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COPYRIGHT INFRINGEMENT BY WAY OF SAMPLING: MULTI-JURISDICTIONAL ANALYSIS

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Abstract

The music industry has seen tremendous transitions over the years from live performers to tape recorders to CDs to now everything being virtual. Those were simpler times when music was produced and distributed among the masses in physical forms like CDs but with everything shifting to virtual medium these days the traditional mechanisms have shrunk, and it also has ensured global access. The Copyright Act was enacted in 1957 and has been amended a few times to improve its effectiveness of the act. With a major amendment coming into effect in 2012, the Copyright Act, of 1957 still does not have any specific provision to deal with the issue of sampling of music. Owing to the spiked rate of music productions, the process of sampling has become a common practice and must be dealt with on an immediate basis to maintain a balance between the exclusive rights of the copyright owners and the artists sampling the work. This paper will delve into the issue of sampling and provide some suggestions to craft the laws around the issue by drawing a parallel from the advanced foreign jurisdictions, the USA and the EU.

INTRODUCTION

Music composition is a combination of many things including lyrics, beats, and chord patterns. As the economy is progressing and the technology advancement is at its peak, the same has been incorporated into the musical works as well as the industry. As the ease of access to music is increasing with software like 'Spotify' the concerns regarding copyright infringement in the industry are on a hike. For instance, the Napster software allowed for illegal downloading of the songs by consumers over the internet and eventually, Napster was held liable for the same.[1] With these modernisations, the sampling of musical works to create mashups and technologically altered music has been on rising.

[1] 239 F.3d 1004 (2001).

The process of Sampling refers to a technique of extracting a part of previously existing work and utilizing it to create new music altogether. It serves as the foundation for global chart-topping songs, parties and club dance floors, electronic dance music, hip hop, and a host of other genres. As the popularity of rap music and hip-hop culture is on a rise across the globe, sampling has emerged as a common practice among the artists to revive and recreate old songs and their essence. This way of sampling a piece of work and looping it or altering it to formulate a new work could even classify as a derivative work i.e., building upon the original work to create its versions. Although the legality of sampling differs across jurisdictions, most the artists have been using it as a common and accepted technique practiced in the industry. Few from the Music Industry believe that sampling of work would imply stagnation and lack of creativity and the copyright, whose main aim was to protect and facilitate the creative expression would be deemed ineffective. One can always sample work and take a chance of the owner not finding it out, while the best way to go about it is to seek licenses for the same as suggested by the legal fraternity as it would limit the sampling of work and safeguard the music from entanglement in the litigation process.

APPROACH AND JURISPRUDENCE OF UNITED STATES OF AMERICA TOWARDS SAMPLING

A copyright extends certain exclusive rights to the owner of the copyright and one of them is the Right to create a Derivative Work. Section 101[2] identifies what kind of works can be considered as a derivative work of the original in terms of music and sound recordings. Further, Section 106(2)[3] provides for the specific right to create a derivate work and Section 107[4] limits this right to some extent via. the Fair Use defences. These are some of the statutory provisions of the copyright law that strives to strike a balance between fair and valid usage of someone's work and protection of the right of the intellectual property holder.

The case of *Campbell v. Acuff-Rose Music Inc.*[5], perfectly stipulates the exception of Fair Use. Here, 2 Live Crew created a parody song named 'Pretty Women' using the song 'Oh Pretty Women' by Roy Orbison and went on the distribute the said song in the market. It was apparent that Acuff-Rose refused to permit the usage of their song and there existed no consent or

[2] The United States of America Copyrights Act, 1976, s. 101.
[3] *Supra* note 2 at s. 106(2).
[4] *Id* at s. 107.
[5] 510 U.S. 569 (1994).

agreement to the same validity. Upon critical analysis, it was held to be fair use as new song was a parody and they have added a transformative element to distinguish their parody song from the original one. The Supreme Court said that "the transformativeness not only occupies the core of the fair use doctrine but also reduces the importance of all other factors."[6]

Fair use would apply in case there exists infringement, however the courts have come up with the *de minimis* test to consider whether there even exists a *prima facie* infringement or not. As per the *de minimis* test, if the usage of a copyrighted work in a new work is minimal or insignificant to affect its value and even get considered by the audience, the same would not amount to infringement. This test, on the lines of sampling, was dealt with in a great detail in *James W. Newton, Jr. v. Michael Diamond*[7]. A legal permission from the recording label for sound recording was obtained for the purposes of sampling the music, but this was ignored in terms of composition usage. The duration of the sampled work was around 6 seconds. The contention for infringement was dismissed as the sample being *de minimis* in nature. Here, only the composition part of the song was in question and the sampled part was brief and relatively simple. The court clarity on this by stating copying or sampling must be substantial in nature, be it quantitatively (how much of the song has been sampled) or qualitatively (significance or the uniqueness of the sampled part). Thus, based on the significance of the sampled song in the market, the *de minimis* test would apply differently to each case.

In the case of *Grand Upright Ltd. v. Warner Bros Records*[8], Biz Markie took a small part (10 seconds) of the music composition (though not very original) along with the accompanying piano chords from the song by Gilbert O'Sullivan. Biz Markie did not duplicate the chords and perform them himself; instead, he got a sample from the Sullivans without their consent. The sampled part was placed towards the end and was only audible to microscopic ears. When the case went to court, the judge ruled in Gilbert O'Sullivan's favour, noting that duplicating or sampling a section of an original song without the proper permits and licenses constitutes theft. The response of Judge Kevin Diffy to this case was, "Thou shall not steal"[9]. Even though such sampling was a common practice within the industry, it must not take place as it is disrespectful

[6] *Id.*
[7] 349 F.3d 591 (9th Cir. 2003).
[8] 780 F. Supp. 182 (SDNY 1991).
[9] *Id.*

to the law of the land. The case of *Bridgeport Music v. Dimension Films*[10], deals with the issue of copying or sampling regarding a sound recording. Rather than delving into the nature of copying or sampling, such as its qualitative and quantitative aspects as a prerequisite for sampling in compositions, the court ruled that any quantity of copying or sampling was a copyright violation of the original work. They took a stance similar to the *Grand Upright* case. The Court created 'Bright-Line Test' to override the technical difficulties that arise with the application of the *de minimis* test. This was done in order to streamline the process of sampling in the music industry and safeguard the exclusive rights of a copyright holder under Section 114[11].

Now in 2016, in *VMG Salsoul v. Ciccone*[12], Madonna took the 'horn hit' from the song 'Love Break' by Salsoul Orchestra and placed it in her song named 'Vogue'. The 'horn hits' in the Salsoul's song goes like 'let's take a love break, tap, let's take a love break, tap tap' and Madonna copied these three horn hits. These hits were clearly audible to the normal ear and the plaintiff cited the decision by 6th Circuit to strengthen its case. The same was rejected to be erroneous and the standard *de minimis* test was upheld again. Further, the case considered such usage to be fair use as the beats were slow in a different tempo and considering the same as a copyright infringement would curtail the creativity of the artists. Thus, no license was required in this case. The same could have been seen in the case of *Sugarhill Gang v. Busta Rhymes*[13], where the song by Sugarhill Gang had a song named 'Natural Wonders' and the phrase "Woo Hah! Got them all in check" was allegedly sampled by Busta Rhymes in their song and the phrase sounded like "Woo Hah! Woo Hah! Got you all in check". The phrase was not unique and has already been used in multiple other songs and the phrase was not used as it is *per se.* and if the case was not settled out of the court there existed a high chance that the court would have considered it under the fair use exception.

Although no official paperwork has to be done for the sampling license and the permission just has to be a mutual understanding, written or oral, between the creators, this process is overlooked. The main issue behind this is the monetary and royalty percentage demanded by the copyright holders as there is no specified standard for such licensing and is completely

[10] 410 F. 3d 792 (6th Cir. 2005).
[11] *Supra* note 4 at s. 114.
[12] 824 F.3d 871 (9th Cir. 2016).
[13] Sugarhill Gang v. Busta Rhymes.

based upon the negotiations between them. The stance taken by US Courts in this regard still differs from circuit to circuit as in the 6th Circuit irrespective of the amount of sampling, license and permission must be received while the 9th Circuit considers the fair use exception and *de minimis* application for sampling. The issue is yet to be decided by the Supreme Court to ensure a standardised application across the country. The current situation in the US can be summed up in an amusing phrase that "if you want to sue someone for sampling go to 6th Circuit and if you want to sample music, do it in 9th Circuit".

APPROACH AND JURISPRUDENCE OF EUROPE TOWARDS SAMPLING

The rights of a copyright owner are recognised in a similar manner across although the degree of enforceability and extent of the right may vary sometimes. Under the Europe legislation fair use exception is termed as Fair Dealing and Sections 29, 30, 30A & 178[14] determine the scope and applicability of the same. The most relied decision regarding the fair dealing is the judgement of *Hubbard v. Vosper*[15], where the concept of fair dealing was loosely defined by Lord Denning. Briefly, the factors emphasized to determined fair dealing are: (i) appropriation and nature of usage, (ii) proportion of usage, and (iii) matter of impression.[16] Also in a recent reference from Belgium in case of *Deckmyn v. Vandersteen*[17], the European Court of Justice (**'ECJ'**) stated that "once a work is published, its author 'may not prohibit … caricature, parody and pastiche, observing fair practice'"[18].

However, when it comes to sampling of a musical work, undoubtedly, EU have considered it as a kind of reproduction of the original work and thus the same right shave been harmonised by EU into the exclusive rights available to any copyright holder.[19] There exists two directives under the EU Directives i.e., Directive 2006/115/EC15 and Directive 2001/29/EC15 that provides basis for sampling related legislations. The issue has been referred by the German Federal Supreme Court to the ECJ to re-examine the situation based upon the digitalisation and recent improvements in the music industry. In the 2019 decision of *Pelham Gmbh, Moses*

[14] The United Kingdom Copyright, Design and Patents Act, 1988, ss. 29,30,30A, 178.
[15] (1972) 2 Q.B. 84.
[16] Hubbard v. Vosper (1972) 2 Q.B. 84.
[17] CJEU, Grand Chamber, C-201/13.
[18] Deckmyn v. Vandersteen CJEU, Grand Chamber, C-201/13.
[19] Kamrul Faisal, "Probing into Copyright Infringement by Sampling: from USA to EU", 6 *ELP European Journal* 42 (2019).

Pelham and Martin Haas v. Ralf Hütter and Florian Schneider-Esleben[20], the ECJ held that be it sampling or any other related issue the owner of the copyright owner has the exclusive right to reproduce, derive and distribute their work and any person encroaching upon this right would be held liable for infringement.[21] After creating a strict approach to deal with the issue of sampling, the court also created a leeway for sampling. It highlighted that in modified form a sample could be allowed if it is unrecognisable to the ear.[22] This is a vague test established by the ECJ, which needs to be developed over the years to come. Furthering this decision, the European Copyright Society is also seeking application of the quotation exception under the Article 5(3)(d)[23] to the music samples as it could be considered as a distant relative of the fair use exception.

IDEAL APPROACH FOR INDIA

In India, copyrights are governed by the Copyright Act, 1957[24] which protects the original expression of works. The importance of the Doctrine of Originality was highlighted by the Supreme Court in *Eastern Book Company v. D.B. Modak*[25]. Section 52[26] provides for the situations where certain acts of copying will not amount to copyright infringement or simply, fair dealing. In the case of *Civic Chandran v. Ammini Amma*[27], the court laid down the elements to be satisfied to claim the defence of fair use i.e., (i) the purpose and character of the use; (ii) the nature of copyrighted work; (iii) the amount and sustainability of the portion used, and (iv) effect on the relevant market.

In the 2011 case of *Super Cassette Industries Ltd. v. Hamar Television Pvt. In Channel*[28], the inspiration of the court from the doctrine of de minimis usage is evident however, the same has not been specifically relied on. In its decision, the Supreme Court, overturning the decision of the lower courts stated that the fact that the broadcast of the copyrighted work (of Super Cassettes) was mere 40 seconds should not absolve the defendant of their liability. Although it may not be a 'substantial taking' but both the quality and quantity of the sampled work must

[20] C-476/17.
[21] *Id.*
[22] *Id.*
[23] InfoSoc Directive, 2001, art. 5(3)(d).
[24] The Copyright Act, 1957 (Act 14 of 1957).
[25] (2008) 1 SCC 1.
[26] *Supra* note 24 at s. 52.
[27] 1996 PTR 142.
[28] 2011 (45) PTC 70.

be assessed. The court went on to say that "while it is not possible to delineate the exact contours of fair dealing, its determination is a question of fact, degree and overall impression"[29]. While Indian courts have incorporated the fair use exception in their decision for a long time, they are yet to include and develop upon the *de minimis* test used in the US. The issue about the cover versions and remixes has been addressed by both the judiciary and legislature as Section 31C[30] provides for the same while the issue of sampling is in its initial stages.

In my opinion it would be ideal for India to adopt the approach of US on sampling by including both the fair use and *de minimis* test and determining the outcome on a case-to-case basis. *Prima facie*, it might seem that the 6th Circuit decision of mandatory licensing for sampling would be more beneficial as it would result in decreased infringement claims while in reality it would not only hamper the creativity by limiting it but also affect the artists on an economical level as well. the exceptions available to copyright infringement can be very well utilised by the courts to reduce the number of infringements claims by establishing specific guidelines for anything to qualify for *de minimis* application (some percentage). Moreover, the mechanism of statutory licensing[31] could be very well utilised in the music industry for sampling, by providing a threshold level more than *de minimis* application and establishing a fixed payment rates for the same and anything beyond that threshold could amount to infringement. The copyright law has evolved a lot and it is just the beginning.

[29] *Id.*
[30] *Supra* note 26 at s. 31C.
[31] *Id.* at s. 31D.