

TWO ASPECTS OF SAMPLING IN THE MUSIC INDUSTRY

"Sampling" is a practice which is now common in rock, jazz, and the more modern categories such as rap, hip hop, dance and house music.

It is now common practice in the music industry for a producer making a record to take a sound or series of sounds from its original context and make a new use of it. For example, the producer of a dance record may take a riff from a BB King guitar solo recorded in the sixties and the drum track from a Ginger Baker album recorded in the early seventies and use computer technology to combine these with the performance of the present day recording artist. To date, it has been rare for the "sampled" artists to be approached for their consent, acknowledged as the performer or rewarded for the reuse of their performance.

The re-use of already existing material in a new social, political, social and intellectual context is a feature of many forms of modern (or so-called "post-modern") arts practice. In artistic terms this is described as the process of "deconstruction" and "recontextualisation". In the visual arts, the artist euphemistically describes this practice as "appropriation"; in the music business it is called "sampling".

A lawyer however may describe the same conduct as either:

- (i) a breach of copyright in the sound recording from which the sound bite is taken;
- (ii) a breach of the copyright of the underlying musical work; or
- (iii) an unauthorised use of the artist's performance.

Briefly, action on the basis of breach of copyright in the sound recording may be difficult because it is not always easy to identify the sampled performance and prove that it is indeed a reproduction of the earlier recorded performance rather than a "sound-alike performance" (in which a later artist is imitating the original). Anyway, companies have generally been not prepared to become involved in the expensive process of copyright litigation merely because a later artist has unlawfully sampled and reused the guitar or drum line of an earlier recording. It is rarely cost effective.

As to the breach of the copyright in the musical work, there must be a very real doubt as to whether sampling is covered by the statutory mechanical licence or

indeed any formal industry agreement. Again, however, the expense is great and the return quite small.

In most cases, it is the artists who are most angered by the reuse of their talents without permission or reward and it is they who press the recording or publishing companies to bring proceedings. Since the introduction of the Copyright Amendment Act 1989 and, in particular, s.248 G, artists have been given the ability to bring their own proceedings against samplers. Now, if the plaintiff artist can prove that the defendant has made an unauthorised use of his or her performance, the artist will be able to seek an injunction and damages (s. 248 J).

In the United States, the process of sampling has become so commonplace that record companies are now no longer discussing the legality or otherwise of the process but rather

- (i) how much should be paid by way of a licence fee
- (ii) to whom should the fee be paid; and
- (iii) whether that fee should be recoupable from the earnings of the artist or be met by the record company.

There, the fee to the record company is usually calculated in cents rather than percentages. The latter generates such complicated royalty accounting statements that most sampled artists prefer to use the more simple, set amount method. Thus small bites may be licensed for \$40 to \$2,500 per bite or 1c-2c per record sold. The actual figure depends on the fame of the sampled performer; whether or not the original recording was a hit; how long ago it was released; and all the other commercial factors that determine the value of a licence.

The fee to the publisher is generally calculated as a percentage of the standard mechanical royalty (6.25% of retail selling price) payable under the statutory licence scheme. Common figures seem to be in the region of 25%-50% of the mechanical royalty, again depending on the commercial realities of the licence.

It is all well and good to merrily talk of paying cents here and percentages there, but who is actually paying this money?

The record companies argue that these payments are in the nature of recording costs and therefore (assuming that the recording costs are recoupable under the recording contract) should be recouped from the artist's share of income.

The artists argue that this allows companies faced with the bother of clearing sampled performances to take the risk of not obtaining clearances and merely relying on the artist's warranty (and indemnity) in the recording contract that he or she has the necessary rights. Then, in the event that a claim is made, the company simply settles the matter using the artist's royalties as and when they accrue.

Lawyers advising musicians and record producers who use sampling techniques should ensure that their clients, prior to commencement of recording, determine who will be responsible for the costs attendant upon the sampling and provide the record company with a memorandum of all samples to be used, detailing where they have been taken from and the use to be made of each sample (both as to nature and length of use).

One other aspect of the sampling controversy highlights the industrial nature of the problems underlying the reuse and recontextualisation of performances. A very successful Australian rock band recently incurred the wrath of the Musicians' Union by lifting from its own record, the performance of the backing vocalists who had been hired to perform on the record. Now, whenever that band plays live they can achieve the sound of the backing vocalists with the flick of a computer switch. Backing vocalists argue that such a band appropriate their voices and reuse them at will and without further payment.

Perhaps the most appropriate way of dealing with this latter problem will be by way of amendment to the Musician's Award so that some form of residuals will be payable each time the session musician's performance is reused. The difficulty facing the Union is a political one: both those doing the sampling and those being sampled, are members of the Union.