

The Bridgeport dimension: copyright enforcement and its implications for sampling practice

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The availability of affordable sampling technology in the late 1980s saw the creation of many innovative records, where substantial elements or even entire tracks were created from a collage of previously released recordings. With the launch of equipment such as the Ensoniq Mirage, Akai S900 and EMU SP12 in 1984, 1985 and 1986, access to digital sampling became a reality for aspiring musicians and producers (see Théberge, 1997: 63–65, Burton, 2007: 4 and Schloss, 2004: 30 for details respectively). Only a few years previously the cost of devices such as the Fairlight CMI had made this technology the preserve of a tiny minority of wealthy and established artists and producers. This led to hip-hop artists having the means to translate what had originally been a live performance medium, combining record decks and rapping, into a permanent recorded medium embodying the same practices. While early hip-hop hits such as Sugarhill Gang's *Rapper's Delight* had recreated the feel of beat matching with the use of live musicians, Joseph Schloss, in the course of interviews with hip-hop producers, argues that the use of live instrumentation was an interlude in the history of hip-hop production. The producer DJ Kool Akiem tells Schloss (2004: 51):

Hip-hop is about the turntables. And cats was rhymin' on turntables. And when they started makin' records ... they had no choice but to get a band ... but as soon as there was a sampler, they went back to the root. How it was originally, you know what I mean?

While Schloss goes on to argue that the apparent similarity between turntables and samplers is more an effect of the way in which hip-hop producers chose to use them rather than of the manufacturers' original intentions for their exploitation (ibid: 52), it is reasonable to posit that the use of elements of existing (usually vinyl) recordings as the building blocks of the musical backing track, or *beat* as it is usually referred to, is the essential basis of hip-hop as a recorded form. Albums such as Public Enemy's *It Takes A Nation Of Millions To Hold Us Back* (1988) and De La Soul's *Three Feet High And Rising* (1989) showcased the apparent potential of the sampler, and suggested the emergence of an instrument that could become "the electric guitar for the next fifty years" (Shapiro, 2000: 7). This technology allowed producers to re-imagine elements of past productions in new contexts, or as Vanessa Chang (2009: 143) puts it, "sampling creates a tradition that involves the past without deferring to its structures and limitations".

This article will explore how far the creative possibilities of sampling have been curtailed through both the enforcement of copyright law and the resulting prohibitive cost of sample clearance. Further discussion will focus on how current interpretation of copyright law is in opposition to what many commentators perceive to be the fundamentals of hip-hop production (and of other sample-based musical styles) as an art form, as well as the perceived intentions of copyright laws to protect creative work. This leads to questions of how far there is parity in the application of copyright protection across different art forms. Through reviewing sampling and copyright case history, as well as the thoughts of commentators who have approached this subject area from the perspective of both legal and popular music studies, discussion will focus on the extent to which current legal interpretation of copyright law may be flawed and how far such interpretation appears effectively to outlaw established production approaches in hip-hop and other forms of sample-based music. Particular attention will be given to the ramifications of the judicial ruling in the USA arising from the case of *Bridgeport Music, Inc. v. Dimension Films, 2004 FED App. 0279P (6th Cir.)* in this regard.

Copyright law, landmark judgements and the rising cost of clearance

There are two sets of rights at stake with any record: the rights of the composer(s) and the rights of the owner(s) of the master recording from which it was duplicated. The record company that released the record usually owns the latter; a publishing company, with which a composer has made an agreement to manage the commercial exploitation of the work, will usually have been assigned the right to conduct negotiations in regard to the former. Anyone who wants to release a record containing a sample from a copyrighted recording has to seek an agreement from both the record company in the form of a licence, and permission from the publisher, for which the publisher will usually demand a percentage of the publishing of the new composition. The original composer(s) will be credited as co-writer(s) of the new record, and together with their publishing company will receive some of the income from any performance of the new record, such as broadcast on radio, film and television, or in a public place.

Complicating matters further in the USA, where many of the pioneers of sampling plied their trade, is the potential protection offered to a sampling artist under the doctrine of fair use. This allows for appropriation from copyrighted sources, “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” (Copyright Act of 1976, 17 U.S.C. § 107). Whether or not appropriation will be deemed fair use can depend on the substantiality of the portion used, the nature of the copyrighted work, the purpose of use (including the intention to or not to make a profit), and the potential for infringing on the economic potential of the copyrighted work. The questions for the sampling artist to consider are whether or not their intended sample is sufficiently substantial or significant to infringe copyright if used without clearance and how much will such clearance cost them.

Copyright laws exist on a national basis and, as such, vary by country but the cross-territorial nature of the music business means that any sampling artist needs an understanding of copyright in at least the USA and the major European nations – although there are international conventions that attempt to assert minimum standards of protection. The Berne Convention, to which the USA became a signatory in 1988, allows that the national copyright laws of signatory nations will apply to copy-

righted material created by authors resident in other signatory nations. So, for example, a musical work created by a British or German sampling producer will be subject to US copyright law and its current interpretation if it is released in the USA. This article will focus mainly on the way the US legal system has responded to sampling because many of the landmark cases have occurred in the USA, and many of the sampling artists discussed here are American. As it is also the world's largest music market (IFPI, 2011: 14) and the largest source of music repertoire (BPI, 2010), it can be argued that the interpretation of copyright law in the USA has the most far-reaching significance for the music industry as a whole. It is perhaps worth noting here, as David Laing (2004: 73–75) discusses, that the Anglo-American idea of copyright was designed more with a view to protecting the rights of “the corporate owners and distributors of cultural products” (the record and publishing companies for the purposes of this discussion), than the rights of the author, which have generally been valued more highly in continental Europe. An example of this is the pressure from the American film industry that led to the USA's signature to the Berne Convention being contingent on them being allowed to continue to waive moral rights – such as the right of the author to be properly identified and for the editing of a work to be carried out in a way that ensures its integrity is preserved.

In the USA, the Sound Recordings Act of 1971 gave the owners of a recording copyright the exclusive right to reproduce that recording. This act was brought about after lobbying of the Federal government by the RIAA (Recording Industry Association of America) to combat a flourishing record piracy industry that they considered to be a considerable economic threat at the time (see Faulk, 2011: 1–3 for further details), but subsequent interpretation of this act has been crucial to the legal position of the sampling artist. In the UK, the 1988 Copyright, Designs and Patents act was the first to address the issue of sampling as copyright infringement. The key to understanding what a sampling artist could legally use without sample clearance was that if a *substantial part* of another record had been sampled, then a breach of copyright had occurred. This UK act corresponds to the Berne Convention, as does most European and Australian music copyright law, with both seeing sampling as intellectual property infringement. Arguments about what does and does not constitute a *substantial part* have kept the courts busy with sampling disputes; however, as Ann Harrison (2008: 271) has noted, the majority of these cases have been settled out of court with

record companies unwilling to set any legal precedent for fear that any revenue gained by copyright enforcement of uncleared samples would be offset by settlements required on behalf of their own sampling artists. There was effectively a golden age of sampling where it was permissible to take small amounts of other records because under the *de minimis* interpretation of statutes they were not deemed significant enough to be considered infringement of copyright. There has never really been a question in law that substantial and extensive use of a sample should require clearance from, and remuneration to, the original creators. As such, it has always been possible to refuse a licence and protect the integrity of the original recording if this is perceived to be at risk. The credits to all of the sample-based tracks discussed in this article acknowledge the original composers and recorded sources of the samples used, with the exception of Public Enemy & De La Soul. Public Enemy's producer Hank Shocklee has revealed that many of the samples used on *It Takes A Nation Of Millions To Hold Us Back* were cleared retrospectively (McLeod, 2002), while Tom Silverman, CEO of De La Soul's record label Tommy Boy notes in the documentary *Copyright Criminals* (Franzen, 2010) that almost all of the substantial samples used on *3 Feet High And Rising* were cleared prior to release, other than a sample of 'You Showed Me' by The Turtles used in the skit 'Transmitting Live From Mars'. The band had not felt it to be worth mentioning a sample used in a short interlude, and found themselves liable for substantial damages for uncleared use when the rights owners of 'You Showed Me' sued. Although there is not a list of sample clearances on *3 Feet High And Rising*, it is evident that clearance had been sought through the acknowledgement of, for example, Daryl Hall and John Oates as co-writers on 'Say No Go' for use of a sample of 'I Can't Go For That (No Can Do)', and of Donald Fagen & Walter Becker as co-writers on 'Eye Know' for the sampling of 'Peg' by Steeley Dan. One issue, then, is how extensive the usage of a sample has to be to warrant clearance. The CD sleeve for DJ Shadow's 'Change-ling' acknowledges the use of one sample, while that of The Avalanches' 'Since I Left You' acknowledges three; both evidently use a number of additional uncleared samples, which due to their fragmented or insubstantial nature, were not considered to require clearance at the time of their creation.

With the case of *Grand Upright Music Limited v. Warner Bros. Records, Inc.*, 780 F.Supp. 182 (S.D.N.Y., 1991), there began a fundamental change to the way samples were used in records. Biz Markie sam-

pled part of the introduction to 'Alone Again (Naturally)' by Gilbert O'Sullivan for his track, 'Alone Again'. O'Sullivan happened to own the recording and publishing copyrights to his record and, unlike many record companies, had nothing to fear in the way of counter suits, He sued Biz Markie and his label for copyright infringement. The presiding judge, The Honourable Kevin Thomas Duffy set the tone for the rest of his judgement with an opening line of "thou shalt not steal". As Stephen Collins (2006: 289–290) has pointed out, Duffy did not take into account that the US Copyright act of 1976 had been designed to protect rights holders against bootlegging and piracy rather than sampling and Markie's attorneys may have had some success in overturning Duffy's decision had they pursued the case, as he was at the time the most reversed judge on the Second Circuit.

With sampling clearly identified as copyright infringement, the cost of clearance, in the form of a licence, started to become prohibitive, especially if an artist's record contained multiple samples. In an interview with Kembrew McLeod (2002), Hank Shocklee, the co-producer and member of Public Enemy, explained how the cost of sampling made it unfeasible to create an album like *It Takes A Nation Of Millions To Hold Us Back* after 1991:

It wouldn't be impossible. It would just be very, very costly. The first thing that was starting to happen by the late 1980s was that the people were doing buyouts. You could have a buyout – meaning you could purchase the rights to sample a sound – for around \$1,500. Then it started creeping up to \$3,000, \$3,500, \$5,000, \$7,500. Then they threw in this thing called rollover rates. If your rollover rate is every 100,000 units, then for every 100,000 units you sell, you have to pay an additional \$7,500. A record that sells two million copies would kick that cost up twenty times. Now you're looking at one song costing you more than half of what you would make on your album.

Writing shortly before the Bridgeport case discussed below, Donald Passman (2004: 307) suggested that rolling payments would be \$8,000 for every \$100,000 units sold with buyouts becoming less common practice. If available, this cost could range from \$5,000–\$50,000 depending on the usage and the commercial success of the song sampled. There would also be an advance payable on what is effectively a royalty rate for each sample used. This is, of course, in addition to the cost of publishing clearance which, while not necessarily requiring an upfront fee, may

be in the region of 50% or more of the publishing rights for significant usage (Passman, 2011: 344–345). In an age of declining record sales where the synchronisation of songs in other media such as films, TV and games is seen as an increasingly important revenue stream (Morey, 2007: 2), this can involve a significant cost to the sampling artist as well in terms of dramatically reduced sync fees and performance royalties.

Bridgeport Music Inc. v. Dimension Films **– the new bright-line**

As the nineties continued, the cost of sample clearance increased, with litigation sometimes occurring in respect of quite short samples. However, most cases were settled out of court, meaning that the law was still unclear as to what level of sampling constituted copyright infringement (Harrison, 2008: 271). This changed in September 2004 when the United States Court of Appeals for the Sixth Circuit gave its ruling in the case of *Bridgeport Music Inc. v. Dimension Films, Fed App. 0279p*. Bridgeport Music Inc. owns the copyright to a number of George Clinton and Funkadelic records, a popular resource for sampling, especially in the hip-hop community. The sample in question appeared in the NWA track ‘100 Miles and Runnin’, originally released in 1990, and consists of three notes of a guitar solo from the Funkadelic track ‘Get Off Your Ass & Jam’, which was lowered in pitch and looped for 4 bars at five different points in the NWA track as a background texture. The action was brought by the copyright owners of the Funkadelic record because of the inclusion of the NWA track in the soundtrack of the 1998 film, ‘I Got the Hook Up’. The original ruling in the case had gone in favour of the samplers, concluding that the sample did not “rise to the level of a legally cognizable appropriation” (230 F. Supp.2d at 841, 2001, cited in 2004 FED App. 0279P (6th Cir.), Section 1)). The presiding judge in that case concluded that because a casual listener, even one familiar with the work of George Clinton, would not be able to spot the original source of this sample without being advised of it, no copyright infringement had occurred.

The Court of Appeals, in reviewing this initial judgement, decided it was in the interests of the courts to establish a “bright-line test” for sampling, “one that ... adds clarity to what constitutes actionable

infringement with regard to the digital sampling of copyrighted sound recordings” (2004 FED App. 0279P (6th Cir.), Section 1). This court overturned the original ruling by interpreting the 1971 US Copyright Act in an entirely literal way. The act had given the owners of a recording copyright the exclusive right to reproduce a sound recording in order to combat piracy at a point before sampling existed anywhere but in the most experimental pieces. Nevertheless the Court of Appeals decided on the following interpretation:

Section 114(b) provides that the “exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.” In other words, a sound recording owner has the exclusive right to “sample” his own recording. We find much to recommend this interpretation... No further proof of [infringement] ... is necessary than the fact that the producer of the record or the artist on the record intentionally sampled because it would (1) save costs, or (2) add something to the new recording, or (3) both. 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. (2004 FED App. 0279P (6th Cir.), Section 2)

Since 2004, then, we have had a legal position in the US that says, “Get a license or do not sample. We do not see this as stifling creativity in any significant way” (ibid.). With sampling now seen as physical rather than intellectual theft, the possibility of a fair use defence for sampling has become highly unlikely, because while intellectual property arguments will still stand for the publishing copyright, the *Bridgeport* judgement effectively removes this possibility for the sound recording copyright. This is clearly very difficult for the sampling artist, as even the most minimal sample currently requires a licence or the threat of legal action. It also means that many artists may see their back catalogue become the subject of litigation. The judgement was very good news for companies such as Bridgeport Music Inc., so-called ‘sample trolls’ (Wu, 2006) companies which have allegedly acquired sound recording copyrights with the express purpose of making money from any detectable infringement of said copyrights on other records. In the following excerpt from an interview in *Stay Fresh Magazine*, Beck Hansen explained why, in the

light of the Bridgeport ruling, it would not be possible to create a second *Odelay*:

It's pretty much impossible to clear samples now [in 2005]. We had to stay away from samples as much as possible. The ones that we did use were just absolutely integral to the feeling or rhythm of the song. But, back [on *Odelay*] 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 for half of a second one time in a song and makes you give away 70 percent of the song and \$50,000. That's where sampling has gone, and that's why hip-hop sounds the way it does now. (Fink, 2005: 1)

Criticism of the Bridgeport ruling

Criticism of the Bridgeport ruling has come not just from the hip-hop community and campaigners for freedom of expression, but from legal practitioners as well. Mark Brodin (2005: 853–857) argues that the judgement is flawed because it ignores prior judicial decisions, its claimed 'literal reading' of the Copyright Act does not stand up to scrutiny, and that its holding is contrary to the purpose of copyright protection. Amanda Webber (2007: 404–405) concurs and adds two further arguments as to why the court's view of the sampling in Bridgeport being "physical taking rather than an intellectual one" (2004 FED App. 0279P (6th Cir.), Section 2) is incorrect:

First, it is applying a common law concept of misappropriation to an area that has been pre-empted by congressional statute, and second, it misconstrues the nature of sampling. "Digital sampling is the creation of a copy, not the seizure of an original sound." Digital sampling leaves the original sound recording intact, so categorizing digital sampling as a physical taking does not make sense, or allow for any kind of argument that sound recordings should deserve greater copyright protection.

Brodin (2005), in his overview of prior sampling and musical copyright cases, argues that the *de minimis* ruling should be applied on both a quantitative and qualitative basis in the first instance with regard to the significance of the sampled extract in its original context rather than in

the defendant's work (as held in *Newton II*, 349 F.3d 591), and whether or not it is of sufficient originality for it to be worthy of copyright. As he puts it, "to demonstrate that sampling has risen to a legally cognizable level, a plaintiff must prove that the copyrighted and disputed works are substantially similar" (Brodin, 2005: 828).

It is perhaps worth considering the contribution a co-writer of a song would have to make in the eyes of the law to claim joint authorship and compare that with the musical significance of the kind of samples that are effectively outlawed since *Bridgeport*. Within copyright law the legal interpretation of a valid claim for co-authorship in disputes has usually taken the view that the song equals the vocal melody, underlying chords and lyrics. Dominic Free (in McIntyre & Morey, 2010: 3–4) cites the following conditions for establishing joint authorship:

- There must be collaboration in the creation of a new musical work.
- There must be a significant and original contribution from each author.
- The contributions of each author must not be separate.

While study of the 1976 US, 1956 or 1988 UK copyright acts fails to reveal any clause with regard to joint authorship that requires a contribution to be "significant and original", the body of case law in song writing disputes suggests that Free's interpretation is correct (see Bently, 2009: 190) for examples of case law where the judicial summary has used that exact phrase). In the case of *Hadley & Others v Kemp* in the UK, the other members of Spandau Ballet claimed a share of the song writing royalties for their contribution in developing the ideas of the main songwriter, Gary Kemp. In the view of the presiding judge, Mr Justice Park, while it was possible for a work of joint authorship to have come from a jamming session in a rehearsal room, Gary Kemp was the sole author:

"There is a vital distinction between composition or creation of a musical work on the one hand and performance or interpretation of it on the other ... It is certainly true that the members of the band sang or played in their own ways (and, in so far as I am able to judge, did so excellently) ... The members of the band ... did what any good musician does: they performed the songs to the best of their

considerable abilities, injecting elements of individuality and artistry into their performances.” ([1999] *Hadley v. Kemp*, 450, N5).

This case is relevant to the discussion here because it underlines the gap between the ways in which authorship and infringement are determined. Lionel Bently (2009: 191–192) admits to a “sense of unease” that, for example, the 35 second saxophone solo in ‘True’ would infringe copyright if sampled without clearance, and yet the contribution of saxophonist Steve Norman in creating the solo is not considered to be significant or original enough for him to deserve a share of the song’s authorship. There is surely an argument for any dispute over sampling-related copyright infringement to be examined with the same application of copyright law as a dispute over authorship, or as Brodin (2005: 840) puts it, “the proper question to ask is whether the defendant appropriated, either quantitatively or qualitatively, constituent elements of the work that are original ... easily arrived at phrases and chord progressions are usually non copyrightable”. Although there is a counter-argument that such an examination could only be applied to the publishing copyright, rather than the recording copyright of a sample, it is hard to square the idea that infringement of intellectual property can occur with one set of rights and not the other.

Fair use in other contexts

The judgement in the *Bridgeport Music Inc. v. Dimension Films* case appears harsh because it effectively outlaws sampling regardless of use or intention. In addition, the judgement highlights the need to examine the evidence that suggests artists in the field of music appear to receive different treatment under the US legal system than those working in other creative media. Two relatively recent cases involving visual artists show that the law appears to be inconsistent from one artistic medium to another in its application of fair use.

In the first, *Blanch v. Koons*, the appropriation artist Jeff Koons was sued by the photographer Andrea Blanch for breach of copyright after Koons had effectively sampled part of one of her fashion photographs, *Silk Sandals by Gucci* for his picture, *Niagara*. Koons scanned the legs and feet from Blanch’s photograph in the construction of a photomontage, which was then used by his assistants as a template to be copied

on to a larger canvass. Because of the photorealistic style of the finished work, this process could be argued to be analogous to making a sample and then treating it with studio effects or filtering for incorporation in a new composition. In an affidavit quoted by the Court of Appeals, Koons justifies his methodology, explaining “by re-contextualising these fragments as I do, I try to compel the viewer to break out of the conventional way of experiencing a particular appetite as mediated by mass media” (F. Supp 2d 476 (S.D.N.Y 2005) abridged: 2).

The re-contextualising of fragments is certainly part of the methodology of artists as diverse as Public Enemy, DJ Shadow, The Avalanches and John Oswald. In spite of the considerable value of the artwork in question (valued by Sothebys at \$1 million), the Court of Appeals found in favour of Koons that his appropriation was fair use because of the transformative intention behind it, and that consequently “copyright law’s goal of ‘promoting the Progress of Science and useful Arts’ ... would be better served by allowing Koon’s use of *Silk Sandals* than by preventing it” (ibid: 6).

In the second case, *Mattel Inc. v. Walking Mountain Productions*, the ‘artsurdist’ photographer Tom Forsythe was sued for copyright infringement by Mattel Inc. for his incorporation of Barbie dolls in a series of photographs entitled *Food Chain Barbie* (for example, *Barbie Enchiladas* in image 1). The intention behind the photographs was for them to be “a seriously funny stab at mindless consumerism, the impossible beauty myth and the advertising that brings it all into our lives”. (Forsythe, undated). Forsythe was brave enough to take on all the legal force that a major corporation could muster to defend himself. The court found that the incorporation of the dolls in his photographs was fair use because “Forsythe presents the viewer with a different set of associations and a different context for the plastic figure” (353 F.3d 792 (9th Cir. 2003): 14), and that the works themselves were “extremely transformative” (ibid: 16).

In both of these cases, it can be seen that significant appropriation, even with a view to making financial gain from the resulting work, can be found not to be in breach of copyright laws. This seems at odds to the treatment meted out to artists whose chosen medium happens to be sound recordings.



Image 1: Tom Forsythe, *Barbie Enchiladas* (1998). Reproduced with the artist's permission.

In discussing their judgement in *Mattel Inc. v. Walking Mountain Productions*, the Court of Appeals noted that because “science and art generally rely on works that came before them and rarely spring forth in a vacuum, the [Copyright] Act limits the right of a copyright owner regarding works that build upon, reinterpret, and reconceive existing works” (353 F.3d 792 (9th Cir. 2003): 10). This would seem to offer many a sampling artist the legal right to pursue their art. Indeed, in another landmark music copyright case in 1994, *Campbell v. Acuff-Rose Music*, the courts found in favour of a sampling artist, in this instance 2 Live Crew, because their use of a sample of Roy Orbison’s ‘Oh, Pretty Woman’ in their composition ‘Pretty Woman’, while being for commercial purposes, was seen as sufficiently transformative to be fair use.

The problem for the sampling artist is that fair use principles require assessment on a case-by-case basis. The *Mattel Inc. v. Walking Mountain Productions* judgement quotes from *Campbell v. Acuff-Rose Music* that the task “is not to be simplified with bright-line rules” (353 F.3d 792 (9th Cir. 2003): 11); this could mean a lengthy and expensive court case for every sample used. When considering a sampling collage piece, it is clear that this could become a Kafkaesque ordeal, especially because the

laws on clearance require each copyright holder to hear the sample use in the context of the finished record. In attempting to establish a bright-line ruling for sampling, the Court of Appeals in *Bridgeport Music Inc. v. Dimension Films* was clearly mindful of the hundreds of outstanding actions in this area, and perhaps rightly suggests that if its interpretation of existing law is seen as too stifling to creativity, then it may be time for the music industry to lobby Congress for an amendment to the current Copyright Act.

It can be argued though that the Court of Appeals has allowed a certain naivety concerning sample clearance to colour its judgement when it suggests that “the sound recording copyright holder cannot exact a license fee greater than what it would cost the person making the license to just duplicate the sample in the course of making the new recording” (2004 FED App. 0279P (6th Cir.): Section B). It would be interesting to see this comment tested, as it would mean, for example, that a producer could license the guitar introduction to Jimi Hendrix’s ‘Voodoo Child (Slight Return)’ for a relatively modest fee, while the use of, say, a John Williams orchestral piece would require sufficient funds to cover the sessions costs for a full orchestra. There is no evidence that this sort of sliding scale currently exists in the music industry. Kembrew McLeod (2005: 87) notes that when Public Enemy wanted to use a sample from Buffalo Springfield’s ‘For What It’s Worth’ for the title song to the Spike Lee film ‘He Got Game’, the clearance fees were so prohibitive that a cheaper option was to mimic the instrumentation in the studio and engage the original artist, Stephen Stills, to re-sing his part, thus avoiding the need to deal with the sound recording copyright owner, Atlantic Records.

Rather than bringing some sense to the issue of clearance fees, this bright-line ruling is more likely to increase costs because sound recording copyright holders will only need to show that a sample has been used to have a cast iron case for copyright infringement. The threat of an impending lawsuit with only one possible outcome can be hung, in Damoclean fashion, over the heads of the sampling artist and his/her record label when sample clearance negotiations occur.

This bright-line ruling also effectively condemns decades of hip-hop production to being an infringing and hence illegal form of expression. Turntablism and scratching are the very basis of the genre, and yet the logical conclusion of *Bridgeport Music Inc. v. Dimension Films* would be that this is now an entirely actionable art form unless endless clearances have been agreed and paid for in advance. While the courts have fre-

quently claimed that it is not their place to decide on the relative merits of works of art, it is interesting to contrast the acceptance of a long history of visual appropriation art, from Duchamp and Warhol through to Koons and Forsythe with a general absence of any support for musical art constructed using similar methods. The chief difference between a visual and musical collage artist is, of course, that the visual artist generally makes only a single copy of the work (with Warhol being a notable exception). Although it can be argued that the music industry is dominated by large corporate entities who stand both to lose and gain from litigation over copyright theft and sample clearance fees, it is perhaps also worth noting the increasingly corporate nature of the art World; the *Easyfun-Ethereal* series of seven paintings, which included *Niagara*, was commissioned from Koons by Deutsche Bank for \$2 million, so Sotheby's valuation of \$1million for a single painting represents a return on investment to delight any major record company, while the 50% share that Deutsche Bank donated to the Guggenheim Museum in New York would, of course, be tax deductible.

Given the high value of works by successful visual artists is it not fair to suggest that they stand to make greater economic gain from sampling than most if not all music producers who use samples? The conclusion to draw from this is that the courts view hip-hop and other sample-based musical forms as low art, with its proponents not deserving the same freedoms afforded visual artists, or indeed writers, for whom quotation is permissible. Chris Cutler (2004: 147) argues that plundering is common to both folk music, in terms of the copying and covering of songs, and in the use of "public domain forms and genres as vessels for expressive variation (the blues form, jazz interpretations, sets of standard chord progressions and so on". We now have a legal position where sampling cannot be considered as quotation or acceptable plundering.

Changes to sampling practice

It is worth noting what both commentators and practitioners appear to value about music that incorporates samples in order to assess how far *Bridgeport* has inhibited esteemed forms of practice. Joseph Schloss (2002: 101–168) undertook extensive ethnographic research among US hip-hop producers, which led to him establishing ethical rules for sam-

pling practice and for the aesthetics of hip-hop composition. Ethical rules for sampling practice in hip-hop include the requirement to sample from original vinyl releases, rather than reissues, compilations or CDs, as the act of crate digging (searching through boxes of records for a useable sample) is considered an essential part of the production process and an activity that preserves a link between hip-hop's turntablist originators and the subsequent sampler-using producers. Another rule is 'no biting', which means not sampling from previous hip-hop productions and not using samples previously employed by hip-hop producers unless these have been significantly 'flipped' or 'chopped' i.e. substantially altered from the pre-existing usage. It is also considered unethical to sample more than one part of a given record as "essentially it is not creative to combine things that already go together". In terms of the aesthetics of sampling in hip-hop production, the chopping and flipping of samples is considered to connote creativity, while the straight looping of a phrase is not necessarily considered to be uncreative, especially if the other elements of the beat surrounding the sample recast the groove or feel of the sampled phrase.

Both Vanessa Chang and Tara Rodgers identify the prioritisation of the sound of a sample over its melodic content by sample using producers. The argument is that "sample-based music uses sound instrumentally, rather than using instruments to make sounds" (Chang, 2009: 146) and that electronic producers are concerned with "foregrounding grain" (Rodgers, 2008: 317) in their chosen samples. In an interview with McLeod (2002), Hank Shocklee explains his preference for samples in terms of their sonic characteristics:

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. Something that's organic is almost going to have a powder effect. It 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. If you notice that by the early 1990s, the sound [of hip-hop] has gotten a lot softer.

This idea echoes the thoughts of Wu-Tang Clan's producer RZA (2005: 192) who advocates the use of the sampler as a "painter's palette", a tool to mix and combine sonic colours and textures rather than as "a Xerox machine" where substantial and identifiable parts of existing records are used as the basis of a new track. DJ Vadim concurs:

One guy makes a photocopy of the Mona Lisa – that’s P Diddy, who just samples the choruses of songs. The other guy takes the same painting, chops it up, and it doesn’t even look like the Mona Lisa any more. He’s made it into a cow, or a spaceship. That’s what sampling can be like. (McLeod & DiCola, 2011: 195.)

The current legal position on sampling effectively endorses the ‘Xerox machine’ approach because there is only one set of copyright and publishing clearance negotiations to conduct. This helps to explain why producers that still use samples take such significant amounts – why give away half of your publishing and thousands of dollars for half a bar? This approach is clear on Kanye West’s *Late Registration*; arguably, the tracks that incorporate samples use one extensive sample as much of the musical basis for a record because, with the expense involved in clearance and the loss of ownership of the track in terms of publishing, it makes sense pragmatically to get something substantial for the money spent and potentially lost. In ‘Diamonds from Sierra Leone’, West incorporates the introduction and chorus to Shirley Bassey’s ‘Diamonds are Forever’, while on ‘My Way Home’, a section of the Gil Scott-Heron song ‘Home is Where The Hatred Is’ is effectively cut and pasted to form the basis of the track, while from 0.56 to the end of the track consists of nothing but a long continuous sample from the same source. ‘Touch The Sky’ does cut up and rearrange (or *chop*) elements of Curtis Mayfield’s ‘Move On Up’, but the sample is still the only musical element in the track. West’s protégé Lupe Fiasco can be seen to adopt a similar approach by his extensive use of a sample from ‘Daydream’ by The Günter Kallman Choir on ‘Daydreamin’ (although he actually used the sample as cut up and treated by I Monster for their song ‘Daydream In Blue’).

There is, perhaps, another motive behind this approach. Artists such as Kanye West and Lupe Fiasco, and the major record companies behind them, are in a relative position of power to conduct sample clearance negotiations compared to smaller, independent artists. West is credited as co-writer on all of the sample based compositions on *Late Registration*, while Lupe Fiasco is a co-writer on ‘Daydreamin’ even though he used exactly the same amount of the Günter Kallman Choir sample as I Monster did on ‘Daydream In Blue’, for which they received no share of the publishing rights. It would seem that rights holders are prepared to be flexible on their terms for sample usage if an obvious economic benefit, such as a major record company promotional campaign and release, can be presented to them.

The implications of current legal interpretations are twofold. Albums such as *It Takes A Nation Of Millions To Hold Us Back* by Public Enemy, *Endtroducing* by DJ Shadow and *Since I Left You* by the Avalanches would be very unlikely to gain a commercial release in 2012. To underline that certain forms of sampling practice have effectively become prohibited, Kembrew McLeod and Peter DiCola (2011: 201–212) have applied current sample clearance costs to Public Enemy's *Fear of a Black Planet* and Beastie Boys' *Paul's Boutique* to show that, based on sales figures for these two albums, the artists would make losses of \$6,786,000 and \$19,800,000 respectively. The original and critically acclaimed pieces of music to be found on these albums were created from fragments gathered from a variety of sources, and took full advantage of the sampler's facilities to manipulate and modify a range of musical sources in a way unparalleled by traditional studio production methods. This fragmented method of composition could also be said to mirror our media-rich, fast-paced modern lives: "because all our experiences of time are now fragmented and multilinear, fragmented music is also realistic music; it represents experience grasped in moments" (Frith, 1988, cited by Arthurs, 2005: 7).

By contrast, extensive use of a single sample has a tendency to produce something closer to a remix than an original work. This is not to say that extensive use of a sample cannot be transformative; I Monster's use of The Günter Kallman Choir's 'Daydream' for 'Daydream In Blue' is certainly extensive, but it is interweaved with other textures and effects and an original and suggestive chorus that contrasts sharply with the almost ecclesiastical sounding chorus of the original which, perhaps ironically, has plundered its melody note for note from Prokofiev's 'Swan Lake'. By contrast, a track such as Ma\$e's 'Feel So Good' uses just as much of an original source as I Monster (in this case 'Hollywood Swinging' by Kool & The Gang), but only embellishes it with an additional kick drum and hi-hat, both mimicking the original groove, and vocals (Ma\$e's rap and a sung female chorus, itself a replay rather than a sample of Miami Sound Machine's 'Bad Boy'). While mash-ups and remixes are often interesting and entertaining they now appear to be the only viable methodologies for the sampling artist who seeks widespread commercial availability for his/her work. It is worth noting that editions of Donald Passman's book *All You Need To Know About The Music Business* published after the *Bridgeport* judgement no longer include information on the likely costs of sample clearance, with the implication of this perhaps

being that if you need to ask how much, you probably cannot afford it (Passman, 2011: 345). Personal interviews in 2011 with current sampling practitioners Mr Scruff and Krafty Kuts indicate that, in the UK, the cost of clearing even a relatively short sample has become prohibitive and these artists now incorporate significantly fewer samples in their work.

It is the contention here that sampling practice has changed through a combination of rising industry costs and legal judgements and that, as such, the possibilities for sampling as a musical discourse have been increasingly curtailed. It can be argued that the use of multiple short but recognisable samples in early sample-based hip-hop production involves the layering of what Philip Tagg (1999: 32) describes as *musemes*, “minimal unit[s] of musical-discourse that [are] recurrent and meaningful in itself within the framework of any one musical genre”. For example, the one beat (as in one quarter of a bar) of groove in ‘The Grunt’ by The J.B.s that is repeated as part of the beat (as in backing track) to Public Enemy’s ‘Night Of The Living Baseheads’ is a *museme* in its original context because it is repeated four times to form part of the bridge (0.55–0.59). Similarly, the phrase taken from 0.30–0.32 is a whole bar containing a nine-note saxophone phrase that occurs twice in the verse of ‘The Grunt’ could be described as both *recurrent* and *meaningful*. Tagg goes on to consider the importance of musical context, noting that “the structures constituting a *museme* in one style do not necessarily constitute a *museme* in another style and, even if they did, the *museme* in question would not necessarily connote the same thing” (ibid.). An example of this is the high-pitched legato saxophone part that appears at the start of ‘The Grunt’ (0.00–0.04). As a one-off short improvisation, it does not satisfy Tagg’s criteria of a *museme*. However, when reconfigured by Public Enemy, the first two seconds of this sample have taken on a character that many commentators, including Public Enemy rapper Chuck D describe as “a siren” (Dery, 1990: 84). Other than its omission on a few short breakdowns, this sample is used continuously on ‘Rebel Without A Pause’ while a reversed version of the sample also appears frequently on ‘Terminator X To The Edge Of Panic’ (both tracks feature on *It Takes A Nation Of Millions To Hold Us Back*). In this new context the siren not only becomes a *museme* but is arguably also one of the defining signature sounds of Public Enemy’s early albums. The taking and layering of multiple short samples (the Wikipedia entry for ‘Night Of The Living Baseheads’ claims 20 different sample sources were used on this track alone, while whosampled.com puts the figure at 16; see Wikipedia 2012

& WhoSampled 2012) creates a musical structure wherein these disparate elements are used as building blocks rather than being showcased or highlighted as would generally happen with a remix or single longer sample. This also provides interesting intertextual possibilities for the listener. On the one hand, short, sampled snippets such as those taken from ‘The Grunt’ may not be recognisable to many listeners and being freed from the source material allows them to develop a new meaning. On the other hand, when the listener happens to stumble across the original source of a short sample it can provoke interesting new readings of the original. To this author’s ears, ‘The Grunt’, for example, develops a darker, foreboding, almost political edge when listened to with Public Enemy’s usage of it in mind. While even a remix, in which the groove, tonality and timbre of the original source remain largely intact can also be perceived as a new reading, the sample will not be freed from its original source and, arguably, any new reading will be largely at the level of functionality (such as being repurposed to fit with a current club style) rather than offering a different emotional perspective. For this author, the current cost of sample clearance and the enforcement of copyright law in respect of sampling has both simplified and curtailed the possibilities for sampling as a form of musical discourse by encouraging the use of a single sampled source over a layered, multi-sampling transformative approach.

Conclusions

One of the implications of the current legal situation is its effect on young and aspiring producers interested in sampling. The logical conclusion for them is to avoid copyrighted material altogether and turn to packages such as Garageband or the Apple Loops in Logic Studio. This effectively changes the music production process in this context to one of consumption and reproduction, something that Paul Théberge (1997: 72–90), among others, suggests has been happening since the development of samplers and synthesisers with extensive sound banks in the mid 1980s, but one which has been further accelerated and assimilated since *Bridgeport*.

Many commentators agree that the *Bridgeport* judgement stifles creativity and should be repealed but this does lead to the question of what

should be put in its place. Amanda Webber (2007: 408–414) has offered the idea of the introduction of a new sub-genre of fair use specifically to cover sampling, a compulsory sampling licence operating in the same way that the compulsory mechanical licence allows anyone to record a cover version at a fixed rate, or a combination of the two where an industry-regulated panel would determine the quantitative and qualitative significance of the sample in its new context and assign a fee (if the sample was not deemed fair use) from a pre-agreed scale in terms of its usage and recognisability. Webber acknowledges that any hard-and-fast rules would be difficult to implement because of the difficulty in determining the significance of the original sampled source. The idea of a compulsory sample licence also fails to account for the fundamental difference in the industry between publishing income streams and recording income streams; a flat fee compulsory mechanical licence is industrially practical because the original writers and their publisher will still receive all of the performance royalties from the cover version whenever it is broadcast, making its popularity and their remuneration inextricably linked. Any flat fee compulsory sampling licence, then, would have to include the kind of rollover fees or royalty rates that are current practice in order for record companies to receive an equivalent sliding scale of reimbursement as their colleagues in publishing, and which would continue to make sampling financially prohibitive for most artists.

It is ironic that at a time when the music industry acknowledges that the income from record sales (even including digital downloads) is in steady decline (for example, see Page & Carey, 2009: 1–2), the cost of using existing recordings to fashion new ones is more expensive than ever. The simplest way for the sampling artist to receive equivalent protection under copyright law as those working in other creative media would be to discard *Bridgeport* and use the tests of substantiality and similarity on recording copyright infringement that currently apply to infringement of a song-writing copyright; those artists and producers who want to use substantial parts of other works in the creation of their own work would pay for sample clearance as they always have done, while those who prefer to use smaller fragments in a transformative way would be able to continue to work in this form of creativity in relative safety. If the value of the recorded medium continues to decline, perhaps this will become the de facto position at some point in the future, if the cost of taking a sampling case to court outweighs any potential gain to be made from a judgement in favour of the plaintiff.

Martin Kretschmer and Friedmann Kawohl (2004: 43–44) have argued that current copyright laws allow only a few “star creators” sufficient remuneration not to require any other form of income, which begs the question of whether current copyright legislation is succeeding in its aim to “promote the Progress of Science and useful Arts” (USC, I, 9), or whether, as Jason Toynbee (2004: 133) has suggested, it is encouraging the music industry to prioritise a star system over a more diverse musical landscape because the current duration of copyright allows for considerable and lengthy exploitation of the back catalogue of famous artists while carrying less financial risk than developing new talent. Perhaps a shorter copyright term is required, with Kretschmer and Kawohl suggesting that if fourteen years (renewable once) was considered sufficient to protect the economic interests of rights owners in 1710 then “the faster dissemination and exploitation environment of digital technologies would suggest an even shorter term.” Currently the trend is for longer copyright terms, however: the European recording rights for records such as The Beatles first LP, *Please Please Me* were due to expire in 2013, but an EU-wide extension of twenty years has recently been agreed, bringing sound recording protection into line with the current length of term in the USA. At a time when music rights are becoming increasingly important to an industry which has seen the global value of recorded music sales fall by 31% between 2004 and 2010 (IFPI, 2011: 5), it is likely that rights owners will seek to lengthen the duration of copyright even further. For now, it appears that the sampling artist will have to pay up, or find another way to make their music.

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