

Sampling Patent to Remix Copyright
Tonya M. Evans

This work-in-progress explores further the general arguments and assumptions presented in my article *Sampling, Looping and Mashing ... Oh My!: How Hip Hop Scratched More Than the Surface of Intellectual Property Law*, 21 Fordham Intell. Prop. Media & Ent. L.J. 843 (2011) (also available at SSRN: <http://ssrn.com/abstract=1674246>).

Because our current system has already struggled to keep pace with the challenges that 21st century technologies have presented to existing (and arguably dated) laws, and the piecemeal amendments have obscured both clear delineations and an appropriate balance between exclusive rights and access, this paper will explore whether copyright should be reverse-engineered so that patent law is “sampled” to “remix” copyright.

This paper will expound on and extend the underlying premise in that article; namely that copyright reform is necessary to adequately and consistently apply to performance-based creative works like music. I assert this is particularly important given the distinct practical realities of how performance-based works differ from text-based works in, among other ways, how they are created.

Accordingly, this paper asserts that copyright reform initiatives should “sample” (that is, borrow from) patent policies to “remix” (that is, inform and reform) copyright jurisprudence. More specifically, copyright law must be reformulated to achieve an optimal balance between a copyright holder’s exclusive rights and the legal “space” a second generation creator needs to build upon existing works to create new ones. This is essential for collaborative and cumulative creative genres like music and the visual arts.

The paper will critique existing copyright jurisprudence to address perceived failures of copyright law and its policies to achieve an “optimal balance” of rights in owners with legal authority to use under certain circumstances by second-generation creators. I will argue that copyright law has concentrated in owners so much exclusive protection (both in substance and duration) that this over-zealous proprietary model, in turn, has diminished fair use and extended the copyright monopoly far beyond the Constitutional confines of the Intellectual Property clause. This reality has led to a fractured legislative framework and a copyright policy that has lost sight of the goal to “promote the Progress of Science and useful Arts,” the purported benefit to a society which tolerates such monopolies.

Additionally, I will explore the concept of “unfair use,” offered by several leading scholars as an alternative approach to the dilemma. Proponents posit that “unfair use” would allow access to protected works and encourage (or at least permit) cumulative creativity (music sampling, collage, user-generated

content and other 21st century uses) much in the same way that reverse-engineering allows for, and indeed encourages, cumulative inventiveness in the patent context. The paper will also briefly highlight the role of misuse in both the copyright and patent contexts as an alternative approach to allow for cumulative creation in creative genres that benefit from, and have traditionally relied on, such creation in a way that causes little if any market harm to the rights holder.

Finally, I will challenge historic notions of the bright-lined semantic demarcation between the terms “innovation” (traditionally attributed to patent jurisprudence) and “creativity” (traditionally linked to copyright jurisprudence). I will also highlight the blurring that has occurred substantively. For example, because both copyright and patent protection is afforded computer programs, Congress has and continues to blur the distinction traditionally made between copyright and patent laws and policies. Indeed, leading scholars and others have presented sound arguments that this blurring should never have occurred at all.

In sum, this article posits that patent law and its policies should be sampled to remix copyright.