the compression and storage of digital audio data.

¹ http://www.riaa.com/aboutus.php?content_selector=about-who-we-are-riaa (2/8/14).

- A compact disc, or CD is defined as a small optical disk usually containing recorded music or computer data.
- A mixtape is defined as a compilation of songs recorded (as onto a cassette tape or a CD) from various sources.²

The Copyright Act provides the following defining terms:

- 17. U.S.C. § 102 · Subject matter of copyright: In general (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.³

- 17. U.S.C. § 103 · Subject matter of copyright: Compilations and derivative works (a) The subject matter of copyright as specified by Section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope,

² <http://www.merriam-webster.com/dictionary/mixtape> (3/3/14).

³ <http://www.copyright.gov/title17/92chap1.pdf> (2/23/14).

duration, ownership, or subsistence of, any copyright protection in the preexisting material.⁴

- 17. U.S.C. § 106 · Exclusive rights in copyrighted works. Subject to Sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
 - (1) to reproduce the copyrighted work in copies or phono records;
 - (2) to prepare derivative works based upon the copyrighted work;
 - (3) to distribute copies or phono records of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
 - (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
 - (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
 - (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.⁵
- 17. U.S.C. § 114 · Scope of exclusive rights in sound recordings
 - (a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of Section 106, and do not include any right of performance under Section 106(4). (b) The exclusive right of the owner of copyright in a sound recording under clause (1) of Section 106 is limited to the right to duplicate the sound recording in the form of phono records or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of Section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. 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

⁴ Id.

⁵ Id.

recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.

The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of Section 106 do not apply to sound recordings included in educational television and radio programs (as defined in Section 397 of Title 47), whether distributed or transmitted by or through public broadcasting entities (as defined by Section 118(f)), provided, that copies or phono records of said programs are not commercially distributed by or through public broadcasting entities to the general public.⁶

- 17. U.S.C. § 501 · Infringement of copyright
 - (a) Anyone who violates any of the exclusive rights of the copyright owner as provided by Sections 106 through 122 or of the author as provided in Section 106 A (a), or who imports copies or phono records into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by Section 106 A (a). As used in this subsection, the term “anyone” includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.
 - (b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.⁷

These works of compilation used without the appropriate licensing allow the copyright owner to initiate an action for infringement. They are a form of free promotion and marketing at

⁶ Id.

⁷ <http://www.copyright.gov/title17/92chap5.pdf> (2/23/14).

no cost to the owner, and are not being sold. In the digital age, a Disc Jockey can make a compilation using a home studio with inexpensive recording devices and market it anywhere in the world over the internet. The vast reach provides opportunity to aspiring musicians to build an audience globally in a fraction of the time it would require without such capabilities.

Hindering a Disc Jockey to obtain licenses and pay fees and additional concessions can put the musician out of business. The time, money and resources to move forward with a claim for the sake of making an example, even if it is shown the compilation was not sold puts Disc Jockey's in a tough position.

The 2007 raid on Atlanta, GA based DJ Drama by federal authorities on behalf of the R.I.A.A. led to thousands of mixtapes, recording equipment and vehicles being confiscated. At the time, there was no indication these mixtapes in CD format were being sold at a fixed price. Nonetheless, criminal charges were filed. There still isn't a clear line drawn between a counterfeit CD and compilation. The gray area, until an official distinction is made will always put a Disc Jockey and their promotional compilations in a vulnerable position. Provided the work is used for promotional purposes only, released to the public where they can download it in MP3 format, or obtain a hardcopy at an event hosted at a nightclub or music festival should not warrant an infringement action. In the event a Disc Jockey sells the compilation without the appropriate licensing then and only then should section 501 be enforced. That is sidestepping income that ought to be provided to the copyright owner.

CONCLUSION

By updating the public policy with limitations, it will open the door to new Disc Jockey's, new remixes, as well as new artists in an industry that moves so fast it can be difficult to keep up. Unfortunately, these compilations are considered infringement. Until this shaky area of copyright law is resolved, it will remain a threat.

An Issue of Individual Sovereignty: The Loss of Constitutional Rights – An Unadjudicated Issue Summarized

By: Ryan Chae

America has long since been known as the land of the free, and although this notion maintains some legitimacy, corruption runs rampant more than ever, slowly limiting the democracy of a once truly free nation. Some of the most prominent philosophers who founded this great state argued against the establishment of government due to their fear of tyranny. Despite their best efforts through the US Constitution, tyranny may well be on its way through the form of governmental corruption as a mere stepping stone to a total paradigm reversion of a time reminiscent of 18th Century England; the very thing our forefathers rebelled against.

THE FORMATION OF PROTECTIONS

In 1871, Congress enacted 42 U.S.C. §1983 to provide a cause of action for those who suffered infringement on constitutionally or statutory guaranteed rights at the hand of a government official, in an attempt to ensure that such rights are respected, and if violated, would allow the victim to seek remedy. However, many public officials, such as law enforcement officers claim immunity from §1983 actions. And, despite the fact that §1983 does not explicitly define or grant immunity from such causes, the United States Supreme Court has consistently interpreted §1983 to implicitly afford immunity to some individuals.

Perhaps one of the most challenging of these implied immunities is the Doctrine of Qualified Immunity. *Bivens v. Six Unknown Named Agents*¹, first acknowledged this immunity and was decided as an effort to shield government officials from the liability of violating another individual's federally established constitutional rights through the execution of their assigned duties. This protection PASSIVE VOICE BOICE was afforded to encourage government officials, primarily law enforcement officers, to promptly perform their assigned duties without fear of retribution for carrying out those duties, thus allowing for unhindered performance. Although the Doctrine does allow for more prompt, decisive performance of law enforcement officers, some unanticipated detriments have come as a result. Thus, one must consider, if there are no limitations on these immunities, would this not enable the uninhibited use of power, force, and ultimate control of constitutionally guaranteed rights?

As a result of the judiciary's uncertainty in interpreting the Doctrine, and the results that ambiguity has had, the answer may very well be yes. While some officials utilize this protection for the fair and just execution of their assigned duties, this is not always the case. Some view this

¹ *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

afforded protection as a way only to remove inhibitions that promote ethical, moral and a fair execution of such lawful duties, thus allowing ultimate, unadulterated power.

Now, without any fear of retribution and a rare occurrence of prosecution of those violating rights deliberately, Americans are starting to see a corrupted state come to fruition, as more and more Americans are reporting unnecessary use of excessive force by law enforcement officials. Moreover, it is increasingly evident that a new breed of law enforcement is well on its way - one which can be defined as egocentric, corrupt, fearless, and abusive. Such mottos as “To Serve and Protect” may well be on its way to being a distant fantasy, where reality is something more similar to that of Big Brother,² if left unchallenged.

THE BIG PICTURE

Such corruption is well portrayed in a recent article by the *Sun Sentinel*³, where an 84 year old African-American, wartime veteran was unlawfully detained, silenced, and denied his right to question the activity of Fort Lauderdale Police Officers⁴. Even more disturbing, he was brutally injured to the point of nullifying his lower limbs, thus rendering him immobile without the use of a wheelchair. All of these injuries were obtained from him merely questioning the activities of law enforcement officers outside of his home, which he thought was questionable. Fortunately, the man in this occurrence was aware of his constitutionally afforded rights and the clear violation and denial of those rights by law enforcement officers. He has since filed suit in federal court, which is currently pending.⁵

More pertinent to this issue is that Americans are rarely able to successfully litigate such corruption, as the judicial system revels in the ambiguity of qualified immunity. The court often allows the defense of qualified immunity to be vastly encompassing, thus rendering officials almost invincible from a §1983 action. As one judge recently stated, “[w]adding through the doctrine of qualified immunity is one of the most morally and conceptually challenging tasks federal appellate court judges routinely face.”⁶

ANALYSIS

² George Orwell, *Nineteen Eighty-Four* (1949).

³ Paula McMahon and John Burstein, *Disabled Veteran says Fort Lauderdale Officer Broke His Hip*, SunSentinel, (November 2, 2011), http://articles.sun-sentinel.com/2011-11-02/news/fl-fort-lauderdale-police-lawsuit-20111102_1_eula-johnson-street-crimes-unit-arrest.

⁴ *K.A. v. State*, 12 So.3d 869 (2009).

⁵ *Dock Williams v. City of Fort Lauderdale*, Southern District of Florida (2011).

⁶ Charles R. Wilson, “Location, Location, Location”: Recent Developments in the Qualified Immunity Defense, 57 N.Y.U. Ann. Surv. Am. L. 455, 447 (2000).

Before one is able to assess the severity of this issue, it is first and foremost imperative to gain a basic understanding of the Doctrine of Qualified Immunity. In accordance with relevant case law and statutes, the Doctrine allows law enforcement officers to employ an array of tactics while investigating and detaining an individual without facing penalties for actions that normal citizens are not typically permitted to perform. However, as detailed by the Supreme Court in *Harlow v. Fitzgerald*⁷, qualified immunity shields government officials from actions, "... insofar as their conduct does not violate a clearly established statutory or constitutional right which a reasonable person would have known."

The court in *Harlow*⁸ established a standard, which qualified immunity must meet in order to raise a proper defense in litigation; however the standard has been so broadly interpreted that the fine line distinguishing qualified immunity from absolute immunity⁹ is often blurred. It has thus become routine practice for law enforcement officers to commonly raise a defense of qualified immunity for even some of the most gross and heinous displays of unwarranted excessive force.

In addition to the standard set by the court in *Harlow*, other attempts have been made to narrow the scope of the applicability of qualified immunity as a properly raised defense. One such standard was that decided in *D.G. v. State*, clarifying that, "[I]t is important to distinguish between an officer 'in the lawful execution of any legal duty' and a police officer who is merely on the job."¹⁰ With this standard in mind, an officer would not be eligible to properly raise a defense of qualified immunity in litigation if the action against him as brought in conjunction with his failure to properly initiate and carry out contact with a subject.¹¹

⁷ *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

⁸ *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

⁹ The Westfall Act, 28 U.S.C. Sec. 2679(b)(1) (2009) provides federal employees absolute immunity from tort claims for actions taken in the course of their official duties, and gives the Attorney General the power to certify that a federal employee sued for wrongful or negligent conduct was acting within the scope of his office or employment at the time of the incident. Once that certification takes place, the U.S. government is substituted as the defendant instead of the employee, and the lawsuit is then governed by the Federal Tort Claims Act. Additionally, if the lawsuit began in state court, the Westfall Act provides that it shall be removed to federal court, and renders the Attorney General's certification "conclusive" for purposes of the removal. Once the certification and removal take place, the federal court has the exclusive jurisdiction over the case, and cannot decide to send the lawsuit back to state court. In this case, the U.S. Supreme Court also ruled that certification can take place under the Westfall Act in instances where the federal employee sued asserts, and the Attorney General also concludes that the incident alleged in the lawsuit never even took place. *Osborn v. Haley*, No. 05-593 2007 U.S. Lexis 1323. (AeLe Law Library of Case Summaries).

¹⁰ *D.G. v. State*, 661 So.2d 75, 76 (1995).

¹¹ *Id.*

For example, a law enforcement officer who is in the process of executing a legal duty, would be one conducting an investigation with arguable probable cause of violating, plotting, or attempting to violate the law. Generally speaking, although it is within the scope of the law enforcement officer's authority to question any citizen, it is not the citizen's obligation to adhere to the officer's contact, as provided in the Fourth Amendment of the US Constitution, which allows all peoples to be free from unlawful search and seizures. Thus, an officer who chooses to approach and contact a citizen cannot lawfully demand that individual to respond or act to the requests of that officer.¹²

For instance, if a law enforcement officer were to approach an individual merely reading outside of a cafe, the officer has the authority to inquire of the person's activities, however without arguable probable cause, the law enforcement officer cannot lawfully detain or demand a response from that individual¹³, thus empowering the individual to not only ignore the law enforcement officer, but legally walk away and disengage the officer altogether¹⁴. Thusly, if a §1983 action were to arise from this instance, because the officer detained the individual anyway, the officer could not properly raise a defense of qualified immunity, as he would not have arguable probable cause to detain or restrict the individual's freedom of walking away. And consequently, the officer would be open to liability of a violation of Fourth Amendment rights.

The last standard to consider is that determined in *Storck v. City of Coral Springs*¹⁵, where the court stated that a violation would only occur if another similarly situated official found the defendant's actions to be unjust.¹⁶ For instance, if a law enforcement officer utilized a "take-down" tactic while detaining an individual, resulting in injury to the detainee, testimony from another, non-partisan law enforcement officer verifying the actions to be just and rational would consequently allow for a properly raised defense of qualified immunity. However, if the officer testifying refutes the actions of the arresting officer, thus claiming it irrational, then theoretically, the arresting officer would be barred from raising a defense of qualified immunity, thus establishing liability in a §1983 action.

¹² *Rinehart v. State of Florida*, 778 So.2d 331(1993).

¹³ *Jay v. State*, 731 So.2d 774 (1999).

¹⁴ **DISCLAIMER:** The Undergraduate Law Journal, its writers, affiliates, partners, or members, do not promote or encourage general disregard for law enforcement. Although legal precedent does support your right to exercise such actions, the Undergraduate Law Journal does not encourage this and consequently does not accept liability for refuting this disclaimer.

¹⁵ *Storck v. City of Coral Springs*, 354 F.3d 1307 (2003).

¹⁶ ("Unless a government agent's act is so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing, the government actor has immunity from suit.") *Storck v. City of Coral Springs*, 354 F.3d 1307 (2003).

Despite these clearly established standards, litigation has rarely benefited a plaintiff when the defense of qualified immunity is raised. With such a tight pact of “brotherhood” amongst law enforcement officers, and a fear of future retribution for their own acts, victims may find the standards laid out in legal precedent ineffective. As it would be not be a surprise for most occurrences to be interpreted as a tactic that another similarly situated official would utilize. Because many law enforcement officers would fear retribution of being under future scrutiny for future actions, it is reasonable to suggest that their testimony would be in affirmation to an officer’s actions.

CONCLUSION

Because litigation rarely affords remedy to victims who file a §1983 action, there is little being done to limit the exercise of uninhibited power against individuals by law enforcement officers. With that being said, the only other option Americans have, in order to put a halt to law enforcement corruption and tyranny by government officials is to demand a shift in authority, thus placing more power in the hands of US citizens. As Thomas Jefferson once said, “All tyranny needs to gain a foothold is for people of good conscience to remain silent.” It is time for Americans to step up, take affirmative action, promote those government officials who prove to be moral and acting within legal boundaries and immediately remove those who promote corruption without hesitation. Law enforcement officers are defined as being public servants; it is time Americans held them to a higher standard, as to avoid total control. The unadulterated, egotistical and clear abuse of power is illustrative of the emergence of government corruption, one in which this great nation’s foundation was built to combat.