Mash-ups and Mixes: what impact have the recent copyright reforms had on the legality of sampling?

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# Introduction[[1]](#footnote-1)

Remixing is not a new phenomenon[[2]](#footnote-2), but developments in computer software have made it feasible for amateurs and professionals alike to combine, rearrange and mix existing tracks in a multitude of ways. The advent of digital sampling has increased remixing techniques and provides endless ways to rework previous songs by merging their beats and creating a synergy between the music, the DJ and the public[[3]](#footnote-3).

Remixes still pushes the boundaries of copyright law. Although based upon the pre-existing works of others, their creativity derive from the ease with which the DJ glides from one song to another. This may be achieved by stripping down an earlier song to its simple beats to create a new track, by extracting or ‘sampling’ portions of earlier works[[4]](#footnote-4) and mosaicking them together, perhaps with a stretched intro, fading sounds or instrumental breaks. Without doubt, the best examples demonstrate a deep musical knowledge of the underlying songs, along with all the sounds contained within each track. Perhaps because the resultant work is created without the DJ needing to know how to play a single instrument, many ‘traditionalists’ see those who use a digital sampler as their instrument to be uncreative thieves, particularly since much sampling takes place without prior consent or licence from the rights-holders of the underlying works. Yet, digital sampling is more than a mere sound collage; it is an art which can make the past come to life.

Where a remix is made from copyright protected works, a DJ is expected to follow an established sampling clearance process, but this has been criticised as stifling, rather than encouraging, these creative musical endeavours. In its consideration of current UK copyright law, this article puts forward some modest suggestions as how this legal regime might best serve this particular type of musical expression. The article first revisits the copyright infringement test, and considers how it impacts on remixes. It then studies the existing defences under copyright law to see whether any might apply. The article then analyses whether unauthorised sampling may violate the moral rights of the original author. Based upon this assessment, the article looks at the current practices within the music industries, and proposes how a fairer balance could be struck between the copyright holders and those, including DJs, amateurs and the listening public, who value sampling.

# Copyright infringement: substantiality and author’s own intellectual creation

Copyright ownership of musical works is complex because of the number of separate rights involved. The UK Copyright, Designs and Patents Act 1988[[5]](#footnote-5) (‘CDPA’) sets out a closed list of specific categories of works[[6]](#footnote-6) which may enjoy copyright protection, once the work is fixed in a material form[[7]](#footnote-7). ‘Authorial’ musical, literary and artistic works must also be original[[8]](#footnote-8) to be protected, whereas ‘entrepreneurial’ works, including sound recordings, do not. Most songs will be made up of three separate copyright works: the lyrics are eligible as a literary work, the sound track is eligible as a musical work[[9]](#footnote-9) and the final track is a protected sound recording[[10]](#footnote-10). Sampling an existing track may infringe all three, unless permission from the copyright owners has been obtained[[11]](#footnote-11). To complicate matters further, the creator(s) of an authorial works enjoy the protection of certain ‘moral’ rights, and sampling could also breach these too. In the music industry, copyright in both the sound recording and the underlying authorial works are typically owned by intermediaries (such as publishers record labels), whereas the moral rights remain vested in the original artists resulting in a fragmentation of ownership[[12]](#footnote-12).

When a track is sampled, a portion of each of the protected works is reproduced[[13]](#footnote-13). Reproduction is one of the restricted acts listed in section 16(1) CDPA 1988[[14]](#footnote-14), which requires the right-holder’s permission or licence, for an individual to carry out; otherwise, the use may infringe. Pursuant to the established UK test, copyright is infringed by any unauthorised reproduction of at least a substantial part of the protected work[[15]](#footnote-15). Here, ‘substantiality’ is not only appraised quantitatively[[16]](#footnote-16), but mostly qualitatively[[17]](#footnote-17), based upon the particular facts[[18]](#footnote-18).

When this test is applied to music, courts have latitude to look beyond a literal note-for-note copying, and assess whether the unauthorised work creates the same overall impression as the original(s)[[19]](#footnote-19). But how is copyright infringement actually analysed in practice? Firstly, courts attempt to distinguish between the idea underlying each protected work and the way in which that idea is expressed, since copyright only subsists in particular expressions, and not in ideas. Only if the sample reproduces the protected expression (to a substantial extent) will it be found to infringe the right-holders’ exclusive rights. But in the case of digital sampling, reproduction can consists of one element, such as a particular rhythmic section or a guitar riff. Can such constitute a reproduction of an expression?

The court may be able to rely upon experts’ opinions to unravel the musical ideas from the musical expressions[[20]](#footnote-20). Such evidence was available to the court in *Produce Records Ltd v. BMG Entertainment UK and Ireland Ltd*[[21]](#footnote-21). In this case, DJ Los Del Rio’s track *Macarena* featured a seven-and-a-half-second sample from The Farm’s recording of *Higher and Higher.* Since it is common for each side in a dispute to adduce their own expert evidence, the resulting opinion might be questionable[[22]](#footnote-22) because it will carry with it a certain degree of subjectivity[[23]](#footnote-23). Although courts are not bound by any expert opinion presented, it can still provide valuable guidance. When dealing with a musical sampling case, having input from musicologists can provide useful guidance, particularly given the additional complexity of the multiple copyright works contained in a song.

Once a court has identified that the sample has been taken from protected parts of the work (rather than merely relying upon freely available ‘ideas’), the next question to ask is whether the amount reproduced is substantial. Although the CDPA 1988 does not defined what ‘substantial’ means, it seems somewhat counterintuitive that a short sampled segment could ever be a substantial part of a musical work. However, this is where the qualitative aspect of the substantiality test comes to the fore. In *Hawkes v. Paramount*[[24]](#footnote-24), use of a twenty-second segment of the tune *Colonel Bogey* (four minutes long) in a newsreel *was* found to be a substantial part, because this particular segment was the most famous part of the tune. As such, UK courts appraise substantiality on a case-by-case basis, having regard to the context of the particular use of the particular protected work[[25]](#footnote-25). Therefore, it may be irrelevant that the elements reproduced constitute only a minor segment of the protected work, or indeed that the sample forms only a short segment in the new work.

It is not only the copyright in the sound recording which is of concern. Sampling also reproduces the underlying musical composition, and so, infringement of copyright protecting the lyrics and music must also considered. In *Ludlow* *Music Inc v Williams & Others*[[26]](#footnote-26), the court found that two lines of lyrics in the Robbie Williams song in *Jesus in a Camper Van* were sufficiently close to Wainwright’s protected lyrics to have reproduced a substantial part.

Yet, it might be possible for the sampler to argue that their use is non-infringing. It has been seen that the UK test requires reproduction of a substantial part of the protected work, to be decided upon the particular facts, and based on an overall impression[[27]](#footnote-27). A sampler may argue that the copyright holder has failed to establish their claim because the particular sample used does reproduce a substantial part of any protected work. Although this case was ultimately settled prior to a full hearing, this approach was adopted in *Produce Records Limited v. BMG Entertainment*[[28]](#footnote-28), discussed above. BMG, the record label for Los Del Rio’s *Macarena* argued that the segment did not reproduce a substantial part of The Farm’s earlier recording. However, as Produce Records had applied for an interim injunction, the court did not have to determine the question of infringement, but merely whether it appeared that the claimant had an arguable case.[[29]](#footnote-29) While an argument of non-infringement is unlikely to succeed simply on the basis that the sample taken is short, in some cases, it may be possible to argue that the sample relates to part of the work which is in the common sphere of musical ideas, rather than the particular protected expression. Ultimately, in many cases, such arguments of non-infringement will be untenable.

Given the sparse case law relating specifically to sampling under UK copyright legislation, the issue meets with different reactions within the music industry. While ‘major’ labels[[30]](#footnote-30) require that *any* sample of a copyright recordings to be licensed, the smaller ‘independent’ labels adopt an approach which equates a ‘substantial reproduction’ - which requires their permission - to a ‘recognition test’ based upon the prominence of the sample in the protected work. This lack of guidance has also given rise to certain prevalent industry urban myths[[31]](#footnote-31), for example, that sampling three notes or less, avoids copyright infringement issues[[32]](#footnote-32).

The UK courts’ approach needs to be evaluated in light of a recent decision of the Court of Justice of the European Union (‘CJEU’). In *Infopaq*[[33]](#footnote-33), the CJEU clarified that EU national courts must determine infringement based upon an assessment of whether the unauthorised use reproduces the ‘*author’s own intellectual creation*’[[34]](#footnote-34). However, the message from the courts seems clear - any unauthorised sample will amount to copyright infringement because the sampler only selects the original, creative parts of an earlier work (as unless the listener recognises that the sample is a sample, the new work loses its impact).[[35]](#footnote-35)

Perhaps because of the apparent presumption in favour of the original copyright holders, many samplers in the UK when faced with litigation prefer to reach a settlement out of court[[36]](#footnote-36), rather than defending what might be a very expensive law suit to a final decision[[37]](#footnote-37).

# Justifying unauthorised samples in court…

But is it really necessary for anyone wishing to use digital sampling to seek the right-holders’ permission? This section explores when it might be possible for a sampler to argue that their work is lawful, even if the use is without prior authorisation or a licence.

As a line of defence, a sampler may concede that the sampling does reproduce a substantial part of the work, but argue that the use is non-infringing because it is of the special types of use which falls within one of the recognised exceptions of permitted use, as fair dealing. According to the CJEU, copyright exceptions must be interpreted strictly in light of their purposes and objectives[[38]](#footnote-38). But also, the interpretation of copyright exceptions must take into consideration the increasing role of fundamental rights in the copyright paradigm by requiring courts to strike a fair balance between the right to freedom of expression and the interests and rights of authors and right-holders[[39]](#footnote-39).

Section 30 CPDA 1988 allows use of a protected work for quotation[[40]](#footnote-40). This provision allows a copyright work to be copied for the purpose of quotation[[41]](#footnote-41), provided that the use satisfies four requirements[[42]](#footnote-42): the work must have been made available to the public; the use must be fair; the length of the quotation must be reasonable; and sufficient acknowledgement of the original work must be made[[43]](#footnote-43). Although this defence is relied upon most frequently in relation to literary works, there is nothing in the legislation to prevent it from applying equally to a sound recording or musical work[[44]](#footnote-44). So, it remains to be seen whether some samples might fall within the scope of this provision. What is significant is an emphasis is placed upon the quantitative amount copied[[45]](#footnote-45). In the absence of any judicial guidance, it is submitted that any ‘quotation’ which is so long as to conflict with the normal exploitation of the original work would fall outside the scope of the exception. In the case of a typical sample, the new work is unlikely to detract from sales of the original work (indeed, it may even reinvigorate interest in the original work). Given that the first requirement is always likely to be satisfied, and that the original work may be acknowledged in the promotional material accompanying the new work, reliance on the quotation exception seems plausible in limited cases. Especially since that in *Eva-Maria Painer v. Standard Verlags GmbH and others*[[46]](#footnote-46) in 2011, the CJEU held that a photography could be quoted as long as this one had already been published and was adequately acknowledging its author when possible. Whilst there is no reason to outright strike out the possibility to rely on the quotation defence in music, it will be of limited assistance to music sampling as in *Painer*, the AG seems to interpret ‘quotation’ in a narrow way which could exclude music samplers unless the latter are able to demonstrate that the quotation ‘*is reproduced without modification in identifiable form*’ and *‘(t)here must also be a material reference back to the quoted work in the form of a description, commentary or analysis. The quotation must therefore be a basis for discussion*’[[47]](#footnote-47).

Some unauthorised samplers may attempt to argue that their use falls under the newly introduced fair dealing defence for the purposes of caricature, parody or pastiche[[48]](#footnote-48). Again, the CPDA 1988 does not indicate when the provision will apply, the exception must be interpreted in light of CJEU guidance, since the new UK parody exception arises from EU copyright law[[49]](#footnote-49). In *Deckmyn*[[50]](#footnote-50), the CJEU defined ‘parody’ as ‘an expression of humour or mockery which, while evoking an existing work, is noticeably different from that work’[[51]](#footnote-51). As demonstrated by the empirical study undertaken on behalf of the UK Intellectual Property Office[[52]](#footnote-52), a significant proportion of contemporary pop parodies sample earlier works.

But will the parody exception have broader application to other remixers which are not blatantly ‘funny’? In order to assess whether the parody exception applies, UK courts will need to determine whether the sampling use reflects a humorous intent on the part of its creator[[53]](#footnote-53). Here, it is pertinent that ‘humour’ in music might not always take the form of traditional ridicule, but may take the form of playful or unexpected juxtapositions, or changes in rhythm or style which break traditional musical rules[[54]](#footnote-54). Thus, it seems reasonable to presume that there is humour in at least some digital sampling, which derives from the combination of excerpts from earlier recordings which will surprise the audience listening to the sampler’s track[[55]](#footnote-55). It is hoped that UK courts will construe humour broadly enough to include musical entertainment, homage and even criticism. But humour in itself is insufficient.

To rely upon a fair-dealing defence (whether the quotation defence or the parody exception), the court must be satisfied that ‘*a fair minded and honest person would have dealt with the copyright work in the manner as the defendant did*’[[56]](#footnote-56). Here, courts weigh up a number of different factors[[57]](#footnote-57) to assess whether the dealing is objectively ‘fair’. In the case of the parody exception this are likely to include the amount copied, whether the parodist has commercial motives, whether the parody is likely to impact on sales of the original work, and the nature of the parody itself.

While it is too soon to know how the UK parody exception will be applied, a number of uncertainties are apparent in relation to any musical parodies. Given that songs are comprised on a number of overlapping copyright works, it remains to be seen whether courts will apply the parody exception by taking the song as a whole into account, or whether the user will need to demonstrate that each requirement has been satisfied for each of the copyright protected works which have been reproduced[[58]](#footnote-58). In either case, is submitted that transformation is at the heart of parody – it calls the original work to mind, but is, at the same time, notably different. Here, it is not clear that all digital sampling techniques will be enough of a modification of the original. Simply inserting an excerpt from one sound recording to another, or changing a drumbeat seems to stretch the parody exception too far. As a result, the quantitative amount taken might play a role in sampling cases. Currently, it is not certain whether the exception applies where a whole work has been reproduced.

A good example of the difficulties encountered when attempting to apply any fair dealing to music is Danger Mouse’s *The Grey Album*. In this case, the ‘humour’ derives solely from the choice of the two earlier works which are combined: vocals from Jay-Z’s ‘*The Black Album*’ and instrumentals from the Beatles’ ‘*White Album*’[[59]](#footnote-59). How can any court determine whether an artist has taken *too much* from an earlier work without passing a judgement on the artistic merits of the new work itself? This factor seems inherently subjective.

Another blurred area is whether the parody exception will apply where the unauthorised parody is used for commercial purposes. Traditionally, the fair dealing exceptions have been interpreted to render commercial use unfair. Here, it must be borne in mind that the parody exception is one of the copyright exceptions based upon the fundamental right to free expression. The European Court of Human Rights has confirmed that freedom of expression does extend to commercial speech[[60]](#footnote-60), but it affords national courts a greater margin of appreciation, than compared to, for example, political expression, in recognition of its greater public interest. Since many cases involve a balancing of one party’s fundamental rights (right to copyright as property) against another’s (right to freedom of expression), the commercial nature of parodic use may tip the scales in favour of the copyright owner, whereas non-commercial use might give rise to the opposite result. This may mean that when UK courts are assessing fairness, they will consider whether the use is likely to impact on the market of the original works, which would include potential licensing revenue lost[[61]](#footnote-61). In terms of digital sampling, as a rights clearance system is already quite developed, this might count against a sampling artist hoping to rely upon the parody exception.

This analysis of the existing defences under UK copyright law affords samplers little comfort, since few sampling efforts would appear to fall within either the quotation or the parody fair dealing. Rather, it reinforces the presumption that because sampling relies upon use of a substantial (in the sense of qualitatively significant, original) part of an earlier work, it will infringe copyright in the lyrics and/or melody and the sound recordings of the sampled works, unless the right-holders are willing to grant permission.

# Digital sampling, a violation of moral rights?

So, while a sampler is likely to encounter economic rights issues, will issues also arise regarding moral rights? It will be recalled that CDPA 1988 introduced moral rights into UK copyright law to meet international law obligations arising from the Berne Convention[[62]](#footnote-62). Pursuant to sections 77 to 84 CDPA, the creator of any authorial copyright work, or the performer of a work enjoys rights of paternity and integrity, once these rights have been properly asserted rights[[63]](#footnote-63). Paternity relates to the right to be identified as the author or performer of the work whenever it is broadcast, or otherwise communicated to the public[[64]](#footnote-64). The integrity right permits an author or performer to object if their work is subjected to a ‘derogatory treatment’[[65]](#footnote-65), so enabling them to retain a degree of creative control over how their works are exploited, even though the author and performer may have signed their commercial rights away to the record label. Finally, songwriters (but not performers) can object to any false attribution of their work[[66]](#footnote-66).

While moral rights cannot be transferred, assigned or licensed[[67]](#footnote-67), they can be waived[[68]](#footnote-68). The type of contracts typically used in music industry often require at least partial waiver of moral rights, but record labels typically do respect a song writer’s or performer’s paternity right, as well as agreeing that certain kinds of commercial exploitation (which are most likely to impact on the integrity right) will only take place with the author’s specific consent. The latter restricted acts include use of a work for commercial advertising, adaptations or any re-arrangements[[69]](#footnote-69). As sampling would generally be classed as a re-arrangement, in cases moral rights have been asserted and retained, lyricists, musicians and performers may independently seek to enforce these rights whenever their work is sampled. An unauthorised sampling might infringe their paternity right, if not properly attributed, and may be a derogatory treatment of their work. This article only focuses on the integrity right given that often the paternity right will be easily satisfied.

Again, there is very little case law to help shed light on how UK courts might consider digital sampling. However, before establishing whether sampling is ‘derogatory’, it is first necessary to establish whether it is a ‘treatment’. Here, the CDPA sets out that there must be some kind of change made whether by ‘addition to or deletion from’ the protected work[[70]](#footnote-70). In *Morrison Leahy Music Ltd v Lightbond Ltd*[[71]](#footnote-71), George Michael tried to relied upon his moral rights to object to release of a medley which sampled his songs, even though his record label (owner of copyright in the works) had granted a licence via the *Mechanical-Copyright Protection Society* (‘MCPS’). In hearing a case for an interim injunction, Morritt, J. was unconvinced that that the original character of the work had been affected by the use[[72]](#footnote-72). This seems to indicate that a treatment is more than simply placing a work in a different context.

In *Confetti Records, Fundamental Records & Andrew Alcee v. Warner Music UK Ltd[[73]](#footnote-73)*, the court confirmed that establishing whether a treatment is a derogatory one is an objective test, based upon whether a right-thinking person would perceive the treatment as harmful to the artist, and not a subjective test based upon the artist’s actual perception of the work. *In casu*, the court accepted that defendant’s rap, *Crisp Biscuit*, superimposed over the claimant’s song, *Burnin*, did amount to a treatment of the protected work, but the claimant failed to establish it was a derogatory one, since other than the claimant’s assertions, no evidence was adduced to substantiate any objective damage to his honour or reputation resulting from the unauthorised use[[74]](#footnote-74). This outcome is not limited to musical works, but reflects the wider approach in moral rights cases[[75]](#footnote-75).

Based upon the background of decisions, it is reasonable to assume that where sampling takes the form of a faithful reproduction of a substantial part of the original, UK courts are unlikely to consider this to be a derogatory treatment in breach of the integrity right[[76]](#footnote-76). It has been suggested that arguments of derogatory treatment would more clearly arise where a song’s lyrics are altered, since the original song would now be associated with a revised message, and it is possible to conceive that certain messages could prejudice the honour or reputation of its original author[[77]](#footnote-77). However, this kind of treatment may be more likely to occur in musical parodies, than conventional remixes.

Although the economic rights of copyright law, particularly the right to control reproduction of a protected work make sampling problematic, it seems less likely that infringement of moral rights will be problematic, provided that the paternity right is respected. Digital sampling, even of a substantial segment of an earlier work, is unlikely to be seen as a derogatory treatment, because sampling generally does not alter the character of the original work.

# Is the solution lying within the hands of industry players?

It has been seen that because digital sampling reproduces significant segments of protected sound recordings, it will generally infringe the copyright holder’s right to control reproductions, unless the user is can demonstrate that their use falls within the scope of one of the specific defences of parody or quotation. It has also been argued that these exceptions are unlikely to apply to most forms of digital samples. This forces those samplers who want their creations to be lawful, to pursue permission from all of the relevant right holders. Currently, without any overarching ‘sampling’ scheme in place, permission needs to be sought from multiple parties on a case-by-case basis, and predominantly reliant on contract law to operate. This process is exacerbated by a somewhat artificial legal fragmentation of authorship and ownership.

As was described earlier, musical copyright in music is characterised by a multi-layering of works. Further, although the musical composition, lyrics and sound recordings are often created by different individuals, copyright ownership in the music industry rarely stay with the original right-holder[[78]](#footnote-78). More often, these rights are assigned or licensed to intermediaries, such record labels or collecting societies[[79]](#footnote-79). A producer’s copyright in a sound recording[[80]](#footnote-80) is generally transferred to a record label, while copyright protection in the lyrics and musical composition will often be transferred to a music publisher[[81]](#footnote-81), at least in respect of promotion, exploitation and distribution of the work, in return for a financial advance and/or royalties[[82]](#footnote-82). This means that digital sampling requires permission from the relevant record label[[83]](#footnote-83) and music publisher.

Although it has been seen that the UK has a strong copyright legislative provision to protecting right-holders from unauthorised copying, it is far from straightforward for a sampler who actually wants to ‘do the right thing’ and obtain permission to sample an earlier work, because of the complex licensing frameworks and clearance process which have been put in place by the key players in the music industry. Even though there has been a change in attitude to digital sampling (right-holders, originally sceptical about the creative merits of sampling, quickly realised that it opens up an additional revenue stream), there has been little progress in reducing the transaction costs which rights clearance entails. This ‘hassle factor’ erect a barrier which serves to stifle a samplers’ creativity. While some record labels licence their masters recording from the public domain[[84]](#footnote-84). Other labels vacillate between permitting free sampling, one off payment or royalty-sharing arrangements, to more onerous terms, such as co-ownership or even ownership of the resulting copyright in the new work.

Given the lack of industry consensus on the treatment of sampling, the question remains how a fair balance can be struck which both recognises the rights of the right-holders, but also appreciates the value which users can add by creating derivative works, and the need to make terms of use available which are reasonable and fair and relieve the user from the worry of any future liability. Several options are suggested.

A possible way to achieve this involves both a change of legislation as well as an overhaul of business practices, and so represents the least likely option to occur. Given that the music industry’s business models are founded upon copyright protection, the current unreasonable licensing terms are directly linked to a strengthening of copyright’s list of exclusive rights over time, which has placed control over more uses of a protective work in the hands of the rights holder[[85]](#footnote-85). This has been exacerbated by the concentration of ownership of these rights, arising from take-over and merger of record labels and cooperation between collecting societies. The market power which the global record labels enjoy extends to their bargaining power *vis-à-vis* of users, and enables them to dictate their own terms of use. There seems little hope that the market is capable of regulating licence fees on its own. Simultaneously, a hypothetical legislative intervention to strengthen copyright protection would only aggravate the situation of individuals wanting to sample[[86]](#footnote-86). This has led some to propose that legislative reform is necessary to weaken copyright’s property rules, for example, removing a right-holder’s veto to block third party use by creating a compulsory licence scheme with set terms for use[[87]](#footnote-87). Unsurprising, this option receives little support from right-holders, who seem to fear a loss in revenue more, but it may also have a detrimental effect on the copyright paradigm because it undermines the creative control which authors may legitimately want to exercise.

Courts also bear an important role in resolving the discomfort between strong protection granted to right-holders and the interests of emerging authors and the wider public in new cultural expressions. The last UK copyright reform spells out that society at large benefits from certain unauthorised uses of copyright works. Inherently, the new quotation defence and the introduction of a parody exception curtailed the exclusive rights of right-holders. In light of this, the substantiality doctrine and the application of copyright exceptions might need recalibrating having this particular goal of fostering creativity in mind.

A better route for digital sampling is to build upon current music-sector initiatives, not least because of the greater chance of reaching fruition. These include bespoke rights clearance services for sampling[[88]](#footnote-88), as well as other more-general proposals, such as the Copyright Hub[[89]](#footnote-89). This is a private initiative in response to proposals in the Hargreaves Review of UK copyright law[[90]](#footnote-90), which has engendered support from the major actors within the music industry, including the collective rights societies. The Hub’s aim is to provide a central web-based platform for users to determine who owns the rights in a particular copyright work, and to facilitate licensing for the work’s use.[[91]](#footnote-91) Although the current version of The Hub is limited to photographs and other artistic works, there are plans to extend its reach to cover musical works too. It thus remains to be seen how well the system will adapt from the relative simplicity of ownership and licensing of artistic works to the more complex rights ownership and management of music-related works, since The Hub will only be of real value to users, if it provides a ‘one-stop shop’ which secures all the permission needed[[92]](#footnote-92).

# Conclusion

The latest copyright reforms seem to provide little, if any, panacea for DJs and others who use modern digital sampling techniques to create new musical works. The clarification of exclusive rights based upon the CJEU’s interpretation of originality and infringement has, if anything, complicated the situation for digital sampling since it seems to render any unauthorised use of any part of a work which represents the author’s ‘intellectual creation’ as infringing, so promoting the interests of one author’s creativity at the expense of another’s. It can no longer be ignored. Digital sampling constitutes a creative form which should be recognised in its own right, but the current legal frameworks seem incapable of fostering this type of creativity.

While strong copyright protection has its place, the market power of the key industry actors as well as complexity is rights clearance procedures create additional barriers to entry for future artists seeking to step onto the lower rungs of the industry ladder. But, it seems that there should be a way which acknowledges the contribution of earlier rights, while still permitting creative derivative uses, which might benefit the music industry as a whole, over time[[93]](#footnote-93). The wheels already appear to be turning in the right direction in the UK, with the recent launch of The Copyright Hub. Time will tell whether this initiative provides the relief which mixers and samplers seem to need to lawfully exercise their art.

1. This article was written based on notes written for Bjorn Schipper’s comparative manifesto on the current legal regime applicable to digital sampling, presented at the Amsterdam Dance Festival 2015. [↑](#footnote-ref-1)
2. Sampling can be traced back to the birth of Hip-Hop culture in the seventies. At this time, sampling was an expensive technique and limited (three octaves at most, changing sounds required new tapes, sampled often only two seconds at a time). Chuck cited in K. Mcleod & P. Dicola, *Creative License:* *The law and culture of digital sampling* (Duke University Press, 2011) 60; R. Salmon, Sampling and sound recording reproduction – fair use or infringement?’ [2010] 21(5) *Ent. L. R.,* 174. [↑](#footnote-ref-2)
3. Eventually, this led to a reduction of costs for the creation of remixes in the end of the eighties. [↑](#footnote-ref-3)
4. Whether by taking segments from original sound recordings or having other musicians play the originals. [↑](#footnote-ref-4)
5. [1988 c. 48](http://www.legislation.gov.uk/ukpga/1988/48). [↑](#footnote-ref-5)
6. Section 1 CDPA 1988. [↑](#footnote-ref-6)
7. Section 3(2) CDPA 1988. [↑](#footnote-ref-7)
8. Section 1(1)(a) CDPA 1988. For copyright to subsist in entrepreneurial works such as sound recordings, originality is not required. [↑](#footnote-ref-8)
9. Sections 1(1)(a) and 3(1) CDPA 1988. [↑](#footnote-ref-9)
10. Sections 1(1)(b) and 5A(1) CDPA 1988. [↑](#footnote-ref-10)
11. Under section 8 Copyright Act 1956, it was possible to reproduce a composition in a sound recording by paying a fixed statutory royalty. [↑](#footnote-ref-11)
12. Later described in part 4 of this article. [↑](#footnote-ref-12)
13. Reproduction comprises both literal and non-literal copying. Therefore, the sampling of sound recordings and the musical composition replayed by others can amount to copyright infringement. [↑](#footnote-ref-13)
14. Reproduction right has been harmonised at EU level by article 2 of the Information Society Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167. [↑](#footnote-ref-14)
15. Section 16(3)(a) CDPA 1988. [↑](#footnote-ref-15)
16. *Hawkes and Sons (London) Ltd v. Paramount Film Service Ltd* [1934] Ch 593 at 604. B. Sherman & L. Bently, ‘cultures of copying: digital sampling and copyright law’ [1992] 3(5) *Ent. L.R.* 1992, 159. [↑](#footnote-ref-16)
17. *Ladbroke v William hill* [1964] 1 WLR 273; *University of London Press Ltd.* v. *University Tutorial Press Ltd.* [1916] 2 Ch. 601 at 610. [↑](#footnote-ref-17)
18. *Ladbroke v William hill* [1964] 1 WLR 273 at 283. In addition to quantity and quality, Bently analyses competition and *animus furandi*. For their application to digital sampling, see, L Bently, ‘Sampling and copyright: is the law on the right track? Part 2’ [1989] *J.B.L* 405-413. [↑](#footnote-ref-18)
19. *Ladbroke v William hill* [1964] 1 WLR 273 at 276. [↑](#footnote-ref-19)
20. For an analysis of the role of experts in court see Keyes JM, ‘Musical Musings: The Case for Rethinking Music Copyright Protection’ (2003) 10 *Mich. Telecom. & Tech. L. Rev*. 434. [↑](#footnote-ref-20)
21. (1999), High Court transcript, 19 January. [↑](#footnote-ref-21)
22. The inherently limited character of expert opinions led some scholars to suggest a greater reliance on technologies or physics to separate the protected expressions from the unprotected ideas. According to Liebesman, subjectivity could be overcome by ‘objectively mapping a song’s many artistic elements’ and ‘using a link between the wave motion theory of physics and music to mathematically model a song’. Liebesman YJ, ‘Using Innovative Technologies to Analyze for Similarity between Musical Works in Copyright Infringement Disputes’ (2007) 35 *AIPLA Q.J.* 332. Yet technology bears the opposite disadvantage of lacking subjectivity. Let’s take the *Content ID* recognition system operated by *YouTube*. Translating each work into a complex algorithm, the system cross-checks all new uploaded content against its database and is susceptible to find partial and entire matches providing more points of comparison between the works. [↑](#footnote-ref-22)
23. McDonagh LT, ‘Is the Creative Use of Musical Works without a Licence Acceptable under Copyright Law?’ (2012) 43 *International Review of Intellectual Property and Competition Law* 416; Bently L, ‘Authorship of Popular Music in UK Copyright Law’ (2009) 12 *Information, Communication & Society* 192; Liebesman YJ, ‘Using Innovative Technologies to Analyze for Similarity between Musical Works in Copyright Infringement Disputes’ (2007) 35 *AIPLA Q.J.* 332. [↑](#footnote-ref-23)
24. *Hawkes and Sons (London) Ltd v. Paramount Film Service Ltd* [1934] Ch 593. [↑](#footnote-ref-24)
25. Copyright can subsist is very small work. In *Lawton v. Lord David Dundas*, the court recognised the subsistence of copyright protection in four notes constituting the jingle for Channel Four. *The Times,* June 13, 1985. [↑](#footnote-ref-25)
26. [2001] EMLR 155; [2001] FSR 271. [↑](#footnote-ref-26)
27. *Hawkes and Sons (London) Ltd v. Paramount Film Service Ltd* [1934] Ch 593. [↑](#footnote-ref-27)
28. *Produce Records Limited v. BMG Entertainment International UK and Ireland Limited* (1999). [↑](#footnote-ref-28)
29. Based upon a simple comparison, Parker J. was satisfied that BMG did have a case to answer, but the parties settled before the full trial. [↑](#footnote-ref-29)
30. In the UK the major labels include *EMI Group*, *Sony Music Entertainment*, *Warner Music Group* and *Universal Music Group*. [↑](#footnote-ref-30)
31. L. Abramson & S. Bate, ‘To sample or not to sample?’ (1997) 8(6) *Ent. L. R.*, 194. [↑](#footnote-ref-31)
32. This legend probably derived from the US case *Newton v. Diamond*, where judges held that the copying of three notes (C-F flat-C) by the Beastie Boys did not amount to substantial reproduction. 349 F.3d 591 (9th Cir. 2003). [↑](#footnote-ref-32)
33. *Infopaq International A/S v Danske Dagblades Forening*, C-5/08, ECLI:EU:C:2009:465. Applied by UK courts in *Meltwater*: Trial: [2010] EWHC 3099 (Ch); Appeal: [2011] EWCA Civ 890. [↑](#footnote-ref-33)
34. *Infopaq International A/S v Danske Dagblades Forening*, C-5/08, ECLI:EU:C:2009:465at [37]. Repeated in amongst others, *Eva-Maria Painer v Standard Verlags GmbH and others,* C-145/10, ECLI:EU:C:2011:798 at [99]; *Infopaq International A/S v Danske Dagblades Forening (‘Infopaq II’)*, C-302/10, ECLI:EU:C:2012:16 at [22]; *Football Association Premier League Ltd and Others v QC Leisure and Others,* C-403/08, *and Karen Murphy v Media Protection Services Ltd*, C-429/08, ECLI:EU:C:2011:631 at [159]. For a recap on the current test for infringement see D. Liu, ‘Test of infringement: what is it now?’ [2014] 36(9) *EIPR*, 588-594. [↑](#footnote-ref-34)
35. This led McDonagh argue for more consideration of the music creation process within copyright law by acknowledging the importance of borrowing from previous works to create new ones. L. T. McDonagh, ‘Is the creative use of musical works without a licence acceptable under copyright law?’ [2012] 43(4) *ICC* 401-426. [↑](#footnote-ref-35)
36. See *Whole Lotta Love* case where Led Zeppelin sampled the Willie Dixon’s *You Need Love*. A deal was cut prior full trial. *Walmsley v Acid Jazz Records Ltd* [2001] E.C.D.R. 4. [↑](#footnote-ref-36)
37. See for example the Verve saga which suffered the cost of a lawsuit as the UK Court awarded one hundred percent of the royalties generated by the exploitation of the Verve’s *Bittersweet Symphony* to the plaintiff, copyright owner in the Rolling Stone’s *The Last Time* sampled by the Verve. This saga led some scholars to argue for the establishment of a single right-holder for downstream users to license from. Loren LP, ‘Untangling the Web of Music Copyrights’ (2002) 53 *Case Western Reserve Law Review* 673, 677. [↑](#footnote-ref-37)
38. *Eva-Maria Painer v. Standard Verlags GmbH and others,* C-145/10, ECLI:EU:C:2011:798, at [133]; *Football Association Premier League Ltd and Others v QC Leisure and Others,* C-403/08, *and Karen Murphy v Media Protection Services Ltd*, C-429/08, ECLI:EU:C:2011:631 at [163]; *Infopaq International A/S v Danske Dagblades Forening*, C-5/08, ECLI:EU:C:2009:465 at [56-57]. [↑](#footnote-ref-38)
39. Deckmyn and Vrijheidsfonds VZW v Vandersteen, C-201/13, ECLI:EU:C:2014:2132, at [27]; *Eva-Maria Painer v. Standard Verlags GmbH and others,* C-145/10, ECLI:EU:C:2011:798, at [134]. [↑](#footnote-ref-39)
40. Section 30 CDPA as modified by the Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, 2014 No. 2356, Regulation 3 inserting subsection 1ZA in the CDPA. This implements article 10 of the Berne Convention for the Protection of Literary and Artistic Works 1886 and article 5(3)(d) of the InfoSoc Directive. [↑](#footnote-ref-40)
41. Quotation is not statutorily defined and must be interpreted by courts following its ordinary meaning. [↑](#footnote-ref-41)
42. New subsection 1ZA. Section 30 was amended by S.I. 2003/2498, regulations 3 and 10(1). [↑](#footnote-ref-42)
43. Generally, the creators of the musical composition (music and lyrics). Unless, the acknowledgement is impossible for practical reasons or otherwise. Section 30(3) CDPA. [↑](#footnote-ref-43)
44. Originally, this defence was limited to use made for the purpose of criticism and review, but this limitation was removed in the latest revisions to the CDPA, making it even more applicable to non-literary works. The UK Intellectual Property Office Guidance suggests that it covers short quotations necessary for academics or students’ papers; see: IPO, ‘Exceptions to Copyright’ (October 2014) 9; available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/375951/Education_and_Teaching.pdf> (last accessed on 04/08/2015) [↑](#footnote-ref-44)
45. In *Painer*, the Advocate General suggested that wholesale reproduction can be quotation. While this was stated in relations to photos, this could potentially be extended to music. Opinion of AG Trstenjak in *Eva-Maria Painer v. Standard Verlags GmbH and others,* C-145/10, ECLI:EU:C:2011:239, at [212]. [↑](#footnote-ref-45)
46. C-145/10, ECLI:EU:C:2011:798 [↑](#footnote-ref-46)
47. Opinion of AG Trstenjak in *Eva-Maria Painer v. Standard Verlags GmbH and others,* C-145/10, ECLI:EU:C:2011:239, at [208-209]. Supported by A Cameron, ‘Copyright exceptions for the digital age: new rights of private copying, parody and quotation’ [2014] 9(12) *JIPLP*, 1006. [↑](#footnote-ref-47)
48. Section 30A CDPA. [↑](#footnote-ref-48)
49. Article 5(3)(k) of Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167. [↑](#footnote-ref-49)
50. Deckmyn and Vrijheidsfonds VZW v Vandersteen, C-201/13, ECLI:EU:C:2014:2132 (‘*Deckmyn*’) [↑](#footnote-ref-50)
51. *Deckmyn*, para 20. [↑](#footnote-ref-51)
52. K. Erickson, *Evaluating the Impact of Parody on the Exploitation of Copyright Works: An Empirical Study of Music Video Content on YouTube* (Intellectual Property Office UK, 2013) available at https://www.gov.uk/government/uploads/system/uploads/attachment\_data/file/309900/ipresearch-parody-report1-150313.pdf. [↑](#footnote-ref-52)
53. Opinion in Deckmyn and Vrijheidsfonds VZW v Vandersteen, C-201/13, ECLI:EU:C:2014:458, paras 66-70; S Jacques, ‘Are national courts required to have an (exceptional) European sense of humour?’ (2015) 37 (3) *EIPR* 134, 136; For an analysis on the impact of the difference between *effect* and *intent* see E Rosati, ‘Just a laughing matter? Why the CJEU decision in Deckmyn is broader than parody?’ (2015) 52(2) *CML Rev* 511, 518. [↑](#footnote-ref-53)
54. Humour in music is explored further in S. Jacques, ‘Are the new fair dealing provisions an improvement on the previous law, and why?’ (2015) *JIPLP* 699. [↑](#footnote-ref-54)
55. Mera M, ‘Is Funny Music Funny? Contexts and Case Studies of Film Music Humor’ (2002) 14 *Journal of Popular Music Studies* 91. [↑](#footnote-ref-55)
56. *Hyde Park Residence v Yelland* [2001] Ch. 143 at 40; *ProSieben Media v Carlton UK Television Ltd* [1999] 1WLR605, 614 (CA).

 Sillitoe v McGrawHill [1983] FSR 545, 562. [↑](#footnote-ref-56)
57. *Hubbard v Vosper* [1972] 2 Q.B. 84 CA (Civ Div) [↑](#footnote-ref-57)
58. S. Jacques, ‘Are the new fair dealing provisions an improvement on the previous law, and why?’ (2015) JIPLP 701. [↑](#footnote-ref-58)
59. For a musical analysis of this mashup and the creative impact of mashups, see K Adams, ‘What did Danger Mouse do? The Grey Album and musical composition in configurable culture’ (2015) 37(1) *Music Theory Spectrum* 7. [↑](#footnote-ref-59)
60. ECtHR in *Robert Ashby Donald and Others v. France*, Appl. No. 36769/08, judgment of 10 Jan. 2013; ECtHR in *Krone Verlag GmbH & Co KG v. Austria* (No. 3) (2006) 42 EHRR 28;ECtHRin *Markt Intern Verlag GmbH and Klaus Beermann v. Federal Republic of Germany,* No. 10572/83, 20 November 1989. [↑](#footnote-ref-60)
61. *Hawkes & Son (London) Ltd v Paramount Film Service Ltd* [1934] 1 Ch. 593, at 598-602; Government, H M, ‘Modernising copyright: A modern, robust and flexible framework.’ (2012) p 14. [↑](#footnote-ref-61)
62. Article 6bis of the Berne Convention for the Protection of Literary and Artistic Works 1886. For more on the sampling and moral rights right after the introduction of moral rights in UK copyright law, see L. Bently, ‘Sampling and copyright: is the law on the right track? Part 1’ [1989] *J.B.L* 113-125. [↑](#footnote-ref-62)
63. Sections 78 & 205D CDPA. Exceptions exist, see sections 79 & 205E CDPA. For a songwriter or performer, these rights are mostly asserted by way of a standard ‘credit clause’ in their contract with the record label, which typically assigns copyright in their work. [↑](#footnote-ref-63)
64. In relation to performers, there are exceptions when it is not reasonably practicable to do so: Section 205C CDPA. [↑](#footnote-ref-64)
65. Sections 80 & 205F CDPA. [↑](#footnote-ref-65)
66. Section 84 CDPA. This attribution may be in writing, orally or even implied. [↑](#footnote-ref-66)
67. Section 94 CDPA. [↑](#footnote-ref-67)
68. Section 87 CDPA. [↑](#footnote-ref-68)
69. A. Harrison, *Music: the business* (6th ed., Random House, 2014) ch 12, p.312. [↑](#footnote-ref-69)
70. Section 80(3) CDPA. See also Burrell R and Coleman A, *Copyright Exceptions The Digital Impact* (Cambridge University Press, 2005) 77. [↑](#footnote-ref-70)
71. [1993] EMLR 144. [↑](#footnote-ref-71)
72. *Morrison Leahy Music Ltd v Lightbond Ltd* [1993] EMLR 144, 151. [↑](#footnote-ref-72)
73. *Confetti Records, Fundamental Records & Andrew Alcee v. Warner Music UK Ltd* (t/a East West Records) [2003] EWCH 1274 (CH). [↑](#footnote-ref-73)
74. *Confetti Records, Fundamental Records & Andrew Alcee v. Warner Music UK Ltd* (t/a East West Records) [2003] EWCH 1274 (CH) at [157]. [↑](#footnote-ref-74)
75. Dealing with cut-away drawing and a modification of colours in *Pasterfield v Denham [1999] FSR 168*, Justice Overend was convinced that the alteration amounted to a treatment as understood under section 80 but was less convinced that this treatment was derogatory ([1999] FSR 168, 183). As such, colour variations do not affect the honour or the reputation of the original artist. Similar approach was adopted in *Tidy v Trustees of the national history museum* [1995] 39 IPR 501 in relation to miniature representations of works where the court held that reduced reproductions of protected works does not harm the reputation or honour of the artist [1995] 39 IPR 501, 504. [↑](#footnote-ref-75)
76. ##  See also *John P Harrison v John D Harrison, Michael C Harrison t/a Streetwise Publications –and– Mark Hempshell* [2010] EWPCC 3, 2010 WL 1990649, at [84-85].

 [↑](#footnote-ref-76)
77. Sainsbury M, ‘Parody, Satire, Honour and Reputation: The Interplay between Economic and Moral Rights’ (2007) 18 *Australian Intellectual Property Journal* 149, 163. [↑](#footnote-ref-77)
78. First ownership of copyright: section 11 CDPA 1988. [↑](#footnote-ref-78)
79. Section 9(1) CDPA. [↑](#footnote-ref-79)
80. Section 9(2)(aa) CDPA 1988. [↑](#footnote-ref-80)
81. Yet, if the writers in the musical composition retained creative control in the use of sample of their work, the user alluring to sample will have to get consent from them too. [↑](#footnote-ref-81)
82. A. Harrison, *Music: the business* (6th ed., Random House, 2014) 73-89; Kretschmer M, Klimis GM and Wallis R, ‘The Changing Location of Intellectual Property Rights in Music: A Study of Music Publishers, Collecting Societies and Media Conglomerates’ (1999) 17 *Prometheus: Critical Studies in Innovation* 178; Greenfield and Osborn, ‘Copyright and Power in the Music Industry’ in Frith and Marshall (eds) *Music and Copyright* (Edinburgh University Press, 2nd ed., 2009) 96. [↑](#footnote-ref-82)
83. Permission from the right-holder of the sound recording is needed even if the sampler intends to re-record the sample, since section 17(2) CDPA defines unauthorised copying in terms which cover a direct or indirect reproduction. [↑](#footnote-ref-83)
84. This is where the artist Scanner draws essentially his samples from. K. Mcleod & P. Dicola*, Creative License:* *The law and culture of digital sampling* (Duke University Press, 2011) 157. [↑](#footnote-ref-84)
85. Expanding the subject-matter eligible for protection, the scope of protection and the duration of copyright itself. Carroll M, ‘Struggle for Music Copyright’ (2005) 57 *Florida Law Review* 919. [↑](#footnote-ref-85)
86. K. Mcleod & P. Dicola*, Creative License:* *The law and culture of digital sampling* (Duke University Press, 2011) 220. [↑](#footnote-ref-86)
87. K. Mcleod & P. Dicola*, Creative License:* *The law and culture of digital sampling* (Duke University Press, 2011) 234. [↑](#footnote-ref-87)
88. http://www.sampleclearance.com/ [↑](#footnote-ref-88)
89. Beta version can be accessed at http://www.copyrighthub.co.uk/ [↑](#footnote-ref-89)
90. Hargreaves I, ‘Digital Opportunity: A Review of Intellectual Property and Growth’ (2011) 33. [↑](#footnote-ref-90)
91. Right-holders are able to set up a relatively simple licensing menu, which sets a fee depending upon the type of use and length of use. [↑](#footnote-ref-91)
92. A suggestion is to allow songwriters and right-holders to be able to license for 100% of the song irrelevantly of whether they only own part of the song. Similarly to the current proposal from the US Department of Justice: see <http://www.billboard.com/articles/business/6649208/the-dept-of-justice-said-to-be-considering-a-baffling-new-rule-change-for> (last accessed on 07/08/2015) [↑](#footnote-ref-92)
93. Like the birth of Hip-Hop, Jazz and Blues musical genres. See L McDonagh, “Is the Creative Use of Musical Works without a Licence Acceptable under Copyright Law?” (2012) 43 *International Review of Intellectual Property and Competition Law* 401, 403; I Monson, ‘Doubleness and Jazz Improvisation: Irony, Parody and Ethnomusicology’ (1994) 20(2) *Critical Inquiry* 283, 283-292. [↑](#footnote-ref-93)