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### Mash-up Culture: Reconciling Art, Commerce and the Law

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## **Abstract**

The proliferation of “sampling” in recorded music and live performances has amplified the level of appropriation and cultural borrowing that exists in the music industry. Artists, music companies and stakeholders on every level from independent to mainstream have been affected by this trend. In addition to catalyzing innovation and inspiring new forms of expression, these creative works, broadly referred to as “mash-ups”, have also been the subject of heated legal debates related to claims of copyright infringement in the last 20 years. This study discusses the essential issues surrounding the musical practice of “sampling” audio recordings, including the issues of copyright infringement related to “sampling” and the legal defenses that have been employed to contest these claims in relevant legal cases.

While presenting legal research and interviews with key players in the entertainment industry, this paper also includes a predictive and persuasive interpretation of specific copyright issues related to sampling. Based on the U.S. Code and case law, this study delves into the “grey area” of copyright law, related to the governance and enforcement of ownership pertaining to sound recordings. By highlighting key arguments of both supporters and opponents of works made from “sampled” sources, the synthesis of opinions expressed herein is presented for the purpose of supporting a practical, dynamic framework for the sustainability of this delicate relationship between art and commerce.

Furthermore, there is a creative component included within the scope of this project. Specifically, this creative work is an original music composition created by the author of this paper for the purpose of illustrating the central themes of this discussion. The concept behind this piece of music was to compose a 3-to-6-minute song built entirely from original instrumentation and arrangements, while integrating one “sample” from a pop music recording. The sample was constructed from a 2-second snippet of James Blake’s “CMYK” and manipulated in the following ways: rhythmic structure, arrangement, dynamics and modulation. In juxtaposing the audio sample with the original composition, there exists a beautiful tension that heightens the effect of the overall work. This feeling could not be achieved by separating the two; therefore this work serves as an embodiment of the premises that are included in the paper.

This project should be viewed not as two disparate components distinct from one another; it should instead be viewed as an observation of the complexities that inherently arise in a multifaceted music ecosystem, where several interests must be considered. While the paper and auditory component together suggest that a compromise, a “happy medium”, can be reached to the mutual benefit of the art and business of music, it is clear that some work still needs to be done before we can

implement a fluid framework designed for the cost-effective and efficient licensing of audio recordings for sampling purposes.

## **Summary**

This project was created with the intention outlining the circumstances that have created a “grey area” in copyright law pertaining to sound recordings. The reason for this is that the practice of “sampling” in recorded music has amplified the level of appropriation and cultural borrowing that exists in pop culture. The written component of my study discusses the essential issues surrounding the musical practice of “sampling” audio recordings, including the issues of copyright infringement related to “sampling” and the legal defenses that have been employed to contest these claims in relevant legal cases.

Samples, in the context of this paper and the music industry in general, are snippets of audio recordings that have been appropriated from previously copyrighted material for the purposes of inclusion with a new composition. This form of music creation has sparked notable controversy in the last few decades, because there is no “blanket rule” for what precisely constitutes copyright infringement in particular the case a sound recording. Since there is not one codified set of standards, this paper examines two cases that help us infer what is acceptable in the eyes of the court.

The first case that is discussed in this paper is *Campbell v. Acuff-Rose Music, Inc.* Argued before the Supreme Court in 1994, this case is important because it set a notable precedent. The court found for the

defendant, a hip-hop group that was accused of copyright infringement, although they had admitted to using a Roy Orbison sample without the permission of the copyright holder. The court justified this ruling by claiming that the new song that had been created from the sample was a “transformative work”, because it altered the entire meaning of Roy Orbison’s original work. Their reasoning behind this is mostly economical. They did not believe that the two works were in direct competition with each other, since the original song was a serious love song and the new work was a satirical parody.

“Transformative work” is a very interesting concept because it has been repurposed to defend an entire new field of electronic music that is based around a production technique called microsampling. As the name might imply, microsamples are significantly shorter in length and therefore hard to recognize as being appropriated from a previous sound recording. This becomes extremely tricky because many times an artist may not even be able to identify their own work, once it has been put through the various processes of microsampling production. While no single definition exists for the term “transformative work”, many members of the industry feel that microsampling is the epitome of a transformative work, because it involves a high level of technical precision to achieve something that is innovative and entirely separate from the original.

Another case that is discussed in this paper is *Bridgeport Music, Inc. v. Dimension Films*. The fact pattern in this case was somewhat similar to the previous case of *Campbell v. Acuff-Rose Music*, which centered on the issue of whether it was copyright infringement for the hip-hop group to recontextualize Orbison's song without permission. Here we had another hip-hop group, N.W.A., who utilized a 2-second sample from a Funkadelic song. There are two main points that are important to take away from this case. Firstly, while this was very similar in fact to the first case examined in this paper, the ruling was opposite; the court found for the plaintiff who was claiming their work had been infringed upon. Secondly, the defense that N.W.A. used was novel, in that it had never before to combat a claim of copyright infringement in music.

Their defense was called *de minimis*, a latin term that means "concerning minimal things". Since the sample was only cut from a 2-second piece of the audio recording, they believed that this was not enough to substantiate a claim for copyright infringement. After all, how could a 2-second snippet that is appropriated for new work harm the market value of the original song? While the argument made was compelling, and a lower court found in favor of N.W.A., the Court of Appeals ultimately did not agree with this defense. The court even went as far as to wholly reject *de minimis* as a viable defense to claims of copyright infringement.

This project is unique in that it incorporates a creative component to augment the academic writing. It is the author's opinion that anyone reading this paper should use the included audio CD to help inform their overall understanding of some of the terms, themes and ideas discussed herein. The song is an original work, created by the author, which demonstrates a composition created on a combination of computer programs and includes one sample from a song called "CMYK" by James Blake.

First, this recording demonstrates how an individual with a requisite amount of music training and a passion for learning new technology can write and record a piece of music with just a laptop computer – no studio needed. This is a demonstration of the increasing power that individuals have to create and publish their own work. Logically, this will lead to an increased amount of creative works circulating and adding to the massive collection of work that is out there, ripe for the picking by artists who "sample". Secondly, it blurs the line between transformative work and copyright infringement. While the recording has been altered significantly, some aspects are kept in tact. It does not fit the bill for microsampling, and, if James Blake heard it, he would certainly be able to identify elements as coming from his original recording. It does alter the feel of the original work by including drastically different instrumentation, composition, progression and texture.

By synthesizing these landmark cases with interviews and panel discussions from leaders on both the creative and business side of the industry, this paper sheds light on the complex issues related to sampling and copyright infringement. Furthermore, the creative component included with this work is an exercise in exploring the fine line between creating transformative works and committing copyright infringement. In conclusion, there is no black and white rule as to what is right and wrong in this rapidly developing niche of the entertainment industry. Until a streamlined model for sample clearances is put in place, it is clear that this will remain a risk-reward scenario. As in all other areas of the creative world, the artist who is truly great will not be afraid to take that risk.

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## APPENDIX A – Tracklist and Samples from 2 Live Crew's *As Nasty As They Wanna Be*

1. "Me So Horny" – 4:36
  - Contains vocal samples from the Stanley Kubrick movie *Full Metal Jacket* and the Mass Production song "Firecracker". Fragments of Nancy Sinatra's "These Boots Are Made For Walkin'" can be heard in the samples from *Full Metal Jacket*.
2. "Put Her in the Buck" – 3:57
  - Main riff of the song and moans are sampled from The Chakachas' "Jungle Fever".
3. "Dick Almighty" – 4:53
  - Main riff of the song is sampled from the title track of Kraftwerk's *The Man-Machine* album. Also contains vocal samples from Rudy Ray Moore and Richard Pryor as well as Whodini's "Big Mouth".
4. "C'mon Babe" – 4:43
5. "Dirty Nursery Rhymes" – 3:05
  - Lyrically inspired by Andrew Dice Clay's "Nursery Rhymes" routine from his *Dice* album. Also contains a sample from Cheech and Chong's "Earache My Eye".
6. "Break It on Down" (Campbell/Two Live Crew) – 3:59
7. "2 Live Blues" – 5:14
8. "I Ain't Bullshittin'" – 4:27
  - The title phrase is sampled from a Richard Pryor recording.
9. "Get Loose Now" (Campbell/Two Live Crew) – 4:36
  - Contains samples from the Rob Base song "It Takes Two" and the Beastie Boys song "The New Style".
10. "The Fuck Shop" – 3:24
  - Contains samples from Van Halen's "Ain't Talkin' 'Bout Love", Music Explosion's "Little Bit O' Soul" and Guns N' Roses's "Sweet Child O' Mine".
11. "If You Believe in Having Sex" – 3:51
12. "My Seven Bizzos" – 4:18
  - Contains a sample from Jimi Hendrix's "Voodoo Child (Slight Return)"
13. "Get the Fuck out of My House" – 4:37
  - Contains samples from the Eddie Murphy recording *Eddie Murphy: Comedian* and Laid Back's "White Horse"
14. "Reggae Joint" – 4:14
  - Satire of dancehall music.
  - Contains a replayed excerpt of the synth-bass riff from Wayne Smith's "Under Me Sleng Teng".
15. "Fraternity Record" – 4:47
  - Contains a replayed excerpt of the guitar riff from The Beatles' "Day Tripper"
16. "Bad Ass Bitch" – 4:03
17. "Mega Mixx III" – 5:44
  - This largely instrumental track contains a sample of an electronic voice counting in German from the Kraftwerk song "Numbers/Computer World"
18. "Coolin'" (Campbell/Two Live Crew) – 5:02
  - Contains samples from Young-Holt Unlimited's "Soulful Strut", the backing instrumental track from Barbara Acklin's "Am I the Same Girl!".

# APPENDIX B – Screenshot and Attached CD of “Found Her Dead” by Trevor Kiviat

Created in Pro Tools, Reason and Logic Pro;  
Includes samples from James Blake’s CMYK (highlighted in yellow)

