The Copyright Dilemma of Music Sampling and Its Future

Ruyi Xiao

China University of Political Science and Law, Beijing 100088, China
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Abstract: With the advancement of digital technology, sampling and remixing digital music has become a common form of creation in the music industry, especially in hip-hop and rap music. However, current law has created a huge barrier to entry for musicians creating sample-based music, as music sampling is often deemed to be a copyright infringement. Such a situation is frustrating for potential samplers, music companies, music lovers and the whole music industry. This brings people to new thoughts on whether legislating a red line for music sampling can breathe new life into the music industry, which is also the main question explored in this article. This essay begins with a brief introduction on music sampling, followed by its judicial dilemma in Europe and the United States. Later, the article analyses the solutions and proposals for resolving this dilemma, namely fair use and compulsory licensing. In the end, it was concluded that the 'fair use' defence has limitations and unpredictability, thus many music samplers remain reluctant to try it. In comparison, a compulsory licence system that requires a fee is more in line with the aims of copyright and the needs of the market. This is because it allows the original copyright holders to receive the reasonable return they might be most interested in, while reducing the time, effort and expense required by music samplers to obtain a licence, thereby encouraging more music to be created.

***Keywords*:** music sampling, copyright infringement, fair use, compulsory licence

1. Introduction

Music sampling is the process by which elements of an existing piece of music are specially processed through a music synthesizer or music software to create a new piece of music.[1-2] In the music industry, music sampling is a common phenomenon that is prone to infringement. As American filmmaker Quentin Tarantino stated, 'All great artists steal.'[3] This quote carries double meanings. On the one hand, artistic borrowing is common, and what an artist creates is more or less based on works that already exist. This is particularly true in musical composition, where the elements and possible expressions of music are relatively limited. The melodic combinations are not yet exhausted, but inevitable similarities can easily arise between two musical works. Admittedly, musical borrowing has indeed facilitated more new works and has become an important source of innovation in the music industry.[4]

On the other hand, it is highly susceptible to identifying music sampling as an infringement. Firstly, copyright is automatically protected, the number of creators and protected works is staggering, and works are difficult to trace; secondly, copyright infringement is strict liability, meaning that whether the infringer is intentional or not does affect the finding of infringement; and finally, the new work may also infringe various rights in copyright and neighbouring rights.[5] On this basis, this essay aims to delve into the copyright challenges facing music sampling and the ways proposed to address these dilemmas, thereby injecting new vigour and possibilities into the music industry.

2. The copyright dilemma of music sampling

2.1 Europe: no sampling of others' works without permission

When talking about the attitude of European jurisdiction towards music sampling the famous Metall auf Metall case[6] must be mentioned. The core legal issue in this case is whether a two-second sample infringes copyright? In 2012, Germany's Federal Court of Justice ruled in favour of Kraftwerk, mainly based on the per se infringement rule.[7] However, in 2016, the German Constitutional Court overturned this decision. The court held that in this case, the 'artistic freedom'[8] of the sampler should prevail over the negative impact of the unauthorised sample on Kraftwerk. In 2019, things did not end there, and the case was brought to the European Court of Justice on appeal. Ultimately, the ECJ ruled that the sampling required permission from the original song unless the sample was modified to 'unrecognizable to the ear'.[9]

The decision means that any entity using a musical sample must have the consent of the owner of the original work, although, it also holds that modified samples that do not identify the original sample can be used without permission. The ruling may establish precedence for future cases involving copyright infringement, but there is still a grey area. There

is still no clear definition in Europe of what is a sample and to what extent a sample must be modified to be considered 'unrecognisable to the ear'. Although this case suggests that the copyright owner may have the upper hand, it may have a chilling effect on artistic expression in a growing remix culture.

2.2 The United States: a bittersweet symphony

The attitude of the United States is more ambiguous than that of Europe. In the 1991 case Grand Upright Music, Inc. v. Warner Bros. Records, Inc, the court directly cited one of the Ten Commandments in the Bible, 'Thou shalt not steal', to determine the defendant had infringed by taking samples without permission. This case was the leading case in US history on the nature of music sampling. Then time came in 2005 when music sampling had its harshest moment. In the Bridgeport Music Inc. v. Dimension Films, the US Court of Appeals for the Sixth Circuit ruled that the defendant's music sampling violated copyright law. In its judgment, the court wrote 'Get a license or do not sample. We do not see this as stifling creativity in any significant way.'[10] The decision has sent shivers down the spine of the music industry. Ten years later, however, in 2016 the US Court of Appeals for the Ninth Circuit, in VMG Salsoul Records v Madonna and Warner Music, took the opposite view to that of the Sixth Circuit, holding that the clips sampled by the defendants were so brief that they were not recognizable to the average viewer and were, therefore 'de minimis use'[11]. Accordingly, the Ninth Circuit held that the defendants did not commit copyright infringement.

Admittedly, US courts have undergone a spiralling process of recognition of infringement in music sampling. The ultimate trend has been to expand the scope of fair use in the defence of music sampling infringement. At the same time, the US has expanded the types of works to which the substantial similarity standard and the de minimis use doctrine apply to include sound recordings, accommodating the development of copyright ability of sound recordings in the digital age. However, the differing attitudes of the two US Courts of Appeals for the Circuit on whether music sampling infringes the copyright in the original musical recording add further uncertainty to this already unclear legal issue. In short, the copyright dilemma faced by music sampling has created certain thorny issues for the music industry, which has naturally sparked criticism from many in the industry.

3. Criticism of the music sampling dilemma

3.1 Inhibiting artistic creativity

The plight of music sampling has suffered many criticisms, one of which is that it is at odds with the purpose of copyright. The purpose of copyright law is to promote scientific progress and artistic creation, balancing the rights of copyright owners with the rights of users, thus achieving a win-win situation for both parties.[12] However, for a potential sampler, with 'unknown sources, a large sample base and high negotiation costs', licensing can be very expensive and often prohibitive for the average sampler.[13] Arguably, sample licensing is undesirable and largely contrary to the purpose of copyright. The scheme could have a direct and negative impact on creativity since only the most sophisticated and wealthy artists could take samples at will.[14]

3.2 Differential treatments for similar legal acts

It is logical that if all unauthorised borrowing is considered 'theft', then the same type of 'artistic borrowing' should be treated in the same way. For example, artistic appropriation and musical sampling are both forms of collage of artistic traditions and are artistically similar acts.[15] The former belongs to the visual world of art. However, when a visual artist samples an entire photograph, the courts would try to label it as appropriation art, collage, and fair use. Nevertheless, aural artists are not so lucky. Even if it is just a 1-2 second sample borrowed, the judge will state very sternly: you shouldn't do that, it's theft. Further, also as appropriators of the aural arts – cover songs – are protected by law.[16] Simply understood, if one borrows a fragment, it is an infringement; but if one covers the whole song, then it is justified. Those differential treatments are unfair and unjust to the sampler. Accordingly, it could be argued that the time for change is now: music sampling is in dire need of a new, distinctive and vibrant future.

4. The future of music sampling

4.1 No permission, no fee: fair use

Many critics believe that the act of sampling constitutes a fair use of copyrighted works. Under the U.S. Code[17], there are four statutory fair use considerations that the judiciary is obligated to examine. The first factor is the purpose of the use: in general, the more transformative the new work, the less significant the commercialism. The second is the nature of the copyrighted work, i.e., the original work is more creative, and fair use is more difficult to determine. The third factor

is mainly the substantiality of the portion used. It depends on the 'minimum use', but there is no standard measure to prove that the minimum use is exceeded. The last consideration is the effect on the market and is the single most important factor, but the flaws are present. Whether the potential market for the original work is 'displaced' by the new work is not a question that can be characterised or predicted on a subjective basis. Ideally, a quantitative analysis of a numerical sample of market effects would be desirable, but this is contrary to the qualitative and subjective arguments on which the Court currently relies. [18]

As can be seen, the current copyright law of 'fair use' provides some scope for music sampling defences. However, concepts such as transformative, substantive, foreseeable use and market substitution make fair use difficult, subjective, and abstract. Under these circumstances, many music samplers are probably still reluctant to take the risk of losing a lawsuit for infringement. Record companies and digital music platforms have been more cautious in this regard, avoiding unauthorised sampling of music. As for the voluntary licensing market for music sampling, it is rarely used by music samplers due to the lengthy, complicated, and costly licensing negotiations.

4.2 No license, fee required: compulsory licensing

Compared with ‘no fee’ fair use, compulsory licensing is probably more feasible. A compulsory licence is a statutory licence that allows a copyrighted work to be used without the permission of the copyright owner and for which a licence fee is paid to the right holder.[19] A compulsory sample licence might look like this: a national body or a designated authority would create a price for the music sample, which would possibly consist of two parts: one is a set price, a statutory price based on the time, labour costs, and popularity of the work being produced. The other is a redistribution formula, to determine the expected revenue based on the market prospects of the new work. For example, the proceeds from the new work could be redistributed among the various creators in a 'sampling ratio' based on the 'sampling time'. Which could ensure that the original creator of the music receives a reasonable share of the benefits of the sampling.[20]

In this way, the artist can use samples from the song by paying a predetermined amount and distributing future proceeds to the original right holder as they arise. In addition, the copyright owner has the right to declare that no use is permitted. Admittedly, the above is a brief illustration, and further details need to be clarified if a compulsory licence system is to be put in place. For example, whether the original author has the right to appeal the price, what factors should be considered in determining the price, the formula for calculating the expected distribution of proceeds, the maximum number of years for calculation, and the upper limit of the distribution of proceeds, etc. It is believed that a statutory licensing model for music sampling can both help original music copyright owners receive reasonable remuneration and reduce the cost of licensing for music samplers, thus encouraging more music creation.[21]

5. Conclusion

With the development of new technologies, sampling of digital music works has become commonplace, and the resulting 'spark of infringement' has burned into the hearts and minds of musicians around the world. The time has come to change the infringement problems caused by music sampling. Due to the limitations and unpredictability of the existing 'fair use' rules, samplers and music companies are reluctant to take the risk. By contrast, a compulsory licence system, on the one hand, allows the original music copyright owner to receive reasonable remuneration and, on the other hand, allows samplers to sample and recreate existing music resources through a simplified and convenient statutory licence model. In this way, a compulsory licensing system appears to be a viable approach. After all, going back to the legislative intent of copyright law - what creators want is the freedom to create and the right to be reasonably remunerated for their work, while what users want is easy access to their work and a reasonable price for it. The legislator's concern is to find a constant balance between the two and the public.

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