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The UMG-EMI Merger And The Substitutability Of Sound

Law360, New York (May 18, 2012, 2:44 PM ET) -- Antitrust law and copyright law are two sides of the same coin: two different approaches designed to maximize consumer welfare. At the risk of oversimplifying each, antitrust limits unlawful monopolies; copyright lawfully allows limited monopolies.[1]

These complementary pillars of law have met thousands of times before, and meet again with Universal Music Group's intended purchase of EMI's recorded-music business. Critics of the deal cite increased anti-competitive risks given the expected market share that a combined UMG-EMI entity would hold.[2] Supporters sing of efficiencies. The resolution rests largely in the hands of antitrust regulators, such as the Federal Trade Commission and the European Commission.[3]

This article addresses whether the combination of (1) copyright law's unusually strict analysis of digital-sampling cases with (2) consolidation in the market to license sound recordings may result in undue pressure on digital samplers to obtain licenses at artificially increased prices.

Heads: Digital Sampling Under the Copyright Law

Recorded music is a hybrid animal under the copyright law. First, recorded music contains a musical composition. The musical composition is essentially the lyrics and music of a song.[4] It is separately copyrightable and protected by certain exclusive rights. Generally, the author or publisher of the song maintains the copyright in the musical composition.

Second, recorded music contains a sound recording. The sound recording is the result of fixing the sounds of the musical composition. The sound recording is separately copyrightable and protected. Generally, the record company, such as UMG or EMI, maintains the copyright in the sound recording.

Digital sampling, a technique often used in pop, rap, hip-hop and R&B, allows musicians to "digitally copy and remix sounds from previously recorded albums."[5] Sampling is a way to quote a prior work. Some artists use sampling to reward attentive listeners by evoking a memory or reinterpreting a familiar tune.[6] Alternatively, some musicians alter a sample so extensively that it is unrecognizable.

Artful quotation of prior works is a timeless practice.[7] For example, jazz musicians regularly use "standards" as a base line upon which to express original interpretation.[8] Despite the rich history of musical quotation, unlicensed digital sampling has drawn ire from some who see the practice as little more than a vulture culture.[9]

Digital sampling implicates both the copyright to the musical composition and the

copyright to the sound recording.[10] Unless the musician has first obtained a license to use the copyrights involved, a digital sampler may face an infringement lawsuit from the owner of either copyright. With respect to the use of the sound recording, at least one court applies unusually strict copyright law scrutiny to digital sampling — the Sixth Circuit under its Bridgeport opinion — and leaves samplers particularly exposed to costly infringement litigation compared to other musical quotation techniques.

In Bridgeport Music Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005), the Sixth Circuit considered the claim by the owner of the sound recording "Get Off Your Ass and Jam" that the rap song "100 Miles and Runnin'" featured an illegal digital sample of the sound recording.[11] The court decided to analyze claims of infringement of the sound recording differently vis-a-vis claims of infringement of the musical composition.[12]

The court refused to apply a "substantial similarity" analysis (i.e., whether the average listener recognizes that the alleged copy appropriated the copyrighted work) and refused to apply a de minimis analysis (i.e., whether the amount taken from the prior work is so small that the taking is not actionable), both of which are used when deciding whether a defendant infringed a musical composition copyright.[13]

Instead, the Sixth Circuit held that, when it comes to the sound recording, only the owner of a sound recording has the right to sample it.[14] By eliminating the chance that defendants could raise and establish the substantial similarity or de minimis defense, Bridgeport effectively increases the pressure on musicians to obtain licenses to sample sound recordings.

The Bridgeport rule is simple: "Get a license or do not sample."[15] The Sixth Circuit felt

Tails: The Proposed UMG-EMI Merger and Substitutes for Sound

On the other side of the coin, the proposed UMG-EMI merger would consolidate the industry by uniting two competing owners of sound recordings, which are the main inputs of digital sampling. This may raise antitrust concerns.[22] In general, mergers by actual or potential competitors, also known as “horizontal” mergers, can harm competition by

whether they would realistically hire a studio musician to mimic a sound recording in response to an increase in the price of a license to sample a particular work.[32]

acquisition of EMI recorded music business by Universal (March 23, 2012).

[4] Hum a few bars of your favorite tune. Yo

depend to a large degree on what musical knowledge, and what listening experience, the listener brings to the music. The more knowledge and experience one brings, the ‘larger’ the intentional object will be: the more there will be to it; for the more we know about the music, the more elaborate

[13] Although Sixth Circuit did not decide “whether the copying of a single note would be actionable,” id. at 800 n. 9, the court did ag

riff. The musician could then alter or remix the recording of the mimicked riff.

[30] Id.

[31] The antitrust agencies use the "hypothetical monopolist test" to define the relevant product market. FTC/DOJ Horizontal Merger Guidelines § 4.1.1. The test asks whether a "small but significant and non-transitory increase in price" of Product A would be profitable. If enough consumers substitute away from Product A in response to the increase in price and choose Product B instead, such that the increase in the price of Product A is not profitable, Product A and Product B are substitutes and belong in the same relevant product market. On the other hand, if after the price increase only a few consumers substitute away from Product A and choose Product B, such that the increase in the price of Product A is profitable, Product A and Product B are not substitutes and do not belong in the same relevant product market.

[32] See FTC/DOJ Horizontal Merger Guidelines § 4.1.3 ("In considering customers' likely responses to higher prices, the Agencies take into account any reasonably available and reliable evidence, including, but not limited to: ... information from buyers, including surveys, concerning how they would respond to price changes.").

[33] See FTC/DOJ Horizontal Merger Guidelines § 4.1.3 ("In considering customers' likely responses to higher prices, the Agencies take into account any reasonably available and reliable evidence, including, but not limited to: ... how customers have shifted purchases in the past in response to relative changes in price or other terms and conditions.").