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A Sample for Pay Keeps the Lawyers Away: A Proposed Solution for Artists Who Sample and Artists Who Are Sampled

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A Proposed Solution for Artists Who Sample and Artists Who Are Sampled

- By Charles E. Maier*

The music industry, and the artists and composers within it, have dealt with many issues over the years. In the early days, the record companies were guilty of taking advantage of unsuspecting or ignorant artists by forcing them to give up their copyrights in order to become famous, and usually giving nothing of long term value in return.[1] In the 1970s and early 1980s the problem became unauthorized duplications through the use of cassette recording technologies which for the first time allowed the general public to cheaply and easily make illegal copies of copyrighted material.[2] Although this had some impact, it was limited due to the inherent degradation in quality each time a cassette is copied from, whether it be master cassette to second cassette, or copies of a cassette where the original cassette copy is from a CD.[3]

Today the issues include digital technologies and the internet, and the subject of this comment, digital audio sampling. Digital audio sampling is the process of using a computer to manipulate small pieces of an existing composition, as embodied in a sound recording, in the creation of a new composition by looping them throughout the new work with varying degrees of frequency ranging from a single occurrence to almost continuous use which permeates the entire work, and with varying changes to the timbre, pitch, etc. of the original data.[4]

Other authors have argued that sampling is not copyright infringement or, that if it is infringement, it should be exempted by the fair use doctrine.[5] My argument is that even if you disagree with these other authors and find that sampling is infringement, it should be regulated in a manner similar to that contained in the copyright act for mechanical reproduction licensing.[6] Artists using digital audio sampling are not pirates. They are not taking money directly out of the copyright holder's pockets by making wholesale copies of the work of others and selling them.[7] Instead, artists who sample generally combine one or more small samples into a new composition of their own creation, thereby creating a new and different work that has little or no effect on the market of the sampled work.[8] In fact, the artist whose work is sampled frequently sees a renewed demand for the original work due to its exposure to an audience that otherwise would never have discovered it.[9]

Background

The law of copyright has its origins in the constitution of the United States, which grants congress the power "to promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[10] To carry out this mandate, Congress passed the Copyright Act, establishing the basic rights to be enjoyed by the copyright owner, including the right of adaptation, and the right of reproduction.[11]

Sampling seems to be a clear violation of these exclusive rights. However, Congress has provided an exception, the affirmative defense of fair use, allowing activity-which would otherwise be infringing to not only be allowed, but encouraged.[12]

The "fair use" defense has been characterized as, "an equitable rule of reason to be applied where a finding of infringement would either be unfair or undermine 'the progress of science and the useful arts.'"[13] This provision has been used repeatedly over the years to justify parodies, educational use, *de minimis* uses, and more.[14]

But traditional fair use analysis in the area of sampling has produced mixed results, due mainly to the fact that most, if not all, sampling cases are for commercial gain, and they tend to take the most recognizable portion of a musical composition (a highly creative work). Thus, the traditional fair use analysis is doomed before it even gets off the ground because three of the four factors will undoubtedly weigh against the sampler.[15]

This comment proposes a modified version of the fair use analysis of section 107 of the Copyright Act and a modified version of the compulsory license provisions of section 115 of the Copyright Act, in light of the realities of today's music environment and authorship, as well as the underlying purposes of our copyright laws.

Analysis of Solution

In analyzing sampling under the traditional fair use doctrine, as mentioned earlier, elements 1 and 2 will almost always going to weigh against a finding of fair use because the composition containing the sample is almost certainly going to be for commercial use. Since what has been sampled is a musical composition, the courts will find that it is highly creative in nature and thus should be protected. [16] This is why a new solution is needed, and why that solution should focus on a modified version of factors 3 and 4 of the fair use test.

Factor 3 focuses on the amount of the work taken. [17] This is not simply a matter of taking the amount sampled in seconds and dividing it into the total time of the composition, but involves an analysis of how much was taken and of the importance of what was taken as viewed in light of the original work as a whole. [18] It is likely that the sampled piece will be a recognizable portion of the original work because, like parody, to be successful a sample needs to conjure up the original in the mind of the listener. Thus, the relevant inquiry needs to be whether or not the sampled work is being used as a substitute for originality and hard work on the part of the author of the new work. [19] In other words, has the author of the new work used the sample in order to free-ride on the goodwill established by the original work rather than to create his/her own unique composition? [20] The basic test for this would be to analyze the new work to see if it would likely be successful even without the sampled work. In other words has the new author added significant originality to the composition so that he has truly created a new and unique work? [21] This is similar to the "transformative" analysis conducted by the court in *Campbell v. Acuff-Rose Music, Inc,:* "the more transformative the new work is, the less significant are other factors, like commercialism, that might weigh against a finding of fair use". [22]

Factor 4 analyzes the effects the allegedly infringing work has on the market for the original composition. It would seem to be the single most important factor in a majority of the courts, due to the rationale behind the creation of copyright law. [23] If the purpose of copyright is to grant a limited economic monopoly to the artist in return for his creation's contribution to the advancement of the arts and sciences, it would seem that only uses which infringe upon this economic monopoly should be questioned. As mentioned earlier, sampling is not likely to have a negative impact on the market for the original work, but is, if anything, likely to benefit the original artist by either rescuing his work from obscurity or by exposing him to a new audience. [24] Because the new work containing the sample is usually aimed at a completely different audience, it is unlikely to cause a loss in sales of the original. Therefore, there is no harm to the owner of the original work, and thus no infringement.

This solution represents a balance between protecting an artists economic interest in exploiting his work while not depriving the public of the "advancement of the arts" through the creation of new and original works that may have borrowed from elements of a prior work. This solution proposes that courts addressing sampling focus on a modified version of factors three and four of the fair use doctrine as set out below.

A.) If the author of the new work is found to have violated factor 3 by using the sample in such a way that a reasonable person would find that the new composition would not be able to stand on its own without the use of the sample or would be substantially different without the sample, and/or to have violated factor 4 by taking away a substantial market of the original work, then the author of the new work would be subject to the compulsory license fees of section 115 of the Copyright Act. This would be the case if the artist had used that provision to obtain a compulsory mechanical license for a cover version of the work sampled. [25] An example of this might be Biz Markie's sample of Gilbert O'Sullivan's "Alone Again, Naturally" in his composition "Alone Again", which was the subject of the *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*

B.) If the court finds no violation of factor 3 and/or 4, a *de minimis* violation, or insufficient originality in the sampled portions to warrant copyright protection, then the author of the new work would not be required to pay for his use of the sampled work. *De minimis* use, one that is neither quantitatively nor qualitatively significant, should be defined as a use having an insignificant effect on the market of the original owner and having taken a minor or common portion of the sampled piece such that a reasonable person would either not recognize it as having come from the original work, or would consider it insignificant in his or her opinion of the new work. [26] Common notes and chords, or other small bits of a work must also be examined to

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see if they qualify as original elements worthy of copyright protection. [27]

C.) If the author of the new work is found to violate factors 3 and/or 4, but the violation, while more than a *de minimis* violation, cannot be said to be a substantial violation, as defined in factor A, then he would be subjected to a pro-rated portion of the compulsory mechanical license fee. [28] This is to be the remainder category for situations which do not fall under "A" or "B" and would likely encompass the majority of cases.

Furthermore, a plaintiff who prevails under the first condition could petition the court to award reasonable costs and attorney's fees upon a showing of bad faith on the part of the defendant. A showing of bad faith would depend on the facts of each case, but might be demonstrated by a pattern of behavior on the part of the defendant to, knowingly and willingly, capitalize on the success of the original work of others with little or no effort on his part to create his own unique composition, or to acquire licenses when he knew or should have known they would be required. By analogy, a defendant who prevails under the second condition could petition the court and would be awarded costs and fees upon a showing of his good faith effort to obtain a license from the plaintiff before his use of the sampled composition, which the plaintiff refused without good cause, or by his showing a pattern of behavior on the part of the plaintiff to file frivolous claims in similar situations.

This solution, I believe, would encourage artists to create new works containing samples of older works, by protecting them and their record labels from the possibility of being enjoined and having to expend large amounts of money to reclaim infringing products already in production and distribution. The rights of the copyright owner of the sampled work would also be preserved by remunerating them for any use not determined to be *de minimis* or fair use under this plan. Since most of the cases brought would likely fall into the third category or perhaps the first category, the original owner is assured of some compensation for the use of his work, and the sampler is assured of his right to sample the work in question provided he pays the fee. This should create an incentive for negotiation between the parties to obtain favorable license fees, while also taking away the apprehension resulting from the inability to find the original copyright owner before production begins, and reducing any litigation costs incurred by plaintiffs to collect monies due them. An agency, such as the Harry Fox Agency, could easily be engaged to handle the issuance of licenses and the collection of fees.

Conclusion

The purpose of copyright -- to encourage individual creativity by personal gain -- is the best way to promote the advancement of the arts and sciences. It is not meant to allow artists to stifle the advancement of the arts and sciences by grants of absolute power over all uses of their creation for an extended period of time. Rewarding the creators of artistic works is therefore only a secondary consideration after promoting the advancement of the arts and sciences. This solution will undoubtedly be viewed by some as eroding the importance of copyright, I believe that it is a workable solution to a problem that is only going to increase as technology advances and the public outcry over what is or is not infringement continues to grow.

ENDNOTES

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[1] See *generally* Fredric Dannen, *Hit Men: Power Brokers and Fast Money Inside the Music Business* 31-58 (Vintage Books 1991).

[2] L. Kevin Levine, *Digital Music Distribution via the Internet: Is it a "Platinum" Idea or a "One Hit Wonder?,"* 104 W.Va. L. Rev. 209, 218 (Fall 2001).

[3] *Id.*

[4] See Jeffrey R. Houle, *Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just a Bad "Rap"?,* 37 Loy. L. Rev. 879, 880-882 (Winter 1992).

[5] See *generally* Carl A. Falstrom, *Thou Shalt Not Steal: Grand Upright Music Ltd. v. Warner Bros. Records, Inc. and the Future of Digital Sound Sampling in Popular Music,* 45 Hastings L.J. 359 (1994); Sherri Carl Hampel, *Are Samples Getting a Bum Rap?: Copyright Infringement or Technological Creativity?,* 1992 U. Ill. L. Rev. 559 (1992).

[6] See 17 U.S.C. § 115 (2000).

[7] Falstrom *supra* note 5, at 370-71.

[8] *Id.* at 371.

[9] *Id.* at 374.

[10] U.S. Const. art. I, § 8, cl. 8.

[11] 17 U.S.C. § 106 (2000).

[12] 17 U.S.C. § 107 (2000).

[13] Marshall A. Leaffer, *Understanding Copyright Law,* § 10.0, 427 (3d ed., Matthew Bender & Co., Inc. 1999).

[14] See e.g., Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984), Maxtone-Graham v. Burtchaell, 803 F.2d 1253 (2d Cir. 1986), cert. denied, 481 U.S. 1059 (1987), *Fisher v.* Dees, 794 F.2d 432 (9th Cir. 1986), Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

[15] See *Campbell,* 510 U.S. at 578-94 (a discussion of the fair use factors when a musical composition is involved).

[16] *Id.* at 578-586.

[17] 17 U.S.C. § 107 (2000).

[18] See Bridgeport Music, Inc. v. Dimension Films LLC, 2002 WL 31496312 at *8 (M.D. Tenn. Oct. 11, 2002), Newton v. Diamond, 204 F.Supp.2d 1244, 1257 (C.D. Ca. 2002), *Campbell,* 510 U.S. at 586-589.

[19] Falstrom, *supra* note 5 at 374; *cf. Campbell,* 510 U.S. at 588 (discussing why a parody usually takes the heart of the original work).

[20] Falstrom, *supra* note 5, at 369 (without use of the sample, there would have been no music at all); see *also Campbell,* 510 U.S. at 586-90 (discussing the proper analysis under the third fair use factor when a musical composition is involved).

[21] This could be accomplished through surveys asking whether or not they would have purchased the song if it did not contain the sample, asking for an opinion of the song after playing it without the sample, or other relevant questions.

[22] *Campbell,* 510 U.S. at 569, 579.

[23] 17 U.S.C. §107 (2000); see *also Campbell,* 510 U.S. at 578-594 (1994) (for an in-depth discussion of all four fair use factors).

[24] Falstrom, *supra* note 5, at 373-74.

[25] See 17 U.S.C. §115 (2000) (once a work has been published, section 115 allows anyone to obtain a mechanical license to reproduce it, provided he/she adheres to the requirements of that section and pays the compulsory license fee currently in effect).

[26] See *Bridgeport Music,* 2002 WL 31496312 at **8-11 (discussion of the "de minimis use" analysis employed by the courts).

[27] *Id.* at **7-8.

[28] Several formulas could be devised for this purpose, but perhaps the simplest would be a rate equal to 50% of the current compulsory license rate.

[29] Mazer v. Stein, 347 U.S. 201, 219 (1954), see *also Bridgeport Music,* 2002 WL 31496312 at *11 ("A balance must be struck between protecting an artist's interests, and depriving other artists of the building blocks of future works.").

[30] *Mazer,* 347 U.S. at 219 (*quoting* U.S. v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948)).

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