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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 that such a "bright-line test" would benefit the music industry and the courts.[16] However, as the U.S. Supreme Court cautioned, "easy labels do not always supply ready answers."[17]

Not all courts have followed the Sixth Circuit's reasoning. In Saregama India Ltd. v. Mosley, 687 F. Supp. 2d 1325 (S.D. Fl. 2009), the district court expressly declined to follow the reasoning of Bridgeport. In this case, a company that claimed to be the owner of an Indian sound recording, "Baghon Mein Bahar Hai," sued Timothy Mosley (p/k/a Timbaland), Jayceon Taylor (p/k/a The Game), and others, alleging that a sample in "Put You on the Game" infringed the plaintiff's copyright in the sound recording. Opting to follow Eleventh Circuit precedent rather than Bridgeport, the district court found that a substantial similarity analysis is required for all infringement cases, including where the plaintiff claims that the defendant's digital sample infringed the copyright in a sound recording.[18]

When the court applied the substantial similarity and de minimis analyses, it found that the only part of the "Baghon Mein Bahar Hai" sound recording in "Put You on the Game" is "an approximately one-second snippet of a female vocal performance" that "is looped in the refrain of the ["Put You on the Game"] at 1:08, 2:03, 3:08, and 3:47."[19] Beyond this one-second loop, the court found that "the songs bear no similarities" and "are completely different songs, with different lyrical content, tempo, rhythms, and arrangements."[20] The judge granted summary judgment for the defendants, deciding that no jury (i.e., average listeners) could find the two songs substantially similar.[21]

It is unclear whether or when the courts will resolve this apparent circuit split. In the interim, the analysis applied when courts consider whether an unlicensed digital sample infringes the copyright in the sound recording is not uniform. A risk-averse musician will either get a license or not digitally sample. The desire to avoid exposure or liability puts increased pressure on digital samplers and their representatives to get a license to clear the sample.

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 reducing the number of competitors or by increasing the risk that remaining rivals may act in a coordinated, anti-competitive fashion.[23] The FTC reviews proposed mergers under the framework outlined in the FTC/DOJ Horizontal Merger Guidelines, the "unifying theme" of which is that "mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise."[24]

Allegations of anti-competitive coordination among rightsholders in the music industry are neither relic nor trend. The issue of market power in such cases is particularly thorny as the ownership of intellectual property, such as a copyright, is in play. It may be tempting to presume that ownership of intellectual property gives the owner market power in the antitrust sense, since others may not infringe the owner's limited monopoly right granted by law.[25]

Tempting though it may be, the antitrust agencies avoid this presumption: "Although the intellectual property right confers the power to exclude with respect to the specific ... work in question, there will often be sufficient actual or potential close substitutes for such ... work to prevent the exercise of market power."[26]

To add another layer of complexity, while the existence of market power alone does not generally impose a duty to deal with others, market power, even if lawfully acquired and maintained, is "relevant to the ability of an intellectual property owner to harm competition through unreasonable conduct in connection with such property."[27] For all its complexities, the estimated market power of UMG-EMI in a relevant market provides guidance as to the expected competitive impact of the proposed merger.[28]

A full analysis of the potential competitive impact of the merger, including impacts on markets in which record companies participate other than the market for licenses to sample sound recordings, is beyond the scope of this article. The discrete issue addressed here is whether the relevant market for licensing digital samples should include the mimic option referenced in Bridgeport.

In support of its simple "Get a license or do not sample" rule, the Sixth Circuit in Bridgeport cited the fact that musicians could imitate the prior work, rather than taking a digital sample, in order to achieve the desired effect.[29] The Sixth Circuit found that the mimic option would control the price of licenses to sample sound recordings: "The sound recording copyright holder cannot exact a license fee greater than what it would cost the person seeking the license to just duplicate the sample in the course of making the new recording."[30]

Translated to antitrust terms, the Sixth Circuit suggested that if the owner of the sound recording raised the price charged for a license to sample the sound recording, enough prospective customers would turn to the mimic option as a substitute that raising the price of the license would not maximize profits. This suggests that licenses to sample sound recordings and the mimic option should be in the same relevant product market.[31]

This passing statement in Bridgeport deserves a thorough antitrust examination, particularly in light of the proposed merger. The FTC and other antitrust regulators should take a close look at the market for licenses to sample sound recordings and carefully define its contours to ensure that the merger does not stifle creative sampling and innovation. For example, the FTC could survey musicians that use digital samples to see

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]

Query how many musicians would be surprised to learn that it is necessary — at least arguably necessary — to obtain a license from the owner of the sound recording before sampling and remixing a few notes from a CD currently located in the musician's car stereo. Another point of investigation could be whether the prices charged by musicians who specialize in mimicking sound recordings have increased since the Bridgeport decision in 2005, holding as many factors constant as possible.[33] Another point to consider is whether hiring studio musicians to mimic the sound recording is a realistic alternative for a customer that intends to sample a selection from a sound recording featuring a 100-piece orchestra.

Conclusion

Antitrust law and copyright law are two sides of the same coin; however, this coin cannot become a "heads-I-win-tails-you-lose" game for pioneering musicians. Given the heightened scrutiny placed on digital sampling after Bridgeport, musicians face increased pressure to get a license to sample a sound recording. It is possible — as with nearly any industry — that the proposed UMG-EMI consolidation would lead to higher prices, lower output, and a loss of original and innovative music.

The antitrust agencies should carefully consider a number of markets that the proposed UMG-EMI merger may affect, including the market for licensing sound recordings for sampling. Determining the substitutability of sound and properly defining the contours of relevant product markets would no doubt be challenging, but such efforts are an important step in understanding the possible consequences of the proposed merger.

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[1] "Antitrust law seeks to maximize efficiency by preventing monopolization or other forms of anti-competitive conduct. Intellectual property, while it does not generally create a monopoly, may in some cases permit or even encourage monopoly in order to give incentives for invention. That invention in turn may generate longer-term wealth gains to society." 1 Herbert Hovenkamp et al., IP and Antitrust: An Analysis Of Antitrust Principles Applied To Intellectual Property Law § 1.3b (2d ed. 2012).

[2] For example, on April 26, 2012, the Consumer Federation of America and Public Knowledge sent a letter to Senators Herbert Kohl and Michael S. Lee of the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights. (Hereinafter "CFA-PK Ltr.") The letter states, "the UMG-EMI merger poses a significant threat to competition and demands close scrutiny and vigorous remedy by the Federal Trade Commission (FTC)" and "[t]he merger will dramatically increase the concentration of control over sound recordings of popular music – current albums, catalogue albums and deep catalogue albums — to which competing distribution models must have access to succeed." CFA-PK Ltr. 1-2.

[3] On March 23, 2012, the European Commission announced that it "opened an in-depth investigation under the EU Merger Regulation" into the proposed deal. Press Release, European Commission, Mergers: Commission opens in-depth investigation into proposed

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

[4] Hum a few bars of your favorite tune. You have identified the musical composition.

[5] Julie E. Cohen et al., Copyright In A Global Information Economy 449 (2d ed. 2006). Judge Schroeder, writing for the Ninth Circuit, described the genesis and development of digital sampling:

> Sampling entails the incorporation of short segments of prior sound records into new recordings. The practice originated in Jamaica in the 1960s, when disc jockeys (DJs) used portable sound systems to mix segments of prior recordings into new mixes, which they would overlay with chanted of "scatted" vocals. See Robert M. Szymanski, Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use, 3 U.C.L.A. Ent. L. Rev. 271, 277 (Spring 1996). Sampling migrated to the United States and developed throughout the 1970s, using the analog technologies of the time. Id. The digital sampling involved here developed in the early 1980s with the advent of digital synthesizers having MIDI (Musical Instrument Digital Interface) keyboard controls. These digital instruments allowed artists digitally to manipulate and combine sampled sounds, expanding the range of possibilities for the use of pre-recorded music. Whereas analog devices limited artists to "scratching" vinyl records and "cutting" back and forth between different sound records, digital technology allowed artists to slow down, speed up, combine, and otherwise alter the samples. See id.
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> Newton v. Diamond, 388 F.3d 1189, 1192 (9th Cir. 2004).

[6] Although in a different musical context, this musician-listener interaction is similar to Peter Kivy's description in his "Introduction to a Philosophy of Music":

> Music, when listened to seriously ... is an intentional object of the listener's attention. And what intentional object it is will depend upon what beliefs the listener has about the music. In particular, it will

> 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 our description of it will be, and the more elaborate our description, the more features, literally, the intentional object, the music, will possess for us to appreciate.

Peter Kivy, Introduction To A Philosophy Of Music 81 (2002).

[7] See generally Note, Jazz Has Got Copyright Law And That Ain't Good, 118 Harv. L. Rev. 1940, 1960 (2005) (referencing digital sampling and stating, "The originality of composition in digital music is twofold. It comes from manipulating the underlying sound or compiling the sounds in a new way, creating a kind of aural collage. Additionally, digital musicians lay claim to underlying works much in the same way as jazz musicians do: both are 'intermediate users' whose art requires a degree of appropriation.").

[8] Id. at 1942 ("Generally speaking, jazz musicians use these standards as jumping-off points for their own spontaneous compositions, borrowing the harmonic skeleton and parts of the melody from the underlying standard.").

[9] Judge Duffy likened sampling to stealing:

> "Thou shalt not steal" has been an admonition followed since the dawn of civilization. ... [T]he defendants in this action for copyright infringement would have this court believe that stealing is rampant in the music business and, for that reason, their conduct here should be excused. The conduct of the defendants herein, however, violates not only the Seventh Commandment, but also the copyright laws of this country.

Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

[10] Cohen, supra, at 450.

[11] Bridgeport, 410 F.3d at 795. The infringement claim with respect to the underlying musical composition was not at issue. Id. at 796.

[12] Id. at 798.

[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 agree with the plaintiff that "no ... de minimis inquiry should be undertaken at all when the defendant has not disputed that it digitally sampled a copyrighted sound recording," id. at 798.

[14] Id. at 801.

[15] Id.

[16] Id. at 799.

[17] Broadcast Music Inc. v. Columbia Broadcasting System Inc., 441 U.S. 1, 8 (1979).

[18] Saregama, 687 F. Supp. 2d at 1339.

[19] Id. at 1338.

[20] Id.

[21] Id. at 1326-27, 1338.

[22] The Clayton Act prohibits mergers if "in any line of commerce or any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." 15 U.S.C. § 18.

[23] FTC/DOJ Horizontal Merger Guidelines § 1 (2010).

[24] FTC/DOJ Horizontal Merger Guidelines § 1.

[25] See, e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16 (1984) ("[I]f the Government has granted the seller a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power."), cited in FTC/DOJ Antitrust Guidelines for the Licensing of Intellectual Property § 2.2 n. 10 (1995).

[26] FTC/DOJ Antitrust Guidelines for the Licensing of Intellectual Property § 2.2.

[27] Id.

[28] Some estimates of a combined UMG-EMI market share that rely on digital/physical album sales data approach 40 percent. See, e.g., The Nielsen Company & Billboard's 2011 Music Industry Report, Jan. 5, 2012, p. 3, cited in CFA-PK Ltr. 1. While useful for some antitrust purposes, this may not be the most helpful market share approach when determining the possible anti-competitive impact in the market for licenses to sample sound recordings. It may be more valuable to use ownership of sound recordings as the relevant metric, although such an investigation may quickly devolve into an esoteric debate about the substitutability of genres, artists, or songs. Under an ownership metric, the combined UMG-EMI market share may be lower. See, e.g., Ed Christman, What Exactly Is An Independent Label? Differing Definitions, Different Market Shares, Billboard (July 18, 2011), http://www.billboard.biz/bbbiz/others/what-exactly-is-an-independent-label-differing-1005281802.story (identifying estimated 2011 Mid-Year market share by label ownership for UMG-EMI at approximately 30%, but noting that "This isn't a definitive market share either, since again there are many secret deals between indies and majors whereby it's hard to determine which entity actually owns the master.").

[29] Bridgeport Music Inc. 410 F.3d at 801. For example, if a musician wanted to quote a particular guitar riff from a prior recording, the musician could hire a guitarist to mimic the

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.").