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**Steal This Music: How Intellectual Property Law Affects
Musical Creativity**

By: Joanna Demers

Citation: JOANNA DEMERS, STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY (The University of Georgia Press, 2006).

Reviewed by: Paul G. Lyons¹

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Summary: Musicologist Joanna Demers introduces the reader to the world of transformative appropriation, where artists and arrangers borrow from other musical works. The author, through a careful study of various musicians, warns the reader of the possible negative effects of increasingly protective IP law. Her research of IP law and the affect on musical and cultural creativity aims to make readers aware of a threat that could potentially stifle transformative appropriation, and the creation of new musical works in general.

About the Author: Joanna Demers is an Assistant Professor of Musicology at the University of Southern California's Thornton School of Music. Her work focuses on 20th and 21st century popular music as well as intellectual property rights.² In 2002, she received her PhD in musicology from Princeton University, and her doctoral dissertation, *Sampling as Lineage in Hip-hop*, received the Alvin Johnson AMS 50 Fellowship in 2001.³ Ms. Demers contributes significantly to the music and intellectual property community; her work having appeared in *Popular Music*, the *Journal of Popular Music*, and the *Social Science Research Network*.⁴

Introduction:

- **Summary:** In a poignant introduction to her book, the author uses several current events to establish a framework for which the audience may understand the

¹ Managing Editor, Syracuse Science and Technology Law Reporter; J.D. Candidate, Syracuse University College of Law, expected 2009.

² Biography of Joanna Demers available at <http://www.usc.edu/schools/music/private/faculty/jtdemers.php> (last visited Nov. 20, 2007).

³ *Id.*

⁴ *Id.*

dramatic effect recent changes in intellectual property, specifically trademark and copyright litigation, affect musical creativity. Ms. Demers uses her examples to illustrate her weariness and growing frustration in the face of an ever-expanding landscape of intellectual property litigation. The introduction is foreboding in that it foreshadows what the author sees as a growing problem for artists.

- **Discussion:** The introduction begins with Demers reporting a hoax lawsuit between the highly litigious rock group, Metallica, and a Canadian band named Unfaith. The concocted dispute was over a specific guitar “riff” that Metallica claimed to have trademarked. The author ultimately clarifies, explaining that the hoax was an Internet joke, thought up by Unfaith songwriter, Erik Ashley.

Demers draws the readers attention to this story to highlight the quickness in which mainstream media picked up the story and reported it as truth. Demers used this example as a satire to demonstrate the extent copyright and trademark law continues to impinge on the creative rights of musicians. The author looks at two similar stunts by musicians, meant as satires in what she describes as “an attempt to draw attention to the absurdities of intellectual property law.”⁵

Demers is predominantly concerned with the continued blurring of lines noted in several cases regarding musical creation rights.⁶ She notes that recent intellectual property litigation has grouped transformative appropriation, forms of sampling, plagiarism and music piracy, into a single nefarious category. Demers notes that several forms of sampling and transformative appropriation have been typically

⁵ JOANNA DEMERS, *Steal This Music: How Intellectual Property Law Affects Musical Creativity* (The University of Georgia Press, 2006) at 4.

⁶ *Id.* at 7.

treated as legitimate creative techniques available to musicians.⁷ The author warns that the current licensing mechanisms and fear of litigation for unauthorized appropriation disrupted the balance that once existed in American intellectual property law.⁸

Chapter One: Music as Intellectual Property

- **Chapter Summary:** The chapter begins with a brief history of the development of copyright law. Demers traces the beginnings of copyright to seventeenth century England, and gives a brief synopsis of the law throughout the ages. The chapter continues through to a discussion of music copyright in the United States, specifically twentieth century intellectual property law. The chapter ends with a brief discussion of transformative appropriation and its place in the current state of intellectual property law.
- **Chapter Discussion:** Intellectual property developed with the creation of the printing press. The ability to distribute an unlimited amount of written work brought a number of difficult questions; including, who had the right to sell or distribute content, and what types of controls could be put on these new documents.⁹ The copyright process in England, because of family and political feuding, began as an instrument of censorship; however, as cries for authors'

⁷ DEMERS, *supra*, at 8.

⁸ DEMERS, *supra* note 1, at 8.

⁹ *Id.* at 14.

rights continued, Parliament passed the Statute of Anne in 1710, which assigned copyright control to authors, instead of publishers.¹⁰ The statute was different in that it allowed a limited term of fourteen years, with a possible renewal period of fourteen additional years.¹¹ Demers provides this brief history of copyright law to illustrate that most changes in the law are done to enhance the rights of authors.

The United States soon followed the English, passing the Copyright Act of 1790, providing the same fourteen-year term as the Statute of Anne, with a similar fourteen year renewal period. An 1831 amendment to the act increased the initial term to twenty-eight years, maintaining the fourteen-year renewal period. Congress passed the Dramatic Compositions Copyright Act of 1856 in order to address the increasingly competitive music publishing industry.¹² An amendment to the act in 1897 called for venue owners to pay publishers and composers for performances of works, a nearly impossible task to enforce.¹³ As technology improved towards the beginning of the twentieth century, Congress passed a new copyright act in 1909, which addressed rights regarding mechanical reproduction, saying, “Once a copyrighted musical composition had been released to the public, any other recording artist could record his own version of the piece as long as he paid a licensing fee.”¹⁴

¹⁰ DEMERS, *supra* note 1, at 15.

¹¹ *Id.* at 15.

¹² *Id.* at 19.

¹³ *Id.*

¹⁴ *Id.* at 20.

The Copyright Act of 1976 addressed changes to the nature of copyright law in the twentieth century. The act increased protections by lengthening the periods of copyright protection.¹⁵ The author notes that intellectual property legislation has lagged significantly behind technological advances in music reproduction, specifically that copyright changes have expanded either lifespan or protection scope, failing to notice changes in cultural production.¹⁶ The most significant of these is transformative appropriation. The author argues that the 1976 Copyright Act sought to legitimize the process, however, recent litigation has brought this assumption under fire.

Transformative appropriation is the process by which an artist engages with and reacts to another creators' works.¹⁷ The author looks at the development of transformative appropriation; stating that some musicians loathed the practice because it was not truly original, while others argue it a legitimate type of musical creation.¹⁸ Ms. Demers agrees with the latter, arguing that transformative appropriation is a legitimate practice that has been used throughout the ages. She argues that reshaping composed material was a common practice among European composers, and that plagiarism only occurred when a composer merely borrowed someone else's ideas, without adding anything new to them.¹⁹ The author notes that transformative appropriation, also referred to as allusion, is an

¹⁵ DEMERS, *supra* note 1, at 21..

¹⁶ *Id.* at 23.

¹⁷ *Id.* at 27.

¹⁸ *Id.*

¹⁹ *Id.* at 29.

ethical gray area that is only being increased by sound reproduction technology.²⁰

Chapter Two: Arrangements and Musical Allusion

- **Chapter Summary:** This chapter discusses the myriad difficulties in regulating musical ontology, as well the development of musical expression from an ink-on-paper expression, to one that is increasingly fluid and difficult to capture for purposes of copyright regulation. In this chapter, Demers provides a more focused analysis of transformative appropriation, specifically noting differences between allusion and duplication, and addressing the growing murkiness in separating the two. Throughout the chapter, the author references important case law and cultural examples in order to develop her ideas.
- **Chapter Discussion:** The chapter begins with a helpful example to allow the reader to more firmly understand the growing tendency of content providers to control the overall image of an artist. Demers cites the Elvis Presley Estate and its control over the King's musical rights, physical appearance, stage mannerisms, quality of voice and overall artistic image.²¹ Demers reminds the readers that US copyright law is intended to protect the expression of ideas, not ideas themselves.²² As a result of this, questions as to the nature of expression and

²⁰ DEMERS, *supra* note 1, at 29.

²¹ DEMERS, *supra* note 2, at 32.

²² *Id.*

music arise that must have answers before regulation may occur. The author follows with the similar question of whether music actually *exists* in printed form, or is merely when performed.²³ The Copyright Act of 1976 somewhat provides an answer, saying that it begins when it is affixed to a tangible medium.²⁴ Demers argues that this definition places sheet music within the realm of an idea, and therefore is perhaps subject to less stringent copyright guidelines.²⁵

The difference between an expression and an idea is pivotal because with each comes specific protection under US copyright law. Demers notes that arrangements of original musical compositions are considered alternative pieces of work and, under the Copyright Act, are derivative works.²⁶ For an artist seeking to publish an arrangement of a prior piece, one would merely need seek permission of the original copyright holder and agree on a licensing fee.²⁷

Musical arrangements and cover songs are two prominent examples of allusion that remain relatively free from copyright litigation. Firstly, musical arrangements have been commonplace since ink-on-paper music has been produced. Demers notes that classical music is attractive to arrangers because, in most instances, the copyrights for these pieces expired already.²⁸ The use of classical music in arrangements became popular during the 1920s and continued its prevalence in musical allusion because of its egalitarianism; making classical music available in a context that lower social classes could know and

²³ DEMERS, *supra* note 2, at 35.

²⁴ *Id.* at 36.

²⁵ *Id.*

²⁶ *Id.* at 39.

²⁷ *Id.*

²⁸ *Id.* at 43.

appreciate.²⁹ Demers cites the example of Walter Carlos's *Switched-On Bach*, an anthology of various Bach movements written for the Moog synthesizer.³⁰ Carlos did not alter any of the music, but merely updated the pieces for the twentieth century.

Rock and Roll cover songs developed through the transformative practice of "crossing over."³¹ Typically white singers crossed over into the "black market" for musical material, and transformed these songs into a "whiter" version.³² Ethical questions arise out of this particular practice, because very rarely have black musicians been credited with the work or received money from subsequent sales.³³

The theory of the cover song, as well as copyright protections provided, altered dramatically with the rise of parody and satire. In *Campbell v. Acuff-Rose Music*, rap group, 2 Live Crew was sued for covering Roy Orbison's 1964 hit song "Oh, Pretty Woman."³⁴ In the parody, 2 Live Crew altered the actual text of the song, changing lyrics and adding artificial record-scratching noises³⁵. The Supreme Court reversed the Sixth Circuit's decision, stating that commercial parody could be a fair use under the Copyright Act of 1976, and

²⁹ DEMERS, *supra* note 2, at 45.

³⁰ *Id.* at 49.

³¹ *Id.* at 50.

³² *Id.* at 51.

³³ *Id.*

³⁴ *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994).

³⁵ DEMERS, *supra* note 2, at 55.

that 2 Live Crew's parody was allowed because the borrowing was not excessive and the market for the original song would not be harmed.³⁶

Musical arrangements, cover songs and parodies all borrow material from original pieces. These forms of transformative appropriation are covered under the Copyright Act of 1976; however, many artists bring suit alleging a borrowing of musical and performance style.³⁷ An increasing number of artists are going to the courts to have their personas protected from potential borrowing.³⁸ One famous instance was *Sinatra v. Goodyear*³⁹, where Nancy Sinatra sued the tire company over a commercial that used Nancy Sinatra look-alikes, and featured these dancers singing portions of Ms. Sinatra's famous song, "These Boots are Made for Walkin'." Although unsuccessful, the litigation brought the concept of secondary meaning and the protection of a performer's persona to the fore.

The author closes the chapter with a parting image of the Elvis Empire. She notes, "The identity of Elvis is one of the most heavily protected commodities in the world. And EPE is thriving by marketing the King's image through a variety of different media."⁴⁰ As content providers became more intent on protecting the entire image of a performer, Demers warns that the blurring between musical allusion and copying will provide fertile ground for harmful copyright litigation.⁴¹

³⁶ *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994).

³⁷ DEMERS, *supra* note 2, at 59.

³⁸ *Id.*

³⁹ *Sinatra v. Goodyear Tire and Rubber Co.*, 435 F.2d 711 (1970).

⁴⁰ DEMERS, *supra* note 2, at 69.

⁴¹ *Id.* at 70.

Chapter Three: Duplication

- **Chapter Summary:** In this chapter, the author discusses the increased duplication of material in music during the twenty-first century. Demers pays particular attention to the growth of this phenomenon, the socio-political messages it conveys, and the applicable copyright law that could potentially stifle artistic expression. The chapter focuses much of its analysis on musical collage and the development of the hip-hop remix.
- **Chapter Discussion:** Unauthorized reproduction of protected works is against copyright law, even if the reproduction is not a perfect copy.⁴² Demers informs the reader that duplication is the dominant form of transformative appropriation today.⁴³ The reuse of sounds and melodies has become a thriving part of modern music, however, it may have costly ramifications for artists who do it without permission. Pop collages, novelties, and remixes have become commercially successful ventures, and copyright holders and content providers have become increasingly protective of their rights. Demers tells the reader of one of the first commercially successful audio collage. “The Flying Saucer,” a 1956 remake of Orson Welles’s “War of the Worlds,” where Dickie Goodman assembled various audio clips and sound bites to depict the alien invasion.⁴⁴ Goodman was

⁴² DEMERS, *supra* note 3, at 71.

⁴³ *Id.* at 72.

⁴⁴ *Id.* at 77.

ultimately sued for infringement, but the situation reminds artists that content providers are present to restrict unregistered use of their work.

Goodman's record was the first of what would become a wave of collages and remixes that would forever change the recording industry. The remix, an audio practice of borrowing sound bites and melodies from previous artists or works, and then adding to it, developed as a result of practice known as "signifyin'".⁴⁵ This practice developed as artists attempted to pay homage to those who came before, and took place when a song or style is "imitated or repeated with a difference..."⁴⁶ Demers cites the example of recent hip-hop and R&B artists signifyin' by sampling pieces from musical legends such as James Brown, Funkadelic and Parliament, and the Isley Brothers.⁴⁷

The author informs the reader that an artist has two choices when deciding to remix or sample from a prior artist: 1) They may license the material legally, and pay the necessary fees, or 2) Risk possible suit by copying without permission.⁴⁸ Citing the case, *Grand Upright Music, Ltd. v. Warner Brothers Records*⁴⁹, Demers notes that the courts have taken a stronger approach to illegal sampling, asserting the proprietary rights of copyright holders by making clearance of a song necessary before it could be used in a remix.⁵⁰ The case revolves around early 90's rapper, Biz Markie, who, in his song "Alone Again" illegally sampled recordings from Gilbert O'Sullivan's "Alone Again

⁴⁵ DEMERS, *supra* note 3, at 81.

⁴⁶ *Id.*

⁴⁷ *Id.* at 85.

⁴⁸ *Id.* at 91.

⁴⁹ *Grand Upright Music, Ltd. v. Warner Brothers Records*, 780 F.Supp.182 (S.D.N.Y. 1991).

⁵⁰ DEMERS, *supra* note 3, at 97.

(Naturally).”⁵¹ The examples used by the author act as warnings to artists who naively sample, assuming they will not be prosecuted.

As a result of increased prices for licensing fees, many artists have begun to sample from foreign sources.⁵² This is a popular form of allusion because oftentimes sounds used are not copyrighted and also, foreign sounds are often seen as fresh, exotic and sincere to listeners.⁵³ This form of borrowing, however, is not without its consequences. Even though they often go without regulation or litigation, Demers notes several prominent cases where foreign artists have sued for illegal borrowing. The complexities surrounding sampling, duplication and other forms of musical allusion are great, and will only continue as producers and copyright holders envision lucrative benefits when their work is used on later pieces.

Chapter Four: The Shadow of the Law

- **Chapter Summary:** The final chapter discusses the inevitable ramifications of a more stringent copyright standard, and the results of overly litigious content providers. Ms. Demers outlines some of the potential dangers for musical creativity, as well as the music industry as a whole. The chapter also discusses several ways artists are dealing with the changes in copyright and IP litigation.

⁵¹ DEMERS, *supra* note 3, at 91.

⁵² *Id.* at 98.

⁵³ *Id.* at 101

- **Chapter Discussion:** This chapter begins with Demers voicing her fear that the current trend of copyright and trademark law application will stifle the exchange of cultural production, and stamp out free appropriation by artist.⁵⁴ Demers notes that many independent artists are wary of the dangers of increasingly litigious record companies, and have thus begun to make their material available for little or no cost. Recording companies, recognizing the effect this will have on the market for music, have consequently begun to lower their licensing charges and other fees for borrowing music.⁵⁵

This chapter focuses much discussion on musician response to the fears that Demers elaborates. She outlines some of the more specific restrictions that effect performers. For instance, she says that because the law does not recognize the difference between “formal” or “informal” events, it is often difficult for artists and venues to determine when royalties and other fees must be paid.⁵⁶ We read of artists who no longer look to other pieces of work for transformative appropriation, because of the heavy fees and potential for lawsuits. Demers quotes Siva Vaidhyanathan, who argues that transformative appropriation has been effectively killed because of licensing fees, saying, “The death of tricky, playful, transgressive sampling occurred because courts and the industry misapplied stale, blunt, ethnocentric, and simplistic standards to fresh new methods of expression.”⁵⁷ Other artists have turned to outright ignorance of

⁵⁴ DEMERS, *supra* note 4, at 111.

⁵⁵ *Id.* at 113.

⁵⁶ *Id.* at 116.

⁵⁷ *Id.* at 119.

copyright laws. Demers looked at artists who put together several bits of material from different sources.

The author ends with the story of Brian Burton (DJ Danger Mouse), who magnificently paired the Beatles *White Album* with Jay-Z's *Black Album*, naming it the *Grey Album*.⁵⁸ In most cases, the work of a DJ will not get into the mainstream, so there is no need to fear possible copyright infringement. However, Danger Mouse's version was a popular success, and subsequently received several cease-and-desist letters from record companies.⁵⁹ The *Grey Album* showed the glaring problems with current copyright law and IP litigation because of its aesthetic integrity and critical success.⁶⁰ Audiences appreciated it because it simultaneously paid homage to the Beatles and Jay-Z.⁶¹

Demers warns that we are living in a permissions culture.⁶² She notes that content providers, intent on immortalizing the image of an artist by refusing borrowing, have stifled creativity, enabling it only when the artist receives the appropriate permission.⁶³ She warns that if intellectual property law continues on the current route, content providers will lobby for increasing or even, perpetual copyright terms that will silence transformative appropriation and cultural exchange.⁶⁴

⁵⁸ DEMERS, *supra* note 4, at 139.

⁵⁹ *Id.* at 140.

⁶⁰ *Id.* at 141.

⁶¹ *Id.*

⁶² *Id.* at 145.

⁶³ *Id.*

⁶⁴ DEMERS, *supra* note 4, at 146.