A Reverse Liability Rule for Copyright in Digital Samples

Over the last two decades, some courts have interpreted copyright law to recognize strong property rights in digital samples. For example, the Sixth Circuit held in Bridgeport Music v. Dimension Films that there is no de minimis threshold for the infringement of sound recording copyright infringement—no sample is too small to qualify as unlawful. Although other sampling cases allow for de minimis use or fair use of musical composition copyrights, the music industry has long required musicians to obtain licenses from both sound recording and musical composition copyright owners for almost all samples. Yet the music industry’s system for licensing digital samples suffers from many barriers and inefficiencies.

In our forthcoming book, Creative License: The Law and Culture of Digital Sampling, Kembrew McLeod and I describe these problems and evaluate a number of public and private reforms to the sample clearance system. We believe some of these proposals would better facilitate creativity of musicians who sample and compensation for owners of sampled works. We conclude the book, however, with a sketch of a bolder proposal for reform. This paper picks up where the book leaves off, fleshing out the legal and economic details of that proposal and examining its desirability.

The proposal is best described, in the language of Calabresi and Melamed’s famous article about property rules and liability rules, as a reverse liability rule for copyright in digital samples. Musicians who seek to use brief enough samples—say, two seconds in length—would enjoy a default entitlement to use the material, subject to the copyright owners’ right to object in return for a small fee. Any funds collected would go to a government fund, not the musician seeking to sample (to avoid the obvious problem of musicians sampling solely to extort owners). The intuition is that copyright owners have to pay in order to block new musical collages from reaching the public. If they want a really strong property right that extends to tiny snippets, they should have to pay for it. In this sense, the proposal has common ground with reforms to copyright duration in which owners must periodically pay to extend their copyrights.

Some authors have proposed a compulsory licensing scheme for samples, in which copyright owners receive statutorily fixed compensation but have no control over who uses their work. A reverse liability rule would flip the assignment of compensation and control. Copyright owners may desire control for ethical reasons—for example, when one’s work is used in another person’s music with a distasteful political message—or for financial reasons—for example, when even a brief sample harms the market value of the original work. Control may have more value than short-term, pennies-per-copy compensation. Therefore, some musicians in some contexts may actually prefer the reverse liability rule to a compulsory license. (One version of the proposal would allow owners to choose between a compulsory license and the reverse liability rule to test this hypothesis.)

The primary goal of the proposal, however, is to circumvent costly and intractable licensing negotiations for very short samples and thus to encourage musical collage. Even if not every sample used is short enough to take advantage of the reverse liability rule, total licensing costs would decline. Many copyright owners will probably decline to exercise their prerogative to block samples, whether because of cost or indifference. Some owners will exercise their prerogative, but those are the owners who refuse to license in today’s system. In other words, a reverse liability rule would likely leave samplers no worse off in such situations.
The reverse liability rule flips the default approach to digital sampling, opening up more space for creativity. It could be part of a more carefully designed copyright, in which the strength of the property right decreases as the size of what is taken decreases. No doubt the administrative details are crucial, such as: communicating what the new system is; determining the level of the fee; allocating the funds collected; designing the system to avoid gaming; and specifying how the reverse liability rule would interact with other copyright limitations and exceptions, most prominently fair use. Yet copyright law and the music-industry institutions that operate in its shadow cannot continue to insist on strong property rights over tiny sub-parts of creative works. The sample clearance system is broken. Contemplating and, better yet, implementing a reverse liability rule for digital sampling would upend the current system and bring us closer to a situation in which musical collages can receive legitimate commercial release.