The Grey Area: Should Sampling in Rap, Hip-Hop and Mash-up be Considered Fair Use?

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Abstract

Fair use is an element of U.S. copyright law that serves to protect limited reproductions of copyrighted materials in specific contexts. Unfortunately, these contexts are not well-defined in terms of musical sampling. Many musical artists use unlicensed samples in their work, especially rap, hip-hop and mash-up artists, for whom sampling is integral to their craft. The samples used may be very short (one or two seconds), or modified beyond recognition. Others are much longer, recognizable clips of music, often heard in mash-up. However, the nature of the sample itself seems to have little to do with whether an artist is guilty of copyright violation and often a lawsuit is simply profiting the record company who holds the copyright, and not the intellectual property of the original artist. By examining case law, the work of legal and copyright scholars, and the postmodernist aesthetic in art, I have found that extending or clarifying the terms of fair use would be beneficial for continued musical innovation. However, in order to balance the rights of all stakeholders, a very careful treatment of this
extension or clarification will be needed.

Contemporary musical artists, particularly in the genres of rap, hip-hop and mash-up, use unlicensed samples of other artists’ music in the creation of their own works. Whether or not this practice is legal, or should become legal, is a complex problem without an easy answer. While this practice occurs internationally, my discussion will be grounded in U.S. copyright law. This paper will synthesize a variety of sources to supplement the discussion of this problem. First I will discuss the United States Constitution in regards to copyright, and section 107 of U.S. copyright law, which outlines the terms of fair use. Next, I will examine the landmark Bridgeport Music, Inc. v. Dimension Films 410 F.3d 792 case and what it means for the future of sampling, and then proceed to examine the culture and influence of mash-up artists and why it is integral to continued musical innovation. To support this argument, I will draw upon the importance of the postmodern aesthetic in contemporary art and the work of Internet scholar Lawrence Lessig. I will argue that the current state of U.S. law regarding sampling has become unreasonable and stifles creativity, and that rap, hip-hop, and mash-up artists deserve to be legally protected, whether through an amendment to the terms of fair use, or through specific legislation.

According to the U.S. Constitution, “The Congress shall have power [. . . ] [t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries” (Art. I, § 8, cl. 8). This clause is the basis for U.S. copyright law and it is particularly interesting because it suggests that the copyright of ideas is useful for promoting progress, but that copyright should not last indefinitely. As Lessig (2004) says, “Creativity depends upon owners of creativity having less than perfect control” (p.58). This is why U.S. copyright law was amended in 1976 to permit ‘fair use’ of copyrighted materials without risk of infringement. The U.S. Copyright Act, Section 107, states “the various purposes for which the reproduction of a particular work may be considered fair, such as criticism, comment, news reporting, teaching, scholarship, and research” (U.S. Copyright Office, 2009, ¶ 2). As these terms are relatively vague (for example, what exactly constitutes ‘comment’?) there are four tests that a court may use to determine whether or not reproduction of copyrighted materials is infringement:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole
4. The effect of the use upon the potential market for or value of the copyrighted work (U.S. Copyright Office, 2009, ¶ 2).
Depending on the specifics of a case, any combination of these tests could be used to demonstrate fair use, as well as other factors such as “bad behaviour by one of the parties, the copyright owner’s right to privacy, and whether the motive of the lawsuit is to suppress unwelcome criticism” (Heins & Beckles, 2005, p. 3). In short, what constitutes fair use in one case may not necessarily hold for all cases.

I will now turn my focus specifically to music, and examine the parties who have a stake in its copyrighting and subsequent fair use (or, perhaps, not so fair use). First, we have the artist, or group of artists, who create a song. Assuming these artists are American, their song is copyrighted “the moment it is created and fixed in a tangible form that it is perceptible either directly or with the aid of a machine or device” (U.S. Copyright Office, 2006, ¶ 4). Independent artists will own their copyrights; however, an artist with a recording contract will most likely not own the copyright to their music, or will be a partial owner. As I will discuss in detail, some artists may welcome the reproduction of their music under fair use, while other artists may not. Secondly, there is the record company, who most likely owns the copyright to all of their artists’ songs. Like any business, record companies aim to make money, and as I will be demonstrating through case law, record companies have a history of suing those who reproduce even the smallest portion of their copyrighted music. While this can serve to benefit the artist and protect intellectual property, it can also be exploitative, greedy and undermine fair use. Thirdly, there are the other artists for whom partially reproducing music is the nature of their artistic expression. This is most often seen in the music of rap, hip-hop, and mash-up artists. These individuals thrive on sampling a variety of music in order to create a new whole. The most extreme examples of sampling are often seen in works by independent artists—Danger Mouse and Girl Talk will be closely examined—as the legal logistics are risky for a major record label. Finally, we have the consumers of rap, hip-hop, and mash-up music, who want to listen to good, innovative music at a low cost. With these stakeholders in mind, I will explore the current legal and ideological trends in music sampling.

In 2005, Bridgeport Music, Inc. filed a lawsuit against Dimension Films over the use of one chord from a George Clinton’s ‘Get Off Your Ass and Jam’ in an N.W.A song (Wu, 2006). N.W.A. “changed the pitch, and looped the sound in the background” so that the chord sounded like a siren (Wu, 2006, ¶ 7). Bridgeport won, and the results of the lawsuit created the rule “that any sampling, no matter how minimal or undetectable, is a copyright infringement” (Wu, 2006, ¶ 7). It was determined that obtaining a licence for any sampled music does not have a negative effect on creativity (Wu, 2006). The fair use argument was not used by the defendant; instead, they focused on the de minimis defence (that the issue was so irrelevant, it need not be regarded by the court) (Bridgeport Music, Inc. v. Dimension Films, 2005). However, Judge Guy noted that, if the case were to go back to court, the trial judge would be “free to consider this defense [fair use]” but that
the Appellate Court “[expressed] no opinion on its applicability to these facts” (Bridgeport Music, Inc. v. Dimension Films, 2005, ¶ 44). While this case then has no formal stance on fair use in terms of sampling, it has still greatly influenced the legality of sampling, and has even found international reach. The very first sampling case ever heard by Germany’s Federal Supreme Court (Metall Auf Metall) referenced Bridgeport Music, Inc. v. Dimension Films as proof that even sampling the “smallest pieces of sound” is infringement (Conley & Braegelmann, 2009).

Who benefits and who is disadvantaged because of these decisions? In the case of Metall Auf Metall, the plaintiff was the musical group Kraftwerk, who successfully sued another artist for using a two second beat from one of their songs (Conley & Braegelmann, 2009). This is an example of an artist benefitting from exercising sole claim to their copyrighted materials. While some might consider two seconds of music to be irrelevant in terms of copyright, Kraftwerk did not agree and took legal action. In this case, one artist benefits while another artist is disadvantaged. This perhaps does not seem so troublesome, as copyright is supposed to be “the servant of artists” (Wu, 2006, ¶ 16). However, the opposite is true in Bridgeport Music, Inc. v. Dimension Films. Bridgeport Music, Inc. is a so-called sample troll. It “[holds] portfolios of old rights (sometimes accumulated in dubious fashion)” and makes money through copyright lawsuits (Wu, 2006, ¶ 2). Bridgeport did not sue Dimension Films for George Clinton’s benefit; in fact, Clinton received no money from that settlement (Wu, 2006). Bridgeport also may have obtained the copyrights to George Clinton’s music illegally, as when Clinton was asked how Bridgeport’s Armen Boladian acquired the rights to his music, Clinton replied, “he just stole ‘em” (Wu, 2006, ¶ 4). Clinton has also voiced his support for the sampling of his own music, stating, “it [is] a way to get back on the radio” (Wu, 2006, ¶ 15). So, in Bridgeport Music, Inc. v. Dimension Films, not only were Dimension Films and N.W.A disadvantaged, George Clinton, the artist who wrote the original song, did not benefit. Furthermore, this decision will affect all subsequent sampling cases in the U.S. (as well as exert some influence internationally) and will therefore harm even more artists. According to Bettig (1996), this is an example of how copyright law in the U.S. is “a process through which the publisher takes control of and benefits the most from the author’s copyright privileges” (p.28). Bettig (1996) sees copyright as a purely capitalistic venture with no benefit to the artist because of what he calls “the essential connection between the rise of capitalism, [and] the extension of commodity relations into literary and artistic domains” (p. 9). Bridgeport Music, Inc. v. Dimension Films illustrates how the prosecution of sampling does not necessarily benefit artists, and hinders the subsequent creation of music.

Why was the de minimis defence used instead of fair use? It is difficult to know for certain, but I argue that it is because fair use, while easily applicable to academic writing, news reporting, and classroom learning, does not so easily support artists. As noted, fair use covers criticism, comment, and was later amended to
include parody (Seltzer, 1979). Sampling does not fall under any of those categories. However, until Bridgeport Music, Inc. v. Dimension Films, the de minimis defence had been an effective argument in sampling lawsuits (Heins & Beckles, 2005). Does this mean that sampling without licensing is actually a gross violation of intellectual property? Or do the existing fair use laws not adequately protect an important artistic technique?

To answer this question, while remembering that U.S. copyright law is based on the notion of artistic progress and innovation, we must now discuss an important trend in art and ideology: postmodernism. As postmodernism is a complex movement which applies to a wide variety of fields, it seems best to provide an operational definition with a broad scope. Klages (2003) defines postmodernism as art or thought that “favors reflexivity and self-consciousness, fragmentation and discontinuity [. . .], ambiguity, simultaneity, and an emphasis on the destructured, decentered, dehumanized subject” (¶ 12). As Hayward (2000) writes, “the postmodern aesthetic relies on four [. . .] sets of concepts” of which we will examine “intertextuality and bricolage” (p. 277). Focusing on intertextuality, Hayward (2000) recounts how filmmaker Quentin Tarantino based the character Butch in Pulp Fiction on specific characters from 1950s movies. The storylines from Pulp Fiction are also lifted from various pulp fiction novels (Hayward, 2000). Tarantino uses intertextuality so that meaning may be created from “the relation between two or more texts” (Hayward, 2000, p. 279). When studying art, a ‘text’ can be a written work, a film, a painting, a sculpture, a song, or any other form of artistic expression. Additionally, bricolage is the “assembling of different styles, textures, genres or discourses” (Hayward, 2000, p. 280).

While traditional uses of sampling in rap and hip-hop can be seen to employ intertextuality and bricolage, it becomes even more apparent when we look at mash-up. DJs Danger Mouse (Brian Burton) and Girl Talk (Gregg Gillis) have both heavily relied on sampling in an innovative way to create works that challenge society’s perception of music. Danger Mouse mixed The Beatles White Album and Jay-Z’s Black Album to create what he called The Grey Album. In an interview in the documentary Good Copy Bad Copy (2007) Danger Mouse said of the album, “you have a very white thing, and a very black thing, apparently, and then [. . .] it can make beautiful music together [. . .] that’s what I’m trying to do, change people’s perspectives about music and what you can do” (Johnsen, Christensen & Moltke, 10:22-10:37). It is clear that Danger Mouse was employing intertextuality and bricolage in the creation of The Grey Album. Meaning is created through the contrasting natures of the different texts, as well as the mixing of genres. Although Danger Mouse and online distributors of the album were making no money from The Grey Album, Capitol/EMI demanded that they stop distribution, and financially compensate the company (Heins & Beckles, 2005). However, “Hundreds of Web sites” chose February 24, 2004 as ‘Grey
Tuesday’ where they would make the album available “as a gesture of protest against a copyright system that fails to acknowledge the importance of mixing and sampling to musical creation” (Heins & Beckles, 2005, p.35). Whether or not a court would agree, one website called Downhill Battle said they had a “fair-use right to post this music under current copyright law and the public has a fair-use right to hear it” (Heins & Beckles, 2005, p. 35). Heins and Beckles (2005) note that while the fair use argument here may not be valid, the Electronic Frontier Foundation (EFF) agreed with this legal defence since the album would not “substitute for purchases of *The White Album*” and was a “transformative use of *The White Album*, not a wholesale copy” (p.35).

Girl Talk, like Danger Mouse, employs sampling and mixing in his art, the creation of which clearly demonstrates postmodernist aesthetics. In his newest album, *Feed the Animals*, there are over three hundred short clips of popular rap, rock and pop songs, mixed together to create a cohesive whole (Levine, 2008). He, like Danger Mouse, relies on the meaning created through a mixing of genres, themes and ideas. However, unlike Danger Mouse, Girl Talk sells copies of his albums through his own record label called Illegal Art (Levine, 2008). Girl Talk argues that if it would be at all feasible for him to make the album legally, he would : “I would be happy paying royalties for every sample on the record [. . .] but to actually licence a sample would cost millions of dollars, which I can’t afford. [. . .] if I had a million dollars, or a billion dollars [. . .] to do it, it would still take me [. . .] fifty years to go through the legal hassle” (Johnsen, Christensen & Moltke 2007, 12:25-12:57). Despite having used hundreds of unlicensed samples, Girl Talk has not been approached with a lawsuit, but he believes that if he was, he would be protected under fair use (Levine, 2008). As previously discussed, that may not be correct. It is easy for a layperson to see fair use as protection for artists, but it is a legal defence which is not easily applied to sampling. Without stretching the meaning of fair use as it is now documented, it would be difficult to persuade a court that Girl Talk’s use of sampling and mixing fell under the categories of criticism, comment or parody. Furthermore, he has made money from the sale of his albums. Although most would agree that *Feed the Animals* is not a substitute for an AC/DC, Queen or Jackson Five album, that fact alone would not be a strong enough argument for fair use. It is unwise for a mash-up artist to believe he or she is protected by fair use, but it also seems unfair that copyright is hindering the innovation of music when it should be promoting the progress of art, and therefore the postmodern aesthetics of mash-up.

In a TED talk on creativity and copyright, Lessig (2007) quotes John Philip Sousa, who saw musical creativity in young people when they got together to sing “the songs of the day, or the old songs”. Lessig (2007) uses this example to illustrate why the art of mash-up (in his case, mashing up video clips and music) is integral to the continued innovation of culture. He argues that technology has made the mash-up a democratizing use of
artistic expression and that the law should provide means to legally create mash-up art (Lessig, 2007). Lessig briefly alludes to his organization, the Creative Commons, which provides licences that “protect [one’s] works and [encourages] pre-defined uses by others” (Creative Commons, 2010, ¶ 2). The Creative Commons is an admirable organization with a strong ideological message about the future of copyright, but it can only accommodate the use of materials that it has specifically licensed. Mash-up often relies on popular songs and images to make a powerful statement. Lessig (2007) uses an example of a video of George Bush and Tony Blair edited so that they are singing the song ‘Endless Love’ to each other. ‘Endless Love’ is not licensed under the Creative Commons, and I doubt that it ever will be. In short, the Creative Commons would be a friend to the art of mash-up and sampling if every song had a Creative Commons licence, which would not be feasible without a dismantling of the current music business. This is not to say that the music business is not in need of an overhaul, as the Internet and file-sharing technology has changed its very nature. However, it is nearly impossible to imagine all previous copyrights being legally taken away from record companies and given to the Creative Commons at the artist’s discretion. In order for mash-up to thrive, artists need access to new and old material, to the popular and to the controversial.

 Sampling is a unique art form that is scrutinized in ways that similar techniques in film and literature are not. I cannot imagine a court telling Tarantino that Pulp Fiction is a violation of copyright, or telling contemporary postmodernist author Jeanette Winterson that the intertextuality in Sexing the Cherry is illegal. Those who study film and literature are often taught to recognize intertextuality, as it helps them to understand the text. In these art forms, it is up to the reader/viewer to distinguish what aspects of the work are intertextual, and therefore acknowledge the original text. Of course, in many cases, especially in literature, the original text is in the public domain, although this is not always the case. Perhaps the difference lies in the medium; it would take a very skilled ear to hear and recognize a two second sample. In mash-up, however, it is much easier for a listener to acknowledge the original artists, especially in the case of The Grey Album. I believe it is safe to conclude that the difference mostly lies in the opportunity for a record company/copyright holder to make money on a sampling lawsuit, as Bridgeport Music, Inc. v. Dimension Films illustrates.

 An amendment to the terms of fair use would certainly help sampling and mixing to become a legitimate art form. However, it may be even more beneficial to have specific legislation about how artists are allowed to use unlicensed samples. Theoretically, this legislation should ensure that art was free to progress while also ensuring that the wholesale reproduction of another artist’s work is not permitted. Striking a legal balance between progress and theft is going to be difficult and there will be opposition from record companies, artists (original and mash-up), and music fans.
Currently, artists like Girl Talk profit from creating and selling illegal music, and while some would argue he has a right to profit from his mash-up art, others would disagree. I find it hard to imagine a legal system that would allow for this practice, as it would be easy for an artist to exploit another artist; it would not just allow for musical innovation. Specific sampling regulations, created with artists, progress, and fairness to all in mind, would ensure artists were not disadvantaged by record companies. However, the limits of creation and art will always be tested, and therefore there will always be illegal art.
References


