The Song Remains the Same: A Review of the Legalities of Music Sampling

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Sampling copyrighted music and lyrics - without permission - remains a common activity in the area of music creation. In this article, Ben Challis explains the extent to which this practice is legal. Relevant case law examples from the UK and USA are identified for consideration.

Sampling can be simply defined as the incorporation of pre-existing recordings into a new recording. It can be extended to include the incorporation of part or the whole of a 'tune' (a melody) and/or lyrics into another work.

Copyright subsists in sound recordings, and in the music and lyrics to a song, pursuant to section 1(1) of the Copyright Designs and Patents Act 1988 (CDPA). The CDPA provides in section 16(1) that the owner of a work has a number of acts restricted to him or her, which are to:

a. Copy the work  
b. Issue copies of the work or lend or rent copies of the work to the public  
c. Perform, show or play the work in public  
d. Broadcast the work or include it in a cable programme; and:  
e. Make an adaptation of the work, and do any of the above in relation to such adaptation.

Therefore, any kind of sampling without the consent of the copyright owner will prima-facie amount to infringement. In both the UK and the USA there is an instant copyright infringement or violation when a song is sampled without permission, as this constitutes the unauthorised use of copyrighted material owned by another. To be clear, sampling without permission will usually violate two copyrights – in the sound recording copyright (usually owned by an artist or their record company) and the copyright in the song itself (usually owned by the songwriter or their music publishing company). In order for another party to carry out any of these activities, they must first gain consent from the original copyright owner or their agent - such as the UK collection societies (the Performing Right Society, Phonographic Performance Limited) which manage copyrights on behalf of copyright owners.

US attorney Michael McCready properly points out that in almost all circumstances a licence needs to be obtained before sampling. The results of failing to do this can be disastrous. Recently Dr Dre protégé, Truth Hurts, learnt this lesson - to their cost.

Truth Hurts had used a four-minute sample from Indian composer, Bappi Lahiri, in their debut album and single Addictive - without permission or credit. A federal judge in Los Angeles ruled that "Addictive" must be removed from shelves unless the composer Bappi Lahiri's name is added to the credits as the author of the sampled work: "Thoda Resham Lagta Hai" composed by Lahiri for the 1987 Indian film, Jhoothi. Lahiri is seeking compensatory damages in excess of $1 million.

Likewise, The Verve counted the cost of a borrowed melody when faced with a court action they settled with ABKCO - owner's of the Rolling Stone's "The Last Time" - for one hundred percent of the royalties resulting from the exploitation of the Verve's "Bittersweet Symphony", which borrowed from the Stones' work.
In 1990, US rapper Vanilla Ice also counted the cost of using the recorded bass line and the melody of the Queen/David Bowie track "Under Pressure" in his "Ice Ice Baby" single - losing one hundred percent of his royalties to the established star.

McCready advises that the use of samples without the proper clearance licenses leaves the sampler open to heavy penalties in the USA. Even at a basic level a copyright infringer is liable for "statutory damages" that generally run from $500 to $20,000 for a single act of copyright infringement. If the court determines there has been willful infringement, damages can run as high as $100,000. The copyright owner can also get a court to issue an injunction forcing the infringer to cease violating the copyright owner's rights. The court can also order the recall of albums and destroy them.

In simple terms, this means that any sample without permission is an infringement, and in both the UK and the USA, the copyright owner(s) have a range of remedies available against sampling - including injunctive relief and damages. However, two legal doctrines have given limited hope to would-be samplers, to attempt to defend their use of sampled material without permission.

The UK: 'Substantial Use'

Firstly, both US and UK law provide tests to determine infringement in related, though not identical, doctrines. UK law provides that the infringement must relate to a "substantial" part of the original work - each case is decided on its individual merits, based upon the context. The case of Hawkes & Sons v Paramount Film Services (1934) held that use without permission of twenty seconds of a musical work, Colonel Bogey (which lasted four minutes in total), was infringement. The position in UK and US law now seems to have reached the point that any "recognisable" use would infringe. Infringement would take place when, on hearing a bar of music, a listener can easily identify a similar sounding piece of music.

In the United Kingdom in Lawson v Dundas (1985) it was held that the four note theme used as part of the Channel 4 signature tune was protected as a musical work - and fifteen years later the 'substantial use' defence was tested in Produce Records Limited v. BMG Entertainment International UK and Ireland Limited (1999). This case reinforced the position that sampling sound recordings without the consent of the copyright owner is prima facie infringement of copyright - if a substantial part of the original material is reproduced. Produce Records owned the copyright in a sound recording "Higher and Higher" by The Farm. BMG manufactured and distributed the hit track, "Macarena" by the group Los Del Rio in the UK. This sampled a seven-and-a-half-second section of "Higher and Higher".

No clearance had been obtained for the use of this sample and Produce Records brought proceedings for breach of copyright against BMG. BMG applied to strike out the proceedings on the basis that it was unarguable that the sample constituted a substantial part of "Higher and Higher". BMG argued that this was a question for the judge alone to decide when comparing the two recordings. Produce Records introduced expert evidence from a forensic musicologist on which parts of "Higher and Higher" were more recognisable and memorable than others. Parker J rejected the strike-out application. He accepted that judges were not expert musicologists, and could be assisted by expert evidence as to whether it was or was not substantial, and also by the extrinsic factual evidence. In any event, having heard the two tracks, he thought that the Produce Records claim was plainly arguable, and that it should not be struck out. Prior to this decision, there was a 'three second rule', which suggested that if three seconds or less of a work is sampled, no action would be customarily taken against a sampler. This is indeed not the case.

The owners of lyrics are in the same position. In 2002, it was held that even short samples of lyrics need copyright clearance. In Ludlow Music Inc v. Robbie Williams and others, Robbie Williams was forced to pay damages to Loudon Wainwright III through the similarity of lyrics in Williams' song, "Jesus in a Camper Van", to Wainwright's earlier work.
The US: ‘Substantially Similar and Fair Use’

US law provides that infringement will occur where a recording or composition fails a ‘substantially similar’ test. If a work is substantially similar, it will infringe the original work unless the very limited doctrine of ‘fair use’ applies.

In *Acuff Rose Music v Campbell (1994)*, the court had to decide whether a 2 Live Crew parody of the Roy Orbison song “Pretty Woman” was ‘substantially similar’. The Court of Appeals, sixth Circuit, found that 2 Live Crew’s use of the prior work was copyright infringement and not a fair use as a matter of law. The United States Supreme Court disagreed, and reversed the lower court, stating that the use of the prior work could be a fair use, and whether it was, needed to be determined on a case-by-case basis. This was not fair use, but the following test for ‘substantial similarity’ was adopted:

1. Does the plaintiff own a valid copyright in the material allegedly copied?
2. Did the defendant copy the infringed work?
3. Is the copied work substantially similar?

However, in the case of *Grand Upright Music Ltd. v Warner Bros Records Inc (1991)*, Inc., the court seemed to skirt the issues in this analysis, moving straight from the defendants’ admission that a recording sampled three words from the plaintiffs’ song, to the conclusion that the only issue, therefore, seems to be who owns the copyright in the plaintiff’s song, when determining infringement.

There seems to be a very limited defence of fair use when a work is said to be substantially similar to an earlier work – but, to qualify for fair use, a sample must be used for purposes such as parody, criticism, news reporting, research, education or some similar non-profit use. Using a sample merely because it sounds good, is simply not enough to qualify for protection as fair use - indeed quite the reverse. Michael McCready insists that the rumour that one ‘can use four notes of any song under the “fair use” doctrine’ is utterly false. ‘One note from a sound recording,’ he points out, ‘is a copyright violation’.

The recent US case of *Newton v. Diamond, 204 F. Supp. 2d 1244, 1256 (C.D. Cal. 2002), 349 F.3d 591 (9th Cir. 2003)* puts some limit on the doctrine that any use without permission is infringement: In 1992, the Beastie Boys got a licence from ECM Records to sample a copyrighted sound recording from James W. Newton Jr.’s flute composition, Choir. The group sampled and used a six-second, three-note sequence and looped it throughout its song “Pass the Mic”, featured on the Capitol album Check Your Head.

In 2000, Newton, who also composed the work, sued the Beastie Boys, alleging that the remix infringed the “heart” of his flute composition, and that the band should have obtained a licence from him as the composer of the underlying work in addition to obtaining a licence to use the recording. The US Appeals Court, affirming the court of first instance’s decision, held that there was no infringement because the use of the sample was minimal and there were no substantial similarities between the two works, or that the average person would recognise the appropriation.

Fair use was explored in a recent US case where a New York federal court upheld the “fair use” doctrine by dismissing a lawsuit against Sony Music Entertainment and rappers Ghostface Killah, Raekwon and the Alchemist, for copyright infringement. The plaintiff, Abilene Music, accused the rappers and Sony - who released the album - of infringing its copyright in the well known song “What a Wonderful World.” The infraction allegedly occurred when the trio made slang references to marijuana in a rap that began with a variation on the first three lines of the song popularised by Louis Armstrong. The defendants successfully argued that while the song’s lyrics were adapted from “What a Wonderful World” - they were protected as fair use under the US Copyright Act.

In granting a summary judgement for Sony and the rappers, Judge Gerard Lynch said the rap was clearly a parody, intended to criticise and ridicule the cheerful perspective of the original song. The judge also noted that the rap made key changes to the lyrics and to the overall effect of the lines, and
it was not an imitation of the original. The Judge held that whereas the original first three lines of "Wonderful World" describe the beauty of nature, the rap version read more like an invitation to get high with the singer. The slang reference to marijuana and the dark nature of the rap tune was in stark contrast to the mood of beauty in the original song.

In another recent decision, the US District Court allowed magazine The Source (who publish in a CD format) the right to use short sections from two Eminen tracks (and up to eight lines of lyrics in print) under the fair use doctrine for the purposes of criticism and review because the tracks contained alleged racist lyrics written when the rapper was a teenager. This is really what is meant by 'fair use' - criticism, reporting and review and this is quite different to putting lyrics or samples into another recorded music work (Billboard, 23 December 2003).

Despite these recent cases, the fair use doctrine is very limited, and it would be unwise for anyone using a recorded sample to rely on this except in a carefully prescribed context with proper legal advice.

In general terms, one would almost always need to obtain permission and a licence from the copyright owner for use of a sample. Neither the 'substantial use', 'substantially similar' or the 'fair use' tests, are 'get out of jail free' cards! The established maxim, 'if it's worth copying, it's worth protecting,' still holds true. Samplers beware!

ADDENDUM

Westbound Records and Bridgeport Music v No Limit Films (September 2004)

The US federal appeals court has ruled that recording artists must clear every musical sample included in their work even minor, unrecognisable snippets of music. The lower court had ruled that artists must pay when they sample another artists' work where the use is recognisable but that it was legal to use musical 'snippets' as long as it wasn't identifiable; The decision by a three-judge panel of the 6th Circuit Court of Appeals in Cincinnati gets rid of that distinction. The court posed the question "If you cannot pirate the whole sound recording, can you 'lift' or 'sample' something less than the whole?" The Court's answer to this was in the negative" and the court added "Get a license or do not sample - we do not see this as stifling creativity in any significant way." The case centred on the NWA song 100 Miles and Runnin, which samples a three-note guitar riff from Get Off Your Ass and Jam by '70s funk-master George Clinton and Funkadelic. In the two-second sample, the guitar pitch has been lowered, and the copied piece was "looped" and extended to 16 beats. The sample appears five times in the new song. NWA's song was included in the 1998 movie "I Got the Hook Up", starring Master P and produced by his movie company, No Limit Films. No Limit Films has argued that the sample was not protected by copyright law. Bridgeport Music and Westbound Records, who own the copyright to the Funkadelic song, appealed the lower court's summary judgement in favour of No Limit Films. The lower court in 2002 said that the riff in Clinton's song was entitled to copyright protection, but the sampling "did not rise to the level of legally recognisable appropriation." The appeals court disagreed, saying a recording artist who acknowledges sampling may be liable, even when the source of a sample is unrecognisable. This case re-affirms the position advanced above - that sampling any part of a sound recording will always result in a copyright infringement - as English judge Mr Justice Peterson said in 1916 - 'if it's worth copying then its worth protecting'. The position with lyrics and particularly the music in the song which is contained in the sound recording is not quite as clear. As said above, the US case of Newton v Diamond & Others (2003) suggested that whilst the copying of any part of a recording would need permission of the copyright owner, the 'use' of the music within that recording in a sample may or may not infringe the rights of the owner of the music - it will not infringe if it is not recognisable because in effect the melody or the tune has NOT been copied. But if the use of the song (or lyric) is recognisable then there will be infringement. Certainly if a 'hook', identifiable 'riff' or identifiable sequence of notes is used there may well be infringement just as use of only one verse of the lyrics of another song would be enough to constitute infringement.
References
Bruce, Jenna Sampling and New Independent Dance Labels: The Importance of Understanding Copyright Law


Case Law

Acuff-Rose Music v Campbell 114 S.Ct 1164 / 510 US 569


Newton -v- Diamond and Others (2003)

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