When does sampling infringe copyright?

Randall Harper discusses the copyright issues surrounding this recent recording technique and explains how the music industry has reacted

The technological advances over the past decade or so have brought great benefits to the music industry. Digital recording equipment, computers, developments in tape manufacture, the compact disc and many other technological advances have resulted in higher and in some cases near perfect quality recorded products being made for consumer consumption. It has also seen the emergence of new forms of music. However, with the new technology and in particular digital technology, we have seen the introduction of a number of problems for the industry, one of the most topical being the sampling issue.

What is sampling?

Sampling involves copying the sounds of a source record, usually a compact disc, and storing those sounds in digital code on a disc or tape attached to or embodied in the sampling equipment. Once copied, the digital codes can be used to produce an identical copy of that part of the original record that has been sampled, or they can be used to change the pitch, rhythm or tempo to produce a version of the recording which can be vastly different to the original.

Completely new songs can be constructed by using the sample as the base of the new song. This is done by using the sample in a so-called loop and adding other music to it as required. By changing pitch, rhythm or tempo, the resulting song can be quite unrecognisable to the average listener. This use of sampling is quite prevalent with rap or hip-hop songs, particularly in the United States, which is where sampling arose in the first place (eg M.C. Hammer's "U Can't Touch This" which is lifted from the Rick James track "Superfreak").

Alternatively, the sampled sound (eg. a guitar riff, drum sound or even a vocal) will simply be dropped into another recording in order to enhance or otherwise complement the other recording. For example, it has been reported that Phil Collins' drum sound has been frequently sampled over the past few years and it is also said that Jon Farriss' (INXS) drum sound was also doing the rounds of Sydney recording studios not so long ago.

In the 1970s, synthesisers enabled producers to create music without the need for musicians or at the very least producers were able to limit the number of musicians required in a particular project. In the 90s, the sampler has the ability not only to replace musicians, but also enables producers to capture and use sounds in recording projects distinctive of particular musicians. In other words, it enables the reproduction of a particular instrument, played by a particular musician in a particular setting, engineered by a particular engineer and produced by a particular producer.

In the United States, because sampled sounds can be stored on compact discs and easily replicated or duplicated from compact discs, libraries of digital samples have been created and are being commercially exploited. Manufacturers of sampling equipment have also developed libraries of sampled sounds to support their hardware, as individual studios have developed sample libraries for use by their clients.

At first blush, the sampling of a recording constitutes an infringement of copyright in the sound recording concerned as well as the underlying musical work. However, there are a number of problems that may arise in relation to proving any claim of copyright infringement.

Substantiality

It is of course not necessary to copy or reproduce the entire work or sound recording to infringe the copyright subsisting in that work or sound recording. Pursuant to Section 14 of the Copyright Act, an infringement will arise if a "substantial" part of the work or other subject matter is copied or reproduced. What constitutes "substantial" is not easy to determine as each particular instance needs to be assessed in its own circumstances. Indeed the Courts have always been reluctant to prescribe any particular formula for determining what constitutes a "substantial part", although it has generally been held that this term refers to qualitative considerations and not those of quantity (*Blackie & Sons* v *Lothian Book Publishing* [1921]. Consequently a very small but well known portion of a work may constitute being "substantial" for the purposes of copyright infringement while a much longer but unremarkable and unrecognisable portion of a work may not. It appears to be a question of whether the part of the work in question is essential to the work, or is an essential feature of the work (*Hawkes & Son* v *Paramount Film Service* (1934); *Joy Music* v *Sunday Pictorial Newspapers* (1960).

In relation to sampling the question of substantiality needs to be assessed from two viewpoints. First, does the sample have that "essential" quality, in relation to the original recording or work, to constitute it being a "substantial" part, the use of which would amount to a copyright infringement? This needs to be looked at not only from the viewpoint of the sound recording itself but also the underlying work and the result may be somewhat different for each. It may well be that the part of the work that has been sampled is quite unremarkable and indistinctive while the recording may be very distinctive of the particular musician who performed it and it is so distinctive that it is easily recognisable. In such a circumstance it may be argued that the work has not been infringed because a "substantial part" of the work has not been reproduced while the sound recording copyright has been infringed because the sample does constitute a "substantial part" of the original recording.

The second issue to consider is whether or not the resulting copy sufficiently resembles the original to constitute an infringement of the copyright in the original. This is particularly relevant with sound recordings. Quite often only certain elements of a sound recording, for example one instrument only, will be sampled. It may well be that this instrument on its own is not so distinctive of the original recording that the subsequent recording in which it is embodied closely resembles the original. The problem is exacerbated if the rhythm, pitch or tempo of the sample is altered. This may make it quite impossible to recognise the original recording when it is incorporated into the new sound recording. If the original recording cannot be recognised then can it be said that a "substantial part" of the recording has been used? In addition, if the instrument or sound is not "essential" (on the *Hawkes & Son* principle) to the original recording, is it "substantial"?

Fear of litigation

These uncertainties have given rise to a great reluctance on the part of artists, songwriters and record companies instituting copyright infringement proceedings. There have been no such proceedings in Australia to my knowledge and very few in the United States, the most notable being the Turtles action against De La Soul for an alleged infringement of the Turtles "You Showed Me".

A number of actions have been threatened in the United States, such as in the case of Tone-Loc for his claimed use of Van Halen's "Jamie's Cryin" and the British act Beats International for use of the Clash's "Guns of Brixton". However, these and many other matters have not found their way into the legal system because both sides are afraid of setting a benchmark for "substantiality" which could open the floodgates or close them completely, depending on the particular side's point of view. What is happening is that artists, companies and users of samples are entering into agreements to regulate the use of sampled recordings. The record company or song writer grants a licence to the sampler in exchange for a royalty payment (the details of which are not common knowledge). Of course it is unlikely, at this time, that the amount of royalty payment for this use represents a commercial level of royalty and adequate return to the creator (unless of course the sample is so significant that it represents a clear infringement of copyright) but it does, where undertaken, nevertheless legitimise sampling as a concept and to some extent rewards the creators of the sampled copyright material or works.

Sampling has not yet become a major issue in the Australian music industry primarily because the type of music that lends itself to sampling is not widespread in this country at the moment. It is, however, inevitable that an increase in the use of sampling will happen in the near future. It will be interesting to see how Australian artists and record companies react.

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Book reviews

Sheila McGregor reviews "Telecommunications Reporter", the latest loose-leaf service on telecommunications law by Diana Sharpe, Gerald Wakefield and Mark McDonnel

The Law Book Company's *Telecommunications Reporter* is the first loose-leaf publication dedicated to providing a collection of materials on Australian telecommunications law and policy. The absence until now of a collection of such materials has required diligence on the part of practitioners in the area to assemble and keep up to date their own set of the materials. So the *Reporter* should be very useful for them and the editors are to be commended for their industry in producing it.

The *Reporter* contains the full text of the *Telecommunications Act 1989*, the *Australian Telecommunications Corporation Act 1989* (*Telecom Act*), the *Radiocommunications Act 1983*, the *OTC Act 1946*, the *AUSSAT Act 1984* and extracts from the *Trade Practices Act* as well as the VAEIS Guidelines and all of the AUSTEL forms, guidelines and reports. The AUSTEL documentation which is not readily available (other than from AUSTEL) will probably be the most useful section of the Reporter. It's surprising that AUSTEL itself has not established a system for distributing its documentation – OFTEL for example has a very efficient distribution system. This may come with the increased resources which AUSTEL will acquire with the implementation of the government's reforms. AUSTEL has also announced that it will shortly be opening shop front offices around Australia.

The *Reporter* contains a discussion of government policy and strategy in both telecommunications and other areas which impact on the telecommunications industry such as the Industry Development Arrangements and Information Industry Strategy. In doing so it puts into context the role of the Department of Transport and Communications and the Department of Industry, Technology and Commerce (DITAC). This information is useful particularly in relation to DITAC because it can be difficult for practitioners to keep up to date with changes in government policy and strategy. This section needs to be kept very-up-to-date if it is to retain its usefulness - for example, the government is apparently considering at the moment changes to the Australian Civil Offsets program and the Partnerships for Development Scheme.

The telecommunications industry's use of acronyms to refer to technologies as well as to describe the industry associations is well known - the *Reporter's* two and a half pages of abbreviations give some indication of this. The first section of the *Reporter* entitled *Telecommunications Industry Profile* which includes some background material on the associations is therefore a particularly useful reference. It will be especially so for newcomers to the area who will come across references to ACSI, ATUG, or AEEMA but may not really have a clear idea of the various associations' memberships and objectives. This section of the *Reporter* also sets out a useful summary of the rights and obligations of the carriers as specified in the *Telecommunications Act*, the *Telecom Act*, the *AUSSAT Act* and the *OTC Act*.

In the section on the Trade Practices Commission the editors comment briefly on some of the restrictive trade practices provisions (Part IV) in the *Trade Practices Act 1974*. Given the *Reporter's* discussion of the statutory monopolies conferred on the carriers under the *Telecommunications Act* it is noteworthy that the editors have not reproduced the *Trade Practices* (*Telecommunications Exemptions*) *Regulations*. These regulations contain important exemptions from some of the conduct prohibited under Part IV of the *Trade Practices Act*. Several of the exemptions cease to be effective as of 30 June 1989 or 31 December 1988. A number of the exemptions should remain applicable until implementation of the government's recent reforms.

As the editors point out in the *International* section, the May 1988 Statement touched only lightly on international policy issues. However, this section of the *Reporter* contains an interesting discussion of the relationship between those issues and the domestic telecommunications services framework.

Updates to the *Reporter* may clarify the focus of the *Case Law* section of the *Reporter*. There are decisions other than the two summarised which are relevant to the industry but which have not been included, for example the Tytel-Telecom decisions. These may have been excluded because the editors decided to concentrate on very recent decisions. One of the case summarised, the ASX-Pont Data decision, has been appealed against by the ASX and the Full Federal Court has heard the appeal. In future updates it will be necessary to include editorial comment on the cases summarised if this section of the *Reporter* is to have an ongoing purpose.

Since the publication of the *Reporter* in September the government has announced major reforms to introduce network competition. These include the merger of Telecom and OTC, the sale of AUSSAT and the grant of three cellular mobile telephone licences. The government has said that the "reforms in telecommunications represent the most radical restructuring of this key industry ever undertaken in Australia". The reforms mean major amendments to the *Telecommunications Act* and to other legislation - a draft bill to amend the *AUSSAT Act* has already been tabled in Parliament. The reforms mean a substantial rewrite of most sections of the *Reporter* will be required as the reforms are implemented. One of the reforms - the