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‘Do the Right Thing’ or ‘Fight the Power?’: Hip-Hop Music, Sampling and Copyright Law

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I. Introduction

Hip-hop music has become one of the most popular music genres. In 2018, hip-hop and rap music topped the league of total music consumption in the USA, at 21.7 per cent.[1] This number reflects hip-hop’s influence not only on a wide audience, but also on other genres of music. Hip-hop music is now a global phenomenon and is performed worldwide in various languages in addition to English, such as French, German, Chinese, Spanish and Turkish. To some extent, defining hip-hop as only a genre of music would be a mistake. Rather, it encompasses a much wider array of cultural practices, with diverse forms of expressions.[2] As such, hip-hop has become a certain lifestyle that an increasing number of people around the world embrace.

The focus of this chapter is the tension between copyright law and sampling, a core element of hip-hop music creation. The drama surrounding The Sugar Hill Gang’s ‘Rapper’s Delight’ embodies the apotheosis of such tension. First released in 1980, ‘Rapper’s Delight’ was one of the very first commercially successful hip-hop tracks.[3] The success, however, came with the threat of copyright infringement lawsuit by the members of Chic. The members of Chic argued that the bassline of their song ‘Good Times’ distinctively featured in ‘Rapper’s Delight’ by the Sugar Hill Gang. It should be noted that Rapper’s Delight did not sample the recording of ‘Good

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[1] www.statista.com/statistics/310746/share-music-album-sales-us-genre/.

[2] M Katz, *Capturing Sound: How Technology Has Changed Music* (University of California Press, 2010) 126.

[3] J Okpaluba, ‘Digital Sampling and Music Industry Practices, Re-spun’ in K Bowrey and M Handler (eds), *Law and Creativity in the Age of the Entertainment Franchise* (Cambridge University Press, 2014) 79.

Times', but used a replay of the notorious bassline.[4] After hearing the track, Nile Rodgers and Bernard Edwards of Chic threatened the Sugar Hill Gang with legal action based on copyright infringement. Ultimately, they settled; it was agreed that Rodgers and Edwards would also be credited as songwriters of 'Rapper's Delight'.[5][6]

Before delving into the tension between copyright law and sampling, this chapter will provide context to sampling, the most essential practice of hip-hop musicians in developing their tracks. For that purpose, the chapter will lay out the evolution of hip-hop music from its inception in the 1970s in New York City's Bronx to its current status as one of the most commercially successful genres of music. The chapter will then look at the pertinent copyright issues surrounding hip-hop music. On this particular point, the chapter will analyse this issue in relation to law of the USA and the EU, as they provide a good amount of case law and serve as a good comparative set.

II. A Brief History of Hip Hop

Hip-hop originated in the USA. More specifically, it originated in the Bronx, one of New York City's five boroughs. The spirit of taking initiatives motivated hip-hop musicians to take on creative ventures throughout the genre's development. The origin of hip-hop music can be traced back to a party held by the Jamaican-American DJ Kool Herc in 1973,[7] where he created the

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[4] A Said, *The Art of Sampling – The Sampling Tradition of Hip-Hop/Rap Music & Copyrights Law*, 2nd edn (Superchamp Books, 2015) 338; J Demers, *Steal This Music: How Intellectual Property Law Affects Musical Creativity* (University of Georgia Press, 2006) 92.

[5] TW Joo, 'Remix without Romance' [2011] *Connecticut Law Review* 415, 427–38.

[6] In an interview, Rodgers said the following: 'Our music to us was sacred. I certainly didn't mind somebody jamming with us on stage live. But to record it and not put our names on it and then make a lot of money. I think that the record was so big it might have been even bigger than "Good Times". At least it was more exciting as it felt like a new Art form': 'The Story of Rapper's Delight by Nile Rodgers' (RapProject.tv, retrieved 12 October 2008) www.youtube.com/watch?v=t-SCGNOieBI.

[7] Said (n 4) 11.

'Merry-Go-Round' technique.[8] The break part, a heavily percussive segment of the records he was playing, was particularly popular with the dancing crowd, which would get ecstatic when the break occurred.[9] He first selected passages of his liking and cut them out to create isolated beats carrying bass and percussion alone.[10] These short instrumental break records, known as 'breakbeats', often lasted less than a second and had to be repeated multiple times to be used. Kool Herc then lined up two record players to produce a continuous flow of breakbeats and created his own unique musical collage.[11] Later, Grandmaster Flash took it even further to orchestrate a table with multiple record players, which enabled him to check the flow of his breakbeats even before it was delivered through the loudspeakers.[12]

Ever since its birth in the 1970s, hip-hop has served as an outlet for the disenfranchised, namely the Black community, to deliver social commentaries in the form of popular art and entertainment. As such, hip-hop naturally embraces the ideology of the civil rights movement and black freedom struggle through and after the pertinent era in the USA.[13] The common topics addressed by hip-hop artists include racial and class inequalities, discrimination, drugs, police brutality and the usurpation of individual rights in the country. Nowadays, these topics concern not only African Americans in the USA, but also other oppressed groups of people around the world[14] who are actively providing cross-cultural elements to the recipe of hip-hop. In the context of US history, hip-hop's criticism on social injustice has been repeatedly produced by a

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[8] J Chang, *Can't Stop Won't Stop: A History of the Hip-Hop Generation* (Picador, 2005) 79.

[9] J Vernon, *Sampling, Biting, and the Postmodern Subversion of Hip Hop* (Palgrave Macmillan, 2021) 13.

[10] F Neumann, 'Hip Hop: Origins, Characteristics and Creative Processes' [2000] *The World of Music* 51, 59.

[11] JA Williams, *'Rymin' and Stealin'' – Musical Borrowing in Hip-Hop* (University of Michigan Press, 2013) 23.

[12] Neumann (n 10) 60.

[13] DP Alridge, 'From Civil Rights to Hip Hop: Toward a Nexus of Ideas' [2005] *Journal of African American History* 226, 226.

[14] ibid 228.

number of Black leaders, including Malcolm X, Martin Luther King, Jr and Angela Davis, among various artists.[15] The rebellious spirit of hip-hop is well reflected in 'Whitey On the Moon', released in 1970 by Gil Scott-Heron. The artists here portrayed in lyric the vivid contrast between the poverty of African American society and NASA's lunar missions:[16]

> I can't pay no doctor bills, while whitey's on the moon
> Ten years from now I'll be paying still, while whitey's on the moon
> You know, the man just upped my rent last night, cause whitey's on the moon
> No hot water, no toilets, no lights, but whitey's on the moon
> I wonder why he's upping me', cause whitey's on the moon?

The hip-hop movement is thus built on the civil rights movement and the Black power movement. It is noteworthy, though, that hip-hop breaks with politics and social visions of the previous Black popular movements. However, despite a view criticising hip-hop's detachment from the civil rights ideology in the post-1970s, it still serves as a powerful tool for youths to find their voices and to come up with a powerful counter-narrative against social inequalities across the globe.[17] The message of positivity has been replayed, referenced and reinvented by hip-hop artists of the following generation.[18] Hip-hop's repertoire thus continues to carry inspiring messages encouraging self-esteem for young people, addressing issues of racial injustice, and promoting the much-needed sense of community. Its emphasis on purposeful optimism has been one of the genre's most salient features from early on and is well reflected on the mission statement of the Hip-Hop Summit Action Network (HSAN). This non-profit organisation is 'dedicated to harnessing the cultural relevance of Hip-Hop music to serve as a catalyst for education advocacy and other societal concerns fundamental to the well-being of at-risk youth throughout the United States'.[19]

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[15] J Demers, 'Sampling the 1970s in Hip-Hop' [2003] *Popular Music* 41, 50.

[16] ibid 43–44.

[17] Alridge (n 13) 226, 228; H Osumare, 'Keeping It Real: Race, Class, and Youth Connections through Hip-Hop in the US & Brazil' [2015] *Humboldt Journal of Social Relations* 6, 6.

[18] DP Alridge, 'From Civil Rights to Hip Hop: Toward a Nexus of Ideas' [2005] *Journal of African American History* 226, 227.

[19] P Butler, 'Much Respect: Toward a Hip-Hop Theory of Punishment' [2004] *Stanford Law Review* 983, 994.

III. The Artistic Features and Practices of Hip-Hop Music

Music is only one form of expression of hip-hop culture. It is more of a lifestyle highlighting distinctive features and practices that have been interacting with and transforming one another. Hip-hop consists of four distinctive features or elements[20]: (i) DJing; (2) rapping or MCing; (iii) breaking; and (iv) graffiti. All these movements are linked to the same geographical space, where artists often engage in more than one of the aforementioned features of hip-hop.[21] Breaking, more widely known as breakdance, was usually performed at 'gigs', or performances, and was most prominent at early hip-hop parties.[22] Contemporary graffiti[23] as another artistic expression linked to the hip-hop lifestyle was equally developed in New York in the 1970ies. Even though these two elements fused into their own sub-cultures, this chapter will not discuss them in further detail, as they are not tangential to music.[24]

DJing as an element of hip-hop music was made possible by turntables becoming more than just a means to reproduce music but instruments in their own right. While DJing is possible with only a single turntable, the combination of two turntables initiated by Kool Herc allowed the DJ to loop a particular part on a record repeatedly. These parts were often instrumental parts, ie 'breaks', to which b-boys and girls (ie breakdancing performers) would showcase their moves.[25]

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[20] Katz (n 2) 126; TM Evans, 'Sampling, Looping, and Mashing … Oh My!: How Hip Hop Music is Scratching More Than the Surface of Copyright Law' [2011] *Fordham Intellectual Property, Media & Entertainment Law Journal* 843, 852.

[21] Williams, *'Rymin' and Stealin''* (n 11) 22–23.

[22] JG Schloss, '"Like Old Folk Songs Handed Down from Generation to Generation": History, Canon, and Community in B-boy Culture' [2006] *Ethnomusicology* 411, 413.

[23] I Miller, 'Hip-Hop Visual Arts' in JA Williams (ed), *The Cambridge Companion to Hip-Hop* (Cambridge University Press, 2015) 32–41; Said (n 4) 13–16.

[24] See further M Iljadica, *Copyright beyond Law – Regulating Creativity in the Graffiti Subculture* (Bloomsbury Publishing, 2016); E Bonadio (ed), *The Cambridge Handbook of Copyright in Street Art and Graffiti* (Cambridge University Press, 2019); IK Johnson, 'Hip Hop Dance' in Williams, *The Cambridge Companion to Hip-Hop* (n 23) 22–31.

[25] Katz (n 2) 125.

While Kool Herc was the first DJ to use turntables as an instrument, it was Grandmaster Flash who first touched the top of records and created various techniques that became staples in hip-hop DJing.[26] Some DJs took yet another approach to make breakbeats last longer by physically turning the record to repeat them multiple times.[27] The by-product of this process was scratchy noise from the turning, which was picked up and arranged to add a rhythmic texture to the music. This technique is called 'scratching'; it was developed by Grand Wizzard Theodore in the mid-1970s in the Bronx[28] and became one of the most iconic sounds of hip-hop DJing.

The aim of DJing in the beginning was to create a continuous musical beat that was recognisable[29] because the music was used at jams to get the crowds dancing. This explains why records from funk and disco music which had noticeable breaks were used in the early days and DJs obtained large collections of records which contained the desired sounds, commonly referred to as 'crate digging'.[30] Before the introduction of digital files, battle records were created which contained many brief desirable samples and sounds for DJing and scratching.[31] The introduction of Digital Vinyl Systems (DVS) along with samplers and synthesisers widened the scope for creating music. As hip-hop evolved as a musical genre, DJs would utilise increasingly diverse types of records from eclectic musical sources for their creation. Afrika Bambaataa, for instance, started using the instrumental portions of songs by a variety of groups such as Aerosmith, the Monkees and Kraftwerk. Similarly, Run DMC covered Aerosmith's 1975 song, 'Walk This Way', to create one of the first crossover tracks featuring musical elements from rock, pop and hip-hop. The subgenre of jazz hip-hop was further developed by artists such as Jungle Brothers, A Tribe called Quest and De La Soul, who prominently used jazz instrumentation within their

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[26] Said (n 4) 19-20.

[27] Neumann (n 10) 59.

[28] Katz (n 2) 125; Vernon (n 9) 15.

[29] Said (n 4) 17–18.

[30] KF Hansen, 'DJs and Turntablism' in Williams, *The Cambridge Companion to Hip-Hop* (n 23) 42, 49.

[31] ibid 42, 49.

composition.[32] This diversification of musical sources and creative desire to improve the quality of the beats transformed hip-hop from mere accompaniment to dance to pleasurable listening sensation by itself.[33] Such transformation also advanced the multidimensionality of the genre, as hip-hop earned global appeal. The sampled material itself would borrow more often from traditional music of worldwide communities, as seen in Turkish hip-hop in Germany using samples from traditional Turkish music.[34]

The other element of hip-hop is rap, or microphone checking, ie MCing. Rapping arguably derives from 'toasting',[35] a verbal performance that is derived from the old African tradition of storytelling.[36] Said identifies three forms of African American toasting as 'signifyin''-, 'radio DJ'- and 'hustler' toasts, all of which influenced rapping in hip-hop.[37] James Brown's music and Lightnin' Rod's album *Hustler's Convention* are commonly considered the most influential works for early rap.[38] Initially, rapping or MCing was only functional and subsidiary to DJing.[39] However, this changed gradually over time. The complexity of the rhymes also evolved as MCing grew to embrace more serious themes, such as crimes and violence, compared to the nursery rhymes and much lighter subject matters from the early days. In the beginning, DJs would be the protagonists, as jams were the main attraction to the public; MCs simply played supportive roles of adding an accompaniment to the DJs' music. However, the roles and dynamics between DJs and MCs reversed over time. The first commercial hip-hop track,

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[32] CJ Farley, 'The Construction of Jazz Rap as High Art in Hip-Hop Music' in Williams, *The Cambridge Companion to Hip-Hop* (n 23) 47–72.

[33] Said (n 4) 70.

[34] Demers, *Steal This Music* (n 4) 89.

[35] Neumann (n 10) 59.

[36] A Price-Styles, 'MC Origins: Rap and Spoken Word Poetry' in Williams, *The Cambridge Companion to Hip-Hop* (n 23) 11.

[37] Said (n 4) 23–27.

[38] ibid 27.

[39] Price-Styles (n 36) 11, 13–14.

'Rapper's Delight' by the Sugar Hill Gang,[40] shifted the focus from the DJs to the rappers. The move away from jams to radio and recorded music arguably added to this development as well.[41] As MCing started to feature as the predominant element of hip-hop, rapping, albeit mistakenly, has often been regarded as an equivalent for hip-hop itself.[42]

IV. Sampling as a Constitutional Element of Hip-Hop Music

Sampling is not simply a feature of hip-hop, but rather constitutes the essence of music composition of hip-hop.[43] Many famous hip-hop tracks contain recognisable samples from other tracks. Examples include Vanilla Ice's 'Ice, Ice, Baby', which sampled the bass line from 'Under Pressure' by David Bowie and Queen, and Coolio's 'Gangsta's Paradise', which sampled Stevie Wonder's 'Pastime Paradise'. In addition, Ice Cube, in 'It Was a Good Day', also used a pitched sample of the main bassline of the Isley Brothers' 'Footsteps in the Dark', and Kanye West used a slowed down sample from Curtis Mayfield's 'Move on Up' in his song 'Touch the Sky'. Other samples are not as easily recognisable but are nevertheless important for the genre, such as the break by percussionist Clyde Stubblefield in James Brown's song 'Funky Drummer', which became one of the most sampled pieces ever.[44] Its consistent presence in the hip-hop canon made sampling a constituent part of the genre and a vehicle of expression for hip-hop artists. It has also assumed a role as an instrument of reference, providing 'a reaffirmation of the musical and

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[40] Evans (n 20) 855.

[41] Said (n 4) 49–54.

[42] ibid 40.

[43] Advocate General Szpunar noted in his opinion in *Pelham*: 'It is true that, in musical genres such as hip hop or rap, sampling plays a special role which provides not only the means of creation, but also constitutes an artistic process in itself'. Case C-476/17 *Pelham and Others* Opinion of AG Szpunar, 12 December 2018, para 93.

[44] The website 'whosampled.com' currently lists that 'Funky Drummer has been sampled in 1760 tracks': www.whosampled.com/James-Brown/Funky-Drummer/.

cultural lineage of hip-hop itself' as hip-hop further evolves.[45] Sampling as a form of musical composition, however, is not a creation of hip-hop. Sound collages were used in earlier compositions, and have been an important form of expression within the fine arts and other musical genres.[46] Finally, as sampling technology became more ubiquitous, digital sampling has become a feature of musical composition for musicians of various genres, such as pop and electronic music.

The practice of sampling entails 'the digital incorporation of any pre-recorded sound into a new recorded work'.[47] The technology allows the digital sample to be altered once it has been created. It can be manipulated in numerous ways, by changes to the tempo or pitch, or by reversing, cutting, looping and layering the sound,[48] thus enabling a multitude of creative options in incorporating it within a new track. The use of samples in hip-hop can be traced back to its very inception, where breakbeats, which were continuously played using turntables, formed constituent parts of the genre. This form of beat making, where many beats derive from a pre-existing record, is essential to understanding the use of samples in hip-hop. The above-mentioned practice of 'crate digging', ie obtaining a large selection of records to be played often by churning through record stores and flea markets, became an important practice of DJs.[49] Finding and retrieving obscure and rare pieces would not only generate new beats, but would also gain respect from the audience and wider community. It also shows the ability of the producers as listeners to perceive 'musical possibility in a song, to listen for connections that may not currently exist in the song, to perceive aural spaces where they might not be obvious'.[50]

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[45] Demers, 'Sampling the 1970s' (n 15) 56.

[46] K McLeod and P DiCola, *Creative License: The Law and Culture of Digital Sampling* (Duke University Press, 2011) 26–74.

[47] Katz (n 2) 147.

[48] ibid 148.

[49] McLeod and DiCola (n 46) 22.

[50] V Chang, 'Records That Play: The Present Past in Sampling Practice' [2009] *Popular Music* 143, 147.

Digital sampling in hip-hop music composition taps into the practice of looping breakbeats. Rather than repeatedly switching back and forth between two turntables, the loop was created digitally. The inception of sampling in hip-hop is linked to DJ Marley Marl, who discovered digital sampling almost by mistake.[51] He not only was the first person to fully grasp the potential of sampling for composition, but started customising the sounds by not only using the break but also other parts of a record.[52] The practice became widely used by artists as the technology improved and became more affordable in the mid- to late 1980s,[53] and this is the era that it often referred to as the golden age of sampling in hip-hop. Albums such as Public Enemy's *It takes a Nation of Millions to Hold Us Back*, De La Soul's *3 Feet High and Rising* and the Beastie Boys' *Paul's Boutique* were created in this period.[54] All of these albums are canonised parts of hip-hop and made extensive use of samples.

The commercial success of hip-hop, however, brought an end to that golden, or 'Wild West', era of sampling due to heightened scrutiny by the music industry.[55] By the early 1990s, the legal landscape had changed, with an increasing number of lawsuits surrounding hip-hop music. The heightened risks for not clearing samples clearly impacted hip-hop music composition. One notable example relates to the next albums of the above-mentioned hip-hop pioneers, which contained far less sampling than in the golden age.[56] For instance, the Beastie Boys' album *Check Your Head* had far fewer samples than its immediate predecessor, *Paul's Boutique*.[57]

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[51] AS Muhammad and F Kelley, 'Marley Marl on the Bridge Wars, LL Cool J and Discovering Sampling' (NPR, 12 September 2013) www.npr.org/ss/microphonecheck/2013/09/11/221440934/marley-marl-on-the-bridge-wars-ll-cool-j-and-discovering-sampling.

[52] Said (n 4) 59.

[53] JA Williams, 'Intertextuality, Sampling, and Copyright' in Williams, *The Cambridge Companion to Hip-Hop* (n 23) 206.

[54] McLeod and DiCola (n 46) 20–26.

[55] ibid 26–30.

[56] A Sewell, 'How Copyright Affected the Musical Style and Critical Reception of Sample-Based Hip-Hop' [2014] *Journal of Popular Music Studies* 295, 302.

[57] McLeod and DiCola (n 46) 27–28.

Artists reacted to the rise of litigation on samples in different ways: while some artists were able to afford to pay royalties to clear samples,[58] others started to employ more obscure sources for their samples, ie crate digging through indie music recordings or niche foreign record shops,[59] in the hope of avoiding litigation. Others used the approach the Sugar Hill Gang used for 'Rapper's Delight' and used re-performances of the sought sample or manipulated the sample beyond recognition (ie 'chopping' or 'flipping' a sample),[60] while others gave up on sampling completely.

While increased litigation has affected the use of sampling in hip-hop music, it has far from faded away. The wider use of source material led to new creations that extended beyond the initial source material of funk and soul albums. Notable, for instance, is the underlying sample from Towa Tei's and Bebel Gilberto's electronic music track 'Techonova' within 'Find a Way' by A Tribe Called Quest. Other examples are Us3's use of Herbie Hancock's famous jazz piano chords in 'Cantaloop Island' in their track 'Cantaloop Island (Flip Fantasia)'[61] and MC Solaar's use of Serge Gainsbourg's 'Bonnie and Clyde' sample. A contemporary example is the creative use in Kendrick Lamar's 'Duckworth' from the award-winning album *Damn*, where the track producer 9th Wonder skilfully intertwines samples from different musical genres. Finally, it should be noted that this reuse and recontextualisation has not only created new music, but has also raised new interest in the sampled pieces.

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[58] Demers, *Steal This Music* (n 4) 97.

[59] H Campos, 'Sampling in Hip-Hop: Art or Theft?' (TCS, 24 October 2020) www.tcs.cam.ac.uk/sampling-in-hip-hop-art-or-theft/.

[60] Sewell (n 56) 298.

[61] Hancock embraced digital sampling as form of musical composition early and allowed Us3 the use of the sample from Cantaloop Island – S Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (NYU Press, 2001) 150–51. In an interview, Hancock said that '"Cantaloop" gave my composition new life, and it still sounds hot': K Grow, 'History of Us3's Bold Jazz–Rap Breakthrough "Cantaloop (Flip Fantasia)"' (*The Spin*, 24 October 2013) www.spin.com/2013/10/us3-cantaloop-flip-fantasia-herbie-hancock-lou-donaldson/.

V. Sampling and the Law

Sampling is important not only for hip-hop music – it has become a crucial element of making music generally. The rising commercial importance of sampling is displayed by the fact that a third of the top 100 albums of 1999 contained samples, a significant increase from the only eight of the top 100 albums in 1989.[62]. The rising success of hip-hop music, however, increased the scrutiny of sampling , as mentioned above. Technological advancement enabled the detection of even less recognisable samples in order to build a case on copyright infringement. This deployment of legal action has led, as some commentators lament, to a decrease of creativity in hip-hop composition, and the end of the golden age of hip-hop[63] was heralded with the seminal decision in *Grand Upright v Warner Brother Records*.[64] Having to clear samples would restrict their use and make creation of new works impossible, and record labels became risk averse in publishing works containing uncleared samples.[65] Other commentators do not regard this higher degree of scrutiny by copyright holders in relation to sampling as preventative. Copyright law did not and could not prevent hip-hop artists from sampling.[66] Samples could be cleared, and issues resolved. Having cleared samples could also be regarded as not just 'doing the right thing' in a legal sense, but also a form of affirmation that the original creator permitted the use.[67]

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[62] Evans (n 20) 857.

[63] Vaidhyanathan (n 61) 144; Demers, *Steal This Music* (n 4) 97; Said (n 4) 71.

[64] The 1991 case *Grand Upright Music Ltd v Warner Brothers Records, Inc* 780 F Supp 182 (SDNY 1991), which involved Biz Markie admitting using a sample from Gilbert O'Sullivan's song 'Alone Again' in his song 'Alone Again', arguably marks the end of the Wild West days of sampling, with the court's opinion opening with the 7th of the Old Testament commandments 'Thou shall not steal' – McLeod and DiCola (n 46) 132.

[65] McLeod and DiCola (n 46) 28.

[66] Butler (n 19) 990.

[67] Okpaluba (n 3) 95.

While sampling is seen as a creative and indispensable process in relation to hip-hop, it is also regarded as the most contentious one from a copyright perspective.[68] In copyright diction, a sample constitutes a literal copy of a sound recording (phonogram) and an unauthorised reproduction would constitute an infringement.[69] Moreover, a sample will also copy the musical composition encapsulated within the phonogram. But, aside from this legal subsumption, the use of samples is not only a distinctive but rather an essential element of hip-hop music. Much of the original shared cultural code of hip-hop stressed recycling or remixing more than creating 'out of whole cloth'.[70] It thus provides for interesting inquiries into the core of copyright law doctrine: are samples mere appropriation of someone else's work which ought to be banned by the law? Or are they rather used transformatively in creating new works built upon the blocks left by previous creators which ought to be fostered? Does it matter that only a fraction of a recording or musical composition is taken for the assessment of copyright? How far does the scope of copyright reach? Does recognisability of the sampled original work in a new work affect the inquiry of infringement or the application of limitations or exceptions thereof? Would this signify that the sampler wishes to create a dialogue with the work or the semiotic features this work stands for, thus being covered by freedom of expression? The courts have had several opportunities to analyse sampling within the copyright context, as will be discussed below.

A. Copyright and Sampling under US Law

The practice of sampling, ie copying and using segments of another artist's work, is generally prohibited under US copyright law, as only a copyright holder has the exclusive right to reproduce the copyrighted work in copies or phonorecords.[71] However, for public policy purposes, courts have been avoiding such draconian illegalisation of sampling through legally

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[68] Said (n 4) 1.

[69] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Art 14(2).

[70] Butler (n 19) 990.

[71] 17 USC §106.

recognised exceptions, such as de minimis use[72] and fair use.[73] Early disputes in relation to sampling, which involved the use of samples by the Beastie Boys, De la Soul and Vanilla Ice, were settled outside the courtroom.[74] The first case to be decided by a court in the USA was the above-mentioned *Grand Upright Music v Warner Bros Records*, the decision of which held that sampling could constitute copyright infringement. The succeeding case law was not coherent as to its approach as some courts were willing to assess the 'relationships between appropriating and appropriated works on a case-by-case basis'[75] and assessed the matter by applying de minimis standards, substantial similarity tests and fragmented literal similarity tests.[76]

In desperate need for a reliable legal doctrine, the US Court of Appeals for the Sixth Circuit issued the highly controversial and often criticised opinion in *Bridgeport Music, Inc v Dimension Films* on 3 June 2005.[77] What was at issue in this case was a mere two-second sample consisting of a three-note guitar riff from the Funkadelic's 'Get Off Your Ass and Jam', which was repeated about 15 times and appeared at five different places in the defendants' (NW.A) song '100 Miles and Runnin''.[78] Before appeal, the US District Court for the Middle District of Tennessee had already summarily judged for the defendant and concluded that there was no actionable infringement because the copying was de minimis.[79] On appeal, however, the US Court of Appeals for the Sixth Circuit reversed the district court's grant of the defendants' summary judgment.[80] The Sixth Circuit reasoned that § 114(b) of Title 17 of the United States

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[72] *Campbell v Acuff-Rose Music, Inc* 510 US 569.

[73] 17 USC §107.

[74] Demers, *Steal This Music* (n 4) 93; McLeod and DiCola (n 46) 131–32; Sewell (n 56) 296.

[75] Demers, *Steal This Music* (n 4) 95.

[76] L Zucchino, 'Sound Familiar? Digital Sampling is taking Center Stage' [2022] University of Miami Business Law Review 295, 306.

[77] 410 F.3d 792 (6th Cir 2005) (*Bridgeport Music* 2005).

[78] *Bridgeport Music, Inc v Dimension Films* 230 F Su2d 830, 839 and 841 (MD Tenn 2002).

[79] ibid 842–43.

[80] *Bridgeport Music* 2005 (n 77).

Code (USC) grants exclusive rights to reproduce sound recordings to copyright holders regardless of the amount copied and that any amount of copying of sound recording is actionable copyright infringement in the absence of a licence to sample.[81] To reach this conclusion, the Sixth Circuit intentionally ignored well-established legal analyses of de minimis use and fair use, debasing the very goal of 'promot[ing] the Progress of Science and useful Arts'.[82] The Sixth Circuit's refusal to apply de minimis analysis is based on an erroneous claim that the analysis applies only to musical composition copyright cases.[83] Such abandonment of de minimis analysis in sound recording copyright cases is unsupported by the language of the 17 USC § 114(b) and legislative history.[84] 'The "practice of digitally sampling prior music to use in a new composition should not be subject to any special analysis".'[85]

Unlike the presumption the court relied on in *Bridgeport*, nothing in the language of 17 USC § 114(b) suggests that de minimis analysis should not apply to sound recording copyright cases. It is true that 17 USC § 114(b) grants exclusive rights to the sound recording copyright owner to copy and prepare derivative works of the sounds from his own recording. However, the language of the statute does not seek to grant sound recording copyright owners absolute and foolproof rights against de minimis copying. In fact, the statute clearly states ""[t]he exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is *limited* to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality" (emphasis added).[86] Accordingly, a court cannot rely on the language of the statute to neglect de minimis analysis in cases where the

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[81] ibid 800–01.

[82] US Constitution, Art I, § 8, cl 8.

[83] *Bridgeport Music* 2005 (n 77) 801–02.

[84] J Schietinger, 'Bridgeport Music, Inc v Dimension Films: How the Sixth Circuit Missed a Beat on Digital Music Sampling' [2005] *DePaul Law Review* 209, 232.

[85] Brief of Amicus Curiae RIAA, 9, *Bridgeport Music, Inc v Dimension Films* 410 F.3d 792 (6th Cir 2005) (Nos 02-6521, 02-5738) (citing MB Nimmer and D Nimmer, *Nimmer on Copyright*, § 13.03[A][2], 13–50 (2004)).

[86] Schietinger (n 84) 233; 17 USC §114(b).

copying at issue is of a sound recording. The language of the House Report No 97-1476 also implies that Congress intended courts to apply de minimis analysis in sound recording infringement cases.[87] The report points out that since 17 USC § 114(b) extends the statutory protection only to the actual sounds of a sound recording, 'infringement takes place whenever all or *any substantial portion* of the actual sounds that go to make up a copyrighted sound recording are reproduced' (emphasis added).[88] As such, it requires courts to apply de minimis analysis in sound recording infringement cases.

The Sixth Circuit supported its perfunctory creation of a bright-line rule by reasoning that it was required to create judicial efficiency in sound recording copyright infringement cases.[89] The court's logic is based on an assumption that the affirmative defence of fair use is neither applicable nor necessary in sound recording copyright cases.[90] Nevertheless, there is no language in House Report No 97-1476 to support that Congress intended to allow courts to treat sound recording copyright cases any differently from others when it comes to applying fair use.[91] The House Report clearly states that 17 USC § 107 'is intended … not to change, narrow, or enlarge [the fair use doctrine] in any way',[92] supporting that fair use shall be treated as a defence available for all types of copyright infringement cases. The House Report acknowledges that while § 107 'endorses the purpose and *general* scope of the judicial doctrine of fair use' (emphasis added), it is ultimately up to the courts to make decisions by taking into account 'the endless variety of situations and combinations of circumstances … during a period of rapid technological change'.[93] Such language seems neither to allow any special treatment of sound

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[87] Schietinger (n 84) 233.

[88] HR Rep No 94-1476.

[89] *Bridgeport Music* 2005 (n 77) 802.

[90] Schietinger (n 84) 235.

[91] HR Rep No 94-1476.

[92] ibid.

[93] ibid.

recording copyright cases nor to justify a bright-line rule at the cost of 17 USC § 107. The Sixth Circuit's justification in *Bridgeport* is therefore flawed,[94] as pointed out by subsequent cases.

In *VMG Salsoul v Ciccone*,[95] for example, the Ninth Circuit squarely declined to follow the reasoning of *Bridgeport*, stating that it found '*Bridgeport*'s reasoning unpersuasive'.[96] Disagreeing with the Sixth Circuit, the Ninth Circuit held that Congress did not eliminate the de minimis exception to copyright infringement claims of sound recordings in 17 USC § 114(b).[97] The subject of this copyright infringement case was the song 'Vogue' by the pop star Madonna. The plaintiff, VMG Salsoul, LLC, claimed that a segment from its song, 'Love Break', was taken, modified and incorporated into 'Vogue' without permission.[98] The segment consisted of a mere 0.23-second horn hit of four notes in the key of B-flat.[99] Reversing the lower court's grant of summary judgment in favour of Madonna, the Ninth Circuit initiated its discussion of the case by establishing the de minimis use as a required analysis to be done. It stated that 'for an unauthorized use of a copyrighted work to be actionable, the use must be significant enough to constitute infringement'.[100] The Ninth Circuit accordingly rejected the plaintiff's request to follow the bright-line rule of the Sixth Circuit, and further emphasised that the long-standing judicial trend clearly compels courts to apply de minimis analysis 'throughout the law of copyright, including cases of music sampling'.[101] The Ninth Circuit further criticised the Sixth Circuit's reading of both the statutory language and legislative history of 17 USC § 114(b), and stated that correct reading reveals that Congress intended to limit the rights of a sound recording

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[94] *Bridgeport Music* 2005 (n 77); Schietinger (n 84) 235.

[95] 824 F.3d 871 (9th Cir 2016).

[96] ibid 874.

[97] ibid 874.

[98] ibid 875.

[99] ibid 875.

[100] ibid 877; see also Ringgold v Black Entm't Television, Inc, 126 F.3d 70, 74–75 (2d Cir., 1997).

[101] *VMG Salsoul* (n 95) 881; also see 388 F.3d, 1195.

copyright holder, as confirmed by the legislative history behind it.[102] It is thus not surprising that the Ninth Circuit characterised the decision in *Bridgeport* as 'illogic'[103] and its interpretation as '[resting] on a logical fallacy'.[104] As the Ninth Circuit acknowledged, its decision in *VMG Salsoul* would lead to 'different levels of protection in different areas of the country, even if the same alleged infringement is occurring nationwide'.[105] The circuit split may result in forum shopping in cases regarding sampling under US Copyright law, which will have to be resolved by either Congress or the Supreme Court.[106]

B. Copyright and Sampling under EU Copyright Law: The 'Metall auf Metall' Litigation

Similar to the situation in the USA, the practice of sampling has been subject to the scrutiny of copyright law in Europe. In the context of copyright law within EU member states, the so-called InfoSoc Directive[107] is the relevant piece of legislation and yardstick. Like other EU Directives in copyright law, it aims to harmonise the copyright legislation of EU Member States.[108] Of particular relevance for this chapter is the fact that Member States must provide phonogram producers with the right of reproduction and the making available right.[109] Additionally, Article 5 Paras 2 and 3 of the InfoSoc Directive provide a closed list of exceptions which EU Member States may optionally provide within their copyright law. Copyright law, however, is not a

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[102] *VMG Salsoul* (n 95) 883.

[103] ibid 884.

[104] ibid 884; *Nimmer* § 13.03[A][2][b], 13–61.

[105] *VMG Salsoul* (n 95) 886.

[106] MS Morrissey, 'A Music Industry Circuit Split: The De Minimis Exception in Digital Sampling' [2022] *University of Richmond Law Review* 1436, 1452–56.

[107] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

[108] InfoSoc Directive, Art 2c).

[109] InfoSoc Directive, Art 3 Nr2b).

unitary EU right but remains national law, albeit the various EU Directives on this subject matter. This added complexity is wonderfully underlined by the 'Metall auf Metall' litigation: it was not only the first sampling case before German courts,[110] and led to one of the major copyright cases before the Court of Justice in recent years; it also showcases how courts appear to struggle to appropriately assess the cultural practice of sampling under the practice of copyright law.

(i) The Litigation in Germany

The underlying litigation that culminated with the decision of the Court of Justice of the EU (CJEU) in 2019[111] commenced as long ago as 1999. Moses Pelham, a hip-hop producer and performer, used an approximately two-second sample that derived from the track 'Metall auf Metall' from the 1977 album *Trans Europa Express* by the famous German electronic music pioneers Kraftwerk. Unaware of its origin, Pelham slowed the two-second segment down, looped it and used it for the track 'Nur Mir' performed by the German artist Sabrina Setlur, which was released in 1997. Members of Kraftwerk sued Pelham for infringement of their phonogram producer's right pursuant to § 85 of the German Authors' Rights Act.

The case made its way twice to Germany's highest court on civil matters, the German Federal High Court (Bundesgerichtshof; BGH). In its first judgment, the BGH initially found for the claimants and discarded the appealed Higher District Court of Hamburg's obiter dictum that using 'tiniest portions' of a sound recording for the purpose of sampling could escape copyright infringement.[112] Apparently realising the vast scope of protection given to right holders, it held that sampling could by analogy fall within free use pursuant to § 24(1) of the German Authors'

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[110] C Zhang, '"Sampling" Is Freedom of Art: The German Federal Constitutional Court Deliberates on the Acceptability of Music Sampling in the "Metall auf Metall" Case' [2017] *Computer Law & Security Review* 870, 871.

[111] Case C-476/17 *Pelham and Others* Judgment of the Court (Grand Chamber), 29 July 2019.

[112] *Metall auf Metall* GRUR 2009, 403, para 14.

Rights Act, which allows the free use of a work without the author's authorisation,[113] thus working as an exception to the right of the phonogram producer.[114] The provision, however, would not apply where the sample could have been created independently, ie without reproducing a phonogram.[115]

In its second judgment, the Federal High Court added that some deliberations on the fundamental rights positions of the parties were enshrined within the German constitution, the Basic Law. The Court, however, noted that the freedom of arts pursuant to Article 5 para 3 Basic Law in using the sample to create a new musical work itself might be based on economic interests. Thus, it would not encompass the use of the entrepreneurial endeavours of others even under the most favourable economic conditions imaginable.[116] Any practical doubts as to what would constitute an independently created sample were dismissed laconically by the Court, which said that such uncertainty 'must be accepted'.[117] The advice given to producers wishing to use samples was to acquire the corresponding rights from the phonogram producers of the original recording, create the sound themselves 'or – if they consider this effort to be too high and not economically viable – refrain from taking it over entirely'.[118]

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[113] § 24 (1) of the German Author's Rights Act (German: Urhebergesetz; abbreviated: UrhG) states: 'An independent work created in the free use of the work of another person may be published and exploited without the consent of the author of the work used.'

[114] The court arguably did so in order to offset the otherwise wide-reaching exclusive rights enjoyed by the Phonogram producers over sound fragments, even though they were not required to meet the originality requirement: M Senftleben, 'Flexibility Grave – Partial Reproduction Focus and Closed System Fetishism in CJEU, Pelham' [2020] *International Review of Intellectual Property and Competition Law* 751, 755.

[115] The Higher District Court of Hamburg, which was tasked to assess the case, after hearing expert evidence, again came to the finding that an average phonogram producer would have been able to reproduce the sequence in question independently in the year 1997 – OLG Hamburg, 'Urheberrechtsschutz für Soundsamples' [2011] GRUR-RR 396, 400–01.

[116] BGH: Benutzung eines fremden Tonträgers – Metall auf Metall II MMR 2013, 464, para 23.

[117] ibid para 24.

[118] ibid para 24.

Questioning the practical application of the Federal High Court's guidance on when sampling would be legal and holding that it would de facto make sampling impossible, Pelham appealed to the highest German Court, the Federal Constitutional Court. The Constitutional Court's discussion is particularly relevant as it showcases the impact of a shift of perspective, ie away from the habitual right–exceptions conundrum that so many copyright and intellectual property (IP) right decisions face.[119] Being a constitutional court, it first outlined the involved interests that needed to be balanced towards one another, ie the guarantee of property by the phonogram producer on the one hand and the freedom of artistic expression of those wishing to conduct an artistic discourse by using samples on the other. It also outlined that the rules of the Copyright Act (ie the exclusive right, its scope and limitation) would serve to balance these interests encapsulated in the clashing fundamental right positions. In order to ensure that such collisions are appropriately accommodated, the principle of practical concordance needs to be applied: this aims at ensuring that both fundamental rights positions are safeguarded as far as possible.[120]

Importantly, the Constitutional Court stressed that such a balancing exercise cannot be conducted from the perspective of one fundamental right only, but rather must relate to balancing two equally protected fundamental right positions. This approach, which has also been applied by the European Court of Human Rights (ECtHR) in its IP-related decisions,[121] breaks with the tradition of regarding IP protection as the rule, stipulating that any third-party use of the IP would need to be permitted only exceptionally. The Constitutional Court provided an important analysis on the point of whether the preceding courts had adequately acknowledged Pelham's artistic freedom. In its deliberations, the Court, for instance, held that in curtailing the phonogram producer's fundamental right to property, the courts would need to apply an art-specific approach that would

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[119] MD Mimler, '"Metall auf Metall" – the German Federal Constitutional Court Discusses the Permissibility of Sampling Music Tracks' [2017] *Queen Mary Journal of Intellectual Property* 119, 126.

[120]AF Lescano, 'Kritik der praktischen Konkordanz' [2008] *Kritische Justiz* 166, 167; T Hoeren, 'Was bleibt vom Urheberrecht im Zeitalter von Filesharing und Facebook?' [2012] *Zeitschrift für Europarecht* 2, 8.

[121] eg A Donald, *Case of Ashby Donald and others v France* App no 36769/08 (ECtHR, 10 January 2013).

entail the acknowledgement that an adoption of works within one's own creation would constitute a form of artistic expression. Practically, this approach would need to guide courts in interpreting and applying exceptions and limitations to copyright and would widen their scope in comparison to non-artistic uses of a copyright-protected work. Where artistic uses would only minimally encroach on the copyright holder's interest to exploit the work, then the latter would need to make way for artistic freedom.[122]

The Constitutional Court underlined that sampling would be covered by the fundamental right of freedom of arts, which was also acknowledged by the German Federal High Court. It noted, however, that the very narrow interpretation regarding the permissibility of sampling as promoted by the BGH's decision would have significant ramifications for artists, in particular in the field of hip-hop music, as it would require sample producers to leave the creator with limited choices: to either ask for a licence or to reproduce the sequence themself. However, only being able to resort to one of these alternatives would curtail the users' artistic freedom, a point not sufficiently acknowledged by the BGH.[123] Having to resort to licensing would entail the possibility of the right holder refusing to this, and the fact that the fee is largely determined by the right holder would make the situation complex where many different samples were used. The transaction costs and limited catalogue of sample databases would be of only limited use, according to the Court.[124]

Finally, the Constitutional Court delivered a striking blow to the BGH's deliberation regarding the reproducibility of samples, ie the litmus test for permissible sampling. Samples were a key element of hip-hop music and the Court compared them to collages, where the use of an original work plays a similar role. Thus, the art-specific approach promoted by the Constitutional Court mandates acknowledgement of the original sequences used in hip-hop music. Additionally, reproducing sequences of samples may be very laborious, and the question remains whether they could actually be reproduced identically – which might have such a chilling effect that artists

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[122] Bundesverfassungsgericht BVerfG 1 BvR 1585/13, para 86.

[123] ibid para 98.

[124] ibid para 98.

refrain totally from using samples.[125] Kraftwerk's position would only be impaired to a minimal extent, as the two works were not in competition with each other. The loss of licensing revenue would not be significant, and the Court noted that § 85 UrhG was provided to tackle piracy, not as a ground for generating licensing revenue.[126] Permitting the use of samples would also not necessarily amount to the loss of such revenue where the works are not in direct competition. Thus, the case was handed back to the BGH.

(ii) 'Metall auf Metall' before the Court of Justice of the EU

The InfoSoc Directive became applicable on 22 December 2002, which meant that any assessment of whether some relevant uses of the 'Metall auf Metall' sample by Pelham were infringing or not would thereafter need to conform with the Directive.[127] Therefore, the BGH decided to stay the proceedings and referred several questions to the CJEU as sole arbiter on EU law by means of a preliminary reference. The BGH queried, inter alia, whether taking a sequence from one phonogram and transferring it to another would constitute infringement.[128] Additionally, the German court sought to clarify whether the German doctrine of free use, which it applied through analogy, would be consistent with EU law as the Directive would currently not provide for an equivalent provision as to whether sampling would fall within the quotation exception pursuant to Article 5(3)(d) InfoSoc Directive and to what extent the rights contained within the Charter on Fundamental Rights of the European Union need to be taken into account.

The Court applied a literal interpretation of the right of reproduction, which allows the right holder to 'authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part'.[129] The Court, therefore, followed the guidance of

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[125] ibid para 100.

[126] ibid para 104.

[127] The referral also sought to ascertain whether an extract of a phonogram is a 'copy' of that phonogram for the purposes of Directive 2006/115 (Rental and Lending Rights Directive).

[128] *Pelham and Others* Judgement of the Court (n 111) para 21.

[129] Art 2(c) InfoSoc Directive.

the Advocate General's opinion (and that of the BGH), by holding that 'the reproduction by a user of a sound sample, even if very short',[130] would constitute a reproduction 'in part' of that phonogram and would fall within the exclusive right. This would be necessary to guarantee the high level of protection enshrined within the Directive's recitals and safeguard the producer's investment against appropriation.[131] The Court then applied fundamental rights considerations. It re-established that IP was not inviolable and should rather provide for a fair balance between the interests of the right holders and 'the interests and fundamental rights of users of protected subject matter as well as of the public interest'.[132] In this context, the Court acknowledged that sampling would constitute a form of artistic expression, thus being protected under the freedom of the arts pursuant to Article 13 of the EU Charter on Fundamental Rights. But in comparison to the wide scope given to artistic freedom by the German Federal Constitutional Court, the CJEU held that it could only be exercised where a sample would be used 'in a modified form unrecognisable to the ear, in a new work'.[133] However, it rejected the Advocate General's opinion, which found that there would be no de minimis threshold for the reproduction of phonograms,[134] thus leaving a small amount of wiggle room for musical sampling.

In relation to whether sampling could be covered under 'free use' as suggested by the BGH, the CJEU reiterated that it would constitute an 'inherent limitation to its scope of protection, based on the idea that it is not possible to conceive of a cultural creation without that creation building upon the previous work of other authors'.[135] The CJEU, however, noted that the relevant catalogue of exceptions and limitations of the InfoSoc Directive would be exhaustive. It would jeopardise the Directive's purpose to harmonise copyright law in view of the proper functioning of the internal market, whereby 'Member States were free to provide for such exceptions and

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[130] *Pelham and Others* Judgement of the Court (n 111) para 29.

[131] Recitals 4, 9 and 10, InfoSoc Directive.

[132] *Pelham and Others* Judgement of the Court (n 111) para 32.

[133] ibid para 31.

[134] *Pelham and Others* Opinion of AG Szpunar (n 43) paras 28–33.

[135] *Pelham and Others* Judgement of the Court (n 111) para 56.

limitations beyond those expressly set out in Directive 2001/29'.[136] Senftleben laments this approach and would rather have seen free use as an inherent limitation of the scope of protection rather than a limitation/exception that would need to be assessed by the legislative straitjacket[137] of Article 5 InfoSoc Directive.[138]

The CJEU also found that the subject matter of sampling would not necessarily fall within the possibility of quotations for purposes such as criticism or review if they relate to a work or other subject matter pursuant to Article 5(3)(d) of the InfoSoc Directive. The Court followed the AG's opinion that a musical work may fall within the scope of the provision. A quotation would be given where

> use, by a user other than the copyright holder, of a work or, more generally, of an extract from a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user, since the user of a protected work wishing to rely on the quotation exception must therefore have the intention of entering into 'dialogue' with that work.[139]

Thus, this could apply where the 'sound sample [is] taken from a phonogram which is recognisable to the ear in that new work'[140] but not where it is not possible to identify the work concerned.[141]

C. Analysis

Courts on both sides of the pond have quickly found that even short passages of samples can fall within the reproduction right and thus be subject to the authorisation of right holders. This is not surprising; the interesting point is how the courts provide leeway to allow certain forms of

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[136]ibid para 64.

[137] InfoSoc Directive, Recital 32 ('This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public').

[138] Senftleben (n 114) 760.

[139] *Pelham and Others* Judgement of the Court (n 111) para 71.

[140] ibid para 72.

[141] ibid para 73.

sampling without seeking authorisation. As sampling often relates to considerably small elements of another work/phonogram, the de minimis doctrine under US copyright law would be able to cover many forms of sampling. Arguably, the *Bridgeport* decision, which denied the applicability of this doctrine on judicial efficiency, provided a blunt and quite cynical approach to addressing the matter.[142] Unsurprisingly, this approach was ignored outside the 6th Circuit, as noted by the 9th Circuit in the *VMG Salsoul* decision.[143] In contrast to the court in the *Bridgeport* decision, the 9th Circuit applied a holistic and teleological statutory construction of copyright law in order to discern congressional intent.[144] It also took every opportunity to criticise the *Bridgeport* approach[145] leading to the aforementioned circuit split. Of course, many forms of sampling may also fall within fair use where sampling is used as parody, such as in the case of the famous decision *Campbell v Acuff-Rose Music* by the US Supreme Court.[146] In the absence of a Supreme Court decision, it has been suggested that applying the fair use doctrine would provide a middle ground to address sampling to address the circuit split,[147] as conducted by the Court of the Southern District of New York in *Estate of Smith v Cash Money Records, Inc*.[148]

The German approach, which would have subsumed certain unauthorised samples under free use and its flexibility in balancing the interest of the involved parties, was carried to the grave by the *Pelham* decision. This currently leaves unauthorised sampling between a rock and a hard place under EU copyright law. On the one hand, unrecognisable samples may fall outside the scope of

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[142] The court held that 'the music industry, as well as the courts, are best served if something approximating a bright-line test can be established': *Bridgeport Music* 2005 (n 77) 798–99.

[143] *VMG Salsoul* (n 95) 881.

[144] TB Burns, 'And They Sayin' It's Because of the Internet: Applying the De Minimis Exception to Digital Sound Sampling in the Wake of VMG Salsoul, LLC v Ciccone' [2018] *Drexel Law Review* 445, 477.

[145] Zucchino (n 76) 312.

[146] 510 US 569.

[147] Zucchino (n 76) 318–21.

[148] The court found that the use of a 35 seconds spoken segment by jazz artist Jimmy Smith by hip-hop artist Drake in the song 'Pound Cake/Paris Morton Music 2' is protected fair use due to altering the wording. *Estate of Smith v Cash Money Records, Inc* 253 F Su3d 737 (SDNY 2017).

copyright infringement, while otherwise they might be covered by the quotation exception where they are recognisable. But trying to navigate between these two criteria regulating the scope of permissible sampling has its pitfalls. Recognisability, of course, leads to the question of how this assessment would be conducted and by whom. How could an objective test be possible if it will inevitably have subjective variations? In order to maintain sufficient scope for artistic freedom, this assessment ought to be conducted by the ears of the average music consumer. Thus, the approach taken by the CJEU may allow sound collages which incorporate a large number of often small sound fragments.[149] Recognisable samples may then fall within the quotation exception, thus ensuring freedom of expression.[150] The scope of the quotation exception remains uncertain as the Court laconically stated that this would depend 'on the facts of the case'.[151] The Court did not follow the Advocate General's copyright maximalist approach, which compared samples to the paint and brushes of a painter that would need to be purchased,[152] thus comparing 'apples and oranges'.[153] So, a sufficiently broadly interpreted quotation exception could cover an array of samples.

Aside from resorting to permitted uses, exceptions or other limitations of the exclusive rights, artists can resort to clearing the samples they use. This would be the way to 'do the right thing' according to the court in *Bridgeport*, which suggested that the new artist 'Get a license or do not sample'.[154] However, the costs for clearing samples can constitute an obstacle according to

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[149] Senftleben (n 114) 757–58.

[150] C Geiger and E Izyumenko, 'The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, but Still Some Way to Go!' [2020] *International Review of Intellectual Property and Competition Law* 282, 289.

[151] *Pelham and Others* Judgement of the Court (n 111) para 72.

[152] *Pelham and Others* Opinion of AG Szpunar (n 43) para 52.

[153] BJ Jütte and JP Quintais, 'The Pelham Chronicles: Sampling, Copyright and Fundamental Rights' [2021] *Journal of Intellectual Property Law & Practice* 213, 216.

[154] *Bridgeport Music* 2005 (n 77).

several commentators.[155] Sample clearing can involve several copyrights held by different parties,[156] and the more samples require clearing the more the situation is exacerbated, which then can lead to hold-up costs.[157] Other costs relate to opaque pricing and search costs, which arise when a sampler seeks to identify the relevant right holder. This is an easier task for artists who are signed for big labels than for those signed by independent labels,[158] which do not have a large back catalogue themselves.[159] In some cases, some artists will refuse to clear samples up front,[160] while, according to Sewell, other right holders behave like 'sample trolls' whose business model is set to extract money from licensing or litigation.[161]

The impact of sample clearing in the aftermath of *Bridgeport* for the creation of hip-hop music has been mixed. Some authors have lamented the restraints that sample clearing poses,[162] which marked the end of the golden era of hip-hop. Indeed, some studies show that highly influential hip-hop artists relied on less sampling in their post-1991 recordings.[163] Joo, however, argues that *Bridgeport* merely confirmed an already prevalent business practice.[164] Sewell, on the other hand, states that these developments have not necessarily decreased the creativity, but have altered the approaches taken by producers and artists.[165] This mirrors Okpaluba's finding that

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[155] Evans (n 20) 862.

[156] ie the phonogram/sound recording and that of the underlying musical composition.

[157] Said (n 4) 349.

[158] McLeod and DiCola (n 46) 161.

[159] Okpaluba (n 3) 86.

[160] Said (n 4) 350.

[161] Sewell (n 56) 297.

[162] Said (n 4) 353.

[163] Okpaluba (n 3) 96. : Sewell (n 56).

[164] Joo (n 5) 428–29.

[165] Sewell (n 56) 316.

many new innovations with regard to digital sampling[166] were applied by some artists by recreating samples with studio musicians and synthesisers in order to avoid clearing costs for sound recordings.[167] Where the sample is altered sufficiently, this might even avoid the need to seek a licence for the musical composition.[168] For some artists, however, recreating samples may not be artistically desirable since the original samples would also create a 'purer' sound in comparison to the reproduction – a point which has resonated within the *Pelham* decision by the German Federal Constitutional Court. A different approach was taken by artists such as Danger Mouse with *The Grey Album*. He resorted to 'fighting the power' by releasing a sample-heavy album on the internet. While this has not generated income for him, it has provided exposure.[169]

VI. Conclusion

Much of this chapter has discussed copyright law's assessment of sampling. It has showcased that the increased scrutiny of copyright law after the 'Wild West' days of hip-hop music did alter practices in the composition of hip-hop music. Providing an answer as to whether this was for the better or worse for the genre is beyond the scope of this chapter. The current regulatory situation presents itself with sample clearing being a commonly used practice now which, however, requires reform. This entails a simplification of the sample clearing process in order to make it as widely accessible and feasible as possible for hip-hop and other sample artists alike. Clear and tiered pricing depending on quantity and quality of the sample would also be beneficial. Compulsory licences have also been mooted as a part of the solution where voluntary licensing fails.[170]

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[166] Okpaluba (n 3) 96.

[167] Sewell (n 56) 298.

[168] ibid 298.

[169] McLeod and DiCola (n 46) 19; Okpaluba (n 3) 97–98.

[170] Demers, *Steal This Music* (n 4) 142.

Additionally, the current industry practices need to factor in free uses of samples that copyright law may provide, such as the de minimis doctrine and fair use in the USA and the interplay of no-recognisability and quotation right under EU law. Standards as to when a sample would be de minimis or considered unrecognisable would make the application of these free uses easier. It would go against copyright policy if the legislative will to keep some reproductions outside of the exclusive right of right holder were to be omitted. This point calls for clarification of the law by courts and possibly also legislators. The discussed case law showcases, however, that courts have often struggled to adequately address sampling as an essential form of artistic expression within hip-hop music. In some cases, it almost appears that courts have discriminated against sampling in comparison to other forms of copying[171] by ignoring the nature of sampling as a laborious, creative and transformative cultural expression.

Such ignorance ought to be avoided and has wider ramifications for IP policy as it calls for appropriately assessing exceptions and limitations to exclusive rights. From a socio-legal perspective, the exclusivity which the legal system provides in the form of copyright law can inhibit the communicative discourses within other societal systems, such as that of the arts.[172] Such clashes between different societal systems can be accommodated through the creation of limitations of rights within the legal system enabling these other discourses. To minimise regime clashes, Teubner argues that the relevant other societal discourse would need to be heard before the legal decision on the collision of discourses is made.[173] This is where the assessment of the fundamental rights position becomes useful as it mandates courts to take all positions and interests into account and thus avoids one-sided approaches.[174]

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[171] McLeod and DiCola (n 46) 16.

[172] D Wielsch, *Zugangsregeln* (Mohr Siebeck, 2008) 46–48.

[173] G Teubner, 'Altera Pars Audiatur: Law in the Collision of Discourses' in R Rawlings (ed), *Law, Society and Economy* (Oxford University Press, 1997) 170.

[174] Wielsch (n 172) 66–81.