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Digital Music Sampling & Copyright Law: Can the Interests of Copyright Owners and Sampling Artists Be Reconciled?

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*Digital Music Sampling & Copyright Law: Can the Interests of Copyright Owners
and Sampling Artists Be Reconciled?*

DIGITAL MUSIC SAMPLING & COPYRIGHT LAW:
CAN THE INTERESTS OF COPYRIGHT OWNERS AND SAMPLING ARTISTS BE RECONCILED?

Copyright law governing digital music sampling is faced with two competing interests: (1) owners of recording and composition copyrights need to be reasonably compensated when their creative works are re-used by sampling artists, but (2) sampling artists should have a reasonable degree of freedom to rework fragments of existing recordings at a reasonable cost. A system is needed that balances these interests and that reduces the degree of uncertainty that arises whenever a sample gets used that infringes a copyright. This Essay will discuss the current state of the law as it relates to digital sampling and will proceed to articulate five goals that this Author believes should be taken into account by any proposed solution to the sampling problem. It will then discuss the various proposed solutions, evaluating each one's strengths and weaknesses with respect to the five goals, and ultimately conclude that compulsory license schemes are best suited to solving or at least minimizing the problem.

I

Description of Sampling and Current State of the Law

Sampling has become very common in modern popular music, particularly in the genres of rap, hip-hop, electronic dance music, as well as rock. The technique extracts fragments from existing recordings and incorporates them into new musical works, manipulating their melodic, harmonic, rhythmic, or vocal characteristics in various ways. The process offers infinite possibilities in terms of refashioning the raw material and "looping," a technique whereby a single sample is repeated continually for an extended period.

Current copyright infringement tests relevant to sampling are vague, making it difficult for sampling artists to know where the boundaries are. Additionally, purchasing the appropriate

licenses can be overly expensive, depending on the extent of the re-use and the cooperativeness of the copyright holders. This situation can result in diminished musical creativity due to prohibitive costs, or worse, copyright holders who just don't get paid.¹

The current procedure for obtaining licenses involves considerable administrative (time) and financial costs.² In general, licenses must be acquired for use of both the sound recording (typically owned by the record company) and the notated form of the musical composition (typically owned by a publishing house or the composer).³ Recording licenses are most often purchased via a flat fee or royalty arrangement.⁴ Flat fees range from \$100 to over \$10,000, while royalties to recording owners range from between half a cent to three cents for every copy of the track sold.⁵ Musical composition licenses typically give "the copyright holder a percentage ownership in the new work's musical composition copyright," as well as an advance of a few thousand dollars on the expected publishing income.⁶ Often, 15% of the new work's musical composition copyright might be assigned to the original work's author, and if the sample is looped and used repeatedly, the percentage could increase to 66%.⁷

For sampling artists who decline to pay for these licenses, there are currently two defenses: de minimis and fair use. The strongest defense for sampling artists is the de minimis doctrine, which argues that the re-use is ultimately trivial use that does not amount to infringement.⁸ However, the test for determining "trivial use" is exceedingly vague. Courts attempt to determine whether an "ordinary lay listener" would find a "substantial similarity" between the pre-existing recording and the new work,⁹ or whether the "quantitative or qualitative" appropriation of elements of the original recording are significant.¹⁰ Fair use, on the other hand, is a defense based on the idea that some unlicensed uses of copyrighted works are justified because they serve a desired social purpose (i.e. criticism, commentary, etc.).¹¹ As a

defense in sampling cases, fair use has generally only been successful for new musical works that parody pre-existing recorded works.¹²

These defenses, however, have been threatened by a recent Sixth Circuit ruling. In *Bridgeport Music Inc. v. Dimension Films*, the court articulated a new, bright-line test whereby *any* unlicensed copying of a sound recording, no matter how minor, constitutes infringement.¹³ The court reasoned that, because 17 U.S.C. § 114(b) gives a sound recording copyright holder the exclusive right “to duplicate the sound recording,” any duplication whatsoever amounts to infringement.¹⁴ If this decision were applied nationwide, both the de minimis and fair use defenses would no longer apply in the context of sound recordings. As such, this decision is unworkable and completely fails to balance the competing interests of copyright holders and sampling artists.

II

Goals for Any Proposed Solution

The Constitution is clear regarding the purpose of copyright law: it should “promote the Progress of Science and the useful Arts.”¹⁵ In other words, copyright law should encourage creativity.¹⁶ However, as discussed above, the current state of the law tends to discourage the creativity of sampling artists. The problem remains: how can we balance fair compensation for copyright holders without inhibiting the development of sampled music genres?

This Author proposes that any potential solution to the sampling copyright problem should aim to achieve five goals. The solution should: (1) set clear, predictable boundaries for sampling artists, (2) keep costs reasonable for sampling artists, (3) minimize litigation as the means to settle infringement questions, (4) minimize the difficulties involved in negotiating licenses, and (5) provide adequate economic benefits for copyright holders (so that they will have an incentive to produce new works). The first four goals tend to encourage the creativity of

sampling artists, while the fifth goal encourages creativity among composers of new music that does not incorporate samples. Additionally, goals three and four would reduce administrative and enforcement costs for copyright holders.¹⁷

III Alternatives to Current Tests

The following alternatives have been proposed by various commentators as means to solve the sampling problem: Compulsory Licensing, Voluntary Structured Negotiation, the Economic Approach, the Pattern-Oriented Approach, and Educational Use.

A. Compulsory Licensing

Compulsory license schemes for samples would be based on the current compulsory mechanical license for the recording of “cover songs,” or new versions of existing songs. When an artist covers a song, they must purchase a compulsory mechanical license from the copyright holder pursuant to Section 115 of the Copyright Act.¹⁸ The current rate is 8.5 cents (or 1.65 cents per minute) paid to the original work’s publisher for every copy of the track sold.¹⁹

A fair licensing scheme for samples would need to take into account the length and substantiality of the fragment sampled in determining the appropriate rate.²⁰ At least two different means have been proposed to vary the compulsory license fees according to the substantiality of the re-use: (1) Charles E. Maier’s approach and (2) Josh Norek’s approach.²¹

Maier divides the spectrum of re-uses into three categories.²² The first category, “*Substantial Violations*” (i.e. the new work is more “imitative” than “transformative”), would require payment of the same rate that applies for cover songs. The second category, *De Minimis* and “*Transformative*” Uses, would require no fee payment. For the majority of cases, those in

between the above two categories, payment of only a portion of the current compulsory license fee would be required (i.e. 50%).

Norek also proposes three basic subdivisions for varying compulsory license fees according to the substantiality of the re-use.²³ First, “*Qualitatively Insignificant Samples*” (i.e. someone familiar with the original work would not easily identify or recognize the source of the sample without having been told of its source) and “*Qualitatively Significant Samples of Three Seconds or Less Used Only Once*” would require no payment. Second, a “*Qualitatively Significant Sample of Three Seconds or Less That Is Looped and Occurs Repeatedly*” would require payment of only a portion of the current compulsory license fee; Norek suggests two cents for every copy sold. Finally, “*Qualitatively Significant Samples Greater Than Three Seconds*” would continue to require “negotiation and clearance of both the sound recording and the musical composition, as per current music industry practice.”²⁴

These Compulsory Licensing schemes would, for the most part, achieve the five goals set forth in Section II above. Copyright holders would be adequately compensated, sampling artists would pay reasonable licensing fees tailored to the substantiality of their re-uses, and negotiation time would generally be minimized. Norek’s proposal would eliminate a considerable portion of the work of negotiating licenses, at least for the majority of samples that are three seconds or less in length. Maier’s approach would largely eliminate the need for negotiation, provided that sampling artists and copyright holders could agree on which of the three categories applied in any given case.

To some extent, however, these proposals fail to entirely eliminate the need for litigation and do not achieve complete clarity in defining the boundaries to sampling artists. For instance, in Norek’s proposal, “*Qualitatively Significant Samples Greater Than Three Seconds*” would

still be negotiated as per current music industry practice. There is also the potentially tricky matter of determining when a sample is “*Qualitatively Insignificant*.” Under Maier’s proposal, substantial re-uses would be charged at the cover song rate, de minimis uses would be free, and most cases in between would require payment of half the cover song rate. Maier assumes that the extent of sampling in the majority of new works would fall somewhere between de minimis and substantial re-use. However, many of the same problems might inevitably arise because the boundaries between categories remain unclear and litigation would probably be needed to resolve infringement questions.

B. Voluntary Structured Negotiation

Jason H. Marcus argues that institution of a compulsory licensing system for samples would be impractical and premature because it “would require absolute cooperation of all in the music industry, and may need to be statutory in order to be implemented.”²⁵ Instead, he supports a “voluntary scheme, which, if effective over an extended period of time, could then be reported to Congress and the Copyright Office with the goal of possibly amending the Copyright Act to apply to digital sampling.”²⁶

The Voluntary Negotiation approach proposed by Marcus involves a licensing system based on good faith and fair dealing whereby artists negotiate with copyright holders in a predictable, established manner.²⁷ Record companies and sampling artists would have general guidelines to follow during negotiations relating to reasonable pricing expectations and the negotiation process itself. Apparently, the record industry and musicians unions could work together to establish the guidelines. The goal would be to avoid litigation and to balance fair financial rewards for sampled artists and artistic freedom for sampling artists.²⁸

Sampling artists or their representatives would first attempt to obtain clearances

without payment for all samples used. Then, the parties would negotiate payment schedules for the remaining samples at fair and reasonable rates, taking into consideration various factors specific to each situation, including the substantiality of the re-use and “whether the use is offensive to the holder of the copyright.”²⁹

Some obvious problems with the Voluntary Structured Negotiation approach are that there is no guarantee of fair dealing and all the players in the industry may not be willing to go along with the guidelines. If copyright owners choose not to follow the guidelines, then a chain reaction of negative consequences could result. Sampling artists might face unreasonably high costs, extensive negotiations and litigation could follow, and the ideal of clear boundaries for sampling artists by way of the guidelines would become meaningless.

In theory, this approach minimizes the difficulty of negotiating licenses because the parties can follow general negotiation guidelines. However, unless definitive guidelines become established and widely practiced throughout the industry, this approach may not drastically reduce the significant administrative (time) and financial costs associated with the current system.

C. Economic Approach

David S. Blessing has formulated an approach that weighs the various costs to copyright holders and sampling artists. The social costs of copyright protection involve two major categories: (1) access costs and (2) administrative and enforcement costs.³⁰ Access costs fall on both consumers and sampling artists. Consumers who value the work at less than its price won't pay for it and are denied access. Likewise, access costs fall on sampling artists “who are deterred from building upon prior works because they are unwilling to pay the price the

copyright holder demands.”³¹ Thus, access costs generally discourage the creation of new works that incorporate samples.

Administrative and enforcement costs include the “costs of excluding trespassers, and apprehending and sanctioning violators,” as well as the costs of setting up the boundaries of what constitutes permissible re-use of a work.³² From an artist’s perspective, enforcement costs are a necessary evil because some degree of copyright protection is needed in order to create economic incentives for the creation of original works. However, an artist’s incentive to protect works via copyright only goes so far: if enforcement costs are too high, then it may not be practical to protect certain elements of the artist’s work (i.e. de minimis elements).

A proper infringement test would keep both access costs and enforcement costs low. Thus, this kind of economic approach “allows unauthorized borrowing in numerous circumstances that in turn promote artistic innovation.”³³ Blessing suggests the following as guiding questions: Did the original artist contemplate that portions of his work would be extracted, and did this discourage his creative effort? Does the sampling artist’s reuse of the extraction tend to discourage other artists from composing original works?³⁴ If the answer is no, then the reuse is trivial, or de minimis.

The Economic Approach attempts to be objective and take into account all of the subtle economic factors affecting copyright owners and sampling artists. However, the approach is flawed because, as Blessing himself notes, it “is too ambiguous and requires an ad hoc analysis.”³⁵ Thus, the proposal does not aid in setting clear, predictable boundaries for sampling artists. It is not likely that negotiation time or the need for litigation would be reduced by this approach. Moreover, it seems unlikely to this Author that the practices of sampling artists would

ever deter other artists from composing original works. Hence, Blessing's plan may disproportionately benefit sampling artists while leaving copyright holders under-compensated.

D. Pattern-Oriented Approach

Professor Michael J. Madison argues that courts should consider social and cultural patterns in assessing the merits of a fair use defense.³⁶ Specifically, Madison accepts as fair any form of re-use that "falls within the boundaries of a recognized social or cultural pattern."³⁷

Patterns are social and cultural structures "that involve relatively stable sets of beliefs and practices grouped around individuals, institutions, and (often) goals."³⁸ However, not just any pattern would be sufficient: "the decided cases suggest that the pattern should have a pedigree of tradition and history such that the practices embedded in the pattern are characteristically recognized as 'creative' or at least tending to promote some sort of 'progress' that does not depend on the market economy."³⁹ These kinds of patterns would be more legitimately valued by reason of their documented presence in society.

The Copyright Act already recognizes a list of such patterns as fair-use: "criticism, comment, news reporting, teaching . . . scholarship, or research."⁴⁰ The phenomenon of sampling could also be considered a legitimate cultural pattern justifying application of the fair use defense whenever it occurs.

Although Madison's approach has promise as a legitimate basis for the fair use defense, it does not offer any clear answers to the problem of establishing the boundaries of permissible, non-licensed sampling. Professor Madison suggests that, if sampling is accepted as a socially-recognizable pattern, then virtually any kind of sampling could be considered fair use. This result fails to acknowledge the copyright holder's need to be adequately compensated for the use of his/her works. Without a doubt, sampling artists would be pleased if this approach were to

gain a foothold because they would no longer have to negotiate or pay for licenses or face copyright holders in court. But that result would be fundamentally unfair to copyright holders who deserve some kind of compensation for their creative contributions.

E. Educational Use

Evans C. Anyanwu argues that rap music “is mainly social commentary providing the world with a useful and artistic depiction of life in the Black community.”⁴¹ In his view, the informative and educational value of rap justifies the protection of most sampling as fair use under the Copyright Act.⁴² He supports his position with a report by education professors in The English Journal, which states that “[h]ip-hop can be used as a bridge linking the seemingly vast span between the streets and the world of Academics.”⁴³ Rap music and sampling, he says, should be encouraged because of their potential for “enriching a poor and undereducated segment of [African] Americans.”⁴⁴

Like the Pattern-Oriented Approach, Anyanwu’s proposal is flawed because it refuses to acknowledge the interests of copyright holders who desire compensation for their original, creative works. Anyanwu doesn’t even try to balance the competing interests of copyright holders and sampling artists, rejecting the former interest as somehow violative of human rights and/or progressive values. Therefore, his approach is impractical and fundamentally unsound.

IV Conclusion

Each of these alternative proposals would achieve some of the goals discussed above in Section II, but it seems that none of these approaches would fully achieve them all. The Pattern-Oriented, Educational Use, and Economic approaches seem to disproportionately benefit sampling artists while leaving copyright holders largely uncompensated. On the other hand, the

Voluntary Structured Negotiation approach has limited potential because it does not radically differ from the present system. Ultimately, the Compulsory Licensing schemes come closest to achieving the five goals.

Although Compulsory Licensing schemes do not completely eliminate all of the uncertainties involved in sampling infringement questions, they nevertheless seem preferable to the other alternatives because they generally offer more clearly defined boundaries for sampling artists, thereby minimizing the need for litigation and ad-hoc determinations. No other proposal even comes close to matching the potential of compulsory licenses in minimizing the difficulty of negotiating the terms of licenses, while satisfying the economic interests of both copyright holders and sampling artists. And in the end, the solution that balances the financial requirements of these parties, while minimizing the extent of their interactions, is probably the best one.

ENDNOTES

⁴¹ Carlos Ruiz de la Torre received his B.M. in Piano Performance, 2000, and M.M. in Jazz Studies, 2002, from Indiana University. He is currently a second-year student at the University of New Mexico School of Law.

¹ Moreover, by discouraging the growth of sampling, the current law tends to interrupt a long tradition of musical borrowing practices in various genres that includes the reworking of songs by contemporaneous artists in American folk music, classical composers' practice of composing variation forms based on existing themes, and the quoting from others' tunes in the context of jazz improvisation.

² Oftentimes, copyright holders will agree to give permission free of charge for the re-use of relatively insignificant, trivial samples, thus bypassing the current licensing procedures. See Michael L. Baroni, *A Pirate's Palette: The Dilemmas of Digital Sound Sampling and a Proposed Compulsory License Solution*, 11 U. MIAMI ENT. & SPORTS L. REV. 65, 99 (2004); Jason H. Marcus, *Don't Stop That Funky Beat: The Essentiality of Digital Sampling to Rap Music*, 13 HASTINGS COMM. & ENT. L.J. 767, 787 (1991). However, free permission may not always be granted as this depends on the cooperativeness of the copyright owners.

³ Michael Ashburne, an attorney in Oakland, California, and author of the book, *Sampling in the Record Industry*, indicates that sampling artists can bypass the purchase of licenses if they legally mimic the sounds themselves by re-recording with studio musicians the content of the sample they want to use. See Steve Seidenberg, *A Few Notes Play a Wrongful Tune: Court Comes Down on Unlawful 'Sampling' in Rap Song*, 3 A.B.A. J. 2 (September 17, 2004).

⁴ Baroni, *supra* note 2, at 91.

⁵ *Id.*

⁶ Josh Norek, "You Can't Sing Without the Bling": *The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need For a Compulsory Sound Recording Sample License System*, 11 UCLA ENT. L. REV. 83, 90 (2004).

⁷ *Id.*

⁸ David S. Blessing, *Who Speaks Latin Anymore?: Translating De Minimis Use for Application to Music Copyright Infringement and Sampling*, 45 WM. & MARY L. REV. 2399, 2408-10 (2004).

⁹ *Newton v. Diamond*, 204 F. Supp. 2d 1244 (C.D. Cal. 2002), *aff'd*, 349 F.3d 591 (9th Cir. 2003); *McDonald v. Multimedia Entertainment, Inc.*, 1991 U.S. Dist. LEXIS 10649; No. 90 Civ. 6356 (S.D.N.Y. Jul. 19, 1991); see also *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70 (2d Cir. 1997); *Sandoval v. New Line Cinema Corp.*, 47 F.3d 215 (2d Cir. 1998).

¹⁰ *Jarvis v. A&M Records*, 827 F. Supp. 282 (D.N.J. 1993).

¹¹ Evans C. Anyanwu, *Let's Keep It on the Download: Why the Educational Use Factor of the Fair Use Exception Should Shield Rap Music From Infringement Claims*, 30 RUTGERS COMPUTER & TECH. L.J. 179, 185-86 (2004).

¹² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

¹³ Nos. 02-6521, 03-5738 (6th Cir. Sept. 7, 2004), available at <http://fsnews.findlaw.com/cases/6th/04a0297p.html> (last visited Dec. 1, 2004); see also Seidenberg, *supra* note 3.

¹⁴ Under 17 USC § 114(b), recording copyright holders are only given the right "to duplicate the sound recording," whereas other tangible forms of expression like books, movies and musical compositions enjoy a broader range of copyright protection from reproduction or imitation of significant aspects of the works, such as copying a plot, memorable characters, or a melody. *Bridgeport Music, Inc.*, Nos. 02-6521, 03-5738. Indeed, "[t]he world at large is free to imitate or simulate" recordings, Judge Ralph Guy, Jr. wrote. *Id.* The Court was persuaded that this narrower scope of protection only from unauthorized duplication of the recording required that exceptions such as *de minimis* and fair use should not be applied. *Id.*

¹⁵ Blessing, *supra* note 8, at 2406.

¹⁶ Though copyrights are designed to reward creators, the Constitution indicates that copyrights ultimately seek to encourage the public benefits that come from the public's exposure and access to culturally enriching artistic activity. *Id.*

¹⁷ Baroni points out that "catching sampling can be an unproductive, time-wasting chore" for many music publishers and record companies who must direct their employees to listen to new pop music albums for samples that may infringe on the company's rights. Baroni, *supra* note 2, at 92.

¹⁸ 17 U.S.C. § 115 (2002).

¹⁹ COPYRIGHT ARBITRATION ROYALTY PANEL (CARP), COPYRIGHT ROYALTY RATES, SECTION 115, available at <http://www.copyright.gov/carp/m200a.html> (last visited Dec. 1, 2004).

²⁰ A critical issue is determining who gets paid. Although the common music industry practice is for sampling artists to obtain both the recording and composition copyrights, Baroni believes that a compulsory license system for

samples should compensate only the owner of the recording, not the owner of the underlying composition. Baroni, *supra* note 2, at 97-98. He argues that most samples do not sufficiently infringe upon compositions and that composition owners should have no claim regarding the duplication of elements of sound recordings because copyrights in recordings and compositions are fundamentally distinct. *Id.* On the other hand, this failure to compensate composition copyright holders is potentially problematic in that it ignores the economic interests of composition owners. It should be possible to devise a compulsory licensing system for samples that would offer some compensation to the composition owner, albeit a smaller royalty than that earned by the recording copyright holder.

²¹ Yet another approach has been proposed by Baroni, *supra* note 2, at 96-97. Baroni advises that the fee should ultimately be determined by the Copyright Royalty Tribunal, but suggests a flat rate of 0.25 cents (1/4 cent) for each copy of a track sold for samples one second or less in duration, and an additional cent for each additional second extracted from the original. The fee would be the same even if the sample is looped repeatedly throughout the new work, thus posing a potential problem for copyright holders who may argue that the compensation is not sufficient.

²² Charles E. Maier, *A Sample for the Pay Keeps the Lawyers Away: A Proposed Solution for Artists Who Sample and Artists Who Are Sampled*, 5 VAND. J. ENT. L. & PRAC. 100, 101-02 (2003).

²³ Norek, *supra* note 6, at 92-93.

²⁴ *Id.* at 93.

²⁵ Marcus, *supra* note 2, at 787.

²⁶ *Id.*

²⁷ *Id.* at 788-89.

²⁸ *Id.* at 786.

²⁹ *Id.* at 789.

³⁰ Blessing, *supra* note 8, at 2420 (citing William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 6-7 (2000)).

³¹ *Id.*

³² Landes, *supra* note 30, at 7.

³³ *Id.* at 17.

³⁴ Blessing, *supra* note 8, at 2421.

³⁵ Blessing, *supra* note 8, at 2422.

³⁶ Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1623 (2004).

³⁷ *Id.* at 1624.

³⁸ *Id.*

³⁹ *Id.* at 1625.

⁴⁰ *Id.* at 1629.

⁴¹ Anyanwu, *supra* note 11, at 186.

⁴² *Id.* at 187.

⁴³ *Id.* at 196 (citing Erika Hayasaki, *Reading, 'Riting and Rap: Teachers Are Using the Song Lyrics to Make Classics Relevant, The Two Have More In Common Than Meets The Eye*, L.A. TIMES, Jan. 14, 2003, at A16).

⁴⁴ *Id.* at 201.