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## Documentary Producers Super Bowl Shuffle their Way out of Copyright Infringement

### *Red Label Music Publishing Inc., et al., v. Chila Productions, et al.,*

By: Francyn Brown and Barry Irwin | June 7, 2019

To native Chicagoans, the *Super Bowl Shuffle* is revered as the hype song for the 1985 Chicago Bears who went on to win Super Bowl XX. But to the Plaintiffs in *Red Label Music Publishing Inc., et al., v. Chila Productions, et al.*,<sup>1</sup> the *Super Bowl Shuffle* is their own original and artistic expression protected by the copyright laws of the United States. Even still, the Honorable Virginia M. Kendall held that Defendants' use of the *Super Bowl Shuffle* in a documentary about the 1985 Chicago Bears was a fair use which precluded finding copyright infringement.

This case reinforces the idea that a work that purports to comment on society or provide factual commentary on history is constitutionally protected speech, even if it incorporates some aspect of a copyrighted work.

Plaintiffs, Red Label Music Publishing Inc. ("Red Label") brought an action for copyright infringement against Chila Productions ("Chila") — the producer of a documentary entitled "'85: The Greatest Team in Football History," which was released in 2016. Chila used portions of Plaintiffs' copyrighted work, the *Super Bowl Shuffle*, as part of the documentary to comment on the *Super Bowl Shuffle*'s role in the Bears' winning season. The Court notes at numerous points throughout the opinion that Defendants only used eight seconds of the *Super Bowl Shuffle* in the documentary, and only four of those seconds included the lyrics. The Court highlights the significance of this through its analysis of the four fair use factors.

The Court applied the statutory test of fair use, considering four factors: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>2</sup>

In the Court's assessment of the first factor, it explained that the purpose and character of the documentary is to comment on the sport-social phenomenon that was the 1985 Chicago Bears. This kind of historical commentary, the Court explained, added something new to the original music video and differed from the work's original purpose. Further, the Court found that the inclusion of the *Super Bowl Shuffle* in the documentary served almost no expressive function at all, instead acting simply as a historical guidepost within the video and therefore the first factor weighed in favor of fair use.

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<sup>1</sup> *Red Label Music Publishing Inc., et al., v. Chila Productions, et al.*, Case No. 18-7525, (N.D. Ill. May 30, 2019).

<sup>2</sup> *Id.* at 11 (citing 17 U.S.C. § 107).

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The Court proceeded to weigh each of the next three factors—finding that factors two and four were neutral, while one and three weighed in favor of finding fair use. Taken together, the Court concluded that the Defendants’ use of *Super Bowl Shuffle* in the documentary was a fair use of the Plaintiffs’ copyrights. Interestingly, the Court stated that the fourth factor is usually the most important of the four and in this case, it found this factor neutral while still concluding that Defendants’ use was a fair use.

The opinion concludes by explaining the purpose of the fair use doctrine: “[i]n passing the Copyright Act, Congress never intended to ‘discourage the makers of all sorts of *historical documentaries and displays*,’ or ‘deplete society’s fund of *informative speech*.’”<sup>3</sup> This explanation further instructs that secondary works purporting to disseminate historical information be protected, for removing these protections has “inevitable chilling effects of allowing an artist too much control.”<sup>4</sup>

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<sup>3</sup> *Id.* at 23 (quoting *Bouchat v. Baltimore Ravens Ltd. P’ship*, 737 F.3d 932, 949 (4th Cir. 2013) (emphasis added)).

<sup>4</sup> *Id.*