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Mosaics in Music

*True skool beats and the
development of creativity
under the Auteurswet*



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*“I AGREE THAT EVERYBODY’S A BITER,
BUT IF YOU XEROX THE STYLE, THEN
THAT’S INFRINGING ON MY COPY,
RIGHT?”*

Phonte in: Little Brother – *We Got Now*

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1. TRUE SKOOL HIP HOP BEATS. A CHALLENGE FOR COPYRIGHT LAW¹

*"If the fundamental goal of intellectual property laws is truly to promote the progress of science and useful arts then current copyright law (...) fails to serve this fundamental goal."*²

1.1 INTRODUCTION

Borrowing from earlier works to build new works has never been a novelty.³ For centuries works of art have used other works as a basis for inspiration and creativity. Copyright law serves as the safeguard to prevent others from harming the economical and/or personal (read: moral) interests of an author of an original work of art. But it also serves another fundamental purpose which has arguably lost focus. With regard to copyright protection, the European *Infosoc* Directive recites that:

*"Their protection helps to ensure the maintenance and development of creativity in the interests of authors (...)."*⁴

From time to time, however, there have been numerous court cases about copyright infringements due to musical borrowing (or: sampling). Current copyright law dictates that the use of an original work of art require permission from the rights holder. Permission is commonly expressed by means of a license. In 1991, the ancient yet ever so present Ninth Commandment ("*Thou shalt not steal*") was the metaphor by which Judge K. T. Duffy condemned musical borrowing (also referred to as "sampling") to the lowest form of art in the famous *Grand*

¹ The term *true skool* is sometimes used to refer to the style which is very reminiscent of the feel of rap music that emerged in the underground hip hop scene that existed in the early '1990s. However, a modern generation of producers has its own interpretation of the music produced by their influential predecessors. The younger generation uses similar instruments, but in a more fragmented fashion.

² Evans, *Sampling, Looping and Mashing ... Oh My!: How Hip Hop Music is Scratching More Than the Surface of Copyright Law*, Widener Law School Legal Studies Research Paper Series no. 10-26 (2011), p. 864. Digitally available at: <http://ssrn.com/abstract=1674246>. See also: Kurtz, *Copyright, Creativity, Catalogs: Commentary: Copyright and the Human Condition*, 40 U.C. DAVIS L. REV. 1233, 1244 (2007).

³ Evans, *supra*, p. 845. Digitally available at: <http://ssrn.com/abstract=1674246>.

⁴ Recital 9 of the Council Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

Upright Ltd. v. Warner Bros. Records case.⁵ The case was meant to set an example for other musicians: sampling music equals stealing property unless you obtain permission by means of a license.⁶ Now that sample clearance rates have risen to extreme heights, lawful musical borrowing or sampling is supposedly an artistic privilege only reserved for the few (and perhaps the famous).⁷ But if artistic borrowing has never been a novelty in creative practices, why should minimalistic forms musical borrowing, which give a new and original meaning to old works, require permission from the rights holder? Such a legal environment could seriously inhibit creativity, which gives rise to the question if copyright in practice truly aligns with one key purpose which copyright law is meant to serve?

The notion of originality is decisive here, and borrowing supposes that a derivative work of art cannot have come to existence without use of the original. A new style of minimalistic musical borrowing has emerged since the *Grand Upright* landmark case and this possibly challenges the scope of protection for original musical works. At what turning point do we consider sampling no longer as the lowest form of art, but as a new form of creativity?

In 2007, a preliminary injunction was given by the Dutch District Court of Alkmaar. The case concerned an oval patch-worked table, which was manufactured from discarded wood. The patch-worked table was not considered to be a copyright infringement, for the work had a different overall impression.⁸

⁵ *Grand Upright Music, Ltd. v. Warner Bros. Records Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991)

⁶ 'Sample clearance' can occur in various ways. In this thesis, two legal traditions will be discussed, namely the US and Dutch legal frameworks. Paragraphs 106 and 114 of the US Copyright Act require two licenses to be obtained in case of nondramatic musical works, which are: a license to use a the sound recording of an artist's performance and a license to sample from the musical composition. Under Dutch statutory copyright law, the Auteurswet 1912 (*Stb* 2014, 428), this is somewhat different. It provides that if a work is original, meaning that it carries the personal stamp of the author, it is a work that shall be protected by copyright law. However, in order to be allowed to actually use the sample, a license must be obtained solely for the use of the published master in either two ways: by explicit content of the lawful proprietor and/or by paying an equitable fee in order to use the sample.

⁷ Lessig, *Free Culture. How Big Media Uses Technology And The Law To Lock Down Culture And Control Creativity*, The Penguin Press (2004), p. 107.

⁸ Dutch preliminary injunction at district court (hereafter Vznr.) of Alkmaar: Vznr. Rb. Alkmaar, 20 February 2007, *LJN* AZ8924, par. 4.6.3.

Although a musical arrangement and a table are two different works of art, they are very reminiscent of a mosaic: both works are similar in the essence that their compositions are founded on artistic borrowing. Moreover, both works are patch-worked creations, which have been given a **new character and meaning**, yet in a different context. Hence, the aforementioned ruling by the Dutch District Court raises serious copyright questions: at what point is *taking* fragments from earlier works of music considerable? Where does unlawful sampling start and where does permissible sampling end, in a cultural environment where borrowing has never been new under the sun? By requiring compulsory licenses for any form of musical borrowing, the development of such arts are possibly inhibited. Accordingly, if the Dutch Copyright Act (hereinafter: Auteurswet)⁹ seeks to ensure the development of creativity by offering a strict regime for original works of art, few forms of musical borrowing are precluded from this development. Therefore, this thesis will examine the following research question: ***“Does the Auteurswet ensure the development of creativity for true skool hip hop beats by applying a broad scope of protection for original works of music?”***

1.2 BORROWING REQUIRES “SKILLS” AND KNOWHOW

One could argue whether something can be truly original. There is only a limited amount of combinations to be constructed musically; everything has already been played for at least once. Moreover, there are only so many chords and tones to be produced. The question, however, is *how* they are produced, for originality stems from the way *how* the musician utilizes his instrument, not from *which* sources he draws his inspiration. In this sense, sampling a sound from an existing record could very well resemble using a (traditional) instrument. Both devices produce sound waves or tones. Both need to be conducted in order to produce or reproduce a sound. Thus, knowing how to utilize an instrument, plus the ability of placing existing tones in a new context, extends far beyond merely borrowing a sound.

While using sound samples from another work as the basis for a new work could possibly infringe the copyright holder’s property rights, how far do the holder’s rights reach when his works are sampled? After all, times have changed and consequently techniques have developed rapidly. In this respect, today’s sampling in the field of hip hop music is still a commonly used method to create music by means of musical borrowing. Yet as obvious as borrowing itself may seem, a new

⁹ Dutch Copyright Act. Auteurswet 1912 (*Stb* 2014, 428).

tradition of minimalistic sampling has developed over the last decade. In short, it is a style of production that is to be characterized as a mosaic of small audio fragments: the duration of a great part of the samples used are usually under 2.00 seconds. As most producers have not labeled this method with a specific name (yet), and an official definition is still lacking, this thesis will refer to this form of sampling as *true skool hip hop music* or *true skool beats*. The details of this style of music are discussed in Chapter 2.

1.3 HISTORICAL BACKGROUND OF THE HIP HOP CULTURE

In order to fully understand how true skool hip hop music has come about, the historical background of hip hop culture must be discussed generally. Hip hop shows a long tradition of borrowing and citing, from African native music to blues, race records (commonly known as r&b), jazz, funk, soul and disco. Although the end of slavery was in a past not too far, the first steps for black people in the Caribbean were still affected by this very cultural heritage of having few resources and to use little existing means to create novelties. Jamaicans developed a culture in which large sound systems were set up to organize dancehall events. Disc jockeys would then play records to entertain a crowd. In the early '70s, Clive Campbell (better known by his acronym DJ Kool Herc) travelled to the United States and brought along this sound system culture from Jamaica. Stealing electric current from the street lights allowed for DJ Kool Herc to set up a sound system out in the streets of The Bronx to play and mix records to entertain large crowds.¹⁰

The necessity to keep a crowd fully entertained proved to be a hard task. Conducting two turntables at the same time, DJs felt the urge to perfect mixing techniques. Still there was also a need for vocal assistance to hype the crowd. In spite of the DJ having to fulfill this task at first, the attendees of such 'block parties' gradually picked up this responsibility of the DJ. This led to the emergence of the MC (*Master of Ceremonies*, commonly referred to as rapper). Other DJs, however, found their recourse to entertain a crowd in inventing new mixing¹¹ and looping techniques and looking to play either the most significant part

¹⁰ Evans, *Sampling, Looping and Mashing ... Oh My!: How Hip Hop Music is Scratching More Than the Surface of Copyright Law*, Widener Law School Legal Studies Research Paper Series no. 10-26 (2011), p. 853 – 856.

¹¹ Scratching is a commonly known term for manipulating a record to play a record back-and-forth at a certain point on the record. It is a technique which was accidentally discovered by DJ Grand Wizard Theodore.

of popular songs or unheard and rare records¹² in order to keep the crowd at the highest level of excitement.

While hip hop gained more popularity among the working class of black and Latino Americans in the suburbs of New York, artists sought to reproduce the sound of the records which the DJs used to play. This was achieved through the use of live instruments and ultimately a verse or popular phrase would be recited over this beat by the MC (see above).¹³

During the mid-80's, the emergence of digital samplers catered for new possibilities to reproduce sounds. Samplers provided producers with the possibility to replay a specific part of a pre-recorded sample over and over without having to manually manipulate them at the same time like a DJ.¹⁴ Similarly, instead of having live instruments reproducing the sound of popular records, artists could now retain the original feel and sound of the records, without 'softening' the spirit of the original tune.¹⁵

1.4 DIGGING IN THE CRATES

In short, hip hop is a culture that is defined by five elements. These elements are: deejaying (DJ), emceeing (MC), break dance, graffiti and human beatbox, as founded in 1973 by DJ Afrika Bambaata from the Universal Zulu Nation. Deejaying is the key element of hip hop. It served as the catalyst for the musical side of hip hop, because it gave rise to the birth of the vocalists (MCs), the break dancers and eventually the producers who utilized beat machines to record and alter the sounds that were embodied on the records they played regularly. Within the culture of deejaying, there is a sub-culture of record collecting

¹² DJs Afrika Baambata and Mark "the 45 King" strived to gain an expertise in looping up to date unused sample sources.

¹³ The Sugar Hill Gang's song *Rapper's Delight* (1979) was one of the first commercial successes to exhibit this form of performing.

¹⁴ Perchard, *Hiphop samples jazz: Dynamics of Cultural Memory and Musical Tradition in the African American 1990s* in: *American Music*, Volume 29, Number 3, Fall 2011, Univeristy of Illinois Press (Illinois), p.283.

¹⁵ Hank Shocklee, one of the legendary *Public Enemy / Bomb Squad* producers metaphorically phrased this point of view on sampling in an interview with Kembrew McLeod in *'How Copyright Law changed Hip Hop. Interview with Chuck D & Hank Shocklee of Public Enemy, StayFree!* (issue #20): "We were forced to start using different organic instruments, but you can't really get the right kind of compression that way. A guitar sampled off a record is going to hit differently than a guitar sampled in the studio. The guitar that's sampled off a record is going to have all the compression that they put on the recording, the equalization. It's going to hit the tape harder. It's going to slap at you. Something that's organic is almost going to have a powder effect. It hits more like a pillow than a piece of wood." Digitally available at: http://www.stayfreemagazine.org/archives/20/public_enemy.html.

which is known to many as 'digging in the crates'. This culture originates from legends such as DJ Afrika Bambaata, who literally went through dusty and dirty crates in search of samples that were rare and unused by others up to the date of discovery. "Diggers", as they call themselves, strive to find records of high artistic value which are extremely rare to find and will ultimately please the listener in an unprecedented way.

A portion of these diggers consider themselves to make a style of beats which they refer to as the *true skool* style. Inspired by the '90s tradition of sampling jazz and soul records, they tend to recreate the sound of the past with a new twist. What makes it different from other forms of sampling is that the *true skool* sound tends to use intelligibly small sound samples to construct the composition in such a way, that it forms a patch work of short fragments and sounds. This collage style of music production makes it almost impossible for the average listener to retrace even the most famous hit song.

1.5 THESIS APPROACH

First, a general theoretical backdrop will be provided in Chapter 2. Here, the processes of creation and the objectives of copyright law will be discussed. Furthermore, the definitions that are used throughout this thesis and the production process of *true skool* beats will be described in detail.

Chapter 3 shall assess to which extent the Dutch Copyright Act (*Auteurswet*) meets the realities of creative practices as discussed in Chapter 2. Since this thesis lays a great emphasis on the notion of "originality", only the sections of the *Auteurswet* that are of relevance with regard to artistic creation will be discussed. Accordingly, the specific production characteristics of *true skool* beat making will form an integral part of the framework discussion.

As hip hop culture was originated in the United States of America, and case law from its legal tradition dominates copyright issues, the U.S. Copyright Act will be discussed in Chapter 4. This chapter will address whether the U.S. legal regime offers a wider scope of protection for *true skool* beats. The chapter will be an analysis from a doctrinal point of view, as my legal understanding of the US Copyright Act is limited to an analysis of available literature.

Chapter 5 will contain a few possible improvements for the *Auteurswet*, according to the findings of Chapter 4. The chapter's main focus shall be on open norms for adaptations. Furthermore, two model clauses from the *Auteurswet* will be

discussed, to exemplify how the Auteurswet would be better in line with creative practices with regard to adaptations in general.

Finally, the conclusion will give a summary of the findings of the subjects dealt with in its previous chapters, and will provide an answer to the central research question, if the Auteurswet ensures the development of creativity of true skool beats.

OVERVIEW OF CHAPTERS

Chapter 1

True skool hip hop music. A challenge for copyright law

Chapter 2

Defining copyrightable content and creativity

Chapter 3

The Auteurswet. Is it fit for true skool beats?

Chapter 4

Does the U.S. Copyright Act provide a wider scope of protection for true skool beats?

Chapter 5

Is creating an open norm for adaptations a solution?

2. DEFINING COPYRIGHTABLE CONTENT AND CREATIVITY

“If copyright is to promote creativity, it will not be well served by rigid control over the ability to access and use cultural goods.”¹⁶

2.1 INTRODUCTION

With reference to the outset of this thesis, nothing is new under the sun. In fact, the tradition of borrowing from other compositions to aid or influence a new work has been a key compositional technique since New Orleans’ early ages of jazz.¹⁷ It is the act of improvisation by morphing and adding to an old context, sometimes paying homage to the original.¹⁸ Whereas modern producers use MIDI-instruments like the *Akai S950* to store parts of other compositions, the great fathers like Duke Ellington, Miles Davis (and even J.C. Bach, who borrowed extensively from Telemann)¹⁹ used their brain to “store” their inspirational works in order to create new material.²⁰ This modern form of sampling could be perceived as a continuation of this cultural heritage.²¹

In order to observe whether the Auteurswet truly promotes the creative advancement of a developing art form, light must be shed on the basic aspects of copyright and creativity in true skool hip hop music, and how they interrelate. The terminology used in this chapter will draw the definitions and outline against which the legal framework of the Auteurswet will be contrasted in the following chapters. Therefore, this chapter will provide a general overview of which purposes copyright law and creativity respectively serve.

¹⁶ Kurtz, ‘Copyright, Creativity, Catalogs: Commentary: Copyright and the Human Condition’, 40 U.C. DAVIS L. REV. 1233, 1244 (2007).

¹⁷ Keyes, ‘Musical musings: The Case for Rethinking Music Copyright Protection’, Michigan Telecommunication Technology Law Review (2004), p. 415.

¹⁸ Percifull, ‘Digital sampling: creative or just plain ‘cheez-oid’?’, Case Western Reserve Law Review (1992), 42, p. 1268.

¹⁹ Carrell, *Bach the Borrower*, Greenwood Press Print (1980), p. 13.

²⁰ Sirois & Martin, ‘United States copyright law and digital sampling: Adding color to a grey area’, Information & Communications Technology Law (2006), 15:01, p. 7. Available at: <http://dx.doi.org/10.1080/13600830500514903>.

²¹ Tough, ‘The Mashup Mindset: Will Pop Eat Itself?’ in G. Plasketes, *Play It Again: Cover Songs in Popular Music*, Ashgate Publishing Company, 206, (2010).

2.2 COPYRIGHTABLE CONTENT

2.2.1 COPYRIGHT'S PURPOSES

Copyright governs the relation between the creator of a work (the author) and his creation (the work). The author exercises the exclusive right to control distribution and manufacturing of the work, and prevent others from doing the same.²² It is governed by intellectual property law because it concerns intangible ideas expressed in a tangible medium.²³ “Creative expression” are the two key words used in copyright law and it is assumed that the expression is separated from its underlying ideas. As only (concrete) expressions are protected by copyright law, (abstract) ideas are not for they exist in the public domain. Within the public domain, ideas serve as “building blocks” that are free to use for anyone who wishes to create new works of art.²⁴ So, copyright applies to the intangible idea, only insofar that they are expressed. Still, this raises a number of questions, one of which “why?” is the most important here. Why is copyright law necessary?

First and foremost, copyright's main purpose is to protect²⁵ the rights of authors in literary and artistic works,²⁶ for which there are several justifications. One justification for the protection of the rights of authors is based on economic grounds: for economic theorists the community as a whole benefits from the production and access to as many creative works as possible. Since the community has a supply and demand for creative works, perfect conditions would stimulate a market. In order to

²² Seignette, ‘Authorship, Copyright Ownership and Works made on Commission and under Employment’ in Hugenholtz/Quaedvlieg/Visser (eds), *A Century of Dutch Copyright Law. Auteurswet 1912-2012* (deLex 2013), p. 115.

²³ Hugenholtz, ‘Works of Literature, Science and Art’ in Hugenholtz/Quaedvlieg/Visser (eds), *A Century of Dutch Copyright Law. Auteurswet 1912-2012* (deLex 2013), p. 44. The requirement of and expressed form was first mentioned in the landmark Dutch Supreme Court case: HR 28 June 1946, NJ1946, 712 (Van Gelder/Van Rijn)

²⁴ Cohen, *Copyright and Creativity*, p. 137 – 138.

²⁵ Recital 10 of the Council Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJL167/10.

²⁶ See here: Preamble of the Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as last revised at Paris on July 24, 1971 and amended on September 28, 1979, 1161 U.N.T.S. 30 and Art. 9(2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

provide a stimulus for creation, granting rewards to the rights holder of an original work of art, literature or science will ensure that the production of creative goods is allocated to the party who values it the most.²⁷ Secondly, copyright may serve the purpose of control: authors who create intellectual property should be entitled to have a certain form of control over their creations. Thirdly, when an author creates a work, he or she expresses his or her personal insights into his work, it could then be argued that the work embodies his personality. Moreover, an author has some sort of close and personal association with a particular work. These are all issues in the domain of personhood. Here, the Auteurswet protects the author by means of *moral rights* (detailed explanation will be given in Chapter 3).²⁸

Another justification for copyright protection is that cultural creativity and production are ensured. EU Directive 2001/29/EC recites that a high level of protection is a necessary basis crucial to intellectual creation.

“Their protection helps to ensure the maintenance and development of creativity in the interests of authors (...).”²⁹

EU law further recites that a rigorous and strict legal framework should be effective to guarantee and safeguard the independence and dignity of artistic creators and performers.³⁰ But how exactly does this correlate with reality? Does a strict framework acquire the goals it is supposed to? Moreover, once a work is created and released, how does an audience interact with it?³¹

2.2.2 THE PROGRESSION OF CREATIVITY VERSUS TRUE SKOOL BEATS

The appropriative character of sampling can be regarded as recoding, a socio-behavioral phenomenon which is described as giving a new meaning by means of symbolic use: an old musical idea is made more flexible by giving it a new meaning or context.

²⁷ Aplin & Davis, *Intellectual Property Law. Text, Cases And Materials*, Oxford (2009), p. 44.

²⁸ *Ibid.* p. 45 – 46.

²⁹ Recital 9 of the Council Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

³⁰ Recital 11 of the Council Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

³¹ Cohen, *Copyright and Creativity*, p. 137.

Recoding can express resistance and give rise to new interpretations, but it can acknowledge and further cultural authority of the original by the same token.³²

Hip hops cultural norms, grounded in the tradition of citing earlier works, reflect a postmodern view of artistic creation. Specifically, creative practices emerge from interactions, through processes of juxtaposition, iteration, dialogue, and experimentation. In the words of Julie Cohen, *situated users* (more commonly referred to as “fans”) derive inspiration from the culture to which they belong. Through a continuous process of dialogue with their peers and preexisting artifacts, they create their own interests and skills.³³ These interests and skills are ever so important in order to create one’s own material; not simply as a *user*, but also as an *author*. Therefore, cultural participation and communication is not something abstract. Contrary, it could imply inserting the self into the work because creative outputs do not simply spring from the minds of their creators. They emerge through processes that are iterative and literally hands-on, rooted in embodied experience.³⁴

Embodied perception or experience occurs when an author does not only mimic or disseminate a work, but also shares the experience embodied in the music.³⁵ The authors of true skool beats are not much different: when sampling, they “catch the vibe” (in other words, a specific part of a pre-recorded song with certain tonal characteristics is being separated from the rest). By doing so, they are reinterpreting it by adding other elements to the sample based song, thus sharing it in a new, different context.

Possibly, legal doctrine works with romantic preconceptions of authorship. Contrary to how authorship works in practice, the artist who uses a sample from a pre-existing work of art (hereinafter: the producer) is simply contrasted against what the author produced (hereinafter: the samplee). However, an author does simply consume, simply copy, just improve or only deconstruct.³⁶ Here, the separation between (abstract) ideas, fixed in (concrete) expressions is too strict, since works of art that involve music sampling require that the sampler has to listen carefully before he uses a sample. He has to both consume

³² *Ibid.* p. 66.

³³ *Ibid.* p. 7 chapter 4.

³⁴ *Ibid.* p. 6 chapter 4.

³⁵ *Ibid.* p. 5 chapter 4.

³⁶ Cohen, *Configuring the Networked Self*, 2012, p. 3 chapter 3, accessible at: <http://www.juliecohen.com/attachments/File/CohenCNSCh3.pdf>.

and produce; inspiration and creation seamlessly coincide. Therefore, by categorizing users as passive recipients of culture, copyright law could simply ignore the critical dimension of the sampler's creative response to works of art. Protecting musical borrowing would be better in line with the realities of how post-modern composition and artists actually work.³⁷ Hence, there is a necessity for clarity on behalf of the *authorship* of the samplee and the *usership* of the sampler to understand the way the interrelationship between plays out in cultural environments where sampling occurs.³⁸

2.3 CREATION OR RE-CREATION? TRUE SKOOL BEATS IN DETAIL

2.3.1 THE PRODUCTION PROCESS

Creation does not exist in a vacuum and new works of art do not come to existence out of nothing. Apart from creating something entirely new, consuming and transforming impressions after consumption also support a *situated user* in making new works of art.³⁹ In this respect, true skool hip hop producers prefer the use pre-existing works of music because it enables them to retain the original feel and sound of the records, without 'softening' the spirit of the original tune.⁴⁰

True skool beats are made by means of sampling various parts from pre-existing records. While sampling may occur through the use of *DAWs* (digital audio workstations), the true skool hip hop community is dominated by producer who use vintage analogue devices, such as the *Akai MPC2000*. These devices allow the producer to record, playback and edit sound samples. Since true skool beats are heavily influenced by music from older generations, such as: jazz, soul, funk, psychedelic rock or

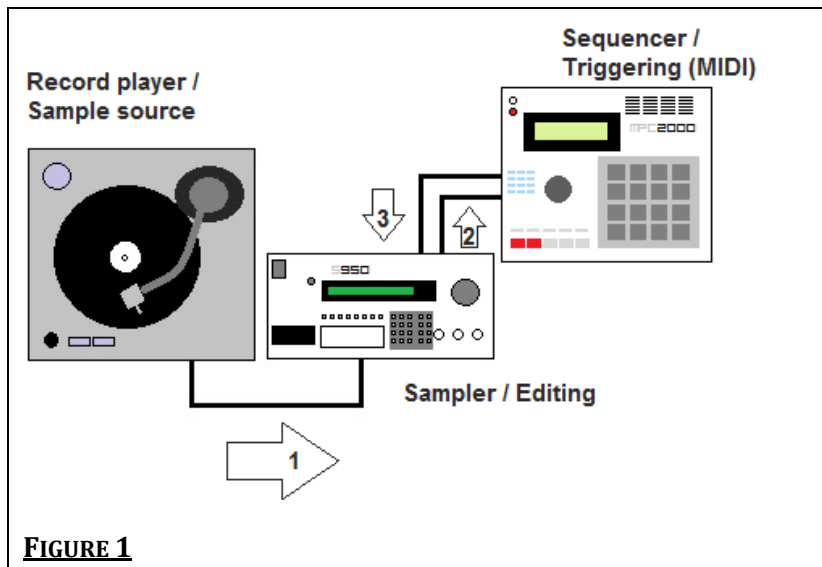
³⁷ Arewa, 'From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context', *N.C. Law Review* (2006), Vol. 84, p. 582.

³⁸ *Ibid.* p. 7 chapter 3.

³⁹ *Ibid.* p. 6 chapter 3.

⁴⁰ Hank Shocklee, one of the legendary *Public Enemy / Bomb Squad* producers metaphorically phrased this point of view on sampling in an interview with Kembrew McLeod in 'How Copyright Law changed Hip Hop. Interview with Chuck D & Hank Shocklee of Public Enemy, StayFree! (issue #20): "We were forced to start using different organic instruments, but you can't really get the right kind of compression that way. A guitar sampled off a record is going to hit differently than a guitar sampled in the studio. The guitar that's sampled off a record is going to have all the compression that they put on the recording, the equalization. It's going to hit the tape harder. It's going to slap at you. Something that's organic is almost going to have a powder effect. It hits more like a pillow than a piece of wood." Digitally available at: http://www.stayfreemagazine.org/archives/20/public_enemy.html.

disco, a record player is connected to the analogue sampler in order to actually arrange a composition (or: make a beat). A standard setup for true skool beats could be illustrated at follows:



A sound sample is recorded from the vinyl source onto the *S950* (arrow 1). The sampler allows the user to record, play back and edit a sound sample to his preferences. These preferences, however, are limited in nature because the *S950* in particular has a limited amount of sample time, namely a maximum of 50 seconds. This limits the possibilities of the producer, for the producer must use his memory space efficiently. Therefore, most producers choose to speed up the record player to its maximum speed in order to reduce the amount of used sample time.

Then, the sample is played back at a reduced speed within the *S950* in order to obtain the preferred sound. When all editing is finished, the producer connects his sampler to a sequencer in order to assign each edited sample to a different pad on the sequencer (arrow 2). The sequencer is then used to trigger the sound samples in a way preferred by the producer in order to create an arrangement (arrow 3). Each time a pad is triggered, the sampler plays the sound which is assigned to a specific pad. In order to actually produce a complete song, the producer must program a sequence of samples within the sequencer. Here, features such as time signature and tempo in beats per minute allow the producer to structure his arrangement of all recorded and edited samples.

2.3.2 TRUE SKOOL BEATS: MUSICAL MOSAICS

The structure of a true skool beat is filled with short samples (or: “slices”) which usually take up less than 1 second, for example: the drum section, which creates a very staccato and abstract character. In addition, some producers choose to “chop up” samples. This means a sample is divided into several parts, making them fit into a different tempo and time signature, instead of looping (repeatedly playing) the sampled fragment in its entirety. The sample is cut into another set of fragments in order to make the samples fit for the rhythmic tempo.

As simple as it may seem, the difficulty of making a beat exists in finding the right samples which ultimately match in character and tonal timbre. It is all a “matter of style”, depending on the original music used as a sample source. In this sense, a great deal of true skool beats usually contain samples from jazz, funk, soul, disco and (psychedelic) rock because the sound of the instruments played therein are very well fit for the hip hop genre.

When all samples are in line, an arrangement can be programmed. Depending on the amount of samples used, layering a multiplicity of samples stemming from a wide variety of music makes the true skool beat sound like a musical mosaic. Producers transform the overall “sound” to such an extent that it is almost impossible to recognize or retrace the original works used.

2.4 WHAT IS STIFLING TRUE SKOOL BEATS’ CREATIVITY?

Some listeners and commentators criticize that the *Grand Upright* case (see introduction, Chapter 1) might have put an end to sampling in hip hop music or that it even “ruined” the art form. Since then, it is agreed upon that copyright practice dictates that the use of music samples requires permission from the author or copyright holder. Permission is usually obtained by means of a compulsory license (explained in Chapter 3). However, licenses to use original works of music have risen to astronomical rates.⁴¹ Since true skool beats make such fragmental use of original works, is it enough to call it an infringement, even if a new context is given and it is almost impossible to recognize the samples used?

⁴¹ Lessig, *Free Culture. How Big Media Uses Technology And The Law To Lock Down Culture And Control Creativity*, The Penguin Press (2004), p. 107 and Pelletier, ‘Sampling The Circuits: The Case For A New Comprehensive Scheme For Determining Copyright Infringement As A Result Of Music Sampling’, *Washington University Law Review* (2012), Vol. 89, p. 1194.

As sampling techniques have developed, they have become less literal from time to time. Since true skool beats contain very minimalistic sound fragments, it could be more difficult for the average listener to distinguish the origins of the secondary work. The following question then arises: if no one recognizes a sample, why should one obtain a license? In fact, artists nowadays are represented by large record companies as the rights holder of the Master Recording, whose only incentive is financial gain. The need to ask permission from the author and/or rights holder is a stretch too far, since clearance prices have risen to astronomically expensive rates, making it virtually impossible to use sample techniques legally. Now, only a few artists who sample are able to pay these prices. Then, copyright's rule of obtaining permission from the author or rights holder could discourage new artists to make works of art by means of sampling music.

Even if sampling imposes costs on the maker of a work, artists will work their way around it. *DJ Shadow* understood this and pioneered in circumventing the rules already in the first half of the 1990's: if samples are sufficiently brief, obscure and/or altered, the copyright holder can simply never know his material was used. Arguably, licenses are required, but they are not necessary. Although a great deal of his material did not need any copyright clearance, he sought copyright clearance for his first album in 1996: he recalls that out of 1.000 samples, only 10 needed clearance.⁴²

For minimalistic sampling artists, the current copyright regime is very reminiscent of the old proverb: "it's not a crime if you don't get caught". In fact, Articles 31 and 31a of the Dutch Copyright Act (hereafter: Auteurswet) even criminally sanction copyright infringements. From a cultural-historic point of view, however, it is debatable whether sampling really is a crime. If musical borrowing has always formed part of creativity in practice, should the law then degrade musical borrowing to the lowest form of creativity? In this sense, the law very well lags behind: by requiring permission for *any use* and sanctioning infringements, the law could withhold true skool beat makers from making their music available to the public.

⁴² Joo, 'A Contrarian View of Copyright: Hip-Hop, Sampling, and Semiotic Democracy', UC Davis Legal Studies Research Paper Series no. 259 (April 2011), p. 36.

2.5 CONCLUSION

Creative practices do not merely come to existence out of nothing. Borrowing and reciting have always been traditional practices in artistic creation. True skool hip hop beats are defined by a very minimalistic use of copyrighted works. While a deal of producers change as little as possible to a sample, others choose to avoid unlawful use by making their samples virtually unrecognizable. True skool beats are characterized by their vintage sound of old analog music production machines. These instruments allow the producer to program a certain sequence, within the limited processing abilities the hardware units have. It has long been an industry practice to give credit to the originators by licensing out musical borrowing. But since techniques and times have changed, it seems that both the law and sampling practices have become more nuanced. Supposedly, the prices for borrowing have risen to extreme rates and a reason for this discrepancy is that artists are represented by large record companies whose only incentive is financial gain. Therefore, the more creatively a producer samples music, the higher chances are that sampling miniscule fragments do not require permission from the author and/or rights holder.

3. THE AUTEURSWET. IS IT FIT FOR TRUE SKOOL BEATS?

3.1 INTRODUCTION

Art is not created out of nothing and everybody is inspired. Chapter 2 learns that in reality, creativity exists in multiple ways. In the Auteurswet, the notion of originality is connected to two important elements: the qualification of a work and the exclusive right to adaptation. Since originality is attached to these two core concepts of the law that governs creation, the law must be as close to reality as possible, in order to truly ensure the development of creativity. Therefore, this chapter shall assess whether the Dutch Copyright Act (hereinafter: Auteurswet) matches the reality of creative practices.

The analysis of the Auteurswet in this chapter will be limited to the issues of direct relevance for the subject-matter of this thesis and accordingly the implications for true skool beats are dealt with integrally. First, the types of protected works are discussed and whether the Auteurswet allows the existence of true skool beats. This will be followed by the exclusive rights that are granted to the author of an original work of music; emphasis shall be laid on the author's exclusive right to make adaptations of his work. Then, limitations impairing the existence of true skool beats will be dealt with. The conclusion shall give an answer to the question raised in the title of this chapter: "Is the Auteurswet fit for true skool beats?"

3.2 ORIGINALITY: ANY WORKS BEARING AN OWN PERSONAL CHARACTER

Art. 1 Auteurswet (hereinafter Aw) dictates that copyright is an exclusive right granted to the *author* of a *work*, which comes to existence by operation of the law, upon the actual creation of a work. Although Art. 10 Aw names few types of works, the list is not exhaustive. The closing section of art. 10 (1) Aw reads as follows:

*"(...) Generally any creation in the literary, scientific or artistic domain, **regardless of the manner or form** in which it has been expressed."⁴³*

⁴³ Eechoud, van, 'Copyright Act – Auteurswet. Unofficial translation' in Bernt Hugenholtz/Quaedvlieg/Visser (eds), *A Century of Dutch Copyright Law. Auteurswet 1912-2012* (deLex 2013), p. 509. As a consequence, sample based music may also fall within the scope of art. 10 (1) Aw because of its wide applicability given by the closing section.

According to this section, true skool beats could fall within the scope of Art. 10 (1) Aw, albeit that the beats are music compositions derived from earlier works, since the manner or form of expression is somewhat irrelevant. Although it seemingly implies that every work of art is protected, only copyrightable features are eligible for copyright protection.

In order to be eligible, a work must bear an own, personal character. The concept of an own and personal character was first used in the reasoning of the Dutch Supreme Court in the *Explicator* case. The court ruled that writings lacking personal character cannot be regarded as copyrighted material.⁴⁴ Several years later, in 1979 the Supreme Court ruled in a copyright case concerning the adaptation of an economics book. It repeated its judgment that an *own personal character*⁴⁵ was lacking, and therefore copyright protection was denied. In addition, the Supreme Court elaborated in 1991 that a work must have an *own, original character and [that] it must carry the 'personal stamp' of the author*.⁴⁶ The *Endstra*-case further developed shaping the concept of originality with singularity (or: *eenmaligheid*): an own and original character implies that the latter work of art must not derive its form from a pre-existing work of art.⁴⁷

In determining whether a work has an own character, the rule-of-thumb that is mainly used is assessing whether it is possible for two independent authors to create identical works. An equally important criterion to determine an own character is assessing the objective and subjective characteristics of a work.⁴⁸ Objective characteristics are for example: facts, usual expressions, logical theories but also technical or functional requirements.⁴⁹ Subjective characteristics of a work are all characteristics based on the authors own taste, preferences and/or habits.⁵⁰ There must be some sort of *personal selection of methods for creation*, irrespective of external (non-personal) factors that could influence the author's choices.

⁴⁴ Hoge Raad or Dutch Supreme Court case (hereafter: HR): HR 27 January 1961, *NJ* 1961, 335 (*Explicator*).

⁴⁵ HR 5 January 1979, *NJ* 1979, 339 (Heertje/Hollebrand).

⁴⁶ HR 4 January 1991, *NJ* 1991, 608 (Van Dale/Romme). Further reading: J.H. Spoor, p. 57.

⁴⁷ HR 30 May 2008, *NJ* 2008, 556 (*Endstra*).

⁴⁸ Spoor/Verkade/Visser, *Auteursrecht. Auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p 66 – 68.

⁴⁹ For functional requirements, see the Dutch 's-Hertogenbosch Court of Appeals (hereafter: Hof) decision: Hof 's-Hertogenbosch 27 April 1998, *IER* 1998, nr 37, p. 214 (Buisklemmen).

⁵⁰ Spoor/Verkade/Visser, *Auteursrecht. Auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 68.

The above characteristics of a work bearing an own and personal character are usually referred to under the umbrella-term of “originality”. In summary, in order to be protected by copyright, features of a work must be the unrepeatable result of the creative efforts of the author.⁵¹

3.3 THE EXCLUSIVE RIGHT TO REPRODUCE: ADAPTATIONS OF A WORK

3.3.1 LEGAL FRAMEWORK

The author in principle is the first and last person to decide however his work may be used. From the authorial point of view, his rights ought to be protected, as it may take a serious amount of creative and financial effort in order to create a work (or even a master piece). The essential part of being “original” complicates the legal status of true skool beats. As the origins of true skool beats are based in earlier works of music, the derivative nature of music samples requires that true skool beat makers asks permission from the author, since the right to publish, reproduce and adapt are exclusively granted to the author of a work.

The Auteurswet grants the author the exclusive right to make a work public for the first time, this is also referred to as the *first sale doctrine* (Art. 12b Aw). This right will cease to exist after the work has been brought into the European Economic Area by means of a property rights transfer, upon prior permission from the rights holder. After this moment, the author has a number of other legal instruments to protect his work. The right to reproduce is one of these instruments, of which the right to adaptation is the most important for the purposes of this chapter.

The Auteurswet mentions the right to reproduction in Art. 13, which can be exercised in two different ways, namely adaptation (*bewerken*), dealt with in Art. 13 and mechanical reproduction (*vervaardigen*), dealt with in Art. 14 Aw. Adaptations concern cases where (a) *original features of protectable works* are (b) *substantially incorporated into another work*.⁵² The higher the degree of originality in the features of a work, the greater the degree of protectability of the work will be.⁵³

⁵¹ Lingen. van, *Auteursrecht in hoofdlijnen*, Groningen: Martinus Nijhoff (2002), p. 48.

⁵² Spoor/Verkade/Visser, *Auteursrecht. Auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 157 – 158.

⁵³ Hof Amsterdam 22 June 1989, *BIE* 1990, nr 44, p. 146 (Laarzen).

Substantial similarity does not automatically constitute an infringement, for instance when the author of a similar work could not possibly have been familiar with the work of the respondent.⁵⁴ It must be proven that the adaptation of a work was directly derived from the original features of an earlier work. Here, the benchmark will be comparing the *total impression* of both works.⁵⁵ However, in determining whether there is a sufficient resemblance of total impressions, it must be evident that protectable (*original features*) of a work have been used.⁵⁶

Under certain circumstances, some adaptations may result in obtaining an own character. *DJ Tiësto*, one of the world's most famous dance DJs, was accused of stealing the tonal scheme of "Swiwal".⁵⁷ It here concerned 8 measures, which were also very similar to "Sarabande", a classical master piece which is in the public domain. The Dutch district court of Breda assessed whether the adaptation of the tonal scheme resulted in the work having an own character carrying the personal stamp of the maker. Firstly, it must be clear that the defendant has sufficiently deviated from the tonal scheme of the original. Secondly, the maker must have sufficiently given his own expression to the latest techniques in the field of dance music.⁵⁸ Elements such as the drum beat, the (4/4) time signature and other additional elements may give rise to a given original character. Particularly, the court found that the addition of typical genre-based style elements is irrelevant for obtaining copyright protection. However, if the adaptation does not deviate enough from the original, the court then adds, there is no own character.⁵⁹

Two other remarkable court cases show that the own character of furniture made from scrap wood is also subject to the total impression test. Although everyone is free to use scrap wood, it could be possible to use a copyrighted piece of furniture by for

⁵⁴ Spoor/Verkade/Visser, *Auteursrecht. Auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 165 – 166. However, coincidence is not likely to be easily accepted as a defense. See here for example the "shopping game" case: HR 18 February 2000, *NJ* 2000, 309, *AMI* 2000, p. 89 (Shoppingspel).

⁵⁵ HR 29 December 1995, *NJ* 1996, 546 (Decaux/Mdiamax).

⁵⁶ Spoor/Verkade/Visser, *Auteursrecht. Auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 164.

⁵⁷ Dutch district court or Rechtbank decision (hereafter: Rb): Rb. Breda 4 May 2001, *LJN* BQ3993, at 3.9.

⁵⁸ HR 29 December 1995, *Decaux/Mediamax; Stadsmeubilair*.

⁵⁹ Rb. Breda 4 May 2001, *LJN* BQ3993, at 3.10.

instance *Gerrit Rietveld*⁶⁰. The maker puts his personal stamp on a work by means of the arrangement of the samples used (in this case the mosaic-wise arrangement of scrap wood), the colours applied thereon, the use of certain additives and finally the choice of certain specific production processes. Furthermore, the court adds that it is highly unlikely that two persons would independently come to the same exact results when making such a work.⁶¹

The district court of Alkmaar found that all aspects of both works are to be considered, such as: the materials used, the shapes and dimensions of both works, the production processes and additives used and the impression which the work makes as a whole (even photographically comparing both works in black-and-white).⁶² These aspects may give rise to a finding of non-infringement because the work has obtained an own character.

3.3.2 IMPLICATIONS FOR TRUE SKOOL BEATS

Sampling is the practice of taking parts of pre-existing (copyrighted) musical works and rearranging them into a new composition. To combine older works of music, one must have a decent knowledge of the various styles of music and the sound of the respective works in order to create a 'mosaic' that actually works within the style-based genre of true skool hip hop, as there are certain conventions that dictate this style of beat making. Therefore, one's personal selection methods are of utmost importance to successfully arrange a beat that is comprised of small and obscure samples. Being able to utilize a sample in such a way that it is obscured rather than mutilated, true skool beat making becomes a unique and unrepeatable activity.⁶³

True skool beats are comprised of a number of small audio fragments. Instead of looking at each small sample individually, one should take the work into account in its entirety, thus the **total impression** of a work is investigated in order to determine whether a work has an own character.⁶⁴ The selection of recorded samples of works of music, the fashion in which they are obscurely altered/ edited and the processing of certain

⁶⁰ Red-and-blue chair by Gerrit Rietveld is a classic Dutch masterpiece of applied arts. <http://zogoedalsoud.nl/?portfolio=red-blue-rietveld-chair>

⁶¹ Vznrgr Alkmaar, 20 February 2007, *LJN* AZ8924, at 4.5.

⁶² Rb. Alkmaar 12 February 2009, *LJN* BH2817, at: 4.12.

⁶³ Lingen, van, *Auteursrecht in hoofdlijnen*, Groningen: Martinus Nijhoff (2002), p. 48.

⁶⁴ Rb. Utrecht 5 December 2000, *LJN* AA8886.

signals⁶⁵ (such as reverberation, delay / echo and compression) strongly determine the outcome of the beat maker's production process. These elements of alteration could result in the true skool beat obtaining an own and personal character. In this respect the law does not seem to conflict with creative practices at all. The question is, however, did the true skool beat maker alter or "hide" his sample sophisticatedly enough?

3.4 THE EXCLUSIVE RIGHT TO MORALLY OBJECT

It is often argued that copyright is not more than just the right to exploitation of one's creative efforts. Indeed, remuneration is always an incentive for creation, but an artist may also have his personal interests in creating a work. The moral right from Art. 25 Aw protect the author's personal reputation and the integrity of his work.⁶⁶

A work possesses original features if it has an own character, carrying the personal stamp of the author.⁶⁷ Consequentially, originality enables the maker of a work to exercise authorship. In turn, authorship grants the maker a set of exclusive rights, which are subject to certain limitations. Logically, it is evidential that originality is connected to moral rights, because personal stamp of author creates a connection between author and his work, since the author exposes one or more sides of his personality through his work.⁶⁸ It is therefore by default that the personal character of a work implies a personal connection or entitlement to a work.⁶⁹

Moral rights of the author form part of one of the limitations to certain reproductions in the form of adaptations and it allows for the author to stop any adaptation if they infringe the author's personal or moral rights. Here the focus lay on the author's personal interests and the integrity of his work, rather than merely the economical perspective of exploiting one's investments. Hence, contrary to the (economically oriented) exploitation rights of the author, personal rights are non-transferable.⁷⁰

In detail, Art. 25 Aw enables the author to oppose to making the work public without mention of his name or other indications as maker (paragraph 1, sub a). Secondly, if a work is made public,

⁶⁵ Rb. Haarlem, 13 October 1989, *BIE* 1991, nr. 6, p. 20 (Ride on Time /Love Sensation).

⁶⁶ Spoor/Verkade/Visser, *Supra*, p. 152.

⁶⁷ HR 4 January 1991, *NJ* 1991, 608 (Van Dale/Romme).

⁶⁸ Spoor/Verkade/Visser, *Supra*, p. 352.

⁶⁹ Spoor/Verkade/Visser, *Supra*, p. 353.

⁷⁰ Spoor/Verkade/Visser, *Supra*, p. 359.

the author has the right to make necessary changes to the work or to even withdraw the work from the public, if the work is made public under a name other than his own (*idem*, sub b). Thirdly, the author has the right to oppose against any alteration made to the work (*idem*, sub c). Finally, the author is also entitled to oppose any distortion, mutilation or other impairment of the work that would be prejudicial to his reputation (*idem*, sub d).⁷¹ Art. 25(1)(c) Aw reads that personal rights cannot be invoked to oppose to anything, since in some instances it could be unreasonable.

As a consequence for true skool beats it could very well be the case that an author could oppose to a sample of his work used in true skool beat, which belongs to the field of Hip Hop, a style of music known for being rebellious. Even the smallest fragment could withhold the true skool beat maker from publishing his beat, if the author successfully opposes to the adaptation on personal grounds. Art. 25 (1)(c)Aw could still be of relevance, but it is very well still matter of taste: there is always a possibility in which an author decides that a true skool hip hop song possibly harms his reputation as an artist. Moreover, authors such as *Gilbert O'Sullivan* degraded musical borrowing to “stealing” works of music,⁷² an argument that obtained legal effect, influencing sample based music ever since.

Has copyright's purpose of protection become overprotective in scenarios like these? After all, the creation of artistic works should not subjectively be compared to the creative processes from the author by which his or her original came to existence. On the contrary, artistic creation happens in various ways of which borrowing has been ever so present. Moreover, the total impression of both works differs too much to find a resemblance of both works which would infringe the author's rights. In this respect, moral rights of the author have the potential of being applied too extensive and legally burden creative arts such as true skool beats.

3.5 DE MINIMIS: A POSSIBLE LIMITATION TO THE EXCLUSIVE RIGHTS

One limitation to the exclusive rights of an author may be that the use of his work is *de minimis*, meaning that the fragments used in a secondary work are too trivial and insignificant to be

⁷¹ Spoor/Verkade/Visser, *Supra*, p. 351. See also Eechoud, van, 'Copyright Act - Auteurswet. Unofficial translation' in Hugenholtz/Quaedly/Visser (eds), *A Century of Dutch Copyright Law. Auteurswet 1912-2012* (deLex 2013), p. 524.

⁷² *Grand Upright Music, Ltd. v. Warner Bros. Records Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991)

considered a copyright infringement. Here, both the quantitative and qualitative aspects of the use are to be considered.⁷³ However, Art. 18a Aw applies to rather “co-incident”, non-deliberate uses only.⁷⁴ This makes the applicability of Art. 18a fairly narrow, because it applies to cases of incidental use, only when the used material is of subordinate importance to the rest of the work. Due to its insignificance, the use of a *graffiti piece* in a video game was denied copyright protection. In this case, a graffiti piece (a large wall-painting made with spray cans) was made on one of the walls of the *Amsterdam ArenA* soccer stadium at the expense of the soccer club. The Ajax soccer club received an invoice for the project, and in return the author was remunerated for his efforts. The author then found out his graffiti painting featured on the walls of the soccer stadium in the videogame *Club Football 2005*, and claimed damages, since the makers of the videogame had not asked prior permission for the use of the painting. The author was denied copyright protection for the use of his work in the videogame, since the purpose of the use and the center of attention of the game are both related to virtually playing soccer *inside the Ajax soccer stadium*. Hence, the use was too insignificant with regard to the purposes of the secondary use of the work.⁷⁵ For true skool beats this exemption is a rather difficult one, since the entire composition of a beat fully rests on small fragments. Then, the samples used cannot be considered insignificant at all. Moreover, the used material is not coincidental or non-deliberate at all, because the selection of samples for true skool beats requires a delicate insight of the author.

3.6 THE THREE-STEP TEST

As mentioned earlier, copyright grants the author an exclusive right over his work. Besides protecting his financial and creative investments in a work, an author may also protect his personal interests in a work by morally objecting to certain uses of his work. These exclusive rights make it virtually a ubiquitous right. In order to ensure that copyright is not exercised as an absolute and unlimited right, the Auteurswet poses certain limitations to make sure the copyright is not disproportionately extensive. One of these limitations to exclusive rights was already explained in the sections above. Any limitation in the Auteurswet is subject

⁷³ See Zwaan, de, ‘Geen beelden, geen nieuws’, Amsterdam: Cramwinckel (2003), p. 195 with regard to the Dutch parliamentary report “Tweede Kamer, 2002-2003, 28 482, nr. 5, p. 37.

⁷⁴ Hugenholtz, “*De Auteurswet gewijzigd: Artikel 18a (incidentele verwerking)*”, *AMI* 2005/2, p.57-58.

⁷⁵ Rb. Arnhem, 21 September 2005, *AU*5454.

to the *three-step test*, which serves as an overarching criterion for limitations of copyrights. This criterion is based on a larger international framework, namely: art. 9 (2) BC, and resonates in art. 10 WCT, art. 13 TRIPs and art. 5 (5) Infosoc Directive.⁷⁶ In the wording of the Berne Convention, limitations on copyrights are a matter for national legislation, and countries of the Union shall:

*"(...) Permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."*⁷⁷

It is argued that these limitations are necessary in the interests of society or third parties,⁷⁸ since they should cater for (a) a *free flow of information*, (b) *rules to works belonging to the public domain*, (c) *the absence of copyright within the private sphere of users* and (d) *supplementary legal mechanisms within the field of contract law between the author and his legal successors*.⁷⁹ Since the applicability of the *de minimis* exception is too narrow, it is questionable whether the limitations provided for in the *Auteurswet* cater for a free flow of information and whether or not it ultimately ensures the creative development of true skool beats.

3.7 CONCLUSION: THE AUTEURSWET HAS A RESTRICTIVE FIT FOR TRUE SKOOL BEATS

Since true skool beats are produced by using pre-existing records that are (usually) copyright protected, an own and personal character could be lacking due to the derivative nature of the music samples used. But Art. 10 Aw is non-exhaustive: every piece of art may be protected as a work regardless of the subjective or aesthetic quality of the samples used. What is essential within the scope of the *Auteurswet* is that it is an

⁷⁶ Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as last revised at Paris on July 24, 1971 and amended on September 28, 1979, 1161 U.N.T.S. 30.. See also: World Intellectual Property Organization, Copyright Treaty, Apr. 12, 1997, S. Treaty Doc. No. 105-17 (1997), the Agreement on Trade-Related Aspects of Intellectual Property Rights, 1869 UNTS 299; 33 ILM 1197 (1994) and Council Directive (EC) 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

⁷⁷ Art. 9(2) Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as last revised at Paris on July 24, 1971 and amended on September 28, 1979, 1161 U.N.T.S. 30.

⁷⁸ Spoor/Verkade/Visser, *Supra*, p. 211.

⁷⁹ Spoor/Verkade/Visser, *Auteursrecht. Auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005, p. 216.

original work, carrying the personal stamp of the author.⁸⁰ True skool beat making requires a certain level of creativity, which is attached to one's delicate insight in music. This insight exists in selecting and editing sound samples to such an extent, that they are either unrecognizable or too insignificant to be recognized. The fact that the samples used are too small and thus too insignificant, does not suffice to pass the threshold for a *de minimis* defense, because the samples are used deliberately and the entire composition of a true skool beat rests on all small fragments used. Nevertheless, by comparing a true skool beat to the original, the total impression of both works would differ too much in order to constitute a copyright infringement. Moral rights, however, could lead to the outcome that the author of the sampled original opposes against the use of his work in a true skool beat. His opposition could be too extensive, which could surpass the rationale of moral rights. Then Art. 25(1)(c) Aw could apply, only when an opposition against an adaptation is unreasonable. In this regard, moral rights bear the potential of restricting the existence of a true skool beat, possibly to the taste of the author.

Comparing true skool beats to the original can only lead to outcomes where there are more differences than similarities between both works. In this regard, the total impression test fits the transformative nature of true skool beats to some extent. In this respect, the *Auteurswet* does not burden its creative nature. On the other hand, *de minimis* and moral rights limit the scope of protection of true skool beats' minimalism. While *de minimis* only applies to co-incidental uses, moral rights can be invoked at the will of the author. This assigns a great scope of protection to original works, where even the slightest adaptations require permission from the rights holder. Thus, these possible limitations to creativity, and the case-by-case applicability of the total impression test, cause a divide between trifling permissible adaptations and significant copyright infringements. Therefore, the *Auteurswet* is scarcely in line with creative realities. Perhaps, there is room for improvements for the *Auteurswet*.

⁸⁰ HR 4 January 1991, *NJ* 1991, 608 (Van Dale/Romme).

4. DOES THE US COPYRIGHT ACT PROVIDE A WIDER SCOPE OF PROTECTION FOR TRUE SKOOL BEATS?

4.1 INTRODUCTION

This chapter will dive into the US Copyright Act from a doctrinal point of view. Although the US common law system is fundamentally different from the continental civil law system of The Netherlands, some legal elements are quite similar. Besides, both legal copyright systems find their origins in the Berne Convention and other international legal instruments such as the WIPO Treaty.⁸¹ But one could ask the question why precisely the United States? Over the last century, the music industry has been heavily influenced by the American record industry model. By the same token, copyright claims with regard to *unauthorized use of samples* in hip hop first saw the daylight in the United States.⁸² After all, the hip hop culture and traditions of sampling in hip hop music found their roots in the United States as well. Therefore, it could be helpful to analyze whether the American legal framework can shed new light on the darker shades of the Auteurswet.

⁸¹ The United States is party to the Berne Convention, the Universal Copyright Convention, the Geneva Convention on the Protection of Phonograms, the TRIPs Agreement and (while its implementation is limited) the WIPO Copyright Treaty. See here: Halpern/Nard/Port, *Fundamentals of United States Intellectual Property Law: Copyright, Patent and Trademark* (3rd edn, Wolters Kluwer 2011) 4.

⁸² *Grand Upright Music, Ltd. v. Warner Bros. Records Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991) was the first case where the unauthorized use of a sample was judged upon. Here the court granted an injunction against the defendants who were tried for using a sample from the song “*Alone Again (Naturally)*” by Gilbert O’Sullivan, without having it ‘cleared’. Sample clearance is often used as the terminology which refers to obtaining prior permission and the licenses necessary in order to use an original work. Because the owner of an original copyright has the *exclusive* rights to the work, permission to use the work is always required. See, *Mulcahy v. Cheetah Learning LLC*, 386 F.3d 849, 852 (8th Cir. 2004).

4.2 ORIGINALITY AND DERIVATION UNDER THE US COPYRIGHT ACT⁸³

4.2.1 ORIGINAL WORKS

It is regarded to be the most quintessential aspect of copyright law: works seeking protection by means of copyright law must be original works of art, literature or science. In the *Feist v. Rural* case, originality was held to be an inescapable constitutional requirement for copyright protection for all works of authorship. Originality of a particular work means that it owes its origin to the author, whereas no large measure of novelty is necessary.⁸⁴ In order to be original, however, the author's contribution must reflect at least "some" creativity.⁸⁵ Another requirement for originality is that the author has created his work independently.⁸⁶ It does not apply to any aspect of a work: copyright protection only extends to those portions that are considered original expressions.⁸⁷

4.2.2 THE AUTHOR'S EXCLUSIVE RIGHTS

The U.S.C. grants a set of exclusive rights to the author of an original work. U.S.C. §106 broadly defines the exclusive rights in general. These rights include the right to reproduce mechanical copies of the work, to prepare derivative works and to distribute copies of the work. But the rights also include the immaterial rights to perform or display the work publicly. These rights are further defined in U.S.C. §§114 – 115, of which the right to prepare derivative works will be discussed in the following paragraph..

U.S.C. §114 (b) provides that U.S.C. §106 (1) grants the author the exclusive right to *recapture* the actual sounds fixed in the recording, whether directly or indirectly. This concerns the right to reproduction of the sound recording in the form of phonorecords or copies. Because it is the authors exclusive right to prepare a derivative work, a creator may not assert a copyright interest in that recording if without permission.⁸⁸ The

⁸³ 17 U.S.C. §§101 – 810.

⁸⁴ *Baker v. Selden*, 101 U.S. 99 (1879).

⁸⁵ Joyce/Leaffer/Jaszi/Ochoa, *Copyright Law* (7th edn, LexisNexis 2006) and *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340 (1991).

⁸⁶ *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 547-49 (1985).

⁸⁷ *Boisson v. Baniyan, Ltd.*, 273 F.3d 262, 266 (2d Cir. 2001).

⁸⁸ *Palladium Music, Inc., v. Eat Sleep Music*, 398 F.3d 1193 (9th Cir. 2004).

exclusive rights to make and distribute phonorecords of nondramatic musical works, as mentioned in U.S.C. §106 clauses (1) and (3), is subject to compulsory licensing, according to the preamble of U.S.C. §115. Therefore, the author's permission to use his work may be obtained in the form of a license, whenever a third party wishes to make a copy or distribute phonorecords of a work in the United States.

Furthermore, §106(2) is limited to the right to prepare a derivative work, to the extent of rearranging, remixing or otherwise altering the sequence or quality of the actual sounds fixed in the recording. U.S.C. §114 adds that independent imitations or simulations do not fall under this exclusive right. In other words, preparing a *covered version* for example is permissible under the article.

4.3 DERIVATIVE AND ORIGINAL WORKS

4.3.1 *SUBSTANTIAL SIMILARITY AND TRUE SKOOL BEATS*

As discussed above, it is the author's exclusive right to prepare derivative works (U.S.C. §§103 and 106 (2)) and true skool beat makers tend to infringe these rights by using a sample without asking for permission and obtaining compulsory licenses.

Independent copyrightability of derivative works only extends to those parts that emanate from a certain contribution by the author of such a work. In other words: there must be a *quantum of originality* distinguishing the original from the derivative.⁸⁹ If a quantum of originality is lacking, the characteristics of the derivative and the original must be substantially similar,⁹⁰ in order to initiate copyright infringement proceedings.

The rights-holder must prove that there is substantial similarity between his work and the derivative. In order to do so, first an analysis of *striking or probative similarity*⁹¹ must show that there is actual and factual proof that copyrighted material has been used in a secondary work. There must be proof that the defendant had access to the plaintiff's work and that the degree

⁸⁹ Halpern/Nard/Port, *Fundamentals of United States Intellectual Property Law: Copyright, Patent and Trademark* (3rd edn, Wolters Kluwer 2011) 80.

⁹⁰ *Castle Rock Entertainment, Inc. v. Carol Publishing Group*, 150 F.3d 132 (2d. Cir. 1998).

⁹¹ *Ray Repp & K&R Music, Inc., v. Andrew Lloyd Webber*, 132 F.3d 882 (2d. Cir. 1998) and *Castle Rock Entertainment, Inc. v. Carol Publishing Group*, 150 F.3d 132 (2d. Cir. 1998).

of similarity between the works is so striking or substantial that the similarity could only have been caused by copying.⁹²

If factual use is confirmed, then a more subjective test will be used to prove the extensiveness of copying. Here the amount of duplication must show whether copying is a misappropriation of one's protected expression, when for instance the copied material is to be regarded as '*the heart of the work*'.⁹³ Since this is a standard which is open for various interpretations, the jury must apply a number of tests on a case-by-case basis to find substantive similarity.⁹⁴ Two of these tests will be discussed below.

4.3.2 *NON-LITERAL COMPREHENSIVE TEST*

Misappropriation of the copyrighted work can be tested by means of the *non-literal comprehensive test*, where the fundamental essence or structure of a work is copied.⁹⁵ The non-literal comprehensive test may result in a finding of a wrongful appropriation of the work, because some true skool compositions are based on a looped drum pattern that forms both the core of the original and the secondary work. Save for looped drum samples, however, this test is unlikely to result in a copyright infringement because drum patterns are often sampled in a way which *chops up* (that is to separate various measures from a sample) and then rearrange them into a different pattern. Furthermore, sometimes only a single snare or hi-hat is used in order to create a totally different drum pattern. In case of other samples, such as (filtered) bass lines or other melodies, it really depends on whether the essence and structure is rearranged and altered in such a way that it hardly resembles the initial fundament of the original work, in order to avoid wrongful appropriation. The easier it is to recognize the original character, to more likely the use will result in a wrongful appropriation of the protected expression.

4.3.3 *TOTAL CONCEPT AND FEEL*

A *total concept and feel test* can also be applied, and it is subdivided into an intrinsic and an extrinsic test. Whereas the extrinsic test forms a complex expert analysis of the underlying

⁹² *Midway Mfg. Co. v. Dirkschneider*, 543 F. Supp. 466, 489 (D. Neb. 1981).

⁹³ *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 547-49 (1985).

⁹⁴ *Johnson v. Gordon*, 409 F. 3d 12 (1st Cir. 2005) and Halpern/Nard/Port, *Fundamentals of United States Intellectual Property Law: Copyright, Patent and Trademark* (3rd edn, Wolters Kluwer 2011) 152 - 159.

⁹⁵ *Arica Institute, Inc. v. Palmer and Harper & Row Publishers, Inc.*, 770 F.Supp 188 (1991).

concepts of the work, the intrinsic test is comprised of a judgment of the *intended audience*, rather than the *ordinary reasonable observer*.⁹⁶ For true skool beats, the *total concept and feel* test is unlikely to result in a wrongful appropriation. An expert analysis (extrinsic test) into both works could prove that the underlying concept of the protected expression is copied, but most works of true skool hip hop are constructed by means of very fragmented and unintelligible transformations of sound samples. Samples from jazz records are often used to create an abstract environment, in which a strict 4/4-measure is adapted. Also, a sample may be pitched to a higher or lower scale, as to make the sound of a sample fit into the composition. Such an approach of a true skool producer, therefore, alters the character of the sample, because it has been placed in another context. Moreover, the extensiveness of the appropriation is not very easy to prove, because some samples only take up less than 2 seconds. Thus it could be difficult to prove that direct copying or misappropriation has taken place.

If an expert analysis is unlikely to prove the use, then an analysis by the ordinary observer of the intended audience will be even more unlikely to find misappropriation of a copyrighted work. Bearing the niche culture of *digging in the crates* (see Chapter 1) in mind, finding samples in order to create a true skool beat is an expertise in itself. Most lay audiences have no knowledge about sampling at all, let alone if very short sound fragments from obscure copyrighted works are used in an entirely different composition.

4.4 DE MINIMIS USE

Save from using greater parts that form the heart of the composition, a true skool beat may very well be comprised of small fragments which do not necessarily form the heart of the composition of the original. Still, substantial similarity can be proven if the copied fragment is of sufficient quantity and qualitatively of great relevance to the original work which has been copied by the true skool beat maker. In such a case, *fragmented literal similarity* could be present even if the slightest amount is copied.⁹⁷ The challenge here is to determine how much is 'enough' to consider it as an infringement.⁹⁸ A case law standard is, that in determining whether de minimis use can be found, both quantitative and qualitative importance of the

⁹⁶ *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977) and *Whelan Associates v. Jaslow Dental Laboratory*, 797 F.2d 1222 (3d. Cir. 1986) and 107 S.Ct. 877 (1987).

⁹⁷ *M. Nimmer & B. Nimmer on Copyright*, § 13.03 [A] (2).

⁹⁸ Harper, *Music Mashups: Testing The Limits Of Copyright Law As Remix Culture Takes Society By Storm*, 39 Hofstra L. Rev. 405, 409 (2010).

copied work should be weighted equally.⁹⁹ But, with regard to the portions used in the plaintiff's work as a whole, the sample's significance in the secondary work is also to be taken into account.¹⁰⁰ In this respect, reference must also be made to *Fisher v. Dees*, where the court held that if the borrowed part is so meager and fragmentary that the average audience would not recognize the appropriation, substantial similarity is unlikely to be found.¹⁰¹ True skool beats are characterized by very short fragments taken from the original, often of insignificant relevance to the whole of the copied work. Recognition of a sample could be circumvented by the transformative nature of a sampler, which uses signal processing and allows the producer to "mutilate" or virtually "hide" the sample.¹⁰² Hence, from one single trumpet or bass note, it is very hard to distinguish from which original work the single note was taken. This could result in some works of copyrighted material falling outside the scope of protection, since the *de minimis* defense applies.

The combination of the sequence of notes and chords played in a specific tempo, at a certain dynamic, is what shapes the timbre of a song. Most average listeners recognize a song by its melody, which is very often the heart of the song. Already in 1980, almost a decade ahead of the bulk of copyright cases concerning the use of samples, the Southern District Court of New York found that taking four notes of an original was not below the *de minimis* threshold because the defendant had copied "the heart of the composition."¹⁰³ But true skool beats are characterized by a mosaic-style fragmental composition, which do not necessarily contain portions that are the heart of an original song.

Essential for a true skool hip hop beat is the combination of the drums, the bass line and the melody. Drum sounds can either be looped fragments of a certain length (which is repeatedly playing a fragment), or be short single sound samples (also known as "chops" or "slices"). For example: one may simply

⁹⁹ Pelletier, 'Sampling The Circuits: The Case For A New Comprehensive Scheme For Determining Copyright Infringement As A Result Of Music Sampling, Washington University Law Review (2012), Vol. 89, p.1188.

¹⁰⁰ Lae, 'Mashups – A Protected Form of Appropriation Art or a Blatant Copyright Infringement?', SSRN, (December 2011), p. 9. Accessible at: <http://ssrn.com/abstract=2003854>.

¹⁰¹ *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir. 1986).

¹⁰² Pelletier, 'Sampling The Circuits: The Case For A New Comprehensive Scheme For Determining Copyright Infringement As A Result Of Music Sampling, Washington University Law Review (2012), Vol. 89, p.1169.

¹⁰³ *Elsmere Music, Inc. V. National Broadcasting Co., Inc.*, 482 F. Supp 741, 743-44 (S.D.N.Y. 1980), 623 F.2d 252 (2d Cir 1980).

sample one single “kick” drum from *James Brown – Funky President* (at 0.00 sec), a “snare” drum from *Skull Snaps – It’s A New Day* (at 0:01 sec) and a “hi-hat” sample from *The Honeydrippers – Impeach The President* (at 0:01 sec). These drum sounds, taken from differing sources, could be played in a sequence completely different from the originals. This creates a new context which does not resemble the originals. Furthermore, a common producer’s technique is the use of the *x-splice* function of the *S-950* sampler. This allows two samples to be enjoined and become one sample. The more layers are added with this technique, the more transformative the use may become, since a sample may be altered to such a degree (for instance by adding an echo or reverberation to a sample) that it is unrecognizable. Hence, a small fragment of a drum sample could fall under the substantial similarity threshold, because the average listener would not recognize elements of the original in the copied work.

Case law, however, has been divergent with regard to the finding of de minimis when small fragments are used. The 6th Circuit rejected the de minimis defense in case of a two-second guitar chord.¹⁰⁴ On the other hand, the 2nd Circuit confirmed that, even if a 2-second drum sample is looped throughout the entire latter song, it is difficult to prove there has been enough material used to find substantial similarity with regard to the original as a whole.¹⁰⁵ In 2004, the *Beastie Boys* were alleged of copyright infringement for sampling a three-note sample of the song “Choir” by flutist *James Newton*.¹⁰⁶ The court held that the defendants only used about 2% of the original composition, stating that “*not every element of a song is per se protected.*”¹⁰⁷ Moreover, the three-note sequence (C – D flat – C) was regarded as both a qualitatively and quantitatively insignificant part of Newton’s composition. In the *Saregama* case, the court held that a one-second sound snippet of a woman singing in G-minor looped four times in the chorus of “Put You OnThe Game” by *The Game* was rather merely de minimis than substantial. Taken as a whole, both songs were not similar to any extent other than

¹⁰⁴ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005). The court ruled that, although de minimis did not apply, the possibility of other defenses such as fair use are not precluded in case of sampling.

¹⁰⁵ *Tuff ‘N’ Rumble v. Profile Records*, 42 U.S.P.Q. 2d 1398 (S.D.N.Y. 1997). This case concerned the use of a drum sample played originally by *The Honeydrippers* in “Impeach the President”, which was looped by *Run D.M.C.* almost throughout their entire song “Back From Hell”. The court did not find substantial similarity.

¹⁰⁶ *Newton v. Diamond*, 388 F.3d 1189 (9th Cir. 2004).

¹⁰⁷ *Ibid.*

the one-second sample. Both songs contained different lyrical content, tempo, rhythms and arrangements. For the court, it was highly unlikely that the average listener could recognize the sampled song in the resulting work without prior warning.¹⁰⁸

4.5 THE FAIR USE EXCEPTION

If a derivative work is proved to be substantially similar to the original, an infringement could still be defended under the *Fair Use* exception. This rule tends to avoid rigid application of the Copyright Act, which could stifle the very creativity which it is designed to foster.¹⁰⁹ It is open to any kind of use,¹¹⁰ and four enumerated factors must be satisfied in order to fall within the scope of the fair use exception. These factors are to be weighed altogether rather than separately, whereas certain factors carry more weight than others.¹¹¹

The first factor to be considered is whether the use is transformative, regardless of it being commercial or non-commercial (U.S.C. §107 (1)). The more transformative the use, the lesser importance is attached to the other factors mentioned below.¹¹²

The second factor is the nature of the copyrighted work (U.S.C. §107 (2)). Here it is important to know that music is a work of creative arts, and these works in particular are “close to the core” of copyright protection. For instance, fair use will not be granted easily in cases of works of architecture. These works are not as creative as true skool beats, for certain choices in architectural works are based on functionality, rather than purely aesthetic reasons.¹¹³

The third requirement is that of the amount taken (U.S.C. §107 (3)), in terms of quality as well as quantity. Both elements are equally important here, for they are intertwined. Whereas quantity refers to the exact amount taken measured in time frames (for instance a 5-second sound sample from a 10-minute original), quality refers to the gravity of the use (for instance that the 5-second sample was used repeatedly throughout an entire 3-minute song). The taken portion, however, must be

¹⁰⁸ *Saregama India Ltd. v Mosley*, 687 F. Supp. 2d 1325 (S.D. Fla. 2009).

¹⁰⁹ *Campbell v. Acuff-Rose Music, Ltd.*, 510 U.S. 569 (1994).

¹¹⁰ U.S.C. §107, preamble, “for purposes such as (...)” indicates that fair use is not limited to the uses mentioned therein. See here: Halpern/Nard/Port, *Fundamentals of United States Intellectual Property Law: Copyright, Patent and Trademark* (3rd edn, Wolters Kluwer 2011) 118.

¹¹¹ *Idem*, 124 – 130.

¹¹² *Campbell v. Acuff-Rose Music, Ltd.*, 510 U.S. 569 (1994) at 1171.

¹¹³ *Idem*, at. 1175.

contrasted against the entirety of the original, not against the work in which it was used. Still, according to these factors, even a small portion could constitute substantial use considering “the real value” of the portion used. Depending on how much is used, it can be determined whether there is transformation.¹¹⁴

The fourth and last requirement is the economic impact (U.S.C. §107 (4)) of both the original and the derivative on their respective relevant markets. The reasoning behind this argument is that secondary use of a work enables the user to offer a substitute for the rights-holder’s original work and usurp a market that belongs to the rights-holder.¹¹⁵ However, the focus must lay on the realistic potential markets for exploitation. As such, it is not presumed that secondary use with commercial intents directly creates market harm. *V. Acuff-Rose*.¹¹⁶ In *Campbell v. Acuff-Rose*, it concerned a parody on the song *Oh, Pretty Woman* by Roy Orbison. In spite of the refusal of a license, the group 2 Live Crew continued to produce and release the parody. Here, the presumptions of market harm are not the most important factor. They were rejected by the Supreme Court and the importance of transformative use was emphasized in *Campbell*: the more transformation is given to the used portion, the lesser weight is given to other factors such as economic impact on the user’s relevant market. It is then more likely fair use will be granted. Consequentially, the Supreme Court held that 2 Live Crew’s commercial use of the song may be a fair use within the meaning of U.S.C. §107, considering it to be a parody.

4.5.1 IMPLICATIONS FOR TRUE SKOOL BEATS

The first factor concerns the purpose and character of the use. Albeit commercial or not, the use must be transformative in order to be fair. A true skool hip hop beat does add a new expression to the samples used, for they are placed within a new and different context as opposed to the original character of the source to which a sample belongs.

True skool beats are challenged by the second fair use factor, which is the nature of the copyrighted work. Save from sampling sound effects records (which contain for example the sound of screeching tires, broken glass or seagulls), music records are most often used for sampling. Since works of music mostly contain copyrightable features, they are closer to the core of

¹¹⁴ *Idem*, at. 1176.

¹¹⁵ *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104 (1998).

¹¹⁶ *Campbell v. Acuff-Rose Music, Ltd.*, 510 U.S. 569 (1994). See further: Halpern/Nard/Port, *Fundamentals of United States Intellectual Property Law: Copyright, Patent and Trademark* (3rd edn, Wolters Kluwer 2011) 128-130.

copyright protection than other sampled records. This could make a case of fair use weaker.

The third factor is that of the amount taken. Quantity and quality are used to distinguish the importance and value of the used material. Considering that a true skool composition repeatedly and systematically uses small portions in a beat, it possibly constitutes an infringement. The relationship between the sampled sound and the original in its entirety must be taken into account, in determining qualitative substantiality. The importance of a fragment is in some way shaped by the fact that it is a memorable part of a song.¹¹⁷ Nonetheless, if a composition does not show signs of an excessive use, the work as a whole may depart markedly from the original by producing distinctive music in another genre.¹¹⁸ This factor must therefore be assessed on a case-by-case basis, as there is not one single outright answer to the question whether the amount taken is qualitatively extensive.

Market harm or economic impact is the final factor on which U.S. Courts base their judgments. Justice Souter in *Campbell v. Acuff-Rose* held that *transformative use outweighs* economical purposes, because commercial use usually creates an (incorrect) presumption of market harm.¹¹⁹ On one hand, the generation of true skool beat makers are a niche among the mainstream Hip Hop audience. On the other hand, the music which they use for sampling (for example: *Blue Note* jazz, psych rock, soul and funk) belongs to an audience, which is unlikely to come into contact with true skool's niche style of Hip Hop music. Besides, secondary use in a new and different music generation could cause a revival of the sampled artist's oeuvre, which would lead to an increase in demand of his work.¹²⁰

With regard to fair use, there is a necessity for specific details in order to strike a balance between the copyrighted expression on one hand, and the transformative use on the other hand. In any case, the re-interpretation of an older work, which is in turn put into a different context, set by different rules, may result in a finding of fair use. Adding a new further purpose or different character by altering the original source with a new expression,

¹¹⁷ <http://fairuse.stanford.edu/overview/fair-use/four-factors/>.

¹¹⁸ *Campbell v. Acuff-Rose Music, Ltd.*, 510 U.S. 569 (1994).

¹¹⁹ *Sony Corp. V. Universal City Studios*, 464 U.S. 417 (1984).

¹²⁰ Scholtens, *Het maken van bewerkingen in het auteursrecht: een alledaagse bezigheid waarbij in Europa niet is stilgestaan*, p. 10 – 11. Accessible at: http://jongenjv.nl/wp-content/uploads/2014/01/Scholtens_Bewerkingen-in-het-auteursrecht.pdf.

meaning, or message, the overall character becomes transformative. This fair use determination weighs in favor of true skool beats.¹²¹

4.6 CONCLUSION: THE U.S. COPYRIGHT ACT DOES OFFER A BROADER SCOPE OF PROTECTION

The U.S.C. dictates that the exclusive rights of a copyright-holder entail preparing a derivative work, the originality of true skool beats is affected by the very fact that material has been 'borrowed'. True skool beats will infringe the rights of the author if the heart of a composition is used. However, a closer observation shows that U.S. courts use a non-literal comprehensive test to assess whether fundamental essences of a work have been copied. Here, true skool beats fall below the threshold, as its minimalistic sampling approach with 1- or 2-second sound fragments possibly do not form a fundamental part of a song.

The total concept and feel test requires that samples are recognized, from both an intended audience perspective and an expert point of view. As true skool beats have a very transformative character in terms of altering the overall sound, the total concept and feel test does protect true skool beats' creativity. Whereas the U.S. total concept and feel is connected to the recognition of a sample, the Dutch total impression test is connected to the overall character of a work. In this respect, the U.S. de minimis defense shows similarities with the Dutch total impression test: the *Saregama* case shows that, if the total impression of both works are entirely different, the sampled portion could be non-infringing under de minimis. Here, the copyrighted material was too meager and insignificant in relationship to the original. Hence, under U.S. copyright law, small fragments may also fall below the substantial similarity threshold, if the de minimis exemption applies. However, the U.S. judiciary is still divergent in its rulings with regard to music sampling. Finally, fair use offers four distinctive factors for true skool beats in case of a possible copyright infringement. Whereas possible market harm and the nature of the copyrighted work weighs against the use of other works in true skool beats, case law pointed out that most weight is attached to transformative character.

Whereas the Auteurswet supports the existence of true skool beat's creativity with the total impression test, it is clear that the U.S. legal system provides for at least three viable legal remedies under the U.S.C. Firstly, the total concept and feel test, which

¹²¹ *Campbell v. Acuff-Rose Music, Ltd.*, 510 U.S. 569 (1994).

examines the recognition of a sample by the ordinary and expert audience. Secondly, the de minimis exemption, which resembled the Dutch total impression test. Finally, the fair use doctrine, which takes into account four factors in determining whether or not certain adaptations are fair. These protection mechanisms tend to promote transformative musical borrowing, even for the shortest fragments. In this sense it promotes the creativity it is designed to foster in a more advanced way than the Dutch lawmaker and consequentially, the U.S. Copyright Act has a broader scope of protection for true skool beats than the Auteurswet.

5. IS CREATING AN OPEN NORM FOR ADAPTATIONS A SOLUTION?

5.1 INTRODUCTION

From the previous chapters it is evident that true skool beats are not burdened by the *Auteurswet*, but that there is room for improvements. A rigid application of the law supposes that true skool beats are borrowed, as an own character and the personal stamp of the author are lacking. Then the *total impression* test offers a way out to such an approach. The old rule: “It is not a crime if you don’t get caught” then still holds true. As many artists in the field of true skool beats have little or no knowledge about the *Auteurswet*, they think of the law as a mechanism to be applied 1:1 on the facts. Chapter 2 has shown that the reality of creativity is nuanced, and similarly, the applicability of the law is more than just a 1:1 Xerox copy. Most true skool beat makers therefore risk creating music under a false presupposition: that *any* form of sampling is equal to stealing according to the law, because originality is supposedly lacking. This having the consequence that artists could be too retained to publish their music. This encourages the true skool beat maker to find and edit samples in such a way that its transformative use makes copyright infringement virtually impossible. But one of copyright law’s aims is to promote creativity. Therefore, it should be facilitating minimalistic musical borrowing. It would be against the law’s own rationale to stigmatize artistic borrowing as a crime, in which case one must try to find the loopholes of the law. On the contrary, promoting creativity must encourage such artists to proudly occur on the radar, instead of trying to keep below it!

Since the closed catalogue of exceptions in the *Auteurswet* creates uncertainty, an open norm could cater for a minimum threshold for adaptations. This chapter shall first discuss the relevance of an open ended norm and the relevance of fair use. Thereafter, a few improvements for adaptations shall be discussed in the form of model clauses.

5.2 OPEN ENDED NORMS: THE DUTCH VARIANT OF A FAIR USE EXCEPTION?

5.2.1 OPEN APPLICATION OF A CLOSED CATALOGUE

A long suggested possibility for certain adaptations, is the implementation of a variant similar to the open ended function of Fair Use. Fair Use requires a balancing of interests, from the perspective of the author and the user. The previous chapter illustrated that the four factors of Fair Use under the U.S.C. promote and protect transformative uses of works. Such an open norm allows for new creations and adaptations to exist, without directly infringing intellectual property rights. A similar rule concerning open ended norms was already created by the Dutch Supreme Court in the *HR Dior / Evora* case.¹²² The Court ruled that in some cases, the closed catalogue of exceptions should be applied as a balancing of rights, in the interests of the development of copyright law, on one hand, and the protection of commercial interests on the other. This relaxed the exhaustive list of limitations to the exclusive rights and posits the limitations to exclusive copyrights near a fair use regime. It allows for the emergence of new creative practices to be weighted in their interest, against the interests of the author.

Still, mixed litigation results show that there is a discrepancy between creativity in practice and creativity in the law. In this respect, stifling of creativity may be due to the fact that law-makers and interpreters are largely ignorant to the process and methods by which creativity occurs.¹²³ An explanation for the current divide between the conventional authors of music and post-modern users might be that there is a lack of understanding between those who favour post-modern creative techniques and those who do not. It is true that the law cannot keep up with creativity to every single detail, but if certain forms of creativity are not well promoted, then the demand of a creative art form will always be subservient to the consensus of the few who are involved in the process of law-making. The ever existing gap between the emergence of new creative practices and well-established legal regimes could be bridged by open norms.

5.2.2 FAIR USE: BALANCING INTERESTS

In legal doctrine, the relevance of fair use has been widely debated. One commentator notes that the public's interests are legally shaped in the form of Fair Use. It is a valuable solution

¹²² HR 20 October 1995, *IER* 1995, 41 (*Dior/Evora*),

¹²³ Vaidhyathan, 'Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity' (2001), p. 148.

when the interests of the individual author and the collective interest of the public, or the group of users, do not coincide.¹²⁴ In this regard, Lemley objects to the financial interests of the author, arguing that there exists no necessity to fully internalize monetary benefits in intellectual property. Such efforts will result in a net loss to society, which might invite anti-social behaviour.¹²⁵ Anti-social behaviour translates itself into the position that large record labels take in the field of copyright law enforcement. An RIAA report proves the decline of power of worldwide record labels. Since their financial viability in terms of actual record sales has diminished significantly, artists represented by worldwide agencies and labels themselves are likely to generate sufficient revenue through litigating or licensing out the use of sampled material, especially since the worldwide success of hip hop music.¹²⁶

But by creating open norms, examining whether an interest in allowing the adaptation outweighs the interests protected by the finding of an infringement, could also balance out both interests instead of encouraging anti-social behaviour. By for instance considering the economic impact on a relevant market, interests in the oeuvre of the original author could be renewed through secondary use. An increase in the demand of the authors work could occur and thus, the profits for both the author and the user are balanced out.¹²⁷ Indeed, in assessing imitation, the focus could lay more on the marketplace impact of copying and the presence or absence of attribution. Anderson proposes a number of possible elements to a future copyright framework. One addition is that the framework could provide tiered protection based on the age of the work, assuming the usurpation risk is greatest when a work is new. Since most works experience financial gain in the first years after their

¹²⁴ Hampel, 'Are samples getting a bum rap? Copyright infringement or technological creativity?', *University of Illinois Law Review* (1992), p. 563.

¹²⁵ Lemley, Property, 'Intellectual Property and Free Riding', 83 *Tex. L. Rev.* (2005), p. 1031 – 1032.

¹²⁶ Pelletier, 'Sampling The Circuits: The Case For A New Comprehensive Scheme For Determining Copyright Infringement As A Result Of Music Sampling', *Washington University Law Review* (2012), Vol. 89, p. 1163. See also: *2008 Consumer Profile*, RIAA: <http://76.74.24.142/CA052A55-9910-2DAC-925F-27663DCFFFF3.pdf>. Sales have declined rapidly and traditional business models are exchanged for alternative measures to keep record companies viable and thriving.

¹²⁷ Scholtens, *Het maken van bewerkingen in het auteursrecht: een alledaagse bezigheid waarbij in Europa niet is stilgestaan*, p. 10 – 11. Accessible at: http://jongeniv.nl/wp-content/uploads/2014/01/Scholtens_Bewerkingen-in-het-auteursrecht.pdf.

release, early copying in the works life cycle could be subject to strict liability protection. As a work becomes known (or perhaps more obscure), the level of protection could be relaxed or copying could be even permitted.¹²⁸ Perhaps, such a legal enforcement flexibility could result in an alignment between legal and hip hop norms.¹²⁹

5.3 RELAXING ART. 13 AW FOR WORKS WITH A HIGH DEGREE OF TRANSFORMATION

Creating a specific positive regime for new forms of adaptation will not have the desired effects if Art. 13 Aw is amended, according to the Dutch Copyright Board (*Commissie Auteursrecht*). Instead, its scope of application could be made more flexible. In this respect, the Board commented that the law should not explicitly mention or make way for adaptations that are new and original, but that a rule similar to the German *Freie Benutzung* (the right of free use, as enshrined in § 24 (1) UrhG, the German Copyright Act) doctrine could be applied. *Freie Benutzung* implies that work may be qualified as an independent and free adaptation, if there is a certain distance between the adaptation and the original work. But, the Board then adds, **explicitly** regulating free adaptations would be against the current practice of creating flexible rules with regard to new forms of adaptations, whether they be User-Generated Content or musical adaptations.¹³⁰

However, the new Art. 13 Aw could still include an exception, maintaining a flexible regime, while adding a nuance. By means of requiring a degree of recognition, it provides for a two tier examination such as US total concept and feel test. Adding the word “reasonably” provides for a safeguard, in which the degree of recognition is decisive in determining whether a (minimalistic) adaptation is permissible. Only those adaptations that are reasonably unrecognizable for any audience, acquire sufficient deviation from the original. Such an amendment

¹²⁸ Anderson, Jr., ‘No Bitin’ Allowed: A Hip-Hop Copying Paradigm for All of Us’, 20 Tex. Intell. Prop. J. 115 (2011), p. 37. Accessible at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1847725.

¹²⁹ Anderson, Jr., ‘Criminal minded?: Mixtape DJs, The Piracy Paradox, and Lessons for the Recording Industry’, 76 Tenn. L. Rev. 111 (2009), p. 135. Accessible at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1273805.

¹³⁰ Commissie Auteursrecht, *Advies aan de Staatsecretaris van Veiligheid en Justitie over de mogelijkheden van het invoeren van een flexibel systeem van beperkingen op het auteursrecht. Deel 1: Een flexibele regeling voor user-generated content*, 21 March 2012. Accessible at: <http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2012/10/30/advies-een-flexibele-regeling-voor-user-generated-content.html>.

would not be against the practice of creating flexible rules, since it excludes only reasonably recognizable adaptations from copyright protection. The rule is still flexible and open to any new kind of adaptation, while it does make way for a minimum threshold for certain adaptations. A model clause could be designed as follows:

Model clause 1

CURRENT ART. 13 AW:

“The reproduction of a literary, scientific or artistic work includes the translation, musical arrangement, film adaptation or dramatization and generally any partial or full adaptation or imitation in a modified form, which cannot be regarded as a new, original work.”¹³¹

MODEL ART. 13 AW:

*“The reproduction of a literary, scientific or artistic work includes the translation, musical arrangement, film adaptation or dramatization and generally any partial or full adaptation or imitation in a modified form, which cannot be regarded as a new, original work, **unless the modification renders the full or partial adaptation of a work reasonably unrecognizable.**”*

5.4 IMPLEMENTING AN AMERICAN DE MINIMIS APPROACH IN ART. 18A AW

A final option would be to relax the applicability of the de minimis rule. Currently, Art. 18a Aw only applies to coincidental uses,¹³² being trivial and banal to the extent where there is no creative labour to be found. From the perspective of minimalistic adaptations, this is rather unsatisfactory. If a high degree of modification or transformation exists, a work could be original under the Auteurswet, albeit that the used materials have been borrowed from another work. If the law is to promote creativity, why does the legal text not support this in practice? De minimis could very well cater for a flexible hardcore legal instrument, in cases where fragmental secondary use is highly insignificant in relation to the original work. Here, a two-tier de minimis approach similar to the U.S. Copyright Act would be functional if incorporated into Dutch framework.

¹³¹ Eechoud, van, ‘Copyright Act – Auteurswet. Unofficial translation’ in: Hugenholtz/Quaedvlieg/Visser (eds), *A Century of Dutch Copyright Law. Auteurswet 1912-2012* (deLex 2013), p. 511.

¹³² Hugenholtz, “De Auteurswet gewijzigd: Artikel 18a (incidentele verwerking)”, *AMI* 2005/2, p.57-58.

First, a quantitative analysis could be inserted into Art. 18a Aw. Instead of analyzing whether or not the use is co-incidental and trivial, the quantitative substantiality of the use of a work could be analyzed. This would examine the minor significance of the fragment with regard to the original work (see below). If the length of the adaptation is so insignificant that the average audience would not recognize the appropriation, a finding of infringement would be applied less strictly.¹³³ Note that such a reform of Art. 18a Aw would not render its applicability to trivial and co-incidental uses improbable, if the exemption of incidental uses is still mentioned in the article (see below).

If the previous analysis confirms that use is below the threshold of quantitative substantiality, a second test could further the analysis more concretely. A qualitative analysis would then prove the importance of transformative use of a sample by first assessing whether the adaptation copies the heart of the composition.¹³⁴ This would examine the degree of transformation by incorporating *own and personal character* requirement into a subsection (see model clause 2). In other words, the new Art. 18a Aw could require that the original was not essentially appropriated. Finally, if the essence of the original work has not been copied, a last examination should determine how similar exactly both works are. It is then up to the judiciary to take elements such as lyrical content, rhythms, tempo and the diversity of both arrangements into account, similar to the *Saregama* case.¹³⁵ With regard today's case law practices, the **total impression test**, currently used with regard to finding an own and personal character, would then form part of Art. 18a Aw instead. As a result, the legal position of the author is still respected as the original work, while the true skool beat is qualified as an adaptation, excused from copyright infringement on grounds of *de minimis*.

A model clause for a new *de minimis* exemption could be as follows:

¹³³ *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir. 1986).

¹³⁴ *Newton v. Diamond*, 388 F.3d 1189 (9th Cir. 2004).

¹³⁵ *Saregama India Ltd. v Mosley*, 687 F. Supp. 2d 1325 (S.D. Fla. 2009).

Model clause 2

CURRENT ART. 18a AW

“Not regarded as an infringement of the copyright in a literary, scientific or artistic work is the incidental processing of it as a component of minor significance in another work.”¹³⁶

MODEL ART. 18a AW

“Not regarded as an infringement of the copyright in a literary, scientific or artistic work is the processing of it, if:

- the use is incidental, or;

- it is of minor significance in the original work, and;

- if it has an own, original character in the adaptation.”

5.5 CONCLUSION: OPEN NORMS ARE A VALUABLE SOLUTION

Open norms have a better potential of encouraging minimalistic musical borrowers to produce and publish their creative efforts, than the current text of the Auteurswet suggests. While there is clearly a lack of understanding between those who make the law, and those who are seeking to circumvent it, the Dutch law maker has made progress in the right direction since the *HR Dior/Evora* case. The balancing of interests helps to align the original author and the true skool beat maker, where the closed catalogue of exception seems to bar new forms of creativity. Whereas a full-fledged fair use regime is still not a possibility, a similarly functioning Dutch regime could balance out all interests concerned. It is true that large record companies are the few who truly benefit from copyright laws in practice, by means of full internalization of monetary benefits into copyright law. But by opening up the legal framework, musical recycling could very well cater for a revival of the original author’s oeuvre and stimulate a marketplace of musical expressions through artistic borrowing.

Two possible amendments to acquire the desired effects of open norms are either relaxing Art. 13 Aw or Art. 18a Aw. The *Commissie Auteursrecht* advised the Dutch law maker not to explicitly regulate new forms of adaptations. Therefore, by incorporating an examination of reasonable recognition, Art. 13 Aw could be made more flexible for minimalistic forms of highly transformative uses, without prejudice to the exact form of new

¹³⁶ Eechoud, van, ‘Copyright Act – Auteurswet. Unofficial translation’ in Hugenholtz/Quaedvlieg/Visser (eds), *A Century of Dutch Copyright Law. Auteurswet 1912-2012* (deLex 2013), p. 522.

adaptation methods. The second possibility for revision would be incorporating an American *de minimis* approach to the current Art. 18a Aw, for the purposes of making the threshold for insignificant borrowing more flexible. Whereas it is currently only applicable to co-incidental uses, a revised Art. 18a Aw would contain an additional dual analysis into the substantiveness of meagre artistic borrowing. In practice it would mean that the open ended total impression test, currently provided by case law standards, is incorporated into Art. 18a Aw, for reasons of legal certainty.

6. CONCLUSION

The tradition of borrowing from other compositions to aid or influence a new work has always been a key compositional technique. Minimalistic production techniques and diligently used musical works revolve around a high level of transformation, making it difficult for the average listener to recognize the materials used. However, there is a substantial amount of court cases about copyright infringements in the field of musical borrowing and sample clearance rates have risen to extreme heights. This has led to the current situation where sampling is supposedly an artistic privilege only reserved for the few who have the financial means for it.

Copyright law aims to prevent others from damaging the interests of an author who makes an original work of art. It has always been widely accepted that this is due to the monetary and creative efforts it takes to create a work of art. But while creative borrowing has been omnipresent, recital 9 of the European *Infosoc* Directive mentions that, with regard to copyright:

*“Their protection helps to **ensure** the maintenance and development of creativity in the interests of authors (...).”*

When contrasting the Auteurswet against the characteristics of true skool beats, it seems that the originality stands in the way of copyright protection for true skool beats. Provided that the borrowed fragment has original (and thus copyrightable) features, originality of true skool beats is essentially lacking, due to the derivative nature of musical borrowing. However, if the **total impression** of both works are different, a true skool beat may be protected by copyright law. This is the case if a sample has been transformed to such an extent that it has given the old work an own character, and that it carries the personal stamp of the author. This shows that the Auteurswet does, in some way support the development of creativity. However, save from the total impression test, there are not many safeguards for this form of artistic borrowing, which give rise to the conclusion that the Auteurswet **ensures** the development of creativity of true skool beats. The fact that the sound fragments are too small or too insignificant, does not suffice to pass the threshold for a *de minimis* defense. *De minimis* requires co-incidental use, being trivial and banal to the extent where there is no creative labour to be found. What’s more, is that the author’s moral rights bear the potential of restricting the existence of any true skool beat, under some circumstances.

In this respect, the U.S. Copyright Act has a greater scope of

protection for true skool beats than the Auteurswet. The Act considers the probability of recognition of a sample by the intended audience, as well as the expert listener. Furthermore, the Act also has a de minimis rule, which is used to assess whether the taken portion was too insignificant in relation to the original to find an infringement. Moreover, de minimis also applies if the total concept and feel of both works are entirely different. Besides, the U.S. regime offers the possibility of a fair use exception, which allows for certain transformative uses. Here, the level of transformativeness plays a central role and it even possibly outweighs the economic interests of the author.

The wider applicability of the U.S. Copyright Act shows that the Auteurswet has a rather restricted applicability with regard to supporting the development of (minimalistic) creativity of true skool beats, whereas it has a wide scope of protection for original works of art. By exercising a large scope of protection for original works of art, the current Auteurswet does not suffice to **ensure the development of creativity** with regard to minimalistic musical borrowing, in the case of true skool beats.

As the law currently stands, the Dutch courts use a balancing of interests to soften the rough edges of the closed catalogue of exceptions, whenever it seems to bar new forms of creativity. The *Commissie Auteursrecht* already advised the Dutch law maker not to explicitly regulate new forms of adaptations. Therefore, open norms bear the potential of encouraging minimalistic creativity in musical borrowing. Indeed, by relaxing the current legal framework, musical recycling could very well cater for a revival of the original author's oeuvre and stimulate a marketplace of musical expressions through artistic borrowing. Two possible amendments to acquire the desired effects of open norms are either relaxing Art. 13 Aw or making Art. 18a Aw more flexible. By incorporating an examination of reasonable recognition, similar to the U.S. regime, Art. 13 Aw could be made more flexible. Without prejudice to the exact form of new adaptation methods, the development of new minimalistic adaptations, with a high degree of transformativeness, is ensured more concretely. The second possibility for revision would be incorporating an American de minimis approach to the current Art. 18a Aw. This would render the threshold for insignificant uses more flexible and tailored to the practices or artistic creation. A revised Art. 18a Aw could contain an additional dual analysis into the substantiveness of meagre artistic borrowing, by incorporating a total impression test into Art. 18a Aw.

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