



# Music plagiarism, sound recordings and the future of transformative musical works

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<b>Abstract:</b> <p>The legality of third-party use of musical expressions on sound recordings has been a subject of much controversy in the U.S. and more recently, in Europe. Concepts like originality, plagiarism and public domain are used to control, incentivise and discourage different forms of creative acts. This has a profound effect on the music industry practices and consequently, on the artists' ability to create new works as well as to benefit financially for their efforts.</p> <p>This thesis addresses the state of protection on sound recordings through copyright and neighbouring rights under the European <i>acquis</i>, with a specific reference to German and UK national laws. Various thresholds of infringement established in the law are contrasted with intertextual and transformative sampling techniques in the general context of musical referencing. An illustration of a typical process of a commercial sample clearance supports an evaluative overview of the current licensing regime and its most unbalanced aspects. A dogmatic and musicological analysis of some of most important European music case law, with a particular emphasis on the German Federal Court decisions in <i>Kraftwerk</i> and <i>Goldrapper</i> cases, serves to highlight the doctrines and the logic used in the evaluation of sampling disputes. A functional comparison with the respective U.S. case law further contextualises the results of this analysis, highlighting policy areas where European artists currently enjoy actual or potential freedoms with respect to copyright and neighbouring rights. Finally, a selection of policy options, including parody, quotation and pastiche exceptions, as well as the options of compulsory licensing and various industry-led voluntary efforts, are evaluated for the purpose of supporting the development of more equitable sample licensing markets. A combination of policies is recommended to encourage the quest for a better balance between the exclusive right protection and the access to cultural expressions on sound recordings.</p>	
<b>Keywords:</b> Copyright, Neighbouring Rights, Sound Recordings, Sampling, Licensing	

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**ABBREVIATIONS**

BGH	German Federal Supreme Court [ <i>Bundesgerichtshof</i> ]
BVerfG	Federal Constitutional Court [ <i>Bundesverfassungsgericht</i> ]
CDPA	Copyright, Designs and Patents Act 1988 (UK)
CJEU	Court of Justice of the European Union
EU	European Union
InfoSoc Directive	Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ No. L 167/10, June 22, 2001.
IPO	Intellectual Property Organisation (UK)
UK	United Kingdom
UrhG	German Copyright Act [ <i>Urheberrechtsgesetz</i> ]
U.S.	United States
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty

## 1 INTRODUCTION

“Get a license or do not sample.”<sup>1</sup>

Ask any entertainment attorney, almost regardless of their jurisdiction of expertise, and they are sure to tell you that music sampling without a license is not recommendable. Even the tiniest musical fragments, such as a three-note melodic motive<sup>2</sup> or a percussion element with two sharp metallic beats<sup>3</sup> from a third-party sound recording may cross the threshold of infringement when sampled unlicensed. Furthermore, the stakes are high: the price of not abiding may rise to millions of dollars, sometimes putting the whole future career of the artist at risk<sup>4</sup>.

Sampling is an “electronic process employed by musicians, in which physical sound waves are converted into binary digital units and used to recycle sound fragments originally recorded by other musicians”<sup>5</sup>. A sample may consist of an entire melody, individual tone sequences, an isolated guitar riff or a base line, or simply a handful of notes, sounds or beats<sup>6</sup>. New works are created through a transformation and incorporation of these fragments into a new musical compositions, building on the carnevalist aesthetics of postmodernism. As digital sampling has become a common technique of composition in a wide range of popular musical genres over the last two decades, certain sampling practices have increasingly often been at odds with the law.

Copyright is often considered as the key incentive for artistic creation and for the promotional work needed to help works reach their audiences. While not all of the transactions that keep the wheels of the music industry spinning depend on copyright alone, the way copyright law is framed defines a type of a cultural policy that both reflects and encourages some forms of creativity and consumption, and discourages

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<sup>1</sup> The U.S. Court of Appeals of the Sixth Circuit in the case *Bridgeport Music, Inc. v. Dimension Films, LLC* 410 F.3d 792 (U.S. 6<sup>th</sup> Cir. 2005) at 801. [*Bridgeport I*].

<sup>2</sup> See, for instance.

<sup>3</sup> See *Metall auf Metall I* (Kraftwerk, et al. v. Moses Pelham, et al.) BGH 20.11, 2008 (I ZR 112/06); translation Conley and Braegelmann 2008.) and *Metall auf Metall II* BGH 13.12,2012 (I ZR 182/11). [Referred together as *Kraftwerk*]

<sup>4</sup> The British group the Verve lost 100 % of the songwriting royalties as well as the subsequent composition copyrights to their own work due to an unsuccessfully concluded clearance process on a Rolling Stones sample buried under several layers of other original tracks on their hit song ‘Bitter Sweet Symphony’. The sound recording had been cleared, but they had overlooked the publishing rights. The song was later licensed by the copyright holder ABCKO Music for several commercials despite the protests from the Verve, and the Grammy nomination for the work credited Mick Jagger and Keith Richards of the Rolling Stones as the authors of the work. See Berndorff et al 2013, 206-208.

<sup>5</sup> Reilly 2012, 157.

<sup>6</sup> Niemann and Mackert 2013, 356.

others<sup>7</sup>. Music, as all creative efforts, builds on the existing pool of works and expressions. In order to balance the need of the original artists to be protected against plagiarism, and the need to allow other artists to access cultural raw materials to continue creating new works, copyright law preserves certain elements free for anyone to use. Furthermore, in certain specific situations it is considered that the creation of the new works is so valuable to the society at large that the normal copyright protection does not apply.

The threshold of copyright protection usually crystallises on the question of originality. While not a simple issue in any music copyright dispute, the concept of originality is even more complex with respect to sampling, in which the original work is not only an inspiration, but also the ‘physical’ source of the sounds used. Are there some elements in recorded music that can be borrowed from an existing recording to a new work without infringing the respective rights of the original? Could sampling without a license *not* be an infringement in some exceptional situations? And if there is such a strong pressure to licensing, why would someone choose to sample without obtaining the licence?

In the United States, the question of whether an artist may sample some amount of third-party audio material without a licence has been a subject of a heated legal and academic debate<sup>8</sup>. Certain U.S. landmark cases unsympathetic of the prospect of unlicensed sampling in combination with aggressive enforcement of the proprietary rights and the failure of the sample licensing market to create independently a working infrastructure that would allow efficient and reliable licensing transactions between the right holders and the new artists, have both limited the possibilities of artists to negotiate reasonable rules for use of material from earlier sound recordings, as well as brought upon an excessive influence of legal considerations and risk calculations on aesthetic decisions<sup>9</sup>.

The specific problems of sampling and the policy options have received less attention in Europe than in the U.S. context<sup>10</sup>, even though in the past few years alone, there have been several interesting developments in this field, including several high-profile European copyright cases as well as significant law amendments in some of the EU

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<sup>7</sup> McLeod and DiCola 2011, 6; Arewa 2011, 1840-1843. For an empirical evaluation of the incentive theory of copyright for different stakeholders in the music industry, see DiCola 2013.

<sup>8</sup> See for example Arewa 2006; McLeod and DiCola 2011; Reilly 2012.

<sup>9</sup> See, for example Arewa 2006; Boyle 2008; McLeod and DiCola 2011; Azran 2014.

<sup>10</sup> See also Morey 2012, 49.

Member States that could potentially change the legal landscape of sampling in a number of ways. The time is ripe for the sampling dispute to be brought to a more international context. For that purpose, this thesis will address two questions:

- What is the threshold of infringement in unlicensed commercial sampling of third-party copyrighted sound recordings in Europe?
- How does the current law establish the balance between protecting the interests of right holders and safeguarding the musical public domain for other artists?

The questions will be approached by a doctrinal analysis of the European *acquis communautaire*, as well as national landmark cases particularly from Germany and from the United Kingdom. A functional comparison with the U.S. case law will provide a context for the evaluation of the current policies options and a hypothetical testing ground for the likely effects of future policy options on the industry practices on the European music markets. The primary emphasis will be on the instances where the current law may recognise unlicensed sampling as legitimate, and secondarily on areas of law that provide flexibilities that could support sampling under certain conditions. This is not to imply an inherent preference of general acceptance of unlicensed sampling, but rather to explore the border area between protection and public domain access under the copyright and neighbouring rights in Europe.

I will begin the discussion by outlining the foundations of copyright and neighbouring rights in Europe and the relevant legal doctrines that relate to their application in legal disputes that involve music and sound recordings (chapter 3). I will then describe the role intertextual techniques have held in the history of music in general, and in the development of sampling practices in particular (chapter 4). After a doctrinal analysis of the selected European case law (chapter 5), I will proceed to describe the evolution of the U.S. law on sampling, as well as to contextualise the European situation by a functional comparison between the two jurisdictions (chapter 6). Finally, I will evaluate some policy options for recommendations regarding the future of transformative sampling-based musical works in Europe (chapter 7).

## 2 METHODOLOGY

The methodology of this thesis comprises dogmatic legal analysis and the functional analysis of the comparative law. In legal research, dogmatic analysis can be regarded as “scientific processing of all legal material” in which the law, its application and the underlying values are evaluated conceptually and systematically<sup>11</sup>. The cases discussed are typically landmark cases, as identified by authors in the relevant legal literature and by the hierarchy of the courts.

Since copyright is essentially national law and the separate evaluation of the jurisprudence of each Member State would be significantly beyond the scope of this thesis, the focus will be on the EU *acquis*, as well as on the relevant case law of Germany and United Kingdom. The choice of these jurisdictions is supported by their contrasting traditions of copyright and authors’ rights, respectively, as well as the significant sizes of their national music industries, which provide a sufficiently robust body of case law for the purpose of the analysis.

The specific type of comparative law used in this thesis is a functional microcomparison<sup>12</sup> of doctrines and legal institutions that regulate the same set of issues in different jurisdictions and under different traditions of law. The basic premise of the methodology is that different legal systems face similar problems, and while they take independent legal measures to tackle these problems, they may reach similar functional results. The purpose of the method is to bring forward the objective facts of the problem set and to compare the detailed logics and functional results of how each jurisdiction solves them. One of the defining characteristics of functional comparison is the focus on the similar sets of facts as the basis of the analysis, and their functional relations to the society. In other words, law is not regarded as an autonomous sphere of purely logical inquiry, but an active part of the society that shapes and is shaped by its values and circumstances. What is relevant from the methodological point of view, is that in a functional comparison, interpretations and solutions offered of both legal and non-legal institutions to specific practical problems can serve the comparison as long as they are functionally equivalent, i.e. they fulfil similar social purposes and may bring about similar results. Sometimes the functional method can be evoked for an evaluation

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<sup>11</sup> Narits 2007, 19.

<sup>12</sup> Zweigert and Kötz 1998, 5 and 34.

and ranking of legal systems in tackling particular issues<sup>13</sup>, but such applicative aspect of the method is not universally accepted, and will not be adopted in this thesis.

The comparative law aspect is serves to highlight the law and the industry realities of music sample licensing markets in Europe and in the U.S. The international reality of the industry necessitate understanding convergences or divergences of specific industry practices and legal contours in various jurisdictions<sup>14</sup>. A comparative perspective at the market situation in the United States is often relevant for a comprehensive evaluation of the implications of particular policies and legal doctrines that affect music industry in any given geographical area. Not only is the U.S. national music industry the world leader in size, it is the focus of the global music markets in several popular genres. Furthermore, a majority of the significant case law concerning the right to sample a sound recording has been decided in the U.S., with direct and indirect influence to the industry practices and potentially also to the legislation around the world. Understanding the history and the current reality of the U.S. law can help find solutions in other jurisdictions that would achieve a good balance between sufficient copyright protection and a reasonable freedom of expression.

The analytical perspective used in this thesis could be described as that of socio-legal studies or even ‘law and musicology’. In general, the aim of the socio-legal studies is to form an understanding of the legal system in the context of wider social structures<sup>15</sup>, in order to “discover patterns from which one can infer whether and under what circumstances law affects human behaviour and conversely how law is affected by social change”<sup>16</sup>. The musicological perspective encompasses approaches of sociomusicology<sup>17</sup>, as well as the general music analytical premises and techniques employed in the field of forensic musicology. As a subtype of socio-legal studies, musicology and law seeks to identify and analyse the network of motives, incentives and deterrents that drive the actions of various sectors of the music industry with respect to the contours of law, and particularly those of copyright and neighbouring rights. The main premise of the perspective is the identification and analysis of the complexities of the cultural production mechanisms of music, as well as the

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<sup>13</sup> See Zweigert and Kötz 1998, 47.

<sup>14</sup> See also Jütte 2014, arguing that in an effort of avoiding infringing existing rights, an author would hope to be able to rely to the same exceptions and limitations in each Member States.

<sup>15</sup> Banakar and Travers 2005, xi.

<sup>16</sup> Zweigert and Kötz 1998, 10.

<sup>17</sup> Sociomusicology is here understood as being generally equivalent of applied ethnomusicology with a socio-legal focus. For more on the development of applied ethnomusicology, see Dirksen 2012. Regarding the under-developed relation between the ethnomusicological and legal research fields, see Seeger 1992.

acknowledgment of the respective realities of, and conflicts between, various actors on the music markets. In the context of this thesis, law and musicology provides tools to describe and explain various interactions between the laws governing music plagiarism disputes on sound recordings, and the creative and aesthetic choices of individual sampling artists, as well as those of the industry as a whole, in response to those laws.

In recognition that the issues involved are complex, the thesis strives to adopt an ideologically neutral approach, with an aim of identifying a practicable balance between various competing interests in music copyright disputes. This is to recognise the double role copyright plays with respect to the competing interests of protection and freedom of artistic expression, as well as the basic premise is that the rights of the samplers are not inherently more or less valuable than those of the copyright holders and the artists whose works are sampled.

### 3 PRINCIPLES OF COPYRIGHT AND RELATED RIGHTS

#### 3.1. Copyright and neighbouring rights

The essential purpose of copyright is to provide a healthy framework for the creative industries to function. The jurisprudences generally seek to achieve this on a reasonably abstract level, without meddling too deep into aesthetic debates, while still providing sufficient incentives and rewards for artistic creation. However, as an exclusive monopoly, copyright needs clear limits and exceptions that set the balance of the exclusive rights and access. The adopted definitions of such exceptions have both direct and indirect impacts on the industry practices and consequently, on the freedom and opportunities of artists to create, as well as to enjoy the fruits of their own work.

The basis of the copyright protection in the European Union derives from a number of international treaties, as well as regulations, directives and case law, such as the 2001 Directive on Copyright in the Information Society ('InfoSoc')<sup>18</sup> and the decisions of the European Court of Justice ('CJEU') on particular aspects of the copyright protection. The most important international treaty in the field of copyright is Berne Convention, which requires copyright protection to cover "literary and artistic works", "whatever may be the more or form of its expression"<sup>19</sup>. Under Berne, a work is protected regardless of its quality, aesthetic merit or imaginativeness<sup>20</sup>, and the protection must be awarded without a separate registration<sup>21</sup>. However, the protection only covers expressions, not ideas or procedures<sup>22</sup>. This idea/expression distinction serves the recognition that "all cultures advance by drawing on the achievements of their predecessors, and that if literature and art are to thrive, the building blocks of expression must always be free for borrowing"<sup>23</sup>.

The owner of the copyright is the author of the work, or a person or an entity to whom such right has been transferred. The exclusive rights granted for the copyright holder

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<sup>18</sup> Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ No. L 167/10, June 22, 2001 [InfoSoc].

<sup>19</sup> Berne Convention, 1971 Paris Text, Art. 2(1).

<sup>20</sup> See Goldstein and Hugenholtz 2010, 189-190.

<sup>21</sup> Berne Convention, Art. 5(2). In the U.S., the registration of a copyright is not mandated, but nevertheless common, because it provides *prima facie* evidence of the copyright ownership and is a requirement for obtaining certain monetary damages for an infringement. See Goldstein and Hugenholtz 2010, 222-223.

<sup>22</sup> TRIPS Agreement, Art. 9(2). Note, however, that the principle of extending the copyright coverage only to the expressions and not to the ideas themselves, has been a traditionally established principle of international copyright long before TRIPS. In the See Goldstein and Hugenholtz 2010, 77 and 216.

<sup>23</sup> Goldstein and Hugenholtz 2010, 216-217 and 299.

include, the reproduction right<sup>24</sup>, distribution right<sup>25</sup>, the right to make translations<sup>26</sup>, adaptations and arrangements<sup>27</sup> and the right for the communication to the public, including typically the public performing rights<sup>28</sup> and broadcasting rights<sup>29</sup>. Of these, the rights of reproduction, communication to the public and distribution are harmonised in the EU by the InfoSoc Directive<sup>30</sup>. Derivative works are generally protected under Berne “without prejudice to the copyright in the original work”<sup>31</sup>, although there is some variation between different countries concerning the protection of new adaptive works when the use of the material from the original has been obtained unlawfully<sup>32</sup>, or when the creative elements appropriated are used in the second work so that an “inner distance” between the two works is preserved<sup>33</sup>.

Under the EU law, the right of reproduction is generally extensive and any exceptions to the exclusive rights are to be interpreted narrowly<sup>34</sup>. According to the CJEU case law, an extraction of even a minor part of an original work may be sufficient for a finding of an infringement. In *Infopaq v. Danske Dagblades Forening*<sup>35</sup>, the threshold of originality was deemed at eleven words of text scanned automatically from newspaper articles. This *Infopaq* test for originality, later confirmed in another CJEU case *Bezpečnostní softwarová asociace*<sup>36</sup>, defines that even parts of a work enjoy independent copyright protection, “provided that they contain elements which are the expression of the intellectual creation of the author of the work”<sup>37</sup>. Such intellectual creation may result through the choice of words, as well as their sequence and

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<sup>24</sup> Berne Convention, Art. 9(1); see also InfoSoc Directive Art. 2.

<sup>25</sup> The right of making copies of the work: WIPO Copyright Treaty Art. 6(1).

<sup>26</sup> Berne Convention, Art. 8.

<sup>27</sup> Berne Convention, Art. 12. Goldstein and Hugenholtz draw the distinction between *adaptation* of a work from a format to another and *arrangement* within the same format, for example through new instrumentation of a musical piece. Goldstein and Hugenholtz 2010, 315.

<sup>28</sup> Berne Convention, Art. 11(1).

<sup>29</sup> Berne Convention, Art. 11*bis*.

<sup>30</sup> InfoSoc Directive, Arts. 3; 4(1),

<sup>31</sup> Berne Convention, Article 2(3).

<sup>32</sup> The U.S. interpretation (in the 1976 Copyright Act §103(a)) is that a derivative work that employs pre-existing material without the consent of the original copyright holder is not covered by copyright for those parts, whereas in U.K. a new copyright may be established if the derivative work contributes new expression to the original. See Goldstein and Hugenholtz 2010, 205.

<sup>33</sup> This more flexible doctrine of “inner distance” is used in e.g. Germany, whereas the U.S. courts have treated the derivative right as more encompassing and exclusive. See Goldstein and Hugenholtz 2010, 316.

<sup>34</sup> See Case C-5/08 *Infopaq International A/S v. Danske Dagblades Forening* [2009], ECR I-6569.

[*Infopaq*]

<sup>35</sup> *Infopaq* ECR I-6569.

<sup>36</sup> Case C-393/09 *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v. Ministerstvo kultury* [2010] ECR I-13971.

<sup>37</sup> *Infopaq* at 37-39.

combination”<sup>38</sup>. These rulings have essentially harmonised the originality threshold within the EU to all classes of works at a level higher than, for example, the traditional “sweat of brow” doctrine previously applied in the UK, hence tightening the European copyright protection overall. Simultaneously, the test might support relatively easy finding of copyright infringements by the application of the “author’s own intellectual creation” threshold not only to whole works but also to parts of works.<sup>39</sup> On the other hand, the CJEU ruling in *Football Association Premier League* indicates that in some instances the interpretation of the exceptions to the exclusive rights should take into consideration the underlying purpose and objective of the exceptions rather than use the strict literal reading<sup>40</sup>. In particular, freedoms of expression and information fundamentally guaranteed in the EU Charter of Fundamental Rights and the European Convention of Human Rights, may give a context that supports flexible interpretation of exceptions and limitations<sup>41</sup>.

The Berne Convention also requires the member countries to recognise authors’ moral rights independent of the economic rights discussed above, including “the right to claim ownership of a work and the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work, which would be prejudicial to his honor or reputation”<sup>42</sup>. Although these moral rights of paternity and integrity are typically thought to exist in civil law jurisdictions only<sup>43</sup>, many common law systems have adopted some aspects of the moral rights philosophy to protect authors’ reputational interests in other areas of law, such as the laws governing unfair competition, defamation and privacy. Similarly, the civil law jurisdictions have *de facto* embraced some balancing factors in the evaluations of authorial integrity, bringing these two systems closer together in this respect.<sup>44</sup>

Neighbouring rights cover the rights of the performing artists in their performances, the rights of producers of the sound recordings in their “phonograms” and the rights of broadcasting organizations in the radio and television programs they have produced.

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<sup>38</sup> *Infopaq* at 45.

<sup>39</sup> Rosati 2011, 802-804.

<sup>40</sup> C-403/08 and C-429/08 *Football Association Premier League v. QC Leisure* [2011] ECR I-9083.

<sup>41</sup> Article 10 of the EU Charter of Fundamental Rights and Article 11 of the European Convention on Human Rights. See Hugenholtz and Senftleben 2011, 25-26.

<sup>42</sup> Berne Convention, Art. 6bis(1).

<sup>43</sup> Some civil law countries provide additionally the right of divulgation and the right of withdrawal. The right of divulgation refers to the right of authors to “control the terms under which their works are first disclosed to the public”. Goldstein and Hugenholtz 2010, 353.

<sup>44</sup> See Goldstein and Hugenholtz 2010, 346-348.

The separation between copyright and neighbouring rights<sup>45</sup> is based on the idea that the type of creations protected by the latter lack the “authorial creativity” expected from copyrighted works and consequently, neighbouring rights holders are typically granted more narrow rights than those awarded for the copyright holders<sup>46</sup>. They are internationally governed by the Rome Convention<sup>47</sup>, the Geneva Phonograms Convention<sup>48</sup> and the WIPO Performances and Phonograms Treaty<sup>49</sup>, as well as Article 14 of the TRIPS Agreement<sup>50</sup>. Within the EU, the Rental Right Directive<sup>51</sup> and the InfoSoc Directive harmonised and extended the economic rights defined in the Rome Convention.

The specific doctrines of a copyright infringement vary from country to country, but the basic principles of idea/expression distinction and determining the level of protection by the degree of originality are common to most copyright systems. Factual works are typically warranted only narrow protection against literal or almost literal copying, whereas a highly original and creative work receives more robust scope of protection<sup>52</sup>. In an infringement action, a copyright owner must typically be able to prove a conscious or unconscious act of copying, and that the expression subject to copying was protectable by copyright. Striking similarities, such as idiosyncratic expressions or mistakes common to both works, may support the finding of an infringement. The tests

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<sup>45</sup> The distinction between copyright and neighbouring right (or a related right) is not drawn equally in all countries. For example, in the U.K. and in the U.S., sound recordings are covered by copyright, whereas in most civil law countries these fall within the neighbouring rights regime. It is important to note, nevertheless, that despite this legal differentiation, the specific rights granted for the right holders are fairly similar in the common law and civil law countries.

<sup>46</sup> Goldstein and Hugenholtz point out, however, that such a simplistic definition does not acknowledge the range of efforts protected under the neighbouring rights umbrella, including for example the creative work of a concert pianist playing on a sound recording and the entrepreneurial and organizational skill of the producer in capturing that performance and editing it for a recording. Furthermore, sound recordings typically involve large-scale collaborative efforts, and it is for this reason that the national legislations have been more flexible in expanding the protection to include corporate creation than in the case of works protected under copyright. Goldstein and Hugenholtz 2010, 230-232.

<sup>47</sup> International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961). [Rome Convention]

<sup>48</sup> Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms (1971). [Geneva Phonograms Convention]

<sup>49</sup> WIPO Performances and Phonograms Treaty (1996) [WPPT].

<sup>50</sup> TRIPS, Art. 14.

<sup>51</sup> Council Directive 92/100/EEC November 19, 1992, O.J. L 346; later replaced by Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 376, December 27, 2006.

<sup>52</sup> Goldstein and Hugenholtz 2010, 299.

may express certain differentiation depending on the subject matter and its inherent constraints.<sup>53</sup>

### 3.2. Exceptions and limitations to exclusive rights

Copyright protection is limited in term<sup>54</sup>, as well as by a range of permitted uses specifically defined in the law. Sometimes labelled as “fair use”<sup>55</sup>, “free use”<sup>56</sup> or “fair dealing”<sup>57</sup>, they cover uses such as private use, making of quotations and the use for educational and press purposes. The Berne Convention gives member countries certain liberties in determining the specific exceptions and limitations to the exclusive rights of the copyright holder, provided they comply with the three-step test of the Article 9(2) and the respective formulation in the Article 13 of the TRIPS Agreement: “Members shall confine limitations or exceptions to exclusive rights to certain specific cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author”<sup>58</sup>. In the EU, the InfoSoc Directive provides an exhaustive, but optional shopping list of exceptions and limitations Member States may choose to implement, although the list in itself is also subject to the three-step test<sup>59</sup>. None of the listed exception addresses sound recording sampling directly<sup>60</sup>.

Some of the exceptions and limitations most relevant for this thesis are the quotation right and the exception for parody and related genres. Quotation right of a previously published work is one of the few mandatory limitations of the Berne Convention<sup>61</sup>. The conditions set in Berne for quotations are that the original has been “lawfully made

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<sup>53</sup> Goldstein and Hugenholtz 2010, 299-300.

<sup>54</sup> Under the Berne Convention Art. 7(1) and Art. 7*bis*, protection must be provided for a minimum duration of the life of the author plus fifty years, or in the case of joint works, for fifty years after the death of the last surviving author. In most countries copyright lasts for the life of the author and then until the end of the year 70 years after his or her death.

<sup>55</sup> Fair use in 17 US Code § 107.

<sup>56</sup> *Freie Benutzung* in German Copyright Act (UrhG) § 24.

<sup>57</sup> U.K. Copyright, Designs and Patents Act 1988 (CDPA) §29 and §30.

<sup>58</sup> TRIPS Agreement Art. 13

<sup>59</sup> InfoSoc Directive Art. 5(2). The only mandatory exception is the permission of incidental transient copying in digital communications in Art. 5(1). For the three-step test, see Art. 5(5).

<sup>60</sup> See also Jütte 2014, noting that since the EU copyright law does not explicitly offer an exception applicable to unlicensed sampling, neither can Member States independently introduce such novel provisions in their national laws. This is not to indicate that some of the existing exceptions could not be interpreted in a new, more flexible way.

<sup>61</sup> Berne Convention Art. 10(1). It is also the only mandatory limitation in an international copyright treaty. The principle of quotation exception is codified in InfoSoc Directive Article 5(3)(d). See Goldstein and Hugenholtz 2010, 379.

available to the public”, that the use of the original is “compatible with fair practice”, and that the “extent does not exceed that justified by the purpose”<sup>62</sup>, although national legislations are free to impose further conditions at their discretion. The German Copyright Act, for example, specifically allows brief quotation of individual passages “in an independent musical work”<sup>63</sup>, as long as the melody of the original has not been appropriated in its entirety<sup>64</sup> and the extent is not greater than justified by the particular purpose. The requirement of proper acknowledgment of the source is recognised in many jurisdictions<sup>65</sup>, and some jurisdictions have established more flexible quotation rights for artistic works, in recognition that to a degree, works of arts gradually enter the public domain<sup>66</sup>.

Goldstein and Hugenholtz note that while a parody may be a direct assault on the author’s interests and integrity, it is widely accepted in civil law jurisprudence as an important literary genre that has its own purpose in the society that must be supported even when that requires some limitations on the moral rights of the original author<sup>67</sup>. In the InfoSoc Directive, parody is listed under the Article 5(3)(k), exempting “use for the purpose of caricature, parody or pastiche”<sup>68</sup>. The InfoSoc Directive gives no further definition of this terms, nor their mutual relations and differences, but there is some CJEU case law that sheds light on the parody exception in countries that have chosen to adopt the exception<sup>69</sup>. Furthermore, parody as an independent genre has started to gain more recognition in the international jurisprudence. For instance, the UK recently introduced an exception that allows partial use of an existing work for the purposes of caricature, parody or pastiche, as well as the quotation of third-party expression, provided the use fulfils the conditions of “fair dealing”<sup>70</sup>. The considerations of fair

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<sup>62</sup> Berne Convention, Art. 10(1).

<sup>63</sup> German Copyright Act (UrhG) Art. 51 (“Kleinzitate”). Translation Goldstein and Hugenholtz 2010, 380.

<sup>64</sup> See §24(2).

<sup>65</sup> Goldstein and Hugenholtz 2010, 379-380.

<sup>66</sup> For example in *Germania 3*, the Federal Constitutional Court of Germany held that the quotation right in the artistic works should be applied broadly, allowing fairly extensive quotations of an earlier commercial work in a theatrical play for the purpose of supporting the freedom of artistic expression of Article 5(3) of the German Federal Constitution. BVerfG June 29, 2000 - *Germania 3 Gespenster am toten Mann* (1 BvR 825/98). The case is discussed in Goldstein and Hugenholtz 2010, 393.

<sup>67</sup> Goldstein and Hugenholtz 2010, 357 and 380.

<sup>68</sup> InfoSoc Directive Art. 5(3)(k).

<sup>69</sup> See case C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others* [3 September 2014, not yet reported] ECLI:EU:C:2014:2132. [*Deckmyn*]

<sup>70</sup> The UK Regulation on Copyright and Rights in Performances (Quotation and Parody) 2014 No. 2356 at 3; see also IPO 2014, 7. In the case of the quotation, the original work must have been made available to the public, the quotation may not extent to more than what is required for that specific purpose and a sufficient acknowledgement must be given, “unless this would be impossible for reasons of practicality or otherwise”.

dealing include questions such as whether the use affects the market for the original work or acts as a market substitute for it, whether the amount taken was reasonable and appropriate, and whether the use in that extent was necessary for the purposes of the new work<sup>71</sup>. In countries without a specific parody exception, the equivalent principle of allowing the use of themes and ideas in earlier works is usually secured in other ways. In Germany, for example, this is accomplished through the free use (*freie Benutzung*) doctrine of Article 24 of the German Copyright Act (UrhG)<sup>72</sup>. Similarly the U.S., parody is an established type of fair use<sup>73</sup>.

The idea behind allowing a limited set of uses that delimit the exclusive rights of the copyright holder is that these specific uses are considered socially important and support values such as freedom of expression<sup>74</sup>, that the right to prohibit them is considered to result in excessive harm for the society or that a licensing between the parties would have resulted in prohibitive transaction costs. In some instances where the remuneration for the use of the copyrighted work to the copyright holder is considered important, such transactions can be governed under compulsory licenses that grant the right to use a copyrighted work under certain conditions, provided that a statutory payment is made to the copyright holder<sup>75</sup>. Other instances where copyright does not prevent a third-party use of creative content include the situations in which the copyright term has expired, when the right holder has voluntarily waived his or her exclusive rights to the work, and when the expression used is of such nature that it is not covered by copyright, such as recorded bird song or generic traffic sounds<sup>76</sup>. Additionally, one could argue that the grey area of tolerated uses, which technically infringe the copyright but in which the right holder chooses to not enforce their rights, forms a similar type of framework for exclusive rights limitation of a third-party use.

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<sup>71</sup> IPO 2014, 9.

<sup>72</sup> German Copyright Act Art. 24. As summed up by Geller (2010, 555), the free use defence applies when the essential aspects of the original work used are “sufficiently attenuated, or faded away, within the later work”, See also *Gies-Adler*, BGH March 20, 2003 - *Gies-Adler* (I ZR 117/00), in which the use of a sculpture was considered parodic because of its “anti-thematic treatment”.

*Campbell v. Acuff-Rose Music, Inc* 510 U.S. 569 (1994) [*Campbell*]. Note however, that the finding of parody does not conclusively refute an infringement, but only supports the *likelihood* of finding fair use.

<sup>74</sup> The principle of freedom of expression as a human right is recognised in national constitutions as well as in the Article 10 of European Convention on Human Rights (ECHR).

<sup>75</sup> The U.S. compulsory mechanical recording license is relevant for the creator of cover songs, which are allowed on the provision of statutory payments when the work has been previously distributed on a phonorecord and the changes to the original amount only to “style and manner of interpretation”. See Goldstein and Hugenholtz 2010, 387-388.

<sup>76</sup> However, if such generic sound material is used or edited in a very specific and creative way, even non-musical sounds and noises could in theory be protectable under copyright, although this is an exception rather than a rule.

The last category is, however, different in that tolerated use is non-binding and reversible, meaning that the rights holder may at any time change their mind and choose to enforce the rights after all, leaving the third-party user of the protected content in a precarious situation.

Public domain is an umbrella term that covers works and expressions that are not covered by intellectual property rights and for which no transactions can take place, making them free for anyone to use. The function of the public domain as an area of common ownership<sup>77</sup> is to grant a public free and equal access to assets of culture and information and to share the elements of common heritage to serve as inspiration for creation of new expressions<sup>78</sup>. Generally, public domain is considered to encompass elements not liable for copyright, such as ideas or unoriginal works and works by definition excluded from protection by their nature or by the expired term of protection<sup>79</sup>. However, some authors further recommend the inclusion of works whose use may be restricted in some contexts but not in others, such as copyright exceptions and other free uses of a protected work, such as the right to access and read or view a protected work<sup>80</sup>. Such an extended definition of public domain recognises the flexible and constantly evolving nature of the public domain, as well as the fact that the doctrines that form the threshold between the public domain and the domains of proprietary control, such as originality, are to a degree dependent on the context and the genre of the expression.

It is important to remember that although many aspects of copyright are harmonised internationally and the rules governing the use of works under copyright are in most respects substantively similar<sup>81</sup>, at its core copyright is still fundamentally national law. In particular, there are some marked differences in the fundamental philosophies of copyright between the common law systems of the United States and United Kingdom, and the civil law *droit d'auteur* or authors' rights system of continental Europe. The common law copyright is based on the premise of economic protection through an exclusive, limited-term reproduction right that aims to financially incentivise creation and commercialization that result in market transactions for new works and eventually

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<sup>77</sup> This is in contrast to the no-authorship view of the traditional public domain definitions. See Dussollier and Benabou 2007, 179.

<sup>78</sup> Dussollier and Benabou 2007, 172.

<sup>79</sup> Dussollier and Benabou 2007, 164-165.

<sup>80</sup> Dussollier and Benabou 2007, 171-173.

<sup>81</sup> Goldstein and Hugenholtz 2010, 14-15.

increase public welfare<sup>82</sup>, whereas the authors' right system then again builds on a notion of an artist's personality materialised in his creation, in addition to the legitimate financial interests an author has in his work. The threshold of copyright protection is generally low across the board, although historically the common law jurisdictions set the focus typically at originality<sup>83</sup>, i.e. the notion that the work originated with its author, whereas many civil law courts expect a modicum of author's personality being reflected in the work<sup>84</sup>.

The two systems also differ in their approach to the relation between the exclusive rights and the exceptions to them. Common law copyright is fundamentally limited, with wide margin for exceptions interpreted flexibly case-by-case keeping the copyright monopoly in check. The price of this flexibility is a degree of legal uncertainty at times when the realities that the law regulates are changing quicker than case law on the subject is established. In civil law systems the predictability of the legal reasoning and results is valued higher and hence, copyright exceptions and limitations are typically defined as strict, closed-ended lists that cover only certain pre-defined situations,<sup>85</sup>. The cost of this trade-off for the benefit of legal security is an inherent inflexibility in the face of technological and societal changes; an aspect criticised by authors such as Hugenholtz and Senftleben<sup>86</sup>. Yet despite these differences, the reasoning and the results in a given dispute might end up being markedly similar, as we will see in the discussion of the sampling cases in Europe and in the U.S.

### 3.3. Legal protection of recorded music

This overview provides a summary of how the principles and doctrines of copyright and neighbouring rights relate to music in general, and to sound recordings in particular, in an international context. To the extent there is no relevant European *acquis* to refer to, the respective national laws of Germany and U.K. will be discussed as general examples of the application of the relevant doctrines.

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<sup>82</sup> See for example Reilly 2012, 164-166.

<sup>83</sup> See for example §1(1)(a) of the U.K. Copyright, Designs and Patents Act 1988.

<sup>84</sup> The German Copyright Act §2(2) (1993), for example, protects „personal intellectual creation“, even if it is minimal. Although the U.S. Supreme Court ruled in *Feist* (at 24) against the copyright protection of a work lacking “some minimal degree of creativity”, they also noted that “the requisite level of creativity is extremely low; even a slight amount will suffice”. About the permissive standards of originality in copyright generally, see Goldstein and Hugenholtz 2010, 190-191.

<sup>85</sup> Hugenholtz and Senftleben 2011, 6.

<sup>86</sup> Hugenholtz and Senftleben 2011, 6.

### **3.3.1. Dualist protection in music**

Berne Convention protects “musical compositions with or without words” and “dramatico-musical works”<sup>87</sup>. A ‘phonogram’ or a sound recording<sup>88</sup> is defined in both the Rome Convention and the Geneva Phonograms Convention as “any exclusively aural fixation of sounds of a performance or of other sounds”<sup>89</sup>. In the context of sound recordings, a duplicate is defined as “an article which contains sounds taken directly or indirectly from a phonogram and which embodies all or a substantial part of the sounds fixed in that phonogram”<sup>90</sup>. The producer of a phonogram is “the person who, or the legal entity, which, first fixes the sounds of a performance or other sounds”<sup>91</sup>. Under the Rome Convention, performers on the recording may be “actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works”<sup>92</sup>. National legislations are free to expand this definition to performers of non-artistic works, as well as to other participants of the performance, such as orchestra conductors<sup>93</sup>. The question of when a performance attains the sufficient level of creativity to be considered a derivative work worthy of copyright protection in its own right is subject to the interpretation of the national laws<sup>94</sup>.

In short, the structures of protection in a piece of recorded music are two-fold. On one hand, a composition copyright refers to the “song” as a compositional structure of a musical work, as in written notes on sheet music<sup>95</sup>. On the other hand, the physical sound recording is protected by sound recording copyrights (in the U.S. and UK) or neighbouring rights (in the continental Europe), which cover the rights to the performance of the underlying song, as well as the effort of the producer in putting together the recording of the performance. The holders of the composition copyright and the sound recording copyright are rarely the composer and the performer themselves<sup>96</sup>, but rather a publishing company and a recording company, respectively,

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<sup>87</sup> See Mcdonagh 2012, 407-408. There is no internationally accepted definition of what constitutes a musical work, but such a definition would generally have to be broad.

<sup>88</sup> The U.S. and the U.K. legislation use the term “sound recording”.

<sup>89</sup> Rome Convention Art. 3(b); Geneva Phonograms Convention Art. 1(a).

<sup>90</sup> WPPT Art. 1.

<sup>91</sup> Rome Convention Art. 3(c); Geneva Phonograms Convention Art. 1(b).

<sup>92</sup> Rome Convention Art. 3(a).

<sup>93</sup> For example, the UrhG Art. 73: “[p]erformer means a person who ... participates artistically in the recitation or performance of a work”. Translation by Goldstein and Hugenholtz 2010, 234.

<sup>94</sup> See Goldstein and Hugenholtz 2010, 234.

<sup>95</sup> See Goldstein and Hugenholtz 2010, 198.

<sup>96</sup> It is worthwhile to note here that the sound recording copyright might be vested through joint authorship not only in the performer(s), but also in the producer when the contribution of each is deemed sufficient and original. See Reilly 2012, 168-169.

to whom the artists have granted the exclusive rights through a standard recording agreement in exchange for the investment made in the production and marketing of the sound recording<sup>97</sup>.

Although common law and civil law jurisdictions govern the rights of performers and phonogram producers under different labels<sup>98</sup>, the rights granted in both systems are largely comparable<sup>99</sup>. The producers of phonograms enjoy protection against unauthorised reproduction of their work<sup>100</sup>, commercial communication to the public<sup>101</sup> and public distribution<sup>102</sup>, including rental<sup>103</sup>. For performers the most important rights granted are the right to control and draw revenue from the first commercial exploitation of their performance<sup>104</sup>, as well as the general moral rights guaranteed in the WIPO Performances and Phonograms Treaty<sup>105</sup>. Under the InfoSoc Directive, the reproduction right of both performers and phonogram producers in the EU includes temporary digital copies and the right of making available online<sup>106</sup>.

These two sets of rights are overlapping in the sense that a musical work on a sound recording in most cases includes material covered by both composition copyright and the neighbouring rights<sup>107</sup>, but a composition copyright exists and can be exploited independently of a sound recording. Consequently, an artist who wishes to reproduce and distribute copies of a musical work that includes excerpts of someone else's sound recording, must be able to secure multiple clearances. The song need not to have a vocal line or lyrics to qualify for composition copyright; the compositional backbone supporting an instrumental work falls equally under the copyright protection. Some jurisdictions do, however, differ in whether they include the lyrics as a part of the underlying musical work (e.g. U.S.) or count them as a separate work worthy of their

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<sup>97</sup> See Apel 2010, 335. This discrepancy between the authorship of the work and the ownership of the copyright may be a factor behind some of the ideological criticism against excessive copyright protection in sampling cases.

<sup>98</sup> Copyright or neighbouring rights, respectively.

<sup>99</sup> Goldstein and Hugenholtz 2010, 337.

<sup>100</sup> Geneva Phonograms Convention Art. 2; see also Rome Convention Art. 10.

<sup>101</sup> Rome Convention Art. 12.

<sup>102</sup> Geneva Phonograms Convention Art. 2.

<sup>103</sup> WPPT Art. 13

<sup>104</sup> The Rome Convention, Art. 7(1); WPPT Arts. 2 and 6.

<sup>105</sup> WPPT Art. 5.

<sup>106</sup> InfoSoc Directive, Arts. 2(c) and 3(2)

<sup>107</sup> The main instances in which a recording would only have sound recording copyrights include situations in which the underlying composition is for some reason so unoriginal that it does not warrant a copyright protection, when the dispute only concerns a *part* of a copyrighted work and that part is too minor or unoriginal to warrant independent copyright protection, or when the copyright to the composition has expired and the work is in public domain.

own separate copyright (e.g. U.K.). Furthermore, there is no need for an actual sheet music rendition of the work to exist, as it is usually implied by certain structures of the audio version of the song, and can be identified through structural music analysis<sup>108</sup>.

While the stark legal distinction between the compositional structures covered by copyright and the performance related structures covered by the sound recording copyright or neighbouring rights is relatively clear in theory, the difference between the two is sometimes blurred by what some authors criticise as the “visual-textual bias”<sup>109</sup> in copyright. According to the criticism, infringement analyses in musical works focus on written notation and lyrics, predisposing a secondary role for any oral and aural aspects of music that do not readily find expression in the score<sup>110</sup>. This is a poor fit with many contemporary music production practices, in which the role of written notation is diminishing or was never the norm to begin with, and the role of collaborative and improvisational creation has been more pervasive<sup>111</sup>. Courts have faced similar difficulties in applying the idea/expression dichotomy to music<sup>112</sup>, despite the general agreement that due to the limited possibilities of semantic referencing in the domain of music in comparison to literary and visual arts, the availability of a robust public domain of stylistic elements, musical conventions and motifs must remain outside of a copyright monopoly.

Copyright is generally understood to protect three main elements of music: melody, harmony and rhythm, alongside with lyrics when they are present. However, only melody is considered to warrant independent protection<sup>113</sup> and tends to dominate the similarity analysis<sup>114</sup>, whereas harmony and rhythm are in most cases only protected in connection to one another and to other elements<sup>115</sup>. In some cases, form or structure of

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<sup>108</sup> The existence of a sheet music version of a composition is useful in that it can be used as an aid in infringement proceedings. In such contexts, a sheet music rendition often plays an active role in the distinguishing of compositional elements (protected by copyright) from the elements of the performance (protected by neighbouring rights).

<sup>109</sup> Arewa 2011, 1833-1840. Arewa traces the origins of the visual-textual bias to historical factors, namely the focus of the early music copyright protection on written scores alone, as well as to the general sacralisation of the concepts of musical creativity, the notion of genius composer and the related dominance of written work over performance of European art music in the course of the nineteenth century; all of which came to be embraced by the developing concept of music copyright.

<sup>110</sup> Arewa 2011, 1830 and 1833.

<sup>111</sup> Brauneis 2014, 1; also Arewa 2011, 1840-1843.

<sup>112</sup> McDonagh 2012, 409-410; see also Rosen 2008, 14-24.

<sup>113</sup> Note, however, that in most cases the simple pitch similarity between two works is not a sufficient proof of substantial similarity required for an infringement finding. Rosen 2008, 155-156.

<sup>114</sup> Cason and Müllensiefen 2012, 27-28.

<sup>115</sup> Gherman 2008 makes a good observation that harmony serves an essentially *functional* role in music, and hence cannot – in most cases – be considered individually original in the strict copyright sense.

the work may similarly have a supporting role in finding of relevant similarities between two works, when found in combination with other similar elements<sup>116</sup>. On the other hand, aspects such as sound colour (timbre), style, instrumentation, ornamentation or genre are generally not protected under copyright, because they rarely are considered original enough for the purpose<sup>117</sup>. Furthermore, standard musical elements including, for example, melodic lines based on simple scale step motives, a key, a tempo, or a chord structure or a harmonic progression, particularly when they are typical of the work's genre, must remain free for all artists to use.

### **3.3.2. Originality and plagiarism analysis in music**

A brief overview of the analysis in an alleged copyright infringement case used the UK law will here serve as an example of a typical process involved in a music plagiarism law suit. Plagiarism is in this context defined as dishonest copying of someone else's artistic expression. It is important to note that while infringement is a legal term that refers to a generally similar principle, plagiarism is a normative proposition that is based on a cultural notion of similarities between an existing and new work and their evaluation as unfair or dishonest, rather than their punishability under the law. Nevertheless, the normativeness of the plagiarism claims is evident in that in the face of imminent litigations stakes are high not only because of the potential infringement of economic and moral rights, but because of violations of artistic integrity of the creator of the original work, as well as potentially tarnishing the integrity and reputation of the artist accused of plagiarism<sup>118</sup>.

When a copyright or neighbouring right holder of a musical work suspects plagiarism, they can sue for infringement, provided they can prove a valid right in the work, access and that legally protected elements have been subject to copying. The plaintiff must be able to show "sufficient objective similarity between the infringing work and the

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<sup>116</sup> Rosen 2008, 152-157. For example, similarity in an unusual form was a factor in favour of finding an infringement in *Bright Tunes Music Corp. v. Harrisongs Music, Ltd*, 420 F.Supp. 177, 178 (S.D.N.Y. 1976), *aff'd sub nom., ABKCO Music v. Harrisongs Music Ltd.*, 722 f:2d 988 (2d Cir. 1983) [*Bright Tunes v. Harrisongs*].

<sup>117</sup> Demers (2006, 25) notes that in some cases, aspects like performance style and timbre, can however be protected under trademark laws and the personality rights. Similarly, right holders to trademarks have sometimes attempted to extend their brand control to song lyrics. See *Mattel Inc. v. MCA Records, Inc.* 296 F.3d 894 (9<sup>th</sup> Cir. 2002), *cert denied*, 537 U.S. 1171, 123 S. Ct. 993, 154 L. Ed. 2d 912 (2003).

<sup>118</sup> Hurvitz 2015, 250-251 discusses *Larrikin Music Publishing v EMI Songs Australia* [2010] FCA 29 FC Aust. [*Larrikin*], speculating on the alleged post-litigation suicide of the flutist Greg Ham, who improvised the infringing solo. Although such speculations were later proven misinformed, the case and its unfortunate outcome has clearly influenced the ALRC proposal discussed in later chapters.

[allegedly infringed] copyright work, or a substantial part thereof<sup>119</sup>. The critical step in this analysis is the question of copying a “substantial part”, as evaluated by a qualitative rather than a quantitative test<sup>120</sup> and the overall impression given by the musical work rather than a note-for-note comparison<sup>121</sup>. The relative importance of the excerpt used for the original work<sup>122</sup>, as well as the questions of whether the material taken may be too generic to warrant protection<sup>123</sup>, are critical in the evaluation of substantiality. An infringement can be found on either conscious or unconscious copying, but in the latter case, the causal link shown must be particularly strong and the objective similarity between the two works such that it could not be a coincidence<sup>124</sup>.

Various different strategies have been adopted in courts in different jurisdictions for the determination of what forms a “substantial part” of a musical work. Some refer heavily in their analysis to the expert testimonies of forensic musicologists, others reference to the experience and the perception of “an ordinary reasonable listener”<sup>125</sup>. Overall, however, the problem of the copyright infringement analysis in general is that the definition of originality is relative and context-dependent, and there are no generally accepted criteria neither for how minimal a part of a musical expression can be original in itself, nor for what types of expression in each popular music genre are too commonplace and unoriginal to warrant copyright protection. Consequently, the

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<sup>119</sup> *Francis Day & Hunter v. Bron* [1963] Ch 587, at 583. [*Francis Day*]

<sup>120</sup> *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 276. Compare this to the conclusion reached in *Larrikin*, in which a flute riff that referenced – evidently unconsciously – two measures of a work that in its entirety only amounts to four bars, i.e. a copying of 50 % of the original work, was found an infringement.

<sup>121</sup> *Francis Day*. See also *Coffey v. Warner/Chappell Music* [2005] FSR (34) 747 [*Coffey*], in which the similarity of some elements in a vocal phrase was considered insincere cherry-picking that could not support the finding of an infringement.

<sup>122</sup> *Hawkes and Sons (London) Ltd v. Paramount Film Service Ltd* [1934] Ch 593. In the case, the twenty second hook of the song was used in a new reel and was found to amount to an infringement. See Mcdonagh 2012, 411.

<sup>123</sup> For example, similarities between two novels on similar subject matter (“information, facts, theories and themes”) were found to be irrelevant since the original expressions of those similar ideas were different. See *Baigent v. Random House Group Ltd* [2007] FSR 579.

<sup>124</sup> *Francis Day*. A famous case of infringing unconscious copying is *Bright Tunes v. Harrisongs*, in which the melodies and chord structures of George Harrison’s ‘My Sweet Lord’ were found to strikingly similar to an earlier work ‘He’s So Fine’. Although unintentional, the copying was an infringement for which Harrison paid total \$587,000 in damages. Other famous U.S. cases discussing and finding such an eventuality include *Fisher, Inc. v. Dillingham* 298 F. 145, 147 (D.N.Y. 1924) and *Three Boys Music Corp. v. Bolton* 212 F.3d 477 (9<sup>th</sup> Cir. 2001). See Moser and Slay 2012, 193-194.

<sup>125</sup> Compare, for example, the lay listener threshold applied in *Larrikin* to the reversal on appeal of *Seth Swirsky v. Mariah Carey* U 376 F.3d 841 (9<sup>th</sup> Cir. 2004), in which the substantial similarity was established through a fairly creatively applied version of so-called Schenker analysis. The latter has been criticised, among others, by Rosen (2008, 212-214) for “manipulative” expert testimonial despite the fact that the schenkerian method is widely established in musicology – even if rarely applied to pop music analysis.

evaluation of whether an infringement has taken place necessarily involves some potentially less than objective analysis<sup>126</sup>.

Overall, the general juridical direction in the EU seems to be toward stronger and more encompassing protection of copyrighted expression, or part thereof. As discussed above, recent CJEU case law has established the threshold of originality low, making infringements relatively easy to find. Because rulings like *Infopaq* and *BSA* concerned different domains, we do not conclusively know what would be the closest musical equivalent of eleven words deemed to satisfy the “author’s intellectual creation” criterion of originality. Nevertheless, it is reasonable to assume that a given musical expression that has an independent character of some sort, even if it is short in duration, is more likely to be eligible for copyright protection than not<sup>127</sup>. Rosati<sup>128</sup> for example questions whether earlier judgements that had dismissed the copyright protection sought for a short musical phrase, as happened in the 2005 British case *Coffey*<sup>129</sup>, would still hold after the CJEU decision in *Infopaq*<sup>130</sup>.

Regarding the legality of unlicensed sampling, the main issue is the distinction between the secondary uses which the owner of the original copyright should reasonably be able to restrict on the basis of their exclusive rights, and certain unlicensed uses which the owners should be required to tolerate for the benefit of the culture as a whole<sup>131</sup>. The question is one of balance, since awarding of too much liberties may render the exclusive rights moot, whereas too restrictive rights risk enclosing the cultural stock materials for the creation of new expressions. There is no CJEU case law that would

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<sup>126</sup> See also McDonagh 2012, 417.

<sup>127</sup> See also McDonagh 2012, 418-420. See, for example cases *Hadley & Others v. Kemp* [1999] EMLR 589, in which a riff was found not original enough for a joint ownership claim for a session musician, and later *Beckingham v. Hodgins* [2003] EWCA Civ 143, finding the exact opposite.

<sup>128</sup> Rosati 2011, 809-810.

<sup>129</sup> *Coffey*. In the case a singer-songwriter claimed vocal inflections in connection of pitch contour and syncopation within a single musical phrase, sung with the lyrical hook of the song “does it really matter”, constituted an original musical work infringed by Madonna’s song ‘Nothing Really Matters’. The Court of Appeal dismissed the claim arguing that a part of an entity can only be regarded as a copyright work when it is separable from the rest of the material to an extent that warrants such independent copyright status, which was not the case.

<sup>130</sup> *Infopaq*.

<sup>131</sup> See also Reilly 2012, 163. The distinction between sampling as a recording technique and “sampling” of musical themes and other elements through occasional plagiaristic composition practices, is not always clear in the legal literature. See, for example Hurvitz 2015, 250-251 and 254-255 confusing sampling and other compositional similarities between two musical works in various music plagiarism law suits.

address sound recording sampling nor music plagiarism generally, so the applicable rules must be inferred from other suitable copyright cases<sup>132</sup>.

In the event of a sampling dispute, the regular plagiarism analysis is applicable only to a certain extent. A sampling suit is different from a general music infringement analysis in that proving a sample originated from an original third-party recording is usually not complicated, and can in most cases be further confirmed by audio watermarking and digital metadata comparison, audio spectrogram analysis or similar sound engineering techniques, and when in doubt, the right holder may request to see the production files of the original track to prove infringement<sup>133</sup>. Consequently, when copying has taken place, original track has been appropriated identically, even if it would have subsequently been edited and re-contextualised in the new work. On the other hand, the analysis of substantiality of taking is often a complex task, and the question of whether identical fragmentary copying of an existing sound *always* amounts to an infringement of copyright and/or neighbouring rights, has not been conclusively settled in most jurisdictions. Some courts acknowledge that the fact that some musical expression has been copied does not necessarily mean that the part appropriated was original and extensive enough to warrant copyright protection, while others grant unequal rights to copyright and neighbouring rights holders. These aspects will be discussed more in detail in the following chapters.

Furthermore, it is important to remember that the judicial opinions only represent the tip of the iceberg. Given the fear of potential legal costs and the risk of injunctions, the vast majority of claims are settled before the trial<sup>134</sup>. Typically, the settlement likely takes the form of a one-time “get lost” payment to the plaintiff<sup>135</sup>, but since the negotiations are private, it is difficult to get a sense of the exact frequency and financial importance of such transactions. Additionally, the downside of the settlements is that in absence of case law that would clearly define the mutually understandable boundaries of a potential infringement, the practice of settling may unintentionally

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<sup>132</sup> Some authors suggest there is a widely held myth among the industry representatives that sampling of less than three seconds might be considered too short to constitute a substantial part and hence to be infringing. There is, however, no established judicial basis for such an argument. See for example Morey 2012b, 53.

<sup>133</sup> Begault et al. 2013, 8-10.

<sup>134</sup> See Morey 2012, 52-53.

<sup>135</sup> Cronin 2015, 6.

promote and provoke frivolous claims by plaintiffs that are seeking easy payoffs<sup>136</sup>. While perhaps not more than a nuisance for a wealthy media conglomerate, such draining of profits may indeed be a serious financial strain for independent producers and artists.

Certain catalogue companies or copyright aggregators like Bridgeport Music, Inc. are sometimes accused for acting as “copyright trolls” or “sampling trolls” in that they, in analogy to patent trolls, accumulate much-sampled sound recording libraries allegedly with the opportunistic and abusive purpose of using them as tools for lucrative copyright infringement suits or as a vehicle of coercing the accused infringers to profitable settlements<sup>137</sup>, increasing the costs of creation and scaring off some contributors out of the market, which leads to both chilling of expression and to discouraged innovation<sup>138</sup>. Critics of the concept argue that common law copyright is a legally assignable and transferable commodity, and it is counterintuitive and irrational to accuse a legal entity like Bridgeport Music, Ltd. for exercising its exclusive rights over legally acquired intellectual property<sup>139</sup>. The evaluation of whether such a business strategy can be regarded frivolous would likely need to be based on whether companies like Bridgeport express equal enthusiasm in licensing material for which they own copyrights as they do for enforcing those said copyrights. Such analysis is outside the scope of this thesis, but it should be noted that inasmuch the activities of companies like Bridgeport with their aggressive copyright enforcement, have an effect on the legal ramifications set for the whole industry, and potentially to the legal realities in other jurisdictions by proxy, it may have serious undesired consequences for the “regular” sample licensing market as well. Successes of alleged sample trolls in courts may also provoke other entities in the market to litigate excessively, to the detriment of the

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<sup>136</sup> Cronin 2015, 6. Morey 2012, 53 agrees, noting that a judicial precedent might either impose even more stringent rules on sample licensing or alternatively, prevent the right holders from arguing that even small samples must be licensed. The risk has made both sides of the argument wary of not settling.

<sup>137</sup> For recent academic comments on the phenomenon of copyright trolling, see for example DeBriyn 2012; Greenberg 2014; Sag 2015. The criticism originally stems from a 2001 lawsuit *Bridgeport Music, Inc. v. 11C Music, et al.*, 202 F.R.D. 229 (M.D. Tenn. 2001), in which the company asserted nearly 500 music copyright infringement claims against approx. 800 defendants. One of the most valuable assets for these claims were copyrights to sound recording portfolio of George Clinton and ‘Funkadelic’, which are among the top 25 of the most sampled artists overall (<http://www.whosampled.com/most-sampled-artists>). Interestingly, Clinton has himself publicly supported the use of his music for sampling and has expressed discontent about the way the rights to his works are being managed. See McLeod and DiCola 2011, 92-94.

<sup>138</sup> Greenberg 2014, 128; DeBriyn 2012, 86.

<sup>139</sup> Reilly 2012, 206-207. Other authors (see Greenberg 2014, 60-61 and 90-91) seem to be more divided on the issue of whether the Bridgeport litigations specifically are frivolous by their extent or content. On the other hand, a company accused of similar business tactics failed a recent law suit on the basis that they possessed a right-to-sue rather than the original copyright, indicating certain intolerance toward such actions. See *TufAmerica, Inc. v. Michael Diamond et al*, 12-CV-3529 (AJN) (S.D.N.Y 2015).

artists themselves. In any case, the threat of lawsuits is a factor that is likely to skew the relative negotiation power in favour of copyright holders, making it more difficult for samplers to strike reasonable licensing deals.

Due to the low threshold of eligibility for copyright protection, the general ease of creating a copyrightable musical work with the current digital consumer technology and the fact that only a small fraction of copyrightable works will have any significant economic worth on the market, copyright may be particularly prone to speculative claims that concern implausible cases of misappropriation compared to other fields of intellectual property<sup>140</sup>. Indeed the as the primary locus of economic value in works of popular music often rests not so much on the originality and technical sophistication of the composition and performance practices as such, but rather on the charisma and glamour, as well as the promotion of a particular artist's performance<sup>141</sup>. Consequently, the more an author has achieved fame and earnings, the more likely target he is for infringement law suits from unknown and less successful authors. On the other hand, the scarcity of successful acts makes some of the superstars or their lawyers highly sensitive of anything they may perceive as ways of tapping into the results of their creativity through imitation or through derivative works.<sup>142</sup>

The ability for artists to create is dependent on the sufficient scope the public domain regardless of the field or medium. Goldstein and Hugenholtz argue that given the limited possibilities of music as a form of expression, courts tend to be inclined to insist on stronger similarities between two musical works for an infringement to be found<sup>143</sup>, with the copyright protection being respectively narrow. One can agree there are certain aspects of popular music production logic and the vocabulary of musical expression that make the robustness of public domain particularly important in comparison to literary or visual expression, for example. Such conventionalism is evident in the highly standardised harmonic and modal progressions of the western twelve-tone scale, the typical structure of a work in popular music idioms<sup>144</sup>, the

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<sup>140</sup> Cronin 2015, 4.

<sup>141</sup> Livingston and Urbinato 2013, 281, noting that the musical content of many contemporary popular works is "rather simple, stylistically similar, and perhaps even generic".

<sup>142</sup> See Cronin 2015, 5. Certain right holders, such as former Rolling Stones manager Allen Klein of the ABCKO Music discussed in the context of the Verve and George Harrison disputes, are particularly famous for their aggressive and often successful right enforcement tactics.

<sup>143</sup> Goldstein and Hugenholtz 2010, 300.

<sup>144</sup> A set of refrains consisting of four or eight bar sections, separated with a repeating chorus, which contains the possible hook of the song mostly in one key only. The rhythmic foundation, most often in quadruple time is typically synchronised with the harmonic rhythm (the chord changes).

duration optimised for radio play<sup>145</sup> and other genre-specific conventions<sup>146</sup>. Aspirations for commercial success tend to limit the maximum vocal range of the melody and the complexity of the lyrics<sup>147</sup>, inasmuch certain sing-along-ability is striven for, and generally the top billboard hit songs tend to have a larger number of linguistic clichés in their lyrics than other songs in their respective genres<sup>148</sup>. Some authors indicate practical limitations caused by the common musical illiteracy of the performers to the complexity of structures that can reasonably be memorised without a written aid<sup>149</sup>. Such considerations of common *scènes à faire*<sup>150</sup> and originality are also relevant to sampling cases to the extent the legitimacy of the use of a third-party expression is evaluated based on whether the sample contains original expression.

It is also possible that one of the other factors likely contributing to the increased number of plagiarism litigations<sup>151</sup> is the effect of internet in bringing about “collisions between commercial and non-commercial milieus”, making niche creative acts that earlier coexisted peacefully with the commercial entertainment industry become perceived as threats to copyright and hence an object of increasingly aggressive enforcement efforts<sup>152</sup>. Similarly, audio fingerprinting techniques have made the finding of an infringement easier, indicating that the increase in disputes is not necessarily a sign of increased copying but rather a result of better tools of detecting it.

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<sup>145</sup> Typically between three and four minutes.

<sup>146</sup> In a somewhat controversial statistic meta-analysis, Serrà et al. (2012) show general trends of diminishing variation in pitch sequences, timbral palette and dynamic levels in the popular music between 1955 and 2010.

<sup>147</sup> Rhyming is more relevant in some genres than in others, and the genre of a musical work can to an extent be inferred from certain statistical aspects of the lyrical content, including the rhyming patterns used. See Mayer et al, 2008.

<sup>148</sup> Smith et al. 2012. The results seem to indicate that for a song to reach popular acclaim, the lyrics cannot deviate too far from the “normal” established by the traditions of the genre.

<sup>149</sup> Cronin 2015, 45-48. Such limitations are, however, somewhat mitigated by the recent computer-based digital composition techniques.

<sup>150</sup> *Scènes à faire* are elements that follow necessarily from a given theme or premise; literally scenes that must be done. See Rosen 2008, 7.

<sup>151</sup> Overall, the number of music copyright infringement cases in the U.S. has grown exponentially during the 20<sup>th</sup> century, more than quadrupling between the first and the latter half of the last century (15 cases in 1900-1950 vs. 61 cases in 1950-1999, almost half of which in the 1990s). In the first *decade* of the 21<sup>st</sup> century there have already been half the number of opinions compared to the *fifty* years prior (37 cases in 2000-2013). See the Case List Music Copyright Infringement Resource <http://mcir.usc.edu>.

<sup>152</sup> See Arewa 2011, 1845-1846.

## 4 MUSICAL INTERTEXTUALITY AND SAMPLING

### 4.1. Brief history of intertextuality in music composition

There is no clear consensus in musicology whether or to what extent music is analogous to a natural language, but it is known that instrumental music can establish general connections between intra-musical or extra-musical ideas, forge links between general styles or specific works, and even evoke fairly detailed shared imagery and connotations in listener populations through the use of *topoi*<sup>153</sup>, but it is not very effective in carrying exact and specific messages of semantic-linguistic content. Lyrics or other texts arguably add another dimension of referential tools available for a music composer, but even then most music communicates on the level of impressions, moods and general associational networks rather than on the level of precise semantic signifieds<sup>154</sup>.

As in any field of art, innovation through a creative circulation of ideas by quotations, references and allusions to existing works, as well as to the shared pool of common structures and expressions of the genre, has been a pervasive element of all musical styles of all eras<sup>155</sup>. Only the extent and the manner has taken different forms depending on the economic infrastructure of music creation and the laws and customs of the society, as well as the rules and traditions of the genre. In various types of folk music as well as later in blues and jazz, for example, the traditionally dominant form of composition has been improvisation and arrangement on the basis of a well-known ‘standard’ and its chord progressions and motives. Some of these standards are unattributable folk songs or other popular melodies that fall safely within the realm of public domain, whereas others are attributed to individual composers or artists. Specifically in the context of 20<sup>th</sup> and 21<sup>st</sup> century music, the oral traditions of creative variation on established forms, improvisation and composition through performance

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<sup>153</sup> As suggested by Huovinen and Kaila 2015, a *topos* [pl. *topoi*] can be defined as “a set of musical entities, as delimited and coherently furnished with meaning by consistent trends of shared extramusical associations in a significant majority of a given listener population”.

<sup>154</sup> Signified is a concept of Saussurean semiotics, meaning the mental concept referred to by a sign, or *signifier*.

<sup>155</sup> Some examples of such common public domain elements include the 12-bar blues structure, I-II6-V-I chord progression, La Follia -theme with its folk-song-like recognisability and the Picardy cadence, in which the last chord of a work in minor key is substituted with an unexpected major chord. For a concise overview of creative use of existing musical works in various genres, see Demers 2006, 31-70; Arewa 2006, and 586-600 and 612-628 and McDonagh 2012, 401-407.

have continued as phonographic orality, in which on sound recordings have become the dominant mode of creation for popular music<sup>156</sup>.

However, also in western art music, which is often seen as the prototype of autonomous music in the copyright law contexts<sup>157</sup>, composers have referenced and re-contextualised themes, harmonic patterns and other musical ideas in a number of ways ranging from subtle to what may seem from today's copyright-dominant angle borderline plagiaristic<sup>158</sup>. Some examples of musical material reuse in art music include compositions based on a theme by some earlier or contemporary composer, or a musical community, such as in Ludwig van Beethoven's 'Diabelli Variations' based on a theme by Anton Diabelli, or as in the use of Hungarian folk music by Johannes Brahms, Franz Liszt and Béla Bartók. The contrasting use of stylistic elements of distant genres or eras, such as the rhythmic pattern of a minuet, the complex contrapuntal structure of a fugue, a passing reference to an ancient Gregorian hymn or a B-A-C-H motive<sup>159</sup> have been utilised to evoke a connection or an homage to the history or to a particular predecessor<sup>160</sup>. Since the 1920s, modernist and avant-garde art music composers like Darius Milhaud, Pierre Schaeffer, Karlheinz Stockhausen and later John Cage and Steve Reich have experimented with the use of gramophones and recorded noises as a method of creating complex sound-collages<sup>161</sup>. In the post-war art music, intertextuality

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<sup>156</sup> Toynbee 2004, 126-127.

<sup>157</sup> For instance, Arewa (2011, 1832-1833) criticises the excessive idealization of Romantic conceptions of individualistic and autonomous genius author, which has led to a failure of copyright law to recognise the central role creative borrowing in music, and the degree to which copying and borrowing can themselves constitute sources of creative innovation in music.

<sup>158</sup> Burkholder's typology of musical borrowing captures a wealth of possible techniques a composer can use in referencing to an earlier work, including the relationship between the two works (e.g. structural, stylistic, cultural, historical), the nature of the existing elements alluded to in the new work (from full texture to instrumental colour), the relation of the borrowing to the new work, the alteration of the borrowed material in the new work, the function of the borrowed material in the new work, both in musical terms (e.g. structural or thematic) and where relevant, in associative or extramusical terms. In addition to the instrumental techniques discussed by Burkholder, possible lyrics can naturally be used for similar referencing purposes as well. Burkholder 1994, 867-869.

<sup>159</sup> B-A-C-H in German nomenclature, or B-flat - A - C - B-natural, has been used both by J. S. Bach himself, and later by hundreds of other composers as a reference or homage to the Baroque composer. Dmitri Shostakovich devised a similar musical monogram for himself, D-S-C-H (D - E flat - C - B natural), which has also been adopted by some later composers as a shorthand for referencing him in their works.

<sup>160</sup> Since the early Romanticism, fugues had been considered an archaic and excessively complex compositional structures, and so the conscious use of fugue of later composers is often read as a reference to the Baroque era and specifically to J. S. Bach, as well as an indication of a high level of compositional craftsmanship and sophistication. One of the most well-known examples of medieval themes preserved as a staple musical quotation is *Dies Irae*, which has been widely used by composers from Joseph Haydn to Sergei Rachmaninoff and to Arthur Honegger, to name a few.

<sup>161</sup> McLeod and DiCola 2011, 36-41. Of course, collage techniques have long existed in other domains, including visual arts (Marcel Duchamp, Pablo Picasso) and literature (T. S. Eliot, James Joyce).

has in general provided a way to preserve a level of recognisability and familiarity for the listeners in the context of alienating modernist structures, as well as served as a vehicle for political, societal or artistic commentary. A prime example of such technique is the third movement of Luciano Berio's 'Sinfonia', in which almost a complete movement from Mahler's symphony is superimposed with over hundred quotational extracts from other works, connecting in various ways to the underlying symphony or to the spoken texts drawn from Samuel Beckett monologue work.<sup>162</sup>

With respect to the debate about sampling, it is relevant to note that a musical reference can in general take a variety of different forms by technique and by extent, and it can serve a number of purposes from non-referential appropriation of existing materials for building blocks of new expression, to providing a powerful vehicle of cultural or societal criticism. In some situations, a swiping allusion or an extremely subtle use of a small element may suffice to evoke detailed connotations in specific listener groups. Furthermore, the significance and meaning of the reference can be very different depending on the genre of the new work and the respective conventions and listener expectations. The simple fact that some existing materials had been used does not provide enough information for the cultural evaluation of a particular use.

#### **4.2. Intertextuality by sampling**

Sampling is an umbrella term for a wide range of musical styles and composition techniques. The earliest origins of sampling date to 1950s, during which a number of artists used analog tape machines to cut, loop and manipulate pre-recorded sounds. Later in the 1960s and 1970s, sampling was a manual live performance technique used by Jamaican disc jockeys and later block party DJs that used turntables and mixers to create seamless transitions between songs.<sup>163</sup> The development of the MIDI synthesizer in the 1980s enabled the development of digital sampling practices, in which a sample became a perfect reproduction of an earlier recording, readily open for a wide range of manipulations and a simple insertion into a new song. With the decreasing cost of equipment, sampling techniques spread widely and became increasingly complex. A style typical of early hip-hop in the 1980s by artists such as De La Soul, Public Enemy and Beastie Boys patched together hundreds of tiny musical fragments in complex combinations, using them more as anonymous and unrecognisable raw materials of a

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<sup>162</sup> Burkholder et al. 2010, 952-953.

<sup>163</sup> Reilly 2012, 157.

veritable “collage of sound” than points of reference and intertextuality<sup>164</sup>. In its extreme version, one album could contain several hundreds of snippets from a wealth of records of various genres. This technique has all but disappeared from most commercially successful genres due to the changes in sample licensing regimes, as will be discussed in the following chapters.

Over the course of 1990s and 2000s, sampling spread also to a host of other commercially valuable genres, such as disco, house and rave, and it is no doubt one of the most important composition techniques of electronic dance music<sup>165</sup>, but sampling techniques also play an important role in the creation of music of various other genres, from experimental and avant-garde to classical concert music<sup>166</sup>. In hip-hop, the most typical form of sampling in the 1990s and 2000s has been the type in which a lengthy part of the original – for example a bass line, a hook or a chorus – is used in its entirety and in such a way that the original is prominently audible in the new work. Examples of such works abound, from Rick James’ “Superfreak” (1981) in MC Hammer’s “U Can’t Touch This” (1990) to Police’s “Every Breath You Take” (1983) in Puff Daddy’s “I’ll Be Missing You” (1997).<sup>167</sup> Furthermore, sampling has become a part of a multifaceted international development of local music cultures and immigrant communities, for which the techniques of intertextuality and re-contextualisation provide powerful tools of self-expression and self-identification<sup>168</sup>.

Overall, the most common sampling techniques can be categorised in a few basic types<sup>169</sup>. In ‘sound mining’, short snippets of an earlier track or isolated sounds are used as raw material for the creation of new sound textures. In this kind of sampling, the original source of the excerpt is not of specific relevance for the new work, and often the connection can indeed only be established by the discerning and knowledgeable expert audience, if anyone. More extensive borrowing can take a number of forms, but for the purpose of this thesis, two subtypes will be addressed: short quotation-type referencing that establishes a connection to an earlier work without *per se* making it a structural

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<sup>164</sup> Azran 2014, 72; McLeod and DiCola 2011, 2-4.

<sup>165</sup> The history of sampling is described in some detail in Reilly 2012, 157-158.

<sup>166</sup> Burkholder et al. 2010, 964.

<sup>167</sup> For further discussion of these various types of sampling and for examples of the artists respectively, see McLeod and DiCola 2011, 2-4.

<sup>168</sup> For an overview of several such local movements, see Nitzsche and Grünzweig 2013.

<sup>169</sup> The present categorisation represents no generally acknowledged division of sampling techniques, nor does it necessarily cover all possible instances of sampling. Rather, it is an attempt to describe the majority of available techniques in the field of sampling in terms compatible both with the musical practices and with the related law.

element supporting the new work, and other extensive references and homages to earlier works, in which the recognition of the borrowing and the identification of the source are critical for the “layered sense of meaning”<sup>170</sup> in the new work. A collage is a work that consists of juxtaposition of the network of multiple simultaneous references to a group of works. Finally, a parody is a work that mocks or comments an earlier work with a specific purpose ranging from humour to political or societal criticism. Mash-ups and remixes are another type of sampling, in which two works from distinctly different artists or genres are layered together in their entirety, or an existing work is reworked through an addition of a contrasting percussion track, while using the original track virtually unedited. However, given the aesthetic and structural differences between the mash-up and remix sampling and the other forms that only utilise *excerpts* of existing records, the legal status of mash-ups and remixes will not be directly addressed in the context of this thesis.

Despite the increasing dominance of the concept of autonomous authorship over the last century, classical composers have rarely met with copyright infringement claims. The reason is not necessarily that the copying or borrowing itself would be of such a different nature, but rather that “classical music” is considered as art and hence, inherently uncommercial. While there is a strong element of cultural hierarchy in such an evaluation, it is also more likely to be an accurate assumption that a given classical work will not generate revenue equal to a work in popular genres, and consequently, it is less lucrative a target for a lawsuit or other aggressive rights enforcement tactics<sup>171</sup>. Hip-hop, on the other hand, is a genre particularly prone to law suits is its tradition of open celebration of the (musical) connections with the past, as well as the commercial success. Nevertheless, in hip-hop, as in most other musical genres, the notions of dialogism and intertextuality are not just aspects of indifference towards the law, but rather the critical keys to understanding the relation between the creative repurposing of existing materials and musical innovation.

In an effort to introduce some analytical tools for the dissection of intertextuality in sampling, Williams distinguishes between discursive (longer phrase with thematic

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<sup>170</sup> Théberge 2004, 149.

<sup>171</sup> Interestingly, in the field of visual arts the division between “uncommercial” high art and “commercial” popular works is similar, and the courts have been willing to provide more leeway for artistic appropriation in such high-revered works despite the fact that certain pieces of visual art sell for millions, making them effectively commercial artefacts.

significance) and musematic (riff-based) samples<sup>172</sup>. Furthermore, a distinction between autosonic and allosonic quotations is suggested, in which ‘autosonic’ refers to direct appropriation of the material through digital sampling, and ‘allosonic’ to a re-performance of an existing music<sup>173</sup>. This distinction is of course particularly relevant in copyright disputes in that an autosonic quotation potentially evokes both composition copyright and neighbouring rights interests, whereas an allosonic quotation in most cases only infringes the rights of the copyright holder of the original work re-performed<sup>174</sup>. As noted before, autosonic sampling is only one of the many ways an artist can use to creatively evoke or reference a pre-existing work or an idea, author, era or other meaning attached to it in the collective consciousness of the listeners. However, specifically using sampling as the chosen technique of reference brings about certain aesthetic benefits of shared cultural and historical resonance<sup>175</sup>. Williams uses the term “vinyl aesthetics” to describe the desire of the samplers to signify authenticity through leaving the non-musical sounds of the original recording audible in the new work. Disruptive sonic qualities like vinyl popping, hiss and scratching, which could easily be cleaned from the digital track, are left intact on purpose to celebrate the connection between the old and the new work as a form of intertextual, inter-stylistic and inter-generational dialogue.<sup>176</sup> Certainly, samples may also be used to cut costs by avoiding the need to hire musicians to play the required sounds, or as a vehicle of tapping into the popularity and commercial success of an earlier work. For these reasons, many sampling artists choose to use original sound recordings instead of new replays, bringing about the requirement of negotiating a license for such a use.

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<sup>172</sup> Williams 2015, 209. The terms derive originally from popular music scholar Richard Middleton. Musemes are defined by Philip Tagg (see for example Tagg 2012, 232-238) as minimal music-structural elements, embodied with certain culturally ingrained semiotic properties, which in combination give rise to semiotic expression.

<sup>173</sup> Williams 2015, 208-209.

<sup>174</sup> Occasionally, performing artists have attempted to exercise the rights of publicity in sound-alike and voice misappropriation cases, but they have met varying success; see *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9<sup>th</sup> Cir. 1988) and *Waits v. Frito-Lay-Inc.* 978 F.2d 1093 (9<sup>th</sup> Cir. 1992) for successful claims, but *Laws v. Sony Music Entertainment, Inc.* 448 F.3d 1134 (9<sup>th</sup> Cir. 2006), *cert. denied*, 127 S. Ct. 1371, 167 L. Ed. 2d 159 (2007) for an unsuccessful protest against a sample including a sound-alike singer. See Rosen 2008, 324-329.

<sup>175</sup> McLeod and DiCola 2011, 100-101.

<sup>176</sup> Williams 2015, 208-210; McLeod and DiCola 2011, 98-101. The concept of ‘aura’, derived from Walter Benjamin’s 1936 classic essay “The Work of Art in the Age of Mechanical Reproduction” is often referred to in this context. The use of the term is, however, somewhat anachronistic, since Benjamin specifically refers to a copy of the original work *lacking* the aura of the original. In the current postmodern era of baudrillarian simulacrum, in which the difference between the original and imitation disappears, sample refers to a *simulated* aura of the original, but given the state of reproduction technology in 1936, Benjamin himself could not have used the term for indicating such a distinction.

In the larger context of referentialism between works, distinctions also can be drawn between textually signalled and unsignalled forms of intertextuality. Textually signalled intertextuality draws attention to the act of borrowing, whereas in textually unsignalled referencing the relation between the old and new is more subtle. Typical examples of textually signalled references include specific forms of expression that are dependent on the existence of the earlier work and celebrate it, such as parody, burlesque and homage. Also pastiche is generally textually signalled, although it differs from the three other forms in that it does not have an evaluatively predetermined relation to the original work.<sup>177</sup> However, textually signalled references can also take place for example through references and citations of specific lyrics of earlier works, or by a striking juxtaposition of the new and borrowed material<sup>178</sup>. Textually unsignalled referencing, respectively, ranges from concealed forms of imitation, such as plagiarism, forgery and hoax, to unconcealed and hence more neutral copying and variation of the original<sup>179</sup>. In the context of this thesis, the focus will be mainly on the textually signalled form of referencing.

#### **4.3. Structure of a sample licensing process**

The legal debate on the realities the sample licensing has sometimes been criticised for being speculative and side-tracked by a political agenda<sup>180</sup>. McLeod's and DiCola's<sup>181</sup> extensive sets of interviews of U.S. sampling artists and other industry representatives and stakeholders, as well as Morey's<sup>182</sup> similar but smaller scale work with sample artists in the U.K., provide thus revealing and important empirical data on the issue.

There is no exact blueprint for how a sample license negotiation runs, since each clearance is idiosyncratic and handled on a case-by-case basis<sup>183</sup>. The first necessary step in securing a license is the identification of the rights holders<sup>184</sup>. As discussed in

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<sup>177</sup> Dyer 2007, 24.

<sup>178</sup> Williams 2015, 207-210. The textually signified intertextuality comes close to the definition of signifying(g), a practise of paraphrasing earlier materials "with a difference", i.e. highlighting the connection to the pre-existing work, author or tradition through a signalled change to its original form. For the purposes of the current treatise, the umbrella definition of intertextuality covers all such techniques.

<sup>179</sup> Dyer 2007, 24.

<sup>180</sup> See also McLeod and DiCola 2011, 17.

<sup>181</sup> McLeod and DiCola 2011.

<sup>182</sup> Morey 2012.

<sup>183</sup> McLeod and DiCola 2011, 149.

<sup>184</sup> The alternative situation, in which the right holder tracks down the sampler to object to the use of the sample is also possible, although the probability that an artist will proactively seek to license increases in the course of their career. See McLeod and DiCola 150-151; Demers 2006, 117.

the previous chapters, the negotiations must be completed for both composition copyright and the neighbouring rights separately from two different right-holding entities, for each of the samples used. Especially when several samples must be cleared, the task of correctly identifying the entity with the authority of granting the license is labour-intensive, and sometimes even borderline impossible without the help of an experienced music manager or lawyer. Such an intermediary can bring in detailed understanding of the system and its customary intricacies, as well as the benefit of long-established business relationships with the relevant parties.<sup>185</sup> Some of the major record labels have established separate clearance departments for the facilitation of licensing of the works in their catalogues<sup>186</sup>. Others deal with the issue by outright refusing to license any samples, sometimes even against the will of the original artists, and correspondingly discourage their own artists from using samples in their music<sup>187</sup>. An artist with no previous experience of finding the right owners and negotiating the licenses is at particular disadvantage<sup>188</sup>.

The major labels typically outsource the clearance process to a number of specialised sample clearance houses. Even if costly up front<sup>189</sup>, such outsourcing may be beneficial, since the clearance houses may be able to secure better deals with often sampled artists and the copyright and neighbouring rights holders of their works<sup>190</sup>, as well as saving time and transactional costs of tracking down the right holders. In some cases, major record companies have provided sampling artists with access to their extensive catalogue for archive-mining collaboration that can be very beneficial to both parties<sup>191</sup>.

The deals struck between the rights holder and the sampler are typically lump-sum buyouts, royalties, co-ownership or assignments of copyright. Sometimes the rights holder may agree to license the sample without a separate charge as long as the original work is credited appropriately. In the U.S., an average sound recording buyout (master clearance) ranges from \$500 to \$15,000 per sample, although some very exceptional samples may cost several tens of thousands. A royalty is often assigned for recordings

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<sup>185</sup> McLeod and DiCola 2011, 155 and 163-164.

<sup>186</sup> Azran 2014, 77

<sup>187</sup> Morey 2012, 54; McLeod and DiCola 2011, 180. Some notorious examples of strict-line artists that do not allow any sampling of their works include Anita Baker, the Beatles, Prince and O'Sullivan, although many others allow licensing in some situations and deny it in others.

<sup>188</sup> McLeod and DiCola 2011, 163.

<sup>189</sup> McLeod and DiCola (2011, 165) cite a figure of \$500 for a negotiation for a single clearance. However, in most cases two such negotiations are required per each sample, and if the negotiation is difficult, the fee may increase to thousands of dollars.

<sup>190</sup> McLeod and DiCola 2011, 149-150.

<sup>191</sup> McLeod and DiCola 2011, 156-158.

with significant commercial potential, and they range typically from \$0.01 to \$0.15 per album sold. Royalty or a co-ownership of the copyright for the original songwriter and the publisher (publishing clearance) is usually a percentage of 10 to 50 percent of the proceeds, making the rights holder of the original work essentially a co-writer for the new work. While corresponding figures for the sample licenses in Europe have been difficult to come by, Morey<sup>192</sup> notes that in general the demands of both publishers and record labels for sample licenses have increased considerably over time, with an interviewee quoting a sum of £10,000 to £20,000 per sample for the master clearance.

The exact result of the negotiation depends on a host of factors pertaining to the original artist, the sampling artist and the work sampled. The price of the license may depend then on the quantitative and qualitative importance of the excerpt used, its role (chorus, melody, background; vocal or instrumental) and recognisability in the original work, the qualitative and quantitative prominence of the sample in the new work, the number of repetitions, the perceived genre or aesthetic quality (including whether it contains any potentially objectionable elements) as well as the commercial potential of the new work, the popularity or fame and commercial successes of the original artist and the sampling musician respectively, whether either or both have a major label or distributor, and consequently, what is the estimated capacity of the sampling artist to pay for the use.<sup>193</sup> In the case of highly successful artists, the licensors may be tempted to charge premium prices knowing that the sampler could afford them<sup>194</sup>. In short, the pricing of the samples is idiosyncratic and difficult to predict before negotiations<sup>195</sup>.

The way the licensing process is typically structured may leave the samplers in a highly disadvantaged negotiation position. It is usually necessary for the sampling artist to create their work first in order for them to then secure a license to use a sampled work. This is in part due to the creative process itself, as the artist likely wants to be sure that the sample is essential enough for the expression sought for, and that the work is likely to enjoy enough commercial success to make the licensing worthwhile. But since the licence price is flexible and likely depends on various factors, the licensor typically wants to hear the finished product before they announce how much they will charge for the use. This means that the sampler must first invest the time, effort and money in creating the new work with the sample, only to be then presented with a price tag of

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<sup>192</sup> Morey 2012, 55.

<sup>193</sup> McLeod and DiCola 2011, 153-154.

<sup>194</sup> Azran 2014, 78-79 discusses Jay-Z as an example of an artist that is likely to be charged more for clearing a sample than a commercially less successful act.

<sup>195</sup> McLeod and DiCola 2011, 166-167.

unlimited sliding scale, or the prospect of having the license declined altogether. Even when the licensor is not directly aiming to charge an outrageous price for the sample as such, the inherent imbalance in bargaining power enables the licensor to charge systematically higher prices than would have been possible in a more neutral negotiation arrangement.<sup>196</sup>

Furthermore, it may not be uncommon for the licensor to resort into extortion by delaying the license agreement in the hopes of increasing the price further, knowing that the samplers' release date sets a powerful incentive to reach an agreement almost at any cost. In such a gamble, the licensor might risk losing a licensee due to the holdup, but will nevertheless have the option of court action and possibly injunctions should the sampler decide to go forward with the release without a license, whereas the sampler may lose all of the work put into production of the track.<sup>197</sup> The delay of a few months in the release of the record may have drastic impact on its commercial potential and hence on the artist's career prospects due to the quick seasonal cycles of promotion in the sound recording business<sup>198</sup>. The accumulated risks and transaction costs create significant disincentives for prospective sampling artists.

The money from the sample license flows to different parties according to the specific contracts in place. For example, a recording artist may be eligible to receive 50 percent of the sampling revenue, which is then charged to "recoup" the expenditures made by the record label for the making and promoting the original album. Similarly, the artist using a sample is typically paying the licensing fees in exchange for further deficit to be deducted from their future profits. For this reason, most artists do not directly receive money from the sampling licenses granted.<sup>199</sup> The composer of the work, on the other hand, likely shares the royalty with the publisher with fewer expenditures to recoup<sup>200</sup>.

#### **4.4. Inefficiencies and obstacles of sample licensing**

The increased fees for licensed samples, the related high transaction costs and the overall skewed balance of power in negotiations between the sampling musicians and the right holders account for a number of experienced inefficiencies in the sample

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<sup>196</sup> McLeod and DiCola 2011, 160-186; see also Azran 2014, 77-79.

<sup>197</sup> McLeod and DiCola 2011, 169; Morey 2012, 53.

<sup>198</sup> McLeod and DiCola 2011, 171-172.

<sup>199</sup> McLeod and DiCola 2011, 79-81. The authors note that according to an interviewee, possibly 85 to 90 percent of the artists are in unrecouped position. Producers, on the other hand, typically get a share of the contractual royalties of the artists, meaning they are directly paid when royalties are available.

<sup>200</sup> McLeod and DiCola 2011 83-84.

licensing market. While it is generally assumed that a free market will keep prices of a given commodity in check<sup>201</sup>, the structure of the sample licensing industry does not follow the general rule very well. The goods of the sample market, songs and parts thereof, are often unique. Inasmuch there are no reasonable substitutes and a rights holder refuses to grant a license a given song, the sampler has no option of simply turning to another seller to license the same song.<sup>202</sup> At the same time, the sample market is thin and infrequent in that a particular sample is likely licenced only a few times during a year, if at all, which keeps the transactions untransparent and complicates the balancing process of supply and demand<sup>203</sup>. Furthermore, some authors regard the whole market for minimally small samples “artificial and inefficient” in the first place<sup>204</sup>. These inflexibilities are prone to make the competition in the market an inefficient monopoly that drives the prices up.

Overall, many authors agree that the current rigid sample clearance culture has led to an overall decline in the quantity and quality of sampling, as well as in the creative progress of sampling as a composition technique<sup>205</sup>. The few commercially viable artists that still can afford to sample, often settle for one extensive sample per song to get their money’s worth, approaching the non-transgressive and obvious appropriation style of a cover song<sup>206</sup>. Others have had to change their musical style to fit the new contours of copyright law, which has pushed the technically complex collage sampling to “non-commercial sector, the underground economy, or nonexistence”.<sup>207</sup> Another problem of sample licensing is the issue of royalty stacking. When an artist samples a work that in itself uses samples of earlier works, the latter artist must clear not only the part directly used, but also all the samples used in that earlier work, causing a domino effect of ever-accumulating transaction costs<sup>208</sup>. Since the size of the label has become one of

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<sup>201</sup> This is also the argument of the *Bridgeport I* court, as will be discussed in the following.

<sup>202</sup> Azran 2014, 76-77.

<sup>203</sup> McLeod and DiCola 2011, 160 and 296. Certainly, as the authors point out, to the extent sampling artists may turn to alternative suppliers of equivalent samples and the licensing fee structures follow on average the standard range of the industry, the aggregated sample market is not small. For the culturally most valuable samples this might, however, not be the case.

<sup>204</sup> Azran 2014, 106.

<sup>205</sup> See for example Vaidhyanathan 2001; Arewa 2006; Demers 2006; McLeod and DiCola 2011.

<sup>206</sup> See Vaidhyanathan 2001, 143.

<sup>207</sup> McLeod and DiCola 2011, 188.

<sup>208</sup> McLeod and DiCola (2011, 97) illustrating this principle: “Takeover” by Jay-Z samples a snippet of six words from KRS-ONE’s “Sound of Da Police”. The KRS-ONE work samples a brief guitar riff from Grand Funk Railroad, which in turn was covering a song by the Animals, the work of whom is a rewriting of a 19<sup>th</sup> century folk song originally copyrighted by an ethnomusicologist Alan Lomax. Hence, the Jay-Z’s “Takeover” lists as co-authors KRS-ONE, the Animals and Alan Lomax. Despite the fact that the KRS-ONE sample in “Takeover” does not include the guitar riff sample that causes this absurd chain of authorship

the determining factor in whether sampling is possible, it is the artists in the mainstream segments of the music industry and the independent acts that most suffer the most from the loss of these potentially creative composition techniques<sup>209</sup>. Certain artists, however, seem to be exceptional in that they are able to navigate the system without further trouble despite not complying with its rules. A sampling artist Gregg Gillis known as Girl Talk is famous for using rich textures of sampling in collage-type works without obtaining any licenses and without getting into legal trouble<sup>210</sup>. This indicates that the industry practices may in some cases tolerate even significant unauthorised uses, although this may be cold comfort for the majority of artists that have, for whatever reason, not achieved such an exceptional status<sup>211</sup>.

As an example of how the requirement of full master and publishing clearances on a sample-heavy sound recording has made certain types of music financially impossible to publish, McLeod and DiCola present hypothetical calculations of how the full clearance of two early, commercially highly successful and sample-heavy hip-hop records, Public Enemy's *Fear of a Black Planet* (1990) and the Beastie Boys' *Paul's Boutique* (1989), would cost under the current sample licensing regime and the current license prices. The conclusion is that neither of the albums would be financially possible to release, since the accumulated price of the samples would bring the artists further in debt with every copy of the album sold, totalling in losses of tens of millions of dollars for the sampling alone.<sup>212</sup>

When licensing is not an option, the sampling artist may choose to disguise the sampling in the hope of avoiding detection<sup>213</sup>, to hire session musicians to replay the required sound or a passable substitute of it, to use digital sound banks to create an equivalent sample, to use another sample from another artist perhaps more open to sample licensing, or to abandon the sample altogether. With the recent audio fingerprinting techniques, the identification of even the most distorted and fragmented

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crediting, the rules of the industry require that the work used is licensed *as a whole*, and it is only the fee that reflects the exact amount of taking from the original.

<sup>209</sup> McLeod and DiCola 2011, 161; see also Azran 2014, 78.

<sup>210</sup> McLeod and DiCola 2011, 118.

<sup>211</sup> Another artist that may enjoy liberties not available for everyone is the parody artist Al 'Weird' Yancovich. A crucial difference between these two artists is, however, that Yancovich generally requests permission from the original right holders, which both demonstrates his good faith intentions and would likely work in his favour in a potential law suit. Despite the common misconception, however, his *satiric* works would likely not qualify as parodies under the *Campbell* rule.

<sup>212</sup> McLeod and DiCola 2011, 201-212. The musical composition share percentages alone total 3120 % and 4565 % shares of the royalties.

<sup>213</sup> This option is suggested by, inter alia, Dougherty 2007, 484.

sample is possible way beyond the recognition capacity of an average listener<sup>214</sup>. This makes disguised sampling often a risky strategy, especially given that certain right holders or their legal representatives are notoriously proactive in enforcing their rights.

#### 4.5. Debates for and against unlicensed sampling

There are some stark differences in whether the current legal position of unlicensed sampling is considered to strike a fair balance between these competing rights. The majority of legal and music scholars<sup>215</sup> lean towards the view that a clear-cut rule that forbids all unlicensed sampling is too limiting and risks enclosing the breathing space of creative expression in certain music genres. Such arguments are often accompanied by a more general concern about the strengthening of exclusive copyright control above and beyond its due proportions, and about the consequent erosion of the public domain and the related communicative and creative liberties<sup>216</sup>. Excessive licensing regimes can be seen as an indication of a classic market failure, in which the private costs of the legitimate action, in this case of acquiring a sampling license, exceed the expected value from the use, making the user reluctant to engage in the use even if it could have brought economic benefits to both parties and for the public<sup>217</sup>.

The matter of argument then becomes whether or not sampling can be considered a new form of composition that utilises as its raw material sounds rather than sheet music, and for that reason is *compelled* to use earlier recordings, although in creative and transformative ways. If that is the case, samplers should theoretically be allowed the widest possible range of socially valuable unauthorised uses, or “efficient copyright infringements” to support versatile development of this new form of expression<sup>218</sup>. Some authors go even further, arguing that a liberal attitude towards unlicensed sampling might bring about efficiency gains, since the mutual financial benefits reaped from the sampling by both the artist and the rights holder present an economically more favourable situation than the one in which high transaction costs and licensing fees prevent the new work from being released, to the loss of all the parties involved, as well as the general public<sup>219</sup>. The supporters of such a view sometimes regard moral rights as an unnecessary obstacle for the free flow of cultural ideas that are essentially

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<sup>214</sup> McLeod and DiCola 2011, 129.

<sup>215</sup> See for example Arewa 2006; Demers 2006; Boyle 2008; McLeon and DiCola 2011.

<sup>216</sup> See for example Boyle 2008.

<sup>217</sup> Azran 2014, 80-81.

<sup>218</sup> Fagundes 1814-1815; Gordon 2003, 149-151.

<sup>219</sup> Azran 2014, 78-79; see also Fisher 2001.

independent of petty disputes about artists' integrity over expressions already released for public circulation<sup>220</sup>.

At the other end of the spectrum are a minority of scholars<sup>221</sup> that see no evidence that the requirement to license samples would stifle creativity, and hence find it in most cases reasonable to allow copyright holders to fully control the use of their sound recordings. They emphasise that modern digital sampling enables exact cloning of not only musical ideas, as happens in the case of compositional paraphrasing or allusion, but also the not-coincidental and *parasitic* duplication of the unique, copyright-protected expressions into the new recording<sup>222</sup>. While the usefulness of the idea/expression dichotomy in music can be generally debated, this position does have a solid base in that it defends the right of the copyright holder to protect their legally recognised property against abuses. It also recognises the existing sample market as a relatively functional forum for transactions that allow later creators to tap into materials from earlier recordings without violating the copyright holders' legal entitlement for the protection of their rights and for remuneration.<sup>223</sup> This frame of argumentation also emphasises that the constraints may work as *incentives* for future artists to seek alternative ways to create<sup>224</sup>. Furthermore, it can be contented that there are always practical and financial restrictions that put practical limits on possibilities that might in theory be artistically interesting and valuable, and that it is not the function of the law to try and eliminate such natural constraints.

As a counter-argument, it must be acknowledged that any objective measurement of increase or decrease in creativity is extremely difficult to establish<sup>225</sup>. Because artists create within the boundaries of the law and other societal and cultural restrictions, a counter-factual alternative scenario would need to be constructed to compare the realities of free sampling and full licensing in a fair manner. The closest equivalent are the calculations by McLeod and DiCola, which clearly indicate that the recreation of the style from the era when unlicensed sampling was possible without significant legal risks would not be financially possible at today's license prices. Furthermore, the inefficiencies of the sample licensing market are not trivial and form very real barriers

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<sup>220</sup> Fisher 2001, 240-242.

<sup>221</sup> Pote 2010; Reilly 2012.

<sup>222</sup> On the distinction between the romantic notions of originality and the assumed derivative nature of mechanical sampling, see Théberge 2009, 148-149.

<sup>223</sup> Reilly 2008, 402.

<sup>224</sup> See Morey 2012, 58-59.

<sup>225</sup> See Azran 2014, 78.

of entry for other than major label signed artists to sample<sup>226</sup>. However, the question of whether the sample licensing regime has been the causal reason for the alleged drop in the aesthetic quality of sampling is a matter not easily demonstrated by empirical or even anecdotal evidence other than subjective personal opinions.

How about the proposition that a sampling artist is not in fact required to accept poor licensing terms, as the law leaves open the option of re-creating the sound using session musicians and music editing software<sup>227</sup>? There are many reasons for why samplers may choose to use the original sound rather than trying to re-create it. The specific aesthetics of the original version from the acoustics of the space to historical instruments and recording equipment, and the process of audio remixing and mastering, among others<sup>228</sup>, may be impossible to recreate for replay. Given the nature of hip hop and many other genres that rely on appropriative techniques, the ‘aura’ of the originality, and hence the expressive value of the new work may be severely compromised by sub-optimal recreation of a musical and cultural reference.<sup>229</sup> Virtuoso instrumental skills of certain artists or highly individual vocal sounds may similarly be not only difficult to imitate, but derogatory of the original artist if done poorly. For instance, Williams discusses the phenomenon of post-mortem sampling, in which the voice of a deceased artist with an iconic status (e.g. Tupac Shakur, Elvis Presley, Michael Jackson) is used for honorary biographical associations, in which authenticity plays a critical role<sup>230</sup>. Perhaps one can argue that if a sample and a recreated equivalent were identical and hence interchangeable, the balance of the sample licensing market should already look much more equitable than it does<sup>231</sup>.

Regardless of which argument is chosen as the initial point of view, scholars on both sides agree that the current legal framework fails to set clear parameters on when a particular instance of unlicensed sampling should be allowed. One of the factors in the debates concerning the need to regulate the use of existing original materials in subsequent derivative works is the effect of the use on the actual or potential markets of the original. This substitution argument takes two forms: even if it can be shown that the act of sampling increases the sales of the original work as a whole, the potential sample licensing revenue is still lost when the sample is used without an authorization

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<sup>226</sup> Azran 2014, 78; also McLeod and DiCola 2011, 200.

<sup>227</sup> Reilly 2008, 391-392, quoting *Bridgeport I* at 800. See also *Kraftwerk*.

<sup>228</sup> Niemann and Mackert 2013, 360.

<sup>229</sup> Azran 2014, 79.

<sup>230</sup> Williams 2013, ch. 4.

<sup>231</sup> Azran 2014, 79.

of the original rights holder. There is generally little empirical evidence of such effects. However, two recent studies shed some light on how the relation between the markets of the original and the latter work might likely interact.

Schuster's<sup>232</sup> rare empirical study on the effects of collage type sampling on the market of the original works indicated a market benefit of the sampling at as high as 92.5 % degree of statistical significance. The study used a recently released popular album<sup>233</sup> that contained unlicensed samples from total over 350 other works. According to the results, the act of sampling significantly increased the sales of the original works that had been sampled in the year after the release of the new work compared to the year before.<sup>234</sup> Given the lack of corresponding studies that would confirm the results on other data sets and possibly with complementary methodology, one should remaining somewhat cautious about the impact of these findings. Nevertheless, they indicate that sampling should not be automatically assumed to be detrimental to the market of the original works, since the result could also be beneficial to both parties. The aspect of lost sample licensing revenue was not taken into consideration, but given that Girl Talk's uncleared albums have generally fallen into the sphere of tolerated use, one could argue that the comparison of economic effect should in this case not be done between licensing and not licensing but rather between sampling and not sampling.

In a similar vein, Erickson's<sup>235</sup> research on the impact of user-generated parodies of the original music videos showed no economic damage through substitution. On the contrary, the existence of parody versions was correlated with, and predictive of larger audiences of the original works. The potential for reputational harm was found to be limited, as only a marginal percentage of the parodies adopted a directly negative or hostile stance towards to original. Finally, the parodists' creative contributions were found to be considerable, working against the possibility of confusion for the source of the expression.<sup>236</sup> Despite the fact that the derivative works analysed were non-commercial, user-generated works and as such not directly comparable to commercial sampling works, the results indicate that rather than displace potential sales, the audience of the new work may well be so distinct from the original as to cause no effect or indeed positive effect to the market of the original.

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<sup>232</sup> Schuster 2015.

<sup>233</sup> 'All Day' (2010) by Girl Talk.

<sup>234</sup> Schuster 2015. No indication was found, however, of correlations between the sample length or prior commercial success, and the post-sampling sales increases.

<sup>235</sup> Erickson 2013.

<sup>236</sup> Erickson 2013, 3.

## 5 SAMPLING DISPUTES IN EUROPE

### 5.1. The evolution of European music sampling case law in the 1990s

The European case law on music sampling is limited compared to the one in the U.S.<sup>237</sup>. It seems likely that the parties of dispute have been reluctant to see through litigations not only in the interest of saving legal costs and avoiding the risk of injunctions, but also in an effort to avoid establishing a precedent that could restrict their future options or worsen their prospects in license negotiations. Consequently, the vast majority is settled outside the courtrooms, either before litigations proceedings are started or at the latest before the final judgement is handed down. The few cases available do nevertheless give some insight into the approaches the courts have taken, as well as the difficulties involved.<sup>238</sup>

Two early UK cases illustrate on how the European thinking on the legality of sampling has evolved, despite the fact that both settled out of court. In *Hyperion Records v. Warner Music (UK)*<sup>239</sup>, a group The Beloved had sampled a seven-note vocal section of a work, without obtaining a license. There was no copyright for the work itself to discuss of<sup>240</sup>, but sound recording copyright held by the publishing company Hyperion was still valid. The sample lasted eight seconds, but it was looped to cover a large part of the chorus of the new work and was clearly audible and recognizable. In the preliminary hearing, the judge opined that there was a reasonably arguable case that the sample could constitute a substantial part of the original and hence to be potentially infringing of the sound recording copyright.<sup>241</sup>

In *Produce Records Ltd v. BMG Entertainment International UK & Ireland Ltd*<sup>242</sup>, the record label of the group Los Del Rio was sued for sampling an unlicensed seven-second vocalization on two ornamentally alternating notes, used repeatedly in their hit record 'Macarena'. The record label holding the rights to the work sampled, 'Higher and Higher' by The Farm, argued that the sample incorporated a substantial part of the

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<sup>237</sup> Morey 2012, 52.

<sup>238</sup> Greenfield and Osborn 2009, 93; also Morey 2012, 52.

<sup>239</sup> *Hyperion Records Ltd v. Warner Music (UK) Ltd*, High Court transcript, 17 May 1991. The case is discussed by Greenfield and Osborn 2009, 93-94 and Morey 2012, 52-53.

<sup>240</sup> The copyright had not only expired; in fact, it had never existed, as the work originated from a famous Abbess composer Hildegard of Bingen, and had been evaluated to date from the year 1179. The whole concept of copyright is several hundred years younger, leaving the work safely in the public domain.

<sup>241</sup> See Greenfield and Osborn 2009, 93-94; Morey 2012, 52-53.

<sup>242</sup> *Produce Records Ltd v. BMG Entertainment International UK and Ireland Ltd*, High Court transcript, 19 January 1999. The case is discussed by Greenfield and Osborn 2009, 94; and Morey 2012, 53.

original work.<sup>243</sup> The vocalization in dispute appeared twice in the original work in the background of an instrumental bridge section about two thirds into the song. To the disadvantage of the defendants, the vocalization received a much more prominent role in the new work, appearing with a just thin bass rhythm track right at the beginning of the song and repeatedly throughout the song. The justice refused to strike out the action, arguing there was a triable issue in the claim, but the case settled out of court.<sup>244</sup>

Additionally, there is some UK case law that addresses the question of moral rights specifically in relation to sampling. In *Morrison Leahy Music Limited v Lightbond Ltd*<sup>245</sup>, a mashup of five original works by George Michael was considered to amount to derogatory treatment, because the act of sampling and re-mixing had altered the character of the original works. In another case of remixing, *Confetti Records v Warner Music*<sup>246</sup>, the opposite view was however adopted. In the ruling, it was established that the finding of distortion or mutilation requires an establishment of prejudice to the author's honour or reputation". Despite the remix work's references to violence and drugs, no such prejudice was found, and the moral rights claim failed.<sup>247</sup>

Despite the fact that none of these cases provided the industry with clear rules on whether or not some particular occasions of unlicensed sampling might be acceptable under the exclusive economic rights of the copyright holder, they point towards the interpretation that in most cases, commercial sampling without a clearance constitutes a *potential* infringement<sup>248</sup>. Nevertheless, the UK cases indicate a willingness to analyse the quality and quantity of the extract appropriated in the new work, although the opportunity to observe how such an analysis was to be carried out was lost as the disputes were settled. However, the German rulings in *Kraftwerk* and in *Goldrapper* provide more detailed accounts of such considerations.

## 5.2. *Kraftwerk* and the protection of sound recordings

German *Kraftwerk*<sup>249</sup> is one of the very few landmark cases to address sampling disputes in Europe, as well as the first Federal Court (*Bundesgerichtshof*, 'BGH') level

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<sup>243</sup> Greenfield and Osborn 2009, 94; Morey 2012b, 53.

<sup>244</sup> Greenfield and Osborn 2009, 94; Morey 2012b, 53.

<sup>245</sup> *Morrison Leahy Music Limited v Lightbond Limited* [1993] EMLR 144. [*Morrison*]

<sup>246</sup> *Confetti Records v Warner Music* [2003] EWCh 1274 (Ch) [150]. [*Confetti*]

<sup>247</sup> *Confetti*. The two cases are briefly discussed in Fitzgerald and O'Brien 2005, 286.

<sup>248</sup> Morey 2012, 53.

<sup>249</sup> *Kraftwerk* refers here to both of the two BGH cases, *Metall auf Metall I* and *Metall auf Metall II*, which discuss the same dispute between the same plaintiff and defendant.

case of the subject matter in Germany<sup>250</sup>. *Kraftwerk* ended – at least for the time being<sup>251</sup> – a twenty-year-long controversy in the German academic and music industry circles about the admissibility of unauthorised sampling of small parts of a sound recording<sup>252</sup>. Although *Kraftwerk* is a national ruling that is not binding in the jurisdictions of other Member States, the fact that the case was debated on such a high level court and given that the decision has also raised a fair share of international interest, it is likely that the *Kraftwerk* decision will cast influence over discussions and rulings in jurisdictions outside Germany as well, and impact the development of sample licensing market transactions within and between the EU Member States. In *Kraftwerk*, the dispute concerned an unauthorised use of a two-second sample of Kraftwerk's 1970s track 'Metall Auf Metall' in a 1990s song 'Nur Mir' by songwriters Moses Pelham and Martin Haas and rapper Sabrina Setlur. The case proceeded from the regional lower court to the BGH twice<sup>253</sup>.

Kraftwerk is an iconic German band that pioneered in the genre of modern electronic music (electronica) in the 1970s. The style experiments with sampling techniques fusing together synthesized excerpts of traditional instrument performances or computer-generated and recorded sounds with the help of tape recorders, as well as different echo and drum machines. Kraftwerk's albums have been widely regarded as a major influence on a range of club music styles in the 1990s and 2000s, including hip-hop, techno, house and synth-pop<sup>254</sup>. In 2014 Kraftwerk was awarded a Lifetime Achievement Award in The Recording Academy GRAMMY Awards<sup>255</sup>. They have been sampled by artists from a wealth of genres, ranging from Pink Floyd to Coldplay, Jay-Z and Madonna<sup>256</sup>. All in all, samples of Kraftwerk works are considered to have a significant cultural *and* market value.

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<sup>250</sup> Conley and Braegelmann 2009, 1017.

<sup>251</sup> The defendants still have the option to appeal the case to the Federal Constitutional Court, if they so choose. As of July 2015, no news of such action has been recorded.

<sup>252</sup> Conley and Braegelmann 2009, 1017. For some early commentary on the issue in the German legal literature, see Hoeren's (1989) defence of the emerging sampling practices and an overview of the related legal issues, as well as Hertin's (1989) corresponding criticism.

<sup>253</sup> After the first BGH ruling, the court of remand was requested to consider the case from a free use perspective particularly, but since the BGH had not provided the court with enough instructions on how the case should be evaluated, it was appealed to the BGH a second time. The majority of the relevant issues were nevertheless discussed in the first BGH decision, as the second one mostly serves to clarify the new concepts established in the previous ruling.

<sup>254</sup> See Rogers 2013.

<sup>255</sup> Grammy website, <http://www.grammy.com/news/lifetime-achievement-award-kraftwerk>

<sup>256</sup> Who Sampled, <http://www.whosampled.com/Kraftwerk/>

Sabrina Setlur is considered one of the most successful German female rappers, and the only artist to have been granted ECHO Awards of Deutsche Phono-Akademie for “Best National Female Artist” on three consecutive years<sup>257</sup>, as well as the Goldene Kamera award for "Outstanding Achievements in German Pop Music" in 2000<sup>258</sup>. Nevertheless, Setlur’s national appeal clearly pales with the international cult following of Kraftwerk. It is open to speculation, whether the commercial success enjoyed by the defendant was a factor in the plaintiff’s decision to continue litigating the case, or possibly in the defendants’ reluctance to settle, but it is reasonable to argue that had the defendant not been a financially lucrative enough target, it would have been unlikely for the case to survive the whole complicated court process, without settling.

Over the course of the litigation it had been established that the excerpt used indeed originated from Kraftwerk’s track and that the use had taken place without a permission, but the question remained whether such use constituted infringement under the German law. The sample used by the defendant was described as “a distinct rhythm-texture of several percussion instruments”, lasting approximately two seconds, that had been looped throughout ‘Nur mir’. The plaintiffs described the sample the “core” of the track ‘Metall auf Metall’, hence giving it a heightened importance in the texture of the song. Furthermore, the plaintiffs argued that the sampling constituted an infringement of both copyright and the neighbouring rights as artists and producers of phonograms under Section 85 of the UrhG.<sup>259</sup>

Interestingly, the lower court did not rule on the issue of copyright infringement, and consequently, the subsequent courts could only discuss the issue from the neighbouring rights perspective only<sup>260</sup>. The court of appeals<sup>261</sup> held that “even the unauthorised partial reproduction and distribution of phonograms infringes, in principle, the rights of the phonogram producers”<sup>262</sup>. Additionally, the court agreed with the plaintiffs that the sampled track was not only clearly recognizable in ‘Nur mir’, but also the “core” of

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<sup>257</sup> Echopop, <http://www.echopop.de/>

<sup>258</sup> Die Goldene Kamera, <http://www.goldenekamera.de/chronik/35-verleihung-2000/>

<sup>259</sup> Conley and Braegelmann 2008, 1025-1026.

<sup>260</sup> Conley and Braegelmann 2008, 1018.

<sup>261</sup> OLG Hamburg *Metall auf Metall I*. It is not clear whether the copyright claim was not addressed because the lower court thought there was no case to argue, since the sample was deemed to cover such a insignificant amount of common musical expression<sup>261</sup> – or perhaps, because no melody was involved, the sample was not considered ‘music’ in the traditional sense at all – or whether the case for neighbouring rights was considered to cover the bases for both arguments simultaneously. See also Apel (2010, 343) arguing that two notes would hardly ever be held to meet the threshold of “personal intellectual creation” required for copyright protection in Germany.

<sup>262</sup> Conley and Braegelmann 2008, 1026.

‘Metall auf Metall’, and that by looping of the element, the defendants “appropriated, in essence, the entire song - - thereby saving themselves effort and expense”<sup>263</sup>.

The BGH agreed with the first principle laid out by the court of appeals in stating that even partial unauthorised reproduction or distribution could infringe the rights of the producer of the phonogram”<sup>264</sup>. The court identified the source of the protection in the Geneva Phonograms Convention to require protection against duplication of “all or a substantial part of the sounds fixed in that phonogram”<sup>265</sup>, but argued that if the right to prohibit unauthorised reproduction were to be limited to cases of copying of the entire work, this would render the protection ineffective, “especially in the light of modern digital recording, reproduction, and rendition technologies”<sup>266</sup>. The court noted that in recognition of the difference between copyright and neighbouring rights protection in Germany<sup>267</sup>, the exact length of the sample should not be a factor in determining an infringement, because even the smallest bit of sound on a sound recording is a result of economic and organisational efforts of its producer. In other words, since the aim of the neighbouring rights protection is to protect the investment *per se*, any considerations of originality, as well as those of the cumulative impact of looping the sample, should be futile.<sup>268</sup>

In a similar vein, the court dissuaded against the use of any test of qualitative or quantitative significance analysis, arguing that it would lead “to difficulties of delimitations, and therefore, to legal uncertainty”<sup>269</sup>. Also other arguments, such as the lack of established impact on the economic value of the original song, the somewhat unlikely ability of the average listeners to discern the use of a sample, or even a potentially *positive* effect of the sampling effort on the value of the original, were considered irrelevant given that a market would or could exist for licensing even the smallest sample of certain recordings. Should the producer be limited in his ability to

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<sup>263</sup> Conley and Braegelmann 2008, 1026-1028. Although the BGH disagreed with the court of appeals on the notion that looping of an important part of the original would have amounted “in essence” to appropriating the whole work, they agreed on the principle of the smallest taking being publishable.

<sup>264</sup> Conley and Braegelmann 2008, 1027.

<sup>265</sup> Geneva Phonograms Convention, Art. 1.

<sup>266</sup> Conley and Braegelmann 2008, 1027. Such an interpretation is more extensive than the substantiality threshold required by the Geneva Phonograms Convention.

<sup>267</sup> The difference referred to here is the protection of personal intellectual creation in the case of copyright, and the protection of economic and organizational effort in the case of neighbouring rights.

<sup>268</sup> Conley and Braegelmann 2008, 1030-1031. See also Apel 2010, 343.

<sup>269</sup> Conley and Braegelmann 2008, 1029.

exploit some of royalty benefits of the sample licensing market, this would cause his to suffer an economic disadvantage.<sup>270</sup>

In the second part of the ruling<sup>271</sup>, the BGH held that in principle, the defendants might be able to evoke a free use argument to defend their actions<sup>272</sup>. The court established that the defence should be available *mutatis mutandis* for the neighbouring right holders of sound recordings, since if in actuality only the creator was obligated to accept the free use of a work, while the producer of phonograms could prevent the free use of the phonogram that contains the work”, “it would run counter to the spirit and purpose of § 24 (1), of the UrhG, which is to bring about cultural progress”<sup>273</sup>. According to the court, the authors of both types of works should be subject to similar limitations.

To support the re-evaluation of the free use defence in the case at hand by the remand court, the BGH established a test outlining two exceptions for when the free use provision would not be available for unauthorised copying of a third-party sound recording. First, the defence should not apply if the defendant would have been able to reproduce the sound himself, and secondly, when the part of the sound copied was a recognizable melody<sup>274</sup>. Furthermore, in order for the latter work to evoke the free use defence, it should be demonstrated that the new work is independent or autonomous in relation to the used work in that the new work “keep[s] a sufficient distance from the borrowed, innately personal elements of the used work” to the degree “the borrowed - - elements of the older work fade [into the background] in the light of the uniqueness of the new work”<sup>275</sup>. Such a comparison would not, according to the court, be invalidated

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<sup>270</sup> Conley and Braegelmann 2008, 1030-1031. The argument of the BGH follows here closely the logic of the U.S. 6<sup>th</sup> Circuit Court in *Bridgeport I* as will be discussed in the following chapters.

<sup>271</sup> While some aspects of the first part of the *Kraftwerk* ruling may already be debatable, it is the second part that has faced the strongest criticism. For a summary of the debate, see Apel 2010, 345-346.

<sup>272</sup> This is not a literal reading of the free use doctrine. UrhG § 24 provides free use exception to the use of copyrighted “work”, whereas the neighbouring rights (UrhG § 85) only protect the “entrepreneurial effort” embodied, and would thus not qualify for the exception. However, the BGH has applied such an extension of the free use before on neighbouring rights in TV productions in the cases BGH April 13, 2000 - Kalkofes Mattscheibe (I ZR 282/97) and BGH December 20, 2007 - *TV Total* (I ZR 42/05). Apel (2010, 346-348) argues strongly against such an extension of the doctrine, whereas Hoeren (2009, 258) regards it as a necessary concession caused by the excessive protection granted to neighbouring rights in comparison to copyright.

<sup>273</sup> The freedom of art, *Kunstfreiheit* is defined in Art. 5 (3) of the German Constitution. Conley & Braegelmann 2008, 1033-1034.

<sup>274</sup> Conley and Braegelmann 2008, 1034. The limitation refers to UrhG § 24 (2).

<sup>275</sup> Conley and Braegelmann 2008, 1035, referring to UrhG § 24 (1).

by the question of whether the borrowed sound sequences were in themselves copyrightable<sup>276</sup>.

The court on remand<sup>277</sup> confirmed that since the defendant's song 'Nur mir' was a complex construct, and since the sample used was only as a part of a rhythm-sequence of a new track, the sampling act could in principle qualify for free use protection. The court also noted that given the conventions of the genre (hip-hop), it would be a stretch to require the rhythm to fade into the background to the extent of being unrecognizable, so the fact that the sample could be technically heard through the other levels of instrumentation in the defendant's song was not held to factor against a free use evaluation<sup>278</sup>. Most importantly, the court established that an identical reproduction would not be necessary for the first step of the free use test to be fulfilled. Rather, a sound-alike would be considered a reasonable equivalent, if an average listener with certain amount of familiarity with the genre would not be able to detect the difference between the self-created sound and the sampled sound, and if the average professional sound producer or sound engineer would have been able to create such a sound at the time of the creation of the allegedly infringing work and with the equipment generally available at the time.<sup>279</sup> The plaintiff's expert witnesses were able to demonstrate that the sound equivalent to the one used in the sample could have been created in less than two working days by crashing metal on metal or by employing a Akai Sampler of the model available at the time of the sampling, and the court held such an effort to be within reasonable limits<sup>280</sup>. Nevertheless, the court demonstrated some uncertainty in its reasoning by granting the defendants a right for another appeal at the BGH for clarification of what sort of efforts should be considered "reasonable"<sup>281</sup>.

The second BGH ruling on the case (*Metall auf Metall II*) essentially confirmed the earlier ruling, with minor adjustments to clarify the correct utilization of the free use exclusion test. The court affirmed that the free use test should evaluate whether a producer with average level equipment and competence could have been able to reproduce the sounds at the time of the recording of the new work, indicating that sampling should not be seen as a simple way to avoid expense. The sufficient similarity

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<sup>276</sup> Conley and Braegelmann 2008, 1035.

<sup>277</sup> OLG Hamburg *Metall auf Metall I*.

<sup>278</sup> OLG Hamburg August 17, 2011 - *Metall auf Metall II* (5 U 48/05), at 19-26.

<sup>279</sup> OLG Hamburg in *Metall auf Metall II*, at 30-37. The reference point of a professional music producer was adopted, because the allegedly infringing work had been produced professionally and for commercial purposes.

<sup>280</sup> OLG Hamburg in *Metall auf Metall II*, at 39-43.

<sup>281</sup> BGH in *Metall auf Metall II*.

between the new and the original sample should be deemed to have been achieved, when the relevant public would recognise the sounds as equivalent, when used in a similar musical context.<sup>282</sup> Regarding the criticism that assigning broader rights to record producers than to composers, the court pointed to the difference in protectable subject matter; financial, organizational and technical effort on one hand, and personal intellectual creation on the other; making the two rights incompatible for direct comparison<sup>283</sup>. Finally, the court restated that as long as the new work could be produced without the direct use of the material from the original work, the restriction imposed on the right to sample without an appropriate license could not be seen as an obstacle for the development of the art<sup>284</sup>.

There are several controversial elements of the BGH *Kraftwerk* rulings. Currently, the price of a sample is likely higher if the sound captured has significant cultural value or is in some other way rare and has few substitutes on the market. The free use test provided by the BGH uses backwards logic in that it grants a narrow protection against unauthorised sampling of particularly unique, original and obscure sounds that would be difficult to reproduce, while requiring a license for common and easy to reproduce sounds. In effect, the test incentivises samplers to graze unlicensed on the high quality sounds that have required significant investment, which are precisely the ones that have potentially the most economic value for the owner, and hence should be granted protection<sup>285</sup>. If the most ‘unique’ samples are free to use, the direct proportionality between the cultural value and the license price is cut by the threshold of inimitability. For the test to be applicable to the current sampling licensing markets, the structure of the sample licensing pricing would need to change in a significant way. Such a drastic reorganising of the industry structures is not likely to happen overnight, which leaves both samplers and right holders in a precariously uncertainly for the time being.

Secondly, the evaluation of the equivalence between the original sample and the replayed version by average music consumers is problematic in that the listeners may well be unable to identify subtle elements of the sample that account for the choice of sampling in the first place. There are numerous aspects in the recording of a sound that may make it very difficult to reproduce faithfully that may not be immediately obvious for an average listener but make a significant qualitative difference between the original

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<sup>282</sup> BGH in *Metall auf Metall II*, at 25.

<sup>283</sup> BGH in *Metall auf Metall II*, at 17.

<sup>284</sup> BGH in *Metall auf Metall II*, at 15-16 and 19-22.

<sup>285</sup> Reilly 2012, 200-201; Niemann and Mackert 2013, 360.

and replayed sounds from a professional point of view. Since fairly approximate replays will satisfy the negative condition of the free use test, this is likely to limit the number of samples that will qualify as truly ‘unique’, thus extending the licensing requirement to most samples on the market.

It seems, then, that the court was ready to sacrifice a small number of very valuable samples for free use in exchange for setting a threshold that generally supports creation of new works and encourages samplers to find amicable solutions with the right holders independently, without either side needing to resort to the courts too much. Such a compromise is likely to disappoint some right holders with particularly unique and valuable sound recordings, and particularly those who have been unwilling or selective in licensing to begin with. For them, the loss includes not just the licensing fees but also the discretion to decide upon who – if anyone at all – is allowed to sample their music. For others, the encouragement to replay rather than sample may increase the use of substitutes that are mediocre in quality, which is also not necessarily in the best interests of the right holders. Furthermore, if samplers were to abandon licensing *en masse* in favour of hiring session musicians to re-record the sounds not available through inexpensive sound banks, this would diminish the income of the artists that currently receive royalties from sample licenses<sup>286</sup>.

The second factor of the free use test, despite its immediate appeal in the face of the traditional view of the three main elements of music<sup>287</sup> and the respective restriction of free use in UrhG §24 (2), is problematic in that it does not properly define a “recognizable” melody. First, it is unclear, whether the recognition should be evaluated in terms of average listener of a general audience, the reasonably knowledgeable fan of the genre, or an expert musicologist<sup>288</sup>. Secondly, the reference to melody seems oblivious to the fact that a significant part of music in genres represented by ‘Metall auf Metall’ and ‘Nur mir’ do not necessarily have any melody-resembling structures at all. Instead, as the dispute at hand demonstrates, a simply percussion beat can sometimes be particularly distinctive and indeed central to the identity of a musical work. Given the formulation of the test by the BGH, it is unlikely, or in event at least unclear,

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<sup>286</sup> The respective income of the session musicians would of course increase, but since the incomes from these two sources are not structurally similar – a session musician is usually paid by the session and is usually not eligible for royalties from the music recorded – it is not possible to compare the two factors directly. In other words, these two developments might or might not cancel each other out, but without further empirical data, no conclusion can be drawn either way.

<sup>287</sup> Such elements are melody, harmony and rhythm; see the discussion on these in earlier chapters.

<sup>288</sup> Reilly 2012, 201.

whether a drum beat could even in theory qualify as “melody” for the purposes of exclusion from the free use test<sup>289</sup>.

From the sampler point of view, the impact of the *Kraftwerk* test is that there are now some new situations in which sampling may be legitimate without an authorisation from the neighbouring rights holder of the recording. While these instances may be relatively rare, they enable appropriation of certain culturally valuable sounds that may have been very expensive, difficult or plain impossible to license. This can be a positive development that leads to more sampling, and despite the forgone licensing fees for some right holders, increased recognition to the original works and hence potential indirect benefits as well. The aspect to be kept in mind is that while the re-recording of a sound-alike is a route to avoid neighbouring rights infringement claims, it is possible that the sound or excerpt re-recorded contains original expression protected under copyright, hence requiring the sampler to obtain a license for the use from the *copyright* holder. Given the general cautiousness of the industry, the threshold for license obtaining may be significantly lower than the level required by the law<sup>290</sup>. Furthermore, as specified by the second part of the *Kraftwerk* test, such a free use liberty cannot in any case be exercised if the sample contains a melody, even if the focus of the protection is the investment in the making of the sound recording and not the original content itself.

The price of this freedom is that sampling of even relatively unoriginal and brief extracts of a third-party sound recording is now without a question liable to licensing of the neighbouring rights. The right holders can enforce such use whether the sample is audible or recognisable in the new work, and regardless of the musical or other audio content of the sample. This is, however, likely to have been the reality for most

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<sup>289</sup> See also Reilly 2012, 201; Hoeren 2009, 253. Given the curious problems caused by the above reading of the test, it might even be possible that the court actually meant a general musical expression that would by its nature warrant copyright protection, and a melody was just an example of such an element. The court in remand took the literal approach, noting that the case law definition of melody would be a self-contained and ordered note sequence, whereas the sample used in ‘Nur mir’ was a rhythm track that comprised of overlapping bundles of notes, the result of which may in theory be original and copyrightable, but not a melody (OLG Hamburg in *Metall auf Metall II*, at 31.). Furthermore, the lower court held the melody specification in § 24 (2) UrhG generally controversial and recommended it to be interpreted narrowly.

<sup>290</sup> McLeod and DiCola 2011, 29 recount an extreme occasion of Jay-Z’s record label requesting a license for the artist to vocal phrasing of a single word (“fame”), because the style of the utterance imitates another phrase (“lame”) by another artist, even though it was very likely not original enough to warrant a copyright. In principle, rulings such as *Coffey* indicate such strict licensing policies unnecessary in Europe, but given the alarmist industry attitudes, as well as the CJEU case law that indicates a low threshold for originality, European artists and producers might well choose to license anyway.

samplers before the ruling as well, meaning that in this respect the BGH merely re-established the status quo. Concerning the status of the copyright claims in sampling disputes, the *Kraftwerk* ruling provides unfortunately no further guidance. Consequently, we do not know whether the two-second percussion element could have even in theory been considered copyrightable in the vein of the narrow originality requirement of *Infopaq*, whether the aspect of being the ‘core’ of the original work would have factored favourably in the dispute despite the small quantitative significance of the appropriation, nor whether looping of the sample would have been a decisive factor of the analysis, or an irrelevant detail. It may also be disputable whether the imbalance between the rights granted for the copyright and for the neighbouring rights holders is optimally fixed with a free use exception of the type introduced in *Kraftwerk*.

It is possible that the German Constitutional Court could still overturn the judgment on the basis of the Article 5(3) of the German Constitution<sup>291</sup>, but as such a constitutional complaint has so far not been submitted, any notions about the possible results of such a theoretical case are purely speculative. For the time being, German samplers and right holders are likely to align their business strategies around the distinction drafted in *Kraftwerk* and the *Goldrapper* case discussed in the following.

### **5.3. *Goldrapper* and the infringement of composition copyrights**

A recent judgement of the German Federal Court of Justice in the *Goldrapper* case<sup>292</sup> sheds more light on the treatment of composition copyrights specifically in sampling disputes. The case concerned works of a French Gothic group Dark Sanctuary that a German rapper Bushido had sampled in total 13 songs without obtaining licenses. According to the ruling, the samples consisted of on average 10 seconds of music, edited into repetitive loops and incorporated with a beat track, on top of which the defendant had added his own rap lyrics. The plaintiffs argued that this use infringed their rights both as the composers of the music and as the authors of the lyrics, as they existed in the original work, despite not having been included in the sample.<sup>293</sup>

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<sup>291</sup> Article 5(3) refers to the rights of artists to have access to works for future artistic creations.

<sup>292</sup> BGH April 16, 2015 - *Goldrapper* (I ZR 225/12), not yet reported. Press release available at <http://www.datev.de/lexinform/0443108.html>. For an English translation of the press release, see also Clark 2015.

<sup>293</sup> LG Hamburg March 23, 2010 - *Bushido I* (308 O 175/08) and *Bushido II* (310 O 155/08).

The BGH held that the original connection between the lyrics and the music of the work cannot be protected by copyright, thereby disagreeing with the Higher Regional Court of Hamburg. Since no lyrics of the original works had been used, this argument seems an attempt to protest against the re-contextualisation of the original expressions as a type of quasi moral rights argument. However, regarding the second claim that concerned an infringement of the copyright in the music, the court sent the case back to the lower court. The BGH expressed doubt of whether the findings of the lower court supported adequately the assumption that the sampled sequences had an objectively sufficient creative quality, amounting to more than a routine creation and hence eligible for copyright protection. In particular, the court criticised that the earlier judgement had been made on the basis of the judges' own aural impression and that the report of the musicologist expert witness had been incompletely referred to.<sup>294</sup> The press release of the judgement does not specify which works specifically were infringed nor by which new works, but a search on the Who Sampled website<sup>295</sup> shows nine instances of Bushido having sampled from Dark Sanctuary<sup>296</sup>. Based on the indications given in LG Hamburg *Bushido II* ruling, it is likely that some or all of these instances were included in the contested samples<sup>297</sup>.

In all of the listed sample uses in *Goldrapper*, a short mainly instrumental melody of four to eight slow beats or one to two phrases has been used in a form almost identical to, only slightly edited from the original<sup>298</sup>, and then looped to form the opening, in which the sample runs through once from beginning to end before the rapper enters. The sample is then looped as a clearly audible background track throughout the new work. In most of the cases, the excerpt from the Dark Sanctuary work is the only material sampled, giving the act of appropriation a particular weight.

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<sup>294</sup> BGH in *Goldrapper*.

<sup>295</sup> <http://www.whosampled.com>.

<sup>296</sup> 'Janine' by Bushido (2006) borrowing from 'Les Memoires Blessées' by Dark Sanctuary (2004); 'Wieder Von Der Skyline Zum Bordstein Zurück' (2006) borrowing from 'Vie Ephémère' (2002); 'Sex In the City' (2006) borrowing from 'L'autre Monde' (1999); 'Eine Nummer für Sich' (2006) borrowing from 'Perdition' (2004); 'Ich Schlafe Ein' (2006) borrowing from 'L'instant funebre' (2004); 'Hast Du Was Bist Du Was' (2006) borrowing from 'Les Larmes Du Meprise' (2005); 'Bravo Cover' (2006) borrowing from 'Valley of the Pain' (1999); 'Bloodsport' (2006) borrowing from 'Reve Mortuaire' (2000); and 'Kein Fenster' (2006) borrowing from 'Loin Des Mortels' (2002).

<sup>297</sup> LG Hamburg, *Bushido I* and *Bushido II*.

<sup>298</sup> While transposition does technically change the character of a sample to a degree, to most listeners without an absolute pitch and without the possibility for a direct side-by-side comparison, a transposition by only a few steps on the scale is still experienced as being more or less identical.

For example, the sample used in ‘Eine Nummer Für Sich’ is a slow four-note step-wise sequence [1-7-1-2] and [3-2-3-4]<sup>299</sup> on low strings that is repeated in the original for approximately 1 minute 30 seconds out of the duration of the whole original song of 7 minutes and 19 seconds. The harmonic structure is simple sequence from the minor tonic to a subdominant, back to the tonic and finally to a dominant chord [i-v-i-III]<sup>300</sup>. In the original song, the sequence marks an instrumental transition bridge between the last two of the total five stylistically distinct structural episodes and is heard first very prominently, but is later somewhat masked by added higher strings and melodic vocalizations by female singers and spoken lyrics. In Bushido’s version, the sequence is transposed somewhat higher in pitch and speeded up, but it is still very recognizable.

Similarly, the samples with a piano melody and low strings used in ‘Kein Fenster’ mark the beginning of a transition in the original work to a section with more rhythmical momentum and increased depth of instrumentation, encompassing together approximately 1.5 minutes of the total 6 minutes and 36 seconds of the original. The strings hold a static tonic tone under a simple piano ostinato [1-2-3-1-(1)-(1)-(1) /...], a harmony of alternating tonic and subdominant chords [i / i / VI-VI] and another slower quarter-note based ostinato of the tonic note repeated in three different octave positions, forming a steady four-beat rhythmic pattern. The ostinato is present for the latter half of the original work, although not at all times dominantly so. In Bushido’s work, the sample of the original remains untransposed, although it has been very slightly speeded up.

The sampled hook of ‘Sex In the City’ is a rhythmically repetitious violin duet ostinato of eight notes or four beats embellished with a short ascending trill figure [3-3-4-5 - 4tr.-3-1-3 / 3-3-4-5-4tr.-3-1-3 /...] and [1-1-2-3 / 2-1-5-1 / 1-1-2-3 / 2-1-5-1 /...], over acoustic guitar arpeggios on tonic and sub-tonic (i / (i) / VI / (VI)]. In the original, it is

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<sup>299</sup> In musical notation, A flat – G flat – A flat, – B flat. The marking of the pitch relations in Arabic numerals used here derives from the conventions in forensic musicology (see Rosen 2008, 153-156). The benefit of such a notation is that it works as a quick short-hand for musical notation, despite its inherent limits in showing rhythmic patterns, octave relations and counterpoint. In the context of this treatise, number indicates a pitch on a scale (between 1-7), (number) indicates a sustained note, {note&note} that the two notes are heard together simultaneously, 12 i.e. two numbers unseparated an additional quicker passing note on the same beat, and [-] a pause. In passages with longer or several phrases, / indicates the measures or other pulse divisions and ... indicates repetition of the previous elements.

<sup>300</sup> The convention of using Latin numbers for indicating chord relations is the established standard in western music theory; see also Rosen 2008, 164. Small letters indicate a minor chord and capital letters respectively a major chord. In the context of harmonies, ‘tonic’ refers to a chord build on the centre pitch of the scale (1), whereas ‘sub-dominant’ and ‘dominant’ are used for harmonic functions of leading to the dominant (minor tension) or from the dominant back to the tonic (strong tension).

heard in a repeated form twice, ranging for a total of 40 seconds in the instrumental middle-bridge of the work. A similar type ostinato is heard in unison over the first part of the original work before the sample used by Bushido is introduced. The sample is slightly faster and transposed higher.

In ‘Hast Du Was Bist Du Was’, the sample is similarly a hook of four notes on low strings [2-3-1-(1) / 5-(5)-(5)-(5)], repeated four times, over a structure of three chords in the standard tonic-subdominant-dominant progression [i-(i)-iv-VII]. It is present for 2 minutes 50 seconds of the total 9 minutes 50 seconds of the original, starting half-way of the work. Again, the sample has been transposed somewhat higher and speeded up, but only slightly.

In ‘Bloodsport’, two separate melodies have been sampled: a four note melody duet of a violin and a female singer vocalization mainly in unison [5-3-2-5] and [5-3-2-45], respectively, over gentle guitar arpeggios [i-VI-VII-(VII)], which is repeated twice on three occasions in the original work, and an excerpt of corresponding length of another descending melody line [6-(6)-5-4 / {5&3}-(5&3)], in which the lines of the violin and the singer are separated to a third on the last note, and the harmony is stabilising momentarily to a major chord [iv-VII / III-(III)]. In the original, these two melodies are introduced in the half-way of the work, which represents a transition from non-musical sounds (church bells, distant echoes of a singing, thunder, rain and wind) to a more structured instrumental ballad. The first of the samples is introduced in the beginning of the Bushido’s work, whereas the second sample marks the transition from the verse to the chorus.

In ‘Wieder Von Der Skyline Zum Bordstein Zurück’, the excerpt sampled is a short element of a longer cadenza-like instrumental section with a guitar, strings and long vocal lines by a female singer, and with a general improvisational quality. The melodic sequence on guitar is longer and more complex than in most of the other samples [(-) (-)-5-(5) / 5-4-3-4-3-2-3-2 / 7-1-1-2-2-3-(3)-2 / 1-(1)-2-3-2-3-2 / ...]. The vocal and violin parts consist of short ostinato of long sustained notes in half-tempo [violin: 5-(5)-2-3 / ... and vocal: 3-(3)-2-(2) / 3-(3)-1-(1) / ...]. In Bushido’s version, it has been significantly speeded up and slightly raised in pitch and looped to run in the background over the whole duration of the song.

Similarly, in ‘Ich Schlafe Ein’, the tempo of the two samples used is markedly faster than in the original, but unlike in other instances of sampling, in which a mid-part of

the original work had been appropriated, in this case Bushido uses the beginning of the original, thereby perhaps making the reference to the Dark Sanctuary's work more obvious. The original is a piano ostinato [5-1-2-3 / 4-5-2-7 / 1-2-3-4 / 1-3-2-7 / ... ] with a step-wise bass figure in parallel octaves [1-(1)-(1)-(1) / (1)-(1)-7-(7) / 6-(6)-(6)-(6) / (6)-(6)-7-(7) / ...] implying a harmony of tonic-subdominant-dominant [i-(i)-iv-VII]. The sample is used in an untransposed form in the new work.

'Bravo Cover' is the only new work in which the sample used is edited to the extent that an immediate recognition of the source of the sample is not likely. Two samples are used from the original work. The pitch and tempo of the first sample are increased manifold to the point that the original sound of female singing is distorted into a flute-like sound that no longer resembling a human voice. Despite the editing, the melody form on a high octave, with its characteristic leap from tonic (1) to dominant (5) remains unchanged and as such identifiable: [1-(1)-1-5-(5)-4 / 5-(5)-(5)-(5)-(5)-(5) / (5)-(5)-(5)-(5)-(5)-(5) / (5)-(5)-(5)-(5)-(5)-(5) / ...]. A violin provides a counterpoint to this melody with a smaller leap [1-(1)-1-3-(3)-2 / 3-(3)-(3)-(3)-(3)-(3) / (3)-(3)-(3)-(3)-(3)-(3) / (3)-(3)-(3)-(3)-(3)-(3) / ...], while the guitar arpeggios on triplets supports the harmony [i-VII / III-(III) / VII-(VII) / i-(i) / ... ]. This first sample is heard twice repeated in the beginning of Bushido's song and then again at the beginning of each chorus. The second sample is a hook of a simple violin melody in a mid-range [1-(1)-(1)-7-7-(7) / 7-(7)-4-5-(5)-(5) / 4-(4)-(4)-2-(2)-(2) / 3-(3)-(3)-(3)-(3)-(3) / ...] and an arpeggiated acoustic guitar accompaniment [i-VII / III-(III) / VII-(VII) / i-(i) / ... ] heard on a loop under the rap track during the verses. The original part is the opening of the Dark Sanctuary's work, a long instrumental intro before the vocal line enters. The changes in tempo and pitch do not change the essential character of the latter sample as much as they affect the first sample, and the latter one is very clearly recognizable in the new work. The importance of this particular excerpt in the original work is, however, somewhat mitigated by the improvisational character of the violin line. Furthermore, the six-part division (6/8) of the original work is polyrythmically contrasted to the four-part pulse of Bushido's song, providing an alienating rhythmic mismatch that seems to underline the foreign source of the sample track.

The excerpt used from 'Les Mémoires Blessées' in Bushido's 'Janine', compasses a slow piano melody [4-(4)-(4)-(4)-(4)-5 / 2-(2)-(2)-(2)-(2)-3 / 1-(1)-(1)-(1)-(1)-23 / 1-(1)-(1)-(1)-(1)-23 / ...] over an accompanying element of four beats of slow triplets with a chord change from subdominant to tonic: [6-2-1 / 6-2-1 / 5-2-1 / 5-2-1 / ...] or [ii° / ii° / i / i

[...]. This melody is heard in ‘Les Mémoires Blessées’ repeatedly for a total of two minutes out of the whole song length of five minutes. The sample is heard clearly throughout the Bushido song, and while recontextualised to a degree by polyrhythmic interplay of the three-beat division feel of the original and the two-beat division of the percussion track in ‘Janine’, the character and mood of the sample remains similar.

In Janine, the Dark Sanctuary’s melancholic instrumental phrase is given a new semantic content through the rapped lyrics that tell a dramatic story of a sexual abuse of a minor. However, in most of the other works, the rap texts denote themes typical of the genre, including self-important boasting, blustering and sabre rattling, swear words and obscenities, as well as generally misogynistic and violent imagery. It is not difficult to understand that the artists of Dark Sanctuary, who represents very different aesthetics with their melancholic neo-classical style and gothic sound references, would object to the use of their music in this kind of context<sup>301</sup>. This might be the actual goal of what the first claim attempted to accomplish in arguing that the connection of the lyrics and the music had been infringed when Bushido recontextualised the samples from their original associational and semantic environment. However, such an argument should have been put forward as an infringement of the moral rights of the original authors, as their artistic reputation and integrity could be tarnished by associations to the themes of the rap texts. The reason the plaintiffs chose the less obvious route may be that the moral rights argument would likely be balanced by the counter-argument about the need to ensure artistic freedom, and the risks of allowing too extensive right holder censorship in the disguise of a moral rights claim<sup>302</sup>. Given that the new works contain little that could be considered extraordinarily crude or obscene in the context of the work’s own genre, the plaintiffs moral rights argument may have not faced much success<sup>303</sup>.

In all but one of these new works, the editing of the samples has been minimal enough to retain the basic identity of the sample recognizable for an informed lay listener. Given the length of the samples, it is somewhat disputable whether these instances of sampling should in fact be considered discursive in nature, but the type of the use would rather point to musematic sampling technique<sup>304</sup>. All of the samples are harmonically conventional and as such not likely to warrant extensive copyright

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<sup>301</sup> See also the related discussion in LG Hamburg, *Bushido I* and *Bushido II*.

<sup>302</sup> Note also the failed attempt to exercise such moral rights censorship in the U.K. case *Confetti*.

<sup>303</sup> Note also Jütte 2014 expressing concern that the unharmonised moral rights (right of integrity) could work as a deterrent of sampling in some Member States, thus limiting its international distribution.

<sup>304</sup> See Williams 2015, 209.

protection. The melodic structures in the samples used in ‘Eine Nummer Für Sich’, ‘Kein Fenster’ and ‘Hast Du Was Bist Du Was’ are very common and unoriginal. Similarly, in ‘Bloodsport’, ‘Bravo Cover’, ‘Sex In the City’ and ‘Janine’, the melodic ostinatos are relatively simple and of generic nature, although there is perhaps a hint of originality present compared to the three earlier examples. The samples ‘Wieder Von Der Skyline Zum Bordstein Zurück’ and ‘Ich Schlafe Ein’ are melodically more complex and while certainly not unique, they could potentially represent “author’s own intellectual creation” if the threshold is sufficiently low. Inasmuch as an original instrumentation may contribute to the originality of a sample, the case is likely stronger for ‘Bloodsport’, ‘Bravo Cover’ and ‘Wieder Von Der Skyline Zum Bordstein Zurück’ in that the choice of instrumentation adds some contrapuntal complexity to the composition. On the basis of this analysis, depending on how low the threshold of originality is set, it is likely that not all or in an extreme case, possibly none of the samples are likely to be considered original enough to amount to a copyright infringement<sup>305</sup>. On the other hand, if the threshold is set to a level comparable to the *de minimis* used in the U.S. case law, all of these samples are without a question more extensive than *de minimis*, and consequently, infringing of the copyrights to the original works.

In music analytical terms, the sampling in *Kraftwerk* and in *Goldrapper* represent two extremes. On one hand there is the short, musematic, textually unsignalled and somewhat obscured sample of *Kraftwerk*, which forms a structural part of a relatively complex texture of percussive and harmonic layers. Regardless of whether the sample was meant to be spontaneously recognised by more initiated listeners, this type of sampling essentially utilises the original as a source of sound material rather than a point of signified reference. On the other hand there is a fairly extensive appropriation of melodic, harmonic and motivic elements in *Goldrapper*, in which the reference is textually signalled by a clear and easily audible establishment of the borrowed elements in the opening of the new work, as well as by the genre-stylistic incongruity between Bushido’s hip hop and Dark Sanctuary’s neoclassical gothic style. Nevertheless, the samples in the latter case do have a degree of structural importance in the new work as well, therefore extending beyond what could be argued as a simple “quotation”, in which the aim would have been to reference the original to make a literal or musical point, keeping the appropriation to the minimum. Furthermore, it is relevant that the

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<sup>305</sup> A fully conclusive analysis would require a comparative mapping of the compositional elements to respective conventions of the genre – a task beyond the scope and purpose of this treatise.

source of the sampling had not been acknowledged, thus making it possible that an average listener might misread the sampled parts as Bushido's own. This leads to a potential confusion about the source of the expression, which might have supported the plaintiffs' claim of infringement of the moral rights of paternity, had they chosen to pursue one.

In reference to the second criterion of § 24(2) in *Kraftwerk* free use test, several of the samples in *Goldrapper* could be characterised as 'melodies' in strict music analytical sense. However, in the narrow interpretation of the § 24 by the court of appeals in *Kraftwerk*, it is likely that none of these excerpts would constitute in itself a melody in the sense of being the dominant and most recognizable structure holding the original work together and setting it apart from any other work. Rather, the most of the excerpts used, even if more or less melodic in nature, are secondary accompanying elements. In this respect, the free use argument in *Goldrapper* has a reasonable possibility of prevailing at least with some of the samples, despite the relatively significant length of the appropriated excerpts. The result of the originality analysis is largely dependent on how narrow or extensive view of the main elements of musical expression the court chooses to follow, as well as how high or low they decide to set the threshold of originality.

Given that the BGH chose not to give directly a ruling on the issue, but remanded it back to the Hamburg court indicates three things. First, according to the court, *some* sampling of a sound record may be possible without a license from the copyright holder of the work sampled. Secondly, the maximum extent of such legitimate unlicensed sampling may be greater than the *de minimis* use in corresponding U.S. case law, which will be discussed more in detail in the following. Thirdly, the BGH ruling establishes that the proper test for analysing the sample and the qualitative and quantitative aspects of its use in the new work is a full analytic evaluation conducted by a forensic musicology expert rather than a lay listener audience test. The ruling does not, however, answer the question of whether or not some or all of the sampling in this particular dispute would qualify for such an exception of sound recording copyright, nor the question of how much of the original could be used under such a rule. All these aspects have interesting consequences on the status of sampling laws in Europe, as will be further discussed in the following chapters.

#### 5.4. Lessons from the case law

On the most fundamental level, the question about legality of unlicensed sampling is reduced to a basic philosophic dilemma of how should the right to access and use existing cultural expressions be balanced with the right to licence revenues derived from granting such an access to creative works. Taking into account the applicable provisions in relevant *acquis*, as well as the existing CJEU case law, the status of the EU law regarding unlicensed sampling is inconclusive. The InfoSoc Directive, specifically, lists no exception or limitation to copyright and neighbouring rights that would directly apply to sampling without the right holder's authorisation, hence indicating that all sampling would per definition be subject to licensing without exceptions. Yet, despite the general scarcity of case law in the Member States, the German and UK case law give some indications of how national jurisprudences have approached the issue. The overall picture emerging is more versatile than the regulations seem to suggest, implying an acknowledgement that some unlicensed sampling under certain condition has been deemed acceptable in the interest of preserving a balance between the right holders and the subsequent creators.

There seem to be at least two types of currently possible exceptions to the licensing requirement of sampling. First, there is the limited free use option for neighbouring rights established in *Kraftwerk* for situations in which the imitability of the original forms the critical threshold of infringement analysis. As discussed earlier, this new rule has some controversial elements with respect to the current standards of the sample licensing regime, despite its generally approving position towards cultural intertextuality in sampling practices. Secondly, the infringement of the composition copyright in the musical work sampled is subject to an originality requirement akin or analogous to the test applied in the evaluations of alleged music plagiarism that do not involve sampling. If the extract of the composition appropriated in the sample is very short or very common and unoriginal, or otherwise not covered by copyright due to the expiration of the copyright term, voluntary waiver of the rights or unprotectable nature of the sound material, it may be potentially open for sampling without a license. It is not clear whether editing of the sample beyond listener recognisability would help the defendant in arguing against an infringement, but based on the BGH opinion in *Kraftwerk*, looping of the sample could be a factor supporting a finding of infringement.

The decision of the BGH to not to give a ruling without a further expert analysis in *Goldrapper* indicates such a non-absolutist approach to sample licensing requirements with respect to copyright. It is particularly encouraging that the court asked the Hamburg court to refer the originality analysis to musicologists, since it is the experts that are in the best position to keep track of the *scènes à faire* and the trends of a given genre and hence to analyse the originality of a given expression in its proper context. However, given the current status of the case law, and including the fact that the *Goldrapper* case is still being processed, there are no clear rules of how extensive a sample may be or in what way it would need to be unoriginal for such an exception to apply, which makes it of little practical use for the samplers for the time being. Furthermore, regardless of how flexible the court chooses to be with regard to the originality threshold, their interpretation is generally bound by the overall strict standard introduced by the CJEU in *Infopaq*.

Comparing the BGH rulings in *Kraftwerk* and *Goldrapper*, it is clear that the court wanted to establish a clear distinction and very different standards of infringement between neighbouring rights and copyright in music. Given the strict interpretation of the BGH in *Kraftwerk*, many authors have observed that in the context of sampling, neighbouring rights seem to have gotten a more comprehensive protection than copyright, since the neighbouring rights holder is now entitled to remuneration regardless of the type and extent of the third-party use, whereas in the case of copyright, the question of originality and legitimate appropriation is evaluated case by case. The view of differentiated standards between copyright and sound recording right was also held by the Sixth Circuit court in their landmark decision *Bridgeport*, discussed in the following. Such reasoning has, however, been faced strong criticism<sup>306</sup>, questioning why would the rights holder of the sound recording should be awarded a more comprehensive and exclusive protection than the rights holder of the creative content, when the core of the protection should fundamentally be in the development of creative works for the cultural development of the society, not in the investment of bringing those works to the market, which is merely a subsidiary of this creative effort.

Given the facts of the *Goldrapper* case and its on-going proceedings, the only certain conclusion is that the question of originality and substantiality of the excerpts from the Dark Sanctuary works was considered to be *potentially* contestable, and that the court

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<sup>306</sup> See for example Hoeren 2009, 253 criticising the *Kraftwerk* court for the creation of an excessive megaright for neighbouring rights, which then needs to be illogically balanced by a free use exception; also Niemann and Mackert 2013.

advised a forensic musicologist to be used for their appropriate evaluation. For the exact evaluation of the originality threshold and the consequent trends on how such cases might be decided on in the future, one needs to wait for the ruling of the Higher Regional Court of Hamburg, provided the parties do not choose to settle before that. Since *Kraftwerk* decision concentrated on the question of neighbouring rights only, it does not shed light to the issue of copyright infringement threshold either. Should the Hamburg court find no infringement, some unlicensed sampling that incorporates a part that is clearly more than just an individual sound might not infringe copyright, provided the material used is common and unoriginal in nature, or otherwise qualitatively not significant in relation to the original work<sup>307</sup>. Such an interpretation would give markedly more flexibility for samplers with respect to copyright than with respect to neighbouring rights, but this would still not warrant a sampler an absolute *carte blanche*, since the evaluation is still done case-by-case. Since the samples used in *Goldrapper* were instrumental or vocal lines without lyrics, these cases do not give an answer to the question of whether the existence of literary content in the sample might make it potentially be considered original more easily or not.

Since both *Kraftwerk* and *Goldrapper* are national rulings, courts in other EU Member States are of course perfectly free to choose to follow the German example or to abandon it for some other solution. It may well be that the rulings will be challenged by a jurisdiction more flexible and open to the argumentation of the subsequential creation both with respect to copyrights and neighbouring rights. Nevertheless, there are some reasons for why the impact of these two high-profile cases may reach outside the German national debate. The BGH decision in *Kraftwerk* was preceded by almost a decade by an extremely influential U.S. landmark case *Bridgeport*<sup>308</sup>, whose logic and reasoning was closely mirrored in *Kraftwerk*, although technically the decisions are of course independent<sup>309</sup>. For this reason, it would not be completely unexpected for the courts in other jurisdictions to choose voluntarily to follow the same rationale. The simple scarcity of European sample cases highlights the importance of these two German cases, as well as the respective U.S. cases, both as local precedents and as examples of possible argumentation. Furthermore, the fact that the BGH was faced with a sampling dispute twice in such a short period of time, may be an indication that

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<sup>307</sup> Note that this is not in conflict with the UK cases discussed above, since in both of them a trial with proper forensic musicological expert analysis was to be held to confirm the possibility of copyright infringement. However, since these both settled out of court, there is no trace of the law being established either way.

<sup>308</sup> The details of this U.S. case will be discussed in more detail in the following chapters.

<sup>309</sup> The *Bridgeport I* ruling was referred to, as *de lege lata*, in the *Kraftwerk* ruling.

such cases will be debated in court rooms more frequently in the future, and quite possibly in jurisdictions other than Germany as well<sup>310</sup>. It is in these later rulings that the significance and impact of the *Kraftwerk* and *Goldrapper* cases will be established conclusively.

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<sup>310</sup> Also Hoeren (2009, 253) expresses such a prediction, although in what seems like a sarcastic tone.

## 6 SAMPLING U.S.A.

### 6.1. Brief overview of the U.S. copyright law

In order to fully understand the sample licensing regimes and the related disputes in Europe, one must be aware of the context set by the U.S. case law and the impact it has had on the industry practices, as well as the unintended externalities caused by the realignment of the stakeholder expectations in the wake of the earliest sampling law suits in the early 1990s and later in mid-2000s. Since the roots of many musical genres that rely or used to rely heavily on sampling originate from the U.S., it is not surprising that also the existing U.S. case law provides the most varied and holistic view of how the courts have approached the issues of unauthorised sampling.

The constitutional and statutory core of the U.S. copyright law and the *sine qua non* of the protection is originality<sup>311</sup>. However, the U.S. Copyright Act grants the sound recording copyright holder rights roughly comparable to, but more narrow, than those granted for a composition copyright holder. The right to distribute copies of the work is more limited in that the sound recording copyright holder's right to "reproduce the copyrighted work in copies or phonorecords" refers to the duplication of "copies that directly or indirectly recapture the actual sounds fixed in the recording". The right to prepare derivative works only covers "works in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality". Finally, the rights do not extend to "the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording".<sup>312</sup>

In an event of an alleged violation of the U.S. composition copyright, the owner of the right may sue for infringement, provided he can prove a valid copyright in the work, access and that the copying concerned legally protected elements. In a sampling suit, once it is shown that a sample originated from a third-party recording, the plaintiff has generally met his *prima facie* for infringement<sup>313</sup>.

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<sup>311</sup> Under the U.S. Supreme Court formulation in *Feist Publications*, originality consists of independently created expression that raises above a minimal threshold level of creativity. See *Feist*, referring to the 1976 Copyright Act, in which copyright is only extended to "original works of authorship", as well as to the IP Clause of the U.S. Constitution in that it implies originality by its reference to "Writings" and "Authors".

<sup>312</sup> 17 U.S.C. § 106 and § 114.

<sup>313</sup> Reilly 2012, 172.

As a defence, the defendant may argue that the work copied or the part thereof was not sufficiently original, or that the elements used belong to the public domain, as they are too common and basic *scènes à faire* to warrant a copyright protection. Secondly, the defendant may claim the use was *de minimis*; i.e. too trivial or insignificant by extent or content for the test of substantial similarity to be satisfied<sup>314</sup>. Thirdly, an independent creation may be argued, although this claim rarely has relevance in debates of sampling of digital sound recordings. Finally, the defendant may choose to assert an affirmative defence of fair use, in which the defendant shows the purpose of copying to be a legitimate cause recognised to support some other generally accepted societal values.<sup>315</sup> Additionally, the statute of limitations or a proof of an abandonment may sometimes be evoked as a defence in a copyright suit<sup>316</sup>.

The section 107 of the Copyright Act defines the four factors to be used in evaluating whether a particular use is fair as: “(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.”<sup>317</sup> Essentially, however, the present fair use analysis concentrates on the element of transformativeness<sup>318</sup>.

Fair use has been described as a ‘safety valve’ that allows the judiciary to read the copyright law in a way that best serves the balance between the interests of artists and the public<sup>319</sup>, or those of copyright holders and users. Generally, Samuelson argues, courts have become more receptive of the ‘quoting’ from a host of different types of creative works, but digital sampling of sound recordings remains an exception to this rule<sup>320</sup>, as will be confirmed in the following discussion of the relevant case law.

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<sup>314</sup> From *De minimis non curat lex*. As discussed in the following, *de minimis* defence is only applicable to composition copyright, as the *Bridgeport* ruling specifically rejected the possibility of *de minimis* for sound recordings.

<sup>315</sup> Rosen 2008, 282-284.

<sup>316</sup> Moser and Slay 2012, 203-206.

<sup>317</sup> *U.S. Code* 17 (2006), § 107. For an analysis of the fair use doctrine, see Beebe 2008.

<sup>318</sup> Beebe 2008.

<sup>319</sup> Azran 2014, 70.

<sup>320</sup> Samuelson 2009, 2537 and 2578.

## 6.2. U.S. case law on sampling: composition copyright

*Grand Upright Music Ltd. v. Warner Brothers Records, Inc.* was the first U.S. ruling to opine on digital sampling<sup>321</sup>. In the case, a sample extending a piece of the melody with three words and the accompanying ostinato figure had been used without a permission<sup>322</sup>. The defendant admitted to unauthorised sampling, but argued fair use and *de minimis*. Starting with a dramatic Biblical citation, “Thou shalt not steal”, Judge Duffy determined that no unlicensed sampling could be legal, disregarding any considerations of substantiality of the use as unnecessary. The plaintiff was granted a preliminary injunction and the matter was referred further for potential criminal prosecution. Some authors<sup>323</sup> have hold the ruling unreasonably one-sided and excessively harsh in its lack of analysis of the facts, although others<sup>324</sup> accept the premise of laying groundwork for boundaries for copyright ownership in music and the consequent rules of legitimate sampling. Either way, *Grand Upright* decision had an effect on the new industry practice of negotiating licenses before the release of any sample-base music<sup>325</sup>, as well as likely on the surge of music copyright infringement litigation starting in the 1990s<sup>326</sup>.

In *Campbell v. Acuff-Rose*<sup>327</sup> the U.S. Supreme Court established that a parodic, transformative use of a copyrighted musical work could qualify as fair use even if the use was commercial in nature. In the lawsuit, a rap group 2 Live Crew was sued for infringing the copyright of Roy Orbison’s “Pretty Woman” by their parody version, which borrowed from the original the first line of lyrics and a characteristic bass riff. In applying the four factors of the fair use analysis, the Supreme Court noted that the analysis should be done case by case, and that the parody defence in itself should be regarded as no guarantee of fair use finding. Nevertheless, the court found that the transformative qualities of the new work helped counterbalance its commercial nature, and that the taking of the ‘heart’ of the original could be considered necessary for the parody to be able to conjure up its target. The parody was itself considered to be

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<sup>321</sup> *Grand Upright Music, Ltd v. Warner Bros. Records Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991). [*Grand Upright*] Some authors list earlier disputes from the late 1980s, but *Grand Upright* was the first that did not settle before the judgement, hence creating the first precedent, albeit only on a district court level.

<sup>322</sup> Before the release of the work, a license had originally been requested for, but not obtained, which was interpreted by the judge as an indication that the defendant had acknowledged the existence of copyright but had deliberately chosen to ignore it.

<sup>323</sup> See for example McLeod and DiCola 2011, 133.

<sup>324</sup> See for example Reilly 2012, 175-176.

<sup>325</sup> Azran 2014, 73.

<sup>326</sup> Cronin 2015, 6.

<sup>327</sup> *Campbell v. Acuff-Rose, Inc.* 510 U.S. 569 (1994).

original with distinctive sounds and a significant amount of musical and lyrical content that departed from the Orbison's work. Regarding the fourth factor, the court noted that parodies rarely work as substitutes for the original work, as they serve different market functions and approach distinct audiences and since given the critical relation of a parodic work to the original, the right holders of the original would not be likely to find parodies a lucrative licensing market, supporting the presumption of no market harm. Overall, then, the Supreme Court concluded that the Live 2 Crew parody version could qualify for the fair use defence<sup>328</sup>.

This seemingly permissive attitude towards parodist's freedom in using pre-existing musical materials does not give a sampling artist a *carte blanche* defence to fall back to in case unauthorised sampling is contested. In *Bridgeport Music, Inc. v. UMG Recordings*<sup>329</sup>, the defendants argued that the excerpts sampled in "D.O.G. in me" from the original work "Atomic Dog" by George Clinton were too commonplace to warrant copyright protection, as well that their sampling fell under fair use, as it was intended as an homage or tribute to Clinton. The first claim contested by both the district court and the court of appeals. The sample used included the word "dog" spoken in a low register at regular intervals, the rhythmic sound of panting and the refrain "Bow wow wow, yippie yo, yippie yea" sung on a single repeated note. These parts were evaluated to form the most well-known and unique aspects of the original work, as demonstrated by expert testimony<sup>330</sup>, and by the fact that the work in question is one of the most frequently sampled compositions of the Funk genre<sup>331</sup>. The credibility of the homage defence was undermined by the failure of the defendants to explain how the use of the samples was purported to honour the original, as well as the lack of any acknowledgement of Clinton's work as the inspiration in the credits or liner notes to the album<sup>332</sup>. Additionally, the ruling confirmed that the expression protected under copyright need not be a melodic or harmonic motive as such, as long as it is uncommon and identifiable enough to be original in the meaning of the law.

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<sup>328</sup> The case was remanded, but the parties settled, leaving open the conclusive analysis of whether the parody was indeed fair use.

<sup>329</sup> *Bridgeport Music, Inc. v. UMG Recordings, Inc* 585 F.3d 267, (6th Cir. 2009). [*Bridgeport II*].

<sup>330</sup> According to the Opinion by Judge Martha Daughtrey, the copied elements were "unique" and "the most well-known aspect of the song-in terms of iconology, perhaps the functional equivalent of "E.T., phone home.""

<sup>331</sup> Who Sampled identifies 227 new works that sample "Atomic Dog"  
<http://www.whosampled.com/George-Clinton/Atomic-Dog/sampled/>.

<sup>332</sup> The decision did not explicitly rule out the possibility that an homage *might* in some circumstances qualify for the fair use defence, nor that "D.O.G. in me" may theoretically have been argued as a parody of "Atomic Dog", but the argument defendants made in this case was not convincing enough to have supported the fair use test.

Despite *Grand Upright*, there have been some cases that have accepted the premise of *de minimis* in the context of composition copyright in third-party sampling. In an early district court case, *Jarvis v. A & M Records*<sup>333</sup>, the defendant had sampled an original bridge section containing some lyrics, as well as a distinctive and qualitatively important keyboard riff. Evoking a substantial similarity test not dissimilar to the one used in traditional music copyright plagiarism disputes that do not involve sampling, the court found infringement on the basis that original elements of the plaintiff's work had been copied. Although the case was ruled in favour of the plaintiff, the fact that the comparative analysis of substantiality was used, suggests that a sampler might not need to obtain a separate license from the composition copyright holder in certain circumstances other than the parody exception of *Campbell* alone.

Such an interpretation was confirmed and refined in *Newton v. Diamond*<sup>334</sup>. In the dispute, the Beastie Boys had used a segment of three notes spanning total six seconds from a work by a flutist James W. Newton. The defendants had obtained a license for the use of the sound recording, but not for the composition copyright, and Newton sued arguing a composition copyright infringement. The main issue in dispute was whether distinctive multiphonic sound created by overblowing the flute was attributable to performance elements alone, which would have been covered by the sound recording copyright or whether it could be considered a separately copyrightable element of composition. Given the sound recording use had been appropriately licensed, the court only analysed the extent "compositional elements" had been appropriated, using an applied version of the substantial similarity test, and found the taking *de minimis* on the basis that "average audience would not recognise the appropriation".<sup>335</sup> As established by the court, this "fragmented literal similarity" standard applies in cases where a small portion of the original copyrighted expression has been copied, but the copy is exactly identical to the original, as is the case in sampling<sup>336</sup>. Most commentators have found this conclusion reasonable<sup>337</sup>, although some have criticised

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<sup>333</sup> *Jarvis v. A & M Records*, 827 F.Supp. 282 (D.N.J. 1993). [*Jarvis*]

<sup>334</sup> *Newton v. Diamond*, 388 F.3d 1189 (9th Cir. 2004). [*Newton*]

<sup>335</sup> *Newton*, at 1190-1193. Korn (2007, 495-497) observes that some U.S. Circuit courts have adopted a dissimilar approach in requiring the audience to be "specialised" in the case of complex and technical works in which the "ordinary lay audience" would not be able to appreciate significant but subtle differences of composition. The problem with this approach – and perhaps the reason for why the majority of circuit courts have not adopted it – is the question of when should a particular work be considered special enough to warrant such a specialist audience evaluation.

<sup>336</sup> *Newton*, at 1195

<sup>337</sup> Reilly 2012, 178-179; McLeod and DiCola 2011, 136-147.

it for adopting too narrow a view on what elements in music can constitute an original composition<sup>338</sup>.

Overall, the conclusion from the case law suggests that unauthorised sampling may not infringe the composition copyright of the original work if the use of original compositional expression is minimal or if the latter work successfully fulfils the criteria of a parody and hence qualifies for a fair use defence. For the sound recording copyright, however, the situation is very different.

### 6.3. U.S. case law on sampling: sound recording copyright

Undoubtedly the most discussed landmark case on the issue, *Bridgeport Music, Inc. v. Dimension Films*<sup>339</sup>, rejected the option of establishing a *de minimis* threshold for sampling of a sound recording<sup>340</sup>. In the dispute, a two-second sample of three-note guitar arpeggio from “Get Off Your Ass and Jam” by Funkadelic had been lowered in pitch and slowed in tempo to the point of barely recognisable, and then used in a song “100 Miles and Runnin’” by N.W.A., a work later used in film production<sup>341</sup>.

The court aimed to establish a bright-line rule of no sampling without a license to increase judicial efficiency and to end the speculations about the exact role of sampling in the spectrum of illegitimate and legitimate unauthorised musical quotations<sup>342</sup>. The court argued that the existence of sampling markets indicated that even the smallest taking would potentially deprive the owner of the original copyright of something of value. Furthermore, it was observed that sampling would always be an intentional act per definition, with the alleged aims of saving costs or of adding value to the new work through the use of the earlier one. The court evaluated that the market would control the prices of the sample licenses, thus avoiding any creativity-stifling impacts. As for the options for samplers unable or unwilling to obtain proper licenses, the court

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<sup>338</sup> See Korn 2007, 493-494. Although his critique on the narrow definition of copyrightable musical composition (melody/harmony/rhythm) instead of a more holistic analysis is reasonable, the author does not discuss the opposite problem of what happens when *any* creative choice with regards to sound, timbre, colour, rhythmic structure or other unconventional element is granted a copyright and hence a vaguely defined monopoly on that element. Coincidentally, Korn was the plaintiff’s lawyer in the *Newton* case.

<sup>339</sup> *Bridgeport Music, Inc. v. Dimension Films, LLC* 410 F.3d 792 (6<sup>th</sup> Cir. 2005).

<sup>340</sup> *Bridgeport I*, at 801. The new song was incorporated to a film soundtrack and the defendants of the case were the producers of the film.

<sup>341</sup> *Bridgeport I*, at 796, 839-840.

<sup>342</sup> *Bridgeport I*, at 802. Apparently the eagerness of the court to come up with an unambiguous rule was related to the hundreds of complaints filed by the Bridgeport Music Inc., several of which the court likely expected to be deciding on themselves, unless they found a way to solve the issue at once.

suggested a creation of an independent rendition of the original sounds to be used for the new work instead of sampling the original.<sup>343</sup> As the question of possible fair use had not been asserted at the district court level, the circuit court did not directly evaluate its potential applicability to the case at hand, but left the option open.

Many commentators<sup>344</sup> have considered the court's analysis of the realities of the sampling license market as misinformed, and lamented that post-Bridgeport, the sample-hostile legal environment has made a lasting and dramatic impact on the creative practices in the music industry in the U.S. One of the most controversial aspects of the ruling is the literal reading of § 114(b) of the Copyright Act not as a limitation of sound recording copyright through the acceptance of independently fixed imitations of the original, but rather as an indication that a sound recording should be protected without exceptions, whether it is used in its entirety or only in part<sup>345</sup>.

Despite the wide publicity and academic debate surrounding the *Bridgeport* ruling, no other U.S. circuit has either adopted or rejected the approach<sup>346</sup>. In fact, only one district court has specifically rejected the *Bridgeport* doctrine in *Saregama India v. Mosley*<sup>347</sup>. The court of appeals of the 11<sup>th</sup> Circuit affirmed the ruling, but on different grounds, leaving the district court alone with the dissident interpretation. Conversely, in *Pharmacy Records v. Nassar*<sup>348</sup>, another district court identified *Bridgeport* as the proper test for sound recording copyright infringements involving sampling, although a summary judgement was granted for the defendants on the basis that the act of sampling could not be convincingly proven<sup>349</sup>.

Concerning the recommendation of the *Bridgeport* court for samplers to re-record the materials they need allosonically, the recent *Blurred Lines*<sup>350</sup> ruling is potentially alarming. Although the dispute was about composition copyrights and involved no

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<sup>343</sup> *Bridgeport I*, at 801-802.

<sup>344</sup> See, for instance Boyle 2008; McLeod and DiCola 2011 and Azran 2014, among others. For a supporting argument, see Reilly 2008, 398-402.

<sup>345</sup> *Bridgeport I*, at, 800. See also McLeod and DiCola 2011, 92-94.

<sup>346</sup> Brauneis 2014, 56.

<sup>347</sup> *Saregama India Ltd. v. Mosley*, 687 F. Supp.2d 1325, 1339-1341 (S.D. Fla. 2009), *affirmed on other grounds*, 635 F.3d 1284 (11th Cir. 2011). The case is discussed in some detail in Reilly 2012, 183-185.

<sup>348</sup> The ruling was later affirmed by the circuit court. *Pharmacy Records, Inc. v. Salaam Nassar*, 379. F. App'x 522 (6th Cir. 2010).

<sup>349</sup> Additionally, Reilly (2012, 186-187) notes two cases in which the *Bridgeport I* rationale is endorsed, although the facts of the case are different and the disputes do not involve sampling as such. See *King Records, Inc. v. Bennett*, 438 F.Supp.2d 812, (M.D. Tenn. 2006) at 850; and *Palladium Music, Inc. v. EatSleepMusic, Inc.*, 398 F.3d 1193 (10<sup>th</sup> Cir. 2005) at 1199.

<sup>350</sup> *Pharrell Williams et al v. Bridgeport Music Inc et al*, No. 13-06004 (N.D. Cal. 2015).

<http://mcir.usc.edu/inplay/Documents/williamscomplaint.pdf>

sampling as such, the ruling implies that the district court was willing to extend copyright protection to a style or groove – an aspect of musical expression previously considered to belong safely to unprotectable elements of the public domain. Inasmuch as a musical style could be regarded as part of a copyrightable expression, this could bring further problems to samplers who are duly trying to produce passable sound-alikes, as instructed by the *Bridgeport* court. As of present, the defendants have filed a notice of motion for a new trial, and it is more than likely that the Court of Appeals for the 9<sup>th</sup> Circuit, with its long experience of copyright cases, will overturn the unexpected jury verdict<sup>351</sup>. In the meantime, however, the case could inspire more misinformed copyright infringement suits, as well as likely increase the pressure of alleged plagiarists to settle for terms reasonable or unreasonable, whether or not the allegations are well-founded, making another unfortunate contribution to the toxic litigiousness of the music industry and hurting all parties involved.

#### 6.4. New dimensions on fair use

As discussed above, fair use has been considered in some sampling cases also theoretically possible outside of the parody exception, but generally the doctrine has run into problems. Typically, the defendant has trouble arguing that the use is not commercial, but the defence can also fail because sampling of a crucial portion can be considered to diminish the value of the original work<sup>352</sup>. However, recent U.S. cases in the field of visual arts provide an interesting point of comparison for the question of non-parodic appropriation of pre-existing copyrighted materials. In the context of the earlier case law, they point to a growing acceptance of unauthorised transformative appropriation as fair use, at least in the visual media.

In *Blanch v. Koons*, a collage-type appropriation of third-party expression was considered fair use<sup>353</sup>. The dispute concerned a copyrighted photography by Andrea Blanch, a part of which appropriation artist Jeff Koons had used in his painting collage. The colours, medium, size and details of the original image had been altered from the original, which, according to the court, made the new work transformative and consequently fair use<sup>354</sup>. In *Cariou v. Prince*<sup>355</sup>, the same court found no infringement

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<sup>351</sup> See, for example, Rae 2015.

<sup>352</sup> Reilly 2012, 174.

<sup>353</sup> *Blanch v. Koons*, 467 F.3d 244, 254-255 (2d Cir. 2006).

<sup>354</sup> The case is discussed by McLeod and DiCola 2011, 242-243; Azran 2014, 95-101. The ruling in this case was particularly interesting given the 1992 dispute in *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), in which the same court had found Koons' satiric sculpture based on the plaintiff's photograph, an

of Patrick Cariou’s copyrights, when another famous appropriation artist Richard Prince used his photographs in his own art. The court regarded the dramatic colour collages on a large canvas aesthetically so different from the original black-and-white landscape photograph book that they did not diminish the market for the latter<sup>356</sup>. The Second Circuit judgment was appealed, but the Supreme Court declined to hear the case, thus indirectly approving the interpretation.

This case has rightly been regarded as perhaps the most expansive interpretation of fair use in the realm of creative works of any court yet, as there was no requirement for the new work to *comment* on the original work to fulfil the test of transformativeness, unlike in most of the earlier fair use rulings<sup>357</sup>. Furthermore, it seems that the fourth factor of market impact has gained an increasingly important role in potential fair use analysis, paving way for more flexible interpretations of creative works that use earlier copyrighted expression<sup>358</sup>. As aligned in *Campbell*, the transformative nature of the derivative work, and consequently the lessened risk of market substitution, requires that market harm cannot simply be presumed<sup>359</sup>. Two possible tests for evaluating the market impact include an inquiry of whether a potential market considered is “traditional, reasonable, or likely to be developed”<sup>360</sup>, and the conclusion that the market for the original has been usurped “where the infringer’s target audience and the nature of the infringing content is the same as the original”<sup>361</sup>.

These two cases seem to have significantly expanded the scope of fair use in non-parodic contexts. While it can be argued that the judgment could be the first step to the right direction in better balancing the freedom of expression and copyrights, the Second Circuit court provided no clear guidelines for evaluating when a particular work might be transformative enough to qualify for fair use, leaving it for the case-by-case analysis of the courts instead. This is problematic particularly because the

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infringement. In this earlier case, Koons argued a fair use parody, but the court rejected the argument holding the new work was a satire. The Supreme Court’s ruling on *Campbell* a few years later extended the possibilities of finding fair use in a commercial work under some circumstances.

<sup>355</sup> *Cariou v. Prince*, 714 F.3d 649 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 816 (2013). [*Prince*]

<sup>356</sup> *Prince*, at 706.

<sup>357</sup> *Prince*, at 706. Azran (2014, 69 and 91) contends that such an interpretation of the *Campbell* ruling by other courts has been misinformed and that the standard adopted in *Prince* with no requirement of an announced intent was what the Supreme Court had envisioned in the *Campbell* ruling. Given that the Supreme Court had an opportunity to weigh in on the *Prince* ruling and chose not to do so, Azran’s interpretation may well be correct.

<sup>358</sup> See also McLeod and DiCola 2011, 242-243.

<sup>359</sup> *Campbell*, at 591.

<sup>360</sup> *American Geophysical Union v. Texaco, Inc.* 60 F.3d 913, 920 (2d Cir. 1994).

<sup>361</sup> *Prince*, at 709.

appropriation in question used what seems like a significant amount of the original, but also because it generally retains the ambiguity and uncertainty inherent to fair use. Finally, the lack of clear guidelines might force courts in the future to opine on artistic merits of a work, which is not ideal.<sup>362</sup>

While these cases have dealt exclusively with high-end examples of visual arts, some authors<sup>363</sup> have been quick to suggest that the divergence of fair use standards in different fields of creative works is unsustainable and that right to transformative music sampling should be – or perhaps already is, through the precedent of *Cariou* – expanded from the strict rule of *Bridgeport* and the narrow *de minimis* guidelines provided by *Newton*. Indeed, there is nothing in the case law to directly suggest why music should be kept to a standard highly divergent from that of visual arts. Yet, in order to apply the *Cariou* fair use standard to sampling, one needs to assume that the market harm caused for the sound recording copyright holders by non-licensing is not an actual market harm, but rather a symptom of a market failure caused by the distorted and artificially all-encompassing licensing regime established in the wake of the *Bridgeport* ruling<sup>364</sup>. According to this interpretation, no licensing market for small fragmentary samples would exist if it were not for *Bridgeport*, and hence no *real* market harm results from such unlicensed use. Such an assumption, even if initially attractive, is complicated to prove and has so far not been directly supported by any U.S. court. Furthermore, there is a crucial difference between visual art and music in that the latter is protected on two levels, each of which has their own standards of protection, whereas there is only one level of copyright protection for a piece of visual art. It is therefore premature to conclude that any transformative sampling of music is definitely fair use.

## 6.5. Comparison of the U.S. and European case law on sampling

On the surface, the courts in U.S. and in Europe have adopted closely similar regimes in evaluating unauthorised sampling. Both *Bridgeport* and *Kraftwerk* grant neighbouring rights holders an extensive monopoly to the sound recording to the extent that virtually any unlicensed appropriation of the sound is an infringement per definition. Both make

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<sup>362</sup> See also Azran 2014, 98.

<sup>363</sup> Azran 2014.

<sup>364</sup> See Azran 2014, 106-107. According to the author, sample users obtain both master and publisher clearances and the right holders choose to enforce their rights largely because of a flawed perception of the law requiring *everything* to be licensed.

a distinction between the neighbouring rights and copyright<sup>365</sup>, granting the former – perhaps surprisingly – more exclusive rights, and subjecting the latter to more exceptions in comparison, using the difference in protected subject matters as the reasoning for such a distinction. Both argue that such a restrictive approach is necessary for the protection of neighbouring rights in sound recordings to be meaningful. Both encourage samplers unable or unwilling to obtain licenses to use session musicians to re-record to sounds they need, arguing this satisfies the requirement of sufficient access to existing cultural materials while protecting the creative and financial investment of the original creators. Finally, both acknowledge the theoretical need for exceptions in neighbouring rights as well, leaving the door open for fair use or for free use, while simultaneously limiting the scope of such exceptions by leaving them undefined (*Bridgeport*) or by subjecting them to a separate test (*Kraftwerk*).

Neither of the two courts discusses the possible large-scale implications that abandoning the licensing markets for the benefit of re-recording might have for the original artists or the session musicians hired to do the re-recording. Similarly, neither of them acknowledge that when a sample is replayed, some neighbouring rights holders might still be able to protest, because their personal input may theoretically rise to the level of independent original creation. Consequently, the re-recording of a sample that contains original expression might escape the licensing requirement of neighbouring rights, but would still potentially infringe the composition copyright of the original, and is hence liable to licensing.

There are also differences in how the U.S. and the European<sup>366</sup> jurisprudences define the possible exceptions for the exclusive neighbouring rights. Since the *Bridgeport* court did not specify how the fair use eventualities should be analysed in sampling cases, the indication seems to be that the exception mainly covers well established types of fair use, but nothing much else. It is therefore likely that a parody would be such a conceivable exception, whereas the status of other types of works, such as a homage or a pastiche, is more uncertain. Similarly, it is likely that the commercial nature of the sampling work is not an unconditional obstacle for a fair use finding. Given the case law in the field of visual arts, it is theoretically possible that also instances of transformative works other than parody could qualify for the fair use exception.

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<sup>365</sup> Or in the case of the U.S. law, composition copyright and the sound recording copyright.

<sup>366</sup> In this case, European refers mainly to the German and UK jurisprudences in addition to the European *acquis*, as previously discussed.

The German approach to the neighbouring rights exceptions in sound recordings is very different. In general, by allowing unlicensed sampling in situations where the sound sampled is truly unique and inimitable, the *Kraftwerk* court established an objective of promoting and safeguarding cultural progress rather than the all-encompassing exclusive right of the right holders in controlling the use of their works. In other words, the court establishes that rare and unique samples provide valuable material for subsequent creation and should as such be kept free, even if the decision to draw the line between accessible and inaccessible unlicensed sampling on the imitability of the sample is unprecedented and radical. It leans heavily on the assumption that in most cases, a re-recording of a sample is qualitatively reasonable substitute of the original, and that the decision to sample is mainly an economic consideration.

Regarding composition copyrights, the U.S. and the European approach seem to diverge somewhat. Given the nature and the breadth of the U.S. case law, the doctrine of *de minimis* has gained some traction, establishing for example that an excerpt of three notes could be *de minimis*<sup>367</sup>, but a set of excerpts incorporating a significant riff from the original, as well as other instrumental elements, is likely not<sup>368</sup>. Such a definition is not sufficient for a conclusive evaluation of an absolute *de minimis* threshold in any given situation, but it does give some guidelines for the extrapolation of how musical originality is to be understood with respect to composition copyrights in sampling. Regarding instances of sampling that are more extensive than *de minimis*, the U.S. doctrine of fragmented literal similarity seems to guide the analysis in the direction analogous to the originality evaluation of traditional music plagiarism analysis.

On the surface, it would seem that if the samplers' argument about the impracticability of allosonic samples holds true in the face of the BGH test, the German model is more flexible and permissive of unlicensed sampling. The German model sets no restrictions on the genre or type of the new work, does not put weight on whether or not the latter use is commercial<sup>369</sup> and requires no specific transformativeness as such, as long as the use is in a context that preserves a sufficient inner distance between the old and the new work. In this case, it is the neighbouring right holders of unique and inimitable

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<sup>367</sup> See *Newton*.

<sup>368</sup> See *Grand Upright and Jarvis*.

<sup>369</sup> This is true unless the fact that sampling is done in commercial context makes it fundamentally incompatible with the free use exception, or with the three-step test of the InfoSoc Directive. The *Kraftwerk* and *Goldrapper* rulings do not indicate such an interpretation to be inevitable.

sounds that suffer the most from the loss of the opportunity of charging premium licensing prices for samples of their works. This could perhaps be seen as the reasonable concession on the basis that it is specifically the uniqueness of the sounds that makes them culturally too valuable to be constrained for private interests. Certainly, there is the counter-argument that the loss of licensing revenue discourages artists from creating unique sounds, since they run at risk of becoming open for unlicensed sampling. This argument is, however, somewhat unconvincing, because of the general nature of the musical creation, in which the potential of the work in sample markets is an after-thought rather than the goal of the creative work. In the opposite situation in which most of the samples would turn out to be reasonably re-recordable, the occasions of truly unique samples that fulfil the free use conditions set in *Kraftwerk* are likely to be rare enough to not to pose a threat to the incentive structures of the right holders as future creators.

Until the Hamburg court gives their interpretation of the issue in *Goldrapper*, and due to the inconclusive results of the two UK cases discussed above, it cannot be definitively concluded at present how the German, or more generally European standard of originality compares with the U.S. one. Nevertheless, the fact that the BGH declined to rule on the issue in *Goldrapper* without a further forensic musicological analysis indicates that the standard could be at least as flexible as in the U.S. It is even possible that the European interpretation in the issue could turn out to be more permissive than the U.S. one in this particular aspect, but that remains to be seen.

Despite the fact that *Campbell* establishes a reasonably flexible safe harbour for parodic sampling in the U.S., there has been little success in introducing other respective fair use types that would involve sampling. Whether the permissive interpretation of transformative use introduced in *Blanch v. Koons* and in *Cariou v. Prince* can be carried over to the field of musical appropriation remains an open question. Should that be the case, the U.S. regime would prove to be significantly more flexible than the European one. Overall, then, fair use may have some future potential in providing samplers some or even significant freedom to use third-party material protected under copyright, but currently such potential has not been confirmed. With the strict European policy of copyright exceptions and limitations, there is per definition significantly less room for flexible interpretations for unlicensed commercial sampling.

Some factors that may play a role in the slight divergence between the U.S. and the European approaches to sampling include the impact of sample trolls on the eagerness

of the courts to find solutions that maximise judicial efficiency, the size of the entertainment industry and the consequently larger volume of disputes, the uncertainties of the jury work in copyright infringement disputes, which may encourage even somewhat speculative infringements to be enforced in the hope of financial gain<sup>370</sup>, as well as the fact that statutory damages provide an incentive for even international cases to be tried in the U.S. rather than in Europe.

A summary of these findings is presented in table 1. The table documents whether unlicensed sampling is generally allowed (not infringing) in each particular situation, the relevant criteria and exceptions, as well as the case law or the statute on which such a defence is based on. ‘*Bridgeport I*’ refers here to the case *Bridgeport v. Dimension Films*, and ‘*Bridgeport II*’ respectively to *Bridgeport v. UMG Recordings*. The applicability of parody, quotation and pastiche (collage) as defences of unlicensed use in Europe (marked \*) will be discussed more in detail in the next chapter.

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<sup>370</sup> See for example Cronin 2015.

Type of sampling	U.S		Europe (Germany, UK)	
	<i>Composition copyright</i>	<i>Sound recording copyright</i>	<i>Copyright</i>	<i>Neighbouring rights</i>
<i>Sound mining</i>	Yes, when not recognisable: <i>de minimis</i> [Newton]	No, but exception: fair use. [Bridgeport I]	Yes, when sample not original expression. [DE: Goldrapper]	No, but exception when not replayable (DE). [DE: Kraftwerk]
<i>Extensive reference, homage</i>	No. [Bridgeport II]	No.	No. [CJEU: Infopaq]	No.
<i>Parody*</i>	Yes – when fair use and not satire. [Campbell]	Yes/inconclusive. [Campbell, Bridgeport I]	No/inconclusive. [Deckmyn, InfoSoc Art. 5(3)(k), UK CDPA §30A]	No/inconclusive. [Deckmyn, InfoSoc Art. 5(3)(k), UK CDPA §30A]
<i>Quotation*</i>	No. [No applicable case law]	No. [No applicable case law]	No/inconclusive (DE). [DE: UrhG §51 Musikzitat, and §24 Freie Benutzung]	No/inconclusive (DE). [DE: UrhG §51 Musikzitat, and §24 Freie Benutzung]
<i>Collage*</i>	No. In some cases tolerated use [Girl Talk]. Transformative fair use eligibility speculative. [Prince]	No. [No applicable case law]	No/inconclusive (UK). [InfoSoc Art. 5(3)(k), UK CDPA §30A: pastiche]	No/inconclusive (UK). [InfoSoc Art. 5(3)(k), UK CDPA §30A: pastiche]

**Table 1** A summary of the legislation concerning different types of unlicensed commercial sampling in the U.S. and in Europe.

## 7 MAPPING FUTURE POLICY OPTIONS FOR SAMPLING

### 7.1. Spectrum of policy options

Despite the wide academic outcry accusing courts of imbalanced interpretations in sampling disputes, it can overall be argued that courts have, in fact, been fairly understanding of sampling – at least with regard to (composition) copyright. Whether the case law currently establishes a perfect balance between the rights of the original and the sequential creators is a different question, but in the very least, some form of balance is being sought for, also in the context of the more traditional doctrines of copyright and neighbouring rights law.

Nevertheless, disillusioned by the existing policy options under the current copyright regime, some U.S. commentators have suggested alternative frameworks of reward and incentive that bypass copyright altogether. Fisher, for example, discusses a “governmentally administered reward system” in which a tax collected by the government and subsequently divided and distributed by the Copyright Office would replace the current proprietary order of copyright protection<sup>371</sup>. A somewhat less radical, but still not uncontroversial option is hypothesised by McLeod and DiCola in their discussion of a reverse liability rule, which, instead of requiring a fee for the use of a protected expression, would impose a statutory fee for the *right holder* to stop the undesirable use<sup>372</sup>. While such proposals may arguably have their merits in widening the scope of options generally available for an idealistic academic debate, and possibly for providing ideas for long-term policy developments, it is doubtful they should be taken as serious short-term solutions for the current problems of the sample licensing market.

Another common frame of argumentation involves some form of an extended fair use regime<sup>373</sup>. A European fair use exception would no doubt be prone to undermining the legitimacy of the existing sample licensing market by allowing too vaguely defined

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<sup>371</sup> Fisher 2001, 202, 235. Even if one overlooks the major ambitiousness of such a plan, the new system as proposed by Fisher is incomplete in that the reward allocation of sample revenue based on the quantitative length of the sample alone is not sensitive to the complex pricing structures of the currently existing license regime. See Fisher 2001, 235.

<sup>372</sup> McLeod and DiCola 2011, 263-266.

<sup>373</sup> Auferheide and Jaszi 2011; Azran 2014.

liberties to exploit the work of others without limits<sup>374</sup>. However, some exceptions and limitations already recognised in the national courts could provide reasonable breathing space for certain transformative secondary uses of sound recording materials. In particular, as interpreted by Hugenholtz and Senftleben, the open-ended wording of several of the exceptions and limitations in InfoSoc Directive indicate that the EU law leaves national legislations ample room for introduction of copyright exceptions that could allow certain transformative uses<sup>375</sup>. Furthermore, given that the Directive does not harmonise the right for adaptation, there is significant freedom for potential national leeway in the way such works that build upon third-party copyright protected material are treated under the law<sup>376</sup>.

Encouraged by this observation, I will in the following discuss some policy options that could be used to further fine-tune or even expand the range of situations in which an act of unlicensed might not necessarily be an infringement. In the interest of pragmatism, the focus will be on some of the most promising practical solutions available for policy-makers already in the near future. First, I will evaluate the possibility of legitimate unlicensed sampling in the context of three types of intertextuality in which the form pre-dictates textually signalled relation to the object of reference: parody, quotation and pastiche (collage). I will then discuss the option of compulsory licenses and finally outline some options for industry-led changes in the sample licensing regime.

## **7.2. Parody case law and humorous sampling**

Parody provides an interesting contrasting perspective to the sampling disputes discussed earlier, because it is one of the more established and traditional types of copyright exception and increasingly recognised in various jurisdictions<sup>377</sup>. Coincidentally, parody also forms the framework of the only ruling on sampling decided by the U.S. Supreme Court<sup>378</sup>, and the only fairly certain type of fair use available for samplers, as discussed in the previous chapters. Contrasting the parody

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<sup>374</sup> Hugenholtz and Senftleben (2011, 29) warn about the drawbacks and risks of blindly adopting an open U.S. style fair use norm, as it would undermine the legal certainty typical of author's right traditions of law. Furthermore, such a provision would potentially be at odds with the three-step test of InfoSoc Directive.

<sup>375</sup> Hugenholtz and Senftleben 2011, 14.

<sup>376</sup> Hugenholtz and Senftleben 2011, 26-28.

<sup>377</sup> CDPA Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 No. 2356. Note also the recent work on parody by Erickson 2013, and Mendis and Kretschmer 2013.

<sup>378</sup> See *Campbell*.

legislation to the cases of non-parodic sampling gives a more complete picture of how copyright and neighbouring rights are interpreted in different contexts.

The CJEU decision in *Deckmyn* case<sup>379</sup> establishes the EU-wide interpretation of parody in copyright in all Member States that have adopted the Article 5(3)(k) parody exception of the InfoSoc Directive<sup>380</sup>. Before the CJEU ruling, national parody tests had developed their own delicate intricacies that were different from country to country. Traditionally, musical parodies have met little understanding in national courts. In the UK, for example, courts have based their determination of infringement on the substantiality of the taking regardless of the nature of the new use<sup>381</sup>, finding for example an advertising jingle made in a form of a parody of a song from the musical ‘south Pacific’ to be an infringement<sup>382</sup>. Similarly, a German parody song that used the original melody but new lyrics, which referred to an alleged affair of the singer of the original with a minor, was found to be an infringement. Although a regional court case, it confirms the general conclusion that in essence, unauthorised parody of a musical work is generally not permitted under the German copyright law.<sup>383</sup>

The CJEU adopted a more straight forward approach. The dispute in *Deckmyn* concerned the cover page drawing of calendars, the cover of which bore an obvious resemblance to the cover of a comic book *De Wilde Weldoener*<sup>384</sup>. In the original picture, one of the main characters is compulsively throwing coins to people on the street, whereas in the picture on the calendar, the ‘benefactor’ was the Mayor of the city of Ghent, and the people picking up the coins were represented by people of colour or wearing veils, in an effort of project anti-immigration values of the Flemish nationalist party through a purposed parody. Faced with the defence claim of parody, the Belgian court of appeals decided to stay the proceedings to request from the CJEU a

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<sup>379</sup> C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others* [3 September 2014, not yet reported] ECLI:EU:C:2014:2132.

<sup>380</sup> The Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, O.J. 2001, L 167, pp. 10-19 (the ‘InfoSoc Directive’).

<sup>381</sup> Section 16(3) CDPA 1988. This narrower focus was adopted after the case *Twentieth Century Fox v. Anglo-Amalgamated Film Distributors* [1965] case 109 S.J. 107. As Mendis and Kretschmer (2013, 12) note, this shift in jurisprudence was considered by many as a move towards supporting increased copyright holder control of ever smaller re-uses of their works, with the potential consequence of limiting opportunities of normal unlicensed exploitation and making (unnecessary) licensing the norm.

<sup>382</sup> *Williamson Music v. The Pearson Partnership* [1987] FSR 97.

<sup>383</sup> OLG München, April 11, 1991 - Gaby wartet im Park (29 U 6719/90). The case is discussed in Postel 2006, 146-147.

<sup>384</sup> The original work known as ‘The Compulsive Benefactor’ (1961) by Willy Vandersteen.

clarification of conditions of a parody within the meaning of Article 5(3)(k) of the InfoSoc Directive<sup>385</sup>

The CJEU noted that the concept should be defined according to “its usual meaning in everyday language”, although the context and purpose of the rules of which it is part must also be appropriately taken into account<sup>386</sup>. Given that neither the everyday meaning nor the wording of the InfoSoc Directive provides further criteria for the nature of parody, the Court held that the only two essential characteristics of a parody are that it (1) “evoke[s] an existing work while being noticeably different from it, and that it (2) “constitute[s] an expression of humour or mockery<sup>387</sup>. Consequently, any further conditions for parody were abandoned, including – but not limited to – that the parody could be reasonably attributed to a person other than the author of the parodied original; that the criticism or mockery is targeted to the original work itself; that the source of the of the parodied work is mentioned; or that the parody is original beyond simple display of noticeable differences between the parody and the parodied work<sup>388</sup>. Furthermore, by discarding the tests developed in various national courts, the Court set up a new harmonised standard for evaluating parody in the context of EU law, likely overwriting earlier national idiosyncrasies in the evaluation standards. <sup>389</sup>

Furthermore, the CJEU referred to the Recital 31 in the preamble of the InfoSoc Directive to point out the need for “fair balance” of conflicting interests between the author of the original work being parodied and the author of the parody. Parody as such may be “an appropriate way to express an opinion”<sup>390</sup> – even a disturbing or upsetting one, or one that the author of the parodied work does not approve for other reasons – and is consequently protected by freedom of expression<sup>391</sup>. However, in situations where the parody conveys a discriminatory message with respect to race, colour or

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<sup>385</sup> The specific questions referred to the CJEU were: 1) Is the concept of “parody” an autonomous concept of EU law?; 2) If so, must a parody satisfy the following conditions or to conform to the following characteristics: display an original character of its own (originality); display that character in such a manner that the parody cannot reasonably be ascribed to the author of the original work; seek to be humorous or to mock, regardless of whether any criticism thereby expressed applies to the original work or to something or someone else; mention the source of the parodied work; and 3) Must a work satisfy any other conditions or conform to other characteristics in order to be capable of being labelled as a parody? To the first question, not discussed further here, the CJEU answered confirmatively.

<sup>386</sup> *Deckmyn*, para 19.

<sup>387</sup> *Deckmyn*, para 20.

<sup>388</sup> *Deckmyn*, para 21. Spence 1998, 594-595 distinguishes between ‘target’ parodies (‘parody of’), in which the object of ridicule is an original text or its author, and ‘weapon’ parodies (‘parody with’), in which the text referred to is used as a vehicle for commentary of something else than the text itself.

<sup>389</sup> See Mendis and Kretschmer 2013; Rosati 2015, 6, for a discussion about the French legislation.

<sup>390</sup> *Deckmyn*, para 25.

<sup>391</sup> Article 11(1) of the Charter of Fundamental Rights of the European Union.

ethnic origin, contrary to the deepest values of the society as defined in Racial Equality Directive and the EU Charter of Fundamental Rights<sup>392</sup>, and may have an effect of associating the original work with such a message, it may fail to be eligible for protection under the Article 5(3)(k)<sup>393</sup>. In such an instance, the authors of the original work being parodied could have “in principle, a legitimate interest in ensuring that the work protected by copyright is not associated” with such a message<sup>394</sup>. The CJEU left it for the Belgian court to determine, whether the changes made for the representation of people picking up coins in the parody picture qualified for such an evaluation<sup>395</sup>. Some authors specifically welcome the indifference the CJEU is expressing toward the *subject* of the parody and hence the distinction between parody and satire, as well as the implied satisfaction of the criteria by humorous intent rather than requiring a humorous effect to be achieved. Overall, the impact of *Deckmyn* on the national parody exceptions is that of increased flexibility, limited only by potential moral rights considerations in situations where fundamental rights may have been violated.<sup>396</sup>

Considering the implications of this for sampling disputes, it seems that there might in theory be some instances where the parody exception could cover a work that involves unauthorised samples. Generally, one would argue that unauthorised parodic sampling should be allowed under the same basic criteria as any other unauthorised parodic work, meaning that the value of producing new transformative content (parody) should be regarded as more important a value for the society than the cost of the limited curtailing of the exclusive rights of the right holder of the original work, at least to the extent it is necessary for the new work to claim its place as a parody. Since the market for commercial music parodies is regardless limited and since there is small likelihood of negative economic impact on the market value of the original<sup>397</sup>, there is little risk that such an interpretation would give prospective samplers a *carte blanche* to excessively exploit their new freedom.

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<sup>392</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and Article 21(1) of the Charter of Fundamental Rights of the European Union.

<sup>393</sup> *Deckmyn*, para 28-30.

<sup>394</sup> *Deckmyn*, para 31. It is interesting to note, that this language is similar to the third leg of the Berne three-step-test, (Berne Convention Art. 9(2)), and consequently, to the Art. 5(5) of InfoSoc Directive (2001/29/EC).

<sup>395</sup> *Deckmyn*, para 32.

<sup>396</sup> Rosati 2015, 5-6. Rosati’s argument is based on the difficulties that have arisen from the US Supreme Court’s parody/satire distinction in *Campbell*.

<sup>397</sup> See Erickson 2013.

For this exception to apply, however, the parodic work must first fulfil the two criteria specified in the ruling: that the new work fulfils the basic criteria of evoking the original work without being identical, and of constituting an obvious expression of humour or mockery. As for how exactly a new musical work could in practice fulfil these criteria, *Deckmyn* provides little guidance. Given the semantically limited referencing capabilities of music, a work that uses portions of a previous work while adding in lyrics of obvious parodic nature might have a better chance of prevailing under a parody exception claim than a purely instrumental parody work, in which it may be disputable whether the “expression of humour or mockery” was obvious enough. It is certainly the case that the use must be sufficiently extensive so that the *Deckmyn* criterion of evoking the original is met, but this is usually not a problem, since it is also the measure of the success of a parody in its own genre. Overall, when a musical parody successfully overcomes these inherent limitations, it should have a reasonable possibility of prevailing as an accepted exception to the copyright of the original work.

In comparison with the U.S. case law, the European legislation and case law seems to be more flexible regarding the nature of the parody as well as the relation between the parody and the original work. Unlike in *Campbell*, the parody definition of *Deckmyn* does not require the new work to be parodic rather than satiric, nor does it impose any other significant limitations as to the extent of use of the original, the object(s) or topic(s) of ridicule, the style or tastefulness, the intended audience and their particular receptiveness, or the need for explicit acknowledgements, among others. The most important borderline cases in which the later work might fail to fulfil the *Deckmyn* criteria include homages, in which the expression of humour or mockery is not clear, and remixes, in which the distance between the original work and the new work might in some cases not be significant enough. Furthermore, no non-parodic works fit this category of exception whether or not they are transformative as such. In this respect, the European regime seems to be more flexible *within the parody genre* only. Similarly, the “legitimate interests” of the copyright holder to the original may in some situations limit the right of the sampler in creating the parody work, although, as previously discussed, such eventualities are not very likely to rise in most typical instances of sampling. Overall, a sampler that successfully argues his work to fall under the parody umbrella is likely to enjoy significantly more freedom in using third-party musical expressions than a sampler creating non-parodic works.

The ‘legitimate rights’ angle evoked in *Deckmyn* however establishes a possible limitation to potential parodic artists. One could imagine that certain types of openly racist, misogynist or otherwise distasteful lyrics in themselves, or in connection to a recognizable musical reference that connects the message to certain groups of people or to certain religions or cultures, could in theory give rise to serious moral right considerations akin to those in *Deckmyn*. Given the relative limitations of music in communicating specific literal messages, it is highly unlikely that such message would get incorporated in a musical work unintentionally or subconsciously. It is important to note, however, that the legitimate interests discussed in *Deckmyn* referred to the endangering of *fundamental rights* specifically. This means that a plaintiff could not use this argument to protest against an otherwise legitimate parodic use that connects the original work or its author directly or indirectly to other values the original author may consider personally undesirable, such as moderate political commentary, commercialism, aesthetic reasons, or other similar aspects<sup>398</sup>. Such potential aggravations of the moral right of integrity by “any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation”<sup>399</sup> may certainly be in some cases infringing as well, but they are likely to have less weight in comparison to the freedom of speech of the latter artist, provided the secondary use can be proven to provide something of value for the society<sup>400</sup>. It is only in disputes where the author has genuine interest in not being associated with discrimination, xenophobia, racism or similar sentiments that the “legitimate interests” of *Deckmyn* are to be adopted, making the rule applicable to only a limited minority of instances.

Naturally, any unauthorised musical parody that involves sampling may only fall under the *Deckmyn* exception when the Article 5(3)(k) of InfoSoc Directive has been implemented in the Member State in question. Since Germany, for example, has chosen not to implement that particular exception, and since the German copyright law in general is not particularly welcoming of musical parodies, it is more likely that a sampling parodist would have prevail in court in UK than in Germany, making such a territorially limited exception a risky defence for a sampler on international music markets.

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<sup>398</sup> See also Jütte 2014.

<sup>399</sup> Article 6bis(1) of the Berne Paris Text; and Article 5 of the WPPT.

<sup>400</sup> See also the above discussion in context of the UK cases *Morrison* and *Confetti*.

### 7.3. Sampling as quotation

A recognition of some forms of sampling as a type of creative quotation could be an option to provide more transactional efficiency for the sample licensing market and to encourage those forms of sampling whose existence and meaning formation is dependent on a specific reference to an earlier work. As discussed previously, quotation is one of the most important copyright exceptions in the Berne Convention, and the only mandatory one. Given the wide definition of ‘works’ protected under the Berne, there is no reason why the quotation exception should not encompass also literary and artistic works, besides text-based materials. Similarly, InfoSoc Directive does not directly address the option of quotations in creative domains, but the use of words “such as” indicates that the purpose of the quotation may be also other than the “criticism or review” explicitly mentioned in the Directive<sup>401</sup>.

The other conditions set in the Article 5(3)(d) of InfoSoc require that the quotation relates to a published work or other publicly available subject-matter, that the source is properly indicated, that the extent of use is justified by what is “required by the specific purpose” and that the use is generally “in accordance with fair practice”, including an indication of the author, when possible.<sup>402</sup>

Sampling could be a promising candidate for such an exception in that the quotation is in a typical case literal (identical), fragmentary, limited in extent and heavily re-contextualising. Often the sample remains audible, identifiable and textually signalled enough in the new work to indicate a foreign source of expression, and while not always the case, such reference may also be necessitated by a critical observation or argument expressed in the new work, which creates the inner distance between the two works as required by some jurisprudences. But would the criterion of the used extent being “required by the specific purpose” be fulfilled for example when a commercial sampling artist uses an individual excerpt of an iconic recording to make a very specific literal or musical point, and the part used is not so extensive as to risk becoming a substitute for

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<sup>401</sup> See also Hugenholtz and Senftleben 2011, 15. The instance of quoting *from* other than a literary medium was discussed in the CJEU case C-145/10 *Eva-Maria Painer v Standard Verlags GmbH and Others*, ECLI:EU:C:2011:798, para 134, establishing a generally permissive interpretation of quotations. The case does not, however, shed further light on a quotation *in* a creative medium, such as music.

<sup>402</sup> InfoSoc Directive Art. 5(3)(d). While some traditions of sampling may find the acknowledgement requirement incompatible with their existing aesthetic practices, others, like Girl Talk discussed in earlier chapters, already list their sources routinely. Given the special status Girl Talk enjoys as largely tolerated use, the good faith demonstrated by the public acknowledgement of the samples might already bring significantly more support for certain instances of unlicensed sampling from the right holders. For this reason, the suggestion of introducing such a requirement should not be rejected at the outset.

the original, but just enough to guarantee a non-specialist listener recognition, and openly acknowledges the quotation with proper credits to the original artist? Recent changes in national legislations shed light on the possibility of such considerations.

Interestingly, the Australian Law Reform Commission (ALRC) has recently recommended extending the fair use or fair dealing exception specifically to some instances of sampling as a form of quotation<sup>403</sup>. Such an exception would cover sampling, mash-ups and remixing, as well as collages, particularly when the new work has its own artistic logic independent of the quotation or the work quoted, and the act of quoting has little or no effect on the value and potential market of the original work. The key to the ALRC recommendation is that such appropriative forms of expression used for the purpose of intellectual commentary or artistic idea should not be directly assumed to infringe copyright, even if the excerpt used is higher than the substantiality threshold. Instead, the use should be subject to a closer fair use evaluation under criteria similar to the U.S. fair use inquiry.<sup>404</sup>

According to the ALRC evaluation criteria for sampling cases, commercial use of a quotation to be considered a factor weighing against fair use rather than an absolutely prohibitive inquiry. Similarly, the extent of the use with respect to both the original and the new work should be a relevant factor, but not decisive when the original work is short, and the market effect of the use should be evaluated in terms of licensing potential of the excerpt as well as with respect to possible positive impacts through an *increase* in the market value of the original. Other suggested considerations include whether the use has been in good faith, whether or not the extent of the quotation exceeds the purpose for which it is used, the degree to which the act of quoting interferes with the commercial interests of the original right holder and whether, correspondingly, the use of the quotation furthers community interests in free speech and in the freedom of artistic expression. The ALRC does not find it necessary to require the quotation to expressly acknowledge the source, as in many cases the relation between the two works is so obvious as to make such an acknowledgement futile, but recommends that the acknowledgement could be taken into account as a factor of assessing whether a particular use is fair.<sup>405</sup>

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<sup>403</sup> ALRC 2013.

<sup>404</sup> ALRC 2013, 221-225.

<sup>405</sup> See ALRC 2013, 213-214 and 221-225.

How does the option look like from a European perspective? The German quotation exception in UrhG § 51(3) specifically mentions music as a type of *Kleinziat*, permissible under the law under certain conditions. The extent must certainly be limited, and as specified by the free use condition in UrhG § 24(2), the melody of the existing work cannot be appropriated in its entirety. Additionally, given the nature of a quotation in general, the use must bear a sufficient similarity to the original as to not distort it, as well sufficient in extent to enable a listener to recognise the reference. While generally understanding of the need of the later musical artists to make creative references to earlier works, the law is unsurprisingly silent of whether such an option is available for samplers as well<sup>406</sup>. Furthermore, the option of musical quotation defence was not raised in either *Kraftwerk* or *Goldrapper*. Given the conditions set for legitimate quotations in Berne<sup>407</sup>, it is likely that neither Setlur's nor Bushido's use of the samples would have passed the test. Consequently, for the time being there is no current case law to support the quotation defence for sampling in Germany, even if it were a potentially available defence for some samplers.

As briefly discussed in earlier chapters, UK has recently introduced a copyright exception that covers quotations and parodies<sup>408</sup>. On the surface, the quotation exception seems like a potential candidate for the type of sampling exception discussed in the Australian context. However, according to IPO guidelines for creators and copyright owners, it is somewhat unlikely that creative commercial copying with a potential to harm the market for the original will qualify as "fair". Specifically, the guidelines indicate that while the right to quote theoretically applies to all types of works, copying a photograph, for example, would likely not be allowed under the exception if the use is such that the artist could have been able to sell or license their work for it.<sup>409</sup> In short, the main purpose of the exception seems to be allowing quotation in certain literal contexts such as in academic essays or in the use of newspaper reviews in promotional materials, not for making an artistic references between works in a creative medium. Even if the negative impact of a sampling work on

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<sup>406</sup> Berndorff et al (2013, 209) address the question of whether sampling could qualify as quotation and conclude emphatically: no. Since their work is directed to artists navigating the industry, this is a reasonable conclusion. Nevertheless, the reasons they give for such an answer indicate that in fact, there is no legal certainty that sampling could not qualify as quotation under the UrhG § 51, but rather that it would simply not fulfil the criteria *in most cases*. The current suggestion that *some* instances of sampling may qualify for the exception is therefore not in contradiction with the literature.

<sup>407</sup> In particular, the compatibility with fair practise and that the extent does not exceed that justified by the purpose.

<sup>408</sup> The CDPA Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 No. 2356.

<sup>409</sup> See IPO 2014, 6-7.

the market of the original could be disputable, the loss of potential licensing revenue in the case of commercial sampling is likely to tip the balance against the quoting sampling artist.

#### **7.4. Pastiche and collages**

As noted earlier, the new UK parody exception is interesting in that it also encompasses the use of copyrighted material in satires and pastiches. Pastiche is defined in the new law as a musical (or other) work that consists of “selections from various sources or one that imitates the style of another artist or period”. Provided the use falls otherwise within the fair dealing provision, a sampling collage that incorporates excerpts from several sound recordings would seem to fit this definition. Even if parody and satire draw their exception eligibility from the humorous treatment of the subject matter, and the subsequent need for the society to ensure the right to mock the high and mighty, pastiche need not to be humorous to satisfy the criteria for the exception. The only direct limitation to the subject matter of a pastiche is that the UK law on author’s moral right to object to a derogatory treatment of the original work has been unaffected.<sup>410</sup>

One could argue there is a strong case for including musical collages that rely on sampling under the pastiche exception. A collage that derives material from a multitude of sources is by its nature very unlikely to become a market substitute to any of the works it references<sup>411</sup>. Given the current sample licensing regime that requires per definition clearance of virtually every sample used, the transactional burdens of legitimate creation of a sample collage can make the project financially impossible. Similarly, the option of replaying all the samples is similarly not realistic in cases where the number of samples per album is in two or three figures<sup>412</sup>. In such a situation the hypothetical trade-off is not between right holders acquiring licensing revenue or being deprived of it, but rather between the work being created illegitimately or not being created at all. Consequently, under the current licensing regime, right holders are not expecting to get revenue from collages simply because they are uneconomical to create, but the creation of musical collages even with samples not cleared, likely does result in overall positive impact on the market of the original works, as Schuster’s<sup>413</sup> empirical research demonstrates. Since the option of revenue for the right holders through

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<sup>410</sup> For general discussion on the exception, see IPO 2014.

<sup>411</sup> See the related discussion on complementary and substitutional copies in Landes and Posner 2003, 154.

<sup>412</sup> See the examples of Girl Talk, Beastie Bys and Public Enemy albums discussed in previous chapters.

<sup>413</sup> Schuster 2015.

licensing is essentially not available, the principle of supporting the creation of the widest possible spectrum of creative works for the public good should prevail and it would therefore be reasonable to allow musical collages that employ sampling under the pastiche exception.

As argued by the critics of the ALRC recommendation in Australia, some potential problems of a quotation and collage exceptions for sampling include their potentially disruptive impact on the current sample licensing practices, as the flexibility of such an exception might introduce uncertainty and encourage extensive unlicensed appropriation to the detriment of the economic and moral interests of the right holders.<sup>414</sup> In particular, the significance of the current sample licensing related income for music publishers and composers was emphasised as a factor testifying of the conflict the exception would cause “with a normal exploitation of the work”, resulting in “unreasonabl[e] prejudice the legitimate interests of the author”, and consequently conflicting with the three-step test of the Berne Convention<sup>415</sup>. Finally, a problem not directly addressed in the report, but indirectly implicated by the criticism was the right of the right holder to decline a license and thus control the derivative or secondary uses of the original work. Quotation or pastiche exceptions that extend to music and to sampling in particular, would make it difficult for artists, who have opted to deny all sampling or to allow it only discretionarily, to keep enforcing such a policy.

Unconvinced of this criticism, ALRC contended that to the extent the fair use or fair dealing criteria outlined above are properly applied to each specific situation, any potential harm to the right holders would be duly balanced by respective benefits for the current artistic community and the community at large<sup>416</sup>. Such an optimistic view is supported by the notion that in the context of a sample licensing market in which the predominant practice has been to require licensing of every single sample, *any* legislative change that grants sampling artists more freedom is bound to cut somewhat to the licensing income of the right holders. In order for that side of the equation to remain completely unharmed, the only policy option would be to uphold the current status quo and the eventuality of some lost revenue should hence not be automatically regarded as an implication of a fatal weakness of the policy proposition. Furthermore, the impact of such a policy change can be controlled and to an extent mitigated by imposing relevant and sufficiently unambiguous criteria that the secondary use must

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<sup>414</sup> ALRC 2013, 215-224.

<sup>415</sup> See also ALRC 2013, 215.

<sup>416</sup> ALRC 2013, 217.

fulfil to qualify for the exception. The examples of such requirements or factors of evaluation as discussed in the context of the ALRC proposal provide an excellent starting point for the defining of the “fairness” criteria.

Would such instances of legitimate unlicensed sampling in the context of a parody, quotation or a pastiche be compatible with the three-step test of TRIPS and InfoSoc Directive? The answer is cautiously affirmative<sup>417</sup>. When the instance of sampling is strictly defined and limited in extent, as in the situations outlined above, it could reasonably be regarded a “certain special case” that would not cover the majority of instances of sampling<sup>418</sup>. The evaluation of “normal exploitation” and “unreasonable prejudice” to “the legitimate interests of the author” is more complex in that what was considered “normal” and “unreasonable” in the sample licensing markets before the *Bridgeport* and *Kraftwerk* rulings, may not seem so after the regime of absolute licensing expectation has become the new norm. If the right holders expect to be able to license every instance of commercial sampling, then per definition, no unlicensed sampling can be legitimate irrespective of any benefit and cost analysis of the actions for the society at large. If, however, it is acknowledged that some fair or free use type exceptions could be applicable to both composition copyright and the sound recording neighbouring rights, as confirmed by the *Kraftwerk* court, it could then be argued that exceptions such as the types previously outlined do not restrict the right holder from exploiting the majority of potential sample licensing opportunities beyond reasonable.

Nevertheless, the question of whether the financial cut to the right holder revenues would be significant and/or reasonable, cannot be comprehensively answered without some empirical evidence of the respective artist income structures<sup>419</sup>. Considering the obstacles of full clearance of collage-type sample albums discussed earlier, it seems appropriate that when the financial and cultural benefits of supporting the exception outweigh the actual – rather than theoretical – financial losses for the right holders, the narrowing of the discretionary power should not be the decisive factor in determining whether an act of creative quotation or collage may be fair. In a more pessimistic view, such argument may be compromised by a strict fair dealing interpretation that excludes all

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<sup>417</sup> See also the analysis by Dougherty 2007, 485, in which he argues the answer is inconclusive.

<sup>418</sup> Compare with Berndorff et al. 2013.

<sup>419</sup> Future of Music Coalition’s research on U.S. artists gives some insight into the income structures and their variations across different modes of employment and authorship over the recorded material, but unfortunately provides no simple answer to the question. See <http://money.futureofmusic.org/>.

commercial uses as inherently “unfair”<sup>420</sup>. In such a case, unlicensed quotation and/or collage by sampling may even theoretically only be legitimate when they are uncommercial, for example user-generated expression<sup>421</sup>.

### 7.5. Compulsory license for sampling

One of the options frequently discussed in the U.S. legal literature on sampling is the introduction of a compulsory license for sampling<sup>422</sup>. While the pros and cons of such a policy regime have been widely debated, most authors seem to discuss the system a potential fix for both the composition copyright and the sound recording copyright simultaneously<sup>423</sup>. However, the significantly less complicated option and one that is more compatible with the European moral rights traditions – adopting a compulsory license for the master clearance (neighbouring rights) only – has received little attention in the literature so far.

Compulsory license refers to a system, in which the government fixes a certain level of compensation and an artist is allowed to use a sample by paying the copyright holder that amount of compensation (“statutory rate”) for the use of their material. Being a liability rule, such a model would allow the use of copyright protected material without – or even against – the permission of the copyright holder, provided the use fulfils certain structural requirements. This type of government interventions may be justified in situations where the unrestricted free use would be overall detrimental, but right holders’ reluctance to license stands in the way of artistic innovation, or when the transaction costs of such voluntary exchanges become too high, for example due to the extensive search needed to track down the correct right holders. Such systems already

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<sup>420</sup> See, for example, Hugenholtz and Senftleben 2011, 30 equating fair with non-commercial (user-generated) exploitation of third-party expression. The aspect of whether commercial uses may also qualify for the suggested policy reform is not further addressed in the report, indicating either that the authors are against such an extension or that it is seen as too ambitious for the current state of the law, even if the possibility of such future considerations were not completely ruled out. The Wittem Code also be interpreted to be supportive of certain *not-commercial* transformative uses.

<sup>421</sup> It should be noted that at times the line between commercial and uncommercial does not equate to high-quality professional and low-quality amateur work. For example, the ‘Grey Album’ by Danger Mouse elicited significant cultural notoriety, critical acclaim, and millions of downloads, although released for free. Despite being one of the most successful albums that year, it elicited no income to any of the parties involved. See McLeod and DiCola 2011, 176-181. From a cultural and copyleft movement point of view, it was a moral victory, but serves as a poor revenue generation model for artists. See also Jütte 2014.

<sup>422</sup> See McLeod and DiCola 2011, 224-232.

<sup>423</sup> See Reilly 2008; Toynbee 2004, 135.

exist in some jurisdictions for the licensing of cover songs<sup>424</sup>, serving as a potential model for how a compulsory licensing regime for sampling could be introduced.

Since neighbouring rights, as interpreted in *Kraftwerk*, protect the investment and labour of the producer rather than an act of creative and original effort, it should be reasonable to argue that the rights of the type of “legitimate interests” evoked in *Deckmyn*, and respectively moral rights in general, should not in principle apply to holders of neighbouring rights<sup>425</sup>. In other words, neighbouring rights holder should not have a right to forbid others from using the fruits of their labour once the recording has been put in circulation. However, in order to avoid undermining the original incentive to invest, they should be entitled to compensation. In essence, then, the requirement for master clearance derives from the entitlement of the rights holder for equitable remuneration for their work, rather than from the right to decide how the work is being used.

Given this premise, the option for governing the master clearance under a compulsory license regime would seem like very promising option. From the licensor point of view, the leverage of prospective injunctive or coercive relief is bargained for a monetary reward that approximates a reasonable license in the free market<sup>426</sup>. A compulsory license for sampling would streamline the process and hence decrease the transaction costs – both financial and those related to time and effort – of licensing, thus potentially encouraging more sampling-based creation. Such a policy would increase the efficiency of the licensing transactions and ensuring that a neighbouring right holder is without exception remunerated for the investment required to bring the sound recording to the market. A compulsory license would also eliminate the need for the sampler and the rights holder to conduct separate negotiations over the sound recording use under conditions significantly in favour of the master clearance licensor, nor would it allow the rights holder to deny the use of the sample once a statutory payment has been duly made.

In an ideal case, it might be possible to link the compulsory license to a requirement of registering the neighbouring rights to a sound recording with a local collective rights

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<sup>424</sup> “Mechanical licenses” for making arrangements (cover songs) currently exist under the U.S. Copyright Act §115(a)(2), as well as under the UK copyright act. Often the use is conditional to that the new version does not change “the basic melody or fundamental character of the work”. See McLeod and DiCola 2011, 224-225; Toynbee 2004, 135.

<sup>425</sup> Note that this delimitation only refers to the moral rights of the record producers, not to the moral rights of the performers, as specified in the Art. 5 of the WPPT.

<sup>426</sup> McLeod and DiCola 2011, 225-227.

organization, or better yet, with an EU-wide or international organization set up for such a purpose. Such an organization would be tasked to store the right holder metadata and provide it for the samplers for the due payment of the compulsory licenses. As a measure of encouraging producers to register their information, the right to the compulsory license payment could perhaps be conditional to the timely and accurate registration of the rights. The existence of such a central organization would allow the samplers to process the statutory payments and proceed with their work without being held up by the search for the correct right holders or by the negotiations about the right to use the sample or about a fair remuneration for such a use, at least with respect to master clearance. The existence of such an extensive database of sound recording metadata could serve also other valuable purposes, as will be further discussed in the next chapter.

However, the option of a compulsory license runs contrary to the idea of extending the free use doctrine to neighbouring rights. If a compulsory license regime were to be implemented, it would require that the current exceptions to the neighbouring rights to be abandoned, as their co-existence would destabilise the legitimacy of the compulsory license. While this seems on the surface to be in conflict with the introduction of the free use test in *Kraftwerk*, a comparison of the suggested compulsory license regime with the free use test that these two policies are in fact fairly well aligned. A compulsory license guarantees remuneration for the investment and efforts of the producer also when the reproduction is only partial, or even minimal in extent, thus supporting the premise that a licensing market exists even for the smallest of samples<sup>427</sup>. A compulsory license requires no complicated evaluations of qualitative or quantitative significance that might cause “legal uncertainty”<sup>428</sup>. Finally, a compulsory license establishes a limitation to the right of the neighbouring right holder in that it waives the right to arbitrarily stop others from using sound recording materials in new cultural productions, thus supporting the “spirit and purpose” of copyright law in “bring[ing] about cultural progress”<sup>429</sup>. There is currently no consensus on how the determination of a compulsory license fee should be set, but a suitable selection of criteria could be adopted to mimic the qualitative and quantitative factors of the pricing structures in place under the current ad hoc licensing regime<sup>430</sup>.

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<sup>427</sup> See Conley and Braegelmann 2008, 1027, 1030-1031.

<sup>428</sup> Conley and Braegelmann 2008, 1029.

<sup>429</sup> Conley and Braegelmann 2008, 1033-1034.

<sup>430</sup> For more discussion on these problems, McLeod and DiCola 2011, 227.

Would such a compulsory licence then be a realistic option in Europe? The Article 9(2) of Berne Convention theoretically recognises the principle of applying “an equitable remuneration under compulsory licenses to overcome an otherwise unreasonable injury to the author’s legitimate interests”<sup>431</sup>, and the Article 13(1) specifically allows Member States to define “reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorised by the latter, to authorise the sound recording of that musical work - - , such reservations and conditions - - shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.” Some optimism for such a regime has been expressed in the literature as well<sup>432</sup>.

Any such licenses, would however remain territorial due to the importation restrictions of recordings in Article 13(3) of the Berne Convention.<sup>433</sup> The territoriality of a compulsory license may not be such a problem for cover songs that are mostly intended for the national markets to begin with, but it might impose a significant limit to the international distribution of works that incorporate samples. Furthermore, the strict conditions set for compulsory licenses in the Article 6 of the Geneva Phonograms Convention<sup>434</sup>, as well as the lack of such exceptions in the InfoSoc Directive leaves little room for the development of such general statutory licenses in EU Member States<sup>435</sup>. The aspect of record producers being ineligible for moral rights may run counter to the notion that in many popular genres, it is the post-production process rather than the performance that brings the most creative and original input to the final expression. Finally, the adoption of a compulsory license would likely establish the level of compensation for sound recording samples to a level lower than what is currently charged by some of the right holders. This makes them unlikely to embrace such a policy option, while the adoption of such a regime would require wide support from the industry to be realistically successful. Given these problems, it may be currently unrealistic to expect a compulsory license to solve the problems of sample licensing.

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<sup>431</sup> See Goldstein and Hugenholtz 2010, 296.

<sup>432</sup> See Toynbee 2004, 135; Jütte 2014.

<sup>433</sup> Goldstein and Hugenholtz 2010, 387.

<sup>434</sup> See Geneva Convention Art.6(a).

<sup>435</sup> Goldstein and Hugenholtz 2010, 58-59 and 387.

## 7.6. Voluntary policy options

There are also voluntary licensing options that could be embraced independently by the stakeholders of the music industry, without the need to resort to courts and government interventions<sup>436</sup>. Some of these options include the Creative Commons license and the introduction of voluntary transaction-facilitating institutions.

Creative Commons licenses allow the author of a work to assign some rights to later creators while retaining others, and most importantly, to choose how the division of rights assigned and retained is done in each individual case. While the specific “Sampling License” introduced in 2005 is no longer endorsed by the Creative Commons organization, the general-purpose licenses can be used for the task. Some communities, such as CC-Mixer website<sup>437</sup>, currently offer Creative Commons licensed music from 40,000 artists available for sampling. The development and growth of such voluntary endeavours certainly helps the artists to voice their opinion on the subject and to participate in the development of a cultural landscape more open for sampling. By offering their work for use of others through this kind of communal projects, sampling artists participate in the creation of ever-increasing pool of materials that allows them to work more freely and define the standards of acceptable use without disruptive interference from external legal or political considerations.

Nevertheless, there are certain inherent problems with the Creative Commons licensing schemes. First, granting a Creative Commons license may help the artist get exposure, but not get paid, which may be fine for artists just starting their careers, but is less lucrative for the more established artists looking to make exclusive deals and to generate income. Given that the economic value of a work may change significantly over the course of its term of protection, the fact that a Creative Commons licence once granted cannot be later reversed or changed is also problematic.<sup>438</sup> Furthermore, the music available for sampling under the Creative Commons license tends to be new, whereas the samplers generally prefer certain generally established and iconic artists, styles and genres, such as the funk, soul and disco from the 1970s and 1980s<sup>439</sup>. These styles and artists will not be comprehensibly represented by the current Creative Commons catalogues. Finally, the Creative Commons is not very well known within the

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<sup>436</sup> McLeod and DiCola 2011, 243-257.

<sup>437</sup> *ccMixer* hosted by ArtisTech Media on <http://ccmixter.org/>.

<sup>438</sup> McLeod and DiCola 2011, 246-247.

<sup>439</sup> For a more detailed network analysis of sampling connections between different music genres, see Bryan and Wang 2011, 329-331.

music industry<sup>440</sup>, which certainly does not negate its potential for growth in the future, but makes it an unlikely solution for the problems of sampling in the short term.

Other options for streamlining the sample clearance process through independent private sector efforts could include the labels or collective rights organisations setting up of simple online services for more efficient contact between samplers and right holders and even for automated sample license fee calculation on the basis of certain basic information about the use. While there are some practical problems in setting the sliding scales of payment for different types of sampling<sup>441</sup>, as discussed in the context of the proposal for a compulsory license, McLeod and DiCola estimate that right holder communities may be more likely to participate in such voluntary projects if the increased volume of sample licensing is sufficient to offset the automatically set and hence likely lower unit prices per licensed sample.<sup>442</sup> Furthermore, given the potential moral rights objections to certain instances of sampling, such semi-automated licensing system is perhaps more suited to the master clearance than to publishing clearance.

A more ambitious plan would be to centralise the sample clearance processes under transaction-facilitating clearinghouses modelled after collective rights organisations. The collection and authentication of rights ownership metadata to a large and well accessible database could provide significant benefits not only for sampling purposes but for solving a host of other problems, including the needs for metadata management for the growing industry of music consumption applications from music discovery tools to audio fingerprinting and beyond, as well as issues of orphan works and library documentation. Such a preferably international organisation could provide approximate rate sheets, hence adding transparency to the pricing overall and allowing the samplers to better predict the financial risks involved. McLeod and DiCola go as far as to suggest such organisation to serve as a one-stop shop meeting place for the right holders to set up licensing platforms and even standardised pricing structures and international codes of conduct, as well as functioning as a facilitator of the licensing transactions themselves.<sup>443</sup> Such an organisation could also support a music industry Arbitration Board of musicologists and music technologists<sup>444</sup> that would help set

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<sup>440</sup> McLeod and DiCola 2011, 246-247.

<sup>441</sup> Toynbee 2004, 135.

<sup>442</sup> McLeod and DiCola 2011, 247-248.

<sup>443</sup> McLeod and DiCola 2011, 248-253; see also Schipper 2014 discussing the option of an international rate committee that could be “a unit of an existing national disputes resolution committee or collective rights organization”.

<sup>444</sup> Reilly 2008, 26-27; see also McLeod and DiCola 2011, 253.

industry-wide standards on the licensing requirements with respect to specific instances of musical expression and to specific types of sampling, as well as give evaluations of whether a given instance of sampling is, for example, *de minimis* and as such not liable to licensing. All these services would help even out the licensing costs between major labels and independent acts, as well as increase transparency and predictability of the system.

There have been several international initiatives for setting up a metadata database or a global music registry, including the International Music Registry (IMR) under WIPO and the currently abandoned Global Repertoire Database (GRD) established by a working group under the European Commission, in addition to the internal databases of collective rights organisations, the U.S. Copyright Office and national projects, such as the U.K. Phonographic Performance Ltd (PPL) and Copyright Hub initiatives. However, none of them has progressed to the point of starting to fulfil the expectations of the various international stakeholders and a lot of the data is still dispersed in separate databases not always interoperable nor generally accessible. Both the green paper of the U.S. Patent and Trademark Office in 2013<sup>445</sup> and the report of the U.S. Copyright Office in 2015<sup>446</sup> acknowledge the benefit of such database endeavours, hence perhaps signalling growing international attention to the issue.

The obstacles of such a project – whether a passive authentication database or a full one-stop shop sample clearance facilitating institution are mainly financial and logistical but to a degree also ideological. Right holders currently enjoy significant freedom in setting the prices for the sample licensing as well as controlling their use, and while some artists may be willing to co-operate for the benefit of the artistic community as a whole, others may be less compliant. It is inarguably the conflicts between the stakeholders *within* the industry that complicate any voluntary policy changes, but a combination of convincing research findings and persuasive advocacy work could eventually succeed in bringing the industry stakeholders together in supporting policy reforms that hold a promise of bringing benefits to everyone involved<sup>447</sup>.

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<sup>445</sup> USPTO 2013.

<sup>446</sup> U.S. Copyright Office 2015.

<sup>447</sup> See also Aufderheide and Jaszi (2011, 152-152) expressing optimism towards such industry-led endeavours of best practices documentation in guiding the legal frame of interpretation rather than the other way round.

### 7.7. Evaluation of the future options

All the options discussed in this chapter would, if successful, provide some new liberties for prospective samplers while still preserving a level of control with the right holders. Unfortunately, each of them also has some significant limitations. The quotation exception, for instance, seems like a relatively plausible option for some types of sampling in Germany, whereas it is unlikely to fit the UK fair dealing criteria. Sampling as a collage and pastiche, then again, might have some traction in the UK under the “parody, satire and pastiche” exception, but lacking a suitable legal home, are less likely candidates to be embraced in Germany<sup>448</sup>. The compulsory license proposal, while in some aspects quite attractive, is due to both practical and political obstacles not a probable short-term solution in a European-wide perspective. Finally, the weakness of the voluntary options discussed here is, by definition, the fact that they are voluntary. Given the widely diverging interests of the various stakeholders of the sample use and licensing industry, it seems highly optimistic to assume that the issues and inefficiencies of the current regime could be overcome by the different sides of the negotiation table agreeing each to give up some existing advantages for the benefit of the creation of a more equal and efficient system for everybody.

On the other hand, the adoption of certain copyright and neighbouring rights limitations in the form of suitable exceptions – for which the BGH indicated some enthusiasm both in *Kraftwerk* and *Goldrapper* – could theoretically tip the balance of power to a more equitable direction and consequently nudge the industry stakeholders to be more willing to cooperate on the additional voluntary actions as well. Similarly, the effects of certain voluntary projects, such as the Creative Commons, may be limited at the moment, but with constantly increased engagement from the grass roots level may eventually grow to become valuable leverages for furthering other policy changes, as well as noteworthy policy options in their own right. In this way, it is perhaps unrealistic to expect a single solution to fix all the problems of sample license, but a suitable combination of various policy options might manage further the process considerably.

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<sup>448</sup> An exception to such an analysis is the possibility that a collage would qualify for multiple simultaneous quotation exceptions at once. Such a hypothetical eventuality will not be discussed further in this context.

## 8 CONCLUSIONS

The debate about unlicensed sampling has polarised to the point that one side equates all forms of sampling with theft, whereas the other side fights for a revolutionary creative freedom of the sampling artists to use any and all sound materials available at their will. Neither of these extremes recognises the complexity of the issue appropriately. There are many types of sampling, all with different repercussions to the original works, and it is not uncommon for artists to sample and to be sampled in turn. If copyright policies are drafted to address the interests of either one of these roles separately, without regard to the other side, they have little chances of successfully supporting and incentivising creative work in a balanced manner.

Overall, there are certain national trends that seem to indicate an increasing tolerance to specific copyright and neighbouring rights exceptions that allow unauthorised but transformative secondary uses of original material. There is, however, also the counter-trend of increasingly tight originality threshold that complicates the matters for later creators, particularly in borderline cases. Given the analysis of the European *acquis*, the entertainment lawyer mentioned in the introduction is probably right in encouraging the customer to err on the side of caution and to obtain proper licenses for each of the samples used. There are arguably certain situations in which the licence may be unnecessary, such as sampling of unoriginal elements, parody, and speculatively even a quotation or a pastiche, but none of them provides the kind of safety harbour that would cover every instance of sample use. The key issues in assessing whether sampling could be eligible for some of these exceptions are the question of *identical* versus thematic copying, and the effect of commercial use on the evaluation of fairness. Currently there are no definite answers to any of these questions.

Unlike some authors suggest, the experienced problems and inefficiencies of the sample licensing industry do not warrant a complete overhaul the copyright system. In this writer's opinion, one apparently shared by the majority of the courts in Germany, the U.K. and the U.S., the proposition that all sampling should by definition be free of financial and intellectual property constraints, is naïve and misinformed. However, as also acknowledged by the same courts to various degrees, the healthy development of proprietary protection in music may at times require exceptions and limitations that secure necessary "safety valves" in order to level the negotiation leverages of various industry stakeholders and to prevent the proprietary rights from becoming an abusive

monopoly of cultural censorship. There seems to be a consensus that sampling should sometimes be able to qualify for such exceptions and limitations, although answers differ on when and how exactly should that be carried out.

As discussed in the previous chapters, none of the solutions suggested in the literature can alone solve the issue of unlicensed sampling in a balanced way. The hypothetical exceptions discussed cover only certain fairly rare types of sampling, and even then would be available in some jurisdictions only. In particular, it is likely that no official policy stipulation will take hold unless supported by voluntary industry actions that ensure that the liberties provided by the legislation can be fully embraced by the creative artists without a fear of expensive legal backlashes and risk calculations. However, a combination of policies, each aimed at carefully balancing one aspect of the transaction economy of sample licensing, could together form a flexible network of solutions that allows a reasonable space for manoeuvre for the stakeholders while safeguarding the core values of copyright and the freedom of expression. Such a reform is not done overnight and it will not happen without active efforts from the artist groups themselves.

In order to evaluate the specific situation as it currently is in Europe, and especially for the purpose of documenting the results from a policy change, there should be significantly more reliable empirical data available on the realities of the sampling artist in Europe. Sets of interviews that encompass the diversity of stakeholders in the industry as comprehensively as possible, as exemplified by the work of McLeod and DiCola in the U.S. markets, could provide insights into the European licensing structures and their possible inefficiencies, as well as to disclose characteristically European issues not previously encountered in the U.S. data. Furthermore, such interviews would be the first step in identifying additional realistic and practicable solutions for the sample licensing issues in Europe, as well as the disposition of the different stakeholder groups for the adoption of such options. The collection of transparent and comprehensive statistics on both national and EU levels on the sampling volumes would help evaluate the scope of the problems. Analysis of other relevant aspects under doctrines other than copyright, such as the legal protection of performance style and other similar elements under trademark or personality rights could shed light on the potential repercussions of replaying of samples that contain highly unique performances. Finally, further empirical evidence on the financial and cultural impact of the act of sampling on the market and value of the original work

could support the adoption of policy options less sympathetic of total proprietary control of artistic expression.

A fortunate aspect of the creative industries is that they are, per definition, inherently creative. Many sampling artists unable to secure licenses or unable to afford them have adopted and honed alternative ways of creating unique and transformative musical expressions. While certain compositional techniques may have been all but lost from the toolbox of a modern artist-composer, this has by no means led to a total stalling of musical evolution, nor has it prohibited the general sampling *aesthetics* from becoming a staple element of many musical genres beyond hip-hop. Furthermore, the spectacular increase of user-generated content online testifies for the widely-spread creative fervour to harness the new digital tools and their unprecedented possibilities for artistic work, both professional and uncommercial. Strict legal and industry-driven control over sampling have not managed to smother all the creative energies in the field, nor are they likely to do so in the future either.

It is then more from a freedom of expression point of view that the balance between protection and access in sampling cases should be approached. Even if some artists have found ways to cope with the current policy regime, others have had to sacrifice their aesthetic ambitions to the realities of the sample clearance economy, thus limiting the collective output of creative works for the benefit of a handful of mostly corporate right holders. To the extent the eagerness of right holders to enforce their rights on sound recording samples is a result of greediness for an unlimited source of additional revenue, perhaps to compensate for the otherwise falling general profitability of the industry, the advocates of greater freedoms for samplers have a good cause to be upset. There is no simple method to prove it either way. Nevertheless, it must be concluded that neither over-enforcement, in which copyrights block the development of a field of art, nor under-enforcement, in which a maximum number of sample-based works is sought for at the expense of the copyright holders, can provide optimal incentives for the creative artists and the entertainment industry to maximise both the quantity and the quality of works in the market. Instead, a well-functioning market that rewards creators for their work whether original, derivative or transformational in nature, provides the best ground for a multitude of creative artistic expressions to blossom. It is the task of the future cultural policies to materialise such a vision.

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