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How Sample Clearance Has Affected Hip-Hop Music-Making

By Bryan Brewster

Abstract

This paper will explain how sample clearance has impacted hip-hop music-making. It will explain what a sample is and show the historical significance of sampling in hip-hop. I will briefly discuss the basics of copyright and the process of clearing a sample. This paper will also look into legal cases of copyright infringement to show the impact of specific cases and analyze data to determine if the amount of sample clearance has changed because of the decisions of the courts. The main goal of this paper is to highlight the significance of sampling in hip-hop, the inherent challenges of legally clearing samples, and the effect copyright laws have on hip-hop music-making.

Introduction

Hip hop icon Questlove has said, "More and more producers of hip hop will fall in the cracks and make mediocre records to hide the fact that they can't make up for not having a stable alternative to sampling...as for me I will one day devote my life to establishing fairer sampling laws" (qtd. in Marshall 887). Questlove has this sentiment toward sample clearance and producers trying to recreate the sound of a sample because he knows what it's like to do both. Questlove and his band The Roots have released 14 studio albums, and in the process of making those albums, they used samples and got sampled multiple times. One example is they sampled "Fantastic" by Slum Village, which was produced by one of the most prolific sample-based producers, J Dilla, for their song "Dilltastic Vol Wun(derful)." Another example of The Roots using a sample is when they sampled themselves for Kendrick Lamar's track "The Heart Pt. 2"

using their own song “A Peace of Light.” So though the Roots have moved away from sampling, it’s not that Questlove and the rest of the group don’t know how to sample, but that it’s not advantageous and cost-effective to sample. Quest explains this by saying, “you don’t know the pain it is to give up mid-5 figures to a group of people (record label/publishing company) who ain’t even the artist. the [sic] pain” (Marshall 868). This quote demonstrates a general frustration that many sample-based producers face. Not only do they have to pay a substantial fee, which alone would turn away most producers, but that money isn’t even going to the person who made the sample.

These statements from Questlove are from the early 2000s, so this reluctance to sample has been around for more than half of hip-hop’s life. Questlove says it’s like “giving up your firstborn” to stop using samples (qtd. in Marshall 868). It makes sense that he feels this way because he spent a lot of time and energy getting proficient at sampling just for it to become nearly impossible to do and still make a profit. Back in the early days of hip-hop, when the “firstborn” was still growing, it was much easier, more efficient, and more effective to sample.

Introduction to Sampling in Hip-hop

In order to explain the significance of sampling I must first define what a sample is. A sample as defined in this paper is a preexisting recording or print/composition of music used in a new musical context. An example of a recording being used as a sample is The Avalanches’ “Because I’m Me,” which uses sections of Six Boys in Trouble’s “Why Can’t I Get It Too.” The Avalanches re-recorded the vinyl and used the exact vocal in their track. An example of a compositional sample is in Logic’s “Warm It

Up,” which uses only the lyrics and not the recording from Nas’ “Life’s A Bitch.” It’s unconventional to call the use of just the composition as a sample but I find it necessary. In 2018 Juice WRLD used a compositional sample of a guitar section from Sting’s “Shape of My Heart” in his hit record “Lucid Dreams” (Jean). Juice WRLD didn’t get the compositional rights to use this interpolation, and now Sting owns 85% of the publishing for “Lucid Dreams” (Jean). If there is a need to buy a copyright license then it is considered sampling.

During the birth of hip-hop, vinyl sampling on a turntable was the only way to do it. Early founders of hip-hop like DJ Kool Herc and Grandmaster Flash exclusively used vinyl sampling. DJs honed their skills in finding samples, transitioning between them, and bringing to life a new sound out of old recordings. The identifying characteristics of hip hop manifested through “four principal elements: emceeing, disc jockeying (“DJing”), break dancing, and graffiti” (Evans 852). Hip-hop DJing was the first element that emerged in the early 70s and was credited to Kool Herc. Herc would find a section on a popular R&B record where the drums were isolated, and he would loop it (Evans 854). While Herc was doing this, his MC, Coke La Rock, would talk to the crowd in a rhythmic rhyme. These two elements were put together on August 11, 1973, and this date “is widely accepted within the hip hop community (as to when) hip hop was born” (Evans 854).

Throughout the next couple of years, more of the principal elements started to appear like Grand Wizard Theodore’s record-scratching and The Rock Steady Crew’s breakdancing (Berkman). Hip-hop grew exclusively as a live performance in the beginning, and parties hosted by Grandmaster Flash, Afrika Bambaataa, and The

Fabulous Five were the only way to hear hip-hop unless someone recorded the performance on a tape recorder. Eventually, 6 years after Kool Herc and Coke La Rock “created” hip-hop, “The Sugar Hill Gang released ‘Rapper’s Delight (1979),’ a song widely considered to be the first hip-hop track” (Berkman). “Rapper’s Delight” uses samples from “Good Times” by Chic and “Here Comes That Sound Again” by Love De-Luxe with Hawkshaw's Discophonia, and all three records came out in 1979. “Rodgers and Edwards (of Chic) immediately threatened legal action over copyright, which resulted in a settlement and them being credited as co-writers” (“Rapper’s Delight”). Rodgers didn’t like the track at first for using “Good Times” but later revealed that it’s “one of his favorite songs of all time” and that “‘Rapper’s Delight’ was just as much, if not more so, innovative and important” than the track it sampled (“Rapper’s Delight”). So the threat of copyright law has haunted hip-hop since the first record of the genre, and The Sugar Hill Gang got off easy and didn’t have to go to court or pay licensing fees for the usage of the samples. Later down the road artists wouldn’t have this luxury.

Introduction to Copyright

The impediments to sampling are largely the result of copyright laws. In the United States, these laws have their roots in the country’s early history, and “the Founding Fathers of this country formed the basis for U.S. copyright law and created the Copyright Act of 1790” (Cox 219). The Copyright Act of 1790 was created “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”

(qtd. In Cox 219). Essentially the first copyright law “gives a copyright owner the exclusive right to do and to authorize others to reproduce the work, [and] prepare derivative works based on the original” (Evans 873). This right is given to the owner “automatically when a work is fixed for the first time in any tangible medium of expression in a copy or phonorecord” (Evans 872). When someone breaches the copyright and uses a work “without right, permission or legal defense-exploits one or more of the exclusive rights of the copyright owner,” it is classified as infringement (Evans 874).

There have been multiple revisions of the Copyright Act since 1790, and the three most famous revisions for music are from 1831, 1971, and 1976. The 1831 Copyright Act gave musical compositions and lyrics protection for the first time (Evans 880). The 1971 Copyright Act provided “copyright protection for sound recordings to prevent the piracy of albums” (Evans 881). The main goal of this revision was to stop the \$100 million piracy market that essentially had no repercussions from copyright infringement (Evans 881). The New York Times found that pirated records and tapes were “costing the composers of the world \$20 million a year in royalties” in 1971, and that tapes took up a significant percentage of this market (Hamilton). The biggest change to copyright law happened in 1976. The Senate Committee found that the “(protection of musical compositions and protection of sound recordings) were not parallel” (Evans 883). This would result in the creation of a federal law making people acquire two licenses in order to use recorded copyrighted material. One license would be for the musical composition and another for the recording. This clause is why Questlove and The Roots would remake samples, because instead of paying for two

licenses they would only have to pay for one, the composition rights, which are often easier to acquire.

The Process of Clearing a Sample

The process of clearing a sample in the producer world seems to be filled with an infinite amount of nuances and mysteries. There isn't one clear-cut way of getting in contact with the rights holder and negotiating a fair licensing agreement. However, there are general copyright laws that need to be followed.

As previously mentioned, there are two separate licensing agreements that need to be made before legally using a sample. The agreement that always needs to be made when using a sample is the composition copyright "which is the underlying melody" and lyrics (Fowlkes). The other copyright is the "sound recording (master)copyright which is the recorded version of a song" (Fowlkes). Licensing both seems easy enough until the time comes to find the owners of these copyrights. Most of the time big records that are sampled are created by multiple people who have split the rights of the song between themselves. This split is common when it comes to the composition copyright because in most major label-produced songs there are multiple songwriters and producers. This means that a producer would need to work out an agreement with each individual owner because "to rightfully clear a sample you need 100% authorization from the owners of the sound recording and the composition" (Fowlkes). It's usually a little easier with the recording copyright because "the most relevant scenario for an artist operating at the major label level is ownership of the sound recording (master) is granted to the major label" (Fowlkes). If the artist that is

sampling a record is part of a major label most of this licensing process is handled by an entertainment attorney, but if they're an independent artist they have to do it on their own.

How Copyright Law has Affected Hip-hop Music-making

One of the landmark cases that brought about a change to sampling in hip-hop was “Grand Upright Music, Ltd. v. Warner Bros. Records Inc. which altered the landscape of hip-hop, finding that all samples must be cleared with the original artist before being used” (“Biz Markie”). Before this ruling, “sampling was cheap” or free in some cases, “and by 1989, hip-hop artists were using them [samples] by the score” (McCormick). Hank Shocklee, a member of the Bomb Squad, recounts that they “couldn’t afford to have a guitar player come in and play on our record. We couldn’t afford to have that horn section...or the string sections” (McCormick). Shocklee states that the Bomb Squad were “like scavengers, going through the garbage bin and finding whatever we could from our old dusty records” (McCormick). With today's average copyright licenses costing anywhere from \$2,000 to \$10,000, it’s cheaper to hire a horn section than to sample one (McCormick). After the Grand Upright decision, “the art of sampling now bore the label of an obvious example of copyright infringement under U.S. copyright law” because of how plainly the judge ruled the case (Cox 229). The justice ruling on the case considered sampling the same as stealing if no copyright licenses were acquired (Cox 229).

Another case that changed copyright law and sampling was Bridgeport v. Dimension Films. This case centered on the “use of a digital sample of both the

Funkadelic musical composition and sound recording of 'Get Off Your Ass and Jam' ('Get Off') in N.W.A.'s rap song '100 Miles and Runnin' ('100 Miles')" (Evans 885-886). The sample in question was a two-second-long, arpeggiated guitar chord from "Get Off" that looped in "100 Miles" for forty seconds (Evans 886). Dimension Films argued that the sample fell under *de minimis* or fair use because the musical elements were unoriginal and that the sample was "insubstantial" to "100 Miles" (Evans 887). *De minimis* is "copying that is so trivial and insignificant that no liability can result" (Evans 876). The first court found that "the sample did not amount to a 'legally cognizable appropriation,'" and the court granted Dimension Films' motion for summary judgment, but the plaintiff appealed (Evans 888). This inevitably didn't go in Dimension Films' favor as they "did not contest that the sample was in fact digitally copied directly from the sound recording rather than re-created" (Evans 887). On appeal "the court attempted to justify its ruling by concluding that if one cannot pirate 'the whole,' one cannot copy less than the whole without permission either" (Evans 888). This case ultimately established that:

[T]he analysis that is appropriate for determining infringement of a musical composition copyright is not the analysis that is to be applied to determine infringement of a sound recording. In most copyright actions, the issue is whether the infringing work is substantially similar to the original work. The scope of inquiry is much narrower when the work in question is a sound recording. The only issue is whether the actual sound recording has been used without authorization. Substantial similarity is not an issue. (LexisNexis)

In a similar case in 2009, *Saregama India v. Timothy Mosley*, Mosley used a one-second snippet of an “Indian sound recording titled ‘Bagor Mein Bahar Hai’ (“BMBH”)” (Evans 890). Instead of the court focusing on whether a piece of the recording was used, it focused on the piece as a whole and whether there was substantial similarity: “[t]he court found that other than the one-second snippet, the songs did not bear any similarities and therefore no copyright infringement existed” (Evans 891). This was a massive win for sampling, but “a split emerged in the federal circuits regarding copyright protection afforded [to] sound recordings” (Evans 893). After this ruling copyright law has been left in a confusing state making copyright infringement determined on case-by-case bases.

Dr. Amanda Sewell, a Ph.D. in musicology graduate from the Indiana University Jacobs School of Music, finds analytical and empirical data showing how sample clearance has affected “sample-based hip-hop artists the Beastie Boys, De La Soul, Public Enemy, Salt ‘n’ Pepa, and A Tribe Called Quest.” Sewell recorded data from these five groups and showed how many samples they used per track and how it “changed quantifiably over approximately a ten-year span” (see fig. 1).

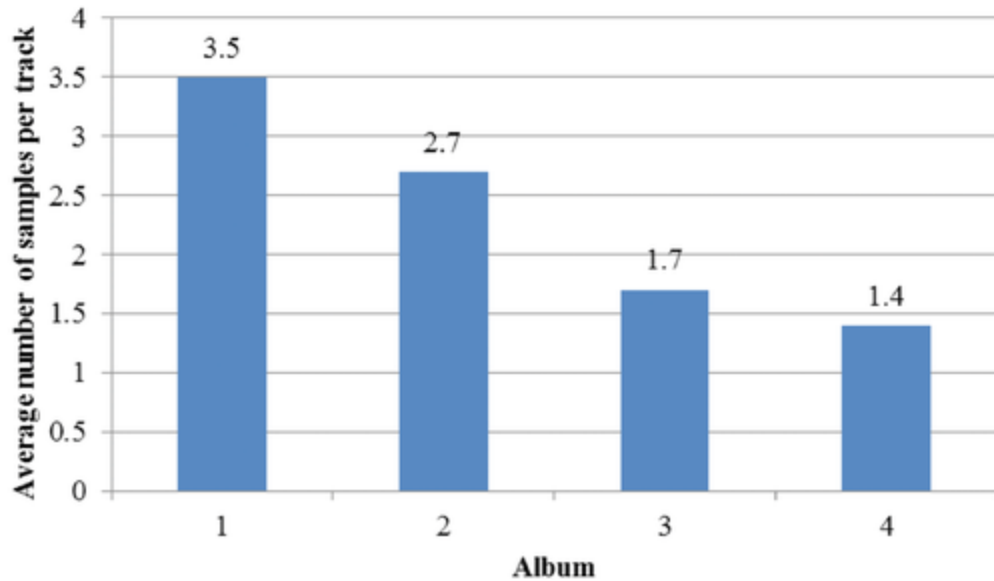


Fig. 1 “Average samples per track in albums 1, 2, 3, and 4 by the Beastie Boys, De La Soul, Salt 'n' Pepa, and A Tribe Called Quest” (Sewell)

Sewell’s data shows how drastic the drop in the number of samples was over this time period for the five groups. Sewell finds that “the sheer number of samples each group used begins to drop in 1991” which makes sense because that is when the Grand Upright Music, Ltd. v. Warner Bros. Records Inc. case was decided.

Another quote from Questlove seems to perfectly articulate how expensive copyright licenses directly affect hip-hop music making: “We regret to inform you that due to the asinine, leech-like, Wall-Streetified sampling-publishing laws that plague hip-hop music, you’ll be unable to witness the miracles that Cash Money creates on the one-and-twos. Unfortunately, we have to leave you with this” (Marshall 878). Questlove says this at the end of the track “For The Love of Money.” Cash Money was supposed to close The Roots’ album *The Roots Come Alive* (1999) with classic record scratching,

but since it would cost too much to clear it was cut from the track. The effect of copyright laws are not only found in analytical data but also in artist sentiment.

The Current State of Sample Clearance

In tandem with this paper, I created a sample-based EP where I attempted to clear samples legally. I used digital and analog sampling techniques to demonstrate the difficulties of clearing both. I used third-party services like Tracklib which advertises itself as a “subscription service for cleared samples” (“How It Works”). Tracklib essentially clears samples and prepares licenses in a tiered system based on the sample used. Tracklib then has predetermined splits negotiated with the sampled artist based on how much of the sample is used. The more of the sample used, the higher the royalty cut is (“How It Works”).

The EP consists of 11 tracks all using one or more samples. Six tracks used samples from Tracklib, and five tracks used samples from other sources. I was successful in legally clearing all six samples used from Tracklib because of how streamlined the process was. I didn’t have to wait for a response or negotiate a licensing fee with the rights holder because they already did it for me. I still had to follow a significant amount of rules in order to follow Tracklib’s contract. I couldn’t use more than 60 seconds of the sample; their contract requires that “[t]he Derivative Work must be substantially different from the Sample;” and the new track must have a different name, just to name a few rules I had to follow (“Tracklib Sample License”). Another rule that I thought was interesting was that I had to register each song to my performing rights organization, which was BMI (“Tracklib Sample License”).

As for trying to clear the other samples used, I tried to get in contact with the rights holders of the masters and compositions of the five samples I used, but not a single rights holder contacted me back to negotiate licensing fees or splits. For some of the samples, I tried to contact the artist directly on social media but this also failed. My next attempt to get these tracks cleared is a bit nefarious. I will be releasing the unlicensed samples onto streaming services, and my hope is that the rights holders will contact me with a threat of copyright infringement. Once that happens I may be able to negotiate damages for their work, licensing fees, and royalty rates for continuing to use the sample.

In the end, for every Tracklib sample I used I only had to pay a \$50 advance or upfront fee, and I am obligated to give the sampled artist 20% of the royalties I make. I am supposed to pay the artist 20% semi-annually, and it all goes through Tracklib and my distributor Distrokid ("Tracklib Sample License"). So for \$300 and 20% of the publishing, I was able to legally release six tracks using samples, which is an amazing deal compared to the average amount a sample would cost traditionally. In one of ?uestlove's blog posts he laid out how Slumvillage had to pay \$78,000 in licensing fees and 100% of the song royalties because of a few James Brown samples (Marshall 877). This is an extreme example, and most of the time the price ranges from \$2,000 - \$10,000 per license, which is still significantly more than \$50 per license (Fowlkes, Evans, Marshall).

Conclusion

It's undeniable that sample-based hip-hop and copyright law are forever tied together. Hip-hop famously and inherently uses samples, and it is now the most popular genre in America. Sampling is one of the founding principles that let hip-hop exist and should be protected to uphold the culture. I don't find it surprising that once the genre became "mainstream" all of a sudden legal issues started arising because there is only one thing the music industry cares about: not the well-being of artists, not the culture of people of color, not the advancement of artistic expression, not the protection of piracy, but money. Obviously, there are cases where artists have gotten exploited because of sampling, but after all the research I did about copyright cases, I found that a vast majority of cases were between big labels. If the music industry didn't care about the money, I believe this quote from Judge Easterbrook would be the mentality on sampling:

Intellectual (and artistic) progress is possible only if each author builds on the work of others. No one invents even a tiny fraction of the ideas that make up our cultural heritage. (qtd. in Evans 845)

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