MUSIC LAW UPDATES

Article: SAMPLING & NEW INDIE DANCE LABELS

"Sampling and New Independent Dance Labels: The Importance of Understanding Copyright Law"

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This article considers whether those founding and operating new independent record labels specialising in 'dance music' genres have sufficient knowledge of legal issues relating to copyright law, and in particular, the sampling of music. With the rapid technological advances of recent times, the accompanying issue of how much is actually known about relevant copyright law has tended to be somewhat overlooked. Consequently, many dance music record companies have had to subsequently overcome legal difficulties relating to sampling. Samples can generate considerable income for the original copyright owners, and for those who ignore clearance procedures, the issue of brevity often affords no legal protection against infringement proceedings. (N.B.: The context of this article relates solely to UK Copyright Law and is based on interviews with a number of UK music industry professionals.)

Copyright in the UK

Great Britain was the first country in the world to establish a formal copyright law (Statute of Anne, 1709). Generally speaking, copyright law serves the fundamental purpose of protecting creative works from misuse and unwanted exploitation, and in doing so allows the creators to generate income from their works. It could be argued that copyright protection, and its subsequent provision of economic incentives, were underlying factors which drove Britain to become the world's first industrialised society, and to proceed to use this wealth, confidence and influence to found an Empire (incorporating the US colonies, India, Australia, Canada, South Africa etc). The legacy of British notions of copyright continue of course be witnessed today, in language, in thought and in statute, throughout the Western-world, among the English-speaking peoples and in many other territories.

A series of domestic copyright laws (most notably in 1911, 1956 and 1988) have continued to strengthen and protect the rights of creators.

Copyright in the UK is deemed to come into existence automatically when a composition is created (section 3[2] of the Copyright, Designs and Patents Act 1988), provided that it is preserved in a tangible format – as with a CD recording, or sheet music, for example. The Copyright, Designs and Patents Act bestows on "rights owners" the ability to undertake what are called "acts restricted by copyright" (section 16[1]). These are the ("five economic") rights to:

1. Copy the work
2. Issue copies of the work to the public
3. Perform, show or play the work in public
4. Broadcast the work or include it in a cable programme

5. Make an adaptation of the work and do any of the above in relation to such adaptation

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 Performing Right Society [PRS] or Phonographic Performance Limited [PPL] for broadcasting and public performance use). Failure to do so may constitute an infringement of the copyright in the work, and the party found to have misused the copyright may perhaps be subject to legal proceedings.

However, the infringement must relate to a "substantial" part of the original work. Furthermore, what is regarded as "substantial" is not definitively set out in statute, and Wall (1998: 131) observes that it is impossible to define this concept other than "in relation to a particular work and the circumstances involved". This means that each case is decided on its individual merits, based upon the context, and often involves calling for expert input from musicologists. Sampling of certain musical sounds (e.g. drum loops) can be very difficult to trace back to an original source if 'lifted' from an existing sound recording. Frith (1993: 7) discusses the concept of "substance", and concludes that a more significant concept is "recognisability" – which applies when, on hearing a bar of music, a listener can easily identify a similar sounding piece of music. This whole concept particularly applies to the sampling of music (and involves correctly identifying the original composition).

When assessing the level of damages in any possible copyright infringement case, it is worth remembering that the UK has no concept of 'statutory' damages or formulaic parameters for calculating these. Instead, any award of damages is usually arrived at by an individual judge on the basis of the material gain derived from the infringement. Note also that the UK, at present, actually has no formal copyright registration facility or procedure (in sharp contrast to the role performed by the Library of Congress in the USA).

Sampling

Sampling can be undertaken in a number of ways. It may involve the simple extraction of a section from an existing sound recording. Alternatively, it may involve the recreation of a specific portion of music or lyrics. The former case is a breach of phonographic copyright and the songwriter's rights, whilst the latter involves a breach of the songwriter's rights (as no sound recordings are actually involved).

Sampling is no new phenomenon, and indeed has occurred regularly since the 1960's. However, with rapid technological development since 1985 (Low: n.d.), the necessary technical equipment facilitating the sampling of various parts of existing compositions has become more readily available to music users and producers. The ease of portability, and the falling cost of purchasing this equipment, has enabled the creation of music in the ordinary home – with technology that would previously only have been found within a professional recording studio environment. In the late 1980's, Bentley (1989a: 113) recognised that technological change was an important factor, which "has especially been felt by the pop industry recently". Sampling, he pointed out at that time, "has become the fashion."

Importantly, Low insists that "sampling has created several problems in the field of copyright law." The main problem appears to be with the interpretation of the law regarding what is, and what is not, protected by copyright. Songwriters clearly wish to be recognised as the creators of their works, and to protect and earn income from their works. Increasing numbers of young music users, however, wish to acquire and use music for free, and many are unaware of the full implications of creators' rights – especially with regard to using "samples" of another composer's music.

There appear to be two moral opinions regarding sampling, which Victoroff (1996: 82) explains concisely: “At its best, sampling benefits society by creating a valuable new contribution to modern music literature. At its worst, sampling is vandalism and stealing …”.

These opinions depend on the viewpoint of the person passing judgement. Some originators of music believe that wherever, and to whatever extent their work is used, they should receive appropriate payment. On the other hand, those undertaking the actual sampling often regard themselves as being creative in their own right, even if there is some small debt to the musical idiom of another composer. Low comments that, to some extent, all music is essentially derived from other people’s ideas, anyway. From a historical perspective, musicologists have shown that a number of Georg Frideric Handel’s compositions owe a great debt (often “literal”) to his Italian contemporaries – and, perhaps, were he to be alive and composing now, he may have had several writs launched against him for infringement of copyright under today’s laws. As the human audio range is so limited, it is also perhaps inevitable that ‘soundalikes’ will occasionally occur. Likewise, music is not created in a vacuum. Instead, the music creator is exposed to a variety of influences, which, intentionally or subliminally, may ultimately manifest themselves within their creative output.

In 1987, celebrated UK record producer Pete Waterman stated that excessive sampling was harming the music industry, and that clear guidelines urgently needed to be established (Anon 1987b: 1). With its core functional interest in collecting mechanical royalties for publishers and composers, Britain’s Mechanical-Copyright Protection Society (MCPS) backed up Waterman’s views, as did Tony Prince of the Disco Mix Club. Waterman’s plea was renewed in 1990, in a further article in Music Week, (Anon 1990a: 3), and then, in the same year, music publishers looked towards ending what they saw as unlawful sampling (Anon 1990b: 1). Music Week highlighted the success of dance music as a contributory factor to increased sampling, and cited John Fogerty as saying that “the new breed of artists don’t seem to understand or want to understand the whole essence of copyright … what we must do is educate people …”.

Twelve years on, has this situation been rectified?

The Music Industry and Dance Music

Contemporary dance music has a strong emphasis on the grass-roots impetus. Consequently, the barometer for success is quite often, in the first instance, the dance floor (be it in the UK, or in popular Mediterranean resorts frequented by young UK tourists – such as San Antonio [Ibiza, Spain], Ayia Napa [Cyprus] or Faliraki [Rhodes, Greece].

Perhaps it is partly due to this ‘limited’ and ‘localised’ initial approach, that a cavalier attitude to sampling is prevalent in dance music. This often manifests itself in the form of ‘white label’ releases (limited 12″ vinyl with minimum packaging, and sometimes only with a mobile phone number for contact purposes). These white labels, if containing unlicensed samples, are of course in breach of copyright – regardless of the scale of their initial manufacturing run or the extent of their publicity horizon. If the ‘trial’ record is a success, and travels to a wider audience by airplay or sales, then it is inevitable that this will ultimately be brought to the attention of the original holder of the master rights or songwriting rights who will then be likely to pursue a claim for copyright infringement. Indeed, note that music publishers are usually contractually obliged to perform the role of legal guardian and custodian of their songwriter’s copyrights.

Protecting copyright of course is central to any organisation in the rights business. Gould (2001) discusses the potential for success in establishing a new independent record label, and states that there are two key fundamentals on which any record label depends: artists and copyrights. These phonographic copyrights are identified as being the “non-tangible assets” of the record label as they usually own the copyright in the sound recordings produced by their artists (the copyright life of a sound recording in the UK is currently 50 years from

the end of the year in which the recording was first released or first broadcast), and generate income from their exploitation (through routes such as sales, licensing, compilations, synchronisation fees and broadcasting). Where a section of a recording is sampled, the record label that owns the rights in the original master will want to claim remuneration for its use. For this to occur legally, label managers must first understand the nature of copyright law, so that they, and those around them (i.e., the artists, producers and songwriters), may all benefit from lawful income. Proper procedures can be observed and permission (before commencing manufacturing) can quite often be granted after negotiation.

Passman (1998: 231) observes that in recent years, record labels have become unwilling to release records containing even very small samples, unless they are "cleared" (i.e., unless permission has been granted by the original copyright owners, and a licence fee usually paid). Recording contracts now tend to include a clause making artists responsible for sample clearance, and consequently liable for any claim made against them for the use of uncleared samples. As Krasilovsky and Shemel (1995: 285) state, record companies "learned to [make artists and producers] bear the full responsibility of unlicensed sampling." Another standard clause gives the record label the right to object to 'unsatisfactory' master recordings, and this can extend to the rejection of masters that infringe copyright (Victoroff 1996: 83). This right is very effective, if asserted – because artists have no option but to abide by the law. Yet for this to happen, record label managers must be aware of the detail of the law, and the options available to them. Similarly, producers may be contractually obliged to observe proper procedures and avoid the use of unlicensed samples.

The Need for Music Business Education

As the music industry in the UK continues to develop an increasingly formalised approach to music business education (by virtue of a wide range of taught courses up to Masters level), then the next generation of record label managers may perhaps be more educated with regard to copyright and sampling.

Several high profile legal cases that involve sampling have also been reported throughout the music press. Some have also been discussed in the popular tabloids and broadsheets. Cases include the claim resolved between Chrysalis Music Publishing and EMI Music Publishing over a sample in the song, "U Sure Do" by Strike (Anon 1995a: 3). It was explained by record label "Fresh" that they did not gain clearance, as they only expected a small number of recorded units to be sold. This assertion emphasises how the issue of sample clearance is ignored at the peril of independent record labels, even where they have no confidence in large-scale sales.
Harrison (2000: 13) presents a number of examples of cases relating to sampling. The leading British case was the writ brought against independent dance label, "Shut Up and Dance", by the Mechanical-Copyright Protection Society in 1992. Shut Up and Dance was accused of twelve infringements of copyright, after the label's owners disclosed that they had never cleared samples. They did not defend the action, and were forced to pay damages for every sample in their repertoire.

In 1987, Pete Waterman Ltd. and All Boys Music sued 4AD Records over the release of a single, allegedly containing an uncleared sample of the Stock, Aitken and Waterman hit, "Roadblock". As with the majority of cases involving sampling, this was settled out of court. Frith (1993: 7) contended that this settlement was achieved because "the industry didn't want a formal ruling that might make sampling either cheaper or more costly by firmly defining concepts like substance". Any legal precedent might have provided crucial interpretations of copyright law, which in turn could have irrevocably changed established rates of income from sampling, one way or the other.

Another interesting test case occurred when Produce Records sued BMG in 1999 (Produce Records Limited v. BMG Entertainment International UK and Ireland Limited [1999]). Here, a seven and a half second sample was disputed, but eventually BMG settled out of court, so that, yet again, no precedent was set.

Then, in 2002, it was shown that even short samples of lyrics needed copyright clearance. The case involved Robbie Williams, who was forced to pay damages to Loudon Wainwright III due to the similarity of lyrics in Williams' song, "Jesus in a Camper Van", to a line from "I am the way (New York Town)". Williams' song then had to be removed from future pressings of the album on which it was released (see: Ludlow Music Inc v. Robbie Williams, Guy Chambers, EMI Music Publishing Limited, BMG Music Publishing Limited [2002]).

Abramson (1999) mentions an unwritten "three second rule", also discussed by McKenna (2000), which he claims has developed by common custom in the British music industry. The custom he refers to depends on the convention that if three seconds or less of a composition is sampled, no legal action is usually taken against the sampler. However, it needs to be stressed that this custom is in no way recognised in law.

Copyright Law : Access to Information

Where new record company managers have limited knowledge of copyright law, especially when first establishing their labels, they tend to utilise various sources of information. Some, for example, gather information from music industry framework organisations (and/or through their own research), whenever the need arises; others, however, will rely primarily on legal advisors in order to acquire appropriate and accurate information.
In contrast, lawyers and music industry organisations list several methods as to how they believe label managers obtain relevant copyright information – and these suggestions go well beyond those rather limited information sources specified by most label managers.

These sources include:

1. the Internet
2. word of mouth
3. advice from other labels
4. courses
5. self-tuition
6. publications such as books, newspapers, and journals

The significant difference between these sources, and the responses of label managers whom the author questioned, is emphasised by what lawyers and music industry organisations believe are the most effective methods of informing managers. Lawyers and music industry representative bodies particularly recommend legal publications and copyright seminars, although at least one label manager interviewed had a rather low impression of the value of some of these "expensive" seminars on sampling.

Information on courses and seminars is indeed readily available from the Internet, and also in the music press. The Global Entertainment Group for example, who advertise in UK trade magazine, Music Week, mention in their literature that their schemes are endorsed by leading music industry professionals. Such professionals include Ed Bicknell, manager of Mark Knopfler (formerly of Dire Straits – whom Bicknell also managed).
As short and intensive industry seminars can sometimes be expensive, they are not always perhaps viable for

new independent labels with limited budgets.
AIM (Association of Independent Music) though do operate a free legal advice service for their large membership of, predominately, young record label bosses.

What Record Label Managers Would Have Found Useful

Label manager John Truelove rejects the idea raised by lawyers that whilst practical experience provides a great education, there are plenty of other theoretical methods of obtaining information. In common with other record label managers, Truelove maintains that only by coming across the urgency to decide if sampling permission is required in a particular circumstance, can one determine, on a case-by-case basis, what is really necessary and relevant.

In the wake of such pragmatic attitudes, industry organisations maintain that there is a significant difference between what the managers should know, and what they actually know. Industry organisations insist that all the relevant information on sampling is now readily available – in music business texts, law texts, and copyright user guides. Areas which need to be studied by new label managers, they argue, include:

1. the precise legal difference between recording and musical/literary rights
2. clarification regarding ownership of copyright
3. what constitutes infringement of copyright
4. and also clearance of rights – and how to achieve this

Helen Smith, from the Association of Independent Music (AIM), notes that the consequences of a successful action for copyright infringement against an independent record label are severe, and therefore sample clearance cannot be left to chance. Yet the financial implications of a sampling-related writs are still blithely ignored by some independent record labels, according to Ivan Chandler of Musicalities, a music publishing and copyright consultancy. He comments that “Labels do not realise the implications of releasing records containing ‘uncleared’ samples and the problems that may beset them as a result of ignoring the warnings”. This can be due to a lack of knowledge, or, more seriously, the intentional ignoring of advice. Lawyer Rupert Sprawson stresses that, in his experience, label managers realise the full implications of copyright law all too late, often “when a company or person is on the receiving end of litigation or litigious correspondence!”

Note that obtaining permission to sample on a new record can be a two-fold process as it requires:

1. clearance from MCPS for use of the composer or lyricist’s work (or from the publisher directly)
2. clearance from the original record label if sampling from an existing sound recording

This process is therefore seen as complicated and time consuming.

Thus some independent label managers are not in possession of the complete facts in relation to sampling and copyright law. Such facts can indeed be obtained from a variety of sources, including the Internet, music industry texts and law texts, and music industry courses and seminars. However, sampling and UK copyright law is still a relatively new and evolving subject. It was only in the mid 1990’s, for example, that music industry texts which focussed specifically on the British music industry became available. These texts tend to incorporate chapters on the basics of copyright, but even these may not contain the level of detail needed by label managers (though there have been a number of copyright users’ guides published).

Searching the Internet can locate a vast amount of information, of course, but much of it is often irrelevant, and this is too time consuming an activity for most busy independent label managers.

Who is Responsible for the Provision of Information?

While record label managers and specialist music lawyers tend to feel that music industry organisations are presently the main source of information on sampling, such organisations themselves look to the Government for their lead. Since the Government sets the legislation, copyright consultant Ivan Chandler argues, they must therefore ultimately be "responsible for providing the relevant information".

The Patent Office, the Government department that deals with all intellectual property rights (and incorporates the Copyright Tribunal), does issue basic literature on each of these rights, including copyright. However, this remains general information, and does not relate specifically to the music industry. While the Department for Culture Media and Sport assists the music industry (DCMS, n.d.) and acts as its "advocate within Government", several label managers still feel that the Government could do more to help them in practical terms.

Dr. Kim Howells, MP (Minister for Tourism, Film and Broadcasting) made a key speech at the Creators' Rights Alliance Conference, in March 2002 (Howells, 2002), in which he indicated that the Government must do more than it has done in relation to preserving the integrity of creators' rights. In particular, he spoke of educating music users, especially Britain's youth, against "stealing the revenue from creative artists". Howells made no excuse for the lack of Government action on this matter, and openly invited the suggestions from creators' organisations, amongst others, on what should be done.

Who Should be Responsible for the Provision of Information?

By far, the majority of specialist music lawyers and independent label managers seem to be agreed that it is music industry organisations who should be responsible for the provision of relevant copyright information and advice – a view which contrasts with the organisations' dependence on the Government. John Reed (Head of Business Affairs and International at Defected Records), insists that "we rely on these organisations to supply us with any updated revisions on copyright matters". He feels that lawyer's advice is generally too expensive for many small labels.

The Association of Independent Music (AIM) claims that, until it was formed in 1999, new music label start-ups had no economical or reliable source of copyright advice, (whereas the Musicians' Union had been offering free legal advice for years to its members). The British Phonographic Industry (BPI), which represents many record labels in the UK (not just the independents as AIM does), is often mentioned as the prime music industry organisation that should be responsible for the provision of detailed and up-to-date copyright advice information to new record labels.

Some independent label bosses feel that the BPI could perhaps promote a greater knowledge-base in this area more effectively.

The Experience of Lawyers

Several lawyers interviewed in the course of research for this article indicated that, whether due to blatant ignorance or lack of education, there still remains a real problem with regard to sample clearances today – well

over a decade since music industry journals first raised such issues on numerous occasions (Anon 1987b; Anon 1990a; Anon 1990b). The experiences of many lawyers reinforces the importance of record label managers coming to grips with copyright law and the sampling issue before embarking on any recording project involving samples.

Due to client-solicitor confidentiality, specific details of cases can rarely be given. But there are plenty of dangers out there. Lawyer John Byrne comments that "independent labels sometimes know about samples on their records but take the risk", while Peter Scott warns of continued lack of sample clearance at some labels. More bluntly, James Harman lists "ignorance and incompetence at the label" as a factor behind some of the worst situations relating to the abuse of samples he has experienced.

In Conclusion

It is clear from responses offered by interviewees, as well as through secondary research, that fundamental knowledge of relevant information in relation to copyright law and sampling is now essential when setting up an independent dance label. Yet, what record labels managers believe should occur in the music industry with regard to the provision of information is very different to what those "behind the scenes" entities (i.e., the music lawyers and music industry organisations) believe should happen.

Lawyers and music industry organisations refute the idea that new label managers have relatively few sources of relevant copyright information, and, indeed, there are now numerous sources available to anyone conducting research in this subject area. But do new and inexperienced record label managers really have time and money to spend on this? It is, of course, ultimately the responsibility of record label managers themselves to locate this information, though perhaps such information could be made more readily and cheaply accessible through the agency of a subsidised industry body, geared towards helping new independent record companies. It is unlikely that anyone entering the music industry for the first time, with a view to setting up an independent dance label, will quickly obtain accurate information, unless they have previous experience, or already know where to look.
At the same time, record label managers need to be made fully aware of the consequences of copyright infringement in cases involving samples (however long, or short, these samples may be – and irrespective of whether they are musical or lyrical samples). With dance music being one of the most popular music genres in the United Kingdom at present, this clearly remains a pressing matter of concern.

The cavalier attitude adopted by many dance music labels and producers who operate on the margins of the law (by sampling by design and without permission) is a worrying issue which requires addressing. This sampling may be undertaken with the best of intentions (to honour, adapt and elevate an existing piece of music or lyric); however, as mentioned, it remains wholly illegal.

In the late 1980's, Sexton (1988:18) cited James Horrocks as having said that sampling will run its course. Yet over a decade later, there appears to be no diminution in the number of samples used (or potential income and writs deriving from them); consequently, more accurate and readily accessible legal advice for start-up dance record labels is still as greatly needed as ever.

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