

Study on the Boundary Definition of Music Sampling and Copyright Protection

Zhengyang Lu^{1,a,*}

¹East China University of Political Science and Law, Shanghai, China

^a210404030018@ecupl.edu.cn

*Corresponding author

Keywords: Music Sampling, Copyright Protection, Fair Use, De Minimis, Free Use

Abstract: With the rapid growth of digital music, music sampling has gained increasing interest as a new approach to music production. This thesis focuses on the boundary between music sampling and copyright protection and delves into the legal disputes and related solutions of music sampling by the analysis of the current situation of copyright protection of music sampling at home and abroad. This thesis first provides a clear explanation of music sampling and discusses its significance in contemporary musical creation. It next explores the applicability of key legal concepts like fair use, de minimis, and free use in the field of music sampling. Based on the comparison of domestic and foreign practice, the suggestions of optimizing the copyright protection of Chinese music sampling are proposed, aiming at balancing the relationship between the rights and interests of creators and music innovation and providing legal support for the healthy development of China's music industry.

1. Introduction

As the cost of sampling has decreased, the public's enthusiasm for the creation of hip-hop and electronic music has increased, and the demand for the use of music sampling has also increased. This can achieve musical works innovation and express novel artistic ideas. However, there are many kinds of music samplings, which are complicated to distinguish, leading to a fuzzy boundary on how to properly use the samples in judicial practice. In addition, the traditional copyright law is unable to adapt the new form of musical creation in the digital era, which not only limits the reasonable use of music sampling, but also limits the vitality of music innovation to a certain extent.

Therefore, scholars and legal practitioners at home and abroad have extensively researched and discussed the legality of the sampling act, the boundary of copyright protection, and the application of fair use, trying to find a reasonable way to protect the rights and interests of originators and support art innovation.

Combining the analysis of the current situation of domestic music sampling with the reference of theories and cases involved in foreign music sampling, this thesis hopes to optimize a set of rules and systems that are more suitable for the operation mode of domestic music sampling to provide references for music creators, copyright holders, and legal practitioners, and jointly promote the prosperity and development of the music culture industry.

2. The Concept and Legal Disputes of Music Sampling

2.1. The Concept of Music Sampling

Music sampling is to present the existing sound and other elements in a new way [1]. With the emergence of MIDI (Musical Instrument Digital Interface) technology, sampling enters into the digital era, and the cost of music production is greatly reduced after abandoning the old way of “simulation” [2].

In practical applications, the materials of music sampling are extremely rich, including not only melodies, chords, lyrics, and other elements in other music works, but also from movie dialogues, public speeches, and even sounds in nature. These samples can range from a full recording to individual tracks within a music work, or even very short sound effects or word fragments. For example, the pop band Blackpink used Hungarian composer Paganini’s *Bell* as sample material for their song *Shut Down*. The works to be sampled may be musical works or sound recordings. The wide use of music sampling has greatly enriched the creation forms of modern musical works because the same material can produce different effects in the creation of different artists. Sampling requires not only an artistic redesign of parts of the original work, but also technical treatment of these parts, such as frequency adjustment and sound quality optimization, to achieve their harmony and integration with the new work [3]. Music sampling is not only a re-use of existing music works, but also an expansion and challenge to the original form of art of music. However, because of the characteristics of sampling, it has caused a series of legal disputes in copyright protection, especially in the definition of fair use, copyright ownership, and assignment of economic benefits.

2.2. The Legal Disputes over Music Sampling

The current legal system of China has not stipulated the relevant legal provisions of “music sampling”. As a creation act, the possibility of obtaining copyright protection for music sampling depends on whether it meets the originality standard of “works” set by the *Copyright Law* [4].

Originality is the core criterion to judge whether a creation can obtain copyright protection. It requires that the work not only has its independence but also has innovation, reflecting the personality and innovative thinking of the creator. The judgment of whether digital music sampling meets the originality standard should be considered from two dimensions: sample selection and creation arrangement. On the one hand, the sampler’s personal preferences and artistic understanding ability can reflect the uniqueness of the sample selection process. On the other hand, if the selected music fragments are arranged artistically and integrated into the new creation, it can also show the originality of the work if it can reflect the unique artistic style and innovative arrangement of the sampler.

In addition, digital music sampling creation is not just a simple “copying”. Sample musicians must demonstrate their originality and innovation in the process of using sampled works to go beyond simple imitation or copying, and thus may meet the requirements of copyright law for the originality of “works”. In short, the key to obtaining copyright protection for music sampling is whether they can show new meaning and value beyond the original works through innovative arrangement and expression. This is an important basis for judging the copyright ownership of music sampling in legal practice, and it is also one of the core issues in the legal disputes over music sampling.

3. Study and Practice on Copyright Protection of Music Sampling at home and abroad

3.1. Domestic Research Process

3.1.1. Differences between Sampling and Referencing

One branch of domestic research is the establishment of the definition of music sampling. The goal of music sampling is the sound in a recording, not the melody [5]. The sound recording is mainly composed of the performer's playing and the integration of other sounds. It is obvious that synthetics, recorded musical creation, and natural sounds are all sources of sound sampling. The song *I Got the Hook Up*, for example, samples previous work by other creators--it uses a guitar solo that is about four seconds long and is derived from *Get Off*. Even if the sampling time is short and the content is minimal, it serves a fundamentally different purpose than quoting. The purpose of music sampling is to create new work, while the citation is more focused on making a point, criticizing, or serving as a basis for research. There is no requirement for music sampling, but the reference must ensure that there is an intrinsic connection to the content being referenced.

In addition, music sampling does not identify the source of the sampled piece, and when quoted, the quoted part is usually considered part of the work. *Hold Us Back* was the work of the Public Enemy, and it was a mix of politicians' speeches, samples that were not explicitly labeled. Therefore, in terms of the purpose of creation, the way of use, and the relevance to the original work, music sampling is fundamentally different from the traditional reference.

3.1.2. Fair Use

To encourage legal digital music sampling, China's *Copyright Law* puts forward fair use, allowing creators to use sampling technology under certain limited circumstances. Nevertheless, this provision tends to target specific subjects such as performers, producers of sound recordings, publishers, and broadcasters. Therefore, its scope of application should be appropriately expanded. Although this is similar to the relevant provisions of the United States and other countries, in practice, China's definition of fair use is relatively narrow, which fails to fully meet the needs of current musical creation and digital communication.

In particular, it is worth noting that *The Draft Revision of the Copyright Law* in 2014 attempted to introduce a "three-step test" to provide a more flexible judgment standard for fair use, that is, any form of fair use cannot affect the interests of the original work, and must also have its originality. This undoubtedly provides a broader legal space for new creation ways such as music sampling. However, the draft also eliminates the explicit application of the fair use of sound recordings, leaving certain legal gaps and uncertainty in interpretation.

3.2. Foreign Research Process

3.2.1. American Experience: Fair Use and De Minimis

(1) Fair Use

The legal practice of music sampling in the United States mainly revolves around fair use and de minimis. Although the U.S. Supreme Court has not issued a clear opinion on this issue, its circuit courts have clear disagreements on the standards of fair use and de minimis for music sampling.

Copyright law in the United States requires the claimant to prove that he legally owns the copyright and that the accused party has violated the copyright. In the process of examining plagiarism and material similarity of works, the qualitative and quantitative analysis method of music sampling is usually used. This method is used to determine whether the amount and

importance of the sampled parts are sufficient to meet the criteria of substantial similarity and thus determine whether infringement is constituted.

This is where de minimis comes in -- if the similarity is less than the required minimum, no further testing is required.

In Bridgeport's case, the plaintiff claimed that the defendant violated copyright by using his musical creation and sound recordings without authorization. The trial court review found that the defendant sampled the plaintiff's song *Get Off Your Ass and Jam* from the film episode *100 Miles and Running*, even though the sample was a short two-second guitar solo and was tonally altered in the new work, making the existence of the original work imperceptible to the general audiences. After synthesized deliberation, the court found that the change was not sufficient to constitute infringement. However, once the case reached the Sixth Circuit Court of Appeals, the court's position changed significantly, holding that the de minimis did not apply in the field of sound recordings, insisting that any unauthorized sampling constituted infringement. The ruling sparked widespread controversy and social debate, with some scholars and industrialists criticizing the Sixth Circuit's strict interpretation of copyright law, accusing it of ignoring the creative contributions of sampled artists, and worrying that this practice could have hurts on the development of the entire music industry.

(2) De Minimis

During Newton's trial against Diamond, the Beastie Boys took three notes from Newton's song *Choir* and, after repeated processing, eventually formed a six-second flute sound fragment, which they used in their own composition *Pass the Mic*. This has led to accusations that the music group infringed the copyright of the original music. However, the court held that the extracted part was insignificant and immaterial and that although the sample and the actual used parts were similar in quality and quantity, such similarity was not sufficient to support the plaintiff's claim of infringement. For example, in Newton's case, the Ninth Circuit applied quantitative and substantive criteria to analyze music works (lyrics) and rejected the claim that unauthorized sampling constituted infringement.

Also, in the 2016 VMG case, the Ninth Circuit extended the de minimis from music works (lyrics) to sound recordings. In that case, record label Salsoul claimed that singer Madonna used an audio sample from its recording of the song *Vogue* without authorization. In particular, the Court emphasized that the de minimis not only considers the quantity and substance of the content used but also considers whether the use of the sample can be distinguished by the "general audience" in the universal view. If the general audiences cannot discover the existence of the sample, that is, the musician who made the sample did not profit from the previous work he sampled, it is not deemed to be infringing.

Here the sentences of the two courts stand in stark contrast. The Sixth Circuit held that any unauthorized sampling of sound recordings constituted infringement, a position seen as too restrictive. In contrast, the Ninth Circuit's ruling is more inclined to balance the relationship between copyright protection and art innovation, emphasizing the importance of considering the minuteness and innovation of sampling in the framework of copyright law.

In general, when dealing with music samples, following the de minimis can effectively avoid wrongfully accusing the infringement of small samples with unique creativity. However, there may be some ambiguity in the court's view when examining the issue, which may reduce the possibility for musicians to experiment with art innovation. Therefore, de minimis can be used as a pre-thinking direction for fair use. The standard of de minimis can play the role of tipping point, and it is only when the work is substantially similar and may constitute infringement that it is necessary to consider the issue of fair use in depth. Because these two principles play different roles in the evaluation process, de minimis should be considered as an independent criterion rather than a

subordinate criterion to fair use.

3.2.2. German Experience: Free Use

The emphasis of copyright protection in Germany and the United States is different.

For music sampling, German copyright law strictly stipulates that the unauthorized copying of any part of a musical work or sound recording is an infringement. However, German *Copyright Law* also puts forward the concept of “free use”. In terms of constitutive elements, the application of the free use is strictly limited, requiring that the newly created work must have significant originality and that the proportion of sampled elements used in the new work must be much lower than that of the new content. In addition, the core of free use is to compare the differences in originality between old and new works, not just the amount used.

In the case of digital music sampling in Germany, Kraftwerk’s case is a high-profile rights dispute case. Specifically, in 1977, Kraftwerk released an album featuring the much-touted song *Metall auf Metall*, in which two short seconds were sampled by later musicians and incorporated into their songs, and Kraftwerk sued the musician. He subsequently won both the first trial and the appeal trial. However, while the court confirmed in its decision that the unauthorized copying of sound recordings constituted infringement, it did not specifically rule on whether the copyright of music works was infringed. The court found that the sampled music played an important and identifiable role in the original work, and thus found that the defendant had violated the plaintiff’s rights as the producer of the recording.

According to the Supreme Court, the value of the original sound recording is impaired by any small or insignificant sampling, and unauthorized sampling necessarily infringes on the neighboring rights of the right holder. Therefore, protecting the originality of sound recording and ensuring that the labor rights of producers are respected are central to the neighboring right. However, the Supreme Court has also held that it is not appropriate to determine infringement solely based on unauthorized copying, because the focus should be on whether the sample fragment is original or identifiable. At the same time, the Court held that although the free use mentioned in the German *Copyright Law* should not simply be applied to neighboring rights, under the premise that copyright and neighboring rights should be equally protected, the fair use could be applied by analogy to the determination of the rights of producers of sound recording.

The subsequent case was retried years later, and the defendants argued that sampling was a common and important technique in the creation of electronic music. The current law does not specify that the producer of sound recordings has exclusive rights to the fixed sound sequences in the recording, and focuses more on ensuring the creator’s right to receive fair remuneration. The defendant argued that there was an “Inner distance” between the new work created by sampling and the original work that would not negatively affect the market for the original work. Finally, in this case, the Federal Constitutional Court decided to overturn the Supreme Court’s ruling. In this case, the defendant’s work exhibits unique creativity and does not adversely affect the original work, so the “free use” can be extended to sound recordings.

Germany has adopted fair use in dealing with music sampling, which focuses on the protection of the neighboring rights of music recordings, rather than copyright, to ensure that the creation of the creators is protected. To protect neighboring rights, Germany has taken strict measures to regulate the practice of music sampling, insisting on the position that “sampling is infringement”, and has launched a discussion on whether music sampling conforms to fair use. In this context, the Supreme Court has held that fair use can be applied to digital music sampling under certain circumstances, but only if it does not involve a major part of the sampled work and cannot be used as the basis for a new work. On the other hand, the Federal Constitutional Court supported and encouraged the rationalization of digital music sampling from the perspective of the constitutional

guarantee of freedom of speech, and held that guaranteeing the fair use of music sampling would help enrich people's cultural experience and creative expression.

4. Practical Implications and Suggestions for Improvements in Music Sampling Copyright Protection

4.1. Implications from Foreign Practice

4.1.1. The Implications of De Minimis to China

In musical creation and other creative activities, copying, extracting, and interception of original works often occur. While this approach promotes innovation and cultural diversity, it also creates a conflict between copyright protection and innovation. Especially in the digital age, the explosion of user-generated content has compounded the problem. User creation often involves fragmented use of the original work, making copyright issues obscure and difficult to manage. In addition, since most user creation is not for commercial purposes, there is little incentive to obtain a formal copyright license.

In recent years, the de minimis defense has been widely used in the adjudication of copyright cases, and has been further promoted by evolving technology and flourishing business creation. In *Ringgold v. Case*, for example, the defendant's conduct was found to have been so small that it did not meet the standard of infringement, i.e. the infringement was so insignificant that it did not bear liability, and the degree of de minimis did not meet the minimum standard of substantial similarity use. As the saying goes, "The law doesn't mind trifles", the de minimis defense has become one of the indispensable ruling criteria for copyright protection.

When China enacts or revises copyright-related laws, it can consider introducing the de minimis to provide greater space and flexibility for China's creative industries and digital content creation, and also help find a balance between protecting the legitimate rights and interests of copyright owners and promoting culture innovation. By clarifying the limits and conditions for the use of de minimis, we can avoid unduly restricting innovation and ensure that the core rights of copyright owners are not infringed.

4.1.2. The Implications of Free Use to China

China's *Copyright Law* adopts a relatively closed "rule-based" legislative model and has a clear boundary setting on "fair use". Similar to the German *Copyright Law*, it is considered that "fair use" is a defense unless it meets the specific legal circumstances. Different from Germany, in addition to listing specific "fair use" cases, the German law also sets up a general free use clause, providing a broader space for creation.

With the rapid progress of information technology, more and more people begin to create or re-process works, which leads to the contradiction between personal freedom of creation and the rights holders of works becoming more and more obvious. In response to this challenge, in the third draft of the *Copyright Law* published in 2014, China attempted to provide a legal basis for fair use by introducing "general clauses" to adopt new situations that may arise in the future. However, China and Germany differ in the rules governing the interpretation of other people's works and the fair use system. In China, any interpretation must be approved by the author. In Germany, by contrast, the rights of interpretation are more extensive, allowing for freer experimentation, interpretation, or adaptation of works. In particular, the "free use" clause in the German *Copyright Law* allows the creation of new works without the permission of the original owner, which further promotes the innovation and development of culture

Therefore, the adoption of appropriate “general clauses” can remedy this deficiency. On the one hand, it helps to clarify the limits of copyright protection for authors and helps citizens to clarify the scope of use of others’ works. On the other hand, it will help to further improve the balance between copyright protection and restrictive rules in China’s Copyright Law.

4.2. The Improvement of the Domestic System

The current music sampling charging market in China still has not established a perfect system, which means that music practitioners need to negotiate with the original creators of music works, performers, and recording producers one by one when seeking permission for music sampling, and strive to obtain the necessary permission. This process is not only complicated and cumbersome but also full of obstacles. To deal with this challenge, we should optimize fair use in a targeted way, simplify the relevant processes and improve efficiency, and explore the construction of a compulsory recording license system that conforms to the market logic.

4.2.1. The Optimization of the Scope of Fair Use System

In the face of the current problems, China has made active attempts in legal legislation, such as the *Provisions of the Supreme People's Court on the Application of Laws in the Trial of Civil Disputes of the Infringement of the Right of Communication to the Public through Information Network*, which expanded and modified the scope of fair use through judicial interpretation to cope with the new situations and new problems in the Internet era. In addition, China also revised the copyright law for the third time to adapt to the rapid development of the digital environment.

In the latest revision of the *Copyright Law*, Article 24 of the Fair Use Clause in addition to the clear provisions of the scope of use also left approaches for defense, leaving more possibilities for fair use. This suggests that the legal definition of fair use has begun to become more flexible to accommodate future developments.

However, for this particular act of music sampling, the current fair use clauses do not seem to fully cover its complexity. The commercial attribute of music sampling, as well as its unique aesthetic and emotional expression, makes it fundamentally different from “personal use” or “appropriate citation”. Sampling is often intended to re-create original works and introduce them to the music market, which has an obvious commercial attribute, and it is unreasonable to simply classify it as “personal use”. At the same time, the purpose of sampling is not merely to comment on or explain the original work, but to express the creativity and emotion of the sampling artist by borrowing the original musical elements, which is quite different from the original intention of “appropriate citation”. Therefore, the court needs to flexibly interpret the provisions of fair use when hearing related cases, so as to better adapt to the characteristics of music sampling.

When dealing with disputes involving music sampling, courts should recognize the importance of the de minimis defense when considering acceptance of the de minimis, which would provide appropriate support for fair use. The main purpose of the de minimis defense is to confirm that the sampling act does not materially affect the normal use and foreseeable market interests of the original work, which is fully consistent with the basic principle of fair use. When it is clear that a small amount of sampling constitutes direct infringement, the court may evaluate and decide to apply the de minimis defense, taking into account factors such as the potential harm of the conduct, the degree of harm, the cost of justice, and the defendant’s intent to use it. If the defendant’s use does not meet the minimum standard of substantial similarity, it probably does not constitute infringement. However, if the samples are substantially similar in quantity and quality, it is likely that the defendant will not be able to successfully defend the infringement claim based on fair use.

At the same time, when applying copyright acts, it must be ensured that it will not damage the

legitimate rights and interests of the author or interfere with the normal use of the work, and these two standards should be consistent, so as to protect the economic rights and interests of the right holder. The optimization purpose of all regulations in China is to clarify the type and scope of fair use, which only needs to be taken into account in court trials. For music sampling, the richer the transformation content, the more original attributes, and the less the possibility of market substitution, the higher the possibility of fair use.

In the legal disputes caused by music sampling, the court needs to comprehensively consider various factors, including not only whether the sampled work has enough innovation and self-expression compared with the previous work, but also whether the sampled work will affect the profit, potential and popularity of the previous work, and make an assessment in the specific provisions of the fair use of copyright in China. In the initial stage of judging infringement, taking “whether the general audience can find the sampling act” as a criterion helps to judge the fair use of music sampling more objectively and rationally.

4.2.2. Exploration and Construction of Compulsory License System for Recording Production

At present, China is facing a common problem that is widely criticized, that is, the legal licensing rate is accused of being low, it is difficult to accurately reflect the actual value of the work, and the user fails to pay the fee in time. In addition, copyright owners usually exclude the issue of statutory authorization for the production of sound recordings in advance to protect their economic interests, but *The Draft Revision of the Copyright Law (Draft Revision)* has deleted the provisions on statutory authorization for the production of sound recordings, so it is necessary to explore how to fill this omission.

To align with the evolving trends of digital music and standardize China's regulations on sampled music, Professor Wang Qian suggests establishing a compulsory licensing system for recording, on-demand playback, and downloading. This system would draw on the compulsory licensing provisions found in the *Patent Law*. Furthermore, he proposes the creation of a unified, large platform. Under this system, producers of sampled music would apply to the copyright owner through the platform whenever they wish to use previously published works. If the author consents to the application, they can grant the music producer the necessary authorization. If it is not possible to obtain voluntary authorization from the copyright owner, the producer of the sampled music can apply to the National Copyright Administration, which acts as the official authority. After accepting the application, the National Copyright Administration will carefully review such applications, paying particular attention to the intent of the sample use and the intended creative result. If the result of the review is that the repetition rate is too high, there is no further innovation and the output of new ideas, or the profit and popularity of the original work are too affected, the National Copyright Administration has the right to reject the application. If the samples sampled by the applicant are not musical works but other audio, the National Copyright Administration will also treat them with a unified attitude and strictly consider whether to allow them to use the audio.

In the license approval process, the National Copyright Administration will consider a number of factors, including but not limited to the amount of the sample, importance, potential market value, and diversity of sampling sources. In addition, the National Copyright Administration will communicate with the copyright owners and users of music works to determine the appropriate licensing rates for works. For those applicants who have great market potential or are highly similar to online music works, the rate level may be adjusted. Furthermore, in the case of compulsory licensing, the National Copyright Administration will pay a certain percentage of the recording license fee to the recording producer to cover their efforts and costs in the recording production process. In the end, the user needs to accurately calculate the license fee and pay the corresponding license fee for the right holder of the music work and the producer of the sound recording according

to the data of the digital music platform to compensate for their labor and input in the production of the sound recording.

Ultimately, users need to accurately use the data of the digital music platform to calculate the license fee and pay the corresponding fees to the rights holders of music works and the producers of recordings in strict accordance with the agreement to ensure reasonable authorization and respect the rights and interests of the original authors. This process can improve the legal problem of music sampling.

5. Conclusion

With the development of the digital age and the continuous change in the music industry, music sampling as a unique form of artistic expression, its legal status and copyright protection have attracted wide attention. Through the in-depth analysis of the legal regulation, judicial practice, and theoretical research of music sampling copyright protection at home and abroad, this thesis aims to explore the boundary between music sampling and copyright protection and provide specific suggestions for the improvement of China's music sampling copyright protection system.

From foreign experience, it can be seen that legal tools such as fair use, de minimis, and free use have played a key role in balancing the rights and interests of originality and innovative development. However, in China, there are still many urgent problems and challenges in the field of music sampling copyright protection, although there are certain legal provisions and judicial practices. Therefore, introducing the de minimis, evaluating the possibility of conversion use, and exploring the construction of a compulsory license system for recording production is of great significance for promoting the healthy development of China's music industry, protecting the rights and interests of creators, and stimulating innovation vitality.

The research of this thesis not only provides an in-depth analysis of the legal issues of music sampling and copyright protection but also provides a reference for the relevant legislation and judicial practice. In the future, with the continuous evolution of musical creation forms and the rapid development of digital technology, the legal regulation of music sampling copyright protection will also face new challenges and opportunities. Therefore, continuous attention to the legal issues of music sampling and continuous optimization of the copyright protection system has important practical significance and far-reaching influence on promoting cultural innovation, protecting intellectual property rights, and promoting the sustainable development of the music industry.

References

- [1] Cui Guobin. *Copyright Law Cases and Materials* [M]. Beijing: Peking University Press, 2014:652.
- [2] Zhao Zhigong. *Rap, Sampling, and Law* [EB/OL]. (2018-10-27) [2020-09-07]. <https://zhuanlan.zhihu.com/p/45326295>.
- [3] Lu Tian. *Analysis and Reconstruction of Legal Regulation Path of Music Sampling—From the Perspective of Regulatory Path in America and Germany* [J]. *Science of Law (Journal of Northwest University of Political Science and Law)*, 2019, 37(4):12.
- [4] *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871 (9th Cir. 2016)
- [5] Section 24(1) of the "Act on Copyright and Related Rights" states