

No Infringement Intended* — Can You Still Sample Like It's 1989?*Hosts: Rusty Close and Austin Padgett****Recorded: 6/11/25****Aired: 9/25/25****Austin Padgett:**

All right. Come on and come all. Welcome to *No Infringement Intended*, an intellectual property podcast of our law firm, Troutman Pepper Locke. Hosted by the bad boys of intellectual property themselves, Rusty Close and me, Austin Padgett. While you're settling in for this episode, and I do like to think of our listeners as settling in, Rusty, in a few ways, maybe they're putting us on as they ease into a big wingback chair sitting next to an open fireplace with a couple of dogs spread across the floor, perhaps getting that last bit of knitting done or enjoying a pipe. Or maybe you've just got the kids down after piecing together dinner from boxed mac and cheese and just barely past the sale date chicken nuggets, giving your last bit of energy to get them bathed. Now, you've got to sit down for a few minutes and let an IP discussion wash over you as you prepare for hopefully a few hours of sleep in a row.

No matter what your circumstances, you are welcome here. When we have a minute, please make sure you've subscribed, and we'd really appreciate a five-star review if you have it in your heart. I'll leave it there for now, Rusty. I guess we should talk about something. So, what'll it be.

Rusty Close:

Why don't we talk about our favorite fictional bands or musicians? Do you have one that really comes to mind and sticks out for you.

Austin Padgett:

Well, I would tell you that it's a real band. Probably my number one is the Rock-afire Explosion from the ShowBiz restaurant. It's an animatronic band that you may remember that would entertain you while you were eating pizza from a long-defunct company. I don't think Showtime has been around for many, many years now. I like The Soggy Bottom Boys.

Rusty Close:

That's a good one.

Austin Padgett:

Then, here's a deep cut for you, Captain Geech and the Shrimp Shack Shooters.

Rusty Close:

I don't know them.

Austin Padgett:

That's a reference to that thing you do where the fictional band themselves, The O'Needers or The Wonders go on set to make like a Frankie and Annette style movie. I think it's called Weekend at Party Pier, and there's like this fake surf rock group called Captain Geech and the Shrimp Shack Shooters. It's a great band name.

Rusty Close:

I'm sure our listeners will be well familiar with that deep cut. I think the goat; the greatest fictional band of all time has to be Stillwater from the movie Almost Famous. I think it's hard for any other fictional band to live up to them. I think it's based on Cameron Crowe's experiences as a young writer for Rolling Stone, kind of based on the Eagles and The Allman Brothers, some Led Zeppelin in there. But are you familiar with a fictional band called The Lone Rangers?

Austin Padgett:

I know of I think an actual band called The Lone Ranger. They play with Steve Martin.

Rusty Close:

This is different. This is different. This is the band from the movie Airheads, starring Brendan Fraser, Adam Sandler, and Steve Buscemi.

Austin Padgett:

Okay, yes. You've got me now.

Rusty Close:

Classic, classic movie. So, in the movie, Brendan Fraser is the lead singer, lead guitarist, his name is Chazz. For our purposes, we're not so much worried about The Lone Rangers. We're more worried about Chazz's girlfriend, Kayla. Do you remember anything about the movie and Kayla?

Austin Padgett:

I don't. I want to make a brief correction for the record that the band that plays with Steve Martin are the Steep Canyon Rangers.

Rusty Close:

Ah, there you go.

Austin Padgett:

All apologies. But tell me about Kayla.

Rusty Close:

Stay out of our mentions, everyone. So, Kayla is kind of the classic. She's trying to make something of her life. She's got this boyfriend who's a lead singer, guitarist of this struggling band. She gets fed up. She kicks him out of the apartment and that kind of kicks off all the action in the movie, where they sort of take this radio station hostage so that they can get their demo played over the air. So, just a great movie. It is actually a pretty funny movie if you go back and revisit it.

Kayla was played by an actress named Amy Locane. So, not really prominent today or maybe for reasons that aren't so – you can look up her history if you'd like to. But she had a decent little run of TV and movie appearances in the eighties and nineties. One of which, she was in the original Melrose Place cast. So, if you want to go back and revisit those episodes, you might get to spend some time with her. But I'm really interested in her first movie role, which was as Cheryl Anderson in a 1989 movie called Lost Angels. Based on my research, unfortunately, not available on any streaming services, but have you ever seen or heard of this movie Lost Angels?

Austin Padgett:

I have not. I have not, unfortunately.

Rusty Close:

I wish we could get our hands on it, because her co-star or the leading actor in this movie is a gentleman named Adam Horovitz. And are you familiar with the name Adam Horovitz at all?

Austin Padgett:

Yes.

Rusty Close:

Tell me about it.

Austin Padgett:

You tell me, where are you going with this?

Rusty Close:

I mean, Adam Horovitz is better known as the King Ad-Rock from the Beastie Boys. So, for a time, he actually has a decent little list of credits from movies that he has starred in, but he was in this movie, Lost Angels. It was from 1989 at the same time the Beastie Boys were recording their legendary album, Paul's Boutique.

Austin Padgett:

I see. Okay. I did not realize he overlapped in time with doing a lot of work with the band, because I know he kind of like Flea, shows up in movies here and there. I've always wondered how they fit all that in.

Rusty Close:

Maybe making albums doesn't take up as much of your time as we would think that it does.

Austin Padgett:

That's right. Maybe they have people helping them.

Rusty Close:

Yes, it could be. So, the Beastie Boys, just a little history lesson for those who aren't familiar. Classically, I mean, they are as New York as you can be. I mean, I think if you think of the Beastie Boys, and especially their early album, License to Ill, I mean, it just screams New York. But all the kind of craziness that went on with that album and the tours around that album, the guys almost kind of defected or went into like self-exile all the way across the country in Los Angeles.

During this time, they're also kind of estranged from their producer of their original album, Rick Rubin, legendary producer, DJ Double R. So, they're kind of getting on with their career, but kind of taking a different direction. So, when they're in Los Angeles, they meet up with these guys known as the Dust Brothers.

Austin Padgett:

This is just their second album, right?

Rusty Close:

This is their second album. The Dust Brothers are sort of known, their sound is just this kind of layered, it's a mix of all of these different types of samples. For those who aren't familiar, how would you describe sampling in general? When we talk about hip-hop or music like Beck's Odelay, what is sampling?

Austin Padgett:

Yes. I think at a high-level sampling is taking a recorded sound that's been previously recorded and doing something with it, to make it some sort of musical gesture. So, what I think about early on is, there's this instrument called the mellotron. Have you ever heard of that?

Rusty Close:

It sounds familiar, but I don't think I know exactly what it is.

Austin Padgett:

Yes. So, The Beatles used one on Strawberry Fields Forever. It's kind of the famous, if you hear that flute kind of like courting, it's like – what's actually happening is, the mellotron is this instrument, where they've taken a recording of an actual flute and they take the tape of that recording. There's a keyboard and it mashes down the heads of a tape playing device. So that, when you press the key, it mashes down to that particular recording and it's pitched. So, they take one pitch of the flute that they've recorded, they pitch it up, a few notes. Maybe they take another recording of the flute up at a higher note and they pitch it for a few notes. So, it is a sampled flute, but it's actually, you're hearing the tape and that's kind of what gives it the warble and the interesting sound that it has. But you can create this flute choir all of a sudden just out of this keyboard.

Then, you go through, particularly in the eighties, when you start having – I guess late seventies too, you start having actual machines where you can put in a recorded sound and start manipulating it in different ways so that you can create a beat, or an effect, or some sort of, like I said, a musical gesture out of some clip.

Rusty Close:

So, I think especially in the late eighties, producers were starting to rely heavily on samples in the hip-hop world. So, the Dust Brothers, especially – I mean, this was sort of their sonic trademark, for lack of a better word, where they're taking bits and pieces from this wide array of genres, and music that they're familiar with. They're sort of this idea that these producers just have this encyclopedic knowledge of all the music that's out there. You can think of them as just having crates, and crates, and crates of records. They know them all inside and out, and they're pulling little bits of sound, underlying tracks, and putting it all together in this sort of new and interesting way.

That's really, when you listen to Paul's Boutique, that's kind of what it's known for, is sort of this sonic tapestry, this amalgamation of all these different existing sounds that they put together as this new kind of stitched together puzzle. Then, of course, the Beastie Boys rapping over these tracks that the Dust Brothers have put together. But what I've always heard is, there's sort of this notion of, well, you could never make Paul's Boutique today. The idea is that, something changed legally, whereas there was kind of this free market of sampling and using other people's music. Did you have to pay for it? Did you not have to pay for it? I think they say, "Did you clear the samples?" That's kind of the terminology that they used.

After Paul's Boutique, down the road, there's this sort of legendary or foundational case involving Biz Markie. I think most people who have heard of Biz Markie would be familiar with his song, *Just a Friend*, which I'd encourage anyone to go listen to. It always will improve your mood. But can you tell us about the sampling case that involved Biz Markie?

Austin Padgett:

Yes. So, let's take it back earlier to 1972, when Gilbert O'Sullivan releases a song called *Alone Again*. I think it has a parenthetical naturally, if I remember right. It's either that one or the Biz Markie has the parenthetical.

Rusty Close:

I think the naturally is in the Gilbert O'Sullivan track.

Austin Padgett:

I think that's right, yes. So, this song is released. If you haven't heard the song, it's a – what would you call it? Kind of a soft rock, soft pop song.

Rusty Close:

Definitely soft, soft, soft rock.

Austin Padgett:

Yes. So, think kind of like, if you're not familiar with Gilbert O'Sullivan, first of all, shame on you. You should celebrate the whole catalog. But think like Christopher Cross type of sound, but Gilbert O'Sullivan's, I think, a great songwriter. I mean, that song, it was a pretty big song at the time and I've definitely heard it through the years. I mean it has that soft pop sound, but if you listen to the lyrics, Gilbert O'Sullivan's doing a lot of heavy lifting. I mean, it involves suicide, and loss, and grief. It's a heavy song and it's a very interesting song.

A lot of his songwriting is like that where he'll deal with heavy topics or he'll have thematic elements, and weird twists, and takes on things. He's probably very underrated for where he ended up, kind of in the pantheon of that era. So, he releases this song, *Alone Again*, parenthetical naturally. Biz Markie takes the opening – the opening of the song is this kind of piano riff that kind of has this kind of chordal wandering a little bit and goes through this progression. And Biz Markie takes that and sets that as a loop and raps over it in kind of Biz Markie's style, that it's comedic. When he gets to the chorus, he sings *Alone Again Naturally*. That's the chorus to it.

The sampling isn't much more than that. I don't have the stems or anything to analyze them, but it doesn't sound like there's a lot of manipulation. or clipping. or cutting, anything like that. I think it's even in the same key. So, it's pretty straightforward, that he created a loop out of the opening to this song and wrote his own song that he rapped with the same title basically. And the chorus shares the same kind of words that are shared in the chorus of the Gilbert O'Sullivan tune.

Gilbert O'Sullivan sues Biz Markie and it erupts into an interesting decision that's kind of well-known for its opening line, which is, "Thou shalt not steal." I think in the background of the case, Biz Markie had tried to clear this with Gilbert O'Sullivan. They had some level of discussion, it

sounds like. I don't know if that's ever been part of the case record deep into it. But from my understanding, there was some sort of clearance, and Gilbert O'Sullivan ultimately said no. It might have to do with contrasting what Biz Markie is doing compared to what Gilbert O'Sullivan's song is about and the heavy themes of it, or it just might be that he didn't like the song. It could be a lot of things. I don't actually have – and there may be some sort of article or something from an interview. I just haven't gone that deep into it.

Ultimately, they said, "No." The judge says, "You can't do this. Thou shalt not steal." At the heart of the case is a question of, "Well, I only took the intro and the opening few measures, created a loop out of it." But the judge says, "Basically, any taking like that is a taking, and you shouldn't have done it without permission. Therefore, no." Biz Markie, if I recall it right, has to take his records off the shelves. Like at the end of the case, I believe there's this discussion where the judge is going to refer the case for potential criminal inquiries, which is fairly unusual. But you start off with thou shalt not steal, and you start heading to criminal court makes it pretty interesting.

Rusty Close:

Yes. I mean, that one really jumps off the page when you see that it was going to be referred for criminal proceeding. But I think, you hit all the points that I'm familiar with, which was, there were at least some discussions about trying to clear the sample, get authorization to use it. Then, they didn't get it. They just used it anyway. They put the record out, and ultimately, there was an injunction filed, and I think they had to pull them off the shelf because of this now rule of thou shall not steal. So, using a sample without authorization is just a binary decision. It doesn't matter that you only took a part of it, or that you made a loop of it, or whatever. You can't do it. So, my understanding is that sort of sets the framework for going forward, what can artists and producers do when it comes to sampling? Does that sound right?

Austin Padgett:

I think so. There's a later case, the 2 Live Crew case, where the use of a song is used as the court says in a satirical or in a parody way, that was not an issue in the Biz Markie decision. So, there's still some open questions as to what you can do with first amendment types of protections and other types of considerations. I also think that you also have this question of, there's Paul's Boutique, and the tracks on that album, which have that Dust Brothers flair, the layered, it's a quilt of samples where you're using samples instrumentally almost. They speak in their own way musically. Down to what Biz Markie was doing in this particular case, which isn't very complicated as far as sampling goes.

Whether the complications of a sample should matter is probably an open question to some. For this judge, it was not, clearly, that this was a simple taking. You just created a loop, there wasn't much else done, and then you wrapped over it, and probably, it didn't help that you called this song the same name, and used it in the chorus, those sorts of things. But I think there's still some open questions after this as to what creates a fair - you really get into fair use type of territory of, if I'm using certain clips or certain examples in different ways, can I do them in a way where I'm preserving my ability to do so under fair use of the copyright act? Where Biz Markie, that case really didn't get into it.

Rusty Close:

Obviously, that case came after Paul's Boutique. I think the facts of the case are kind of simple enough where it's this very obvious piano loop. The names of the songs are similar. You can put it in front of a judge, and there's not a lot of explaining that you have to do. You can almost imagine that if you played one of the songs off of Paul's Boutique, and you had some plaintiff that was going, "No, no, listen real close. Listen real close. Okay, there's my part." Under all of this different layering and all of this mixing together of sounds, if the judge takes a different approach and says, "Well, wait a minute. That's a different altogether situation, but that's not the facts we have, and that's not what we have to work with." There's this notion of; you mentioned fair use. What about this notion of de minimis use? Is that similar or are those different concepts?

Austin Padgett:

They're different concepts, and that the de minimis is basically the court is saying, "What's the big deal here? There's so little use that it's not an actual taking from a copyright perspective." It's also tough too because you're in the same field. You're one musician and you're taking from another musician. I think a lot of comparisons are a little easier when you're taking something and using it for a different purpose. You're kind of at a higher level so that, you know, if for some sort of different, you're taking pages out of a book and you're creating some sort of physical artwork with the words. Where it's kind of like, well, the words don't really matter as much as the de minimis taking in some way. That's not a perfect example. But if it's, you took one, half-second or a millisecond of a clip, and somehow you were able to even identify that that came from you, who cares? It's such a small taking that we're not going to burden the court system with that type of thing, because it's not an actionable type of offense.

Rusty Close:

It would be almost hard for the hypothetical plaintiff in that situation to show, how have you been harmed, what are your damages, that kind of thing. I mean, there's no, from what I can gather, there's no real hard definitive count of how many samples were even used in Paul's Boutique because of the layering and things being buried in the mix. So, the Dust Brothers know that they're there, they put it together. But just trying to listen to it, and pull it apart, and identify them all separately. I've seen estimates ranging from 150 samples to 300 samples.

Again, if you look at the Biz Markie case, it's a lot easier to point.

Austin Padgett:

It's a one song.

Rusty Close:

It's a lot more straightforward.

Austin Padgett:

Yes. I don't know if you ever heard this old undergrad joke, if you steal from one person, it's plagiarism. If you steal from many, it's research. But there's a lot to be said about that, that we're going to view that type of Dust Brothers layering with a lens of more sophistication. Whether that's true or not, I think you could find a way to take from one thing, and use it in a way that is still a level of genius, or in holding a high regard. It just wasn't with the Biz Markie song.

Rusty Close:

There's also, to me, this idea of, okay, in that time period, late eighties where producers like the Dust Brothers, it was almost sort of, you can imagine this cultural cachet in being able to say, going back to this idea of, "I've got such encyclopedic knowledge of music and records that I can put this together." Because you could just produce the sounds on your own, you could hire musicians to make these sounds, and you could reproduce. Now again, they're cutting in clips from TV shows. I mean, they're doing a lot of different stuff.

I think about like the early Dungeon Family albums, and Organized Noise being the producers on those. They weren't using samples. They were using them selectively, but primarily, they were using live instruments and synthesizers. I don't know if that's just a stylistic choice, if it was a practical choice, knowing that – I mean, those albums were a little bit later, and knowing – we don't have the money to clear these samples anyway, we're going to do this a different way. But I don't think as the times shifted, their thought of as having less artistic merit, it's just sort of the climate change, and people started doing things a different way.

Austin Padgett:

Yes. It might be just kind of genre camps that, when you think about found art, like Marcel Duchamp, like what makes him signing a urinal art. But sampling is kind of that type of found art type of thing of that. I found this object and I'm going to put it into a different context or do something different with it. That gets to the fair use aspect of it. Whether what you do is enough to transform the use into something that's fair. Have you created work? Are you contributing to the dialogue of society and those types of things that come into play.

Rusty Close:

Well, when we did our episode about cover songs, and there was kind of this formulaic approach to if you want to cover a song, there's a royalty rate that you pay based on the length of the song, and it's just sort of a math equation. Is there anything similar when it comes to sampling or are you negotiating with each rights holder individually?

Austin Padgett:

Yes, it's going to be the wild west of property valuation that – because unlike the cover songs, remember that there are two copyrights in music. There's the recording and then there's the underlying song, thinking of it like sheet music. So, for a cover song, you just need that sheet music, and that's what you are able to just go get. The master itself, the master recording is

different and it doesn't have that type of licensing scheme around it under the Copyright Act. So, when you're sampling, that's what you need that master recording to. So, that's what that issue. And so, you've got to go – separately negotiate how you're going to get that license and that clip of what you need, and you're going to have to provide information of how much of it you're taking, what you're using it for, what's your expected number of releases, all that sort of stuff.

Rusty Close:

So, I expect I know the answer, but is there sort of a cottage industry around those transactions?

Austin Padgett:

Well, I mean, they're anticipated now. So the rights holders, like the major labels that hold the rights to the master recordings that you would need, certainly have forms available, so that they can price them out accordingly. When we were talking about the covers, there was this middleman type of organization called Harry Fox, which was facilitating all this stuff. To my knowledge, there's not that type of kind of singular or major institution, where you can just go and get all of your samples. There are companies that will sell you, what are called stems, which are portions of recordings that you can use. But they're far and flung between, their competitors. Some of them will hold the rights to the stems of kind of big songs. So that if you needed that little piano riff, you can get the stem of that, so that it's already isolated for you to be able to use as a sample.

To answer your question in a way, yes, there is a cottage industry, in that, people are trying to get more realized monetary exchanges out of these things.

Rusty Close:

Yes, but it always makes – so, you talked about if you need to get this little piano riff, you can go get this stem. But if we think about Gilbert O'Sullivan and Biz Markie, he wanted to use this specific chord progression. Is there any reason he couldn't have just had someone come in, play it live, and record it?

Austin Padgett:

Yes. Well, then you're talking about, okay, you're copying – if they go to this piano player and say, "I want you to play the opening of the Gilbert O'Sullivan song, and we're going to take that, and sample it. No longer do you need a license to Gilbert O'Sullivan's recording.

Rusty Close:

To the master.

Austin Padgett:

Right. But that underlying, you're no longer doing a cover. So, you're not going to be able to get that statutory mandated license to the underlying composition. So, you're still going to have a problem, even then, I think particularly at that level of a taking, that you're taking like four full bars of not intricate piano playing, but widely known, you're copying it.

Rusty Close:

It's clear and recognizable. It's not a little snippet. Yes. So, you would still have something you needed to deal with, it would just be a different thing you needed to deal with.

Austin Padgett:

Right. That's right.

Rusty Close:

So, if we think about our original question, could you make Paul's Boutique today? I mean, I think the answer is, you could. Now, there's a framework in place for all of the samples that you would need to clear. So, in theory, you could, it would just be the logistics of could you get all of the rights, pay all of the money, do all of the things that you needed to do?

Austin Padgett:

Or, will you have some attorney who's willing to take the risk, creative risk with you, to say, "You know what, we're going to defend this, because let's document how we made this, what our intentions were in using all these different clips and samples to create this separate work product that we're making." Because if someone approaches me with this project, I'm going to tell them, one, it's going to take forever, and a small fortune to get all these licenses, if we're talking that level. So, why don't we think about, maybe, we take even more. Because taking from one person is plagiarism, and taking from several is research. Let's make this into your magnum opus. It's going to be your Pet Sounds type of album of that type of, if you're going to go, go the whole way with it.

It sounds unethical. But perhaps, the more you take, the less risk you actually have, because you have this argument that this is actually a work of pure genius.

Rusty Close:

Right. I mean, that makes perfect sense to me. We've already done episodes on re-recording albums, so we've kind of laid the groundwork for that. So maybe, we're setting it up to re-record Paul's Boutique. Now, unfortunately, you know, MCA has passed away, but we still have Mike D and Ad-Rock. Maybe we can use MCA's existing tracks and convince them to re-record Paul's Boutique, and then we'll run this thing to the Supreme Court. We'll set the new framework.

Austin Padgett:

Yes. Or listen, I think with the kind of the legendary status of Paul's Boutique, that you could set up a framework where you say, "This doesn't look like the Biz Markie case. This looks like Paul's Boutique," which is well regarded by critics and the public alike as being a work of important stature, and a cultural shift, and those sorts of ideas. I think there's room enough and you have enough artists who are known for this type of concept that we use samples in a strategic and culturally relevant way that part of using the sample is the message that I'm sending by my selection of samples. But I think it has to be, it has to look more like Paul's Boutique than it does the *Alone Again* case.

If you set up that spectrum, I think that's where you say, I'm going to take a risk and I'm going to say, granted I've got 300 rights holders, any one of them can come after me because of a two second sample that I used in a couple of different ways on a track. I'm going to accept that risk as many of those as I'm inviting, because the arguments I have are so enhanced by the fact that the way I've done this, and it makes it look like more like I've done this with great intention, rather than just taking this, looped it around and wrapped over it.

Rusty Close:

I like it. I think we need to – we'll get our people and have them start reaching out to the living members of the Beastie Boys and see if we can make this happen.

Austin Padgett:

Yes. I mean, it's kind of the question of, it's like, particularly in the film space of, you need an insurance policy to get distribution a lot of times. So, who will cut the policy on it, particularly when, like in documentaries, when there's an issue of maybe a defamation potential claim, or you might have some issues of, there's a relatively famous case brought by Yoko Ono, where there's a use of *Imagine* behind a film. The use of *Imagine* is kind of – not kind of, it is in an ironic sense that they're kind of showing how that generation and that thought pattern kind of failed, and the clips that they're showing over it are anything but what you normally associate with *Imagine*. There was a lawsuit over it. It's that kind of, what are we doing that's interesting and will my legal representative take the risk with me and help me create something that's defensible and still a work of art?

Rusty Close:

I like it. We're here for it. That's a very maybe new area of specialty insurance. So, I think you're really thinking outside the box.

Austin Padgett:

Right. There's a great practitioner out in LA. He's a great guy. That's kind of his – he's the guy for that store stuff and film.

Rusty Close:

Well, interesting. Well, I hope we learned something today. Interesting for me to talk about and think through this situation. So, I appreciate it.

Austin Padgett:

Absolutely. Thanks to everyone here for listening. While you're at it, just be sure to like and subscribe. And if you would, a five-star rating would be great. Help everyone know what we're up to here at *No Infringement Intended*.

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