

Golden Withers Music vs. Lamar case offers the occasion to reflect upon the trade-offs of copyright law

Sampling, the technique of ripping extracts from songs in order to create original compositions, has a longstanding tradition: it was first developed by pioneering electronic musicians in the second half of the XX century, but it is the emergence of *hip-hop* that marked its globally widespread use and artistic significance.

The history of hip-hop is a history of coping with marginalization and poverty through creativity. The Bronx, NY in the '70s was a deprived neighbor, inhabited predominantly by an underprivileged Black population, struggling with everyday survival and gang violence. To escape this grim reality, the local youth started developing original artistic expressions, such as graffiti writing. In this context, a few DJs used their turntables to loop popular disco vinyls, so that they could retain the beat section or rhythm break, and had MCs (masters of ceremonies) adding rhythmic spoken verses, later dubbed as rap. It was the birth of a brand new musical genre, out of the contamination of *African* musical tradition, based on repetition and juxtaposition of rhythmic elements, and the *Western* music production. Its cultural significance and potential are proven by its unparalleled worldwide success and ongoing influence on a number of music genres all over the world.

Rising from ghettos to international recognition, hip-hop has never ceased to use sampling as a *constitutive element*: if sampling was maybe initially prompted by the scarcity of technical resources, in a social context where no one could afford musical instruments, it was assumed by modern hip-hop as an autonomous stylistic element, as the global phenomenon of trap testifies. Sampling has greatly benefited from the introduction of technical advancements in music production, which allow to easily produce and manipulate samples from virtually any recording. However, its success, following the rise of hip-hop, entailed new threats: the question of its *legality* was not relevant when sampling was limited to illegal parties in the Bronx, but further evolution through recording and mainstream diffusion meant the original copyright holders of sampled tracks noticed the infringement and gradually started taking legal action against it.

The US context on derivative work and fair use

The United States law on [copyright](#) is rather strict, since it reserves the possibility to create **derivative work** to the copyright holder only. Furthermore, most of legal cases regarding music sampling and copyright infringement end with a settling among parties, often preferred to a finance and time consuming trial, so it is very rare that a Court reaches a final decision on the matter; when it does, it is usually in favor of the copyright holder, therefore cases that recognize sampling as fair use are extremely rare. The absence of *statutory regulation* on sampling adds to the absence of cases supporting sampling as fair use in posing serious constraints to the artistic expression of hip-hop artists.

Nowadays those wishing to sample have to demand a [clearance](#) from the rightful owners of the original recording, a process requiring financial resources and legal assistance that are often unavailable to emerging artists. In addition, the *bargaining power* in sample clearance is remarkably in favor of the rights owner: once the new song has been produced with the use of a certain sample, artists are forced to accept the owner's conditions if they do not want to let their efforts go to waste.

When copyright protection clashes with innovation

Besides these practical considerations, the present copyright policies, based on the principle of exclusive and absolute [intellectual property](#), clash with emerging principles of *open source innovation* and shared knowledge, nurtured by the web culture. On the theoretical level, innovation never originates from the void, rather it results from an original elaboration of pre-existing ideas and elements; if these elements are strictly protected by exclusive rights, innovation simply cannot legally take place. Music is an artistic field where influence, quotations and elaboration of past elements are essential and constitutive, with sampling simply adding to the range of possible expressions.

While the importance of **copyright** to foster creativity and innovation cannot be ignored, its limitation of expression poses a threat to the very same creativity and innovation it wishes to encourage. As a consequence, a revision of the principles governing copyright is desirable, especially regarding the specific issue of sampling. US law partly recognizes the need to loosen the protection of copyrighted works to allow freedom of expression according to the doctrine of fair use, yet fair use does not act as a guarantee as it must be determined case by case, making sampling without [licence](#) a legally risky practice. The purpose of this paper is exploring the possibility of considering sampling as fair use and laying out the ground for a revision of the measures adopted for sampling as copyright infringement.

The complaint hereby analyzed was brought forward by copyright holders of the recordings by **Bill Withers**, a legendary LA Black musician whose production spans from the '70s until the '80s, claiming the acclaimed rapper **Kendrick Lamar** sampled Withers's 1975 song

Don't You Want To Stay in early production *I Do This*, appeared for the first time in Lamar's 2009 self-titled debut EP. The interest of this case lies in its typicality, as it clearly follows the wave of international awareness on copyright infringement, fomented by the 2015 *Gaye v. Thicke and Williams* case. It is not coincidentally that the complaint in question was filed in the very same court that decided in favor of the Marvin Gaye estate.

Analysis of the complaint

Plaintiffs are Mattie Music Group, doing business as Golden Withers Music, and Hadley Murrell, doing business as Musidex Music. Plaintiffs are the rightful owners of the copyright on Bill Withers's recordings.

Defendants are individuals Kendrick Lamar and Mark Anthony Spears (AKA Sounwave), co-authors of the song *I Do This*, and business entities Top Dawg Music and Hard Working Black Folks Inc., which co-published said song. Defendants are assumed to have participated equally in the wrongful acts and are thus jointly liable for them.

The **infringement** reported by plaintiffs is related to the copyright of the recording *Don't You Wanna Stay*, composed by Bill Withers and others, released in 1975 on Withers's fourth studio album *Making Music* and lawfully registered for copyright protection. The defendants are deemed as liable of copyright infringement because the music of said song was exploited to produce a new composition, *I Do This*, by the rapper Kendrick Lamar, released in the *Kendrick Lamar* EP in 2009 and still distributed to the public for free, on digital download, and for sale, through physical copies, without seeking any authorization from the original music owners.

The plaintiffs affirm that Lamar's song "consists of nothing more than new, so-called Rap or Hip Hop lyrics, set to the existing music" by Withers and that Lamar and Spears "did not simply "sample" some of the existing music", rather they copied the whole music composition of *Don't You Wanna Stay*, straightforwardly adding the rap lyrics over it. Defendants were notified by Musidex of the copyright infringement and asked to cease the exploitation of the copyright infringing material on two occasions, in 2013 and 2016, still defendants never responded the allegations and never ceased the exploitation. A final notice of copyright infringement was sent to the music publishing companies, without any tangible consequence.

Plaintiffs **request** a temporary and final injunction to cease the copyright infringement. In addition, they demand damages for the profits that can be attributed to the infringement, or in alternative the statutory damages instructed by the Copyright Act. Furthermore, since the plaintiffs claim the copyright infringement was willful and carried out with disregard of the owner's rights, "with a catch me if you can attitude", they intend to seek for an additional award to statutory damages.

Implications on copyright infringement

The Copyright Act protects the song *Don't You Wanna Stay*, since it falls in two categories of work of authorship enlisted in Section 102:

- 1) literary works;
- 2) musical works, including any accompanying words;
- 3) dramatic works, including any accompanying music;
- 4) pantomimes and choreographic works;
- 5) pictorial, graphic, and sculptural works;
- 6) motion pictures and other audiovisual works;
- 7) sound recordings; and
- 8) architectural works.

The song can be considered both as *musical work* and *sound recording*, which could lead to two slightly different accusations of copyright infringement. The copyright bundle is composed of five exclusive rights, as numbered in Section 106:

1. the right to reproduce (copy) the work into copies and phonorecords,
2. the right to create derivative works of the original work,
3. the right to distribute copies and phonorecords of the work to the public by sale, lease, or rental,
4. the right to perform the work publicly (if the work is a literary, musical, dramatic, choreographic, pantomime, motion picture, or other audiovisual work), and
5. the right to display the work publicly (if the work is a literary, musical, dramatic, choreographic, pantomime, pictorial, graphic, sculptural, motion picture, or other audiovisual work).

The **accusations** that Lamar et al. could face are those of infringing the plaintiff's right of reproduction and to have created derivative work without seeking for licensing, as is demanded, in the form of sample clearance. First it must be verified that the plaintiffs own the copyright - as proven by the evidence brought forward as annex to the complaint. Second, it must be demonstrated that the work is indeed a copy or derivative work of the protected material.

Plaintiffs declare that Lamar's composition does not contain new music, yet *I Do This* production includes drum programming, trap and classic electro hip-hop elements, a verse by rapper Jay Rock, two verses by Lamar and a chorus. I argue that since the work resulting

from the use of the sample has artistic merits of its own, it cannot be said to limit itself to being a copy of the copyrighted material, so its use does not qualify as reproduction right infringement. Provided the defendant's work is not a mere copy of the copyrighted work, is it still left to determine whether such work is derivative or not.

On sample clearance

In the perspective of sample clearance, the author is considered to create a derivative work and must then demand the authorization of the copyright holders. Defendants never engaged in sample clearance, probably due to the costs associated: it must be noted that at the time of the recording of the infringing material the rapper Kendrick Lamar was 24 years old, living on welfare in the Section 8 housing of Compton, Los Angeles, a city well known for the high rate of criminality and gang activity. This scenario is similar to the one of many other young artists, emerging from the ghettos and finding in hip-hop a way out of a violent life. The position of such artists is fragile, as they do not possess the technical and financial means to either record music with live musicians, nor to seek the assistance required to obtain sample clearance, not to mention that often sources of music will not deal with independent, unsigned artists, posing them at disadvantage.

The absence of statutory regulation regarding sampling becomes thus a *disincentive* for the creativity copyright regulation seeks to enhance. While maintaining that sample does indeed constitute derivative work, the unbalanced situation could be normalized with the introduction of fixed fee to obtain clearance, in the form of a compulsory licence similar to the one that regulates covers: author wishing to reinterpret nondramatic musical works can simply provide notice to the copyright owner and pay a royalty, a fixed mechanical rate, instead of a prohibitive upfront payment.

Nevertheless, one could also argue that a sampling cannot be assimilated to creating derivative work. According to the definition of **derivative work**, the recording must include the original work to be deemed derivative: adopting the de minimis principle, an 8-second sample from a 4-minute song can be considered as too little to qualify as derivative, since the songs differ greatly in terms of rhythm, musical genre and lyrics. In this case, no licensing would be required of the author.

On fair use

Another way to consider the matter is to declare the use of the protected recording falls under the exemptions identified by the doctrine of *fair use*. As of Section 107 of the Copyright Act, fair use explicitly applies to criticism, news reporting, teaching, scholarship and research purposes, while still having to be determined case by case by considering the following factors:

- (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; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work. (USA 1976, par 107)

Regarding the **purpose** and character of the use, the new work does not substitute or lessen the original work's value: it is true that both are music compositions, but they are aimed at different audiences. Furthermore, fair use of copyrighted material should be *transformative*, such as to alter the original with new expression or meaning, just as Lamar's use of Wither's sample does. It should be noted that sampling in hip-hop is always transformative: the aim is to pay a tribute to the original authors by appropriating part of their work and giving it new resonance and significance. The use of protected work sampling does is therefore assimilable to the one of **lawful quotation**: just as the use of a snippet of a written work is not copyright infringing, the use of a music snippet does not violate the exclusive rights of the sampled artist.

The amount and **sustainability** factor relate once again to the analysis of the song as a whole: in Lamar's new work, the amount of protected material is reasonable and sustainable. Finally, when it comes to the consideration of the effect of the use of protected work on its potential market, it comes to the copyright to demonstrate the negative effects of the infringement on the commercial exploitation of the work. Assuming the works serve different audiences, the harm posed by Lamar's sample to the commercial exploitation of Wither's song is not relevant as the new composition does not act as a direct substitute of the original work. In conclusion, the use of Wither's sample in Lamar's composition can and should be considered as fair use and be dismissed of the copyright infringement complaints.

Final notes on sampling and copyright infringement

The analysis of the case brought forward led to the conclusion that sampling does not originate copies of protected work, thus it does not infringe owner's right of reproduction; furthermore, that the works resulting from sampling are not derivative but original, so not subject to licensing obligations; finally, that sampling qualifies as fair use because of its similarity to **lawful quotation**. In fact, if sampling in hip-hop is recognized as an art form, not dissimilar from collage art, one that maintains links to history and comments on them and wishes to transform the original work, its use cannot be defined as copyright infringing. The use of samples in general does not originate copies of protected work, but entirely new compositions, resulting also from the *intellectual activity* of selection and elaboration,

besides the obvious contribution of the rap lyrics in the case of hip-hop music.

Fair use is currently the only tool to protect sampling artists, but its application is subject to a risky, potentially biased case-by-case examination. The absence of specific regulation regarding sampling creates a **legislative gap** that damages the creativity of emerging artists. The 1976 Copyright Act was inspired by the noble principle of creating a tool to promote creativity by allowing artists to appropriate the economic benefits of their creation; however, its strictness causes the balance between interest to be in favour of the established players, leaving emerging innovators in a difficult position. The American law on copyright protection risks to hinder innovation and creativity, causing a damage to the public interest.

According to WIPO, “the legal protection of new creations encourages the commitment of additional resources for further innovation”, establishing a system that “helps strike a balance between the interests of innovators and the public interest, providing an environment in which creativity and invention can flourish, for the benefit of all” ([WIPO](#)). In theory, intellectual property is supposed to generate a **virtuous circle**: artistic creation is incentivized by the existence of rights that allow for economic exploitation, which provide the resources for a broader distribution and therefore the enjoyment of the intellectual innovation in society at large. For this to be true in modern communications society, where information is easily accessible and innovation is crucial for the advancement of human culture, the principles governing copyright protection should be revised. Sampling specifically calls for a statutory regulation that can encourage emerging art forms according to the principle of open innovation, while maintaining the virtuous cycle generated by the economic exploitation of artistic endeavours.

Legal definitions of copyright-related concepts

- **Copyright** refers to a bundle of *exclusive intellectual property rights* that apply to literary works, films, music and other artistic works, for a limited time (never less than 50 years). These exclusive rights allows the authors of cultural content to realize the economic benefits of their creations, by endowing them with an instrument to *control* their use and *appropriate* the revenues resulting from their exploitation. Among the rights granted by copyright, we find:
 - reproduction rights;
 - public performing and communication to the public rights;
 - broadcasting rights;
 - translation rights;
 - adaptation rights.

The exclusive rights defined by the copyright can be entirely or partially transferred to third parties according to an *ex-ante* agreement, a process called *copyright licensing*. An *infringement* is the act of exercising one of the exclusive rights granted by

copyright law without seeking the permission of the copyright owner.

- While copyright is a specific tool to protect artistic production, **intellectual property** refers more broadly to the creations of the mind. The *World Intellectual Property Organization* (WIPO) is a specialized agency of the United Nations, created in 1967 in order to promote the protection of intellectual property throughout the world, with the purpose of encouraging creative activity. Since its establishment, WIPO emanated a number of international treaties establishing a common framework for copyright.

The WIPO establishing act defines intellectual property and its deriving rights as those that relate to:

- literary, artistic and scientific works,
- performances of performing artists, phonograms, and broadcasts,
- inventions in all fields of human endeavor,
- scientific discoveries,
- industrial designs,
- trademarks, service marks, and commercial names and designations,
- protection against unfair competition,

and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields. (WIPO 1967, art. 2 par. viii)

While other treaties and laws tackle the issues related to the industrial intellectual property (patent and trademark law), the 1996 WIPO Copyright Treaty deals with the protection of *cultural content*, granting the rights of the copyright owners in the digital environment. Once again, the Treaty affirms the importance of copyright protection as a measure to incentivize

artistic and literary creation, while also “recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information”. (WIPO 1996, preamble)

Furthermore, it allows national authorities to define “limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author”. (WIPO 1996, art. 10, par. 1)

- A **sample** is an excerpt from a pre-existing recording used in a new recording, while *sampling* is the technique of taking a recorded passage from an already existing or recorded musical, spoken or other work and then adding it into a new recording. This wide definition results in a large array of possible outcomes, ranging from two-second samples, extremely manipulated and unrecognizable samples, long and rather non-transformative samples and so on. Sample regulation is not directly addressed by the US Law, thus it falls broadly under the *Copyright Act* and its specifications of compulsory licence and fair use.
- A **licence** is the *transfer* of part of the exclusive rights on a protected work from a

copyright owner to another party. Section 115 of the Copyright Act states the need for a licence for the third-party production and distribution of nondramatic musical work, specifying that the licence “includes the privilege of making a musical arrangement of the work [...] to conform it to the style or manner of interpretation” of the third party (USA 1976), par 115).

However, the licence is not necessary in case the new sound recording “consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording” (USA 1976, par 114). The administrative procedure calls for the the third party to deliver a *notice of intentions* to the copyright owner or the Copyright Office. The copyright owner will then be entitled to receive a fee and/or a share of the royalties from the recording, regulated by negotiation and agreement among the stakeholders.

- In the case of sampling, licensing takes the form of obtaining a so-called **sample clearance** from the copyright owner, usually the original author, the record label or the publishing company of the protected song. The fee for a sample clearance vary broadly, depending on the *size* of the portion of original work used, its *importance* in the derivative work and the *relevance* of the original work in the market. Sampling without clearance is regarded as copyright infringement, making the infringer liable for “statutory damages” amounting to thousands of dollars or resulting in an injunction forcing the artist to cease the infringement, therefore ceasing the distribution and destroying all copies of the infringing material.

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