The legality of music sampling in Sweden
Complicated issues demand complicated measures

Master’s thesis within Commercial and Tax Law (Intellectual Property Law)
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In May 2015

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Abstract

The legality of music sampling is in Sweden unknown. The reason for this is mainly the lack of relevant case law and that the legislation and legislative history has not reach clarity within this subject.

There are generally two different routes and perspectives on sample issues. The first main route is that samples should be judged according to the “common” copyright rules where originality, similarity and other factors need to be investigated. The second route is that sampling issues should be judged upon the neighbouring rights, and within these rules no other tests needs to be included. It is simply an infringement if it is proven that someone has in fact sampled a recording. American case law has inherent both views and most often are pending between these views. German case law however made it clear in the Kraftwerk case that the neighbouring rights are used within German law. Through this inconsistency the authors have not found any clear indications which rules a Swedish court would apply. Due to the relationship between Sweden and Germany, and that they are both members of the European Union the authors believe that Sweden will judge accordingly to the neighbouring rights.

However, the authors believe that the neighbouring rights were created for the purpose to contradict piracy and not sampling disputes. Furthermore, neither the legislative history nor judicial literature gives any indications that the neighbouring rights should be used when a part of a work has been altered and used in a new work. The author’s personal beliefs are therefore that the neighbouring rights should not be applied on sampling cases. The “common” copyright rules should instead be applied which includes originality and similarity tests.
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1 Introduction

1.1 Background

The music business can be considered as an economic explosion, at least since the introduction of sound recorded on LP records in the late 40s and early 50s. It was followed by the introduction of the compact cassette and the music industry had instantly become consumer friendly. Music could then be bought with high quality and for a reasonable price, that most people could afford. Hence, it grew into a large industry involving a wide diversity of actors that wanted their fair share of the rights and money involved. Throughout the years there has been an evolution and increase in genres. This has been the result of not just creativity, but new ways of making music with the help of modern equipment.

The modern digital equipment has enabled music creators to isolate samples of sounds and further to record, transform and reuse them. For the understanding of the reader, the term sampling will be explained. Sampling is when an artist/producer uses a piece of an already existing recording and uses it as a piece in a new creation. The sampled piece can either be changed beyond recognition or used in a way that is similar to the original work. Since this equipment was introduced it has changed the course of conventional music production. Sampling has become a cult, especially within the Hip-Hop community, and older songs of other genres are altered and transformed to work within this new genre of music.

Sampling has become a phenomenon, subject to copyright disputes, especially in America where several cases have been ruled in court.\(^1\) America now has a substantial case foundation in the matter, but still no clear precedent. Sampling issues are equally unclear in the European copyright legislation, although the German Supreme Court has ruled in one large case concerning sampling.\(^2\) Hence, neither Swedish law regulates this type of music production in a satisfactorily way, nor has any case about sampling been ruled upon in Swedish courts.

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The legal uncertainty the lack of clear legislation induces, and the money involved in the industry that cause actors to react strongly against infringements, makes this area highly interesting and in desperate need of illumination. It is only a matter of time before the Swedish legal system is forced to take a stand in the question.

1.2 Purpose
The purpose of this thesis is to evaluate to what extent it is permissible, according to Swedish law, to use samples of third party copyrighted works when creating music. In order to explore possible applicable scenarios, this work will examine how international case law tackles the issue and to evaluate the applicability of these approaches to Swedish copyright law in general as well as to a hypothetical dispute in a Swedish court.

1.3 Delimitations
The foundation of Swedish copyright law will not be covered as a result of limited space. The authors will presume that the reader is familiar with Swedish copyright law to that extent that the reader know about exclusive rights to artistic works according to the Swedish Copyright Act. All original musical creations, which samples are taken from, throughout the essay are presumed to be covered by copyright.

The definition of sampling that will be used throughout the thesis will be covered in a dedicated chapter. The authors’ definition in the dedicated chapter is the only type of sampling that will be discussed in this thesis. Therefore, covers and interpolation will not be covered. When discussing sampling it is presumed that the sample is integrated in a new sound recording and also reproduced and distributed.

Significant case law – one case from Germany and three cases from the USA – will be covered and evaluated. The essay will include German case law but German legislation will be left out of the essay, apart from those laws that are necessary to point out when the case is discussed. Concerning the German case used, the translation by Neil Conley & Tom Braegelmann, *Metall auf Metall: The Importance of the Kraftwerk Decision for the Sampling of Music in Germany, providing the English translation for the German Federal Supreme Court decision in Kraftwerk*
v. Pelham, will be used and this is the only translation the authors have taken notice of. A part of the German case, concerning surrendering of phonograms, evolves into a property dispute. This part will be left without notice since the property dispute is not relevant to the purpose. The part relevant to the purpose is whether the sampling is an infringement of intellectual property rights.

Even though the essay will include American case law, American IP legislation will be left out of the essay a part from what is necessary to point out when discussing the case. This is done since it is only the cases that are relevant to the purpose, the interest of the purpose is not in the difference in law but in the difference in judgment. To include a full investigation of the American and German IP law systems would be too extensive for a master thesis but could be suitable for continued studies.

When determining if a creation is new compared to other creations and therefore can possess copyright, one must look at the inner and outer form of a creation to know what is protected. The inner form is the idea and how the creator has chosen to format and execute his work. The outer form is the format that the creator has given his creation, for example a song. If the song is protected by copyright it will still be protected if someone determines to make a novel about of this song. This essay will only focus on the inner form of a creation since all creations assessed in the essay are musical creations and therefore all have the same outer form.

1.4 Method and materials
The methodological approach involves the analysis of the texts produced by government and regulatory institutions as well as by judicial authorities. In particular, the research and the research questions will be discussed and analysed by using the following methodologies: interdisciplinary legal research, doctrinal research and comparative method. The comparative method will be used to illustrate how different jurisdictions have responded to the opportunities and threats posed by the technologies of digital media production. This

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3 Neil Conley & Tom Braegelmann, Metall auf Metall: The Importance of the Kraftwerk Decision for the Sampling of Music in Germany, 56 J. Copyright Soc'y U.S.A. 1017, 1018-19 (2008)….providing the English translation for the German Federal Supreme Court decision in Kraftwerk v. Pelham, No. I ZR 112/06, dated November 20, 2008. (Furthmore only referred to as Conley and Braegelmann, Metall auf Metall)
5 Olsson, Copyright, cit., p. 67.
comparative and multi-perspective analysis will look at the past, the present and the future regulatory framework making assessments of the landscape and structure within the Swedish legislation.

This essay is built upon a comparison between Swedish legislation and international case law, more specifically German and American case law. Since the Swedish legislation regarding copyright is used as a basis for the comparison, this legislation will be examined extensively with focus on the parts that directly concerns music rights. The international arrangements governing intellectual property are primarily the Berne Convention and the TRIPS agreement. Sweden as well as Germany and USA are all parts of these agreements and hence, whatever Sweden can learn from the case law from these countries could be highly useful since all domestic legislation inherits from international regulations and agreements. The similarities in domestic legislation would emphasise a predicted forecast concerning the Swedish courts.

In the parts that concern Swedish copyright law in the materials used will be evaluated according to the following hierarchy; laws, legislative history, case law and judicial literature. Since law is to be regarded as the highest source of legal materials, this will be used to the extent it is possible. The legislation at hand is limited due to age, technical development and specifics. This has lead to that the legislative history has been consulted concerning specifics and details to that extent it has been provided. Case law has been used as a complement to the legislative history. When legislation, legislative history or case law is not suitable or extensive enough, judicial literature has been examined. The parts of the Swedish materials that are referred to in the essay, that do not have a suitable translation, are freely translated by the authors themselves.

Concerning both German and American copyright law, legislation has been excluded. The focus is only on case law in both countries since the interest is not in the difference in law but the difference in judgements. In the comparison between the countries, the collection of Swedish legal sources concerning copyright will be compared with the outcome of the foreign cases.

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[https://www.wto.org/english/tratop_e/trips_e/amendment_e.htm](https://www.wto.org/english/tratop_e/trips_e/amendment_e.htm)
When explaining the term sampling, judicial literature will solely be used due to the fact that this term is not stated in either of the other legal sources. The term sampling refers to when a producer/musician uses a pre-recorded piece of music when creating new music.\(^7\) This term will therefore not be used when a producer/musician have gotten inspiration or copied notes from a pre recorded song.

### 1.5 Disposition

The essay commences with an introductory chapter that determines the background of the legal problem in the thesis, the purpose of the thesis as well as methods, material and limitations. Chapter two is a presentation and an assessment of the Swedish Copyright Act. Firstly containing an overview of the legislation that concerns sampling, followed by a demonstration of essential concepts and principles within the legislation. The principles covered are originality threshold, double creation, alteration, independent alteration and neighbouring rights.

Chapter three presents the concept of sampling. It explains the definition of sampling, how sampling was invented and the different types of sampling.

After these first chapters defining the foundation of the essay, the fourth chapter is structured as a half-time analysis where the authors narrows down the main legal issues of sampling within the Swedish legislation. This is made in order to simplify the comparison between Swedish legislation and the international case law presented below. To have the legal issues of sampling in mind, will make it easier for the reader to recognize similarities and differences in the international case law compared to Swedish legislation.

The fifth chapter clarifies some international doctrines that are used in the following cases. Brief definitions of these doctrines are necessary to simplify the understanding of the cases as well as the analysis later on.

Chapter six is dedicated to a central case in Europe concerning sampling. The German band Kraftwerk won a long dispute concerning a two seconds long sample. The case is presented with a summary of the case, followed by a discussion around the outcome with

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input from relevant articles. Finally, the key points and grounds of the judgment is sorted out and elucidated for later comparison with Swedish legislation.

The seventh chapter is also dedicated to case law relevant to the purpose but this time to American case law. The cases discussed are Bridgeport Music, Saregama India and Jarvis. These cases are presented in a similar manner as the German case, starting with a summary, followed by a discussion around the outcome. Also, the key points and grounds of the judgments are sorted out and elucidated for later comparison with Swedish legislation.

Chapter eight sums up the main issues in the case law that has been analysed. Its purpose is to clarify the key points and to highlight what will be brought into discussion in the analysis.

The ninth chapter is a full analysis containing discussion and a comparison between Swedish IP law and the key points taken from the previously presented case law. This analysis will be based upon filling the gaps within the Swedish legislation with international case law. All the legal controversies discussed in this study – in addition to having a national impact – can create a persuasive legal precedent that courts in other countries, e.g. Sweden, can look to when evaluating similar questions. The different aspects discussed in the analysis lead to a forecast of how a Swedish court might approach a dispute concerning music sampling. The analysis is then summed up with the authors’ personal thoughts and opinions on what is discussed in the essay.

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8 Bridgeport Music, 410 F.3d at 792, Saregama India, 687 F.Supp 2d at 1325, Jarvis 827 F.Supp at 282.
2 Musical rights according to Swedish IP-law

2.1 Overview

The legislation that regulates copyright law in Sweden is the Swedish Copyright Act.\(^9\) The Copyright Act explains that the creator of any type of intellectual property has the exclusive right to exploit the work by making copies of it and by making it available to the public, in its original or in an altered form, in translation or adaptation, in other literary or artistic form or another technique.\(^10\) This right covers every kind of artistic creation, for instance photographs, movies and art, but for this purpose the protection of musical creations is of importance.\(^11\) Copyright protection makes it illegal for someone to sell or in other way make the musical creation available to the public without the permission from the original creator. This law gives the musician the sole right to his creation from the point the song is made until 70 years after the musician’s death.\(^12\) This right is focused upon the financial rights and these rights can be transferred.\(^13\) The transferring of the financial rights are commonly used since it is often the record label themselves who owns the copyrighted material. There is also an additional rule that states that a musical creation may not be changed so that the author’s artistic reputation is violated, furthermore the work shall not be made available to the public in such form and/or in such a context that injurious the author.\(^14\) This rule, since it is more bound to the personality of the creators, can in principle not be transferred to someone else.\(^15\)

The Copyright Act states that only a ”work” can have copyright protection. This means that this law only covers a musical creation if it is new and original, this is called the originality threshold.\(^16\) The purpose of this rule is that no artist should be allowed this protection if the musical creation is not innovative enough. This has nothing to do with the quality of a song itself, the protection is therefore not linked to if the song is to be regarded as good or bad. However, the protection is based on the involvement of some kind of artistic effort and complexity of the work.

\(^9\)The official translation of: Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk. From now on only reffered to as The Swedish Copyright Act.
\(^10\)Art. 2 of The Swedish Copyright Act.
\(^11\)Art. 1 of The Swedish Copyright Act.
\(^12\)Art. 43 of The Swedish Copyright Act.
\(^13\)Art. 27 of The Swedish Copyright Act.
\(^14\)Art. 3, 2nd paragraph of The Swedish Copyright Act.
\(^15\)Olsson, Copyright, cit., p. 119.
Even if a song is to be considered as new and original it could still be used in a new musical creation even if the new creation have clear connections and similarities with the original, this is called alteration. In these cases the person that samples can in some circumstances own the rights to the new creation if permission has been given from the original copyright holder. In contrast an alteration can be declared as created independently from the original, this is called an independent alteration. This means that the new creation is influenced by the original song, but is considered to be independent and have its own copyright protection. In these cases the Copyright Act explains that the new creation is fully owned by the new artist, and permission from the originator is not demanded. This is the case when the new song only contains significantly small portions of similarities with the older song. The Copyright Act also contains protection of a performance or recording, these are called neighbouring rights. These rules are intended to protect the artist that in some way performs the work, or the person that made the recording of the work possible. This protection is not affected by who originally wrote the musical work, it is only deemed to protect the performance or recording itself. This protection is limited to 50 years after the recording or performance was made.

Copyright protection is automatic. This means that protection under the Copyright Act does not demand any registration but is given when the work is completed. Further, copyright protection does not demand any formalities or examinations before it is given. Copyright is due to this presumed and only challenged if it is argued in court.

17 Art 4, 1st paragraph of The Swedish Copyright Act.
18 Art 4, 2nd paragraph of The Swedish Copyright Act.
21 The neighbouring rights are located in Art. 45-49a of The Swedish Copyright Act.
22 Art 45-46 of The Swedish Copyright Act.
23 Olsson, Copyright, cit., p. 268-269.
24 Art. 45 and 46 of The Swedish Copyright Act.
25 Art 1 of The Swedish Copyright Act, and Art 5(2) of the Berne Convention for the Protection of Literary and Artistic Works.
26 Olsson, Copyright, cit., p. 20-22.
2.2 The originality threshold criteria

The originality threshold is an essential aspect to the countries signed to the Berne Convention. 27 This includes Sweden who implemented the originality aspect in the Swedish Copyright Act in order for a work to achieve copyright protection. 28 The law does not define the concept of originality threshold. 29 Guidance can however, be found in legislative history, law comments and Swedish case law. The requirements for originality are set low in Swedish law. 30 A work must possess certain originality and be independent. 31 A work that does not posses any impression as a spiritual creation but is a result from a mechanical activity does not posses any copyright protection. 32 The criteria of originality and individuality do not include any form of valuation of the work. A worthless creation could still possess originality and individuality and be considered a work, and even if it has no economic or practical value it still possesses copyright. 33 The judgment of originality threshold should be done with consideration to the international direction of this judicial area. 34 Sweden should therefore take inspiration from similar music cases in other countries in order to endeavour harmonization within the area. 35

The concept of originality is judged differently depending on the artistic work at hand, such as literary work, art, music etc. 36 However, it is considered commonly known that the creation must posses personal and distinctive characteristics. 37 In order to be considered a work as defined in the Copyright Act the creation must possess originality and distinctive characteristics. 38 Judicial literature supports that musical creations are only considered works if they possess the three fundamental elements; melody, harmony and rhythm. 39 Considering musical pieces, originality conclusively means that music enjoys copyright protection if it contains enough distinctive elements. 40 Pop-music is claimed to have a fewer

27 Art 2(2) of the Berne Convention.
28 Art 1 of The Swedish Copyright Act.
29 NJA 2002 s. 178. p 181.
30 NJA 2002 s. 178. p 181.
31 NJA 2002 s. 178. p 181.
32 SOU 1956:25, Upphovsmannarätt till litterära och konstnärliga verk, Lagförslag av Auktoritätskommittén, p. 66.
33 SOU 1956:25, p. 67.
35 Christiansson, Upphovsrätt och närliggande aspekter musiksamling, cit., p. 27-28.
36 NJA 2002 s. 178. p 181.
38 NJA 2002 s. 178 p. 181.
40 Christiansson, Upphovsrätt och närliggande aspekter musiksamling, cit., p. 26.
variation opportunities which increases the risk of two persons creating a similar piece. This is due to trends and commercial interests.\footnote{NJA 2002 s. 178. p 187.}

The creation must be an expression of the creator’s personal artistic spirit.\footnote{Olsson, Copyright, cit., p. 52.} It is also a widely used rule that two persons, independent of each other, should not be able to express the creation in the same way as another.\footnote{NJA 2002 s. 178. p. 181.} Hence, the creation must be unique.\footnote{NJA 2002 s. 178. p 181.} When determining originality threshold, no consideration shall be made to quality, quantity, style or manner of the musical piece.\footnote{NJA 2002 s. 178. p. 187.} In order to determine if a piece possesses originality, the creation as a whole must be considered and the consideration shall be made according to how the piece is interpreted by the listener.\footnote{NJA 2002 s. 178. p 187.}

Although the originality threshold differs between the different types of artistic works, it could still be helpful to take part of cases concerning other artistic creations than music, to establish an understanding for originality threshold. In a Swedish case concerning a textile pattern figuring wild strawberries the court claimed that since the wild strawberries had been pictured in their natural state, there are a wide possibility of variations. It is therefore unlikely that another artist would create a similar pattern without being inspired by the original, and the original pattern was determined to have a high originality threshold. The court also took into account the placement of the wild strawberries on the textile and the way they were weaved into each other.\footnote{Swedish Supreme Court, 23rd of February 1994, Case No. T-1138-92,/NJA 1994 s. 74.}

\subsection{The ”Regatta”-case}

The following is a summary of the most relevant case explaining the originality threshold in Swedish case law. It is also from this case that most of the definitions and requirements for originality threshold, stated above, originates from.

T828-01/NJA 2002 s. 178

The case is about two melodies, both containing a similar isolated part played by violin. The melodies have not been created during the same time and the question is therefore if melody 1 (made by the plaintiff) is considered to enjoy exclusive in-
intellectual property rights and if so, if melody 2 (made by the defendant) infringes those rights.

In order to determine if Swedish intellectual property law protects melody 1, the court first had to define if melody 1 reaches the originality threshold. The court held that in order to have originality the creation must possess independence and distinctive characteristics, and that the creation's quality, quantity, style or manner lack importance in that assessment. The possibilities to variety are limited within popular cultural music and trends and commercial interests contribute to this effect. Although melody 1 is built on conventional musical elements, the determination of originality will be based on an overall assessment on how the melody is interpreted by the listener. Melody 1 is considered sufficiently individual and is therefore considered to possess copyright by the court.

The defendant claimed that melody 2 was created based on inspiration from a Swedish folklore song which one could freely use, melody 3. However, the parties somewhat agree that there is very few similarities between melody 1 and 3 and the court claim that there is no noteworthy similarity between melody 2 and 3. Therefore it is little that suggests that melody 2 should have been inspired by melody 3. Furthermore the court declared that melody 1 and 2 have remarkable similarities with only a small difference in the ending notes and a small difference in tempo, which gives the impression that the melodies are more or less identical. These differences lack importance since it is not what a listener will focus on and a judgment shall be based on the general impression.

Based on the above, the court ruled that is implausible that melody 2 should have been created independently of melody 1. The defendant is therefore infringing the plaintiff's copyright and was obliged to pay damage compensation.

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50 NJA 2002 s. 178, p. 178.
2.2.2  Double creation

The criterion of double creation is based on the principle that if a work possesses sufficient individuality and originality the risk of two persons, independent of each other, creating the same or similar work is minimal. The criterion has become widely accepted in order to determine copyright protection, double creation must be ruled out in order to possess copyright.\textsuperscript{51}

However, this criterion has also met some criticisms. Case law claim that is obvious in Swedish law that the originality threshold shall not be determined by the use of the double creation criterion. For example in the Case NJA 2004 s. 149\textsuperscript{52} concerned two separate drawings of a floorboard. The court found that no risk for double creation concerned the first drawing. This did not however, conclude that the first drawing possessed any originality, since the drawing was too simple. Case law also states that a creation that does not possess originality is likely to be made twice.\textsuperscript{53} Therefore, it is important to see the double creation criteria only as a help to determine originality.

2.3  Alteration

When a musician samples an original song it is most often- if not always- changed and altered in some way. This alteration could be made in a number of different ways. The original song could for example be pitched up or down, be modified with different filters or cut up into small parts and put together again in a different order. What is characteristic of an alteration is that the new musical creation needs to leave the original samples individuality unchanged and that the essential features of the original song need to be retained.\textsuperscript{54}

The Copyright Act states that person that sampled the original work possesses copyright to the alteration: “A person who has made a translation or an adaptation of a work or converted it into another literary or artistic form, shall have copyright in the work in the new form…” \textsuperscript{55} However, the person that made the alteration has no right to make the altered musical creation available to the public, reproduce it or in other ways use it for financial benefits without the permission from the originator.\textsuperscript{56} Worth notice is that the altered crea-

\textsuperscript{51} Swedish Supreme Court, 2nd of April 2004, T218-02/NJA 2004 s. 149, p. 163.
\textsuperscript{52} NJA 2004 s. 149.
\textsuperscript{53} NJA 2002 s. 149. s 163.
\textsuperscript{54} SOU 1956:25 p. 136.
\textsuperscript{55} Art 4 1 paragraph 1st part of The Swedish copyright Act.
\textsuperscript{56} Art 4 1 paragraph 2nd part of The Swedish copyright Act.
tion is itself protected by copyright law even if the originators permission has not been received.\textsuperscript{57} This means that a sampled song needs to be “cleared” with the originator before for example released to the public, for the song to be released legally. However, if the song is released without the originators permission the new creation is protected by copyright law, but since the permission is not granted by the originator the alteration is to be considered as an infringement.\textsuperscript{58}

For the alteration to have copyright protection the work needs to be a result of an individual spiritual creation, but it does not need to be new. The copyright protection is also based upon that the original musical creation is to be regarded as a work, but the original creation does not need to be protected by copyright law.\textsuperscript{59}

\section*{2.4 Independent alteration}

An independent alteration is when influences are taken from another song but a new and independent one is created, which is different from alteration. When a musical creation is defined as an independent alteration the original song is not the main part of the new song, the sample is merged into the background of the new musical creation. The sample needs to be altered in melodic, rhythmic or harmonic terms for the new song to have its own copyright and therefore not to be a copyright infringement.\textsuperscript{60} When making an independent alteration, contrary from alterations, the originators permission is not needed. The new creation needs to be altered in such a way that the new song is to be considered as a new work, and is therefore not to be considered as copyright infringement. The difference between when a sampled song is to be defined as an alteration and when it shall be defined as an independent alteration is hard to distinguish. This investigation must be assessed case by case and a general rule is hard to outline, especially since this has never been judged upon in Swedish courts. However, the assessment that should be examined is the similarity between the two songs. This assessment shall be made by examining the quantity of the sample in the new song, how important role the sample have in the new work, and to what extent the sample is altered.\textsuperscript{61}

\begin{thebibliography}{99}
\bibitem{57} SOU 1956:25 p. 135.
\bibitem{58} Olsson, Copyright, cit., p. 64.
\bibitem{59} SOU 1956:25 p. 133-134.
\bibitem{60} SOU 1956:25 p. 136.
\bibitem{61} Christiansson, Upphovsrätt och närliggande aspekter musiksamling, cit., p.40-41.
\end{thebibliography}
Related to independent alterations are parodies and travesties. Parodies can by it’s nature be undoubtedly similar to it’s original, perhaps even follow the same melody, rhythm, harmony and sometimes follow the lyrics word by word. However, parodies and travesties are to be defined as independent alterations, and therefore not as alterations. This is based upon the fact that travesties and parodies have a completely different purpose and subject than the original musical creation.  

2.5 Neighbouring rights

Another aspect of the Swedish copyright legislation is the neighbouring rights. These have much in common with the “common” copyright rules explained above. The neighbouring rights are focused upon the performance itself and therefore not on the spiritual creation. The rules regarding neighbouring rights do not protect the composition, e.g. the structure of the notes and chords, but it protects the final product the work, e.g. a recording or performance. The neighbouring rights are divided up into the protection of the performance and of the protection of the recording. The protection of the performance gives the artist/performer the exclusive right record the performance, making copies of the recording and making it available to the public. The protection of the producer gives the producer the exclusive right to make copies of the recording and making the recording available to the public. The most important rules regarding sampling is Art. 45-46 of the Copyright Act.

Art. 45 of the Copyright Act is intended to protect the artists performance from being used without his permission. One of the most important rules in the aspect of sampling is that no one is allowed to record or copy the performance in such a way that it could later be reproduced and made available to the public. The purpose of this rule is to counteract piracy, and is therefore not directly related to sampling. However this rule protects the artist performance to be used in a way that the artist does not permit. This protection is based

63 Art 45-49a of The Swedish Copyright Act.
64 By "common" copyright rules the authors aim at the rules protecting the spiritual and personal creation for the creator and not the protection of phonograms and performances. This implies that the common copyright rules are the rules protecting creations before they are performed and/or recorded, which is stated in Art. 45-49a of the Swedish Copyright Act.
65 Olsson, Copyright, cit., p. 268.
66 Art. 45 of The Swedish Copyright Act.
67 Art. 46 of The Swedish Copyright Act.
68 Art. 45 1st paragraph of The Swedish Copyright Act.
69 SOU 1956:25 p. 381.
upon that the performance itself must be considered a work.\textsuperscript{70} The neighbouring rights are also not a protection against any alterations or independent alteration.\textsuperscript{71}

Art. 46 of the Copyright Act is intended to protect the producer or the party that made the phonogram possible. The term phonogram means “the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work”.\textsuperscript{72} This rule makes it a copyright infringement if someone uses an already recorded song, and reproduces it or makes it available for the public, without permission from party that made the recording possible. This paragraph is not dependent on that the recording is to be considered a work. Art. 46, similar to Art. 45, does not give an exclusive right that protects against any alterations or independent alterations.\textsuperscript{73}

\textsuperscript{70} Note the wording in Art. 45 1st parapraph of The Swedish Copyright Act. The term “work” is used which means that the sample must reach the originality threshold.
\textsuperscript{71} Regeringens proposition 2004/05:110, Upphovsrätten i informationssamhället - genomförande av direktiv 2001/29/EG, m.m. (Prop. 2004/05:110) p. 265 and 269.
\textsuperscript{72} Art 2b WIPO Performances and Phonograms Treaty (WPPT).
\textsuperscript{73} Prop. 2004/05:110 p. 265 and p. 269.
3 Sampling

The easiest way to explain music sampling is when a producer/musician uses a part of an already recorded song to make a new piece of music.\(^{74}\) This essay will be built upon this definition of sampling. The authors will therefore not include covers, interpolations\(^{75}\) or any other ways of producing music without taking a piece of a pre-recorded musical creation. Typical instrumental samples consist of e.g. grand piano, violins, percussion instruments and guitars. Typical vocal samples consist of choirs, singing, grunts and screams. It is important to note that a sample could also contain both instrumental and vocal parts, e.g. if a chorus is sampled. Non-traditional samples includes dogs barking, traffic noise, car honking its horn and wind blowing through a leafy forest.\(^{76}\) Samples could consist of pretty much every kind of audio that could be recorded by a human ear.

The genre that is most well known for using samples is Hip-Hop. It is also Hip-Hop that originally introduced the public to sampling.\(^{77}\) It all started in New York in the late 70’s when DJ’s started to mix songs during live performances.\(^{78}\) They isolated “breaks” which they later talked over, which was the start of rap. This evolved and were later not only performed live but recorded and used in songs. One of the most famous and earliest is the legendary song “Rapper’s Delight” by the Sugarhill Gang who sampled Chic’s song called “Le Freak”. This song set the bar for the future of Hip-Hop and the way sampling became a large part of it.\(^{79}\) Musicians has since then reused songs in new recordings at a frequent pace with or without authorization.

Tone-Loc’s hit song “Wild Thing” contained the intro drum loop, and some shorter musical samples, of Van Halen’s song “Jamie’s Crying.”. The record labels involved drafted an agreement for the use of the sample. However, in some cases musicians has failed to draft these kind of agreement, either they did not want to or did not think it was necessary. Examples of this are De la Soul, the Beastie Boys, and Biz Markie which all have used samples in their recordings without permission of the copyright holder.\(^{80}\) These samples have in

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\(^{74}\) Wilson, Music Sampling Lawsuits, cit., p. 179.
\(^{75}\) Interpolation is when a musicians/producer replays a melody instead of sampling it.
\(^{76}\) Johnson, Music Copyrights, cit., p. 136.
\(^{78}\) Christiansson, Upphovsrätt och närliggande aspekter musiksamling cit., p. 14.
\(^{79}\) Johnson, Music Copyrights, cit., p. 137.
\(^{80}\) Johnson, Music Copyrights, cit., p. 137.
some cases been altered heavily and in some cases they have simply been looped. With todays technology the way a sample can be used and altered is more advanced and the possibilities for what can be done is expanding. Sampling began as a foundation for the creation of hip-hop music, but this way of making music is now a part of almost every genre of music. It does not stop there, sampling is also used within the movie industry, computer gaming industry, advertising industry and so forth.

We can distinguish four types of music sampling. Before we explain these types of sampling techniques it shall be noted that in all these cases the sample could go through different types of modifications and be of different length. It could be pitched up or down, given a reverb, gone through filters or in other ways altered.

The first type of sampling, which is a commonly used technique, is when a part of a song is isolated and sampled. This part is then incorporated in the new musical creation and looped. The term looped means when a sample is cut into a shorter parts so the end of the sample matches the beginning in terms of rhythm. The sample could then be played back in an infinitely sustainable form, forever repeating itself. This sampled part then plays throughout the new song or in some parts of it, for example the chorus. The second type is when a part of a song is cut into smaller pieces and then put together in another order. These cut up pieces are rearranged and often forms an own loop. The third and final way is when an even smaller part of a song is used and incorporated in the new song in a way that makes it somehow isolated. This could for example be when a grunt from James Brown, a high-hat from Lars Ulrich or a piano note from Aretha Franklin is copied and inserted in the new creation. There are other ways of sampling but these types are very common and they all exist within a grey area of the Swedish copyright law.

81 Johnson, Music Copyrights, cit., p. 137.
82 Johnson, Music Copyrights, cit., p. 136.
83 Christiansson, Upphovsrätt och närliggande aspekter musiksamling, cit., p. 15.
84 Johnson, Music Copyrights, cit., p. 137.
85 Christiansson, Upphovsrätt och närliggande aspekter musiksamling, cit., p. 13-14.
4 The legality of sampling according to Swedish law – an analysis

4.1 Introduction to the analysis

This chapter is an attempt to analyse to what extent sampling is legal within the Swedish Copyright law. To fulfil this analysis the authors have, on the basis of their knowledge, constructed a test. The purpose of this test is to evaluate if the Swedish copyright law is regulated to that extent it could solely be used as a basis of a possible court ruling. Since these issues are decided case by case and there is currently no court decision regarding samples in Sweden, it is hard to define a scheme on how Swedish court would have ruled on this matter. However, using the legislative history, case-analogies and relevant judicial literature we could give the reader some insight on how a Swedish court possibly could rule on a sampling dispute.

4.2 Legality test

4.2.1 Is the original song identifiable?

The reason for the argument to reach a courtroom in the first place is whether the original song could be identifiable in the new musical creation. If no one could recognise the sample, neither would the originator and hence, the originator would not dispute the use. This has much to do with how much of the original song was used in the new musical creation and also to what extent it has been changed. If the sample is altered in such a way that it is not identifiable, there is little risk of copyright infringement. Generally, the longer a sample is, the more likely the sample is to be identifiable and the higher the risk is that the new song is to be considered as a copyright infringement. A musician could in some cases more easily hear the similarity between songs compared to a regular listener. According to Swedish case law the originality of songs shall be investigated from the listeners perspective, which is leading to an overall assessment. It is not farfetched to believe that also similarity should be investigated from a listener’s perspective. In this case, the “listener” is not identified. The judgment on whether two songs are similar or not is highly connected to who the listener is and what knowledge and musicality that party brings to the table. Without clarifying this, the outcomes of future cases could jeopardize the foreseeability.

4.2.2 Does the original sample reach the originality threshold?

When a sample used in a new song does not reach the originality threshold, the sample does not obtain copyright protection. A complete song is most often original enough to obtain protection, however, just because a complete song has reached the originality threshold does not mean that a small part, such as a sample, has reached that level of originality. According to Swedish case law the originality threshold has been set low. This means that even simpler musical creations should be able to reach copyright protection. It has been stated that a creation must possess a certain level of originality and be independent to be covered by Swedish copyright law. This is the general approach to the originality threshold, the legislative history has however failed to define what a musical creation is, it is simply stated that “The term musical work hardly needs any further description”.

However, it is considered commonly known that the creation must possess a personal and distinctive characteristics. What this means in practice is however hard to distinguish.

When discussing a sample that has been looped, for example a chorus that contains drums, instruments and singing, it seems that such a sample could reach the originality threshold and is therefore to be defined as a work. The reason for this is that a chorus that contains these parts is most often complex, original and possesses distinctive characteristics. It is however more difficult to assess whether or not a sampled drum loop contains distinctive characteristics enough to be declared a work. According to judicial literature, a song needs to have the three fundamental elements; melody, harmony and rhythm, to be declared as a work. Due to the lack of e.g. melody, in individually kicks, snares or drum loops it is unlikely that drums are to be regarded as a work if this judicial literature should be taken into account.

When an original song is cut into smaller pieces and put together in another order, the originality threshold is even harder to assess. It all depends on how much of the distinctive characteristics still exist in the new song. How long the pieces of the sample are and to what extent they have been changed. When sampling even shorter sounds, such as a single

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88 Christiansson, Upphovsrätt och närliggande aspekter musiksamling, cit., p. 21.
89 NJA 2002 s. 178. p. 181.
90 NJA 2002 s. 178. p. 181.
93 Levin, Lärobok i immaterialrätt, cit., p. 161.
kick or a snare, it is even more doubtful if the sample has distinctive characteristics and possesses originality enough to be declared a work.

4.2.3 **Is the new creation considered an independent alteration?**

If the sample has been declared as original, the court needs to address if the new creation is differentiated enough to be declared as an independent alteration. As stated before, an independent alteration is not a copyright infringement. This is the case when a sample is altered in such a way that the new creation is to be considered as an independent alteration. When an alteration reaches the independent alteration barrier is hard to foresee and is based on a case-by-case assessment. It is hard to know what must be changed for the new song to be independent from the original work and therefore not an infringement.

The legislative history states that for a song to be defined as an independent alteration, the sample needs to be altered in a melodic, rhythmic or harmonic way.\(^9^4\) According to the Swedish legal hierarchy the judgment on whether a song is to be regarded as an independent alteration or not shall be assessed according to the legislative history, if the law is not as specific as required. It is highly questionable what melodic, rhythmic and harmonic changes really means and how these are measured. The outcome of a future hypothetical case regarding independent alteration is therefore highly unsure.

4.2.4 **Are the neighbouring rights applicable?**

The neighbouring rights deserves an own sub chapter in the analysis due to the fact that they are important rules that works in parallel with the “common” copyright rules. As explained in chapter 2.5 the neighbouring rights protects the recording and/or the performance itself, and not the artistic work behind it. In these rules the originality threshold seems to not be as important. The phonogram protection in Art. 46 of the Copyright Act and the phonogram protection in Art. 45 of the Copyright Act do not require any originality.\(^9^5\) This means that any type of recorded sound has protection. According to this explicit interpretation an unauthorized use of a sample should always be an infringement.

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\(^9^5\) Note that the legislator purposely did not include the word ”work” in the wording of Art 46 and 45 of the Swedish Copyright Act.
It seems that the phonogram protection in Art. 46 of the Copyright Act is the biggest obstacle on sampling without permission. However, the phonogram protection is designed for protection against piracy and illegal copying of for example records. This leads to a significant uncertainty on how this rule would be applicable in Swedish courts.

The Swedish courts ruled upon the applicability of the neighbouring rights in 1976. The case was about photographs that were taken during a movie shoot. These photographs were later sold and used in a commercial purpose without the permission of the actor. The plaintiff claimed that this was an infringement of the neighbouring rights since his performance was made available to the public. The court ruled that this was not the case. The reason for this judgment was that a photograph alone is not enough to mirror the actor’s performance of a theatrical works. The court furthermore stated that an infringement under Article 45 of the Copyright Act should at least require a rendition of such a large section of the events that the rendition thereby portrays the performance. According to judicial literature this case could be used as an analogy in the case of sampling. This is an indication that the smaller a musical sample is, the less likely it is to portray the original performance or recording. It also serves as an indication that alterations of a performance or recording are not directly applicable of the neighbouring rights.

4.3 Summary
The outcome of a hypothetical sample case in Sweden is hard to predict. There are so many question marks that a prediction becomes close to impossible. When does a sample reach the originality threshold and is therefore covered by the Swedish copyright law? Secondly, when a song is in fact sampled, to what extent must the sample be altered for the new creation to be acknowledged as an independent alteration? How is that judgement made? The authors will answer if the similarity between an old and a new creation is measured from the consumers’ point of view or maybe from the point of view of the experts in the area? Lastly, are the neighbouring rights applicable on sampling? To answer these questions the authors needs to consult other countries case law where these types of questions has been answered by the courts.

98 Christiansson, Upphovsrätt och närängande aspekter musiksamling, cit., p. 36.
5 Doctrines related to sampling case law

5.1 Fair use
The five exclusive rights of a copyrighted work are stated in the United States Federal Copyright Act of 1976. The Copyright Act however, opens up for the fair use doctrine. It states that apart from the copyright rules, fair use of a copyright protected work is allowed if it is for the purpose of comment or criticize the original work, news reporting, teaching, scholarship or research. Fair use is a judge made doctrine and the determination of fair use is done by a test. To determine fair use one should consider the factors: if the purpose of the use is either commercial or non profit educational purpose, the nature of the copyrighted work, the amount and substantiality of the work used in relation to the copyrighted work as a whole, how the use effects the potential market or the value of the copyrighted work.

In short, fair use is a limitation and exception to the exclusive rights granted to the creator of a work by copyright. It is excused from infringement when a copyrighted work is used for a limited purpose. The person who wants to enjoy fair use does not have to be permitted by the copyright holder. The copyright owner of the original work has no say and cannot in any way impact the fair use of the work.

5.2 Free use
Similar to fair use, free use is the translation used in the above-mentioned Kraftwerk-case. The free use is stated in section 24 of the German Copyright Act, UrhG. The German free use allows a third party to use a protected work without prior consent by the creator. It “allows the creation of an independent work using someone else’s creation without permission”. Hence it is very similar to the American fair use since it is an exception or defence for a copyright infringement, but it is a narrower doctrine since it only allows transforma-

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100 Section 107, 17 U.S.C.
101 Section 107 (1-4), 17 U.S.C.
tive use of the protected work.\footnote{Reilly, Good fences makes good neighbouring rights, cit., p. 189.} Free use shall be determined ad hoc on a case-by-case ba-
sis.\footnote{Reilly, Good fences makes good neighbouring rights, cit., p. 189.}

5.3 \textit{De minimis}

\textit{De minimis} is Latin for “of minimal things”.\footnote{Fellmeth, A and Horwitz, M. Guide to Latin in International Law. Oxford University Press 2009, USA, 1st edition.} It is a doctrine stating that the court shall not care for too small a matter. This means that the fact or matter at hand is so insignificant that acknowledging it would lack legal consequence. A court could choose to apply the \textit{de minimis} doctrine in matters that the court finds to be of too trifling character.

In a case of music sampling, contrary to free- and fair use, \textit{de minimis} is no infringement since it fails to reach the level of infringement at all.\footnote{Blessing, D. S., Who Speaks Latin Anymore? Translating \textit{De Minimis} Use for Application To Music Copyright Infringement and Sampling, 45 Wm. & Mary L. Rev. 2399 (2004), p. 2410 and Sykes, J, Copyright--the \textit{de minimis} defense in copyright infringement actions involving music sampling, 36 U. Mem. L. Rev. 749 (2006), p. 763.}
6 Kraftwerk

6.1 Summary of the case

This decision was ruled in the German Federal Supreme Court, who handed down its decision the 20th of November 2008. The lawsuit was filed by the music group Kraftwerk (the plaintiffs) and it concerned a twenty year long dispute between them and the producers of a new song, regarding the issue of “whether the sampling of small parts of a sound recording constituted an infringement of the producers neighbouring rights in the sound recording.”

Two producers (the defendants) had taken a two bar, or two second long, sample from the song *Metall auf Metall* (song 1) by the plaintiffs. The plaintiffs own both the producer rights as well as the performing rights to the song. The plaintiffs also own the copyright to the song since one of the group members is the composer and he has transferred the copyright to the music publisher. The music publisher itself is owned and operated by the plaintiffs. The two bars were sampled to a song called *Nur mir* (song 2) produced by the defendant. The plaintiffs therefore claim that the defendants both infringed their rights as producers as well as the copyright of the group member who composed the song. They demand the defendant to stop further infringements, pay damages and surrenders the phonograms for destruction. However, the lower court only ruled on their rights as producers since they saw the sample as a phonogram. That is the reason why the highest court has only ruled on the same rights, since it is the first decision that was appealed.

The plaintiffs are to be considered as the producers of song 1, and according to German IP law the producer possesses neighbouring rights. The sampled bars are seen as the nucleus of song 1. The sample is continuously used as an underlying rhythm throughout song 2, it is not altered but is used in its entirety, and is distinctly noticeable in the song. By using the sample, the defendants are saving themselves effort and money.

The court found that by using this sample, the defendants interfered with the plaintiffs’ rights as producers and their exclusive rights to reproduce and distribute the phonogram.

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108 Conley and Braegelmann, Metall auf Metall, cit., p. 1017.
109 Conley and Braegelmann, Metall auf Metall, cit., p. 1026.
110 Conley and Braegelmann, Metall auf Metall, cit., p. 1025.
111 Conley and Braegelmann, Metall auf Metall, cit., p. 1028.
112 Conley and Braegelmann, Metall auf Metall, cit., p. 1025 and p. 1026.
Within the neighbouring rights, it is not the sample itself that is protected but the financial, organizational and technical effort behind the song by the phonogram producer. This effort is generated for the entire song and since no part of the song is left without entrepreneurial effort, no part of the song is left without protection. This means that even the sampling of a small sounds effect the entrepreneurial effort. The quantity or quality of the sample shall therefore have no effect on the judgement. According to the exclusive rights of the producers of a phonogram it is an infringement when “even the smallest parts of sounds are taken from a phonogram”.

The defendants claim that samples have become “...essential building blocks of musical creativity in the modern production of music”. This does not however, conclude that a producer should be required to waive its neighbouring right to a small part of a sound recording. It does furthermore not conclude that music creators are free to, unauthorized, use someone else's sound recording. The court claimed that this will not lead to a halt in within the music development since one that wants to use a specific sound is free to record the sounds themselves as far as they are not protected by copyright. If the although want to use the original song, one can ask for an appropriate license.

The court decided that the sample of song 1, used in song 2, can not be considered free use, which may be published and exploited without the original author's prior consent. That is because that German legislation is applicable on the free use of the original work but not on neighbouring rights and hence phonograms. It is clarified that this case that the sample is not considered a work but a phonogram, why the free use legislation is non applicable. There is a possibility for an analogy of the free use legislation on phonograms but this was left undecided. However, right to free use of a phonogram in an analogy can not be granted when the melody of the original work is recognizably used as a base for the new work. Unauthorized use of a phonogram is only allowed in the creation of a new and independent work. This requires the new creation to keep an adequate distance to the personal elements of the original work. That only happens when the new work possess such

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\(^{113}\) Conley and Braegelmann, Metall auf Metall, cit., p. 1027 according to § 85 para. 1 Urheberrechtsgesetz (UrhG) (German Copyright Act).

\(^{114}\) Conley and Braegelmann, Metall auf Metall, cit., p. 1031.

\(^{115}\) Conley and Braegelmann, Metall auf Metall, cit., p. 1030.

\(^{116}\) Conley and Braegelmann, Metall auf Metall, cit., p. 1029.

\(^{117}\) Conley and Braegelmann, Metall auf Metall, cit., p. 1028-1029 and §85(1) sentence 1 UrhG.

\(^{118}\) Conley and Braegelmann, Metall auf Metall, cit., p. 1032.
uniqueness that the personal elements of the original work fade away, and the new work is viewed as independent.

Whether the defendants needs to surrender their phonograms or not is a property dispute which will not be covered according to the delimitations.

### 6.2 Key points of the case

Just as the Swedish copyright laws, the German copyright laws give a producer of phonograms the exclusive right to reproduce, distribute and make the phonogram available to the public.\(^ {119}\) However, German IP laws explicitly protect small parts, or samples taken from a phonogram.\(^ {120}\) Both Swedish and German IP laws gives the opportunity to create a new, independent work with free use of an original work without consent from the rights holder of the original work, as long as the new work does not contain a recognizable melody from the original work and used it as a basis for the new work.\(^ {121}\) This analogy could although not be used if it is possible to record the sounds of the sample by oneself.

Sound recordings are not granted “common” copyrights according to German legislation, but are instead protected by neighbouring rights. This is one of the reasons why the court in the Kraftwerk-case ruled referring to neighbouring rights and ignored the “common” copyrights. Sound recordings are not considered an intellectual creation and is neither present in the list stating the protected works according to German IP law.\(^ {122}\) Sound recordings are however, granted neighbouring rights according to German IP law.\(^ {123}\) The neighbouring right protects the entrepreneurial effort such as time and money, that the producers have invested in the finished product.\(^ {124}\) This leads to the conclusion that samples are not considered a musical creation but a sound recording according to German law, and therefore are samples granted neighbouring rights. This is the reason why it is allowed to reproduce the sound by oneself as stated in the summary of the case, as long as the sample is not protected by copyright, which samples rarely are in German legislation. Whether or not a Swedish court would rule in the same way is still to be discussed in this essay.

\(^{119}\) Art. 45 1st paragraph of The Swedish Copyright Act and § 85(1) sentence 1 UrhG.

\(^{120}\) § 85(1) UrhG.

\(^{121}\) Art. 4 2nd paragraph of The Swedish Copyright Act and § 24 UrhG.

\(^{122}\) § 2 (1-2) UrhG.

\(^{123}\) § 85 (1) UrhG.

\(^{124}\) Conley and Braegelmann, Metall auf Metall, cit., p. 1019.
6.3 Criticism to the ruling

There have been several articles published after the release of the Kraftwerk judgment. Some of them direct harsh criticism towards the outcome and claim that the judgment is not exhaustive enough on several discussed areas. Some of the criticism will be presented and discussed below in order to highlight the difficulties of the sampling area.

Prior to this case there was a common belief that sampled breaks and small parts of sounds to create songs was legal but that sampling of a melody recorded on a phonogram, or a sequence of notes, was considered copyright infringement. By the Kraftwerk decision the German Supreme Court made it clear that “even the smallest shreds of sounds can infringe the exclusive rights of record companies”125.

According to the case, one is allowed to free use a work if the new work is sufficiently different compared to the new work. The judgment also states that the free use of a work is only applicable if the tone or sequence taken is not possible to record by oneself. That the free use is applicable if one can not reproduce it oneself has met criticism since even the original creator might not be able to reproduce the sequence. This is due to that all sound recordings are impacted by the specific musical instrument used, the microphone, recorder or other equipment used, and the room used to record in. Hence, all sound recordings are unique. 126

There is also an economic perspective of the critique. The sounds to which free use applies are the sounds which can not be easily reproduced. These sounds tend to be expensive and difficult to recreate. The ones that can be reproduced and hence, to which free use does not apply, are sounds that tends to be easy and therefore cheap to recreate. This concludes that the more expensive sounds have lower protection than sounds that are cheap to make. 127 This is also critiqued in the way that such reasoning motivates samplers to only use high quality sounds which they are not required to reproduce by themselves.128

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125 Neimann and Mackert, Limits of sampling sound recordings, cit., p. 357.
126 Neimann and Mackert, Limits of sampling sound recordings, cit., p. 360.
127 Neimann and Mackert, Limits of sampling sound recordings, cit., p. 360.
128 Reilly, Good fences makes good neighbouring rights, cit., p. 201.
Most regular music consumers can not recognise the delicate elements of a sample which the court ignores to enlighten.\textsuperscript{129} The case does neither define if it is a general audience or a musicologist who will determine the recognition of a melody. The Kraftwerk-case also fails to define what part of a phonogram that is considered “recognizable” melodies, which is an additional point of critique.\textsuperscript{130} Furthermore one could question the term “sufficiently different” in order to determine if free use is applicable. Again, who will be the judge of whether the new creation is sufficiently different from the original work? It is doubtful whether a regular music consumer recognizes the original work in a new work, even if the two works would sound similar to a professional musician.

\textsuperscript{129} Neimann and Mackert, Limits of sampling sound recordings, cit., p. 360.
\textsuperscript{130} Reilly, Good fences makes good neighbouring rights, cit., p. 201.
7 American case law

7.1 Introduction

In the following chapter the authors will present three cases of American case law. These are handpicked based on either the outcome of the case or the courts reasoning in the ruling. The case Bridgeport Music, Inc v. Dimension Films was chosen since it has an essential role in the modern case law concerning sampling. It is one of the most famous cases in the area and is referred to in many cases that have followed it. Bridgeport is special in the sense that it purposely neglects the substantial similarity test in its judgement. It is also the case concerning sampling that has been judged in the highest authority of court. Compared to Bridgeport v. Dimension Films, Jarvis v. A&M Records and Saregama India Ltd. v. Mosley both use the substantial similarity test but are interesting from this perspective since they are directly opposite in outcome. For the understanding of the reader, substantial similarity is a test conducted by the court to determine whether a song containing a sample is substantially similar to the original song from which the sample was taken. If the court finds the new creation to be substantially similar, it constitutes a copyright infringement. Jarvis v. A&M Records is further of importance since it discusses the definition of quantitatively and qualitatively measures of the sample. Saregama India Ltd. v. Mosley is one of few cases that actually does not find the use of a sample in a new creation to constitute copyright infringement.

7.2 Bridgeport Music, Inc. v. Dimension films

7.2.1 Summary of the case

This case was argued in the United States Court of Appeals, sixth circuit the 28th of March 2005 and was decided the 3 of June 2005. The case concerned a copyright owner of a musical composition who claimed infringement action from a motion picture producer.\(^{131}\)

Bridgeport Music (the plaintiff) possesses the copyright to the musical composition and the sound recording of a song called “Get of your ass and jam” (song 1). Two seconds of a guitar riff in song 1 was sampled and used in “100 Miles and Runnin” (song 2), where the sample was pitched and looped to a seven second sequence that was repeated several times.

\(^{131}\) Bridgeport Music, 410 F.3d at 792, p. 794.
Song 2 was then used in a movie. There is no dispute to the fact that song 1 was sampled and that song 2 was used in the soundtrack of the movie. 132

The court firstly stated that the sample were to be considered as original and therefore has copyright protection. 133 The court decided that this was an infringement and said “Get a license or do not sample” 134. The court did not show any understanding for the claim that such a decision would suffocate creativity. 135 There was no de minimis discussion or sufficiently similarity test since the court declared that independent of how small part that is taken from a sound recording, it is still taking something of value. 136

Though the court takes a very firm standpoint in the case, the court states that the market will control the licence price to keep it reasonable. However, most importantly the court states that “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.” 137. Thirdly, the court states that sampling is never accidental, it is an intentional action and when someone samples, one is aware that they are taking someone else’s product. 138

The court claims that a substantial similarity test is only applicable on musical compositions. 139 Hence, the court avoided making a substantial similarity test and held that it was not necessary in a case concerning music sampling of a recording because the court does not see sampling as an intellectual taking but rather as a physical taking. 140 Another reason for this choice is that the court stated that a bright line rule is more valuable considering the amount of sampling cases that could be apparent. 141 The court claimed to save costs by excluding a substantial similarity test. 142

132 Bridgeport Music, 410 F.3d at 792, p. 796.
133 Bridgeport Music, 410 F.3d at 792, p. 798.
134 Bridgeport Music, 410 F.3d at 792, p. 801.
135 Bridgeport Music, 410 F.3d at 792, p. 801.
136 Bridgeport Music, 410 F.3d at 792, p. 801-802.
137 Bridgeport Music, 410 F.3d at 792, p. 801.
138 Bridgeport Music, 410 F.3d at 792, p. 801.
139 Bridgeport Music, 410 F.3d at 792, p. 801.
140 Bridgeport Music, 410 F.3d at 792, p. 802.
141 Bridgeport Music, 410 F.3d at 792, p. 802.
142 Bridgeport Music, 410 F.3d at 792, p. 802.
This is emphasised by the following citations:

“For the sound recording copyright holder, it is not the “song” but the sounds that are fixed in the medium of his choice. When those sounds are sampled they are taken directly from that fixed medium. It is a physical taking rather than an intellectual one.”\textsuperscript{143}

“If the sampler physically copied any portion of another's copyrighted sound recording, then infringement should be found. If the sampler did not physically copy, then there could be no infringement (even if the resulting recording substantially simulates or imitates the original recording).”\textsuperscript{144}

\subsection*{7.2.2 Key points of the case}

The most interesting point in the ruling of this case is that the court avoids making a substantial similarity judgement. This case creates a strong precedent within American case law by stating that a substantial similarity test should only be applied on infringements of musical compositions, not on infringements of sound recordings. It is however, still to be seen if the following case law agree and applies this precedent.

Even though the court takes a firm standpoint regarding sampling of sound recordings in this case, the court still opens up for discussion in another important part of the sampling issue, which is the economic aspect. It is clear that most artists, producers or other music industry actors restrain from seeking a license to samples they want to use and a reason for this is the expense a license brings. In Bridgeport Music, Inc. v. Dimension Films the court states that the market shall regulate the price on licensing and that a license shall not be more expensive than the expense it would cost to reproduce the sound. To try to implement new customs for pricing licenses does not only show that the court is aware of the price range of licensing today but also that they have some understanding for the economic reasons for unlicensed sampling. They also imply what price range that is reasonable according to the court, which is a promising rule of thumb. The court is not more explicit than this concerning the pricing of licenses and the assumption from this statement is that a license to a more complex sample will be more expensive than a license to a simple

\textsuperscript{143} Bridgeport Music, 410 F.3d at 792, p. 802.

sound. That is the result of that simpler sound are cheaper to make and since complex sounds are more expensive to make and since the pricing should mirror the cost of duplicating the sound.\textsuperscript{145}

These points are of importance since one of the most prominent reasons for sampling is to save time and money, and by stating this it seems like the court is aware of the issues with expensive licensing and show some understanding to why people indulge in this way of creating music. This also opens up for further future discussions concerning sampling and licensing.

There is one aspect of the pricing of licences that the Bridgeport ruling failed to address since it is still not cheap to sample. The market of licenses to samples does not work in the same way as the most common markets where an allocation of prices could be executed. In fact, in other markets the good provided are mostly similar but in the market of samples, all songs are unique. The sellers, in this case the creator of the original work, have the possibility to demand a high price for the good since the customer, the sampler, cannot find the very same sample somewhere else. There is hence, very little or none competition within this market.\textsuperscript{146} Furthermore, if the creator of a new work realises he needs a license after the new creation is finished, it puts him in a really unfortunate bargaining position.\textsuperscript{147} The creator of the new work is afraid to loose the sunk costs he has already invested in the creation, which the rights holder of the original work realises and can secure a higher license fee.\textsuperscript{148}

### 7.3 Jarvis v. A&M Records

This case was decided in the United States District Court in the district of New Jersey by the 27\textsuperscript{th} of April 1993. The case concerned a songwriter who brought actions against the defendant who had digitally sampled the plaintiffs’ song, and claimed copyright infringement.\textsuperscript{149}

\textsuperscript{145} Bridgeport Music, 410 F.3d at 792, p. 801.
\textsuperscript{147} Azran, Bring Back the Noise, cit., p. 77.
\textsuperscript{148} Azran, Bring Back the Noise, cit., p. 77.
\textsuperscript{149} Jarvis, 827 F.Supp at 282, p. 284.
In Jarvis v. A&M Records the defendant used smaller parts of the plaintiff’s song without permission. The parts that were sampled consisted of short vocal parts. More specifically the expression “oohh”, “moves” and the phrase “Free your body”. The defendant also sampled a distinctive keyboard riff. In this case the courts laid down a three-step process to investigate possible copyright infringement. This resulted in that the copyright holder of the original song must prove that he is a valid copyright owner and that the defendant copied the protected composition. This was hardly up to debate in this case since the defendant admitted the used of the sample without permission. The courts therefore focused on the third step, that the plaintiff must prove that the "copying is substantial enough to constitute improper appropriation of plaintiff’s work".

In this step the court focused on the undeniably similarity between the two songs. And the court stated that “the copied parts could not be more similar”. The defendant claimed that the “oohs”, “moves” and “free your body” are cliché phrases that are non-copyrightable. The court argued that this was not the case, the main reason for why the court argued that the phrases were copyrightable was particular arrangement the phrases were used in. Also the keyboard riff that was sampled has a distinctive melody and rhythm which makes it sufficiently distinctive and distinguishes the phrases.

The defendant also states that copyright infringement only should exist when two songs are similar in their entirety. Since the similarity within these two songs only exists within smaller portion of song, there is no apparent similarity. The court countered with that if this was the case, a specific song could hypothetically reach a level of immunity from infringement, if the new song reaches a substantially different audience than the original work. The court held that a party should be able to be held liable when that party samples a qualitatively important section of plaintiff’s work, and that connection is not necessarily connected to the quantity of the sample. The court found the two songs to be substantially similar and therefore constituted a copyright infringement.

150 Jarvis, 827 F.Supp at 282, p. 289.
152 Jarvis, 827 F.Supp at 282, p. 289.
156 Jarvis, 827 F.Supp at 282, p. 290.
To this end, the court further explained that "fragmented literal similarity" infringement may decrease the value of the original work even when only a small, but qualitatively significant portion of the work was copied. The court however did not strengthen this argument with any facts or examples.

7.4 Saregama India Ltd v. Mosley

7.4.1 Summary of the case

This case was decided in the United States District Court in the southern district of Florida by the 23d of December 2009. The case concerns Saregama India Ltd who brought actions of copyright infringement upon the defendant for the copying and digitally sampling of a song they claim to have copyright to.157

The defendant, the producer of the song ”Put you in the game” (Song 2), had in his musical creation used a one second sample from the song ”Bagor Main Bahar Hai” (Song 1). The plaintiff argued that it held a valid copyright of song 1, due to an agreement with the original author. The sample were looped four times in the chorus of song 2 and the defendant admitted to the use of the sample without permission. The question the court had to answer was therefore if the sample of song 1 is original and if the songs were to be considered as substantial similar.

The sample consisted of a short “common vocal exercise”.158 Even though, the court found that the sample used were to be considered as original, and therefore possess copyright protection. The court went on to the question if the two songs are to be regarded as substantial similar. The court stated, “two works are substantially similar if an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work”.159 The court conducted a similarity test and found, different from previous judgments, that the songs needs to be examined as a whole. The court stated that taken as a whole, song 1 and song 2 “are completely different songs, with different lyrical content, tempo, rhythms, and arrangements”.160 Further, the court stated that is must be highly unlikely that the average lay listener could determine the source from where the sample was

157 Saregama India, 687 F.Supp 2d at 1325, p. 1326-27.
158 Saregama India, 687 F.Supp 2d at 1325, p. 1336.
159 Saregama India, 687 F.Supp 2d at 1325, p. 1337.
160 Saregama India, 687 F.Supp 2d at 1325, p. 1338.
taken without prior warning.  

The court concluded the case by stating that the plaintiff's ownership of song 1 was based on a time-based agreement. The plaintiff subsequently failed to prove that song 2 was created during the term of the agreement. The court continued to explain that the sample was original, however, the two songs were not substantially similar and therefore no infringement was found.

7.4.2 Key points of the case

This case changed how the similarity test could be conducted. The court stated that the test should regard the songs as a whole. In other words the similarity test should not be restricted only to the parts that contains the sample. The test should in contrary be conducted to the similarity between the two full songs. This judgment could dramatically change the future outcomes of cases regarding samples. The reason for this is that songs that have sample-based elements within the work are often not similar when the complete songs are compared. Generally samples are taken from one genre of music and used in another with changes of e.g. rhythm, pitch, tempo, melody and lyrics. In previous judgments the courts have focused upon the isolated sample and not the arrangement as a whole. The court stated some important focus points and exemplified why these songs where not described as similar, the examples were the differences in lyrical content, tempo, rhythms, and arrangements.  

It must be noted that if this kind of argumentation were to be used in other judgments regarding samples, including the German Kraftwerk-case, the outcome would possibly be the opposite.

The court also stated that an indication for the dissimilarity between two songs is at hand if the average listener could not distinguish the source of the sample without any prior warnings. In fact, this means that the average consumer should be able to detect where the sample comes from without any directions. The judge also critiques the outcome of the Bridgeport ruling by criticizes how the court interpreted the legislation at hand. It is highly doubtful that the two songs compared in the Bridgeport case would to be considered as significantly similar if the test were to be conducted in a similar way as in this case. Further, it is even more doubtful that an average music consumer would be able to distinguish the sample presented in the Bridgeport case without any prior warning. The question is wheth-

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161 Saregama India, 687 F.Supp 2d at 1325, p. 1338.
162 Saregama India, 687 F.Supp 2d at 1325, p. 1342.
163 Saregama India, 687 F.Supp 2d at 1325, p. 1338.
er this case will be used as a base in future judgments or not. If it does, it could change how the courts will rule in cases regarding sampling.
8 Concluding thoughts on the case law

When reading the Kraftwerk-case it becomes clear that the court distinguish a difference between when an actual recording is sampled, and when a musical composition is taken. The court states that “even the smallest bits of sound of a phonogram are protected by the neighbouring right, while parts of a musical work are only protected by copyright if they [i.e., the parts taken from the musical work] fulfil the conditions for copyright protection in and of themselves”\textsuperscript{164}. The court ruled upon the neighbouring rights and stated that that is always the case of an infringement when a part of a sound recording is taken, no matter the quantity or the quality of the sample. No substantial similarity test was therefore conducted.

The same discussion occurred in the Bridgeport case. The court agreed on the plaintiffs view that “no substantial similarity or \textit{de minimis} inquiry should be undertaken at all when the defendant has not disputed that it digitally sampled a copyrighted sound recording.”\textsuperscript{165} The court clarified this by stating that if an actual sound recording was taken, and therefore not an imitation of the composition, infringement should be found.\textsuperscript{166} The American court is therefore conducting a judgement, which was not based on proving any substantial similarities or \textit{de minimis}, this is very similar to what the German court stated in the Kraftwerk case. The German court labelled it as neighbouring rights infringement and the American court as Copyright infringement, but the outcome is almost identical.\textsuperscript{167}

The Jarvis ruling had the same outcome as Kraftwerk and Bridgeport but with an opposite view on sampling. The court conducted a similarity test to clarify if an infringement was at hand.\textsuperscript{168} The court did state that taking an actual recording was directly to be defined as an infringement, as the court did in the Bridgeport case. The court ruled that the two songs were to be considered as substantially similar if a lay audience would detect it.\textsuperscript{169} The Saregama case ruled in a similar way but with opposite outcome than the court had in the Jarvis case. The court went further and openly criticized the Bridgeport ruling. The court stated that “the Sixth Circuit’s decision to carve out an exception for sound recordings has

\textsuperscript{164} Conley and Braegelmann, Metall auf Metall, cit., p. 1031.
\textsuperscript{165} Bridgeport Music, 410 F.3d at 792, p. 798.
\textsuperscript{166} Bridgeport Music, 410 F.3d at 792, p. 804.
\textsuperscript{167} Reilly, Good fences makes good neighbouring rights, cit., p. 203.
\textsuperscript{168} Jarvis, 827 F.Supp at 282, p. 290.
\textsuperscript{169} Jarvis, 827 F.Supp at 282, p. 290.
not been followed in this Circuit. Indeed, the Eleventh Circuit imposes a “substantial similarity” requirement as a constituent element of all infringement claims”.

The main distinction in these cases is whether sampling\(^{171}\), should be exempted from the substantial similarity test commonly used in other copyright infringements, such as when issues regarding musical compositions is at hand. The conclusion is that the Kraftwerk case and the Bridgeport case ruled according to, or in the case of Bridgeport, in a way that is almost identical with, the neighbouring rights. These rules disregard the requirement for substantial similarity and the applicability of *de minimis*. On the other hand the Saregama case and the Jarvis case ruled according to the “common” copyright rules where substantial similarity is required and what falls outside of the test is to be declared as *de minimis*. The question is which path is the most suitable with regard to sampling disputes, neighbouring rights or “common” copyright rules? For the sake of predictability and consistency this needs to be clarified.

\(^{170}\) Saregama India, 687 F.Supp 2d at 1325, p. 1338-1339.

\(^{171}\) Using the definition we have chosen, when someone actualy uses an already recorded sound when creating a musical work.
9 Analysis

9.1 Introduction

After presenting international case law together with some reasoning around the outcome, neither case is a crystal clear precedent around sampling cases. The authors have yet not found any obvious common grounds in the judgments and found that the legal approach differs not only between the countries, but within the same country as well. The case law presented has not been able to clarify how Swedish legislation and courts should or will tackle the issue of unauthorized sampling.

Copyright in Swedish legislation could be divided into two main parts. In chapter 2 the authors tried to highlight these two parts as the “common” copyright and the neighbouring copyright. To obtain “common” copyright a work needs to exceed the originality threshold to obtain copyright, and the neighbouring rights protect the performance or ing. The analysis will be divided into two main parts, copyright and neighbouring rights, to keep focus on the structure of the Swedish legislation.

In the previous chapter 4 it was clear that several gaps within the Swedish legislation remains unsure within the area of sampling. It might be due to the relatively new type of music making that sampling actually is. The authors will therefore in this analysis try to answer the questions that remained in chapter 4 to clarify the Swedish legislation in the area. When does a sample reach the originality threshold and is therefore covered by the Swedish copyright law? Secondly, when a song is in fact sampled, to what extent must the sample be altered for the new creation to be acknowledged as an independent alteration? How is that judgement made? The authors will answer if the similarity between an old and a new creation is measured from the consumers’ point of view or maybe from the point of view of the experts in the area? Lastly, are the neighbouring rights applicable on sampling?

By discussing and evaluating the international case law used in previous chapters, the authors will try to fill the gaps in the Swedish legislation by answering these questions. The authors will also approach the cases in a critical manner and in some occasions question the practical effect of these cases in terms of clarity as precedent, the possibilities to alter an original work and the economic perspective. The analysis will elucidate the concept of neighbouring rights and discuss the applicability of these rules by guidelines in international
case law. The aim of the analysis is to finalize in a predicted forecast on how a Swedish court would approach a case of music sampling.

9.2 “Common” Copyright

9.2.1 When does a musical creation reach the originality threshold?

When a musical creation is considered a work according to the Swedish copyright law has been stated above. The difficulty is where to set the originality threshold for smaller parts of a musical creation such as samples.

The originality threshold has much in common, if not identical, with the demand for originality within the international agreements the authors have taken part of. According to Swedish law a melody is to be declared as original if it possesses distinctive characteristics\(^\text{172}\) and is an expression of the creator’s personal spirit.\(^\text{173}\) As stated before, the bar is set low for something to be called original in Swedish copyright law.\(^\text{174}\) Judicial literature has also stated that musical works are only considered creations if they possess the three fundamental elements; melody, harmony and rhythms.\(^\text{175}\) The Regatta-case regarding originality of musical creation in Sweden did not emphasise these elements as a demand for a musical creation to be regarded as a work. These elements also seem to contradict the “low-bar” that case law stated since including all of these elements seem to set the bar relatively high. Swedish case law made an originality judgement on music in the Regatta-case.\(^\text{176}\) Here the Swedish court stated that even a basic melody receives protection, if it is sufficiently original, note that the court did not include the three elements when conducting the originality test.\(^\text{177}\) Similar cases that were settled internationally supports the idea of that the originality threshold is set low and is most often not analysed in depth. Generally the longer the sample is, the higher chance it is that the sample is to be declared as original. But according to American case law even a shorter loop of a guitar or piano riff most often reaches the originality threshold. For example, in the Saregama-case the sample consisted of a short “common vocal exercise”.\(^\text{178}\) Even though, the court found that the sample used were to be

\(^{172}\) NJA 2002 s. 178. p181.
\(^{173}\) Ohlin, A, Law comments to Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, 1§ 2) and Olsson, Copyright, cit., p. 52.
\(^{174}\) NJA 2002 s. 178. p 181.
\(^{176}\) NJA 2002 s. 178.
\(^{177}\) NJA 2002 s. 178, p 187.
\(^{178}\) Saregama India, 687 F.Supp 2d at 1325, p. 1336.
considered as original, and therefore should have copyright protection. The American court, similar to the Swedish court, left the three elements out of the originality test. Generally in American case law, sample-cases do not include any long analysis of whether a sample is to be regarded as original or not. The question is however, how low the threshold really is, if all of these elements are required for a musical creation to be declared as a work? Further, if the three elements were to be demanded it would result in that drums and other kinds of percussion probably would not possess copyright protection. The reason for this statement is that drum loops rarely contain any specific melody. The conclusion of this must be that the three elements probably are not demanded for a musical creation to receive copyright protection. This results in that both Swedish and American case law indicates that melodic loops most often possesses distinctive characteristics and is original enough to be considered a work within the Swedish copyright act.

The real discussion appears when a single sound has been sampled, for example a piano note or a single percussion of some sort. It is highly doubtful if a single note or sound could be declared as original and have distinctive characteristics within the Swedish legislation. How long or complicated a piece of music needs to be to be regarded as original is not stated in Swedish law, legislative history or case law. However, it has to have some element of artistic value and spirit. It has also been stated that musical works are only considered creations if they possess the three fundamental elements: melody, harmony and rhythm. Due to this, the authors agree upon that a single note or sound does not overcome the originality threshold if the three fundamental elements are demanded as stated in Swedish case law and judicial literature. Mainly since shorter samples of single notes or drums does not consist of melody, rhythm or harmony. The authors, as stated before, agree that it is doubtful whether the three elements are demanded for copyright protection. In the case of single notes or percussions, this however becomes irrelevant. Mainly since these types of sounds with most certainty would not be characterized as distinctive and is not the result of a spiritual creation in the eyes of the court. Further, these types of sounds would probably not be characterized as creative and innovative enough to be protected. The shorter the sample is the lower the chance it has to be declared original. The Swedish court said the opposite in the Regatta case, the court stated that:

"To obtain protection under the Swedish copyright act shall the literary or artistic achievement exhibit a degree of independence and individual distinctiveness or,
with another term, have originality. Irrelevant to this is the performance quality, quantity, style or mannerism”.\textsuperscript{179}

The authors have found that for most part this is true. However, the authors firmly believe that quantity must be regarded as a factor when determining originality.\textsuperscript{180} The reason for this is that the level of originality a sound could generate decreases when the time is minimized. It is hard for a sound to leave a mark if it only has a second to do it.\textsuperscript{181} American judicial literature supports this argument that single notes, chords or sounds does not have copyright protection.\textsuperscript{182} It could be argued that a more qualitative sample such as an orchestra "hit" reaches the originality threshold since it consists of many instrumental sounds at once. This could be debatable but the author’s agree upon that an orchestra "hit" is in fact one sound when it has been fixed on a phonogram. Other authors agree and further states that an orchestral “hit” could be defined as a chord, which is a simultaneous sounding of single notes, which is not copyrightable.\textsuperscript{183}

This leads to a conclusion that longer melodic loops, for example a guitar riff, most probable would be considered as a work and therefore receive copyright protection within the Swedish copyright act. Single sounds, such as notes, chords or percussion elements will probably not reach the originality enough to be covered by the Swedish copyright act.

\textbf{9.2.2 When is a song an independent alteration and how is that test conducted?}

This chapter focuses on explaining when a sampled song is to be regarded as an independent alteration according to the Swedish copyright act. Since there is no current Swedish case law to consult regarding when a sampled song is to be regarded as an independent alteration, it is difficult to foresee the outcome when only considering Swedish law. However, this term is closely linked to the substantial similarity test sometimes used in e.g. American case law. This close connection however needs to be motivated to receive legal traction. An independent alteration is when a sample has been used but the new work is to be categorized as an original work and the sample has only been used as inspiration. When a

\textsuperscript{179} Translated from NJA 2002 s. 178, p 187.
\textsuperscript{180} Sykes, Copyright—the de minimis defense in copyright infringement actions involving music sampling, cit., p. 761.
\textsuperscript{181} Christiansson, Upphovsrätt och närliggande aspekter musiksamling, cit., p. 31-33.
\textsuperscript{182} Johnson, Protecting Distinctive Sounds cit., p. 281 and Johnson, Music Copyrights, cit., p. 142.
\textsuperscript{183} Johnson, Protecting Distinctive Sounds cit., p. 281 and Johnson, Music Copyrights, cit., p. 142.
musical creation is defined as an independent alteration the original song is not the main part of the new song and the sample is merged into the background of the new musical creation. The independent alteration test examines the full works in an overall examination. What is being examined more specifically is whether the sample is changed in a melodic, rhythmic or harmonic way.\textsuperscript{184} When conducting the similarity test, the court focuses on changes within lyrical content, tempo, rhythms, and other arrangements.\textsuperscript{185} Generally, an overall assessment of the complete work. The analysis the courts conducts is whether the sample is used in such a way that the new song is substantially similar to the original work and therefore is to be regarded as an infringement, or if the new song is to be declared as completely different and therefore does not infringe the sampled musical work and consequently receives its own copyright protection.

As seen above the independent alteration examination is closely linked to the substantial similarity test. In both independent alteration and in the similarity test used in American case law, it is not argued whether a sample has been used or not. But to what extent the musical creations are similar. Therefore to evaluate how the independent alteration rule will be used in Swedish courts, guidance can be taken from the substantial similarities test used in American case law.

Substantial similarity, \textit{de minimis} and fair use are three commonly used, or at least mentioned, concepts within sample disputes.\textsuperscript{186} In copyright disputes these are used almost as synonyms. The reason for this is that the courts, when conducting the substantial similarity test, is asking themselves if the two songs are similar enough to constitute infringement. If the new song is not to be constituted as infringement and therefore not as substantial similar, the court actually states that the sampling is so small or insignificant that the new song is not remotely similar to the old song. The court acknowledges this as the \textit{de minimis} doctrine.\textsuperscript{187} It should be noted that fair use and \textit{de minimis} has some differences. Fair use refers to when a musical creation is an excused infringement, but still an infringement, while \textit{de minimis} use of a sample fails to reach the level of infringement at all.\textsuperscript{188}

\textsuperscript{184} SOU 1956:25 p. 136.
\textsuperscript{185} Saregama India, 687 F.Supp 2d at 1325, p. 1338.
\textsuperscript{186} Sykes, Copyright—the de minimis defense in copyright infringement actions involving music sampling, cit., p. 760.
\textsuperscript{187} Sykes, Copyright—the de minimis defense in copyright infringement actions involving music sampling, cit., p. 760.
\textsuperscript{188} Blessing, Who Speaks Latin Anymore? cit., p. 763.
The conclusion that can be drawn from this is that the independent alteration test, substantial similarity test and *de minimis* is in sampling disputes virtually similar. And fair use is in fact closely connected and sometimes used in a similar manner. To try to learn how to apply the independent alteration test the authors therefore uses how international case law handles the matter of substantial similarity, *de minimis* and fair use.

The three American cases we have analysed gave no clear-cut path on how to handle the question of substantial similarity. In the Bridgeport case the court stated that the similarity test was not appropriate when an unauthorized digital sample of a sound recording is involved. However in the Jarvis case and the Saregama case a substantial similarity test was conducted, but with opposite outcomes.

When examining if two songs are to be regarded as substantial similar the similarities should be observed from the point of view of an ordinary lay listener. Which means one that does not have any specific or extraordinary musical knowledge. This could, and also should be used in Sweden when conducting the independent alteration test. The reason for this is that it comes naturally that the person who shall make this judgement should be the same person who the musical work was created for. It is in fact within this relationship, between musicians and consumers, that the subject of copyright becomes central.

In some cases American courts states that the songs should also be compared to each other in their complete form. This means that the test should not solely be focused upon the part that contains the sample but to the full arrangement. In other cases the courts does not clarify this. The authors agree that this should be used within the independent alteration test. The reason for this is that if the independent alteration test should be conducted from the perspective of an average lay listener, it should also be conducted in a way that is similar to how these listeners interpret music. An average music consumer does not isolate different parts and tries to find a similar riff in another song. An average lay listener listens

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189 Sykes, Copyright--the de minimis defense in copyright infringement actions involving music sampling, cit., p. 762.
190 Bridgeport Music, 410 F.3d at 792.
191 Bridgeport Music, 410 F.3d at 792, p. 798.
192 Jarvis, 827 F.Supp at 282.
193 Saregama India, 687 F.Supp 2d at 1325.
195 Gustavsson, Musikaliska verk och ombearbetningar, cit., p. 74.
to full songs without any limitations and modifications. It is not however demanded that the average lay listener would have to confuse one song for another.\footnote{197 Jarvis, 827 F.Supp at 282, p. 290.}

In Jarvis v. A & M Records the court stated that it is of important to determine if the sample taken was qualitatively important to the work or that the defendant took quantitatively too much of the original work.\footnote{198 Jarvis, 827 F.Supp at 282, p. 290-291.} This means that a sample that contains a large part of e.g. background noise could be considered to be substantially similar to the original work, and a smaller part of something significant could be considered to be substantially similar to the original work. In the Saregama case the court stated that the songs need to be compared in their entirety with specific focus on for example tempo, rhythms, and arrangements.\footnote{199 Saregama India, 687 F.Supp 2d at 1325, p. 1338.}

This statement seems to be closely connected with how the Swedish legislator sees the matter. The Swedish legislative history states that for a song to be defined as an independent alteration, the sample needs to be altered in a melodic, rhythmic or harmonic way.\footnote{200 SOU 1956:25 p. 136.}

The conclusion is that the independent alteration test should be based on what an average lay listener would detect. Further, the similarities between two songs should also be compared to each other in their complete form, which includes the changes of tempo, lyrics and other arrangements. Lastly, even when smaller sampled portions are included in a new work, the new work could be considered to be substantially similar if the sample used is to be regarded as significant.

### 9.3 Are the neighbouring rights applicable?

As stated previously, the neighbouring rights protect the phonograms or the performance of a work. There are no specific guidelines to what is considered as a performance but it is clear that the same work can be performed several times and each unique performance possesses its own neighbouring rights protection. This means that the same original work could get numerous protections in the form of phonograms and performances.

Since a sample is taken from a fixed recording, it is easily believed that a sample dispute in Sweden should be judged according to the neighbouring rights rules.\footnote{201 Art 45-46 of The Swedish Copyright Act.} Contradicting to this is the legislative history stating that the neighbouring rights rules in Art. 45-46 of the
Swedish Copyright Act should be used to counteract piracy.\textsuperscript{202} The authors question if these rules realistically could be applicable in a case of sampling since this does not seem to be the purpose of the rules. However, according to the Kraftwerk-case, a sampling case should be judged on the German neighbouring rights. It is though not clear if the rules are applicable in the same manner in Sweden. The court judged on neighbouring rights to protect the entrepreneurial effort of the performers,\textsuperscript{203} no such entrepreneurial perspective has been found in the Swedish legislation. It could be argued that such a case should be handled similarly in Sweden, since both Swedish and German legislation inherits from EU law. Yet nothing in the EU legislation indicates any limitations concerning which copyright protection that should be prioritized, “common” copyrights or neighbouring rights. The authors have therefore chosen to rely on the Swedish legislative history and doubt the applicability of neighbouring rights on sampling.

Secondly it is stated that a neighbouring rights holder is not protected against imitations, alterations and similar.\textsuperscript{204} If a sample that has been processed as mentioned throughout the essay, for example modified in tempo and pitch, it could be seen as an alteration or even an independent alteration. Since a phonogram, according to the legislative history, is not protected against alterations, sampling with a musical part that has been altered should not be an infringement. Thirdly, a holder of neighbouring rights has the exclusive right to make the performance or recording available to the public.\textsuperscript{205} The authors question if the legislation aims to protect the recording as a whole when giving the creator the exclusive right to exploit the recording. An answer to this could not be found in the sources used. If the legislation aims at protecting the whole recording as one piece, a sample might be legal to use. If the legislation however, aims at protecting the recording even if it is divided into parts, a sample could be illegal to use.

It is clear that neighbouring rights does not protect against alterations. If a sample is processed in such a way to be seen as an alteration or an independent alteration, the neighbouring rights are not applicable. The reasoning regarding if the legislation aims at protecting the performance or phonogram only as a whole or also in small parts concerning the

\textsuperscript{203} Conley and Braegelmann, Metall auf Metall, cit., p. 1030.
\textsuperscript{204} Prop. 2004/05:110 p. 265 and p. 269.
\textsuperscript{205} Art 45 3rd paragraph and Art. 46 2nd paragraph of The Swedish Copyright Act.
exclusive right of making the work available to the public, should in such a case be left without recognition.

The authors further believe that making a new creation that includes a sample, available to the public does not have to mean that the original creation de facto is made available to the public. If the sample is altered in such a way that it possesses its own originality these rules would again play no role in protecting the original creation.

If one should think that a sample should be judged according to the “common” copyright rules instead, it would be a question of whether the copyright of the original work has been infringed. If the neighbouring rights rules should be interpreted explicitly a judgement based on the “common” copyrights would rarely happen. Firstly due to the fact that a sample is a part of a finished product, a phonogram. Secondly because taking a part of an original work that is not considered a performance or a phonogram, would most likely result in the use of the same notes and sounds as the originator and could hence be seen as a remaking of the same sounds. A reconstruction of the same sounds as the original is clearly legal according to the Kraftwerk-case. However, a reconstruction according to the Swedish copyright Act and the Regatta-case could still be considered a copyright infringement under the “common” copyright rules.

9.4 The economic aspect of copyright protection

In all the cases considered above, one party has moved for unlawful use of copyrighted material and therefore claimed economic compensation for that use. Some courts have also ruled in favour of those claims and some has taken a firm standpoint explaining that taking something without permission, independent of how small it is, composes stealing. Independent of the above discussion, the economic impact on the samples will now be analysed.

When considering this from a Swedish perspective, one could feel some confusion when connecting this economic perspective to the Swedish Tort Liability Act. In order to be victorious with such a claim concerning compensation due to copyright infringement, it must be handled as a question of exclusively economic damage according to the Swedish Tort

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Liability Act.\textsuperscript{207} In a question of exclusively economic damage the party claiming compensation must prove that this loss of liquid assets actually exists.

In Jarvis v. A&M Records the court stated that sampling may decrease the value of the original work but did not strengthen it with any facts.\textsuperscript{208} In fact, in none of the cases that the authors have taken part of have it been shown any decrease in value due to sampling. In none of the above cases have the creator of the original work been obligated to show that they have been hurt economically, they have not shown any exclusively economic damage, but have still been granted economic compensation. No party has shown that the sampling of their original work has led to loss of sales, dilution of their trademark or made their performances less attractive. One could rather argue for the opposite. One could argue that sampling a melody into a new creation gives new life to the original work. Especially if the original work is an older song, soon to be forgotten, the sample could highlight what was once loved about the original song. As well as the new creation might ride on the reconnaissance of the older song, the older song might also get some new publicity and a free marketing campaign towards a new audience. It is not farfetched to believe that the original creation might even receive some unexpected temporary royalty increase, only due to the reminder the audience gets in the new creation. In fact, W. Michael Schuster II proved this in a study of an album containing 350 samples that “to a 92.5% degree of statistical significance — the copyrighted songs sold better in the year after being sampled relative to the year before.”\textsuperscript{209} It is further stated by Julian Azran based on Schuster’s study, that if high licensing fees prevent the new work from being released, both the creator of the original work and the creator of the new work lose.\textsuperscript{210} Azran continues by stating that if a work is allowed to be released without licensing, both the creator of the new work and the creator of the old work can achieve monetary gain.\textsuperscript{211} This must be considered a win for both parties from an economic point a view.\textsuperscript{212} Based on this, the authors question how the court can take such a firm standpoint concerning sampling as theft and deem economic compensations when no economic damage is shown. The authors also question the decrease in value that was stated in the Jarvis-case.

\textsuperscript{207} Chapter 2 Art. 1 Swedish Tort Liability Act.
\textsuperscript{208} Jarvis, 827 F.Supp at 282, p. 291.
\textsuperscript{210} Azran, Bring Back the Noise, cit., p. 79.
\textsuperscript{211} Azran, Bring Back the Noise, cit., p. 79.
\textsuperscript{212} Azran, Bring Back the Noise, cit., p. 79.
This above mentioned assessment that sampling might not conclusively be an economic disadvantage for the original creator might not however, be suitable when only a single sound is sampled. This due to the fact that it is harder for the public to recognize the sampled original song by just hearing a looped word or a single percussion. The fact, that the parties have not been required to show economic damages and the fact that it is unsure if they would be able to show economic damages still persists.

Another economic perspective related to copyright was highlighted in the Kraftwerk-case, and especially in the critique to the ruling above. The case makes clear that free use of a copyrighted work is allowed when it is not possible to recreate the sound one wants to sample. This means that free use is not applicable when it is possible for a creator to recreate the sound. This leads to that a sound that is easy to reproduce possesses stronger copyright protection, since free use of a complicated sound is allowed. As mentioned above, more complicated sounds are often more expensive to produce, and simpler sounds are often cheaper to produce. This concludes that since simpler sounds are easy to reproduce and therefore results in inapplicability of free use, cheaper sounds have stronger copyright protection than more expensive sounds.

The Kraftwerk-case rules on neighbouring rights and disregards the “common” copyrights. According to German legislation the neighbouring rights protect the entrepreneurial effort of a creation, which means the time and money invested in the protected creation, in America known as the “sweat of the brow”. The fact that cheaper sounds possesses stronger copyright protection therefore feels contradicting to the purpose of the ruling, which is to protect the entrepreneurial effort. The above reasoning states that a creation with a lot of entrepreneurial effort invested are less protected than creations with less entrepreneurial effort invested. Hence, the authors believe that the entrepreneurial effort is not protected in the sense that the court destined which diminish this cases’ position as a strong precedent.

9.5 A possible model for similar cases in Sweden

The conclusion based on the analysis above must be that the Swedish courts have two different routes to choose from when deciding in a sampling case. One of these routes is the “common” copyright, the other is the neighbouring rights. In this chapter of the analysis the authors will first describe a prediction on how Swedish courts will rule if the “com-
mon” copyright rules are applied, the same will be done with the neighbouring rights. After this description the authors will present their personal view on which route is most likely taken by the Swedish courts.

In a judgement based on the “common” copyright rules, the first the court needs to illuminate is whether the sampled portions are conceived as a work and therefore protected by the Swedish Copyright Act. In order to be considered a work, the creation must possess distinctive characteristics and be the result of the creators’ personal and artistic spirit. Judicial literature claims that a work shall possess the three elements rhythm, harmony and melody and that these elements enable a work to reach the originality threshold. These have not previously been used in Swedish case law and none of the cases analysed in the thesis consider these elements in order to determine originality. Hence, the authors believe that a Swedish court would leave out these elements in a test of originality.

Considering samples, the authors believe that single sounds and single percussions do not possess the above-mentioned requirements of distinctive characteristics and originality. They could therefore not be considered works. The same should apply to single notes and single chords. If such samples are not considered works, they are not protected by the Swedish Copyright Act and are therefore free to be sampled.

Longer samples such as loops are more likely to possess the requirements to be considered a work. It is also more likely to possess the doctrinal stated elements of rhythm harmony and melody. They are therefore more likely to reach the originality threshold and will be protected by the Swedish Copyright Act and could therefore not be sampled without permission.

If a sample is to be regarded as a work and therefore protected by the Swedish Copyright Act, the court needs to conduct an independent alteration test. If a work is considered an independent alteration, it is not seen as a copyright infringement but the new creation is granted its own copyright protection. In order to be considered an independent alteration, the sample must be altered in a rhythmic, harmonic or melodic way. The sample cannot be a significant part of the new creation and therefore cannot be prominent in the new creation. Hence, melodic loops that has not been substantially altered, where the original melody is still prominent, are never independent alterations and are therefore not free to sample.
If the Swedish courts choose the route of neighbouring rights, the outcome of sampling dispute might be different. As previously stated neighbouring rights are granted to performers of a work and producers who enables a recording on a fixed format. The explicit way of interpreting the Swedish articles concerning neighbouring rights states that such performances and song recordings shall be protected. However, if the court chooses to interpret the Swedish legislative history in this judgement, the belief is that the neighbouring rights will not protect the performances and recordings against sampling but only against piracy. An argument for this is the previous analogy from a Swedish court ruling concerning neighbouring rights, where photographs were taken of movie shoot without permission. The court found, as previously stated, that these photographs alone did not mirror the performance and hence, did not constitute a copyright infringement. The authors believe that it is reasonable to compare photographs of a movie shoot with samples of a song and that sampling therefore shall not be constituted infringement under neighbouring rights.

If the court instead chooses to use the neighbouring rights rules in the same manner as the German court in the Kraftwerk-case, a sound recording is always protected since one wants to protect the entrepreneurial effort of the performer or producer. In such a case, sampling of a sound recording is never legal. The reason for why a Swedish court might take significant influence from German case law is both since Sweden and Germany are members of the EU and their copyright legislation inherits from the same EU directives. The Swedish legislative history also states that the court shall seek guidance from international case law. Furthermore, it could be as likely to seek guidance in American case law. This, however, would perhaps not bring much clarity at all since the American courts has not been consistent in disputes regarding samples. In addition to this American copyright has no explicit neighbouring rights rule, even though they have in some cases judged in a similar manner as the Kraftwerk case. It must be regarded as more likely that Swedish courts would look for guidance from German case law, more specifically the Kraftwerk case.

The authors believe that this uncertainty that is presented above will make the Swedish court, that have no previous experience in sampling disputes, to seek guidance elsewhere and at first hand within the EU. It is for that reason likely that Swedish courts will take the Kraftwerk-case as a strong precedent and align its judgment with this case. Hence, unlicensed sampling will always be considered taking something of value from the performer or producer and therefore will be considered as an infringement of the neighbouring rights.
9.6 Final thoughts and opinions by the authors

Compared to the above conclusion, the authors are of another opinion regarding how sampling matter should be handled. The authors believe that sampling should not automatically be regarded as an infringement, with the use of the neighbouring rights, without further tests. The neighbouring rights were created to protect copyright holders against piracy, and the authors believe that these rules should not be extended to cover sampling in a way that was executed in the Kraftwerk case. The rules regarding neighbouring rights, is according to the authors most suitable used for protecting musical recordings or performances in their entirety, therefore not shorter portions such as samples. When deciding upon a sampling matter it is accordingly to the authors most suitable to use the test of substantial similarities/independent alteration. More exactly, sampling is only to be regarded as an infringement when the two creations are to be regarded as substantially similar. If this method were to be used the court would only find infringement in the cases were someone has used longer loops or were very significant parts have been used.

The reason for this opinion is that if no substantial similarity can be found, there is with most certainty no economic damage. It shall be noted that even though the songs are to be regarded as substantially similar, there is most often no proof that any economic damage has occurred. In fact to the contrary, an economic gain might appear due to the sampling. Naturally if the new creation is not to be regarded as similar to the older work there is even less chance that economic damages have arisen due to the sampling. According to Swedish legislation a copyright infringer must compensate the damages that the sampling has generated. Since no damages most often can not be shown a court ruling regarding sampling would rather result in that the court would deem copyright infringement but would not oblige any party to pay damages, such a case would only result in unnecessary expenses and wasting the courts time.

Generally samples are taken from one genre and inserted in another, e.g. by sampling jazz, soul or funk and incorporating it into Hip-Hop. In this way the new work reaches a significant different market and audience than the old work did. The authors firmly believe that this new audience would not prefer the old song above the new song. This means that the new work is not “stealing” possible listeners and consumers from the original copyright
holder, the new work is merely expanding the old work to a new market. Which as said before could be considered as a win-win scenario.

Also, one of the arguments in the Kraftwerk case to use the neighbouring rights is to protect the creator’s economic interest, is furthermore not always a valid argumentation according to the authors. In some cases, the amount of time and money invested by the producer of a new creation to reform a sample could exceed the time and money invested to create the original work. This could especially be the case when only a couple of basic chords in the intro of a song are used. The argument to protect time and money invested is also somewhat contradicted as a result of the Kraftwerk ruling. As stated above, by allowing free use and reproduction of complicated sounds but not of simple sounds gives simpler sounds a stronger copyright protection. This means that sounds with less time and money invested are more protected than complex sounds with less time and money invested. Hence, the authors doubt whether the Kraftwerk case is a reliable precedent.

Further, to declare every sample as an infringement is according to the authors not proportionate according to the general principle of proportionality. The concept of proportionality is used as a fairness test, which is meant to help define the most fair and suitable balance between the restriction imposed and the severity of the act. To automatically regard sampling as infringement no matter the quality, quantity or similarity of it is in some cases not proportionate. For example, it is common for especially Hip-Hop producers to sample drums. If the neighbouring rights are used in such a way a producer that has sampled one kick or snare, which is generally approximately half a second long, would have to pay damages and profits of the musical creation. To not regard other factors such as similarities with the original, tempo or rhythm is not proportionate according to the authors.

According to the legislative history of the Swedish copyright act the neighbouring rights are attended to counteract piracy. Hence, they are intended to protect full, or at least large part, of musical creations to prevent them from being reproduced or rendered which would effect the profits from the copyright holders. It also becomes relatively clear that the neighbouring rights legislation were intended to cover what was stated in the legislative history, that works in its entirety shall be protected against piracy. Therefore, if the neighbouring rights were to be used to counteract sampling this would be contradictory to the legal sources in Sweden. Also, the Swedish court have ruled according to the “common” copy-
right rules before in the Regatta-case which results in that there is at least some experience within Swedish courts in these kinds of analyses concerning originality and similarity.

If every sample is illegal without permission from the original copyright holder the musicians without this permission is committing an illegal act. To get permission to use samples is both expensive and hard if the musician is not bound to a large record label with contacts and capital. This results in that sampling can only be used by the elite within the music business. It could ultimately contradict what the, e.g. court in the Bridgeport and Kraftwerk case, sought for, “Get a license or do not sample”. Most musicians do not have a record label, capital or contacts enough to seek license for the use of samples, which most certainty is leading musicians to disregard this possible rule. Furthermore, to seek license for the use of samples is haltering the process and results in significant expenses. Most musicians and labels would possible still use unlicensed samples if the sampled song is not easily identified, and the chance to get caught is not as big as the benefits of saving time and money by not seeking a license. This would possible result in that musicians/labels seek a license agreement if the risk of litigation is higher than the cost efficiency of not to, you could even say that license will be sought if the songs are on the border of being substantially similar.

Why pay license fees if no one could hear the similarity. This would hardly change the problematic sampling issue.

Due to all of these factors the authors firmly believe that sampling should, instead of being automatically illegal by the use of the neighbouring rights, be covered by “common” copyright law. This would include an independent alteration test and \textit{de minimis}. The independent alteration test would detect in which cases the new work has in fact reached a level of similarity that could injure the original copyright holder. If someone samples a longer significant portion of a song and uses this in a way that mirrors the original work, it would be considered as an infringement, and rightfully so. If someone however samples a shorter sound or note and includes this in the work this would probably fall within the category of \textit{de minimis}. To declare every unlicensed use of samples as infringement is accordingly to the authors an attempt for an “easy-fix” to reach clarity and foreseeability within sampling cases. This solutions suitability can however be questioned. A complicated matter such as sampling, can not reasonably be resolved by a general rule that criminalizes sampling without exceptions. Complicated issues demand complicated measures.

\footnote{Bridgeport Music, 410 F.3d at 792, p. 801.}
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Appendix