Sampling: Weapon of the Copyright Pirate?

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Introduction

In recent years, technological innovations have revolutionised the music industry. Digital sampling has emerged as the technology most likely to change the traditional ways of creating music. Since its release the use of this technology has expanded rapidly, from rap where its presence has become almost mandatory, to mainstream pop. While sampling has been most widely used in the United States ("US"), it has spread throughout the world. For example, Australian band Sound Unlimited Posse recently sampled "Down Under" by Men At Work, also Australian, for the basis of their song "The Undersound". While legal commentators have devised theoretical methods of dealing with potential copyright infringement by digital sampling, the music industry has developed its own practices to cope with the technology. However, until the case of *Grand Upright Ltd v Warner Bros Records*[1] in 1991, the courts had had no opportunity to examine the copyright implications of sampling and to clarify its legal ramifications. Although cases alleging infringement of copyright through sampling had been brought, to date all but this one have been settled out of court. In the light of this recent decision, it is time to examine the likely impact of this new technology on Australian law. This paper will outline the issues involved in sampling, proceed to discuss its implications for Australian copyright law, and assess the effectiveness of current and suggested practices for dealing with infringement of copyright through digital sampling. Discussion will be limited to the situation of copyright holders in musical or literary works and sound recordings, and performers.[2]

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1 780 F Supp 182.

2 Another controversial issue in the sampling area is subsistence of copyright in individual sounds. Space does not permit an examination of this area, but as copyright law does not protect an idea itself but its expression, it is interesting to consider whether current copyright law could confer copyright in a sound, or whether legislative amendments would be necessary to protect the interests of people who have collected and developed their own unique sounds and created a "sample library".

Background

Definition

Digital sound sampling is a technique by which sounds are recorded by converting their analogue waves into a series of digits and storing them in computer memory chips.[3] Analogue audio signals are sampled at regular intervals, to analyse and convert the analogue sound waves into a series of digits that can be read by computer.[4] Each sample generates a new number, and the resultant stream of data corresponds to the original sound wave. When the signal is converted back to analogue, the original sound waves are replicated exactly. [5] The digital code storing these can be manipulated or combined with other sounds using a MIDI (Musical Instrument Digital Interface) synthesizer. Through sampling it is easy to reproduce all or part of an existing recording, then alter its speed, pitch, rhythm or tone if desired, before incorporating it into another composition/recording. Sounds can also be sampled direct from live performances, and completely new tracks can be created using original sampled sounds.

Reasons for Sampling and Potential Uses

An artist may choose to use samples to reproduce the distinctive sound of other musicians, or "...to create an association between their song and a successful song by sampling a familiar melody line or other feature that the listener will recognise".[6] Further, sampling may enable music publishers and record companies to "...recycle old and relatively inactive copyrights..."[7] and can reduce the overheads involved in record production.[8]

Sampling technology is used in various ways in the music industry. Examples are as follows:

(1) One instrument or vocal track is sampled from a recording and incorporated into the subsequent composition.

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3 Bentley, L, "Sampling and Copyright: Is the law on the right track?" (1989) 1 *Journal of Business Law* 113.

4 Giannini, M, "The Substantial Similarity Test and its Use in Determining Copyright Infringement through Digital Sampling" 16 *Rutgers Computer and Technical Law Journal* 509, at 510 (1990).

5 Giannini, at 510.

6 Note, "A new spin on music sampling: A case for fair pay" 105 *Harvard Law Review* 727 (1992) .

7 Broussard, WC, "Current and Suggested Business Practices for Licensing of Digital Samples" 11 *Loyola of Los Angeles Entertainment Law Journal* 479, at 501 (1991)

8 Broussard, at 502.

(2) One complete part, comprising all tracks on the original recording is sampled and incorporated in the subsequent composition, eg, MC Hammer's use of the riff from "Super Freak" by Rick James in his track "U Can't Touch This".

(3) A composition may be compiled from tracks from different sound recordings, containing very little material actually composed or performed from scratch.

(4) A session musician's performance may be sampled and the sounds used to create new tracks as a cheap substitute for hiring the musician or expending the time and money ascertaining how a particular sound was produced. This mainly occurs with session musicians who have developed distinctive sounds and styles, and may have an extremely adverse effect on their career prospects.[9]

Aims of Copyright Laws

When considering the legal impact of a new technology such as sampling, it is necessary to bear in mind the implicit aims of copyright law. "The primary purpose of copyright law has been the protection of the economic interests of copyright holders...", those who have invested creative effort or time and money in producing something.[10] Copyright protection rewards and encourages creativity by enabling copyright holders to "...benefit economically from the exploitation of their work".[11] To fulfil its aims of promoting creativity while protecting the investment of time and skill, copyright law must maintain a careful balance between protecting existing works and limiting new methods of creation and thus production of new works.

Implications for Australian Copyright Law

An inherent problem in considering copyright infringement by sampling is that, generally, the sample is mixed with original work or has been manipulated and changed in some way. Consequently the sampler may consider that the application of effort and skill to the sample, together with its incorporation into a new work, legitimises use, and that no compensation is necessary or appropriate. However, composers, performers and holders of copyright in the work or sound recording may view such use as piracy or theft.

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9 See footnote 6.

10 Court, J, "The Politics of Copyright and the Hometaping Problem" (1986) 4(7) *Copyright Reporter* 11, at 12.

11 See footnote 10.

In Australia, the *Copyright Act* 1968 (Cth) ("the Act") regulates copyright. Sampling may infringe copyright in the sampled sound recording and the musical and literary works underlying the section sampled from the sound recording.[12] As the criteria for infringement of copyright in the musical/literary work and the sound recording differ, these will be considered separately. Copyright in the underlying musical/literary work will be considered first.

Musical and Literary Works

Under s 31(1) of the Act, the owner of copyright in a musical or literary work has the exclusive right to reproduce, publish and broadcast the work (s 31(1)). Under s 35(2), the "author" is deemed to own copyright in a work. However, in the music industry, generally the mechanical, or reproduction rights will be assigned to the record company as part of the recording contract, under which royalties will be payable to the songwriter and performers. The right to publish sheet music is generally assigned to a music publisher.[13]

Criteria for Infringement

Section 36(1) of the Act provides that infringement consists of doing any act comprised in the copyright without permission. Section 14 provides that copying or reproduction of a substantial part of a work will constitute infringement. To establish the initital infringement of copyright in a work two essential elements must be proved: "First, there must be sufficient objective similarity between the infringing work and the copyright work ... [and] secondly, the copyright work must be the source from which the infringing work is derived."[14] A similar result achieved by independent effort will not constitute an infringement.[15]

In *Francis Day & Hunter v Bron* Romer LJ stated that the requisite similarity is such that "...an ordinary reasonably experienced listener might think that perhaps one had come from the other...", and that "...proof of similarity coupled with access raises a prima facie case for the defendant to answer".[16]

In the sampling context, a listening test would demonstrate objective similarity, and access to the plaintiff's work could be established by earlier record release and airplay. This would raise a

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12 *Copyright Act* 1968 (Cth), ss 89 and 32.

13 Australian Copyright Council, "Music and Copyright" (1989) 70 *Australian Copyright Council Bulletin* 4-6.

14 *Francis Day & Hunter Ltd v Bron* [1963] Ch 587.

15 *Corelli v Gray* (1913) 29 TLR 570.

16 [1963] Ch 587.

prima facie case of infringement. Next, it must be established that infringement has occurred in relation to a substantial part of the work.

Substantial Part

Sampling, of its nature, does not usually involve reproduction of an entire work. However, as reproduction of a substantial part of the work is sufficient to establish infringement,[17] the meaning of "substantial part" assumes crucial significance in the sampling context. Although what constitutes a "substantial part" will vary according to the circumstances of each case, some general principles have been established to assist in determination of this issue. In *Blackie & Sons v Lothian*[18] it was held that the word "substantial" refers to the quality of what is taken rather than the quantity. In *Hawkes & Son (London) Ltd v Paramount Film Service Ltd*,[19] infringement of copyright was established by the playing of 20 seconds of the "Colonel Bogey March", in which the plaintiff held copyright, on a newsreel. The court indicated that it was appropriate to consider matters apart from quantity. Lord Justice Slesser placed considerable emphasis on the fact that the part taken, although not significant in terms of quantity, was clearly recognisable as the "Colonel Bogey March". According to one commentator, "[i]t appears to be a question of whether the part of the work in question is essential to the work, or is an essential feature of the work".[20]

The qualitative aspect concentrated upon in the US has been the commercial value of the portions appropriated. Protection is given not to "...the plaintiff's reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public's approbation of his efforts".[21] This is why even very short uses of choruses have been infringements.[22]

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17 *Copyright Act* 1968 (Cth), s 14.

18 (1921) 29 CLR 396.

19 [1934] Ch 593.

20 Harper, R, "When Does Sampling Infringe Copyright?" 10(4) *Communications Law Bulletin* 28.

21 *Arnstein v Porter* 154 F 2d 464, at 473.

22 The US case of *Boosey v Empire Music* 224 F 646 has very similar facts to a sampling situation. A part of the chorus of the plaintiff's song was incorporated into the defendant's song, which was otherwise very different. The phrase "I hear you calling me" and its underlying music was "practically identical" in both songs.The court held that this use had infringed the plaintiff's copyright because, even though the portion taken was small, "... it had the kind of sentiment in both cases that caused the audience to listen, applaud and buy copies ... on the way out of the theatre". This case suggests that in the US sampling a small part of a song, if it is distinctive and memorable, thereby comprising a large

It has been argued that many repetitions of a sample in the work makes it more likely that a "substantial part" of the work has been appropriated, because this strengthens the association between the two compositions and makes them appear more similar.[23] If the part of the musical or literary work said to have been infringed is quite nondescript, but it is the actual performance that makes it distinctive, it is possible that the part of the sound recording infringed is found to be substantial while the part of the musical/literary works is not.[24] Further, if the sample has been manipulated so that the underlying composition is no longer recognisable, it is arguable that this does not constitute reproduction of a substantial part. A recognisable sample of any distinctive feature of the muscial or literary works is likely to fulfil the substantiality test.

Infringement of Copyright in the Sound Recording

The owner of copyright in a sound recording has the right to make a copy of the sound recording (s 85(a)), for example, by manufacturing CDs, to cause the recording to be heard in public (s 85(b)) and to broadcast the recording (s 85(c)). To prove infringement of copyright in a sound recording, it must be established that a substantial part of the original recording was copied (s 14) and that the sample embodies the actual sounds in the original recording. [25]

Copying

Use of sophisticated technology can assist in establishing whether the sounds embodied in the original recording have been reproduced. An American music programmer has devised a way to prove that sampling of an original recording has taken place. By this method, the relevant passages in the original and the work containing the sample are isolated and a sampler is used to graph the amounts of particular frequencies in the sounds. Comparison of the graphs can conclusively establish copying.[26] It is consistent with the aim of copyright law to protect creative efforts, to characterise use of samples as an embodiment of the actual sounds contained in the

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part of the commercial value, is likely to be found to be an infringement.

23 Broussard, at 488.

24 Broussard, at 494.

25 *CBS v Telmac* (1987) 9 IPR 440.

26 Giannini , at 518.

sound recording, and not as an independent fixation of such sounds.[27]

Sampling can be considered as analogous to record piracy, a recognised form of copyright infringement. The US record piracy case of *US v Taxe*,[28] found that re-recording protected sound recordings infringed the US *Copyright Act*, despite changes in rhythm or speed and the addition of synthesised sounds, unless the copied version is no longer recognisable as the same performance.[29] Although sampling technology is a more complicated form of copying than the making of pirate copies, and usually only a part of a sound recording is taken rather than the whole, it is difficult to see why a court would not similarly find that sampling constitutes "...reproduction of the actual sounds embodied in the recording".[30]

Substantial Reproduction

Similar issues to those considered in relation to musical/literary copyright are relevant to the question of whether there is substantial reproduction of the sound recording. If the relevant part of the underlying musical composition is not distinctive, then that copyright may not be infringed, while if the performance is very distinctive, it can be argued that the sample does constitute a substantial part of the original sound recording.[31] However, if only a small part of one instrument track has been sampled, as with compositions, unless it is the actual riff or another crucial part of the song's theme or melody, it is arguable that only an insubstantial part has been used.

If any manipulation of the sampled sounds has taken place, that will reduce the similarity between the original and the sample. If only minor alterations have been made, such as variations in speed, and the sample remains recognisable, it is likely copyright is infringed. However, if the sample is completely unrecognisable, its use is unlikely to constitute an infringement.[32] Where it can be shown that the pattern of sound waves is identical, and a substantial part has been taken, use of a sample is likely to be an infringement of copyright in the sound recording.

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27 McGiverin, BJ, "Digital Sound Sampling, Copyright and Publicity: Protecting against the electronic appropriation of sounds" (1987) 87 *Columbia Law Review* 1723, at 1731-2.

28 380 F Supp 1010 (1974).

29 See work cited at footnote 6, at 735.

30 *CBS v Telmak* (1987) 9 IPR 440.

31 Harper, at 28.

32 Bentley, at 117.

Unrecognisable Use

Samples may be unrecognisable because of their brevity or due to the samplers' manipulations of the sounds. It is unlikely that the use of unrecognisable samples will be found to be copying of a substantial part of the sound recording or underlying composition, even if actual copying can be established. In the case of sound recordings, the sound waves of samples which have been manipulated to this extent may not resemble the original waves sufficiently to constitute reproduction of the actual sounds embodied in the recording.

This is consistent with the aims of copyright protection. In these circumstances, it is less clear that a copyright owner deserves compensation, for in one sense no loss has been suffered. However, in another sense, the sampler has taken a "free ride" on someone else's investment of creative effort and skill. For practical reasons, record companies, authors, music publishers and performers are mainly concerned with recognisable copying,[33] so a sampler may include many samples in a work, but license only those which are recognisable. Although cases of unrecognisable use involve appropriation of someone else's effort, traditional copyright principles offer no assistance.

Performers

The Australian *Copyright Act* confers only very limited rights on performers, yet it seems that often the artist is the person "...most angered by the re-use of their talent without permission or reward".[34] Under s 248 of the Act, artists can bring proceedings for damages or an injunction for unauthorised use of their performances. However, once consent has been given to an initial recording of a performance, whether by tape, film or video, the Act confers no legal right to control subsequent uses of that recording, irrespective of the purpose for which the recording was made and irrespective of the uses contemplated at the time the recording was made.[35] Where the performer did not authorise the recording or was not aware of it (eg, recording a live performance), action may be taken in relation to the recording itself and any subsequent uses.

The Act therefore provides some protection to musicians relying on live performances for income, but little or none to session musicians who rely on fees for playing on sound recordings. There is

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33 Even if copyright protection applied to performers, it is arguable that an unrecognisable sample is not a "substantial part" on established copyright principles.

34 Simpson, S, "Two Aspects of Sampling in the Music Industry" (1989) *Australian Law Journal* 771.

35 Australian Copyright Council, work cited at footnote 13, at 32.

a growing number of recording engineers who keep libraries of samples to use instead of flesh and blood performers.[36] "Performers working hard to get an edge in a competitive recording industry by using a distinct, interesting sound find that exact sound appearing on competing recordings."[37] Performers are also unlikely to hold any copyright rights in the musical/literary work or the sound recording and therefore must rely on those copyright holders taking action against unauthorised sampling and re-use of their performance on another sound recording. If use has been authorised by copyright holders, performers are unlikely to receive any part of the license fee and have no avenue for complaint. The Act therefore provides no remedy in situations where, for example, a band hires backing vocalists to record an album. Their performances are sampled and used to produce the same sound as the recording, whenever the band plays live.[38] "Sound sampling copies the commercially successful sound better than a live musician could because the sampled sound is an actual recording of the original performer transformed and transplanted into a new song."[39] One commentator argues that any part of a performance which is sufficiently unique or distinctive to be recognisable as the artist should be protected, whether by copyright law or specific legislation.[40]

Defences

There is doubt as to whether ss 55 and 56 of the *Copyright Act* (which confer a statutory right to make a cover version of the work), cover the sampling situation.[41] It is arguable that sampling is not analogous to recording a cover version, but involves directly reproducing the copyright version itself. In addition, reproduction of only a part of the original work and incorporation in a subsequent work could arguably be said to debase the work, rendering the defence inapplicable, as could any manipulation of the sample.

The other defences in ss 40-43 are not applicable. In the music industry, samples are being used for artistic/commercial reasons, not for purposes of research and study (s 40), criticism and review (s 41), reporting of news (s 42), legal advice (s 43) or other specified defences. It therefore seems that if the criteria for

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36 McGiverin, at 1728.

37 McGiverin, at 1726.

38 Simpson, at 772.

39 McGiverin, at 1726.

40 Wells, RM, "You Can't Always Get What You Want But Digital Sampling Can Get What You Need" 22 *Akron Law Review* 691, at 705 (1989).

41 Simpson, at 771.

infringement are satisfied, samplers will be unable to rely on any statutory defences.

Issues in Infringement Actions

Reasons to Take Action against a Sampler

There are several possible reasons why a copyright owner or performer may wish to take action against a sampler:

(1) An author or performer may wish to exert control over use of his or her work[42] or object to the particular context in which it has been placed by the sampler.

(2) A copyright holder may consider that considerable financial rewards may flow from an action for infringement of copyright. The Act provides that infringement is remedial by an injunction, an account of profits or damages, including additional damages in certain circumstances and conversion damages, including delivery up (ss 115, 116).

(3) It has been suggested that if a song in which a record company or author owns copyright is in chart competition with the song containing the sample, then use of an injunction to stop distribution of the infringing song may improve the chart position of the earlier song and thus increase its popularity.[43] Alternatively, use of the sample may revive interest in the performer or author's work, and it may therefore be more advantageous to take no action even in cases of clear infringement (eg, the use of a sample of Suzanne Vega's voice from her song "Tom's Diner" increased interest in her own version which had been released several years previously and was no longer being promoted).

(4) An action may also increase the profile of less prominent artists due to the resultant publicity.

While there are certain circumstances in which it would be disadvantageous for a copyright holder to take action against a sampler, this does not explain why all such cases but one have been settled out of court.[44] Several factors have contributed to this result:

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42 Bentley, at 116.
43 Bentley, at 116.
44 See work cited at footnote 6, at 728, 744.

(1) The expense of litigation rarely renders it a cost-effective solution.[45]

(2) Uncertainties of how terms such as "substantial part" will be interpreted in the context of sampling have contributed to an avoidance of litigation.[46] Both copyright owners and infringers are reluctant to set a standard for "substantial part" which could "...open the floodgates or close them entirely, depending on the particular ...point of view". [47]

(3) The person who objects most to the subsequent use of sample may not hold copyright in the work or sound recording and therefore has no basis for a cause of action.

(4) A court case may be detrimental to a sampler not only due to the cost of legal services and any compensation payable to the copyright holder if infringement is established, but also "...the time and energy wasted in attending to the suit may create a substantial impediment to the orderly development of the artist's recording career".[48] However, it is arguable that pre-trial settlements are disadvantageous to samplers due to weak bargaining position when release of the recording is imminent or has already occurred, and the plaintiff is also more likely to make more stringent demands due to the lack of negotiation.[49]

The artist is likely to be liable for any infringement due to indemnity clauses in the recording contract, but the record company still faces a substantial risk if the artist is not in a financial position to uphold the indemnity.[50]

The case of *Grand Upright Music v Warner Bros Records Inc*[51] has broken the ice, but it is unclear to what extent it has resolved these difficulties. The US District Court found that rap artist Biz Markie, his record label and his publishing company had infringed US copyright law by the unauthorised use of a three-word sample and music from Gilbert O'Sullivan's song "Alone Again, Naturally".[52] Injunctions were granted to prevent further sales together with an order for return of unsold copies. [53]

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45 See work cited at footnote 6, at 728.
46 Harper, at 28.
47 Harper, at 29.
48 Broussard, at 481.
49 Broussard, at 481.
50 Broussard, at 482.
51 780 F Supp 182.
52 See work cited at footnote 6, at 744.
53 See footnote 52.

Although only limited details of the case are available, it demonstrates that even small recognisable samples will constitute infringement under US law. The situation is likely to be similar in Australia. The court has come down on the side of protecting the copyright holder and it remains to be seen whether the decision will encourage further litigation.

Current Practices, Problems and Suggested Approaches

In dealing with sampling, the music industry has largely relied on an *ad hoc* licensing system containing significant flaws. One commentator stated prior to the *Grand Upright* case:[54]

> It seems that record companies are no longer concerned with the legality of sampling but rather how should licence fees be calculated, to whom should they be paid and should fees be payable from the artist's earnings or met by the record company.

However, the decision in *Grand Upright* reveals that the situation is not so clear cut. Disagreement on rights of performers and samplers compared to copyright holders in the work or sound recording continues.

Currently, lawyers acting for samplers may approach copyright holders to negotiate authorised use, or take a risk that infringement will not be detected. Some lawyers representing artists listen to all new releases to determine whether unauthorised samples of their clients copyright material have been used.[55] In cases where authorisation is obtained, different kinds of deals may be available. A licence to use a sample from a sound recording may be free, or in the form of a buyout or a royalty.[56] It seems that buyouts are preferred, due to the complicated calculations involved in royalties.[57] In the US small bites may be licensed for up to $5000 or 0.05c per record sold.[58]

A licence for permission to use the musical work will take the form of a royalty, co-ownership or an assignment.[59] This fee is often calculated as being between 25-50% of the standard mechanical royalty paid under the statutory licensing provisions.[60]

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54 Simpson, at 771.
55 See work cited at footnote 6, at 727-728.
56 Broussard, at 498.
57 Simpson, at 771.
58 Broussard, at 499.
59 Broussard, at 500.
60 Simpson, at 772.

Problems with Current Approach to Licensing

First, there is a lack of protection for performers, especially session musicians, to ensure they receive some economic benefit from unauthorised use of their performance. To preserve the aims of copyright law, legal protection is necessary to prevent the exploitation of others' skill and labour without compensation. With the increasing use of sampling, it seems equitable that performers' livelihoods should be better protected as they are equally vulnerable to its economic effects.

Secondly, there is great uncertainty generated by an *ad hoc* approach and inadequate or excessive compensation for use of sampled works. It has been suggested that current negotiations may be unfair to a sampler who pays more than the sample is worth due to inequality of bargaining power, or to a copyright holder who obtains less than the creative value of his or her work.[61] Harper has commented that unless a sample clearly infringes copyright, payment for its use is unlikely to be commercially realistic.[62] Conversely, successful artists may be overcharged for use of a sample on the grounds that they can afford it.

Possible Approaches

Despite the popular belief that copyright law as it stands, correctly applied, can adequately remedy the problems caused by digital sampling, many commentators have suggested refinements to the law to enable it to better cope with this new technology. These reform suggestions will now be critically analysed, to determine the best solution to the problems outlined above.

It is important that samplers do not obtain an unfair advantage through their use of others' creative efforts. "A requirement that sampling artists pay for the use of samples is fair and promotes efficiency because such a requirement ensures both that new artists are not 'stealing' and that artists will not be discouraged from producing new songs."[63] Objective standards for licensing samples would reduce uncertainty and possibly reduce the costs associated with negotiating licences.[64] Samplers would sample

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61 See work cited at footnote 6, at 729.

62 Harper, at 29.

63 See work cited at footnote 6, at 739.

64 There are several disincentives for copyright holders pricing licence fees too high: (1) The transaction costs associated with obtaining a licence will increase and tend to result in abandoned negotiations and inefficient use of resources. (2) Overvaluation will dissuade others from obtaining permission to use samples in the future. This could have the effect of "...encouraging the continuing unlicensed use of samples, since

when it was worthwhile and not be inhibited by uncertainty as to potential litigation.[65]

Statutory Licensing Scheme

One suggested approach to compensation for use of sampled copyright work involves payment to holders of copyright in the composition and the sound recording under a statutory licensing scheme.[66] A suggested starting point for determining the value of a sample is that payment should be no more than the statutory licence fee for recording a cover version, as a sample is usually only a part of the orginal composition and the sampler's work. Additional elements to be considered in determining the value of the sample would be:[67]

> (1) The popularity of the prior work as a whole, as samples from previously successful songs are more likely to improve the chances of commercial success for the later work
>
> (2) The importance of the sampled portion to the prior work, eg generally a sample from a chorus should be considered more important than one from a verse, samples including vocals would be seen as more important than an instrumental section etc
>
> (3) The duration of the sample, and
>
> (4) The importance of the sample to the new work, ie the extent to which the new work relies on the sample as eg a background theme, for a chorus or as an unrecognisable effect.

Consideration of these factors would enable a value to be placed on each sample, and a royalty percentage calculated to be payable out of profits.[68] The justification for this scheme is that "...a private bargaining system will be arbitrary at best (and inequitable at worst) unless the participants have a good idea of how judges would value a given sample if a copyright holder did litigate".[69]

Evaluation

Even if a sample comprises the main value of the song, the ceiling comparable to covers means that royalties would be relatively certain. Although the author would not retain any control over use of his or

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the sampler may, under the circumstances, decide to undergo the risks involved". (3) Record companies and music publishers are likely to hold copyrights for sampled as well as sampling artists, so in the long term costs should balance out.

65 Broussard, at 483.

66 See work cited at footnote 6, at 739.

67 See work cited at footnote 6, at 740.

68 See work cited at footnote 6, at 741.

69 See work cited at footnote 6, at 742.

her work under this scheme, due to the operation of the statutory cover version scheme, an author currently has limitations on retention of control. Royalties are payable out of profits, rather than pre-production, benefiting self-financing artists and independent record companies and avoiding the problems of an upfront fee.

A shortcoming of this approach is that it still allows "...some uncertainty to private bargainers and allows those in stronger bargaining positions to apply these criteria to their advantage".[70] However, scope for such exploitation is limited by the ceiling on royalties. Further, more court cases are likely to assist by laying down precedents on fee levels.

Whitney C Broussard's Proposal

The Broussard approach also involves a statutory licensing scheme. It focusses on three factors in valuing a sample:

(1) What is sampled, relevant considerations being the popularity of the work, the recognisablility of samples, the part of the song sampled, and the recognisability of the performers.[71]

(2) How the sample is used, involving a consideration of the number of times the sample was repeated, its importance to the new work, and whether the new work has artistic/commercial merit (eg, controversial works may attract higher fees).

(3) Who is using the sample. Of relevance would be whether the sampler had initiated negotiations. In practice, if a copyright owner has to approach a sampler, a substantial penalty will be added to the licence fees.[72]

Lionel Bentley's Proposal

Bentley's proposal has two basic elements. First, he suggests that copyright Acts should be amended to incorporate a definition of "substantial part" and that emphasis should be placed on the loss of reward to the plaintiff as a crucial factor in assessing substantiality.[73] The second element of his scheme is the introduction of a general defence of fair use as in the US (in contrast to the Autralian and United Kingdom defences of fair dealing for specified purposes).

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70 See work cited at footnote 6, at 742.
71 Broussard, at 497.
72 Broussard, at 497-498.
73 Bentley, at 412.

This approach emphasises intellectual property rights as incentives to create and innovate:[74]

> Taking a small amount, as the sampler does, does not reduce the rewards of the author: the author will either have reaped all the rewards of his creation, or may be promoted by inclusion in the sampling record. The record will in no way be a substitute for or change the market for the original work. Thus the sampling does not affect the degree of incentive to the creator of an original song or record. The sample record is itself a creation and the copyright law is at present at least in part creating a disincentive to produce such works.

Appraisal of Suggested Schemes

Ideally, a sampling licence scheme should aim to maximise the creative potential of sampling while adequately protecting the interests of copyright holders. It would combine the benefits of current practices with the best aspects of proposed reforms, while specifically addressing problem areas. Such a scheme will now be outlined.

First, the current alternatives of buyouts, royalties, etc, would be retained but given legislative force. This would retain flexibility but increase certainty due to the presence of legislative formulae for calculating the value of a sample. Further, small independent record companies and artists catering to a limited audience will not find the cost of an upfront fee prohibitive. The factors to be taken into account in determining the value of each sample would be a combination of those described in the Loyola and Harvard approaches. The maximum payable would not be limited to that payable under the statutory cover version scheme, as this does not take into account the benefit gained from reproduction of the original performers and sound recording. This factor is probably more influential in linking the sampler's song to the original recording than a cover version and thus confers a greater economic benefit on the sampler. To encourage the creative aspects of sampling and balance the increased rights granted to performers, a defence of fair use would be incorporated into the Act.

Secondly, session musicians would be entitled to compensation for unauthorised use of their original sounds. The valuation factors considered above would be taken into account when determining the value of a sample, but where an entire part had been reconstructed using the distinctive unauthorised sampled sounds of a performer, the fee that the session musician would have charged for his or her performance will be relevant. The justification for this approach is that it is unfair to pay someone for one performance, and

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74 See footnote 73.

construct an unlimited number of other performances from that without permission or compensation. These activities are motivated solely by economic and not artistic reasons and constitute unfair economic exploitation of someone else's creative efforts.

Amendment of the *Copyright Act* would be necessary, possibly by insertion of a specific section on sampling conferring rights on performers and establishing a valuation scheme for licensing and incorporating a defence of fair use. Proof of unauthorised use in the case of sound recordings would be established on the basis of the electronic finger printing technique described above.

Conclusion

It is important that the law is able to respond to the continuing development of new technologies. The Biz Markie case firmly establishes unauthorised use of samples as an actionable form of copyright infringement in the US and compels adoption of an equitable and consistent approach to licensing. A statutory licensing scheme for samples such as that proposed would clarify the remaining uncertainty related to copyright infringement through sampling in Australia and resolve the problems inherent in current practices. Appropriate amendments to the *Copyright Act* would protect the interests of all parties, while ensuring that legitimate creative uses of sampling could continue to develop. This result would be consistent with the aims of copyright law and ensure that the law keeps pace with technological developments.