

A COMPULSORY LICENSE FOR DIGITAL MUSIC SAMPLING:
HISTORICAL CONTEXT AND FUTURE GUIDELINES

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ABSTRACT

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Over the past three decades, digital music sampling has become a cornerstone of modern music production, and is reflective of a larger movement towards collage and re-appropriation across the arts. Despite this fact, the legal paradigm surrounding the clearance of samples remains full of inefficiencies and unfairness, with unnecessarily high transaction costs on both sides of the sale, and some potential purchasers of licenses being shut out completely. The option of a compulsory license has been used to solve similar problems in many areas of intellectual property, including mechanical licenses in the area of music itself. This paper looks at the legal, economic, technological, and creative history of digital music sampling and argues that the creation of a compulsory license for sampling would be a worthwhile endeavor, ultimately benefitting the three most important stakeholders in sampling: the party being sampled, the party doing the sampling, and the audience for sample-based music. In the final chapters, guidelines for how such a license might look are presented, and the actual process for how a compulsory license might be created is explored.

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Introduction

“The sampling machine can handle any sound, and any expression....Music becomes liquid architecture. Sound becomes unbound.”

- DJ Spooky, *Sound Unbound*¹

Peer to peer networks, and the digital technologies they rely upon, have undoubtedly turned the entire music industry on its ear. Conferences have been convened, executives and artists have been called before Congress, college students have been arrested and fined, and an entire political party, Pirate Parties International, has been formed around digital piracy in Europe. While not every reaction to the disruption makes sense, the fact that there has been some sort of reaction makes perfect sense. We need to find new ways to monetize music, to offer customers-turned-pirates alternatives to 99 cents per song or zero cents. A combination of new business strategies, cultural sensitivity to copyright, and especially legal accommodations are called for. I would argue that, also as a result of new digital technologies, music sampling has had a disruptive effect on the creation of music equal to the effect of peer to peer networks on the distribution of music. A new business and legal paradigm needs to be brought to the issue of sampling, and a compulsory licensing scheme may be the answer.

The market for the clearance of samples is clearly not functioning in a fair or efficient way. The artists and labels who can actually afford to clear them avoid samples at nearly any cost, as a quick scan of the urban radio charts will make clear. Obtaining permission to sample is much more costly and time consuming than it needs to be. The courts have left the development of a consistent and streamlined system in the hands of the music industry, but, thirty years into the era of sampling,

nonetheless exists. Because they are not compelled to do otherwise, copyright holders can charge whatever they please for a sample clearance. As they are granted monopoly power of their sound recordings for an extended period, there is not much bargaining leverage for sample-based artists and their representatives. Unfortunately, but not surprisingly, examples of extreme gouging are easy to find. And when an artist simply refuses to ever clear any sample at any price, there may not be inefficiency, but there can be unfairness, and there is conflict with the stated purpose for the very existence of copyright in the United States.

As way of example, perhaps the most notorious case of an artist being gouged for a sample was with British rock band The Verve's 1997 hit song "Bittersweet Symphony." They constructed the song around a sample of The Andrew Oldham Orchestra's recording of a symphonic version of "The Last Time," written and recorded by the Rolling Stones in 1965. The sample was of a very catchy passage of strings, brass, and percussion, with some melody and harmonic progression. The Verve looped this passage, then added some complementary music, completely original lyrics, and beefed up the percussion with modern rock drums. The Verve had cleared the master recording, and had agreed with ABKCO (owned by former Rolling Stones manager Allen Klein, and the owner of the publishing rights to "The Last Time") to split songwriting royalties 50/50. However, as the song gained steam, eventually reaching #2 in the U.K. and #12 in the U.S., and being used in several commercials, ABKCO had a change of heart. They now wanted 100% of the royalties, and threatened to have the record pulled off the shelves if their demand was not met. The Verve, not wanting to compromise the royalties from the other songs on the album in question, *Urban Hymns*, and the opportunities for performing live that come with a hit song, relented and the songwriting was entirely credited to Mick Jagger and Keith Richards.

The original 50/50 arrangement seems much more reasonable, as The Verve clearly added value to an already existing product. They wrote all of the lyrics, augmented the backing music, and brought the original song renewed attention it was not likely to see otherwise. And what was The Verve's

compensation for this added value? They were forced to pay 100% of all royalties to the Rolling Stones and their representatives. Beyond obvious unfairness, this is not an example of the efficient functioning of a market. When legitimate, original added value is not monetized there is a problem.

The above example leaves us unsurprised that a noticeable chilling effect in the sample-based genres has occurred in the past fifteen years or so. In 2002 hip hop group Public Enemy used a sample from The Beatles' song "Tomorrow Never Knows." However, the sample clearance fee asked by the Beatles and their record company, Capitol, was prohibitively expensive.² Although financial details are not public in this case, copyright holders will often ask for a large chunk of money upfront, as well as a percentage of sales on the back end. Therefore, it did not make sense for Public Enemy to include this track on their album.

One can see this was simply not the best way for the market to deal with this situation. Who won here? Public Enemy lost the revenue they may have earned from their song, The Beatles lost an ancillary revenue stream for their product, the government lost any money that could have been brought in through related tax revenue, and the public lost a chance to even hear this song. In fact, it would be difficult to construct a less efficient structure around the market of sample clearances if we just started from scratch. A compulsory license would have allowed Public Enemy to make their song and their money, The Beatles to make further money from their catalogue, the government to collect tax revenue, and the public a chance to hear what may have been a great song.

And aside from any academic, legal, or philosophical musing, what do actual artists think? This quote from Beck sums up nicely the dysfunctional landscape as seen from a sample-using artist: "It's pretty much impossible to clear samples now. We had to stay away from samples as much as possible...But, back [on "Odelay," Beck's hit album from 1996] it was basically me writing chord changes and melodies and stuff, and then endless records being scratched and little sounds coming off the turntable. Now it's prohibitively difficult and expensive to justify your one weird little horn blare

that happens half a second one time in a song and makes you give away 70 percent of the song and \$50,000.”³ When artists are creating with this kind of cloud over their heads, nobody benefits.

Even less fair or efficient is the market for independent artists, who can generally not afford to clear samples at all. The vast majority of hip hop and electronic artists fall into this category. Clearing samples is simply not a possibility, and often not even a thought. This dynamic is partially driven by the overly-litigious nature of copyright holders. Because reaping money from the use of a sample is in itself a substantial legal cost, a certain threshold of sales must be reached before the copyright owner can hope to make a profit, or at least break even. This figure depends on a number of variables, but for the sake of argument, we will assume 40,000 units sold is the threshold. So, if an artist is sure her album will not do any better than 35,000 sales (still pretty well for an independent artist), and has little chance to be licensed for film or television, there is little economic incentive to clear samples. And even if she wanted to, the going rate is often so outrageous that she would just scrap that song or album. This, of course, is not an ideal situation for copyright holders either. It must be frustrating to watch someone sell 35,000 songs using your sample and know you can do nothing about it, unless you are prepared to lose money just to make a point. This can lead to aggressive legal action when a chance to make up a chunk of this lost money presents itself, as we saw with The Rolling Stones.

So we have a situation where The Verve pay 100% of their royalties and an independent rapper pays zero. This may seem like a distinct advantage for independent artists, but they are disadvantaged as well. Major labels at least have access to sample clearing services if they have a potential money-making song on their hands and need to clear something. Independents can not get in that door without at least a few thousand dollars up front. An entire generation of musicians working in various genres have been turned into de facto criminals, which will sound like a familiar theme to those watching the debate around digital music piracy.

On the bright side, for all the disruption caused by the digital revolution, one positive development has been the emergence of a “long tail” for content. While a traditional retailer could never carry every album in production, iTunes basically can. And that creates new opportunities for artists as well as distributors and retailers, not to mention fans. The same principles apply to the independent artists using samples. The long tail is where most of the actual music creation occurs, at least by pure volume of records. Perhaps the most glaring inefficiency in this whole situation is the failure to monetize the long-tail of sampling. A reasonable compulsory license would create a nearly infinite number of possibilities for copyright owners to exploit new revenue streams by offering their back catalogues for use by other artists, with a stable, relatively low transaction cost.

This paper seeks to demonstrate a justification, and in fact a need, for a compulsory license for the sampling of copyrighted music. It will argue that an intervention from the federal government into the freedom to contract between private entities is necessary in order to maximize the public benefits of modern music. Sampling is the backbone of reworking, remixing, and re-imagining snippets of another party's creation to make something entirely new, which is the cutting edge of artistic expression in our century. It is the foundation of entire genres of some of the world's most popular music and deserves to be treated with the philosophical and legal respect afforded to other artistic techniques. This paper will chart the history and nature of digital sampling, how it has been shaped by copyright law, examples of compulsory licenses in music and other creative areas, various proposals to bring some fairness and efficiency to the market for samples, and finally, attempt to provide some basic guidelines for how a compulsory pricing scheme for sampling might look, and the process through which it might be created.

NOTES

NOTES

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Chapter 1: The Importance of Sampling to Modern Culture

“In truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must successfully borrow, and use much which was well known and used before”

-Justice William Story¹

“Online, everything is a sample. Every audio element becomes a potential fragment for manipulation and recontextualization. Sampling follows the logic of the abstract machinery where there are no bodies – just simulations of bodies.”

-Ken Jordan and DJ Spooky, *Sound Unbound*²

For many readers, explaining the significance of digital music sampling will seem unnecessary. However, it seems part of the reason that sampling has not been afforded much legislative or administrative attention is its largely negative reputation. Much of the public, and many people who grew up in the pre-sampling era, and now hold positions of power, see samplers as lazy outlaws, and think changing the rules to create a more fertile environment for sampling is not a worthwhile endeavor. Placing sampling in the context of similar kinds of appropriation in other arts, and in the context of the huge advances in digital technology that have affected many other parts of life, may leave some readers more open to the idea of sampling as a legitimate technique, and therefore more open to the idea of essentially forcing artists to allow their music to be sampled through a compulsory license.

Although it first struck much of the public, and the legal community, as a straightforward case of “stealing,” a more nuanced view of sampling has slowly been adopted those who care enough to think about such issues. In fact, upon closer inspection, its collage-like nature puts digital music sampling at the very heart of Western culture in the 20th and 21st centuries. Musicologists know that the music of any era is reflective of trends in the wider culture, and reworking and remixing have been common themes throughout all of the major art forms in this period. As Jonathan Lethem explains:

“Visual, sound, and text collage....became explosively central to a series of movements in the twentieth century: futurism, cubism, Dada, musique concrete, situationsim, pop art, and appropriation. In fact, collage, the common denominator in that list, might be called the art form of the twentieth century, never mind the twenty-first.”³

Cubism

An important early example of this artistic strategy is Picasso's painting *"Still Life with Chair-caning"* (1911–1912), which was in the style of “synthetic cubism” and includes the use of cloth, rope, and text. Other materials, like sheet music and pieces of newspaper, were also common collage elements for the cubists.⁴ Later on, pop artist Andy Warhol famously repurposed Campbell's soup cans, da Vinci's *The Last Supper*, and photographs of Elvis Presley. A decade later, in the world of poetry, T.S Eliot's *The Waste Land* alluded to, or copied verbatim, phrases from Shakespeare, Hermann Hesse, the Bible, and a dozen other sources. Eliot even credited each of these uses in notes attached to the poem.⁵

Photography and Cinema

In other arts, where the role of technology is central to creation, new technologies have made even more direct re-appropriations possible, and the effects are so profound, and so open to creative interpretation, that the art of the remix now seems inevitable across a variety of media. Long before digital music sampling, photography and cinema were presenting new ways to re-imagine objects or artifacts that had once existed for another purpose entirely. Seeing a familiar person or street corner in a photograph or film can give the viewer a much different perspective than what would be possible with an unmediated view. This fundamentally new human experience, using technology to change one's focus by taking a closer look at the symbolism of the objects around us, stretched even further into the wider culture of the 20th Century, and was directly related to what Freud was exploring in the field of psychology around the same time as cinema and photography were taking off. Again, Jonathan Lethem, writing about art in the 20th century, specifically the surrealist movement:

“...the process of framing objects in a lens was often enough to create the charge [the surrealists] sought. Describing the effect, Walter Benjamin drew a comparison between the photographic apparatus and Freud's psychoanalytic methods. Just as Freud's theories 'isolated and made analyzable things which had heretofore floated along unnoticed in the broad stream of perception,' the photographic apparatus focuses on 'hidden details of familiar objects,' revealing 'entirely new structural formations of the subject’”⁶

This effect is analogous to what can be created when a simple drum beat is sampled. Like the street corner photograph, the character of that recorded sound carries an immeasurable number of qualities, including the mood of the drummer that day, captured in the slight imperfections of his playing, the equipment being used to record, and the tastes of the engineers operating the equipment,

that might fly right by the listener on first listen. But when that portion is reanimated with new technology decades later, looped dozens of times, and framed by another sound, the character can be amplified and re-contextualized in ways that are surprising and give new meaning to old ideas. Like photography or film, the thoughts and emotions brought out of the audience can be especially profound if the sample brings them back to a familiar, but long-forgotten, place and time.

21st Century Art

Digital music sampling is even more at home in the 21st Century. In spite of the legal obstacles, and sometimes slow acceptance as a legitimate form of expression, that the explosion of digital sampling into countless new genres would coincide with other computer and web-based phenomena seems inevitable in retrospect, for a variety of reasons. The rapid increase of the price/performance ratio for computers, and their subsequent ubiquity, is probably the top reason. Although sampling technically predates the time when every studio, and nearly every individual, had a computer that was capable of chopping up and rearranging samples, the two are closely linked. There are a number of free or nearly free software programs that can handle basic sampling and looping tasks, including Garageband, which comes included with any new Mac computer. And most of the world's commercially released recordings can be downloaded for ninety-nine cents or imported into the computer from an already-purchased CD.

There are also a countless number of sites that provide pre-chopped downloadable samples for free. Some of these sites are plainly illegal, and can be thought of as The Pirate Bays of sampling, but some, like freesound.org, contain user-recorded sounds available with a Creative Commons license. There are also sites devoted to uncovering the samples used in previously released songs, most notably whosampled.com, which can give aspiring samplers a head start in digging for their own material. Viewed next to similar internet based expressions, like comical photoshop blogs, or political mash-up videos on YouTube, digital sampling seems like the perfect musical expression of the internet age. In

this sense, a sample-based track, or at least one that credits the original source material, can be thought of as something akin to news aggregators like Google News, with each sample a snippet or headline and a hyperlink to someone else's work. Once the desired source material is found, the user can simply drag the file in their software's arrangement window and start chopping away. Compare this to the up-front costs of producing recorded music in the home in previous decades. An aspiring musician would need to buy an instrument like an electric guitar or synthesizer, which cost at least into the hundreds of dollars, plus the other necessary equipment, like tape machines and microphones.

Just as importantly, it can not be denied that the learning curve for sampling is not nearly as steep as for playing a traditional instrument, though the effort and talent that go into sampling *well* is often underestimated. Our modern culture is much less interested in spending years to master a physical skill than taking a few hours to learn a digital one. One has to wonder what percentage of adolescents and young adults even have the brain circuitry and personality types that are conducive to sitting at a piano every day for two hours at a time. A decent hip-hop beat often requires nothing more than a catchy sample matched to a drum pattern, which is relatively intuitive to write. Knowing any serious music theory is not a prerequisite. Whether or not this is a positive development is open to different points of view, but we now live in a new world where the production of music has largely been digitized, simplified and democratized.

Sampling As a Necessary Evolution

These changes have also happened at a time in music history when traditional genres like pop, jazz, classical, and country have arguably reached their apex and begun to plateau creatively. While there will always be an inexhaustible number of ways to tinker around the edges of these genres, hearing something truly new in traditional music is increasingly rare. The Hendrixes and Coltranes and Stravinskys of the current crop of young musicians, blowing listeners away with revolutionary new sounds, are often found working with samples. Many of the envelope-pushers of the past few decades

have been artists like Bjork, DJ Shadow, Danger Mouse, Moby, Justice, and a legion of hip-hop producers, who are all heavy users of samples.

If we leave out their own adoption of sampling, the most significant shifts in the older genres over the past twenty years have been largely cosmetic. Alternative or indie rock is not radically different from classic or punk rock in basic variables like tempo, song structure, or instrumentation. The differences are mostly in attitude, and perhaps lyrical content. “Young country” is a lot like old country, but with more studio gloss, some leather pants, and a step towards mainstream rock and pop. Because of the wider variety of structure and instrumentation, along with a more sophisticated and adventurous audience, it is still possible to push the envelope in jazz and classical. However, the results of experimentation are usually not listener friendly, and often discard any kind of harmonic or melodic progression that the average listener would find agreeable.

On the bright side, the 130 years of recorded music that have brought this relative exhaustion of traditional genres has left a truly overwhelming amount of quality music, that most listeners have never heard, just waiting to be mined for samples. And this is a resource that will never run dry. Just as every year brings cheaper, faster ways to sample, it also brings new music to be sampled. While many sampling artists prefer the crusty character of old soul or jazz records, this is not always the case. Especially with the increasingly popular “mash up” genre, current pop songs are also sampled. Moreover, any song, old or new, has the potential to be sampled in dozens of different ways by different artists in different genres.

“Amen Break”

Perhaps the best way to illustrate just how dramatic an effect these developments have had on music production, and how versatile a single sample can be, is to follow the story of one of the most important samples ever, the “Amen Break.” This was a drum solo, 5.2 seconds in length, from the song “Amen, Brother” by the Winans, a soul group in the 1960's. It has been called “a six-second clip that

spawned several entire genres.”⁷ Producers of some of the more aggressive sample-based genres, like breakbeat hardcore, jungle, and drum-and-bass, sped up the tempo of the original track considerably, nearly doubling it. It would have been nearly impossible to go to any drum-and-bass show in the genre's heyday without hearing the “Amen Break” at least a few times. In fact, this five second snippet of music has launched entire *careers*. Electronic producer Luke Vibert “has released several records under the moniker Amen Andrews, using the Amen on nearly every track, heavily sliced and edited.”⁸

“Amen” was also slowed down for heavy use in hip hop. Some popular songs in which it appears include N.W.A's “Straight Outta Compton,” 2 Live Crew's “Feel Alright Y'all,” and “King of the Beats” by Mantronix. It has even appeared in many commercials and television programs, including *The Amazing Race*, *Futurama*, and *The Powerpuff Girls*.⁹ However, the most striking fact in the Amen story is not the sample's versatility or ubiquity, but that no one was ever sued for appropriating it. The copyright owner, Richard Spencer, never pursued any legal action. Imagine how all of the above artists, and genres, would have been damaged if he was of a different mind about sampling. If each of these instances were met with litigation, our collective creative culture would have lost something real.

Sampling In the Public Interest

The popularity of these and other instances of sampling provide perhaps the best argument for the legitimate role of sampling in our culture: the free market shows us that people like this stuff and find it valuable. There is no question about the popularity, and at times supremacy, of hip hop in American culture. It is hard to sit through any television commercial break or attend any sporting event without hearing hip hop. The sampler has lowered the barrier to music composition like perhaps nothing we have ever seen before. And when a sea change in the craft and business of music like this

occurs, our government should amend the laws to reflect that change, as opposed to asking generations of musicians and music consumers to radically alter their natural behavior to fit within an old paradigm.

This is not a radical perspective. In fact, it is quite traditional. Thomas Jefferson explained his rationale behind this approach in a letter from 1813:

“He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening mine. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible all over space, without lessening their density at any point, and like the air in which we breathe, move, and have out physical being, incapable of confinement or exclusive appropriation.”¹⁰

Jefferson was probably contemplating more conventional intellectual property, like patents for the cotton gin or printing press, or copyrighted books, as audio recordings and digital technology did not exist in 1813. It also must be reiterated that recorded music is the combination of both intangible musical ideas *and* the physical labor and capital required to affix them to a tangible medium. However, Jefferson's larger notions still apply to digital sampling. It is still true that lighting the taper of your song with a sample does not diminish the brilliance of the original work, nor does it generally weaken the market of the original. It also seems true that, in its worst moments, overly restrictive copyright law is an attempt to control the musical inspiration that moves naturally across space and time.

The writers of the United States Constitution primarily wanted copyright to “Promote the Progress of Science and Useful Arts,” as opposed to making sure rights holders could squeeze every

penny from their work. In the United States at least, copyright protections exist specifically for the benefit of the public. The courts have affirmed this emphasis throughout the years, including in the 1975 case of *Twentieth Century Music Corp. v. Aiken*, which specifically dealt with the rights of a fast food restaurant to play a radio station inside their restaurant without paying a publishing fee on top of what the station had already paid. From the decision:

“Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”¹¹

As we will see in the next chapter, the “general public good” is not being served best by modern copyright law as applied to digital music sampling.

NOTES

NOTES

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4. <<http://en.wikipedia.org/wiki/Cubism>> 16 Apr. 2011.
5. <http://en.wikipedia.org/wiki/The_Waste_Land> 16 Apr. 2011.
6. See Lethem (2008), FN3, 30.
7. <<http://www.youtube.com/watch?v=5SaFTm2bcac>> 16 Apr. 2011.
8. <http://en.wikipedia.org/wiki/Amen_breal> 16 Apr. 2011.
9. Ibid.
10. Jefferson, Thomas. Letter to Isaac McPherson, 13 Aug. 1813.
11. *Twentieth Century Music Corp. v Aiken*, 422 US 151, 155 (1975).

Chapter 2: A Selected History of Sampling

“The Breakbeat is a motion-capture device, a detachable Rhythmengine, a movable rhythmotor that generates cultural velocity.....this functionalism...allows Hip-Hop to datamine unknown viens of funk...”

-Eshun Kodwo, *More Brilliant Than the Sun: Adventures in Sonic Fiction*¹

“Thou shalt not steal”

- Hon. Kevin T. Duffy²

Taking the broadest view of sampling, or at least musical re-appropriation, the history of this creative urge can be said to be as old as the first early human hearing a grunt or the beating of a stick on a rock, and reworking it to make it his own. But when sampling is defined as the act of using a piece of recorded music and incorporating it into a new recording or performance, the story probably begins in 1924 with the performance of Italian composer Ottorino Respighi's *Pini di Roma*, or *Pines of Rome*.

In this piece, many scenes from the natural and civilized world are portrayed with symphonic instruments, such as an organ and various brass instruments playing low pitched notes to represent the catacombs. The third scene, "I pini del Gianicolo," features the song of a nightingale. Rather than conjuring images of a nightingale with a flute, Respighi decided to just cut to the chase and play a recording of a nightingale.³ Fortunately, there were no legal ramifications for the use of this sound, as

the nightingale in question would obviously have no legal standing, and Respighi was far enough ahead of his time as to be creating outside of the law.

The next landmark came in 1939 with the performance of *Imaginary Landscape No. 1* by American experimental composer John Cage. The six minute piece was written for muted piano, cymbal, and two variable-speed turntables. On those tables were “frequency recordings.”⁴ These were records that produced one constant frequency and were designed to help calibrate or tune other recording equipment or musical instruments. By manually slowing down or speeding up the revolution of the records, the pitch could be changed, and any note conceivably played. French composer Darius Milhaud had actually experimented with a similar idea, by changing the speed of phonographs to alter the pitch of a human voice, as early as 1922.⁵ However, there is no record of a Milhaud written composition or performance using this technique.

One can argue about whether or not these “frequency recordings” were actually music, but they were certainly sounds recorded by someone else and then manipulated to create a new piece of music. What Cage was working on could probably be more accurately classified as primitive “turntablism,” the act of performing music using a turntable as the primary instrument. In fact, modern DJ's still use tracks of single sine waves to scratch and create new melodies and rhythms. It appears there are no legal impediments to using these frequency recordings in a new musical work, as they are not music per se, but a tool, much like a tuning fork.

Tape Manipulation

The invention of the tape recorder in 1935 opened up a new world of re-appropriation, and in the 1940's the French “musique concrète” movement, led by composer and engineer Pierre Schaeffer, took full advantage. They used tape manipulation to create compositions from recorded sounds, mostly things like trains, clocks, or other sounds from everyday life. Tape manipulation is the act of altering

the normal playback of magnetic tape by speeding it up, slowing it down, playing it backwards, damaging the tape, or playing multiple copies of the same recording simultaneously while slightly altering the speed of one copy to create a flanging or phasing effect.

However, as ground-breaking as Shaeffer and his cohorts were, the first documented cases of artists taking copyrighted, popular music and chopping them up for rearrangement were in the early 1960's, also using the technique of tape manipulation. Often credited as the first sampling of a hit song was “Collage No. 1 (Blue Suede)” by scholar and composer James Tenney when he sliced and spliced a tape of Elvis Presley's “Blue Suede Shoes,” originally released in 1956.⁶ Tenney's derivative piece is 3' 26", and it takes at least half that time to discern the source material, as it winds through a multitude of speed changes, tape head echo effects, and more. Eventually, “Collage No. 1” works its way into some sort of groove, but it is never really catchy in any way. Perhaps because it clearly had no chance of making Tenney a profit, there was not yet any precedent for legal action around sampling, and Elvis and his representatives probably had no idea it even existed, the sample has thus far stayed uncleared without any repercussions. Tenney himself considered “Collage No. 1” an homage to Elvis, rather than a theft from him. He later remarked “I consider it a celebration of Elvis Presley, and I like to think it would have pleased him.”⁷ It is interesting to note that even at this primitive stage of sampling there was an uneven dynamic in play. The artist doing the sampling often has an affection for the artist being sampled that goes unreciprocated.

Following Tenney, tape manipulation quickly started to move into popular culture. Slicing up recordings became an obvious tool for artists embracing the sonic psychedelia of the 1960's. Poet and author William Burroughs chopped up radio broadcasts to make new works, which was similar to what he was doing in a strictly literary sense with his “cut-up technique” work in the 1950's and 60's, the

most notable example of this being the classic *Naked Lunch*. The book copied snippets from science fiction books of the 1940's and 50's, among other sources.⁸

The Beatles

In the most popular of popular culture, The Beatles made extensive use of tape manipulation on several albums in the 1960's, including *Revolver*, *The White Album*, and *Magical Mystery Tour*. The psychedelic effects made possible with tape fit perfectly into what the Beatles were doing musically, and what was happening in the larger culture. Specifically, "Revolution 9" from *The White Album* contains many tape loops. Some of these loops are of The Beatles themselves making various noises, some are from the Beatles' previously recorded work, and some are from other copyrighted recordings. These re-appropriations include Vaughan Williams' "Oh Clap Your Hands," Sibelius' *Symphony No. 7*, Schumann's *Symphonic Studies*, and Beethoven's "The Streets of Cairo."⁹ No legal action was taken against them for appropriating these songs, as the technique was still relatively obscure and there was not the complex of legal departments built around copyright litigation that we see today.

To the modern sampling aficionado, The Beatles as sampling pioneers is ironic. They are notoriously stingy with sample clearances, to this date clearing exactly zero, and have prevented many prominent artists from releasing anything with a Beatles sample, either through lawsuits or the threat thereof. A brief list of artists who have recorded songs with samples from The Beatles that may never see the light of day, at least legally, includes The Beastie Boys, The Roots, Wu Tang Clan, Ja Rule, and The Chemical Brothers. In the case of Wu Tang and Ja Rule, they had studio musicians recreate something close to the original material, known as an interpolation, which is perfectly legal with a compulsory mechanical license.¹⁰

Interpolations

Interpolations are used much more widely in hip hop and other sample-based genres than most listeners would ever realize. Sometimes they are used to save money, because only the underlying composition needs to be licensed, and not the master recording. Other times, they are used because the recording's owner refuses to grant a license at all. A prominent example is The Sugar Hill Gang, who were the first hip hop group to achieve mainstream success. Their song "Rapper's Delight" was a Top 40 hit in 1979. Many fans just assume that the bass line was taken from Chic's hit song "Good Times." However, the bass line was actually replayed by The Sugar Hill Gang's studio band Positive Force. The Gang used this technique on many other songs as well. Another notable early example of this technique is Afrika Bambaataa and Soul Sonic Force's "Planet Rock." The melodic synthesizer hook sounds almost exactly like Kraftwerk's "Trans Europe Express," but was in fact replayed by Soul Sonic Force's John Robie.¹¹

One could argue this phenomenon is a tremendous market inefficiency that benefits neither the original musician nor the artist appropriating the sample. It is a waste of time and money, as these interpolations may never be as good as the original, don't earn any money for the owners of the original sound recording copyright, and would be completely unnecessary with a compulsory license for sampling. As to the question of the sonic quality of samples vs. interpolations, hip hop producer Hank Shocklee explains,

"A guitar sampled off a record is going to hit differently than a guitar sampled in the studio. The guitar that's sampled off a record is going to have all the compression that they put on the recording, the equalization. It's going to hit the tape harder. It's going to slap at you...."

(an interpolation) hits more like a pillow than a piece of wood. So those things change your mood, the feeling you can get off of a record.”¹²

It seems absurd that such time and effort are spent to create a newer, often degraded, version of a product that already exists, when reproducing the original would have negligible costs and would be profitable to both the original and secondary creator.

Jamaican Dub

Sampling is most closely associated with hip hop, so it is worth exploring that genre's most fundamental roots, which reach back to dub music. In Jamaica, starting in the late 1960's, artists like King Tubby and Lee “Scratch” Perry began using a process that bridged the gap between early tape manipulation and modern hip hop. They would make copies of already existing masters, and press them with everything except the vocal track. They would then mix these instrumentals with other previously recorded vocals. Often, techniques from the tape manipulation scene would be used, most notably tape echo. In a live setting, they would “toast” over the instrumental, ad-libbing humorous rhymes or commenting on the party at hand. Sometimes the crowd would sing the original lyrics, in something like karaoke.¹³ This was basically the genesis of rapping. These new musical ideas quickly made their way to places like London and New York. In London, dub was influential for rock bands like The Clash, while in New York, where there was a large Jamaican population, these sounds and techniques were soon transformed into hip hop.

Hip Hop

Shortly after the success of The Sugarhill Gang, hip hop became the dominant aesthetic of young urban culture. Sampling as we think of it today became the rhythmic backbone of the culture's

soundtrack, the money started coming in, and the litigation began to get serious. One early, and instructive, case revolves around the popular breakbeat known as the “Apache break.” Breakbeats are so named because they are percussive sections in recordings that last for a few seconds. The band is taking a “break” from the harmonic and melodic elements, and letting the drummer shine for a moment. Breakbeats are considered by many producers as the best possible foundation to build a hip hop song. The “Apache break” comes from The Incredible Bongo Band's 1973 release “Apache.” It is perhaps the single most sampled drum beat in all of hip hop, and has been used by artists like Nas, The Roots, Grandmaster Flash, TLC, Vanilla Ice, and countless others.¹⁴ In 1983, West Street Mob's “Break Dance (Electric Boogie)” leaned on the sample so heavily they ended up forfeiting 100% of their songwriting royalties, not just because they used the sound recording, but because they were considered to have used the underlying composition of “Apache” itself, regardless of the fact that West Street Mob contributed other various original elements, and that the breakbeat in question contains no harmonic, melodic, or lyrical content.¹⁵ Unfortunately, handing over 100% of the royalties for building half (or less) of your song around a sample would prove to be less than unique to this case.

For the next few years, as hip hop gained steam around the world, most samples were still breakbeats in the “Apache” style. Some were cleared, some were not. It is hard to get the full picture of the legal and economic landscape for sampling during this period, and it remains nearly as difficult today. Virtually every case is settled out of court and not subject to public review. This, as will be discussed later, not only makes research difficult, but also creates a situation where the buyers and sellers in the sampling marketplace have nothing close to perfect information, which leads to prolonged and unstandardized negotiation, and unnecessarily high transaction costs.

What we do know is that sampling, and all of creative culture changed forever in 1986, with the release of Akai's S900 sampler. While not the first sampler, the S900 was the first digital sampler that

was both affordable and professional.¹⁶ Previous professional samplers had been much too expensive for the average teenager in the Bronx to set up in his or her bedroom. For example, the Fairlight CMI Series was the class of the early 1980's, but sold for upwards of \$10,000. The S900 was quickly followed by a number of other popular samplers, most notably E-mu's SP1200 in 1987. While mind-blowing to some at the time, the SP1200 was extremely lo-fi by today's standards. Its maximum fidelity for each sample was only a sample rate of 26.04 kHz, with a bit depth of 12.¹⁷ This created a sound that was less than half as sonically detailed as a modern CD. Also, the maximum sample time was about 10 seconds. These limitations actually contributed to the early, gritty sound of hip hop, and many producers today go out of their way to achieve that sound, and the ones who can afford to often keep a vintage SP1200 in their studios.¹⁸ It is interesting to note how dedicated many hip hop producers are to getting that very specific, recognizable sound. Not only do they scoff at recording new interpolations that could compromise the “dusty” and “crispy” sound that comes from the pops, hisses, and other artifacts that are captured when lifting directly from a vinyl record, they also prefer to run that sample through a very limited vintage sampler to add another layer of discoloration. In the opinion of most actual artists in the field, interpretations and emulations are still not desirable, even in 2011.

“Pump Up the Volume”

While popular hip hop groups like the Beastie Boys and EPMD were butting heads with original copyright holders as early as the mid-1980's, perhaps the first “landmark” sampling case to be settled in a public way was the British group MARRS' hit single “Pump Up the Volume” in 1987. This track sampled up to a dozen different recordings, but the rights holders who took legal action were the producers Scott Aitken Waterman (SAW).¹⁹ SAW objected to the use of their hit “Roadblock.” The

sample in question was a female voice singing “way-ay-ay,” a one note vocal snippet that was used sporadically in the derivative track. As “Pump Up the Volume” moved close to the top of the UK charts, SAW received an injunction against the distribution of the song. The injunction was later lifted as the parties settled out of court, with the agreement that further pressings of the track did not contain this sample, and all royalties earned from the original version with the sample intact be given to charity.²⁰ This case, though not settled by a court, set a tough precedent for future sample-based musicians. That a tiny snippet that was neither critical to the original nor the new recording could potentially get one's record pulled from the marketplace would inevitably have a chilling effect.

Grand Upright

An artist who did have his records physically removed from the shelves was American rapper Biz Markie, following the ruling in *Grand Upright Music, Ltd v. Warner Bros. Records Inc.*²¹ Biz Markie had fairly egregiously copied his song “Alone Again” from Gilbert O'Sullivan's “Alone Again (Naturally),” sampling the main piano chord progression as well as copying the lyrics in the chorus, and the title of the song itself. Judge Kevin Thomas Duffy found that Biz Markie had infringed O'Sullivan's (or more accurately, Grand Upright's) copyright and that the infringing record could no longer be sold. The aspect of this case that many find frustrating is that it did not advance or settle the philosophical and legal debates around the emerging cultural norm of sampling, but rather focused on whether or not Grand Upright actually owned the copyright to “Alone Again.” Judge Duffy had nothing insightful to say about what is or is not fair use, or what the proper compensation for a sample might look like. He opened his opinion by writing “‘Thou shalt not steal’ has been an admonition followed since the dawn of civilization...,”²² and adding hardly any nuance from there. *Grand Upright*

was the first in a long line of sampling cases that did little to clear the murky legal waters around musical re-appropriation.

Campbell

Another equally frustrating case for those looking for some sort of guidance to the legal parameters around sampling was *Campbell v. Acuff-Rose Music, Inc* in 1990. This suit dealt with the 2 Live Crew song “Pretty Woman,” which was essentially a parody of Roy Orbison's classic 1964 hit “Oh Pretty Woman.” The Supreme Court ultimately ruled favorably for Campbell (2 Live Crew), and the song was allowed to be distributed on the basis of clarifications and guidelines made by the court regarding parody.

One important determination, especially for sampling artists, was the decision to qualify 2 Live Crew's version as being protected by fair use. The Copyright Act of 1976 provides four guidelines for determining what is protected by fair use, the fourth of which is “the effect of the use upon the potential market for or value of the copyrighted work.” Writing for the majority, Justice Souter explained

“No 'presumption' or inference of market harm..... is applicable to a case involving something beyond mere duplication for commercial purposes. The cognizable harm is market substitution.....it is unlikely that the work will act as a substitute for the original, since the two works usually serve different market functions.”²³

While Justice Souter was specifically writing about parody, and not necessarily sampling, his words could just as easily apply to most samples. It is difficult to imagine a consumer on the fence about purchasing a light rock song from 1964 about a shy man approaching a beautiful woman on the street, but then deciding his money was better spent on a rap song with lyrics like “Big hairy woman,

you need to shave that stuff.”²⁴ Even if the lyrical content is similar, most sample-based tracks borrow from recordings that are long since gone from the charts, and are usually from completely different genres that have little audience overlap. Unless the sample is something akin to just taking an entire original recording, slightly altering it and putting a new name on it (which common sense would call piracy – not sampling), then the market for the original can not realistically be said to be harmed. If anything, one could assume that the publicity from this case actually helped Orbison sell more records.

At the time, and still today, *Campbell* was regarded as a victory for sampling. However, one must keep in mind that this case never specifically dealt with sampling, as the music in question was an interpolation. Orbison's original composition was replayed by studio musicians hired by 2 Live Crew. Even taking this into account, in 1990 it could still be seen as a significant victory for hip hop because, at that time, many hip hop songs were essentially parodies, including the aforementioned “Alone Again” by Biz Markie. However, parodies are much less common in hip hop today, and almost non-existent in other sample-based genres. For example, a house music producer who samples the “Apache” breakbeat, has basically zero chance of doing so in some sort of parody of the Apache tribes or Native American issues, or of the original “Apache” song by Incredible Bongo Band, which itself has no lyrics. The questions of when a parody qualifies for fair use in *Campbell* unfortunately have no relevance to the vast majority of sample-based music.

In the 1990's these unsatisfying legal decisions were the closest we had to real watershed cases, and sampling continued to diversify and move into the mainstream. Most major-label artists who were using easily recognizable samples obtained licenses before the new tracks were released, or their songs never saw the light of day. However, by volume, most samples still existed in a murky legal and financial environment. Because high profile sampling lawsuits were relatively rare, the companies releasing sample-based music often calculated that clearances would likely cost more than any future litigation, especially if the sample was hard to recognize. Also, many of the people working in the

legal or financial departments at these labels were relatively far removed from the actual production of the music, and had no idea what sort of sampling was going on.²⁵ The artists had little incentive to inform the label that their music contained samples, because the artist would most likely end up paying for the clearance out of their royalty checks. And at independent labels, much like today, most samples were not cleared because they could not pay the upfront fee that often accompanies a clearance, and the owner of the original master recording would most likely not be able to recoup the money spent on litigation if the defendant's sales were only in the low tens of thousands or less.

Newton

During this period, one band that used sampling in an especially artful, and profitable, way were the Beastie Boys. Their 1992 song “Pass the Mic” led to an interesting court ruling that, once again, only partially dealt with sampling. The backing music of the song was largely built around a flute sample from flautist James Newton's song “Choir.” At the time, the Beastie Boys and their representatives decided to license the rights to the master recording (which were owned by Newton's record company, ECM), but not the underlying musical composition (which were retained by Newton).²⁶ After hearing the song, Newton disagreed with their assessment, and brought the lawsuit *Newton v Diamond* in 2003.

Ultimately, the Ninth Circuit Court of Appeals ruled in favor of the Beastie Boys. The portion of the song they sampled was determined to be short enough, and a common enough progression, to be less than infringing. The melody in question was C - D flat – C, which is not a unique or complex melody, and it only appears once in “Choir,” at the very beginning. The court decided it was more important that the three notes were insubstantial to Newton's song than the fact that they were quite substantial to the Beastie Boys'. Writing for the majority, Judge Shroeder explained “.....the fact that

Beastie Boys 'looped' the sample throughout 'Pass the Mic' is irrelevant in weighing the sample's qualitative and quantitative significance.”²⁷

This distinction is important for sample-based artists. Taking a brief snippet from previously recorded work and looping it many times is what much, if not most, sampling is built around today. The fact that the quantitative analysis in question revolves around the importance of the passage to the original work and not the newer work is of enormous importance. This case also benefits sampling artists by providing an example of when it is appropriate to clear only the recording and not the composition, potentially saving a significant amount of time and money. However, like the other cases mentioned, *Newton* still left some of the most important legal questions around sampling unanswered.

Bridgeport

The most recent case that could legitimately be considered a landmark proved to be disastrous for sampling artists. The good news is that *Bridgeport Music, Inc., Westbound Records, et al v Dimension Films* in 2005 was settled publicly in court and was specifically about sampling, which has been a surprisingly rare occurrence. The bad news is that the ruling suggests that any snippet of music sampled, no matter how small, or how transmuted and buried in the mix, was to be considered infringement. Basically, after *Bridgeport*, one can say there really is no fair use possible in sampling, at least when the actual sound recording is sampled.

In 1990, rap group N.W.A. released the song “100 Miles and Runnin’,” which features a handful of samples, including Michael Jackson’s “Thriller”, Wilson Pickett’s “Get Me Back on Time, Engine #9”, and Funkadelic’s “Get Off Your Ass and Jam.”²⁸ From Funkadelic they took a single guitar chord, changed the pitch, and looped it a few times in the background. Funkadelic, fronted by George Clinton, never took legal action, but the “sample troll” who had acquired the copyrights to much of

Funkadelic's catalogue saw a potential financial windfall. Funkadelic, like most of George Clinton's catalogue, is used heavily by samplers, especially in hip hop.

Bridgeport is a one-man operation with no employees, and no assets other than music copyrights.²⁹ Their business model appears to be based almost solely on suing modern sample-based artists for infringement of old copyrights. They don't use copyright to advance the public good, as the constitution intends, and they provide no added value in the musical supply chain. Their lawsuits generally can not incentivize musicians to record more dusty 1970's funk tracks, which would of course be impossible, but they do create a disincentive for the artist wishing to re-work those old tracks into something new. "Sample troll" really is the best description of Bridgeport. They simply set up shop on a busy strip of musical real estate and start charging tolls. Bridgeport has filed at least 500 lawsuits against at least 800 artists.³⁰

The case was originally decided in favor of the defendants (N.W.A.), but was ultimately reversed by the United States Court of Appeals for the Sixth Circuit. In a brief submitted to the appellate court, the Brennan Center for Justice, along with the Electronic Frontier Foundation, argued that they "endorse the district court's conclusion that the *de minimis* rule applies to sound recordings."³¹ Simply put, this means that the *de minimis* ("about minimal things") standard that applies to other areas of copyright and intellectual property law should also apply to music sampling. What exactly is considered minimal is, of course, a tricky question. However, the brief notes that "Every court of appeals to consider the *de minimis* rule, including this one, has accepted it as a fundamental part of copyright law. Every court to address the issue in the music sampling context (including sound recordings) has concluded that the *de minimis* rule applies." The brief convincingly argues that finding against a defendant for sampling a single guitar chord would be reversing a long history of legal precedent. Unfortunately, the Court did not agree.

Their basic conclusion was that a small piece of musical composition could be fairly re-appropriated due to “the limited number of notes and chords available to composers,” but that sound recordings were a different issue. In a recording, they argued, the articulation of the musician was important and “the question turned not on the originality of the chord but, rather, on the use of and the aural effect produced by the way the notes and the chord are played.”³² The court did not explore whether a chord could theoretically be played so blandly as to have no value beyond a chord written on a page. One has to assume their standard would apply to any possible recording, just by the very fact that it is a recording. Their conclusion on this front is built on the court's premise that “For the sound recording copyright holder, it is not the 'song' but the sounds that are fixed in the medium of his choice. When those sounds are sampled they are taken directly from that fixed medium. It is a physical taking rather than an intellectual one.”³³

This gets at a key issue involved in other piracy-related debates in the digital ecosystem. Is copying a recording from a fixed medium the same as stealing another physical good? Is burning a DVD for your friend the same as stealing a DVD from Best Buy? The simple answer is “no.” While piracy is a serious issue and does take money out of artists' pockets, the difference is that stealing a DVD means the store no longer has that DVD and must buy another, while burning one leaves the store with the same inventory. And, more to the point of music sampling, NWA was never accused of stealing a vinyl record from Funkadelic, but just recording a snippet from a record they legally owned onto a computer and re-working it. Even if this difference was not already obvious, it is tacitly acknowledged when a sample is actually cleared. The rights-holders do not send the sampling artist a copy of the record to borrow along with the license. The actual physical repository of the audio information is correctly seen as unimportant. Determining such a meaningful, precedent setting case based on such a misunderstanding is a tragedy.

Another area where the court clearly showed their ignorance of the actual workings of the music industry, and what effects their decision might have, was in their analysis of the market for sample licensing. They saw the issue as being quite simple, writing

“Get a license or do not sample. We do not see this as stifling creativity in any significant way...the market will control the license price and keep it within bounds...The sound recording copyright holder cannot exact a license fee greater than what it would cost the person seeking the license to just duplicate the sample...”³⁴

If these assertions were true, of course, this very paper, and others like it, would not exist. We would have a smoothly run free market for sample licensing. However, the court's analysis does not take into account the monopoly rights afforded copyright owners, the prohibitive transaction costs associated with clearing a sample, nor the market failure brought about by these costs, along with the lack of price information available to those seeking a clearance. Assuming that the copyright holder is somehow constrained by the market in what they can charge for a sample is just wrong. There is no real competition for a particular sample, and a truly memorable sample can never be duplicated. An artist can not go down the street and get another “Apache break.” The percussionist who played the break in the first place, whose articulation the court clearly values, could well be deceased, and the equipment used to record the break is very likely extinct. The rights-holders simply have no obligation to sell a license at any price, and many choose not to.

One can forgive the court for not understanding all the moving parts involved in the production of, and market for, samples. They are, after all, judges, not DJ's or record company executives. However, their misreading of copyright law was simply jaw-dropping when asserting that “there is a large body of pre-1971 sound recordings that is not protected and is up for grabs as far as sampling is

concerned.”³⁵ One does not need to be a legal scholar to pick apart this statement, as basic empirical evidence reveals its flaws. Did they bother to ask any expert if this was actually true? Did they try to find a single instance of sample from pre-1971 being re-appropriated and released under this premise? Considering no song with a legal sample from The Beatles has ever been commercially released, and their entire output predates 1971, this claim seems not only wrong, but disturbingly so.

Congress did not explicitly include sound recordings for copyright protection until 1971, with the law going into effect in 1972. However, as The United States Copyright Office states,

“Sound recordings fixed before February 15, 1972, were generally protected by common law or in some cases by statutes enacted in certain states...Any rights or remedies under state law for sound recordings fixed before February 15, 1972, are not annulled or limited by the 1976 Copyright Act until February 15, 2047.”³⁶

So, in a best case scenario, it seems an artist might be able to use a sample whose owner is located in a state without such a statute and distribute his derivative work only within similar states, working only with partners also located within these states. This kind of approach hardly seems practical.

It is, however, interesting to explore this statement as a possible legal loophole for samplers. *Bridgeport* represents, to date, the farthest a sampling case has gotten in court. The Supreme Court has never ruled specifically on sampling, as the work at issue in *Campbell* was an interpolation, not an actual sample. As of today, *Bridgeport* is the law of the land, or at least the reigning interpretation of the law of the land, however flawed it is. Perhaps a keen sampler from an obscure locale will be able to adhere to all of his particular state's copyright laws and ride that one errant sentence to the Supreme Court, and force them to make a definitive statement about sampling. Or we could just wait until 2047, and hope that the term of ownership has not been extended again.

Seizing on the *Bridgeport* decision, the music lawyers really went to work. Within a few months, Bridgeport Music went after Universal Records and various other companies for the use of a three second Ohio Players sample in rapper Notorious B.I.G's hugely successful *Ready to Die* album, along with his single of the same name. The ultimate conclusion, this time by a jury, resulted in over \$4 million paid in statutory and punitive damages to Bridgeport and Westbound, although the ultimate amount was lowered on appeal in *Bridgeport v Combs*.³⁷

Chilling Effect

The chilling effect from this case and others has been quite noticeable in sample-based genres, hip hop in particular. Even going back to the early 1990's, rap groups were changing their sound for legal reasons and compromising their aesthetic vision. Public Enemy was regarded as the pinnacle of collage-like sampling, using a hundred or more small snippets on an album. As their frontman Chuck D explains, “Putting a hundred small fragments into a song meant that you had a hundred different people to answer to.....It's easier to sample a groove than it is to create a whole new collage. That entire collage element is out the window.”³⁸ Eventually, most hip hop groups resorted to interpolations or to taking large chunks of music, perhaps an entire bridge, and looping it throughout the whole song.

Chuck D was referring to changes his group was forced to make in the early 1990's, but the post-*Bridgeport* compromises have been even more severe. It has become almost cliché for hip hop fans today to pine for the “golden age” of hip hop in the late 1980's and early 90's. They complain of stale drum beats and uninspired, cold synthesizer melodies, and the reason for this aesthetic turn is the relative death of sampling in mainstream music. A quick scan through urban radio playlists will reveal very few samples. More likely, one will hear “hip hop” songs that are constructed around R&B vocals (often heavily processed with pitch correction software like Auto-Tune) and synthesizers on top of pre-

fabricated drum sounds. For instance, the top 5 songs on WGCI, Chicago's top "Hip Hop and R&B" station at the time of this writing (1/17/11) are "Can't Be Friends" by Trey Songz, "Aston Martin Music" by Rick Ross, "Down on Me" by Jeremih, "Black and Yellow" by Wiz Khalifa, and "No Hands" by Wacka Flocka. To my (relatively well trained) ears, not a single one of these songs contains a sample in the traditional sense, and, with the exception of "Can't Be Friends," all of them are hip hop songs. In comparison, the top 5 highest selling hip hop songs from 1994,³⁹ which many consider the year when hip hop peaked, were "Whatta Man" by Salt N' Peppa, which is built around a sample from "What a Man" by Linda Lyndell, "Fantastic Voyage" by Coolio, which is built around a sample from "Fantastic Voyage" by Lakeside, "Regulate" by Warren G, which is built around a sample from "I Keep Forgettin'" by Michael McDonald, "Shoop" also by Salt N' Peppa which is built around a sample from "I'm Blue" by The Sweet Inspirations, and "Funkdafied" by Da Brat which is built around a sample from "Between the Sheets" by the Isley Brothers.⁴⁰

While this analysis is hardly scientific, it does corroborate the general feeling that hip hop is not what it used to be. Whereas almost all popular hip hop songs used to be constructed from samples, today almost none of them are. It is much more commercially viable to build backing tracks from the sounds pre-loaded on synthesizer workstations like the Roland Fantom and the Yamaha MOTIF or from "sample libraries" and royalty-free loop packages like those from loopmasters.com or primeloops.com. While these tools sound fine, and allow modern producers more flexibility than sampling alone, they are often used to create just a stale impression of the kind of hip hop beats that originally made the genre exciting. As Hank Shocklee explained, spending \$12.95 for some guitar loops from Loopmasters or hiring a guitar player for a couple of hours will never give your beat the same soul as the vintage equipment, inspired performances, and recording techniques that can be created through sampling old records. And, of course, although somewhat less dramatic, this kind of

aesthetic regression can also be heard in other sample-based genres like house and trip-hop. It is worth reiterating that the owners of the original recordings that aren't being sampled are losing out just as much as the producers who are not doing the sampling, and the audience who are frustrated by lifeless, prefabricated beats. Almost no one benefits from the current arrangement, and certainly not the “Progress of Science and useful Arts” for whom the constitution establishes the foundation of our copyright law.

NOTES

NOTES

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Chapter 3: Legal Failure and Market Failure

"Overprotecting intellectual property is as harmful as underprotecting it....Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture"¹

-Judge Alex Kozinski¹

“The costliness and clumsiness and randomness of this system mock our tradition....It could be made radically more efficient, and inexpensive, and hence radically more just.”

- Lawrence Lessig, *Free Culture*²

It is now plain to see that the law has yet to fully deal with the problematic economic and legal situation around the licensing of samples. It is understandable that legislation written in 1976 did not specifically address a practice that only existed on the fringes of music at that time, but it is more than unfortunate that there is still so much confusion, unfairness, and inefficiency in 2011. Copyright laws were designed to govern the republishing of someone else's work, but today are asked to serve the purpose of also governing the transformation or re-appropriation of that work.³ New technologies have opened up new possibilities, and the market has not provided a simple, fair, cost-efficient method for samples to be cleared, and there is not much reason to think the market will provide these things in the near future. The courts, while making a few bizarre judgements along the way, have done what

they could with the unsatisfactory laws they've been given the duty to interpret. The music industry has relied on the courts to set the boundaries of a practice they generally do not understand, a practice that copyright legislation has never directly addressed. The courts have essentially tried to decide this very specific area of copyright law by interpreting laws that do not even contain the word “sampling.” Meanwhile, a few pages of legislation could clear up most of the ambiguity and provide an enormous benefit to both sides of the licensing transactions.

Of course, this theoretical legislation would not be necessary if the market itself were not dysfunctional. There are four inter-related arguments that best illustrate the problems with how sample clearances are bought and sold today:

- neither side is getting the full benefit of a well-run market;
- transactions costs are too high;
- there is an unfair burden put on the creators of new, sample-based works;
- and there is a very substantial amount of illegal sampling.

Neither Side Is Benefitting

Who wins in the current climate for sampling? The biggest winners are music lawyers and the companies that sell pre-fabricated loops that are basically a royalty-free impression of a sample. This means that neither of the primary sides in the sample clearance market, the original copyright owners and the creators of new works, are getting nearly as much as they could from this musical technique. Entire industries have popped up mostly to feed on inefficiencies. While some of these royalty-free loops sound very good, it is amazing the lengths these companies will often go to just to sound like something that already exists. Wouldn't the copyright owners of older music like to have that money in their pocket instead? Wouldn't the artists looking to add authenticity to their tracks rather have the real

deal? While copyright owners do have an incentive to keep their samples at a minimum price, and knock-offs exist in all types industries, the market for sampling seems almost uniquely dysfunctional.

In general, scholars and artists that have argued for a new kind of sampling license have had more of an affinity for those artists trying to clear samples than those holding on to them. But many of the benefits of a compulsory license should come as a relief to copyright holders. Nearly every dollar spent on negotiating a license could be a dollar saved, assuming the compulsory rate comes close to the eventual negotiated price. And, perhaps even more important to the bottom line, the new revenue coming in from artists who never would have tried to clear their samples, or never used the samples at all, could be huge. Of course, there would be opposition from rights holders to a compulsory scheme, but a streamlined, money-saving clearance system coupled with virtually overnight growth in the number of artists looking to clear samples would hopefully ensure that rights holders are actually more profitable than before. It is certainly not my goal, nor my estimation, that they will suffer overall losses. And it is my suspicion that even within the large, traditional, content-owning companies there are people who know the benefits a new system could bring. In *Free Culture* Lessig quotes an anonymous “insider from Hollywood,” speaking about the reworking of older films: “They've got extraordinary (old) content that they'd love to use but can't because they can't begin to clear the rights. They've got scores of kids who could do amazing things with the content, but it would take scores of lawyers to clean it first.”⁴

Transaction Costs Are Too High

Putting aside the fact that the cost of the clearances themselves are often prohibitively expensive, if available, the cost of even getting to the point where new artists start writing checks to rights holders can be immense. The primary reason for all the time and money that can be spent, and wasted, on clearing a sample is the number of parties whose demands must be catered to. As Joseph

Schloss explains in his book *Making Beats*, “A substantial number of people, including artists, lawyers, copyright holders, and their various representatives and assistants, must approve any given sample request—and any one of them can veto it by simply ignoring, forgetting, or otherwise failing to respond to it.”⁵ Money can be left on the table, and samples left off a record, because any one of these parties has sloppy paperwork or a mercurial attitude about sampling. No one knows how many classic hip hop or dance songs will never see the light of day because just one of a half dozen parties had some objection, or some unreasonable demand, and the whole process fell apart.

Even when all the parties do finally get to the negotiating table, the negotiations themselves can be inefficient. Because there is no standardized rate or process, negotiations, especially for less experienced artists or labels, may need to start by covering ground and agreeing to terms that should not necessarily even need to be discussed. Of course there are some specialists in sample clearance who have positive relationships and working understandings with regular players like major record companies and publishers, and can smooth out the process, but the market is starved for information. It is not like negotiating for other products or commodities where anyone can hop on the internet and get at least a rough feel for the going rate. And because the nature of copyright is monopolistic, an artist can not shop around and play two rights-holders off against each other for a better price.

The Unfair Burden On New and Independent Artists

Experimental hip-hop producer The Angel puts it this way:

“It's too much of a nightmare...It's all down to the publishers and the record company, who own the masters. And they couldn't care less who you are...And sometimes they don't even wanna make a deal. It's like not even worth their while to do it; they don't want the paperwork. It's below their radar.”⁶

The hurdles in time and effort to clear samples have already been laid out, but the cost of the samples themselves can be excessive to the point of gouging. As has been explained, finding good information on average costs is difficult, but entertainment attorney Donald Passman provides some estimates:

“For the master, a record company will want a royalty, which is usually in pennies and payable on worldwide sales. The range is around 3 cents to 8 cents, sometimes more if it's an important song and they think they can get it, or if they don't care whether you use it or not and you're desperate. They also want an advance of however much they can squeeze.”⁷

The royalty rate described here, while highly variable and difficult to accurately estimate for an individual case, does not seem generally unfair. If a song is sold for 99 cents on iTunes, sending 8 cents to the people who originally recorded the track on which the new one is constructed sounds reasonable. The unfortunate portion is the “advance of however much they can squeeze.” Passman says this upfront amount is usually at least \$1,000, and often much more, and that this amount is “rolled over,” meaning it is repaid again each time sales reach a certain threshold. The new artist, or their representative, is going to have to sink a potentially substantial amount of money into a product that has yet to be released. Will they ever make that money back? The music buying public is notoriously fickle, and leaps of faith do not often pay off, especially with an unestablished artist. While the minimum of \$1,000 might not be much to Warner Bros., for an independent rapper trying to make a record in his bedroom on the weekends, \$1,000 could literally represent more than the cost of his entire studio, or the contents of his savings account. Is it worth putting that cost on a credit card, when he has little chance of making that money back, and even less chance of getting sued for the sample? No artist or entrepreneur can, or should be, completely shielded from all risk of losing money

on an investment, but paying a substantial amount up front to clear a sample that will most likely not bring a return seems particularly shaky, and would be unnecessary if there were a compulsory license. While not necessarily the most ethical, or legally defensible, decision, we can see why so many samples go completely uncleared.

Royalty Stacking

The costs described so far are only for the master recording and are *per sample*. Clearing a song produced in the Public Enemy style of a dozen or so different snippets per track would obviously be much more expensive, and the fees paid to publishers can make the track prohibitively so. Passman explains:

“Publishers will almost always insist on owning a piece of the copyright, songwriting royalties, and publishing income. The percentage varies with how significantly the sample is used in your record. If you've lifted an entire melody line, or their track is the bed of your song, they might take 50% or more; for less significant uses, the range is 10% to 30%.”⁸

Maybe if someone takes an entire verse, chorus, and bridge of a hit song and then raps over it, like Puff Daddy's infamous lifting of The Police's “Every Breath You Take,” they actually deserve to forfeit 50% of their publishing income. Puff Daddy's re-interpretation, “I'll Be Missing You,” certainly would never have existed without The Police, just like all the extra income brought into The Police and their publisher from “I'll Be Missing You” never would have existed without Puff Daddy. This arrangement is certainly more fair than the extreme example of The Verve forfeiting 100% of their royalties to the Rolling Stones. However, the real problem comes with the “10% to 30%,” when a beat is more collage-like and takes tiny snippets from many different sources. Again, Donald Passman:

“I’ve seen more than one situation like this: A song has three samples. Publisher X wants 40%, Publisher Y wants 40%, and Publisher Z wants 30%. If you do some quick math, you see that’s 110%. So every time you sell a record, you get to write a check out of your own pocket.”⁹

This kind of scenario is known as “royalty stacking,” and is obviously not a formula for financial success, and is why sample-based genres sound so much different than they used to. It would seem to be advantageous for all parties involved to get each of these percentages down to the point where the whole cost would give the new record a chance at profitability, and a reason to be released. However, the party wishing to release the new record is the one responsible for going back and forth between all the rights holders and hoping to get them to individually lower their costs, if they are even willing to negotiate. It is not realistic to get everybody together in one room to hash out a fair split of revenue from the final product, and then repeat that process for each track on a hip-hop record with fifteen or more songs. This is the very definition of a high bargaining cost.

In *Creative License*, Kembrew Mcleod and Peter DiCola interviewed many people involved with clearing samples and came up with similar numbers to Passman's. They broke samples into a few different categories, based on the popularity of the original artist and how much the sample is used in the new track. At the top tier of sampling, when using material from a “superstar” artist, they write that a sampler can expect to pay “\$100,000 or \$0.15 a copy” for the sound recording license and 100% of the publishing rates for the composition license. If the artist is only “famous,” the estimated rate is “\$50,000 or \$0.12 a copy” for the sound recording, and 100% for the composition. They write that the numbers from both these categories are regardless of how long the sample is or how many times it appears in the new work.¹⁰ Using their numbers, McLeod and DiCola estimate the clearance cost of a few classic, sample-based records and basically determine that large-scale commercially released

collage-style records could not exist today. For instance, they estimate that Public Enemy's *Fear of a Black Planet* (81 identifiable samples) would actually be a net *loss* of \$6,786,000 for the artists, and Beastie Boys' *Paul's Boutique* (125 identifiable samples) would see a loss of \$19,800,000.¹¹ Basically, the more a prominent collage-style sampler sells, the more money they would lose in today's environment.

From the perspective of the rights holders, there is an incentive to keep their prices high, so when an artist with deep pockets approaches them with a sample clearance request that artist is not armed with the bargaining power of previous low-ball deals. And, of course, the publishers have to pay their own transaction costs (lawyer fees, travel expenses, opportunity costs, etc.), so it is not worth even discussing the matter with a rapper who can not even cover the cost of a few billable hours. As The Angel says, “they don't want the paperwork.”

Making the process even more exasperating, this paperwork may only cover the release of the actual record, not subsequent synchronization licenses for movies, television, or video games. Those may require another round of negotiations altogether, once again dealing with several different rights holders. Passman:

“.....[the publishers] have the right to stop you from granting a particular license – for example, you couldn't license the song in a commercial without going back to the record company and publisher (and paying them for it). So when you sample, you can lose control of your song.”¹²

One of the reasons the licensors can make such demands of licensees is the simple dynamic of how sample-based music is created. The artist creating a new track in the studio does not usually know ahead of time what samples they will end up using, and the specifics of what it will take to clear each

one. Thus, the artist has sunk costs, certainly in labor and perhaps in cash, by the time they reach the bargaining table. They can not make a credible threat to not make the new track, they must either meet the demands of the publisher and record company or risk losing all of their previous hard work.¹³ This unfortunate, and often inefficient, dynamic is not unique to sampling. The inherent flaws of “sequential innovation” have also been documented in negotiations over patent licenses.¹⁴ It is much easier for the licensor to get up from the table at any given moment, an advantage the licensee would share if they had an option of invoking the compulsory rate.

Much (Most?) Sampling Is Done Without A License

If, within any market segment, most goods are obtained illegally, when there is, or could be, a legal alternative, it seems safe to say there is some kind of economic and/or legal problem. It is a minor tragedy that an important element in the economy of modern music needs to be lumped in with bootleg liquor or pirated software, but this is the current state of sampling. While official statistics on the total volume, or percentage, of samples that are released but not paid for are impossible to calculate, there is plenty of anecdotal evidence that most samples are never cleared. Today, most music, by total volume of releases, not sales, is created independently, without a budget for samples or access to the industry machinery required to get a sample cleared. For example, there are an estimated 8 million band or artist pages on myspace.com,¹⁵ but only a few thousand major label releases per year.

As digital audio production techniques have progressed, it has become easier to blend samples into a mix without their sources being obvious, and many producers take pride in these techniques. It is hard to find producers who will give a full accounting of all the samples they have used illegally, but some have been open about the lengths they will go to conceal the origin of the material, a technique which would largely be unnecessary if these samples were getting cleared. For example, producer and

label owner El-P in the sampling documentary *Copyright Criminals*: “If you can catch me [sampling] then it's my fault, straight up. I didn't do my job.”¹⁶ And, of course, most artists will never sell nearly as many records as El-P, so concealing their samples is just not that important, as they will probably never reach the threshold of revenue needed for the copyright owner to financially justify a lawsuit. The large upfront costs of clearing a sample, combined with the reasonable chance that there will never be consequences for not clearing it, have contributed to a fatalistic attitude and a level of comfort with operating outside of the law. Says label owner and hip hop historian Jeff Chang, “You see...sampling going back underground, way underground. For a bunch of artists who feel like, hey I'm going to be outlaw about it. You know, because sampling law has created two classes: you're either rich enough to afford the law or you're a complete outlaw.”¹⁷

Mash-Ups

On the other side of the spectrum, a more recent development has seen some very popular independent artists blatantly and prominently using samples, but making their songs available as free downloads (sometimes with a chance for listeners to pay voluntarily). They do not necessarily create any revenue to be sued for, but they can more than make up for it by playing live and selling ancillary merchandise like t-shirts. It is perfectly legal to perform these “illegal” songs live, as the venues have blanket licenses with the performance rights organizations, and the samples are covered under these licenses, the same way a DJ set or a tribute band would be. It is still technically illegal to host and distribute these songs on their website, but it is legally more akin to a much, much smaller and more narrow Pirate Bay than to Puff Daddy selling CDs with uncleared samples in record stores. The most popular artist to embrace this new strategy is Gregg Gillis, aka Girl Talk, who creates “mash ups” from snippets of dozens of different songs and layers rap acapellas over the top. His latest album *All Day*

uses 373 different samples, about 30 per song, and the vast majority are instantly recognizable to any fan of the genres he leans on, mostly classic rock and hardcore rap. While artists like Aesop Rock go to great lengths to hide their samples, every sample from *All Day* is neatly catalogued on the website for Girl Talk's label, Illegal Art.¹⁸ The strategy seems to be paying off handsomely for Girl Talk as he routinely sells out concerts across the country and overseas, but has yet to receive a single lawsuit.

It is an open debate as to why Gillis has never been sued, but it probably has something to do with his potential as a dream defendant. He is a favorite of copyright reform heavyweights like Lawrence Lessig and Electronic Frontier Foundation, and “would be a ready-made hero for copyright reformers; if he were sued, he’d have some of the best copyright lawyers in the country knocking on his door asking to take his case for free.”¹⁹ It also does not hurt that he happens to be white and from a middle class suburb of Pittsburgh, and trained as a biomedical engineer at Case Western Reserve University. His profile may make him a more sympathetic character to a judge or jury than a gold-toothed black rapper from a tough neighborhood. Another factor is probably that rights holders with much to lose are not eager to have the current legal standards for sampling shaken up. Girl Talk, along with other samplers, and their advocates, may be able to present a compelling fair use argument, especially on the questions of whether or not their work is transformative and whether or not it affects the market for the original(s). Illegal Art's head, using the pseudonym Philo T. Farnsworth, says “No one knows which side might win... If a case weighed in our favor, it would open the door for a multitude of artists to feel more comfortable about sampling without permission.”²⁰

Regardless of what becomes of Girl Talk, artists getting even more aggressive with their sampling, and paying nothing for it, can not be what the record industry had in mind when they started getting serious about litigation. Their reluctance to test themselves against such an obvious target as Girl Talk may show they perceive a possibly fatal flaw in the logic of the current legal system that was

not apparent in the immediate post-*Bridgeport* world. The fact that “no one knows which side might win” creates an even stronger incentive to create a compulsory license, or at least a clear test for what is or is not fair use, a standard that can hold up to legal scrutiny much better than the flawed language of *Bridgeport*.

NOTES

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1. *White v. Samsung Elec. Am., Inc.*, 989 F.2d 1512 (9th Cir. 1993).
2. Lessig, Lawrence. *Free Culture: The Nature and Future of Creativity*. Penguin, 2005. 305.
3. Ibid. 19.
4. Ibid. 270.
5. Schloss, Joseph G. *Making Beats: The Art of Sample-Based Hip-Hop*. Wesleyan, 2004. 179.
6. Ibid. 179.
7. Passman, Donald S. *All You Need to Know About the Music Business*. Free Press, 2009. 319.
8. Ibid.
9. Ibid.
10. McLeod, Kembrew and DiCola, Peter. *Creative License: The Law and Culture of Digital Sampling*. Duke University Press, 2011. 205.
11. Ibid. 207.
12. See FN7.
13. DiCola, Peter. "Sequetial Musical Creation and Sample Licensing" *Northwestern University School of Law, Law and Economics Series*, 15 Feb. 2010.
14. Green, Jerry and Scotchmer, Suzanne. "On the Division of Profit in Sequential Innovation" *RAND Journal of Economics* Vol. 26, No. 1, Spring 1995. 20-33.
15. <<http://en.wikipedia.org/wiki/Myspace>> 16 Apr. 2011.
16. El-P. *Copyright Criminals*, IndiePix Films, 2009.
17. Ibid. Jeff Chang.
18. <<http://www.illegal-art.net/allday/samples.html>> 16 Apr. 2011.
19. Mullin, Joe. "Why The Music Industry Isn't Suing Mashup Star 'Girl Talk'" *Paid Content*, 16 Nov. 2010 <<http://paidcontent.org/article/419-why-the-music-industry-isnt-suing-mashup-star-girl-talk>>
20. See FN10. 242.

Chapter 4: **History and Overview of Compulsory Licenses**

Of course, the inefficiencies and unfairness that can grow out of a copyright system that awards a temporary monopoly are not unique to the music industry, or even to this specific area of the industry. Compulsory licenses have been a part of American creative culture since the early 20th Century, and have proven useful. Originally, the compulsory license was created to deal with the reproduction of musical compositions for a player piano or a phonograph, two inventions that became quite popular in the late 19th Century. Traditionally, musicians and the publishers who distributed their works made money from selling sheet music and collecting royalties for public performances, two areas specifically covered in copyright law. However, it was not clear that pressing a record of a song, making copies, and selling them to the masses, was covered. The composers and publishers felt their work was being taken advantage of and the creators of these new technologies were “sponging upon the toil, the work, the talent, and genius of American composers,”¹ a sentiment that almost perfectly matches the attitude of copyright owners today when it comes to uncleared sampling. Eventually, with the 1909 Copyright Act, Congress stepped in and created the “mechanical license,” which allowed anyone to record and distribute a published song after it was recorded once, provided they paid a standard fee.

The reasoning for, and nature of, such licenses is described succinctly by the United States Copyright Office itself:

“Because Congress was concerned about the potential for monopolistic behavior, it also created a statutory license, section 115 of the law (the Copyright Act), to allow anyone to make and distribute a mechanical reproduction of a musical composition without the consent of

the copyright owner provided that the person adhered to the provisions of the license, most notably paying a statutorily established royalty to the copyright owner.”²

In layman's terms, this means that the copyright owner of a work you wish to recreate and distribute is *compelled* by law to let you do so, as long as you pay them an established rate per copy. This rate is periodically updated by the government to reflect the changing creative economy and to adjust for inflation.

Television, Internet, Patents

Compulsory licenses have been so successful in the area of musical reproduction, that they have also been adopted for other media, including cable television and the internet. When cable television first began, the providers were simply passing on content from the broadcasters, and not paying the broadcasters anything, something like the digital pirates of today. After a few decades of wrangling, Congress finally created a system for cable similar to the one for recorded music. The content owners would be compensated at a rate set by Congress.

Internet and satellite radio can also distribute content with a compulsory license under The Digital Performance Right in Sound Recordings Act of 1995. While there is still some controversy around this law, particularly the advantages they present to the grandfathered-in terrestrial radio, at their best, these licenses are a common sense way to compensate producers and owners of copyrighted material without allowing them to gouge the purchaser. They eliminate the need for endless haggling over fractions of pennies. And, in areas of much greater importance to the economy and public well-being, patents for things like pharmaceuticals and other products are also sometimes managed with compulsory licenses.

Why Not Sampling?

When looking through the lens of history, it actually defies common sense that we do not already have a compulsory license for digital music sampling. Sampling is hardly a new technology, it moved into the mainstream of modern music decades ago and, though setting a fee schedule would be tricky, it is not nearly as complicated or arcane as a flu vaccine (and, admittedly, not as urgent). Going forward, the best corollary for a compulsory license for sampling remains the mechanical license for musical reproduction. This is based on issues of file size, the nature of musical creativity, and the companies and business practices already built around the industry of music.

It is an interesting question as to why the government has yet to even begin the discussion about a standardized way to clear samples. It certainly can not be that sampling is too new a practice. The distribution of ringtones, non-existent until the late 1990's, has already been given a rate set by the Copyright Royalty Board (CRB). The board has also ruled on satellite and internet radio, both newer developments than sampling. The reason for inaction is probably some combination of the complexity and nuance of sampling and the entrenched interests of major labels, publishers, and their lawyers.

With digital sampling, the parties most vocal about the need for a standardized rate are usually the little guys. Courts have interpreted copyright law in favor of the established labels and publishers, ruling that even the tiniest samples must be cleared. With cable television the dynamic was exactly the reverse. The powerful, established broadcasters were losing their legal battles against the upstart cable companies, all the way to the Supreme Court.³ The pirates were winning, so Congress changed the rules and created a reasonable compromise. So far with digital sampling, the pirates have lost the biggest battles. Although, it is hard to see who is actually winning other than the sample trolls and the lawyers.

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1. Lessig, Lawrence. *Free Culture: The Nature and Future of Creativity*. Penguin, 2005. 56.
2. <<http://rightsflow.com/resources/copyright-licensing-resources/compulsory-license/>> 16 Apr. 2011.
3. See FN1. 61.

Chapter 5: **Guidelines for A New Scheme**

Criticizing the current climate for sample clearance and arguing for a compulsory license for sampling are easy. We have seen compulsory licenses work across a range of media, particularly within the industry of music itself, and imagining those successes applied to digital sample clearance is not difficult. What is difficult is to actually design such a scheme. In this chapter I will attempt to provide guidelines for a new way to license samples based on what makes sense in the current paradigm for sample clearance, the characteristics of already successful compulsory systems, and a few basic philosophical assumptions about the value of samples and the nature of copyright.

The Current Paradigm

In *Creative License*, the authors interviewed an impressive variety of music industry players to come up with a basic list of factors that can determine the price of a sample in today's market. This list should provide a good foundation for analyzing what does or does not make sense about the way samples are cleared today.

Pertaining to the original song being sampled:

1. Quantitative portion of the recording or composition used
2. Qualitative importance of the portion used
3. Whether the sample comes from the chorus, the melody, or the background
4. Whether the sample comes from the vocal portion or the instrumental one
5. Recognizability of the portion sampled
6. Whether the sampled musician had a major label or distributor

7. Popularity of the sampled recording or composition
8. Level of the sampled musician's commercial success and fame

Pertaining to the new sample-based song:

1. Number of times the sample is repeated
2. Quantitative portion that the sample represents with respect to the new song
3. Qualitative prominence and importance of the sample in the new song
4. Perceived aesthetic qualities of the new song, such as genre or quality
5. Whether the new song is of a violent or pornographic nature, or is other-wise objectionable
6. Level of commercial potential for the new song
7. Whether the sampling musician has a major label or distributor
8. Level of the sampling musician's commercial success, fame, and ability to pay¹

The book also explains how the party initiating the clearance negotiations is usually at an advantage. For example, if a rap group puts out a hit record that contains an uncleared sample, they will likely end up paying more for that sample than if they had simply cleared it ahead of time. In contrast, if a label approaches a modern artist to rework their catalogue (one famous example is the arrangement between the jazz label Blue Note and various modern hip hop producers, including Madlib and Pete Rock), they will be more likely to make a reasonable offer that is profitable for all parties. Sometimes, the new artist has more leverage. An obscure label from which Jay Z wants to sample may have a lot more to lose by saying no than does Jay Z, and so he will be in an excellent position to negotiate the price down. The origin of the negotiation should not be as much of an issue in a statutory licensing scheme, but could still play some role. A price could still be negotiated below the

compulsory rate, so a more traditional style of negotiation could take place. This situation still occurs with mechanical licenses even though there is a compulsory rate available in that area.

Guidelines

In this section, I will provide some guidelines for how a new sample clearance system might (or should) look. I will divide the guidelines into two somewhat overlapping sections called “Rights,” where mostly non-economic issues are discussed and “Money,” where recommendations for the division of revenue are given, based on the nature of the sample(s).

“Rights”

Aesthetic Qualities

In these guidelines for a new sample clearance scheme a few of the criteria discussed in *Creative License* would be thrown out entirely. The potentially offensive nature of the work and its “perceived aesthetic qualities” would be the first to go. These types of qualitative objections, along with those based around common notions like “hip hop is not really music,” or “I just don't want to my music to ever be sampled” are often used today as reasons to deny the clearance of a sample, beyond any economic rationale. In a compulsory system, of course, that choice would not be at the discretion of the original copyright owner. The clearance would be *compelled*. And, of course, aesthetics are in the eye of the beholder, and would be very difficult to quantify in a more regulated system. Does any song with profanity have negative aesthetic qualities? Should there be an extra charge if the new song uses racial, misogynistic, or homophobic slurs? For the sake of simplifying the license and reducing subjectivity, it makes more sense to just ignore these variables entirely. However, these questions bring up an important issue, perhaps the most important to many rights holders. When I have spoken to nearly anyone in the music industry, who is not a sample-based artist himself, about a compulsory

license for samples, they suggest another protection against unwanted sampling that is not about money: moral rights.

Moral Rights

The recognition of moral rights presents one of the greatest differences in approach to copyright law between the United States and many European countries, including France and Germany. Some would argue the relative lack of moral rights is one of America's great strengths in the arts, especially in this era of collage and remix, and is crucial to a new system. Typical examples of moral rights include the right to attribution (which are actually strengthened in these guidelines), and the right of an artist to protect her work against alteration, which may include being sampled or “mashed up” in a way the artist finds objectionable. Most moral rights, and especially the ones most relevant to sampling, can broadly be described as the right to keep one's artistic vision pure, even if they have long ago sold their economic claim to the work, and sometimes even if they are deceased.

It is worth remembering that moral rights are not a part of the compulsory mechanical licenses that have been in place for over a century, and would be the closest relative to a compulsory license for sampling. Any neo-Nazi band is free to cover “Imagine,” John Lennon's meditation on world peace and the end of nationalism, on their next record, so long as they pay the established rate. That is simply a possible negative consequence that Lennon agreed to when he published his song in the United States, and a consequence that is far outweighed by the benefits of the compulsory mechanical license. Contrast that scenario with the idea that Lennon's offspring could one day stop the release of a song that used a single snare drum sample from “Imagine” because they did not like the beat, or had an argument with the producer, or just wanted to make a point. At their worst, these are the kinds of complications that moral rights can create, and they could be disastrous to any serious attempt to reform sample clearance.

The United States has been quite firm in her reluctance to embrace moral rights in the past. Although a signatory to the Berne Convention for the Protection of Literary and Artistic Works, the United States held out from signing on until 1989, about 75 years after the treaty was first completed. A major source of the objection was a refusal to accept some of the convention's language on moral rights.² Even now, the United States somewhat sidesteps the issue by declaring that the moral rights included in the Berne Convention are already sufficiently covered in existing copyright law.

The only federal law in the United States to explicitly address moral rights is the Visual Artist Rights Act of 1990. Among other rights, VARA protects visual works from “distortion, mutilation, or other modification,”³ which could be somewhat analogous to what happens with digital music sampling. However, VARA does not mention music, and specifically excludes mass-produced visual works, “audiovisual” works, and other several other types of electronic media.

Interestingly, the concept of moral rights was not mentioned in the decision for *Campbell v. Acuff*, which may have provided the best case for such an argument. 2 Live Crew reworked Roy Orbison's “Pretty Woman” into something that Orbison or his descendants could easily find offensive. Frankly, they “mutilated” his classic composition and mocked its very essence. It should also be noted that a lack of moral rights can cut both ways. When they forfeited the songwriting credits for “Bittersweet Symphony” to The Rolling Stones, The Verve had no recourse to stop the licensing of the song to television commercials for products they had a moral objection to. In that case, the extreme nature of the current legal environment for sampling, giving overwhelming favor to original rights holders, actually compromised one band's moral rights.

Opt Out

A concept related to moral rights, and one that is also discarding from these guidelines, is the choice of original rights holders to opt out of the compulsory sampling license. An opt out would, of

course, make the license something far less than compulsory. Although a standardized license that was completely voluntary, and had an opt out available, would probably still help with some of the current inefficiencies, it would provide too much leverage for rights holders, as they could kill any deal for any reason. It would also not address at all the problem of artists, like The Beatles for instance, who simply do not allow any sampling ever for any price. Once again, we should look to the success of the mechanical license, which can not be opted out of, for guidance.

Many scholars and members of the industry have suggested a possible third-party clearinghouse for samples, that would be well-organized and provide a clear menu of prices for artists wishing to sample from the catalogue, with the additional benefit of letting rights holders opt out of the collective altogether. This clearinghouse could function in a similarly to the Harry Fox Agency, the country's largest distributor of mechanical licenses. The benefits are obvious, as it is usually preferred for industries to create efficiencies voluntarily without the government getting involved, especially in an area the government does not seem to understand well. However, sampling has been a serious component of popular music for 30 years, and a clearinghouse has yet to emerge. We could very well have to wait another 30 years for one to come around, if ever. There are decades of evidence that such a clearinghouse may need a push from the government, in the form of a standardized license, to get rolling.

Public Domain

In the United States, any sound recording made before February 15, 1972 is subject to state law, but will be covered under federal law beginning on February 15, 2067. Anything created after February 15, 1972 is already subject to federal copyright. The distinction between state and federal jurisdiction is important because there is a whole web of state laws that generally are not favorable to public domain, whereas federal law does provide for the movement into the public domain eventually. Recordings made on or between February 15, 1972 and January 1, 1978 will be protected for 95 years,

meaning they will lose protection in 2068 at the earliest.⁴ In short, the late 2060's will be a fun time to be a music producer, but for those working with samples today, an expansion of public domain would be of tremendous value.

Currently, compositions registered before 1978 are covered for 95 years. It does not seem like 95 years of potential revenue would be a necessary incentive to ensure proper time and money is invested in the creation of music. Are people really thinking 95 years into the future when they write music? Most songs see their greatest earnings within a few years, at most, of their release. The purpose of copyright is to “promote the Progress,” not “provide a comfortable living for Bing Crosby's great-great-great grandchildren.” A shorter term of something like 50 years for both the composition and sound recording would open up anything before 1961 to the public domain, and be a great boon to sample-based music. 50 years would probably be the minimum possible term because the Berne Convention, which is the law of the land in the United States, states that all works, except photographs and films, must be protected for *at least* 50 years, but can be protected longer if the country so decides.

Some will argue that expanding public domain and/or fair use would lower the incentive to create new music to the extent that some musicians would simply stop creating. This is far from certain, however. Peter DiCola has developed a “Labor-Time-Allocation Model of Sampling and Licensing” that models the behavior of musicians if they have a choice between spending their time writing and recording music, touring, and a non-music job that pays a fixed wage.⁵ DiCola determines that expanding the public domain (by way of expanding fair use), would actually lead to more music being recorded and be better for the public in general, which, once again, is the stated purpose of copyright. His models, using game theory as way to study the “sequential innovation” relationship between samplers and original rights holders, suggest that music creation would actually be *more efficient without any copyright at all* than the current system. He explains “the source of the inefficiency is the timing of the agents' actions. The sequence of events means that a single piece of

information is missing when production occurs: the identity of the licensor or licensee they will need to negotiate with to authorize the use of a sample.”⁶

Neither DiCola nor I actually propose such a radical solution, but it does go to show just how inefficient our current system can appear when analyzed through some traditional economic analyses. These results also make some intuitive sense when we realize that human beings, and musician's especially, are not hyper-efficient revenue-maximizing robots. People created music long before it was profitable. DiCola also argues, by way of Landes and Posner's *The Economic Structure Of Intellectual Property Law*,⁷ that because “prior works are an input into musicians’ production processes, a tradeoff exists between increased return on a musician’s own copyrights” and increasing “author’s cost of expression,” so that “increased copyright protection does not unambiguously benefit musicians.”⁸

Fair Use

The Copyright Act of 1976 provides four criteria for measuring fair use. These criteria act only as guidelines, and any single factor, or combination of factors, does not necessarily qualify or disqualify a work from fair use protection:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

There is actually a reasonable argument that a good portion, or even the vast majority, of sampling is covered by fair use, and some legal scholars have been eager to make that argument in court. My view is more conservative, as taking large chunks of music and looping them in a new work for commercial release violates the letter and the spirit of fair use. Every instance of sampling mentioned so far in this paper fails on the first criterion above, as they were all commercial in nature. Even Girl Talk's mash-ups, available for free, were still released with an eye on potential profit from other avenues. The second criterion is largely irrelevant to sampling, as most samples are of commercially released, privately owned music. If an artist were to sample a little audio from a news story or a speech (which does happen), they may have a better argument.

Harm to the Original

Jumping ahead, the fourth criterion could make for an interesting economic analysis or legal debate, to the extent that the issue is even debatable. What is the effect of a sample on the market for the original? I agree completely with Lessig when he writes

“I have never seen anyone prove that in fact, that some work was diminished in its ability to make money by somebody’s sample. In my mind the work that’s reusing it is not in competition with the original. And you haven’t removed the original. It’s still there. It will always be there, as it is, as it was, as the original. And if you sample from it, you’ve made something else. You’ve probably put samples from ten other things into this thing, and that’s just one little element, and together the parts make up something that has very little bearing on that one thing you may have sampled from. I just don’t think there’s an argument there of what the harm is. No one’s ever shown me that the harm is real.”⁹

His last point is the most important. Individual lawsuits, and policy in general, are at least partially constructed around the presumption of harm, a harm which no one has ever successfully demonstrated. Has there ever been a person on Earth who was going to buy Michael McDonald's single "I Keep Forgettin'" but heard "Regulate" by Warren G feat. Nate Dogg, and decided to buy the latter instead? This is not to say McDonald does not deserve some compensation, but that is an issue of basic fairness and the nature of ownership, not harm.

One area in which harm could realistically be possible is in the world of mixtapes, in which a rapper looking to make a name for himself will simply put his own rhymes on top of instrumental versions of already released hip hop songs, and sell those CDs for a few dollars out of his trunk or give the mix away for free online. Mixtapes are also created by hip hop DJ's, sometimes looking to make a name for themselves or other artists on the tape, and sometimes just to rip off the original, more established artists featured. The most high profile example of this practice was the case of DJ Drama, who was arrested for piracy in 2007, when investigators confiscated more than 80,000 mixtape CD's from his Atlanta studio.¹⁰ Clearly, this kind of practice is much closer to classic bootlegging or piracy, and does not really deserve the artistic respect that comes with the word "sampling."

Substantiality

So, if no commercially available, sample-based music fits the first criterion, but almost all of it meets the second and fourth, then what *should* be fair use? The third criterion, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," is the key. The language is ambiguous, as anyone can form their own opinion about what is or is not "substantial." My solution is to create a guideline which declares that the sampling of a single transient, at minimum, no matter how many times it is repeated or looped, is fair use.

In acoustics, a transient can be described as “a short-duration signal that represents a non-harmonic attack phase of a musical sound or spoken word.”¹¹ In musical layman's terms it would be described as a “hit.” For instance, a single strike of a snare drum, a single strum of a guitar chord, or a single syllable would each have one transient, while a melody or chord progression would have multiple transients that theoretically could be chopped up and separated. Anyone who has zoomed in on a digital audio waveform has seen a transient. Unless the recording is of a single droning sound, transients are usually easy to find, and there are already many software applications that will automatically cut the waveform at the beginning of each transient. Certainly, anybody who is serious about digital sampling has spent dozens, maybe thousands, of hours finding transients and chopping them up.

While the current post-*Bridgeport* standard is that literally any length of sound recording is off-limits for sampling without permission, a single transient should already be considered not to violate the copyright of the underlying composition without any change in the law. A single chord, single note, single percussive hit, or single syllable are not subject to copyright, even if they are distinctive, as per *Newton*, where the Beastie Boys were sued for infringing the underlying composition when they sampled a short, “overblown” flute passage, and were ultimately cleared of any infringement.

Of course, transients can be manipulated, which is often half the point of sampling. Once in the computer, audio can be slowed down, sped up, compressed, or effected any number of ways to squash the transient and make a longer passage of music look like a single transient. The solution here is to measure the transient by looking at the waveform of the original recording at normal speed with no added compression or other effects. If it looks like a single transient under those conditions, then the new artist can do whatever they please to manipulate the sound afterwards.

An immediate upside to legalizing these little, atomized snippets of sound would be to incentivize a return to, and expansion of, collage-style sampling. As it stands now, royalty stacking (the expensive

process of clearing many different samples within one song) actually creates incentives to just sample one large section from a single song. Looping an entire chorus can be, counterintuitively, cheaper than building an entire new piece of music from tiny samples of drum, bass, and guitar from a dozen different records. This wholesale lifting of entire passages is viewed by many as artistically inferior to the collage technique, for obvious reasons. A fair use protection for transients would promote just the opposite practice.

The single transient standard is not fool proof. For instance, many rock songs will end with the guitar player holding a single chord while the amplifier feeds back, technically creating a transient that can be minutes long. Should that also be free to take, the same as a single strike of a drum? I have no problem saying “yes,” as holding a single power chord is hardly a life's work, and it would be tough to build a hit song from a loop of amplifier feedback. But it is understandable that others may not agree. There are also situations where distinguishing the moment when one transient ends and the next begins can be difficult. In these cases, it would be important to remember that the single transient standard is a guideline, not necessarily a bright line rule. There would probably be cases where the line was fuzzy and some sort of negotiation or legal moderation would be necessary, like any other area of copyright law, and that is okay. Searching for bright line rules has so far not been very good to the world of sampling, with the brightest of lines coming with unsatisfactory language like “thou shall not steal” and “Get a license or do not sample.” Sampling is such a versatile and nuanced art form that it may just prove impossible to exist in the same space as bright lines, but some sort of fair use standard would be tremendous progress.

Personality Rights

With vocal samples, even of just one syllable, a tricky area that must be addressed is the “right to publicity,” or “personality rights.” As Richard Stim explains, “A music publisher may not be entitled to a payment for some samples, such as the use of James Brown's voice saying 'Get Down,' because

copyright law does not protect short phrases. However, James Brown may have a separate claim under a legal right known as the right to publicity, which protects a celebrity's right to control the use of his image, voice, or persona.”¹² These types of laws vary from state to state, with a dozen or more states having rights of publicity on the books, including California and New York. Not surprisingly, this right would be left out of the theoretical, federal scheme presented here. While understanding the power and value of James Brown's personality as carried through his voice, one syllable is one syllable. It is much different from putting James Brown's name and face on the cover of the album. Seventy years of protection for a spoken syllable is not compatible with what the framers had in mind when constructing the “promote the Progress” clause.

Attribution

Attribution is one area where these guidelines actually strengthen the rights of the original composers and performers, as it would be required for each sample. As of now, some sample-based tracks will indicate the source of the sample and/or list the the original composers as co-authors in the liner notes, but this is not always the case. Sometimes the new artist will even pay a premium to avoid having to make that attribution. These guidelines would require the original sound recording to always be cited, at minimum, and the composers to be cited as well if the threshold for composition infringement is met. As music is moving towards digital distribution over the internet, these attributions should be able to be attached to the metadata for each track fairly easily.

There is a particularly strong intuitive sense, even among children, that credit for one's work is important. Curiously, attribution is often preferred by artists, even more so than money. Clyde Stubblefield, the eponymous source behind the endlessly sampled “Funky Drummer” breakbeat, says “I prefer to get my name on the record saying 'this is Clyde playing', the money is not the important thing, just to get my self out in the world...is the more important thing.”¹³ Stubblefield is hinting at the

second, more practical benefit to attribution: it can lead to new opportunities for revenue. He is most likely looking for live gigs and session work, as he does not own the master recording and receives no compensation when “Funky Drummer” is sampled, but attribution can also facilitate further sampling by artists looking to replicate a certain sound. As the popularity of sites like whosampled.com proves, artists and fans are very interested learning the source for samples.

“Money”

The Value of A Sample

All other variables being equal, samples are clearly more valuable, and should require more compensation, than a traditional mechanical license. A musical composition is an idea on a piece of paper, but a recording has the added value of the artistry, technology, and effort that went into bringing that idea into aural fruition. Recording an album requires a substantial sunk cost, whether the copyright holder owns the studio or is renting by the session. Microphones, recording consoles, digital audio workstations, and recording engineers are not cheap. Also, the value of the individual performance captured on tape needs to be taken into account. There are infinite number of ways to play even a simple chord progression or melody, and that artistry needs to be compensated as well.

Also important is to determine different values for different types of samples. Specifically, the difference between percussion and melody/harmony needs to be addressed. Because combinations of chord progressions, melodies, and lyrics can be copyrighted, but the backing beat can not, melodies and harmonies are seen to be more valuable. I see no reason to disagree. So a sample of a few piano chords, for example, should be given a higher price than a few strikes on a crash cymbal. But what if percussion and melody/harmony exist within the same sample? I would argue that these samples should be treated like a combination of samples and priced at a higher rate, but valuations that lean more heavily on simply the length of the sample may have an equally good argument.

Popularity

Measures of the fame and popularity of the original or sampling artist should not be a factor. In determining the price of a sample in a compulsory system for sampling, just as they are not included with compulsory mechanical licenses. Other scholars who have argued for a compulsory sampling license have chosen the popularity of the original song as a key factor, and sometimes the single most important factor, in valuing the sample. Their analysis has often relied on previous settlements in which this factor was considered. However, calculating these variables would involve an unnecessary level of guesswork, and significantly diminish the elegance (simplicity, universal application) of a new scheme. The potential popularity of the new artist, especially, would be very difficult to guess. Famously, only about ten percent of major label releases actually turn a profit, so predicting who will or will not have a hit record is obviously very difficult. And what if a suspected hit single actually bombs? Does the artist get a refund or a reduced royalty payment? Since these guidelines are based almost entirely on royalty sharing, the popularity of the new artist is already baked into the formula and does not need to be explicitly addressed.

While measuring the popularity of the original song would be comparatively more easy, as verifiable sales figures may be available, that factor is also an unnecessary distortion. Why create a disincentive to use successful music? The value of any sample should be judged by the market, with payments made through a structured royalty-based system. If Puff Daddy samples a huge hit like “Every Breath You Take,” and the new song becomes a hit based on the strength, and perhaps recognizability, of that sample, then The Police and their representatives will see revenue reflective of that strength. There is no need to pay a premium on top. While many of the most popular sample-based songs throughout history have sampled from previous hits, many have not. A good example would be the Beastie Boys' aforementioned “Pass The Mic,” a very successful hip hop track built on an obscure flute song. Paying a premium for already popular content would also have the negative effect

of relatively discounting obscure samples, and be unfair to artists who may have already had some tough luck in their careers. The very nature of sampling is transformative, so the popularity of new sample-based work can be completely detached from its origins in many cases.

Ownership

The next criterion to go is whether or not the song being sampled is controlled by a major label or distributor. This variable is only a reflection of the difference in leverage between major and independent labels and distributors, and has not much to do with the actual value of the sample. A big company simply has deeper pockets for lawsuits than a smaller one and can more credibly back up any legal threats. So, as the unfairness and inefficiency of a playing field tilted in favor of larger companies is one of the primary arguments for the need for a standardized licensing process, the size and power of the parties on either side of the license should be irrelevant to this vision for a new formula.

Location of the Sample Within the Song Structure

A tougher choice to make is whether or not to price snippets from the chorus, verse, intro, bridge, etc. differently. A good argument can be made that taking the “hook” from a chorus and putting it over a new beat is qualitatively much different than taking an intro; that the sampler is essentially getting the sampled artist to write the most commercially important part of the song. However, once again for the sake of elegance, this variable must be left out of the compulsory rate. Samples from any part of an old song can be used in any place in the new work. As discussed in previous chapters, drum breaks are often considered the most valuable building blocks for a hip hop song. By their very definition, drum breaks are found in either the bridge, another moment of transition, or maybe the intro. Very few songs in the history of pop music have had a drum solo for a hook. A fee based on the location of the sample would also discount samples from genres that do not necessarily rely on hooks or choruses, like classical and some types of jazz. And, as also explained above, taking the juiciest part

of a song to rework will pay a fair dividend if the new song is successful. Nearly any conceivable compulsory scheme would establish a higher rate for samples that are longer, and a hook is nearly always at least one bar long, and more likely to be four or eight bars, if not more. So it will be nearly impossible to snatch an entire hook for a new song without paying out a decent percentage of the royalty just based on the length of the sample. Once again, fair compensation is baked in to a royalty-sharing system. This agnostic approach is even more appropriate when considering whether or not to set the rate by looking at where the sample is placed in the *new* work. In many independent hip hop songs, for instance, there is not really any kind of traditional structure, with bridges, choruses etc. There is simply a beat lasting a few bars, some rhymes are laid over the top, and that is it. Every minute of the song is a verse.

Safeguards Against Royalty Stacking

It is absolutely essential that the problem of royalty stacking be at least mitigated, if not completely solved. Each additional sample added to a mix should be seen to dilute the value of the other samples in the work. While a track with forty samples should not necessarily only cost the producer as much as a track with one sample, it should also not cost forty times as much. And it does not make sense for anyone if the new artist pays out more than 100% of the total revenue just to cover the samples. The actual formula would need to be based on expert economic analysis, something I can not provide here.

Alternative Revenue Models

As mentioned in the previous chapter, many artists have taken to giving away their music online and trying to make up the lost money through ticket and merchandise sales. So, how can rights holders be compensated when there is no revenue to share from sampling? One possible answer could be a one-time, upfront fee. However, a better solution is to compensate the original artists in a more

comprehensive way. The chunk of music industry revenue that comes from direct sales to consumers has fallen off a cliff in the last decade or so. An increasing percentage comes from streams, satellite and terrestrial radio, and licensing to film, television, and video games.

When sample-based music sees revenue from any of these other sources, the same compulsory percentage rate should apply when those royalties are divvied up. If 5% of Jay-Z's sales revenue from his new single goes to The Clash, then 5% of the licensing revenue from a video game soundtrack should as well. There would be no need to create a complex clearance agreement with all sorts of contingencies for possible future licensing opportunities or sales thresholds. This approach should create new sources of revenue for the original rights holders, as mash-up artists like Girl Talk could get their music in films or on the radio, which does not happen now. Registering these samples could also make a difference in how ASCAP and other PRO's distribute their money from live performance and radio licensing fees. While mash-up artists like Girl Talk are allowed to perform their music live, because the venues pay a blanket license to the PRO's, those songs being mashed-up are not necessarily being counted by the PRO's and included in their formulas when money is disbursed to publishers and songwriters. If these don't sound like good enough ways for rights holders to collect money in the new music economy, then it is important to remember that they are currently getting \$0 from artists like Girl Talk.

Penny Rate vs. Percentage

Since a compulsory license for sampling is already a forward-looking idea, a forward-looking approach to royalty distribution is in order. As just mentioned, while the number of actual record sales has plummeted, there are all sorts of new ways to create revenue through licensing, streaming, etc. The compulsory mechanical license has traditionally been based on a "penny rate," meaning the artist covering the song is required to pay a fixed amount, regardless of how much the track is sold for:

“For every physical phonorecord and permanent digital download made and distributed, the royalty rate payable for each work embodied in such phonorecord shall be either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.”¹⁴

This somewhat rigid approach is, of course, starting to make less sense as artists are beginning to sell entire albums on sites like bandcamp.com for only a few dollars, effectively making each song not much more than 9.1 cents to begin with. While iTunes is still by far the leader in music downloads, and has fought off attempts to bring the price per download below 99 cents, the RIAA has argued that the penny-rate structure is “disruptive as consumer prices continue to decline,” and that “record companies cannot lower their prices below a certain threshold without losing the margin needed to cover their very significant costs,”¹⁵ echoing my argument. However, the CRB's argument for maintaining the penny-rate is one of tradition, reasoning that changing the structure after all these years will create new confusion and increased transaction costs:

“...in the case of the physical formats and permanent digital downloads that account for the overwhelming bulk of mechanical license use at issue in this proceeding, the parties have until now lived under a penny-rate standard not a revenue-based regime. Therefore, the parties are less familiar with the operation of a revenue-based metric. The value of such familiarity lies in its contribution towards minimizing disputes and, concomitantly, constraining transactions costs.”¹⁶

This argument is valid for CDs and downloads for the time being, but there is no “familiarity” with a statutory rate for sampling, obviously. With a fresh start, it makes sense to acknowledge the diverse revenue streams for modern music and use a percentage-based system. One idea being kicked

around that would go even farther in dividing up music revenue into tiny pieces is an “ISP levy” where customers pay a tax (\$10 a month?) and are given license to download any song legally at no additional cost. A percentage-based sampling license would work especially well within this type of arrangement, as explored by William W. Fisher in “Promises to Keep.”¹⁷

If however, a penny-rate is also adopted for sample licenses, it may make sense to simply peg that rate to the mechanical rate. Since the CRB is already meeting somewhat regularly to explore changes to the mechanical license rate, based on changes in the music industry and/or inflation, those changes should apply in a similar way to the rate for sampling licenses. For instance, if the mechanical rate is raised from 9.1 cents per record to 10 cents then the rate for all samples would also simply increase by the same ratio without the need for a separate hearing.

Overall Philosophy

I have given specific reasons for removing some of the more vague, qualitative variables from a new formula for the division of revenue, but these choices also contribute to a larger strategy. The very nature of the sample clearance problem is in the unique complexity of sampling. The widely varying opinions about sampling, the unpredictable prices, and the high negotiating costs are all reflective of this unique practice. The actual value of a sample is almost impossible to define, so getting that value exactly right should not be our primary goal. Instead, we should steer towards the already successful compulsory scheme for mechanical licenses, and emphasize the value of that scheme's simplicity. The formula for slicing up royalties on sample-based works will necessarily be more complex than for mechanical licenses, but that complexity has to have limits in order to make a regulated system worth pursuing. Even if these specific ideas about how such a scheme should look are discarded, the idea of having a relatively simple, concrete system is important going forward when others make the actual decisions.

NOTES

NOTES

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Chapter 6: The Process for Constructing a New System

I have laid out what I see as reasonable guidelines for a theoretical compulsory license, describing what variables should or should not be considered in the pricing, and what samples should be free from licensing altogether. The actual rates, based on length of sample, type of sample, whether or not the underlying composition is infringed, etc., would most likely need to be worked out in a fashion similar to other statutory licenses, with the Copyright Royalty Board using their authority, as given by the Copyright Act, to set “reasonable terms and rates” for statutory licenses when “copyright owners and licensees fail to negotiate terms and rates themselves.”¹ They are required to set those terms and rates by trying to balance “four general and sometimes conflicting policy objectives:

- (1) maximizing the availability of creative works to the public;
- (2) providing copyright owners a fair return for their creative works and copyright users a fair income;
- (3) recognizing the relative roles of the copyright owners and users; and
- (4) minimizing any disruptive impact on the industries involved.”²

A new statutory license for sampling could theoretically be created by the same people, using the same basic process, the same basic balance of objectives, and for the same reasons. Many of the potential questions that could arise from such a statutory license, like the size of the fees for late payments or ways to settle disagreements between parties, have already been addressed by the board and much of that language could carry over to licenses for sampling. The point is that multiple

statutory license determinations have been made in the past, and updated throughout the years, and we would do not need to start from scratch. Of course, different parties would have opposing views, but that is why the CRB welcomes testimony. Hopefully, with testimony from all interested parties, along with an independent economic analysis, they could come up with some reasonable compromises.

Benchmarks

Most likely, as with other rate-setting, the board would try to establish benchmarks from which to work. It would be fascinating to hear various pricing standards discussed in public, although one can imagine that major record labels and publishers might not be eager to disclose this kind of information, and an impartial analysis would be needed. In the case of pricing for ringtones, for example, some benchmarks were established by William Landes of the University of Chicago, representing various copyright holders.³ He looked at details from a few hundred sales prior to the CRB intervening, presented his analysis of the economy for ringtones, and the board worked from there.

There are, however, some doubts about whether similar benchmarks would be quite as useful when setting compulsory rates for sampling. For one, sampling is more nuanced than a ringtone, which is a pretty straightforward medium. But, more importantly, the benchmarks would likely reflect the current environment for sample clearance, an environment which I am clearly arguing is problematic. If a significant portion of samplers are being gouged now, the benchmarks could reflect that gouging and make an unfair practice seem normal and economically healthy. While still addressing the problem of high transaction costs, to codify an unreasonable rate would leave samplers in a position not much better than where they stand now, in terms of what they pay for each sample.

Navigating the New Environment

For more complex, collage-like songs it could be difficult at first to wade through the new rules. However, it still should not be as complex, expensive, or time consuming as clearing the same material now. As the process matures, precedents will be set, standards will be clarified and specialists will emerge. These things have all managed to occur naturally in the current environment for sample clearance; the new protocols will just be more efficient. And if a portion of the new scheme proves truly unworkable or unfair the CRB can always make changes, just as they do with other statutory licenses.

It is crucial to note here that most mechanical licenses do not actually rely on the compulsory rate. Instead, that rate acts as an upper limit on what can be charged and is often just used for leverage. One could assume that the same would be true for sampling, at least when the sampling artist has deep enough pockets, or a long enough window of time, to engage in a negotiation. These market-based negotiations should help to satisfy those who have an ideological leaning towards market solutions, as well as help the CRB study the functioning of the sampling market in order to make any necessary adjustments to their rates.

Expected Outcomes

One hopes that reforming the sample clearance process would lead to a substantial increase in the quantity and quality of commercially available music from sample-based genres, and that the listening public would benefit. Regardless of any positive or negative impact on the ability of the traditional music industry to make money, to “Promote the Progress,” is the core function of intellectual property law in our country. If that promotion were to happen, a compulsory licensing system would be a success, at least in some sense. There should also be significant positives for the music industry. Perhaps this will be more true for new music creators than for rights holders, but any scheme that limits transaction costs should benefit both sides of that transaction. Perhaps music

lawyers will see a reduction in billable hours, but that is a negative externality we should be willing to live with, as any increase in industrial efficiency will lead to lost wages for somebody. On the bright side, there will still be work to do in securing and managing a compulsory license, and rates below the compulsory rate will still need to be negotiated.

In my estimation, the biggest winners, aside from the audience, will be medium-sized independent labels and artists. The major labels can usually get their samples cleared if absolutely necessary, with the exception of samples from artists like The Beatles that simply will never clear anything. On the other extreme, hobbyist producers and tiny labels fly under the radar and do not even usually bother trying to clear samples, and may continue to operate outside the law even when the process is simplified and prices more fair. But the “major indies” in hip hop, like Stones Throw or Rhymesayers, sell enough to get noticed and sued, but not necessarily enough money to pay large up-front clearance fees or employ a team of lawyers to negotiate on their behalf. In the new paradigm, they will hopefully be able to compete artistically, with access to the same catalogues as the big-budget major labels.

Recommendations for Moving Forward

Changing the current paradigm for sample clearance in any fundamental way could be difficult, perhaps especially so for a compulsory license, as right holders have not seemed open to relinquishing their monopoly rights in the past. There is not any large music industry organization that is passionate about changing the rules in this way, and sample-based artists are not an organized collective and do not have any lobbyists on the payroll. However, there are some organizations that have expressed interest in reforming musical copyright, including the Electronic Frontier Foundation, Creative Commons and the Future of Music Coalition. If these groups, and others, were to agree on a basic set of principles for digital sampling reform, they could certainly persuade many music fans and sample-based artists to help petition the relevant legal bodies and get some momentum on this issue. The

actual entity to be petitioned would most likely be the Copyright Royalty Board, though Congress could also be persuaded into applying pressure to the CRB, as the CRB's authority is derived from Congress.

Of course, it would be much more effective to have large, traditional organizations like the RIAA approach lawmakers with a similar proposal, but that does not seem likely to happen. Their main constituents, the major record labels, have shown no interest in a new license, though the guidelines presented here should also benefit the major labels as efficiency and market information are strengthened. And, we can not forget, major labels have come out on the wrong end of some of the landmark decisions cited above, including in the cases of *Grand Upright* and *Bridgeport*.

NOTES

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1. *Recording Industry Association of America, Inc. v. Librarian of Congress* 608 F.3d 861 (2010).
2. Ibid.
3. Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding Copyright Royalty Board, 26 Jan. 2009.

Conclusion

The time for a more sane way to deal with the legal and economic issues around sampling is overdue. Sampling is a legitimate artistic technique that is here to stay, and needs to be treated with the same respect afforded to collage and re-appropriation in other mediums. While all artists have to live within the constraints of copyright law, those laws have failed to make any adjustment in over thirty years of widespread sampling, and are clearly not well adapted to the way a substantial amount of modern music is created. Recently, legal decisions like *Bridgeport* and new laws like the Copyright Term Extension Act have actually created a more difficult environment for the creation of certain styles of music the public clearly wants. The failure of the government, and the music industry itself, to create a standardized rate for sampling, or at the very least a fair use standard, has created a market failure that costs all parties money, and costs the public the chance to hear songs constructed using samples that were not able to be cleared.

I have shown why the benefits of government intervention into the freedom of various parties to create their own sample licensing agreements now outweigh the potential negatives. The bargaining power is stacked so heavily in favor of the original rights holders, and the transaction costs so high, that the value chain simply stalls at a crucial point in many cases, ultimately benefitting neither artists nor fans. Compulsory licenses have proven an effective way to deal with failures and concerns in various industries, and especially so with mechanical licenses in music. Some of those issues successfully addressed through compulsory licenses in the past are analogous to the problems created by the clash between modern sampling techniques and traditional copyright law, and a compulsory license for sampling is worth exploring. Perhaps the generation that has grown up with YouTube and web 2.0 will have the courage to finally tackle this issue, as the spontaneous creative output of more and more people is criminalized, and the public begins to think more deeply about the nature of creativity and

ownership.

I have also attempted to provide a rough blueprint for what such a compulsory licensing scheme could look like. By no means is it intended to be the final word, as these decisions would most likely need to be made by a government authority like the Copyright Royalty Board, with testimony from many different sides. A healthy debate can certainly be had about the relative values of different kinds of samples, and I am sure scholars more experienced with copyright law or economics could contribute insights I have not considered. It is clear, however, that the debate itself is overdue, and would be a welcome, civilizing antidote to the wild west of appropriation in which independent artists have been operating, and to the aggressive, opportunistic litigation faced by the more successful sample-based artists.