

**Troubles with Samples – Music
Sampling as Quotation and Pastiche
under UK Copyright Law**

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I. Introduction

Music sampling, the technique of incorporating portions of a past song into new songs, is a popular musical practice in hip hop and electronic music. Whether this form of reusing others' music constitutes "theft" or "art" has long been controversial, and its legal position has never been certain in the United Kingdom (UK). Sampling artists either assume unauthorised sampling would constitute copyright infringement, or fear being sued by record companies, so they would almost always pay licensing fees to record companies for authorised sampling uses. However, with the rise in licensing fees, sampling has become increasingly unaffordable, leading to concerns that copyright law has stifled such forms of creativity.

As the current legal position of music sampling is unsettled in the UK, this essay will discuss how the copyright law should ideally deal with this issue without excessively hampering artistic and cultural development. Although there is extensive literature about the issue in the United States (US), there has been little relevant literature in the UK and previous academic suggestions mainly focused on modifying the licensing practice.¹ Instead, this essay suggests that the existing statutory quotation² and pastiche³ defences introduced in 2014 would already have great potential in accommodating fair sampling practices in the UK if the provisions are interpreted liberally. Past legal literature also did not discuss in detail how the fair dealing mechanism should apply to sampling, so this essay will attempt to fill in the gap in the discourse with reference to both legal and musicological resources. The overall aim is to propose a liberal interpretation of the existing legal mechanism in the UK that

¹ Sabine Jacques, 'Mash-Ups and Mixes: What Impact Have the Recent Copyright Reforms Had on the Legality of Sampling?' (2016) 27(1) Ent. L.R. 3.

² Copyright, Designs and Patents Act 1988 (CDPA), s 30(1ZA).

³ CDPA 1998, s 30A.

would provide greater allowance for unlicensed but fair sampling practices.

The legal and factual background of the issue will first be examined in Section II, followed by explanations of why most instances of sampling fall under the quotation and pastiche defences in Sections III and IV respectively. The application of the “fair dealing” analysis to sampling will then be discussed in Section V, followed by a discussion of why the alternative solution of a compulsory licensing scheme is less desirable in Section VI. Section VII would finally summarise the arguments raised in this essay.

II. Music Sampling and its Current Fate

Music sampling, or digital sampling, is the process of digitally copying a section of an existing sound recording (called a “sample”) and inserting it into a new recording.⁴ The sample may be reproduced exactly or altered by changing its pitch, rhythm, speed, tone, timbre or volume.⁵ The sample can be inserted at various intervals, or “looped” in continuous repetition as a rhythmic background.⁶ The overall sound can also be modified by combining different samples, superimposing one onto another and incorporating effects like reverse, reverb and echo.⁷

Music sampling originated in Jamaica in the early 1960s, was popularised in the US, and later introduced into the UK. It initially consisted of disc jockeys collaging the most danceable

⁴ Spenser Clark, 'Hold up: Digital Sampling, Copyright Infringement, and Artist Credit through the Lens of Beyonce's Lemonade' (2019) 26 J Intell Prop L 131, 136.

⁵ Rachael Carnachan, 'Sampling and the Music Industry: a Discussion of the Implications of Copyright Law' (1999) 8(4) Auckland U L Rev 1033, 1035.

⁶ *ibid.*

⁷ Accuson Blog, 'The past and the future of music sampling' (22 February 2017) <<https://blog.accuson.com/past-future-music-sampling-118/>> accessed 27 August 2021.

sections of songs for partygoers in dance clubs, which later developed into dedicated sampling recordings.⁸ The musicians were initially free to use sampling as they pleased and often included sample-heavy beats in their pieces,⁹ until sample clearance practices emerged in the late 1990s.¹⁰ Since then, sampling artists have to “clear” their samples by seeking permission from record companies and paying licensing fees before sampling.

Since sampling involves the reproduction of another recording, music sampling, especially unlicensed sampling, is sometimes labelled as involving “theft”.¹¹ However, this negative label is unjustified as sampling has great artistic and cultural value. Copying and borrowing from others is commonplace in music and can be found even among famous classical composers like Bach, Beethoven and Brahms.¹² For example, Brahms quoted sections from Wagner’s “Tannhäuser” in his Symphony No.3, which was interpreted as a tribute to his deceased artistic rival, signifying an end to their artistic dissension.¹³ Such practices of musical borrowing are not only considered acceptable, but are even hailed as great art.

⁸ Kembrew McLeod, ‘Musical Production, Copyright, and the Private Ownership of Culture’ in Justin Lewis and Toby Miller (eds), *Critical Cultural Policy Studies: A Reader* (Wiley-Blackwell 2003) 246.

⁹ *ibid.*

¹⁰ Justin Morey, ‘Copyright Management and its Effect on the Sampling Practice of UK Dance Music Producers’ (2013) 3(1) *IASPM Journal* 48, 55

<https://iaspmjournal.net/index.php/IASPM_Journal/article/view/589> accessed 27 August 2021.

¹¹ Olufunmilayo B Arewa, ‘From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context’ (2006) 84 *NC L Rev* 547, 580-581.

¹² J Michael Keyes, ‘Musical Musings: The Case for Rethinking Music Copyright Protection’ (2004) 10 *Mich Telecomm & Tech L Rev* 407, 427.

¹³ Charles Michael Carroll, ‘Musical Borrowing — Grand Larceny or Great Art?’ (1978) 18(1) *College Music Symposium* 11, 18.

In particular, sampling serves the cultural functions of paying tribute and homage to other musicians, bringing back forgotten tunes and breathing new life into the borrowed music. For example, different hip-hop artists sampled the works of the deceased rapper “The Notorious B.I.G.” as a way to pay tribute,¹⁴ and Ariana Grande paid homage to Brenda Russell by sampling the latter’s “A Little Bit of Love”.¹⁵ Sampling may also help to preserve the legacy of the sampled author, like how the sampling of George Clinton’s songs in the 1980s helped to repopularise his music among the new generation, leading to a republication of his old albums which were originally in risk of being forgotten.¹⁶ Sampling can therefore help the sampled pieces last in public memory for a longer duration. Moreover, sampling artists can build on previous musical pieces and breathe new life into the quoted music, so that the sampled music is not “stolen” but is revitalised in a new context. For instance, when “Electric Counterpoint” by Steve Reich was quoted in “Little Fluffy Clouds” by the Orb, Reich’s music was also given a different, psychedelic flavour because of the new context.¹⁷ Music sampling therefore has great artistic and cultural value in paying homage to other artists, preserving the legacy of the sampled musicians and revitalising the sampled music.

Despite the substantial artistic and cultural value of music sampling, the current copyright framework does not accommodate this sampling culture well. Under the UK Copyright, Designs & Patents Act 1988 (CDPA), copyright

¹⁴ Thisisdig.com, ‘Notorious B.I.G. Tributes: 10 Modern-Day Shout-Outs to Hip-Hop’s Best Rapper’ (15 September 2020) <www.thisisdig.com/feature/notorious-big-tributes-hip-hop/> accessed 27 August 2021.

¹⁵ Rory Seydel, ‘Stop Thinking of Sampling as Theft’ (*Hypebot*, 1 January 2016) <<https://www.hypebot.com/hypebot/2016/07/stop-thinking-of-sampling-as-theft.html>> accessed 27 August 2021.

¹⁶ William Michael Schuster, ‘Fair Use, Girl Talk, and Digital Sampling: An Empirical Study of Music Sampling’s Effect on the Market for Copyrighted Works’ (2015) 67(3) *Okla. L. Rev.* 443, 445-446.

¹⁷ Kevin Holm-Hudson, ‘Quotation and Context: Sampling and John Oswald’s Plunderphonics’ (1997) 7 *Leonardo Music Journal* 17, 19.

owners, typically record companies, enjoy exclusive economic rights to reproduce, distribute, perform, adapt and communicate the copyright works to the public.¹⁸ When a sampling artist takes a “substantial part” of a copyright-protected work,¹⁹ such as a sound recording, they would have reproduced that portion of the work and violated the copyright owner’s exclusive reproduction right, unless they have obtained permission from the owner and acquired a “licence” to use the work.²⁰ They would also have violated the distribution, performance and adaptation rights if they subsequently distribute and perform their sampling song, and have modified the sample without permission. Sampling artists would thus likely be liable unless they can rely on statutory defences.

In practice though, infringement lawsuits for sampling are rare in the UK, because sampling producers would almost always go through sample clearance processes and pay licensing fees, or would settle the cases outside court in fear of the high legal costs involved in litigation.²¹ Nonetheless, the sample clearance process is costly and has arguably stifled creativity in the industry. In 2011, the clearance cost of a substantial sample had risen to around £10,000 to £20,000 in the UK, approximately ten times that in 1998.²² Moreover, the copyright owners would often require a high percentage of the rights in the sampling song as the condition for granting publishing clearance. For example, a record company director once gave expert evidence in court that he had granted very few licences and would often require 50% or 100% ownership rights in the resultant piece in return for the clearance.²³ As the UK legal position has not been clarified by the courts, sampling artists often prefer to be prudent and seek clearance if in doubt. The threat of a court action would put the copyright owners in a very

¹⁸ CDPA 1988, s 16(1).

¹⁹ CDPA 1988, s 16(3)(a).

²⁰ CDPA 1988, s 16(2).

²¹ Morey (n10) 52.

²² *ibid* 55.

²³ *Ludlow Music Inc. v Williams (No.2)* [2002] EWHC 638; [2002] EMLR 29 [34].

strong bargaining position so that sampling artists have to reluctantly accept unfavourable terms during the clearance process.²⁴

When several British music producers were interviewed, some spoke of avoiding sampling altogether and merely using previous pieces as a source of inspiration. Some would have new musicians re-play the piece they want to sample, and others would only include unrecognisable snippets to avoid clearance.²⁵ Although these can be considered as creative ways to work around the restrictions, it remains the fact that the high clearance costs have restricted the development of this musical practice,²⁶ which could involve hundreds of samples in one album to create a dense collage in the past²⁷ but would now include only a few or no samples at all. If even professional artists fail to afford the clearance costs and have to avoid sampling, amateur samplers would be even more incapable to afford clearance costs and would be deterred from engaging in sampling. The artistic potential of sampling has therefore been limited by copyright and this culture cannot flourish unless the legal approach becomes relaxed.²⁸

The courts have mentioned that copyright should not “become an instrument of oppression rather than the incentive for creation which it is intended to be”.²⁹ While copyright can provide protection to the copyright holders and incentivise upstream creative production, it must also not excessively restrict and deter derivative creativity from downstream producers. It is both common and important for musicians to build on existing musical materials and works, so the law should allow certain leeway for musical borrowing and copying to contribute to

²⁴ Morey (n10) 53.

²⁵ *ibid* 57.

²⁶ Andrew Gowers, *Gowers Review of Intellectual Property* (The Stationery Office 2006), para 4.86.

²⁷ McLeod (n8) 248.

²⁸ *ibid* 249.

²⁹ *Nova Productions Ltd v Mazooma Games Ltd* [2007] EWCA Civ 219; [2007] Bus L R 1032 [55] (Jacob LJ).

musical creativity and diversity. In the British sampling industry, the balance has currently tilted excessively towards the record companies, because the prohibitively high clearance costs have deterred creative production from sampling artists.

As music sampling has significant artistic and cultural value, the law should adopt a more liberal approach to accommodate and even encourage creativity from sampling artists, to readjust the balance between upstream rights and downstream creativity. The following sections will discuss how this balance can be readjusted properly with reference to the statutory defences of quotation and pastiche.

III. Quotation

The quotation defence is provided by s30(1ZA) CDPA, under which copyright is not infringed by the use of a quotation from a work, provided the work has been made available to the public, the use of the quotation is fair dealing with the work, the extent of the quotation is no more than is required, and there is a sufficient acknowledgement of the quoted author. This is based on Article 5(3)(d) of the Information Society Directive (InfoSoc Directive),³⁰ which intended to implement Article 10(1) of the Berne Convention. To determine whether the quotation defence is applicable to sampling, the meaning of “quotation” needs to be ascertained.

(a) Type of work

We often speak of “quotation” as the excerpting of sentences or sections from another literary text and placing them in quotation

³⁰ Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (Information Society Directive).

marks in the quoter's work.³¹ However, there is nothing in the language of the CDPA or the Berne Convention that imposes restrictions on the applicable type of work. The quotation defence should apply to all types of works, including musical works and recordings. A commentary by the World Intellectual Property Organisation (WIPO) also suggests that Berne Convention Article 10(1) can apply to the taking of a "musical passage ... from a piece of music".³² In particular, music sampling has been referred to by musicians, composers and academics as "sonic quote", "audio quotation", "timbral quotation" and so on.³³ Music sampling would *prima facie* be considered as a form of "quotation".

(b) Requirements of "dialogue", "unaltered" and "distinguishable"

However, this issue is complicated by *Pelham v Hütter*, where the Court of Justice of the European Union (CJEU) introduces additional requirements for the quotation defence. This case concerns the sampling of a two-second rhythm segment from "Metall auf Metall" by the German band Kraftwerk, which is looped throughout the song "Nur mir" by Sabrina Setlur. In analysing whether the quotation defence may apply, the Advocate General (AG) suggests that the quotation "must enter

³¹ Tanya Aplin and Lionel Bently, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works* (Cambridge University Press 2020) 83.

³² Sam Ricketson, 'WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment' (SCCR/9/7, Standing Committee on Copyright and Related Rights of the World Intellectual Property Organization, 5 April 2003) 12 <https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805> accessed 27 August 2021.

³³ Aplin and Bently (n31) 91.

into some kind of dialogue with the work quoted”³⁴ and should be “unaltered and distinguishable”.³⁵

For the “dialogue” requirement, the AG explains that possible ways of interaction between the quoting work and quoted work include paying tribute, confrontation and so on.³⁶ The judges also agree with the AG on the requirement of “entering into a dialogue”, and suggest that this includes “illustrating an assertion”, “defending an opinion” or “allowing an intellectual comparison”.³⁷ Subsequently, the German Federal Court applies this “dialogue” test to reject the quotation defence on the basis that the defendant did not intend to interact with the plaintiff’s work.³⁸

However, such an understanding of “quotation” largely resembles that of literary quotations only, which are often used to express relatively concrete ideas, as opposed to musical quotations which involve relatively abstract musical relationships between the quoting and quoted pieces. An academic paper may quote the words by another scholar and comment on the argument raised; whereas a quoted musical segment may not contain any message or argument for subsequent musicians to comment on or compare with, but is merely quoted to create a musical effect. As musicologist Ballantine describes, a musical quotation can communicate an attitude toward the original occasion and create a “dialectic between ... the fragment and ... the new musical context”.³⁹ Quotation involves implanting a

³⁴ Case C-476/17 *Pelham GmbH v Hütter* EU:C:2018:1002, Opinion of AG Szpunar, para 64.

³⁵ *ibid*, para 65.

³⁶ *ibid*, para 64.

³⁷ Case C-476/17 *Pelham GmbH v Hütter* EU:C:2019:624, para 71.

³⁸ Lea Noemi Mackert, Christoph Hendel and Simon Hembt, ‘German Federal Supreme Court decides in spectacular music sampling case - for the fourth (and last?) time’ (*Lexology*, 1 May 2020) <<https://www.lexology.com/library/detail.aspx?g=dfb1dd85-7237-44ac-a727-05a9bdaa7075>> accessed 27 August 2021.

³⁹ Christopher Ballantine, *Music and Its Social Meanings* (Gordon and Breach 1984) 73.

musical segment into a new musical fabric or structure, through which the fragment and its associations are now to be understood.⁴⁰ For example, by quoting the “Westminster Chimes” in the piece “The Call of the Mountains”, composer Charles Ives has given the chimes a new role in the new musical fabric of an imaginary mountainous landscape.⁴¹ Even if the music is not related to any concrete programmatic elements like chimes and mountains, Ballantine suggests that implanting a quote into a new fabric would imply an abstract musico-philosophical attitude towards the original piece.⁴²

If we apply this understanding of musical quotations to *Pelham v Hütter*, we can see that the AG’s comments are unreasonably narrow and unsuitable for the arts. The AG suggests that the sampled extract being looped in the background is too short to allow any interaction, and that sampling is generally not used for comparative purposes, so it is not “a form of interaction but rather a form of appropriation”.⁴³ Nonetheless, despite the lack of concrete interaction or communication, the defendant can be considered to have interacted with the extract on a musico-philosophical level by implanting it into a new musical fabric — turning a segment that may originally evoke a fast-moving Trans-Europe Express train in “Metall auf Metall” into part of a strong rhythmic background that further energises Sabrina Setlur’s brisk rap in “Nur Mir”. The sampling artist has breathed new life into the sampled extract, and this act of implantation in all instances of music sampling would arguably constitute an interaction with the original piece, a communication of an abstract musico-philosophical attitude and an initiation of a musical dialogue, even though no concrete arguments or comments are being expressed. This broader interpretation of “dialogue” would suit musical quotations better, and music sampling thus understood would likely satisfy the “dialogue” requirement.

⁴⁰ *ibid* 74.

⁴¹ *ibid* 77.

⁴² *ibid* 87.

⁴³ *Pelham* (AG Opinion) (n34), para 67.

It is questionable whether this “dialogue” requirement is necessary in the first place though. The AG seems to have relied on the requirement in InfoSoc Directive Article 5(3)(d) that the quotation should be “for purposes such as criticism or review” and adopted this “dialogue” feature found in quotations for “criticism or review” as a unifying feature for all purposes of quotation.⁴⁴ However, Berne Convention Article 10(1), which the InfoSoc Directive intends to implement, has not given the examples of “criticism or review” as possible quotation purposes. Its language plainly has not indicated any additional “dialogue” requirement to be necessary. To add this requirement would be to unnecessarily restrict the scope of the quotation defence under the Berne Convention.⁴⁵ After Brexit, the UK is no longer bound by *Pelham v Hüütter*, so the UK courts may adopt an interpretation of CDPA that suits the Berne Convention better and reject this “dialogue” requirement altogether, or at least interpret “dialogue” in a broader sense that fits musical quotations better.

The “unaltered” requirement is also unjustified, because “quotation” often refers to transformative reuses in non-literary fields like music, paintings and films.⁴⁶ In particular, musical quotation has been described as reproducing a stylistic or timbral excerpt of a pre-existing work,⁴⁷ and capturing the overall timbre does not entail an unaltered exact reproduction. Theorist Holm-Hudson describes John Oswald’s sampling of Michael Jackson’s “Bad” as a timbral quotation even though Oswald truncated and rearranged the bass line and magnified Jackson’s whisper of “Who’s bad”.⁴⁸ What is being quoted is the sound quality or tone colour of Jackson’s music but not the harmony or melody, so such a stylistic or timbral quotation still qualifies as a musical quotation despite involving alterations. This shows that the quotation defence should not be limited to unaltered quotations.

⁴⁴ *ibid*, para 64.

⁴⁵ James Parish, ‘Sampling and Copyright -- Did the CJEU Make the Right Noises?’ (2020) 79 *The Cambridge Law Journal* 31, 34.

⁴⁶ Aplin and Bently (n31) 115-121.

⁴⁷ Holm-Hudson (n17) 18.

⁴⁸ *ibid* 21.

Finally, the “distinguishable” requirement is already covered by the condition of sufficient acknowledgement in s30(1ZA)(d) CDPA. The AG argues that the quotation must be easily distinguished as a foreign element so that the quoting and quoted work are dissociable from one another, like how a literary quotation is distinguishable by quotation marks.⁴⁹ However, as musical philosopher Bicknell concludes, there is no auditory equivalent to quotation marks.⁵⁰ The quoted extract can be stylistically similar to the quoting work and not highlighted by any particular musical device like pause or emphasis, but it does not cease to be an extract taken from elsewhere. Whether the quoted extract can be identified by listeners as foreign also depends on the listeners’ familiarity with the quoted work.⁵¹

As a solution, Bicknell proposes that a musical quotation is aesthetically effective as quotation only if the composer’s intended audience recognises it.⁵² Therefore, the lack of musical “quotation marks” or the failure of some people to recognise the quotation would not matter, so long as those familiar with the quoted work can recognise it. This approach fits the reality of musical quotations better than the search for auditory “quotation marks”, but cannot be directly applied for legal purposes, as it is difficult to identify the composer’s subjectively intended audience or define the degree of “familiarity” with the quoted work required. Instead, the existing requirement of sufficient acknowledgement already provides clear objective evidence of a quotation — so long as the quoted work is sufficiently acknowledged in the caption of the music video or description of the music album, listeners would know there is such a quote and those familiar with the quoted work would likely recognise it as a foreign quotation. If the quoted extract is unrecognisable, it has likely been so significantly altered that it has become

⁴⁹ *Pelham* (AG Opinion) (n34), para 65.

⁵⁰ Jeanette Bicknell, ‘The Problem of Reference in Musical Quotation: A Phenomenological Approach’ (2001) 59 *The Journal of Aesthetics and Art Criticism* 185, 187-188.

⁵¹ *ibid* 186.

⁵² *ibid* 188.

something new, amounting to the sampling artist's own original intellectual creation,⁵³ or the unrecognisable quote may be too insubstantial to be caught by the infringement standard in the first place,⁵⁴ so neither case would need protection from the quotation defence. In conclusion, instead of adding a "distinguishable" requirement, the courts should just apply the sufficient acknowledgement criteria without wrestling with the difficult questions of whether there are musical quotation marks and whether the extract is dissociable from the rest of the piece.

The UK courts should therefore either reject the requirements of "dialogue", "unaltered" and "distinguishable", or apply an interpretation consistent with musical quotations, in which case these requirements would not be hurdles to sampling.

(c) Length of quotation

There should also be no restrictions on the length of a quotation. Although a quotation is often described as a "partial extract"⁵⁵ or "melodic, stylistic or timbral excerpt" in the musical context,⁵⁶ it is not necessarily short and there are circumstances where quoting a work in full may be justified.⁵⁷ For example, AG Trstenjak suggested in the *Painer* case that a full quotation of a picture may be necessary to create the necessary material reference back to the work.⁵⁸ Similarly, some folk songs, popular jingles or simple tunes may be so short that full quotation is reasonably necessary to evoke the original work. The Berne Convention has also abandoned its original restrictive

⁵³ *Interlego A.G. v Tyco Industries Inc. and Others* [1989] AC 217 (PC) 263C (Lord Oliver), Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* EU:C:2009:465, [2009] ECR I-6569, para 37.

⁵⁴ *Pelham* (ECJ Judgment) (n29), para 31.

⁵⁵ Case C-145/10 *Painer v. Standard Verlags GmbH* EU:C:2011:239, Opinion of AG Trstenjak, para 212.

⁵⁶ Holm-Hudson (n17) 18.

⁵⁷ Sam Ricketson (n32) 12.

⁵⁸ *Painer* (AG Opinion) (n55), para 212.

formulation “short quotations” and only requires that the extent of quotation “does not exceed that justified by the purpose” and is “compatible with fair practice”.⁵⁹ Therefore, a long or full quotation should still fall within the “quotation” defence, but whether such quotation is justified would be assessed under the fair dealing mechanism.

(d) Purpose of quotation

Since the quotation needs to be justified by its purpose, a relevant question is what quotation purposes are allowed. InfoSoc Directive Article 5(3)(d) refers to “quotations for purposes such as criticism or review” and CDPA s30(1ZA) uses the phrase “whether for criticism or review or otherwise”, which led some commentators to suggest that the purpose must be analogous to criticism or review.⁶⁰ However, the original Berne Convention article contains no reference to any particular purpose, not even mentioning the possible purposes of “criticism or review”. In the explanatory memorandum for introducing the quotation defence into CDPA, the drafters also clarified that the phrase “or otherwise” is intended to ensure that UK copyright law “offers as wide a quotation exception as is permitted by EU law and not one limited merely to criticism and review”.⁶¹ This shows that the drafters’ intention was for s30(1ZA) to have broad applicability for various quotation purposes. The literal meaning of “or otherwise” has nothing to

⁵⁹ Case C-516/17 *Spiegel Online GmbH v. Volker Beck* EU:C:2019:16, Opinion of AG Szpunar, para 45.

⁶⁰ Jane Parkin, ‘The copyright quotation exception: not fair use by another name’ (2019) 19 *Oxford University Commonwealth Law Journal* 55, 79.

⁶¹ UK Intellectual Property Office, ‘Explanatory Memorandum to The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 (2014 No. 2361) and The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (2014 No.2356)’, para 3.4.3 <<https://www.legislation.gov.uk/uksi/2014/2356/memorandum/contents>> accessed 27 August 2021.

do with “analogous” either. The words “criticism and review” were likely there to provide possible examples but not to limit the scope of the provision. Quotations for “entertainment purposes” under Berne Convention Article 10(1) have also been referred to in the 1965 Committee of Experts report for the Stockholm Conference,⁶² so musical quotations for artistic, musical or entertainment purposes should be covered by the quotation defence as well.

The above analysis therefore shows that music sampling should fall within the quotation defence if the express requirements of s30(1ZA) are satisfied, including the requirements of sufficient acknowledgement and fair dealing.

IV. Pastiche

When *Pelham v Hüttner* returned to the German Supreme Court in 2020, the court held that the defences of quotation, parody and caricature would all fail, but left open the possibility that sampling could be permissible under the pastiche defence,⁶³ which is an optional exception in the InfoSoc Directive⁶⁴ previously not expressly adopted in Germany. The case might therefore have been decided differently in the UK, where there is a pastiche defence: s30A CDPA provides that fair dealing with a

⁶² Sam Ricketson (n32) 13.

⁶³ German Federal Supreme Court, ‘Bundesgerichtshof entscheidet über Rechtswidrigkeit des Tonträger-Samplings’ (The Federal Court of Justice decides on the illegality of phonogram sampling) (2020, Press release No. 046/2020) <<https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2020/2020046.html?nn=10690868>> accessed 27 August 2021; Julia Reda, ‘German Federal Supreme Court defends press freedom in two high-profile copyright cases, no resolution of sampling dispute’ (*Kluwer Copyright Blog*, 1 May 2020) <<http://copyrightblog.kluweriplaw.com/2020/05/01/german-federal-supreme-court-defends-press-freedom-in-two-high-profile-copyright-cases-no-resolution-of-sampling-dispute/>> accessed 27 August 2021.

⁶⁴ Information Society Directive (n30), Article 5(3)(k).

work for the purposes of “caricature, parody or pastiche” does not infringe copyright in the work.

Although put together in the same provision, the words “caricature”, “parody” and “pastiche” mean different things and should not be used interchangeably. Some European States treat the three concepts similarly, like Belgium which declared that the three concepts are too similar to be distinguished from each other.⁶⁵ However, they would likely be treated differently in the UK, as the Intellectual Property Office (IPO) provides separate descriptions for the three concepts respectively, stating that a parody “imitates a work for humorous or satirical effect”, a caricature “portrays its subject in a simplified or exaggerated way, which may be insulting or complimentary”, and a pastiche is “a musical or other composition made up of selections from various sources or one that imitates the style of another artist or period”.⁶⁶ IPO’s descriptions highlight at least two special features of “pastiche” that warrant its isolation from the other two concepts: Firstly, as opposed to “parody” being an expression of “humour or mockery”⁶⁷ or “caricature” being “insulting or complimentary”,⁶⁸ “pastiche” can have a complimentary or neutral connotation. Secondly, “pastiche” may include a compilation or mixture of different source materials. These two features of “pastiche” make it more suitable for describing sampling pieces which are musical mixtures not necessarily having any humorous intention.

⁶⁵ Frédéric Döhl, “The Concept of “Pastiche” in Directive 2001/29/EC in the Light of the German Case *Metall auf Metall*” (2017) 2 Media in Action 37, 49-50.

⁶⁶ UK Intellectual Property Office, ‘Exceptions to Copyright: Guidance for creators and copyright owners’ (2014) p.6 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/448274/Exceptions_to_copyright_-_Guidance_for_creators_and_copyright_owners.pdf> accessed 27 August 2021.

⁶⁷ Case C-201/13 *Deckmyn v Vandersteen* EU:C:2014:2132, [2014] ECDR 21, para 20.

⁶⁸ IPO Guidance (n66) p.6.

There is currently no settled legal definition of “pastiche”. CJEU has held in *Deckmyn v Vandersteen* that, since “parody” is not explicitly defined in the directives, its meaning and scope should be determined by considering its “usual meaning in everyday language”, taking into account the context of the provision and the objectives of the rules of which it is part.⁶⁹ This approach can similarly be applied to “pastiche”,⁷⁰ which has so far neither been considered by courts nor defined in statutes on both the national and European levels.

The word “pastiche” derived from the Italian word “pasticcio”, meaning a pie of various ingredients, and was referred to during the Renaissance as works where the author drew upon diverse techniques and styles.⁷¹ Today “pastiche” is mainly used in two senses, either referring to a combination of aesthetic elements or to a kind of aesthetic imitation, which align with UK IPO’s description.⁷² The first sense is more relevant to music sampling. However, commentators are divided as to the precise definition of “pastiche”, and a clear-cut binding definition has long been absent from the history of the arts.⁷³ For example, Hoesterey found nearly twenty different terms used by arts scholars to describe “pastiche”, from “adaptation” and “montage” to “plagiarism” and “travesty”, indicating how complex and inconsistent the discourse on the concept is in the arts.⁷⁴ In the context of sampling, commentators are also divided

⁶⁹ *Deckmyn* (n67), para 19.

⁷⁰ European Commission, ‘Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market’ (Brussels, 4 June 2021) 19 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0288&from=EN>> accessed 27 August 2021.

⁷¹ Ingeborg Hoesterey, *Pastiche — Cultural Memory in Art, Film and Literature* (Indiana University Press 2001) 1-4.

⁷² Richard Dyer, *Pastiche* (Routledge 2007) 1.

⁷³ Döhl (2017) (n65) 55; Frédéric Döhl, ‘On the New Significance of the Pastiche in Copyright Law’ in Berthold Over and Gesa zur Nieden (eds), *Operatic Pasticcios in 18th-Century Europe — Contexts, Materials and Aesthetics* (transcript Verlag 2021) 217-218.

⁷⁴ Döhl (2017) (n65) 55; Hoesterey (n71) 10-15.

as to the prerequisites for applying the concept of “pastiche”, disagreeing on issues like whether an intentional intertextuality recognisable by the audience or a “juxtaposition of disparate aesthetic systems” are required.⁷⁵ This led to some commentators like Döhl and Hui doubting whether the “underdeveloped” and “widely disputed” concept of “pastiche” could develop into a broad defence without compromising legal certainty and predictability.⁷⁶

Nonetheless, the “pastiche” defence arguably still has great potential. Despite scholars’ fine disagreements on the precise boundaries of “pastiche”, it seems generally true that the term is different from “parody” as it may accommodate neutral or non-mockery imitation and assemblage uses. Together with the fact that the statute specifically includes all three words instead of merely using the word “parody”, it is reasonably arguable that the statutory intention is for “pastiche” to cover its own type of exempted conduct. Therefore, despite its disputed meaning, it should still operate as a proper defence. The IPO can issue a clarificatory guidance document (discussed in Section VI below) explaining how “pastiche” is to be understood. IPO should just generally define “pastiche” to have its meaning in either the “imitation” or “medley” sense, without any fine musicological or philosophical restrictions. Borderline cases, like cases failing to meet certain fine artistic criteria, can be considered as “pastiche” first and filtered by the more flexible fair dealing mechanism, instead of rigidly excluding them from the meaning of “pastiche” and depriving them of legal protection altogether. Such a broad interpretation of “pastiche” has gained momentum in European legal literature,⁷⁷ and has

⁷⁵ Döhl (2017) (n65) 56-57.

⁷⁶ Döhl (2017) (n65); Döhl (2021) (n73); Alan Hui and Frédéric Döhl, ‘Collateral Damage: Reuse in the Arts and the New Role of Quotation Provisions in Countries with Free Use Provisions After the ECJ’s *Pelham*, *Funke Medien* and *Spiegel Online* Judgments’ (2021) 52 *International Review of Intellectual Property and Competition Law* 852, 860 and 882.

⁷⁷ Hui and Döhl (n76) 881.

also been advocated by Professor Hudson in the UK.⁷⁸ In its guidance document, the IPO can also provide examples of “pastiche” to illustrate its possible coverage, similar to how a new “pastiche” provision introduced in Germany in 2021 is expressly stated to cover “remix, meme, GIF, mashup, fan art, fan fiction, cover and sampling”.⁷⁹ Sampling should also be included as an example of “pastiche” in the UK. If this broad interpretation leads to an overshoot in permitted conduct, the flexible fair dealing mechanism would maintain the balance between upstream rights and downstream creativity.

V. Fair Dealing

One may object that a broad interpretation of the defences would disproportionately favour downstream authors by exempting them from infringement liability. However, this would be balanced by the courts’ consideration of fair dealing factors. For the two defences to apply respectively, s30(1ZA)(b) CDPA requires the use of the quotation to be “fair dealing with the work” and s30A(1) CDPA also requires “fair dealing” for the purposes of caricature, parody or pastiche. This allows the courts to balance between the copyright owners’ exclusive economic rights and the alleged infringers’ rights to freedom of expression⁸⁰ and freedom of the arts.⁸¹ The copyright owner’s

⁷⁸ Emily Hudson, ‘The pastiche exception in copyright law: a case of mashed-up drafting?’ (2017) 4 IPQ 346, 363.

⁷⁹ Hui and Döhl (n76) 881.

⁸⁰ Charter of Fundamental Rights of the European Union [2012] OJ C326/391, Article 11; given effect in UK Human Rights Act 1998.

After Brexit, the right to freedom of expression will continue to be protected under Human Rights Act 1998 and the devolution statutes, see UK Government, ‘Charter of Fundamental Rights of the EU Right by Right Analysis’ (5 December 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/664891/05122017_Charter_Analysis_FINAL_VERSION.pdf> accessed 27 August 2021.

⁸¹ Charter of Fundamental Human Rights of the European Union, Article 13, given effect in UK Human Rights Act 1998.

interest in restricting artistic reuses would also be balanced against the public interest in having a diversity of creative artistic products.

In the UK, fair dealing is traditionally based on factors set out by the courts but not the statute. In *Asbdown v Telegraph Group Ltd*, the Court of Appeal cited with approval an academic summary describing fair dealing as a “matter of fact, degree and impression” for which it is “impossible to lay down any hard-and-fast definition”.⁸² The most important factor to consider is whether the alleged fair dealing is commercially competing with the copyright owner’s exploitation of the copyright work and is a market substitute for the original work.⁸³ The next important factor is whether the original work has already been published,⁸⁴ followed by the third most important factor being the amount and importance of the work that has been taken⁸⁵ and whether the extent was necessary and justified with respect to the purpose of the dealing.⁸⁶ These factors still represent the current UK position, as they have been followed by the High Court recently.⁸⁷

There are currently no cases illuminating on how fair dealing would apply to s30(1ZA) and s30A CDPA, so it is difficult to predict how the courts would actually approach the issue. Instead, this essay would propose how the courts should apply the fair dealing evaluation to music sampling. The factor of prior publication can be dealt with quickly as virtually all sampled pieces have been published before. In the rare case that a quoted sample is unpublished, such sampling would unlikely be “fair”. The remaining two factors, commercial competition and

⁸² *Asbdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [2001] 3 WLR 1368 [70] (Lord Phillips).

⁸³ *ibid.*

⁸⁴ *ibid.*, *Hyde Park v Yelland* [2000] 3 WLR 215 (EWCA) [37] (Aldous LJ).

⁸⁵ *Asbdown* (n82) [70] (Lord Phillips).

⁸⁶ *Hyde Park* (n84) [37] (Aldous LJ); *Hubbard v Vosper* [1972] 2 QB 84 (EWCA) 94B-C (Lord Denning).

⁸⁷ *Duchess of Sussex v Associated Newspapers Ltd* [2021] EWHC 273 (Ch), [2021] 4 WLR 35 [154] (Warby J).

proportionality of the extent of work taken, would be discussed in detail below.

(a) Commercial competition and market effect

The UK fair dealing factor of commercial competition is similar to the requirement that the reproduction does not conflict with a normal exploitation of the work in Berne Convention Article 9(2) and the US fair use factor of market effect,⁸⁸ so the US approach may shed some light on this issue. In relation to sampling, the US courts have held that the enquiry must take account not only of harm to the original market (primary market) but also of harm to the market for derivative works (secondary market).⁸⁹ The primary market consists of the sales of the musical work or copies of the album, while the secondary market consists of collecting royalties and licensing the work for subsequent uses of the work by other artists. The analysis below would show that this fair dealing factor would unlikely pose difficulties to sampling artists.

(i) Primary market

In terms of the primary market, sampling works are unlikely to harm the sales of the sampled music. The sampling work and the sampled work are two different pieces. In the sampling work, the sample is accompanied by other musical segments resulting in a new overall flavour. The sampling work is not a market substitute of the sampled work but a different product possibly with a different consumer base: Those who love the original work may not buy the sampling piece only to listen to the sampled portion, whereas those interested in sampling music may have no interest in the original work anyways. This is especially true when the two pieces belong to different genres. For example, where a rap song sampled an easy-listening pop

⁸⁸ Copyright Act 1976 (US), s 107(4).

⁸⁹ *Harper & Row v Nation Enterprises* 471 US 539, 568 (1985).

ballad, a US court noted that “The two songs were utterly unlike and reached completely different markets. Certainly, nobody would have confused the songs. Few would have bought the rap song because it contained a portion of the original song.”⁹⁰

Not only are sampling works unlikely to harm the primary market, but they may even bring economic benefits to the sampled artists, as evident in an empirical study⁹¹ about the effect of music sampling on the market for copyright-protected music. The study looks at the album “All Day” from the musician Girl Talk, which is a collage of around 400 interwoven samples of copyright-protected music,⁹² and compares the sales of the sampled songs a year before and after the release of “All Day”. This album is particularly suitable for an empirical study because it was highly popular but was created without licensing any of the copyright works being sampled.⁹³ The study found that the average sampled song sold over 1300 more copies in the year after the release of “All Day” than the year before. This accounted for an aggregate sales increase of 3.2% and this increase is statistically significant to a 92.5% confidence interval.⁹⁴ This shows that the sampling of a copyright work may not harm the sales of the original copyright work, and may even boost their sales by reviving the listeners’ interest in the original work.

Moreover, even sampling for commercial purposes can satisfy fair dealing pursuant to this factor. As explained later in Section VI, a well-known sampler (who likely uses sampling commercially) may even be more likely to revive interest in a

⁹⁰ Melissa Eckhause, ‘Digital Sampling v Appropriation Art: Why is One Stealing and the Other Fair Use? A Proposal for a Code of Best Practices in Fair Use for Digital Music Sampling’ p.31, <<https://ssrn.com/abstract=3224724>> accessed 27 August 2021; citing *Jarvis v A&M Records* 827 F Supp 282, 295.

⁹¹ Schuster (n16).

⁹² *ibid* 446.

⁹³ *ibid* 463-464.

⁹⁴ *ibid* 474.

sampled work and bring economic benefits to the original author than a lay person who uses sampling non-commercially.

Meanwhile, if a sampling artist incorporates an excessively long quote that is unaltered, or if the sampling song taints the original song with a derogatory message that leads the audience to associate it with the original author, then the primary market may still be harmed. Where there is evidence of actual or likely harm to the primary market, it may point against fair dealing.

(ii) Secondary market

Even if sampling may bring benefits or no harm to the primary market, copyright owners may be concerned about the reduction of income from the secondary market. Nonetheless, this essay argues that effects on the secondary market should be left out from the fair dealing analysis.

Firstly, copyright owners may argue that the lost licensing fees from the defendant would constitute market harm.⁹⁵ However, this would involve circular reasoning in the form of “you should not be exempted from paying licensing fees to legally use my work (by relying on the statutory defences) because if you do I cannot receive licensing fees from you”. This would presume that the defendant is obligated to pay licensing fees, without explaining why that should be the case.⁹⁶ Moreover, if lost licensing fees would constitute market harm, then the more expensive the licensing fee of a piece is, the greater the amount of lost licensing revenue and market harm would be, and the more unlikely it constitutes fair dealing. This would mean that copying pieces with lower licensing fees would more easily qualify as fair dealing, but large record companies and famous artists that charge high licensing fees would more likely win against sampling artists and keep tight control over uses of their

⁹⁵ Sam Claflin, ‘How to Get Away with Copyright Infringement: Music Sampling as Fair Use’ (2020) 26(1) *BUJ Sci & Tech L* 102, 124.

⁹⁶ *ibid* 125.

work. Famous and expensive pieces would be kept off from musical borrowing. Not only does this exacerbate inequality in the music industry, but it also hampers the flourishing of a sampling culture where both expensive and cheap pieces can be sampled.

Secondly, some academics argue that allowing unauthorised sampling once may lead to a chain of other derivative works which diminishes the commercial value of the original piece. Under this view, when one sampler renews public interest in a particular sample, other samplers would also want to use the same popular sample. The market would become “flooded” with the same popular samples, and their commercial value would dissipate quickly.⁹⁷ As it is once put, “no matter how catchy a particular original song is, a proliferation of derivative works may render it so common that it loses its commercial appeal.”⁹⁸

However, there are several objections to this argument. One main objection is the difficulty in making a speculative assessment of whether one instance of unauthorised sampling would repopularise the sample to the extent that the market would become “flooded” with the same sample. The particular sample may not necessarily be requoted in a short while. Unless there is actual evidence that the sample is requoted excessively after the first instance of quoting it, the court is not equipped to predict the popularity of this sample in the future.

Even if this instance of unauthorised sampling has indeed led to a “flood” of derivative works of the same sample, this should not be a reason for denying fair dealing. If this phenomenon occurs, it means that the defendant’s sampling song has successfully renewed public interest in the plaintiff’s sampled song, benefitting the latter’s primary market. Moreover,

⁹⁷ Robert M Szymanski, ‘Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use’ (1996) 3 *UCLA Ent L Rev* 271, 321-322.

⁹⁸ Harvard Law Review Association, ‘A New Spin on Music Sampling: A Case for Fair Play’ (1992) 105(3) *Harvard Law Review* 726, 738.

the legacy of the sampled song would be more likely preserved among the listeners. To cite this “economic harm to the secondary market” to deny fair dealing would be to penalise such positive effects that the sampling culture can bring to the sampled song, as sampling artists are better off if they fail to revive interest in that sampled song. Therefore, this damage to the derivative market should not be counted in the market harm assessment of the fair dealing analysis. The factor of commercial competition thus understood should generally pose no difficulty to sampling artists.

(b) Proportionality of the extent of work taken

The next factor to consider is the extent of copying and its proportionality to the purpose of use. In general it is more likely to be fair if the extracted sample is short and relatively unimportant, but a long extract or full quote may also be fair depending on the circumstances.

For quotation, the court may consider whether the quotations are altogether too many and too long to be fair,⁹⁹ as well as the qualitative importance of the quotations.¹⁰⁰ The courts should not set a rigid limit on the number of seconds of a sample but should adopt a flexible assessment considering the general length and frequency of other similar samples and the overall context. For example, it may be fair for a sampling artist to quote the entirety of a long musical phrase to ensure musical coherence in one case, but unfair for another artist to quote the entire signature section of the sampled song given its importance to the quoted work. It would be a fact-sensitive question.

Applying this factor to *Pelham v Hütter*, the fact that only 2 seconds of music had been taken from the plaintiff’s piece (albeit repeated in the defendant’s piece) may point to a finding of fair dealing. The importance of the part copied is generally assessed in terms of its importance to the plaintiff’s work but not

⁹⁹ *Hubbard v Vosper* (n86) 94B-C (Lord Denning).

¹⁰⁰ *Ashdown* (n82) [70] (Lord Phillips).

the defendant's work,¹⁰¹ so the short 2-second sample is relatively unimportant to the plaintiff's work even though its repeated use may indicate its importance in the defendant's work. The short length of the sample should therefore outweigh its repeated use in the defendant's piece.

As for full quotations, as explained above in Section III, some folk songs, popular jingles or simple tunes may be so short that full quotation is reasonably necessary to allow listeners to recognise the work and appreciate the quotation. However, the explanatory memorandum to the 2014 UK copyright reform cautioned that, although there may be circumstances where quotation in full is permissible, in practice such a full quotation is much more difficult to constitute "fair dealing" than a shorter quotation.¹⁰²

For pastiche, the general principle of considering the length, frequency and qualitative importance of the extracts should also apply, but it can arguably accommodate long or full quotations better due to its emphasis on "mixture" or "medley" instead of "excerpt" as in the case of quotation. "Quotation" and "excerpt" usually refer to a partial extract of the original work, and according to the UK explanatory memorandum a full quotation is unlikely to be fair in most circumstances. On the contrary, a "mixture" or "medley" has no implications on whether their ingredients are partial extracts or entire works, so the inclusion of a full work as an ingredient of a mixture can still be fair for the purpose of pastiche. Whether including a long or full work is fair is still a fact-sensitive question, but it may more likely be fair under "pastiche" than under "quotation". For example, if the new work is entirely made up of two full quotations horizontally placed to each other, there is little sense of a "mixture" involved and the long length of the quotations would render them unfair under the general rule. However, if several extracts are vertically superimposed onto a full quotation, the full quotation may be considered justified for its role in the

¹⁰¹ *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416 (HL) 2426 (Lord Millett).

¹⁰² UK IPO Explanatory Memorandum (n61), para 3.5.7.

mixture as an overarching backbone to mix with the superimposed extracts and create varied musical textures. Therefore, in addition to considering the length, frequency and qualitative importance of the sampled extract, the court should give some leeway to long or full quotations that are justified for the purpose of “pastiche”.

This difference between the two defences also shows that pastiche is different and separate from quotation but not, as Professors Aplin and Bently suggest, a mere sub-group of quotation.¹⁰³ The two professors have suggested broadly interpreting “quotation” under Berne Convention Article 10(1) as covering most reuses of recognisable expressive material for expressive purposes,¹⁰⁴ so pastiche as a type of reuse would fall within the quotation defence as its subgroup. However, this understanding does not suit the UK CDPA regime and is unlikely to be adopted by the UK courts. Given that s30(1ZA) CDPA was introduced in 2014 as a separate subsection but not as an overarching umbrella provision, the legislative intention was likely for the quotation defence to be distinct from the pastiche defence. The former would focus on the excerpting of materials from other sources, and the latter would focus on aesthetic imitation or aesthetic combination, so their functions and emphases are different. Although there are overlaps between quotation and pastiche in relation to sampling, one difference may lie in the application of fair dealing — long or full samples may be unfair for the purpose of quotation but fair for the purpose of pastiche.

(c) Implications

The implications of the analysis above are that most sampling cases should qualify as fair dealing. The factor of prior publication is largely irrelevant as most sampled pieces have been published previously. The factor of commercial exploitation would unlikely pose difficulties to music sampling, because

¹⁰³ Aplin and Bently (n31) 124.

¹⁰⁴ *ibid* 138.

sampling works are unlikely to cause economic harm to the primary market and may even bring economic benefits by reviving interest in the sampled music. Reduction of licensing income from the secondary market should not be considered by the courts. The third factor, the proportionality of the extent of work taken, is a fact-sensitive question. It is generally more likely to be fair if the sampled extracts are short, infrequent and qualitatively unimportant. Longer or full quotations may also sometimes be considered as justified for the purpose of pastiche. Overall speaking however, an unfavourable finding under one factor is not conclusive, as the courts would weigh all factors to obtain an overall impression.

Under this liberal interpretation of fair dealing, it would be easier for sampling artists to use sampling fairly, upon which the quotation and pastiche defences would have permitted them to incorporate samples for free instead of having to pay expensive licensing fees every time. The existing CDPA regime therefore has great potential in accommodating a vibrant sampling culture so long as “quotation”, “pastiche” and “fair dealing” are interpreted more broadly.

VI. Rejecting the Compulsory Licensing Scheme

Alternatively, some academics have suggested implementing a compulsory licensing system with implied licences issued to the public for all musical pieces, so that record companies have no discretion to deny clearance and samplers can use any pre-existing musical piece so long as they pay.¹⁰⁵ The licensing fees would be based on a statutory rate,¹⁰⁶ which can be made more affordable than current fees. However, this is still insufficient in accommodating and facilitating a vibrant sampling culture. Amateurs who sample as a hobby may still fail to afford the licensing fees, especially if they want to create sample-heavy pieces that are common in hip-hop music, in which case the accumulated statutory licensing fees for the numerous samples

¹⁰⁵ Keyes (n12) 439.

¹⁰⁶ *ibid.*

can be high. Such creations by amateurs would unlikely harm the commercial interests of copyright owners, but could be prevented from emerging due to the requirement of licensing fees.

Other academics therefore argue that non-commercial uses should be exempted from payment of licensing fees altogether, and a compulsory licensing system should only apply to commercial uses.¹⁰⁷ However, the line between commercial and non-commercial uses may be hard to draw. For example, Girl Talk's aforementioned album "All Day" was released online for free and he encouraged free downloads and optional contributions,¹⁰⁸ but this album may have also helped to boost his fame and allowed him to earn more during his live performances. His use of sampling is not "commercial" in the conventional sense of selling one's works for profit, but is not entirely "non-commercial" either, as it does bring him economic benefits. Therefore, there may be difficulties in drawing a clear line of commerciality.

Moreover, this would in effect exclude commercial uses from the fair dealing mechanism, in turn unreasonably discouraging those commercial sampling practices which are fair and beneficial. The more well-known a sampler, the higher the number of listeners and the greater the positive market effects the sampler can bring to the sampled works. When a famous artist and an unknown person sample the same song, it is reasonable to expect that the famous artist would more likely renew public interest in the sample than the unknown person. These well-known artists would usually use the samples for commercial purposes, but they may potentially bring more benefits to the sampled author than non-commercial uses. The

¹⁰⁷ Bernd Justin Jütte, 'The EU's Trouble with Mashups: From Disabling to Enabling a Digital Art Form', (2014) 5 JIPITEC 172, Section 4 <www.jipitec.eu/issues/jipitec-5-3-2014/4094> accessed 27 August 2021.

¹⁰⁸ Elina Lae, 'Mashups – A Protected Form of Appropriation Art or a Blatant Copyright Infringement?' (15 February 2012), 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2003854> accessed 27 August 2021.

fair dealing mechanism should encourage such fair and beneficial uses even if they are commercial. Therefore, it is undesirable to require commercial uses to follow a compulsory licensing scheme and limit the fair dealing mechanism to non-commercial uses only.

Instead of establishing a new compulsory licensing system, a liberal application of the existing CDPA regime would already help to promote a vibrant sampling culture. Because it may be rare for cases of sampling to reach the courts, one way to effect a change is for IPO to publish a formal opinion to clarify the legal position of sampling. As suggested in the Hargreaves report, such opinion can be non-binding but courts should have a duty to take the report into account when adjudicating relevant cases.¹⁰⁹ IPO can therefore explain how “quotation”, “pastiche” and “fair dealing” should be interpreted, and clarify how licence-free music sampling practices can be fair and permitted under these existing copyright defences, so as to provide assurance to musicians to engage in sampling activities more boldly, and encourage copyright owners to be more accepting towards such sampling practices.

VII. Conclusion

Music sampling serves important artistic and cultural purposes, including paying tribute and homage to other musicians, bringing back forgotten tunes and breathing new life into the sampled music. Unfortunately, its development in the UK has been hampered by the high licensing fees and the lack of legal certainty. This essay therefore makes a case for a liberal interpretation of the quotation and pastiche defences to exempt fair sampling practices from copyright infringement and allow this art form to properly develop in the UK.

¹⁰⁹ Ian Hargreaves, ‘Digital Opportunity: A Review of Intellectual Property and Growth’ (May 2011), paras 10.22-10.23 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf> accessed 27 August 2021.

The quotation defence should apply to musical quotations and there should be no restriction on their length or purpose. Requirements that the quotation should be unaltered, distinguishable or involve a dialogue are also unjustified. As for pastiche, it is different from parody as it can have a commendatory or neutral connotation. Generally understood as an assemblage of works or a mixture of artistic ingredients, pastiche has the potential of covering the practice of music sampling. Therefore, sampling may fall within both quotation and pastiche defences.

Given the lack of cases discussing how fair dealing should apply to quotation and pastiche, the actual approach of the courts cannot be predicted, but the essay argues that the fair dealing mechanism should be interpreted liberally to enable sampling artists to adopt a fair sampling practice more easily. Most sampled pieces have already been published previously, and empirical evidence shows that music samples rarely compete with the commercial exploitation of the original pieces. If the sampled extracts are short, infrequent and qualitatively unimportant, they would likely be considered proportionate and fair. Meanwhile, commercial sampling uses should not be automatically excluded from fair dealing as they may bring economic benefits by reviving interest in the sampled work. Finally, clarifications on the legal position of sampling can be made in the form of an IPO opinion which the courts are bound to consider. It is hoped that a more liberal interpretation of “quotation”, “pastiche” and “fair dealing” as applied to sampling would encourage sampling artists to engage in sampling activities more boldly, and allow a vibrant sampling culture to develop.