

Sampling and the Music Industry: A Discussion of the Implications of Copyright Law

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I: INTRODUCTION

The emergence of digital sampling technology coincided with the birth of rap and hip-hop culture in the urban ghettos of New York in the late 1970s. Afrika Bambaata, a black American musician from the Bronx, was inspired by the electronic sounds of a German pop group, Kraftwerk, and pioneered a “new” sound by splicing Kraftwerk’s “electro-beats” into his own rap-based tracks.¹ Bambaata’s subsequent *Planet Rock* album laid the foundation for a hip-hop culture that would embrace the use of sampling to collate diverse musical sounds.

The influence of rap and hip-hop on music and youth culture has been immense.² In England and Europe, the American rap wave was absorbed by a strong club scene and has metamorphosed into hybrid movements like pop, funk, dance, house, techno and trip-hop. Today, these musical dialects have a strong following in the New Zealand music and club scenes - a phenomenon aided by modern communication technologies and a full carousel of visiting international DJs.

Underpinning this new, global musical culture is digital sampling, which has become an integral tool for artists across the musical spectrum.³ In fact, the widespread practice of cutting-and-pasting musical sounds to create new compositions has prompted one industry spokesman to predict that “the sampler will supplant the electric guitar as the centre of the pop music universe”.⁴

This form of audio-collage, however, raises copyright issues where the use of the sampled work is not authorised. On the one hand, the individual artist has a right to control his or her work; on the other hand, the public has a corresponding right to

¹ The Kraftwerk song that Afrika Bambaata drew most heavily on in “Planet Rock” was “Trans-Europe Express.”

² Frith, “Music and Identity” in Hall & Du Gay (eds), *Questions of Cultural Identity* (1996) 115.

³ For example, sampling is integral to the sound of such diverse contemporary artists as Coldcut, DJ Shadow, Portishead, De La Soul, A Tribe Called Quest, Marxman, Massive Attack, Air, Major Force, Universe Crew, and Luke Vibert.

⁴ James Meyer of Polygram Ltd, quoted in Upton & Mende, “Deconstructing Music Sampling: Questions Arise and Practice Becomes Increasingly Common” (1997) 218 (87) *New York Law Journal*, S3 Col 1 at 57.

build on existing material to create new works, particularly once the material has entered the public domain.

In the early 1990s, there was anxiety that copyright law might not be sufficiently robust to protect works from appropriation by samplers.⁵ However, the hard-line approach taken by record companies towards individuals who breach copyright in their works has ensured the opposite outcome. As more artists face penalties for infringing copyright in samples, there is growing concern that restrictive copyright laws are inhibiting artistic freedom.

This paper seeks to evaluate the practical ramifications of the Copyright Act 1994 in the context of sampling in the music industry. In particular, the possibility of the “fair dealing” defence (or, in the United States, “fair use” defence) is considered for artists engaging in social criticism through music. The article concludes with a discussion of the impact on current sampling practice of the moral rights and performers’ rights introduced in the 1994 legislation.

II: THE DIGITAL SAMPLING PHENOMENON

1. The Digital Sampling Technique

Digital sound sampling enables an artist to appropriate the distinct tonal qualities of a particular vocal or instrumental sound and insert it into a different musical context.⁶ The duration of that “sound” can range from a minute to a single second, and may be derived from a live performance or an existing sound recording. Increasingly, studio artists source material directly from sample “libraries” sold in compact disc or computer disc format.⁷

This sampling process comprises three steps:

- (i) Digital recording;
- (ii) computer analysis with possible alteration; and
- (iii) playback.

⁵ For example, Quail, “Digital Samplers: Can Copyright Protect Music from the Numbers Game?” [1991] 7 IPJ 39; McGivern, “Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds” (1987) 87 Columbia Law Review 1723.

⁶ Sampling technology is also used extensively by musicians to “correct” imperfections in their own work. See Byram, “Digital Sound Sampling and a Federal Right of Publicity: Is it Live or is it MacIntosh?” (1990) 10 Computer Law Journal 365.

⁷ *The Wall Street Journal* (5 November 1990, Section 1, 2) reports that a Hollywood-based enterprise sells compact-disc libraries containing pre-recorded notes of grand pianos, brass selections, electric guitars and other instruments for sale. Likewise, the New Zealand music industry broadsheet, *Rip It Up* (No. 184, November 1992, Page 2) confirmed that such compact disc libraries are available in Australasia. However, these collections do not raise copyright issues since consent is sought from copyright holders before release.

The sampling unit that carries out this process has been described as “a computerised combination of a tape recorder and a camera”.⁸ Sounds are stored in the memory of the sampler’s microprocessor. Once the sound is in the sampler, the musician can then use the sampler’s built-in functions to alter the parameters of the sound if desired. It is virtually impossible to detect any discrepancy between the original sound and its playback equivalent since the computerised resolution corresponds to the upper range detectable by the human ear.⁹

The photographic aspect can be described as follows. In effect, the digital sampler takes a picture of the sound. It then divides every second of the sound into 44,100 separate parts,¹⁰ converting its analogue waves into numbers that are stored in the sampler’s memory. Thus, a digital recording of an entire song is simply a series of binary values, each representing a discrete moment of the song’s duration.¹¹

Once digitally recorded, the sound may be reproduced exactly or altered in any way. For example, pitch, rhythm, speed, tone, timbre, or volume can be modified at the touch of a button. The artist then typically inserts the sample into a separate composition. Either the sample is used to punctuate the new track at various intervals,¹² or alternatively, it may be “looped” in continuous repetition to provide the backing rhythm.¹³ With this technology, artists can thereby record entire “new” songs combining elements from previous songs: a drum beat from one source, a melody from a second, a vocal from a third, guitar riffs from a fourth, a horn blast from another and so on. More frequently, artists create hybrid songs by merging samples from other works with their own original music.

However, a point that is too often overlooked in the sampling debate is that the technology is only a tool; it does not guarantee the quality or success of the final product. Ultimately, it is the sampling artist’s personal inspiration and talent that guides him or her in the arrangement of those sounds to create the final track.¹⁴

[P]art of the artistry of musical collage involves harnessing sounds from the past and piecing them together in a new form ... To overlook this would do a disservice to the whole of the creative arts...

Sampling technology has many applications in the music industry. It has enabled technicians to preserve the work of the twentieth century’s greatest musicians

⁸ Quail, “Digital Samplers: Can Copyright Protect Music From the Numbers Game?” (1991) 7 IPJ 39, 42.

⁹ Ibid.

¹⁰ Corresponding to 44,100 kilohertz which is the speed at which the unit records the sample.

¹¹ McGiverin, *supra* note 5 at 1724.

¹² For example, the Beastie Boys sampled the lyric excerpt, “Yo Leroy!” from recording artist Jimmy Castor’s 1977 hit “The Return of Leroy” in their 1990 song “Hold It, Now Hit It” and used it to punctuate the song at various intervals; Giannini, “The Substantial Similarity Test and its Use in Determining Copyright Infringement through Digital Sampling” (1990) 16 (2) Rutgers Computer & Technology Law Journal 509.

¹³ Sievwright, *It’s No Use Crying: The Copyright Implications of Digital Sampling* (1992) (unpublished thesis, University of Auckland) 4.

¹⁴ *Supra* note 8 at 55.

for posterity;¹⁵ it allows musicians to make cosmetic improvements to their own studio recordings;¹⁶ and it has opened up wide vistas for artistic creation and collaboration. This paper will focus on the third application: the copyright implications of appropriating sounds from one source and combining them with new material to create a composition.

2. Why Do Artists Sample?

There are four circumstances in which artists tend to appropriate samples from other works. Firstly, from a practical perspective, sampling enables artists to access distinctive sounds or backup support without incurring the expense of hiring performers or spending time trying to emulate the desired sounds themselves.¹⁷

Alternatively, sampling may be accidental or subconscious.¹⁸ In fact, the tendency to involuntarily recall information from the subconscious mind is a recognised medical condition,¹⁹ and its increased manifestation in the past decade has been attributed to the pervasive effects of modern popular culture.²⁰ This raises the question of whether the full schedule of remedies can be justified against a defendant who “involuntarily” samples another artist’s work.²¹

Most commonly, however, an artist samples in order to create an association between a prior work and his or her own composition. This motivation may be honourable, as in the case where an artist wants to pay tribute to the work of a musician whose work he or she admires;²² or it may be a mercenary tactic whereby the later artist endeavours to free-ride on the commercial success of the previous work.²³

Finally, an artist may sample another’s music for the purpose of parody or satire.²⁴ This method has become popular among fringe groups who sample mainstream bands

¹⁵ McGiverin, *supra* note 5 at 1734.

¹⁶ *Ibid.*

¹⁷ *Ibid* 1726. Note that the recognition of performers’ rights in the New Zealand Copyright Act 1994 has made this technique less attractive from a cost-saving perspective as licence fees must be paid to avoid infringement.

¹⁸ However, this assumes that a digital sampling unit is not used. It refers to the case where a musician imitates an earlier song when composing a new work. See for example *Bright Tunes Music Corporation v Harrisongs Music Ltd* (DNY 1976) 420 F. Supp. 177.

¹⁹ The condition is cryptomnesia. See Vaver, *Intellectual Property Law* (1997) 71.

²⁰ *Ibid* 72.

²¹ *Ibid.*

²² For example, on the Garbage album, *Version 2.0*, the song “Push It” features (authorised) samples from the Beach Boys’ Brian Wilson and solo artist Chrissie Hynde. The band felt that sampling was a way of paying homage to those artists; “Garbage Interview: 1998 Album Release”, MTV On-line @ <www.mtv.com>

²³ For example, rapper Vanilla Ice’s plagiarism of the Queen-Bowie collaboration, “Under Pressure” in his song “Ice Ice Baby”.

²⁴ For example, Negativland’s parody of U2’s song, “I Still Haven’t Found What I’m Looking For”, and 2 Live Crew’s parodic version of Roy Orbison’s “Oh, Pretty Woman”.

in order to criticise the “hypocrisy” of the music industry and the control wielded by multinational record companies.²⁵

3. The Impact of Sampling on the Industry

The modern music industry is a multi-billion dollar business.²⁶ It is an industry founded, in particular, upon intellectual property rights and copyright.²⁷ Consequently, record companies are swift to enforce their rights in order to maintain and increase their market share. In this respect, unauthorised sampling is not just a matter of exploiting the work of the original artist - indeed, it threatens to undermine the economic structure of the music industry.²⁸

Times have certainly changed since 1988, when an American record producer told a journalist for *The Wall Street Journal*: “We’re all blatantly stealing from everyone else...[t]hat’s just the way it’s done in the 80s”.²⁹ By the early 1990s, the rapid increase in sampling had prompted record companies to become pro-active in protecting their interests. The larger companies actively established committees to seek out infringing samples by checking market releases against the company’s own catalogue of copyright works.³⁰ The exercise has proved to be extremely lucrative for companies with large copyright holdings, since every infringement potentially entitles them to thousands of dollars by way of compensatory damages, or more commonly, private settlement.³¹ Once a song with uncleared samples has already been released, an artist, or his or her record company may be forced to pay extremely high fees to the copyright holders to avoid the expense of recalling records.³²

This clampdown on copyright enforcement by the major record companies has forced artists to become more restrained in their use of sampling.³³ Instead of risking litigation, artists and record companies prefer to pay for a licence to use the sample. As demand for samples has risen, however, so too have the licence fees. For instance, “Chuck D”, the key vocalist for the controversial rap group Public Enemy, told *Rolling Stone* magazine that the “prohibitively high cost” of clearing samples had had a profound effect on the making of the group’s latest album:³⁴

We could never make a Public Enemy record the way we did before... We used to have 300 samples on a record, and you can’t do that any more. The whole time the record company was going, “Make sure they’re not going to have any samples”.

²⁵ In particular, Negativland and the Art of Noise take this approach to sampling.

²⁶ IFPI, *The Recording Industry in Numbers* (1996).

²⁷ Price, *The Economic Importance of Copyright* (1993) 43.

²⁸ Ibid 44.

²⁹ Tom Lord-Alge cited in Sievwright, *supra* note 13 at 16.

³⁰ Ashburne, “Sampling Issues in the Music Industry” (1994) 212 (10) *New York Law Journal* 5, 6.

³¹ Ibid.

³² Ibid 10.

³³ Ibid 5.

³⁴ “Public Enemy is back!” *Rolling Stone*, July 1998, 17.

By corollary, failing to clear samples can have extremely adverse consequences for artists. The seminal court decision on sound sampling was *Grand Upright Music Ltd v Warner Bros Records Ltd*.³⁵ In that case, rapper Biz Markie was held to have violated federal copyright law in his unlicensed use of a three-word sample and its accompanying music from the song "Alone Again (Naturally)" by Gilbert O'Sullivan. The United States District Court found that Markie had demonstrated "callous disregard for the law and for the rights of others" by failing to clear the sample before releasing his album "I Need A Haircut".³⁶

Markie's attorney, Robert Cinque, however, claimed that clearance for the sample had been sought from the copyright owners in good faith on numerous occasions, and that clearance negotiation was still under way at the time the lawsuit was filed.³⁷ Nonetheless, the Judge enjoined further sales of the record and referred the matter for possible criminal prosecution.³⁸

In the same year that *Grand Upright Music* was litigated, a group of self-professed "musical-cultural terrorists" known as Negativland enjoyed fleeting but disabling celebrity when they infringed copyright in a song by the Irish rock band U2. Negativland had released an album called "U2EP" which featured a parody of the U2 song, "I Still Haven't Found What I'm Looking For." Consequently, Island Records, U2's record label, sued the band for copyright infringement which led to the near-collapse of SST Records, Negativland's long-standing label.³⁹

The litigation, however, failed to deflect Negativland's sampling activities. The group fully documented its legal battle with U2 in the combined compact disc/book release, "Fair Use: The True Story of the Letter U and the Numeral 2". The 270-page book is a compilation of legal documents, press releases, correspondence and articles relating to the legal battle among Negativland, Island Records and SST Records. Rather than appease litigators, the accompanying CD deliberately included samples drawn from several high profile musicians, including U2. None of the copyrights on the compact disc were cleared. The tracks on the "Fair Use" include "Please Don't Sue Us", "It Ain't Legit", "You Must Respect Copyright", "Only A Sample" and "Crosley Bendix Discusses The US Copyright Act". Not surprisingly, the release of the "Fair Use" compact disc sparked numerous actions for breach of copyright.⁴⁰

Another highly publicised sampling case involved the successful 1980s rap group, De La Soul. Two former members of the seventies band, The Turtles, filed an action against the group for \$US1.7 million in the United States District Court. De La Soul

³⁵ *Grand Upright Music Ltd. v Warner Brothers Records, Inc.* No 91 Civ. 9648 (SDNY) Dec 16, 1991.

³⁶ *Ibid* 211.

³⁷ "A New Spin on Music Sampling: A Case for Fair Pay" (1992) 105 *Harvard Law Review* 726-744, 744.

³⁸ *Supra* note 35.

³⁹ "Negativland versus U2: the beat goes on..." (1993) *Rolling Stone On-line* @ <www.rollingstone.com>.

⁴⁰ Refer to Negativland's Internet homepage for more information (In addition, see Telecommunications Radio Project, Program #5-93: "Art and Music Sampling: The Death of Creativity" KPFA Radio - December 1, 1993 (panel discussion).

had sampled twelve seconds of The Turtle's song "You Showed Me" and looped it throughout the entire song "Transmitting Live From Mars" from the album, "Three Feet High and Rising". The case was settled in June 1990 for over \$US1 million.⁴¹

Likewise, rapper Vanilla Ice attracted considerable attention in 1990 with his single "Ice Ice Baby". The single sampled a distinctive opening sequence from the 1982 Queen-David Bowie collaboration "Under Pressure". The success of Vanilla Ice's single, which went platinum when its sales exceeded one million records,⁴² prompted the original artists, their record company and the affiliated music publishing company to seek recoupment of part of the "Ice Ice Baby" royalties. The parties eventually settled for an undisclosed sum.⁴³

Sampling has also caused controversy in the New Zealand music industry. In 1992, the Headless Chickens achieved chart success for the single, "Cruise Control" contributing to industry recognition of the album "Body Blow" as Best Album of the Year at the New Zealand Music Awards. It transpired, however, that the single featured an unauthorised sample from a recording by Shona Laing in which Laing's vocal refrain "It's no use crying" was looped four times into the Headless Chickens track. Under threat of a lawsuit, the Headless Chickens agreed to an out-of-court compensatory settlement.⁴⁴

Last year, the British band, The Verve, made headlines when it was ordered to surrender one hundred percent of the royalties from its number one hit, "Bittersweet Symphony." The song was found to have used an unauthorised sample from a Rolling Stones tune.⁴⁵ The thirteen-second sample was taken from an instrumental version of the Stones' 1965 song "The Last Time".⁴⁶

In fact, The Verve had been licensed to use the sample by Decca, the company that owns the copyright in the actual recordings of "The Last Time." Another company, Abkco, however, which owns the copyright in the publishing for the song,⁴⁷ refused to licence the use of the underlying literary and musical works.⁴⁸ According to Managing Director Alan Klein, "Abkco is not in the business of allowing samples".⁴⁹

This is not the first time that a reference to the Rolling Stones has backfired on artists. George Michael had to turn over 50 per cent of the royalties to Abkco on his song "Waiting For That Day" because he quoted the Stones lyric "You Can't Always Get What You Want". Likewise, Janet Jackson had to give up a proportion of her

⁴¹ Supra note 8 at 49.

⁴² Certified by the Recording Industry Association of America (RIAA) on October 29, 1990.

⁴³ Supra note 30 at 6.

⁴⁴ Supra note 13 at 2.

⁴⁵ "Rolling Stones Say Sample Not Minimal," *MTV News*, 3 Feb 1998, 7:55 EDT on MTV On-line @ <www.mtv.com>

⁴⁶ Ibid.

⁴⁷ A song may have up to three copyrightable elements: copyright in the "literary work" (lyrics), the "musical work" (musical composition) and the ultimate "sound recording". In this instance, Abkco Ltd owns the copyright in the "musical work" and the "literary work" but Decca Ltd holds copyright in the actual recordings.

⁴⁸ Supra note 35.

⁴⁹ Ibid.

copyright for “What’ll I Do” for using the “Satisfaction” refrain, “Hey, hey, hey, that’s what I say!”.⁵⁰

Sampling is even causing controversy in the political arena. A fascinating legal battle is currently being waged in Australia over a song about the controversial politician Pauline Hanson. Cheekily titled “I’m A Backdoor Man”, the ballad was recorded with theatrical flair by Sydney drag queen “Pauline Pantsdown” and features samples of Hanson’s voice. Pauline Hanson’s solicitors contend that the use of the samples is defamatory and in breach of her copyright in the recordings, while the Australian Broadcasting Corporation (whose youth network, JJJ, originally aired the tune) has defended its right to broadcast the song on the basis of the right to free speech and the public right to satirise politicians. The radio network is currently seeking leave to appeal to the High Court in Brisbane to have an interim injunction overturned.

As this cross-section of cases indicates, the stakes are high where copyright infringement via sampling is concerned. If the matter is litigated, defendants may face an injunction,⁵¹ delivery-up and destruction of the infringing albums, lost royalties, or substantial compensatory and punitive damages.

The vast majority of sampling cases, however, settle out of court for substantial sums. This is largely because litigation usually pitches the plaintiff record company against the sampler’s record company as co-defendant, and the record companies are all too aware that their positions could be reversed at any time; that is, today’s plaintiff could be tomorrow’s defendant.⁵² Therefore, private settlements are preferred because they avoid the cost of litigation, the risk of spawning a series of retaliatory actions and, most importantly, the risk of the court setting an adverse precedent.

Yet, despite the massive penalties they may face for infringing copyright, some artists continue to flout the law and use unauthorised samples. This is because there are two significant barriers to obtaining valid sampling rights.

The first barrier is a practical one. For an artist to obtain permission to use the sample, the copyright owner(s) must be identified. Yet it is often difficult to trace the copyright owner because copyright in an artist’s music may be split among several different companies. For example, when San Francisco attorney Mark Grundberg attempted to get permission for his client band, The Evolution Committee, to sample a Public Enemy song, he was referred to eight different people at three different record companies over a period of two months because nobody knew who had authority to licence the material.⁵³ Tracking down the correct copyright owners would probably be even more difficult in the case of older or more obscure material.

Moreover, obtaining permission in itself is not always easy, especially where the sampling artist wishes to use the material in a context unflattering to the original performer or work involved. The copyright owner may simply refuse permission.

⁵⁰ Ibid.

⁵¹ For example, *Grand Upright Music Ltd. v Warner Brothers Records, Inc.*, *ibid.*

⁵² *Supra* note 13 at 10.

⁵³ Upton & Mende, *supra* note 4 at 43.

This was illustrated in the *Pretty Woman* case in which Acuff-Rose Music, Roy Orbison's record company, refused to licence the 2 Live Crew parody version.⁵⁴

The second barrier to authorised sampling is financial. Assuming an artist is able to locate the copyright owner and is granted permission to use the sample, a licensing fee is payable. By all accounts, the costs involved in obtaining licences are substantial.⁵⁵ According to Michael Ashburne, an American copyright lawyer, "it costs between 30 and 40 thousand US dollars for a record that utilises sampling extensively".⁵⁶

III: A BACKGROUND TO COPYRIGHT LAW

1. Intellectual Property

Intellectual property has been heralded as the most significant source of wealth in the modern global economy.⁵⁷ As a result, Western capitalist economies have duly sought to measure and commodify this wealth and thus, for many purposes, intellectual property is classed as personal property (or technically, as choses in action). At law, it has many attributes of economic property; it can be bought and sold, licensed and used to obtain credit. It may be part of the matrimonial assets available to parties on the dissolution of a marriage, and on death it may form part of an estate. It can be charged, taxed, subjected to a trust and accepted in satisfaction of a judgment debt. On insolvency, it can pass to the official assignee in bankruptcy or to a corporate receiver to be sold off for the benefit of creditors. It cannot – any more than any other asset – be expropriated without compensation.⁵⁸

Yet, by its nature, any intellectual property regime is marked by an inherent tension. It must weigh the moral claim of the "author" to his or her own work and the ensuing recognition and reward for it, against the social importance of leaving the creative opportunities inherent in ideas, facts and new technology unencumbered. In essence, this reflects a perennial concern of the law: to what extent can a balance be struck between the interest of the individual and the wider public interest? To achieve an optimal result, the law must be sufficiently dynamic to accommodate changing social and economic conditions.

2. Copyright

The scion of intellectual property known as "copyright" protects original

⁵⁴ *Luke Skywalker v Acuff-Rose Music Ltd* (1994) 114 S. Ct. 1164.

⁵⁵ Supra note 48 and accompanying text.

⁵⁶ Supra note 30 at 7.

⁵⁷ Vaver, supra note 19 at 4; Laing *The Economic Importance of Music in the European Union* (1991) 1.

⁵⁸ Vaver, *ibid* 4.

expression. It does not, however, protect the ideas or facts underlying that expression. The rationale for this distinction is that the rudiments or “building blocks” of creative endeavour must remain freely accessible in the public domain. There is, however, a point when an individual assembles those “building blocks” in such a manner so as to constitute an original work. The expression of that work will attract copyright protection.

In reality, the difference between an “idea” (which is not protected) and its “expression” (which is protected) is often ambiguous, leading to some uncertainty as to when copyright protection will subsist in a work.⁵⁹

At its most fundamental level, a copyright regime has two bases: fairness and efficiency. The fairness justification is that copying the creative work of another without compensating the original author amounts to theft.⁶⁰ This echoes the biblical notion that “one should not reap where he (or she) has not sown”.⁶¹ The efficiency justification is that some measure of protection for creative works is necessary as an incentive for creative endeavour.⁶² In the United States, this latter rationale has been explicitly recognised by the judiciary.⁶³

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in “Science and Useful Arts”.

Striking the correct balance is, however, integral to achieving these aims. An overly-protectionist copyright regime can equally chill creative endeavour, either by making the risk of litigation so high as to deter certain forms of artistic enterprise, or by restricting access to creative source material altogether. This sentiment was recognised by the court in *Hanfstaengl v Baines & Co*,⁶⁴ which emphasised that care must always be taken to not allow copyright to become an instrument of oppression or extortion.

Furthermore, many commentators have questioned whether artists need a statutory-imposed incentive to work, pointing out that creative endeavour flourished

⁵⁹ Currently, the cases presenting the most difficulty are cases involving the non-literal copying of software programmes. See for example, *Powerflex Services Pty Ltd v Data Access Corporation* [1997] 37 IPR 436; *John Richardson Computers Ltd. v Flanders & Another* (1993) 26 IPR 367; [1993] FSR 497; *Ibcos Computers Ltd v Barclays Mercantile Highland Finance Ltd* [1994] FSR 275; (1994) 29 IPR 25; *Whelan Associates Inc v Jaslow Dental Laboratory Inc* (1985) 797 F. 2d. 1222; [1987] FSR 1; *Lotus Development Corporation v Paperback Software International* (1990) 18 IPR 1; *Computer Associates International Inc v Altai Inc* (1992) 982 F. 2d. 693; *Dyason v Autodesk* (1990) 18 IPR 109 (Fed. Ct.); [1992] RPC 575. (1992) 105 Harvard Law Review at 731.

⁶⁰ *International News Service v Associated Press* (1918) 248 US S Ct. 215.

⁶¹ Landes & Posner, “An Economic Analysis of Copyright Law” (1989) 18 Journal of Legal Studies 325, 333.

⁶² *Mazer v Stein* (1954) 347 US 201, per Reed J, 98 L ed 643.

⁶³ [1895] AC 20 (HL).

⁶⁴ Supra note 19 at 4.

heritage not only tolerated but relied on the recycling of stories and characters from artist to artist, generation to generation. While this observation may appear politically and economically naive today, it arguably reveals the extent to which commercial imperatives have come to obscure artistic ones. Modern copyright law provides a mechanism for manufacturers of such mundane objects as gudgeons,⁶⁶ lavatory pan connectors,⁶⁷ and chainsaw chain,⁶⁸ to restrict competition in the marketplace, yet penalises post-modern artists engaged in bona fide creative endeavour where that endeavour involves borrowing from other artists' work.

Ultimately, when a copyright regime restricts creative endeavour more than it nurtures it, it is no longer justifiable. With this in mind, the current copyright law will now be considered.

IV: COPYRIGHT: THE LAW

The law of copyright in New Zealand is codified in the Copyright Act 1994 ("the Act"). In enacting the 1994 Act, Parliament was influenced by the recommendations of the GATT: TRIPs agreement:⁶⁹ most notably, the need for "technology neutral" definitions and adherence to the principles of the 1971 Revision of the Berne Convention.⁷⁰

New Zealand shares its copyright legislation and case law with other common law countries such as United Kingdom, Canada, Australia and India.⁷¹ In addition, the New Zealand Act shares many similarities with the United States Copyright Act 1976.

1. The Plaintiff's Case

Under the Act, to establish that copyright in a sample has been infringed, a plaintiff must prove two elements:

- (i) that copyright subsists in the work; and
- (ii) that there has been unauthorised copying or reproduction amounting to infringement.

⁶⁶ *Franklin Machinery Ltd v Albany Farm Centre Ltd* [1992] NZLR 151.

⁶⁷ *Johnson v Bucko Enterprises* [1975] 1 NZLR 311.

⁶⁸ *Husqvarna Forest & Garden Ltd v Bridon New Zealand Ltd* [1997] 3 NZLR 215.

⁶⁹ The acronym "GATT" stands for the "General Agreement on Tariffs and Trade" and "TRIPs" signifies the associated "Agreement on Trade-Related Aspects of Intellectual Property Rights".

⁷⁰ Brown, "New Zealand's Copyright Act of 1994" (1995) 9 IPJ 229, 230.

⁷¹ This common law tradition traces back to the Imperial Copyright Conference in 1910; *ibid*.

in the centuries before a copyright regime was established.⁶⁵ Indeed, our cultural (a) *Element 1: Subsistence of Copyright*

The first step is to determine whether the sample is, in itself, a “qualifying work” under s 14. Recorded musical tracks may consist of up to three copyrightable elements. First, there is copyright in the “musical work”; that is, in the underlying musical composition or written embodiment of the musical arrangement.⁷² A second copyright subsists in the “literary work”; any lyrics spoken or sung on the sample.⁷³ In addition, a third copyright subsists in the “sound recording”; the actual recorded sounds as contained within the record, audio-cassette or compact disc from which the sample is derived.⁷⁴

In practice, this tripartite copyright scheme creates difficulties for artists who wish to obtain permission to sample a song.⁷⁵ For instance, to make an authorised sample, separate licences must be obtained for the use of the publishing rights and the rights to the sound recording of the same track. This often requires negotiating with two different companies. This difficulty is illustrated by the experience of The Verve when it sought permission to sample the Rolling Stones tune, “The Last Time”. The licence the band bought from Decca to use the sound recording was rendered redundant when Abkco refused to licence the use of the underlying “musical” and “literary” works. In its refusal, Abkco was arguably exploiting its superior bargaining position which enabled it to collect all the royalties from the Verve track.⁷⁶

A further observation is that the Copyright Act does not specify a quantitative minimum vis-à-vis what constitutes a “work” under s 14. This raises the as yet unlitigated question: can copyright subsist in a single sound? This would require that a single note - for example, a James Brown horn blast – be recognised as a “musical work”.

Interestingly, a collateral question “can copyright subsist in a single word?” has been addressed by the courts. In *Exxon Corporation v Exxon Insurance Consultants International Ltd*,⁷⁷ the plaintiff company alleged that it owned the copyright in the invented eponym “Exxon”. At trial, Stephenson LJ affirmed the decision in the court below that copyright could not subsist in that single word, and quoted extensively from Graham J, the trial Judge, “in order to adopt [his reasoning] gratefully”:⁷⁸

As I have already stated, the question that I have to decide is, shortly stated, whether Exxon is an “original Literary work” within s 2 of the 1956 Act? I do not think it is It

⁷² Section 14 (1) (a).

⁷³ Ibid.

⁷⁴ Section 14 (1) (b).

⁷⁵ This assumes that all three elements are present. However, if the sample does not include vocals, there will only be two separate copyright issues: the copyright in the recording and the copyright in the musical work.

⁷⁶ Refer to the discussion supra in the section headed “The Impact of Sampling on the Music Industry”.

⁷⁷ [1981] 3 All ER 241 (CA).

⁷⁸ Ibid 242.

is a word which, though invented and therefore original, has no meaning and suggests nothing in itself. To give it substance and meaning, it must be accompanied by other words or used in a particular context or juxtaposition Nothing I have said above is intended to suggest that I consider that a word which is used as a title can, as a matter of law, never in any circumstances be the subject of copyright, and I would disagree with dicta in previous cases to the contrary effect. Such a word would, however, I think have to have qualities or characteristics in itself, if such a thing is possible, which would justify its recognition as an original literary work rather than merely an invented word ... the mere fact that a single word is invented and that research or labour was involved in its invention does not in itself in my judgement necessarily enable it to qualify as an original work within s 2 of the 1956 Act.

Justice Graham went on to draw a comparison between the invented word “Exxon” and Lewis Carroll’s famous invented word “Jabberwocky”:⁷⁹

[T]he word alone and by itself cannot properly be considered as a “literary work”, the subject of copyright under the Act. It becomes part of a “literary work” within the Act when it is embodied in the poem, but it is the poem itself as a composition which is a work within the Act and not the word itself.

Therefore, although the court in *Exxon* did not completely rule out the possibility that copyright might exist in a single invented word, it is difficult to imagine how any invented word could possess the requisite intrinsic “meaning” to qualify as a “literary work”. More likely, any such word would assume its “meaning” exogenously in popular consciousness and therefore would not be eligible for copyright protection because it would have entered the public domain.⁸⁰ This was the reasoning of the American court in *Life Music Inc. v Wonderland Music Co*⁸¹ which held that popular knowledge of the word “supercalifragilisticexpialidocious” precluded its protection under the copyright regime.

Although there is an obvious parallel between a single word and a single sound, the extrapolation of the *Exxon* and *Life Music* reasoning into the sampling context is problematic for two reasons. Firstly, the “meaning” of a single sound is not easily equated to the “meaning” of a word in the literal sense that is demanded by the courts; secondly, it may be more difficult in the case of a sound to determine when it is “invented” in the first place. Accordingly, it is submitted that, unless a single sound can be demonstrated to possess an extraordinary and intrinsic significance, it is highly improbable that copyright would be held to subsist in it. This is because of a policy concern to maintain the rudiments, or “building blocks”, of creative endeavour in the

⁷⁹ See [1981] 2 All ER 495 at 504, [1981] 1 WLR 624 at 635; Graham J’s emphasis, cited in [1981] 3 All ER 241 (CA), per Stephenson J at 242.

⁸⁰ On this point, see also the decision of *Life Music Inc. v Wonderland Music Co* 241 F. Supp. 653 (SDNY 1965).

⁸¹ Ibid.

⁸² See the discussion of the jurisprudential foundation of copyright *supra* in the section headed “Background to Copyright Law”.

public domain.⁸²

The second step in determining copyright subsistence is that the sample is an “original” work for the purposes of s 14. This “originality” requirement is not an onerous one. It requires that the work “originate” from the original artist, not that it be particularly novel or innovative. Consequently, only a modicum of creativity is required,⁸³ and courts are often wont to apply the “rough, practical test” that, *prima facie*, what is worth copying is worth protecting.⁸⁴

The third criterion is that the plaintiff owns the copyright in the sample. In the absence of any contrary agreement, the copyright owner is the “author”⁸⁵ of the work.⁸⁶ In the music industry, however, musicians and producers usually assign their ownership of copyright to their record company in exchange for a percentage of the royalties from their record sales.⁸⁷ As a result, most actions in copyright infringement in the music industry are brought by record companies rather than the individual artists.

A fourth requirement for copyright subsistence is that the term of the copyright is still valid. Copyright in a literary or musical work lasts until 50 years after the death of the author.⁸⁸ Copyright in sound recordings expires 50 years after the work is produced or made available to the public, whichever is the later.⁸⁹ Given this extensive duration, it is unlikely that a sample would not qualify on this basis.

This, however, raises another issue: is the duration of copyright *too* long? Modern media capabilities and technology have ensured the public is exposed to a much greater volume and variety of music than ever before, thereby accelerating the pace of social and cultural evolution. Yet music is not deemed to enter the “public domain” until at least 50 years after its commercial release. Since the original artist rarely receives any financial reward for the use of a song, particularly in the latter period of the copyright term, usually only the record company benefits from the extended protection.⁹⁰

The fifth requirement is that the sample be fixed in a tangible or material form.⁹¹ This will not be problematic where a sample is derived from a pre-existing recording. When a plaintiff is sampled in live performance, however, he or she will need to provide a recording of the performance or a written record of the underlying literary or musical work.

Finally, the work from which the sample is derived must satisfy requirements as

⁸³ *Express Newspapers plc v News (UK) Ltd* [1990] 3 All ER 376.

⁸⁴ *University of London Press Ltd. v University Tutorial Press Ltd* [1916] 2 Ch. 601, 610.

⁸⁵ According to s 5 of the Act, the “author” is the person who creates the work.

⁸⁶ Section 21.

⁸⁷ Section 113 provides for the transmission of copyright. Section 114 sets out the formality requirements for assignment.

⁸⁸ Section 22(1).

⁸⁹ Section 23(1)(a)(b)

⁹⁰ Laing, *supra* note 57 at 55.

⁹¹ Section 15(1).

to author, country and place of publication laid out in ss 18 - 20.

(b) *Element 2: Infringement*

Copyright restricts certain specified acts.⁹² The primary restricted act is the copying of a work.⁹³ Copying means “reproducing or recording the work in material form”, and (since 1994) includes “storing the work in any medium by any means” in relation to a literary, dramatic, musical or artistic work.⁹⁴ Clearly, the use of digital sampling technology, which involves storing sounds in code or in another transient form, will not circumvent this definition. Thus uncertainties in the previous statute are resolved. In addition, the making of an adaptation is a restricted act in relation to literary, dramatic and musical works and computer programs.⁹⁵ “Adaptation” in relation to a musical work means “an arrangement or transcription of the work”.⁹⁶ The restricted act must also be unauthorised. No legal issue arises where the owner of the copyright has consented to the defendant’s act.⁹⁷

In 1996, the New Zealand Court of Appeal reaffirmed the infringement test it established in *Wham-O Manufacturing Co. v Lincoln Industries Ltd.*⁹⁸

- (i) Is there reproduction of at least a *substantial* part of the work?
- (ii) Is there *sufficient objective similarity* between the two works?
- (iii) Is there *causal connection* in the reproduction?

(i) *Substantial copying*

Digital sampling rarely involves copying an entire work. Therefore, the issue of whether the sampled portion is “substantial” enough to constitute infringement is a particularly relevant consideration.

The first step is to determine whether “substantiality” is assessed in quantitative or qualitative terms. In the case of *Ladbroke (Football) Ltd v William Hill (Football) Ltd*,⁹⁹ Lord Hodson affirmed that “substantiality depends on quality not quantity.”¹⁰⁰ This echoes the position in the United States. In the case of *M Whitmark & Sons v Pastime Amusement Co*,¹⁰¹ the defendant was alleged to have infringed copyright when he publicly performed a 27 second “sample” of the chorus of the plaintiff’s song. The defendant argued that copyright was not infringed because there had not

⁹² Section 16.

⁹³ Section 30.

⁹⁴ Section 2.

⁹⁵ Section 16.

⁹⁶ Section 2(1)(c).

⁹⁷ Section 6 (2).

⁹⁸ [1984] 1 NZLR 641, cited in *Beckmann v Mayceys Confectionery Ltd* (1996) 33 IPR 543.

⁹⁹ [1984] 1 All ER 465.

¹⁰⁰ Ibid 477. Lord Hodson was referring to the case of *Hawkes & Son (London) Ltd. v Paramount Film Service Ltd* [1934] Ch. 593.

¹⁰¹ 298 F. 470 (1924).

¹⁰² [1984] 1 All ER 476.

been a quantitatively “substantial” taking. The Court, however, did not agree:¹⁰²

The [substantiality] question is one of quality, rather than quantity, and is to be determined by the character of the [original] work and the relative value [to the original work] of the material taken.

The United States Court of Appeals reiterated this approach in *Baxter v MCA*,¹⁰³ when it held that:¹⁰⁴

[E]ven if a copied portion [is] relatively small in proportion to the entire work, if *qualitatively* important, the finder of fact may properly find substantial similarity.

An early analysis of substantiality on a qualitative basis was undertaken in *Boosey v Empire Music Co.*¹⁰⁵ In that case, the Court found infringement on the basis of numerous repetitions of a six-note chorus. The Court found the six-note chorus was the “heart” of the composition.¹⁰⁶ In modern sampling cases, the issue of “qualitative importance” is usually resolved by considering whether the allegedly copied material has been lifted from the portion of the song that led to its popular appeal or commercial success.¹⁰⁷ When the melody of a prior song is almost wholly appropriated, as in the example of MC Hammer sampling the melody from Rick James’s track, “Superfreak”, or Vanilla Ice sampling Queen in “Ice Ice Baby”, it is not difficult to infer that the “commercially valuable” aspect of the original work has been taken. This inquiry is, however, more difficult in the context of short samples of background music or instrumental sequences.

When will a sample be qualitatively “substantial”? The majority in *Bauman v Fussell* said that taking will be substantial when the “feeling” or “artistic character” of the original work has been appropriated.¹⁰⁸ In the case of *Bleiman v News Media (Auckland) Ltd*, the New Zealand Court of Appeal, influenced by *Bauman*, said that the test is whether the “essence” of the copyright work has been taken.¹⁰⁹

A case that has interesting implications in the modern sampling context is *Joy Music Ltd v Sunday Pictorial Newspapers Ltd*.¹¹⁰ The plaintiff company owned the copyright in a popular and commercially successful song entitled “Rock-a-Billy”. It brought an action claiming that copyright in the words of that song had been infringed in an edition of the *Sunday Pictorial* newspaper.¹¹¹ The edition contained an article headed “Rock-a-Phillip Rock! Rock!” that told how Prince Phillip had been criticised by certain persons for engaging in adventurous activities.¹¹² The article concluded:

¹⁰³ 812 F. 2d. 421 (9th Cir. 1987).

¹⁰⁴ Ibid 425 (emphasis added).

¹⁰⁵ 224 F 646 (SDNY 1915).

¹⁰⁶ Ibid 647.

¹⁰⁷ *Robertson v Batten, Barton, Durstine & Osborn, Inc*, 146 F Supp 795 (S D Cal 1956).

¹⁰⁸ [1978] RPC 485.

¹⁰⁹ [1994] 2 NZLR 673.

¹¹⁰ [1960] 1 All ER 703; [1960] 2 WLR 645.

¹¹¹ August 4, 1957. Note that *Joy Music* was concerned purely with the infringement of the song in its literary aspect.

¹¹² These activities included paragliding, car accidents and “reckless” polo-playing.

“So what? Give us a chord in ‘G’ and we’ll sing Paul Boyle’s version of Rock-a-Billy in support of the dashing Duke.” The article then laid out two stanzas of lyrics, and two choruses, modelled on the pattern of the original “Rock-a-Billy” song. The verse lyrics of “Rock-a-Phillip” bore no resemblance to the words of the original song, and instead contained light-hearted advice for Prince Phillip (“Never mind what all the fuddy duddies say, Phillip’s making history his own sweet way!”). However, the plaintiff’s concentrated on the similarity of the chorus sections of the two songs, comparing the following:

“Rock-a-Billy, Rock-a-Billy, Rock! Rock!”; and
 “Rock-a-Phillip, Rock-a-Phillip, Rock! Rock!”

The question for the Queen’s Bench Division to determine was whether the sampled lyrics amounted to a reproduction of a “substantial part” of the work. Justice McNair said:¹¹³

[I]t is quite clear that the question of substantiality is not determined solely by any process of arithmetic... You have really got to look, it seems to me, to a large extent at the primary – I will not say “idea” because idea cannot be the subject of copyright – but at the essential feature of the work which is alleged to have been subject to copyright.

On that basis, the judge concluded that the *Sunday Pictorial* had not reproduced a “substantial part” of the plaintiff’s song.¹¹⁴

I cannot help thinking that a jury ... would have said “Although it is clear that the article in the ‘Sunday Pictorial’ had its *origin* in ‘Rock-a-Billy’, it was produced by *sufficient independent new work* by [the defendant] to be in itself, not a reproduction of the original...but a new original work derived from ‘Rock-a-Billy’.”

By extrapolation, this reasoning could be of assistance to defendants in sampling cases where the sampled material has been altered. Although a sample might clearly have “its origin” in the plaintiff’s work, the addition of “sufficient independent new work” could equally render the defendant’s version “a new original work”. Essentially, the sampler has used the original sound as a foundation of an idea for developing his or her personal and original expression of that particular sound.¹¹⁵

The current legal position is, however, that in determining infringement the court should concentrate on what has been taken, not on what has been added. In *Bleiman v News Media*, the New Zealand Court of Appeal issued the following caveat:¹¹⁶

¹¹³ [1960] 1 All ER 706-707.

¹¹⁴ Ibid 708 (emphasis added).

¹¹⁵ Supra note 13 at 28.

¹¹⁶ [1994] 2 NZLR 673, 679.

The fact that separate original work has been added to an infringement does not make it any the less an infringement.

Furthermore, although the substantiality test is strictly a qualitative one, the quantity taken will impact on whether the sample is deemed to be “substantial”. For example, a long sample is more likely to contain qualitative value sufficient to constitute infringement.¹¹⁷

(ii) *Sufficient objective similarity*

Digital sampling enables the sampler to alter significantly the sampled portion in terms of its speed, pitch, length, rhythm, tone or volume. The distortion may render the final product unrecognisable from the original. This ability to modify samples will thus impact upon the degree of objective similarity between the two works.

The similarity test will not, however, penalise a plaintiff where the sample has been extensively modified. In *Wham-O Manufacturing*, the New Zealand Court of Appeal noted:¹¹⁸

[I]t is not necessary for a plaintiff to establish a sufficient degree of similarity between the copyright work and the alleged infringing work, each taken as an entirety. It is sufficient to establish that such similarity exists between a substantial part of the copyright work and the alleged infringing work.

Substantiality is thus a prerequisite for the determination of objective similarity. However, at this point the difficulty is in judging when the similarity is “sufficient”. The courts have developed various guidelines for making the assessment. Certainly, less than an exact replica will be sufficient.¹¹⁹ In *King Features Syndicate Inc v O. & M. Kleeman Ltd*,¹²⁰ the House of Lords cited with approval the words of Bayley J in *West v Francis*:¹²¹ “[a] copy is that which comes so near to the original as to give to every person seeing it the idea created by the original.” According to his Honour, “sufficient similarity” means:¹²²

... such a degree of similarity as would lead one to say that the alleged infringement is a copy or reproduction of the original or the design – having adopted its essential features and substance.

¹¹⁷ *Sillitoe v McGraw-Hill Book Co. (U.K.) Ltd* [1983] FSR 545.

¹¹⁸ [1984] 1 NZLR 641, 666, per Davison CJ.

¹¹⁹ *AHI Operations Ltd v New Lynn Metalcraft Ltd (No 1)* (1982) 1 NZIPR 381; *British Northrop Ltd v Texteam Blackburn Ltd* [1974] RPC 57, 72.

¹²⁰ [1941] AC 417 (HL).

¹²¹ (1822) 5 B & Auld 737, 743.

¹²² [1941] AC 417 at 424; adopted in *L B (Plastics) Ltd v Swish Products Ltd* [1979] RPC 551, 610 (Eng. CA), 625 (HL), and in *Wham-O Manufacturing Co v Lincoln Industries Ltd* [1984] 1 NZLR 641, 666.

¹²³ [1989] 1 NZLR 239, 246.

In New Zealand, Hillyer J applied a marginally broader test in *Thornton Hall Manufacturing Ltd v Shanton Apparel Ltd (No 2)*.¹²³

The question of copying is of some difficulty and the best test that appears to have been formulated is simply that something is a copy if it brings to mind the original. In other words, a copy is a copy if it looks like a copy.

In the context of sampling, Hillyer J's test must be reworked: that is, a sample is a copy if it *sounds* and *looks* like a copy. For example, in *Francis Day & Hunter v Bron*,¹²⁴ the Court made both a visual comparison of the musical scores and an aural comparison of the music. Similarly, in *Bright Tunes Music Corp v Harrisongs Music Ltd*,¹²⁵ the written arrangement of the musical score was an important factor for the Court in deciding that George Harrison's song, "My Sweet Lord" was indeed a copy of The Chiffon's 1963 pop hit, "He's So Fine".

In the United States, where the similarity test is for *substantial* as opposed to *sufficient* similarity, the test to be applied is whether "the ordinary lay hearer" comparing the two works could recognise the copyrighted work in the allegedly infringing work.¹²⁶ The standard for this "audience test" was articulated in *Arnstein v Porter*.¹²⁷ The determination of a finding of substantial similarity according to the *Arnstein* Court, depends upon whether the "defendant took from the plaintiff's work so much of what is pleasing to the ears of lay listeners ... that [the] defendant wrongfully appropriated something which belongs to the plaintiff".¹²⁸ The Court found that the audience test was appropriate for determining similarity, since what is at stake is not so much the musician's reputation, as his or her interest in the potential financial rewards of his or her work. These rewards are derived from the public's reaction to his or her efforts.¹²⁹

This "audience test" has, however, been criticised on the grounds that copyright breach is concerned with the act of unauthorised copying, not the similarity of derivative version to the sampled work.¹³⁰

[The] Copyright Act is intended to protect writers from the theft of the fruits of their labor, not to protect against the general public's spontaneous and immediate impression that the fruits have been stolen.

(iii) Causal connection

This element requires that the copyright work be the source from which the infringing

¹²⁴ [1963] 2 All ER 16.

¹²⁵ 420 F. Supp. 177 (DNY 1976).

¹²⁶ *Baxter v MCA* 812 F. 2d 421 (9th Cir.) cert. denied, *Williams v Baxter* 484 US 954 (1987). The *Baxter* Court adopted the reasoning of the landmark case of *Arnstein v Porter* 154 F 2d 464, 468 (2d Cir. 1946).

¹²⁷ 154 F. 2d. 464, 472 (2d Cir. 1946), aff'd on rehearing, 158 F 2d 795 (2d 1937).

¹²⁸ 154 F 2d. 472.

¹²⁹ Ibid.

¹³⁰ Nimmer, *Nimmer on Copyright*, ss 13.01[B] at 13-7 (1989) at s 13.03[E][2] cited in Giannini, supra note 14 at 519.

¹³¹ [1963] Ch 587; [1963] 2 All ER 16, 17.

work was derived. In the words of Lord Diplock in *Francis, Day & Hunter Ltd v Bron*, “the copyright work must be shown to be a *causa sine qua non* of the infringing work”.¹³¹

In practice, however, there are evidentiary difficulties in proving this element. To circumvent the problem, the courts are prepared to make a “fair inference” of copying where no evidence can be adduced.¹³² Furthermore, the copying may be direct or indirect,¹³³ and neither fault nor intention are relevant.¹³⁴

2. The Defendant’s Case

If the plaintiff establishes that a sample infringes copyright in his or her original work, the defendant may be entitled to raise the defence of fair dealing. This defence is provided under s 42.

“Fair dealing” is not defined in the New Zealand or United Kingdom legislation, and the courts have been reluctant to circumscribe the defence; “[i]t is impossible to define what is ‘fair dealing.’ It must be a question of degree”.¹³⁵

Certainly, this ambiguity favours only those with deep pockets.¹³⁶ Many artists will be deterred from expression that a court might ultimately deem fair dealing because of the uncertainty inherent in litigation, and, by consequence, this will discourage artists from pushing the boundaries.¹³⁷

The test for “fair dealing” has two limbs:

- (i) substantiality; and
- (ii) fair dealing

(a) Element 1: Substantiality

In order to be assessed on the basis of fairness, the defendant’s use must first satisfy a substantiality requirement. In the case of *Joy Music*, the defendant successfully argued that his use of the plaintiff’s tune, “Rock-a-Billy”, amounted to “fair dealing” because he had not taken a “substantial part” of the original song.¹³⁸

This substantiality test is subtly different from the qualitative one used to establish infringement, in the sense that the *quantity* copied has a impact upon whether the use is fair. Accordingly, the larger the sample in volume, the more likely it will give rise

¹³² *Zeccola v Universal City Studios*, (1982) 67 FLR 225.

¹³³ *Plix Products Ltd. v Frank M. Winston (Merchants) Ltd.* [1986] FSR 63.

¹³⁴ *Bright Tunes Music Corp. v Harrisongs Music Ltd*, 420 F Supp 177 (DNY 1976).

¹³⁵ *Hubbard v Vosper* [1972] 2 QB 84 at 94 (CA).

¹³⁶ *Supra* note 19 at 102.

¹³⁷ With the notable exception of *Negativland*.

¹³⁸ [1960] 1 All ER 703.

¹³⁹ *Sillitoe v McGraw-Hill Book Co (U.K.) Ltd* [1983] FSR 545.

¹⁴⁰ [1934] Ch 593.

¹⁴¹ [1964] 1 All ER 465.

to a presumption of unfair use.¹³⁹ This quantitative approach was evident in the case of *Hawkes & Son (London) Ltd v Paramount Film Service*,¹⁴⁰ which was cited with approval by Lord Hodson in *Ladbroke*.¹⁴¹ In *Hawkes*, the defendant had appropriated 28 bars of the plaintiff's song, "Colonel Bogey", lasting 50 seconds in performance.¹⁴² Lord Hanworth MR based his decision on the fact that he was "quite satisfied that the *quantum* taken [was] substantial". It follows that if a song contains so many samples that a listener would be likely to listen to it in lieu of the original song, the dealing is unlikely to be deemed fair.¹⁴³

(b) Element 2: Fair Dealing

If the taking is found to be substantial, the defendant may be able to defend his or her unauthorised use of the plaintiff's sample under s 42 of the Act:

42. Criticism, review and news reporting

- (1) Fair dealing with a work for the purposes of criticism or review, of that or another work or of a performance of a work, does not infringe copyright in the work if such fair dealing is accompanied by a sufficient acknowledgment.

The relevant application of the s 42 defence in the context of this paper is when an artist samples for the purpose of criticism, where "criticism" involves "social criticism" or parody. This application of the fair dealing defence has not yet, however, been invoked in a sampling case in New Zealand, unlike in the United States where the equivalent of s 42 has been the subject of much litigation and debate.

(c) Fair Use

The United States Copyright Act 1976 provides a defence of "fair use" at s 107. Unlike New Zealand's fair dealing defence, the American legislation lays out four criteria to be considered by a court:

S 107 - Limitations on exclusive rights: Fair Use:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for the purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-

- (i) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

¹⁴² Ibid 469.

¹⁴³ *Tom Hopkins International Inc. v Wall & Redekop Realty Ltd* (1984) 1 CPR (3d) 348 (BCSC); *Bradbury v Hotten* (1872) LR 8 Ex 1.

- (ii) The nature of the copyrighted work;
 - (iii) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
 - (iv) The effect of the use upon the potential market for or value of the copyrighted work.
- The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

The first music sampling case to raise the fair use defence was *Luther R Campbell v Acuff-Rose Music Ltd*,¹⁴⁴ known as the *Pretty Woman* case. The defendant band, 2 Live Crew, had made a parody rap version of the well-known Roy Orbison rock ballad, “Oh, Pretty Woman”.

In the 2 Live Crew song, the “pretty woman” of the opening verse is subsequently replaced by a “big hairy woman”, a “bald-headed woman” and a “two timin’ woman”. A selection of the altered lyrics follows:

Big Hairy Woman, you need to shave that stuff,
 Big Hairy Woman, you know I bet it’s tough,
 Big Hairy Woman, all that hair, it ain’t legit,
 ‘Cause you look like Cousin It, Big Hairy Woman’...

Big Hairy Woman, come on in,
 And don’t forget your bald-headed friend
 Hey Pretty Woman, let the boys jump in...

Two Timin’ Woman, girl you know it ain’t right,
 Two Timin’ Woman, yous out with my boy last night,
 Two Timin’ Woman, that takes a load off my mind,
 Two Timin’ Woman, now I know the baby ain’t mine!
 Oh, Two Timin’ Woman...

The United States District Court in Nashville ruled that 2 Live Crew could raise the fair use defence to protect its parody. The Court of Appeals, however, reversed and remanded the lower Court decision on three grounds: firstly, that the “blatantly commercial purpose” of the parody rendered it presumptively unfair;¹⁴⁵ secondly, that by taking the “heart” of the original and making it the “heart” of a new work, 2 Live Crew had qualitatively taken too much;¹⁴⁶ thirdly, that market harm to the original song could be presumed where the new work was a commercial one.¹⁴⁷

The defendants appealed to the United States Supreme Court. The Supreme Court overturned the Court of Appeal’s decision and found that 2 Live Crew was entitled to raise a fair use defence under s 107.

In delivering the majority judgment, Souter J said a parody “must be able to Negativland devises a bizarre interpretation of the Fair Use statute contained in current

¹⁴⁴ (1994) 114 S Ct. 1164.

¹⁴⁵ United States Copyright Act 1976, s 107(1).

¹⁴⁶ Ibid s 107(3).

¹⁴⁷ Ibid s 107(4).

conjure up at least enough of the original work to make the object of its crucial work recognisable". 2 Live Crew's parody was found to be "a comment on the naivete of the original in an earlier day" and "a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies". This reference to "street life" may be attributed to the film "Pretty Woman", featuring Julia Roberts and Richard Gere, which glamorises the life of a Los Angeles prostitute and which featured the original Orbison track. The 2 Live Crew parody was partially inspired by the hype surrounding the movie.

The Supreme Court went on to find that "[parody] can provide a social benefit, by shedding light on an earlier work, and in the process, creating a new one".¹⁴⁸ The Court did not, however, go so far as to rule that all parodies are now entitled to a presumption of fair use. Justice Kennedy, while ultimately concurring with Souter J, expressed some reservations:¹⁴⁹

We should not make it easy for musicians to exploit existing works and then later claim that their rendition was a valuable commentary on the original...I am not so assured that 2 Live Crew's song is a legitimate parody...As future courts apply our fair use analysis, they must take care to ensure that not just any commercial take-off is rationalised post-hoc as a parody.

The Supreme Court's ruling in the *Pretty Woman* case was welcomed by many artists who felt that copyright was limiting their artistic freedom and freedom of speech.¹⁵⁰ As licence fees continue to rise, however, many musicians feel that the fair use defence must be expanded further to balance out the protectionist trend of copyright law in the music industry. Negativland is a particularly passionate advocate of reform to the current fair use defence. Don Joyce, a member of Negativland, explains:¹⁵¹

The impulse to sample isn't new. Picasso used fragments of newspapers in his Cubist collages. T.S. Elliot and Ezra Pound included verbatim passages of pre-existing texts in their poetry. Bruce Conner's movies, made of recycled footage, influenced MTV and too many TV commercials. But new tools like the Xerox machine, the VCR, and now digital information systems of all kinds have made copying a casual act. When artists pick up these tools, they naturally turn them on their environment. And today the environment is filled with copyrighted media. The Fair Use defence must be flexible enough to respond to the changing needs of artists.

Negativland's attitude to sampling and fair use has infuriated recording company executives:¹⁵²

¹⁴⁸ Supra note 154 per Souter J.

¹⁴⁹ Ibid 1179.

¹⁵⁰ Supra note 30 at 213.

¹⁵¹ Negativland, "Fair Use" *Billboard*, December 25, 1993, 7.

¹⁵² Adams & McKibbins, "Sampling without Permission is Theft" *Billboard*, March 5, 1994, 106 (10) 5(1). Note: Andrian Adams is Executive Vice President of Seymour Glass Songs/EMI. Paul McKibbins is Director of Publishing for Riltong Music Inc.

copyright law in which they believe it allows for free appropriation in instances that include parody, education and commentary. Negativland benignly views these exceptions as a window for an “artistic freedom” and “free speech” – an interpretation of Fair Use that would allow stealing for personal gain...It is sad that there are growing numbers of Negativlands in our midst, people who want to steal from us in the name of “art” Make no mistake. This is not a struggle of art against commerce. It is about honest, hardworking people being compensated for the music they create and rightfully own.

Interestingly, as the major record companies continue to flex their legal muscle against samplers, renegade musicians are finding refuge in the decentralised medium of the Internet. For instance, a survey of the Negativland homepage provides links to numerous sites of fellow agitators for copyright reform.¹⁵³ Among the international networks represented are Musicians Against the Copyrighting of Samples (MACOS),¹⁵⁴ the Kosmic Free Music Foundation,¹⁵⁵ the Copyright Liberation Front,¹⁵⁶ the Copyright Violation Squad,¹⁵⁷ and “Detritus: Advocates of Fair Use”,¹⁵⁸ a group dedicated to protecting “recycling” in the music industry. While these organisations often represent the extreme viewpoints endemic on the Internet, the opportunity the new media affords to achieve global circulation of their manifestos and infringing material is quietly increasing momentum for copyright reform.

V: ADDITIONAL RIGHTS & REMEDIES

The New Zealand Copyright Act 1994 introduced two new “non-copyright rights”: “Moral Rights” and “Performers’ Rights.” The New Zealand provisions are based on those contained in the 1988 United Kingdom statute,¹⁵⁹ and are consistent with similar rights in Canada, the United States,¹⁶⁰ and European Union member countries.¹⁶¹

1. Moral Rights

The inclusion of moral rights in the statutory regime recognises that authors

¹⁵³ <<http://www.negativland.com>>

¹⁵⁴ <<http://www.icomm.ca/macros/>>

¹⁵⁵ <<http://www.kosmic.org/>>

¹⁵⁶ <<http://www.cyborganic.com/people/vircomm/>>

¹⁵⁷ <<http://soli.inav.net/~psrf/cus.html>>

¹⁵⁸ <<http://www.detritus.net/>>

¹⁵⁹ Brown, *supra* note 70 at 241.

¹⁶⁰ In the United States, the rights are referred to collectively as “Rights of Publicity”; *ibid.*

¹⁶¹ In European Union member nations’ legal systems, authors and composers have authors’ rights (“droit d’auteur”) while performers and producers of sound recordings (usually the record companies) each have a neighbouring right (“droit voisin”); Laing, *supra* note 57 at 43.

¹⁶² The term “moral rights” is a misleading translation of “droits moraux”, which means “personal” or “intellectual rights”. Vaver, *supra* note 19 at 87.

have enduring rights in respect of their works, quite apart from any copyright. Despite the innocuous title, these rights are legally enforceable.¹⁶²

There are three moral rights articulated in Part IV of the Act:¹⁶³ the right to be identified as author or director; the right to object to derogatory treatment of a work; and the right not to have a literary, dramatic, musical or artistic work falsely attributed to another. The rights to be identified as author and to object to derogatory treatment of a work endure until the copyright in a work expires. The right of objection to false attribution expires 20 years after the death of the right-holder. Where infringement is established, the plaintiff may be entitled to damages or an injunction.¹⁶⁴

Moral rights are a manifestation of the “fairness” concern which underlies copyright law; they safeguard the author’s claim to his or her work. Furthermore, since moral rights are unassignable, this “fairness” goal is not easily undermined, unlike copyrights, which artists frequently abdicate complete ownership and control of to record companies or publishers.¹⁶⁵

2. Performers’ Rights

“Performers’ Rights”, which appear in Part IX of the Act,¹⁶⁶ protect performers in their capacity as singers, instrumentalists, actors and variety artists during live performances. This recognises that their personal version or rendition of the underlying musical, literary or dramatic work is worthy of separate protection. Performers’ rights have also been interpreted as a reaction to the danger of “acute technological unemployment”; that is, the concern that sampled sounds and other electronic support will replace acoustic musicians in live performances.¹⁶⁷

Consequently, it is now a breach of a performer’s right to make an unauthorised recording of a whole or any substantial part of a performance. Where infringement is established, the court may grant an injunction, damages (compensatory and exemplary), or delivery-up. Performers’ rights last for 50 years from the year in which the performance takes place. Like moral rights, performers’ rights are not assignable.

3. Impact on Sampling in the Music Industry

Both these new types of rights are likely to have a chilling effect on sampling in the music industry. The unauthorised use of a sample taken from a pre-existing recording will now regularly spark two actions: the first will be a copyright suit brought by the copyright owner (usually, the record company); the second will be an action brought by the “author” for the breach of his or her moral rights in the sample. Signifi-

¹⁶³ Sections 94 – 110.

¹⁶⁴ Section 125(2).

¹⁶⁵ Price, *supra* note 27 at 40.

¹⁶⁶ Sections 169-204

¹⁶⁷ Byram, *supra* note 6 at 370.

cantly, there is *no* substantiality test in proving a breach of moral rights, which weighs heavily against the defendant. Similarly, if the sample is taken from a live performance the performer may sue for the breach of his or her performer's rights under the Act.

This is not to say that statutory recognition of moral rights and performers' rights is undesirable. In fact, both are a welcome addition to the current legislation because they are more likely to safeguard the interests of the artist, as opposed to the artist's commercial representative (namely the record company), than copyright law. However, the addition of these new rights to an already stalwart copyright regime, without a corresponding relaxation of fair use or substantiality requirements, tips the balance even further against the defendant in a sampling suit.

VI: CONCLUSION

In the case of *Franklin Machinery Ltd v Albany Farm Centre Ltd*,¹⁶⁸ Thomas J recognised that copyright law "has got quite out of hand" in industrial design. In that sphere, the spectre of litigation for copyright infringement is being used to restrict competition, while infringement has proven to be a lucrative source of income for copyright owners.¹⁶⁹ It is submitted that those same abuses are manifest in the international record industry.

Uncertainty as to the degree of copyright protection for sampled works has yielded arbitrary results in the bargaining process, particularly when disparities in bargaining power exist. For instance, large record companies with extensive catalogues of musical compositions are able to set disproportionately high licence fees and command excessive damages in private settlement.¹⁷⁰ At the same time, record companies are limiting their own liability by inserting an indemnity clause in recording contracts with artists.¹⁷¹ In view of the imbalance of power between the dominant companies and the smaller labels and individual artists, steps must be taken to make the music industry's private bargaining more consistent and equitable.

Furthermore, uncertainty as to the scope of the fair dealing defence is likely to mean artists will seek permission from record companies (copyright holders) to carry on arguably non-infringing activities because the cost of permission is less than the cost and inconvenience of going to court to defend their action.

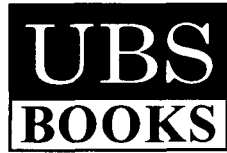
Copyright is an important mechanism for protecting the creative endeavour of artists.^{*} It seems, however, that financial imperatives have come to obscure this grundnorm of copyright law. To ensure copyright nurtures artistic freedom, it is submitted that the boundary lines for "substantiality" and "fair dealing" must be adjusted to accommodate the digital sampling technique.

¹⁶⁸ [1992] NZLR 151.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Supra* note 30.

¹⁷¹ *Ibid.*



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* * * *

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