The Art of the Remix: Rights and Wrongs in the Modern Age

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The remix. At best, it is a new spin on an existing tune, a transformative, creative moment when the remixer makes something new of something old(er). At worst, it is a derivative work concocted by a record label to breathe fresh life into a previously released work. Either way, remixes dominate the world of pop culture and can become hits in their own right. Here are five things to consider regarding remixes as it relates to United States copyright law and practice in the music business:

>> The Rights

A sanctioned remix is a derivative work that has been authorized by at least one of the composition's songwriters (i.e. the releasing artist) and the owner of the master (i.e. in most instances, the record label). Note that for purposes of a license to create the derivative work, any co-author of a composition may authorize the remix. However, a co-author may not grant an exclusive license, because "…. if a co-author attempts to convey exclusive rights, his co-author can convey the same exclusive rights – in effect, [rendering] such an exclusive license … [as] a non-exclusive license" (Davis v. Blige, 505 F.3d 90, 100 (2d Cir. 2007). As a co-author has access to the entire "bundle" of rights in and to the copyrighted work, any attempt by one co-author to grant an exclusive license could effectively be circumvented by another co-author doing the same. Additionally, a co-author may not authorize composition splits at less than the splits already negotiated and agreed upon by the original writers (see Brownstein v. Lindsay, 742 F.3d 55, 68 (3d Cir. 2014), "With respect to transferring the ownership of a joint work, a co-author cannot transfer the

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ownership interest of his co-author"). Generally, there is only one master owner, so in this case, there is less potential for issues to arise in the fluid world of remix procurement.

But what if the co-authors of a composition have a co-writer agreement limiting licenses to each individual's respective share? You may remember this concept from United States v. Broad Music, Inc., 720 F. App'x 14 (2d Cir. 2017) with respect to fractional licensing. In the event of an agreement limiting a co-author's right under copyright law to issue a license for the entire composition, an artist is in breach unless it obtains a license from the other writers for each remix. Many compositions have co-writer agreements, and most remixes are not separately licensed prior to release.

Under United States copyright law, the concept of "fair use" may allow a party using another party's copyrighted intellectual property even without the copyright owner's consent in certain specific instances. Section 107 of the United States Copyright Act allows for the "fair use" of a copyrighted work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use, scholarship, or research)" (17 U.S.C.A. § 107) without giving rise to an infringement claim. But, a non-sanctioned remix is an infringement, and it is highly unlikely that a "fair use" argument will wholly insulate an unauthorized remixer from liability.

>> Remixer Royalty/Songwriting

In most instances, the party seeking to exploit the remix (i.e. typically the record label) offers payment of a fixed fee to a remixer in exchange for all of the remixer's right, title and interest in and to the remix (otherwise known as a "buyout"). However, since an authorized remixer is creating a new derivative work, they may sometimes request a share of the derivative composition and a royalty as a producer or co-producer of the derivative master recording. What this percentage may be is up to negotiation. However, there are a few conflicting reasons that underlie the request.

First is the claim that the remixer is a co-author and is entitled to a pro-rata share of earnings from the new work. What if the remixer took the topline, i.e. the lyric recording

only, and made an entirely new production underneath? They would be entitled per established copyright law to request a 50% share in the new work, and even, while not typical, have a legal basis for claiming co-ownership of the new master recording.

This reasoning is countered by the argument that the remixer is a service provider who, for a fee, is giving up all master and composition interest in and to the remix. Since the label or releasing artist commissions the work, the delivery of the stems, (i.e. the music files that make up the master recording), is conditioned upon a remixer's acknowledgement and agreement that no royalty is due. This requires organization and foresight on the part of the label and/or releasing artist to get the remixer's agreement before the remix is initially commercially exploited. Often times, in the heat of a campaign, remixes are commissioned and delivered prior to any of this being set in stone.

That leads us to the hybrid solution, which is becoming more common in the industry. The hybrid solution consists of a fee for the work plus a small master royalty and/or a smaller piece of the composition. This is truly where managers and lawyers sculpt the landscape, remix by remix. There is no set format or norm for the hybrid philosophy. It all depends on the scope and nature of alterations made to the remix from the original, the leverage of the remixer, and the creative brilliance of the legal and management team in sculpting a deal.

>> Original Producer Royalty/Songwriting

This brings us to the producer and songwriters of the original work. If a record label and/or artist have agreed to grant to the remixer of an original work a percentage of master or composition income, there may be ramifications on not just the artist's percentage of the master or the composition, but also on other, third-party royalty participants who were not consulted prior to the remix creation. This may occur in a few instances, such as when the artist does not own any portion of the composition, and thus cannot grant any portion to the remixer, or where the remixer is so highly sought after that the master-royalty commanded by the remixer is so large that the artist would want to ratably reduce the third-party producer's master royalty alongside the artist's own.

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Let's start with the producer, who, hopefully, has a fully executed producer agreement with the releasing artist. And let's assume there is only one producer who has worked on the recording (we have seen instances where there are up to 9 producers on one recording). Say the producer has a 4% PPD royalty, which is the middle end of the standard for producers on recordings released by major labels. And say the remixer wants a 4% PPD royalty for their work on the remix. And one more very important assumption – let's say that the remixer uses a good portion of the original producer's stems.

In this scenario, the original producer is clearly entitled to a royalty, as the proceeds of her services are embodied in the remix. And, while there may be reduction language in the producer's deal with respect to another producer providing services in regards to the master, it probably does not mention anything about a remix, and the producer is probably protected once the master has been delivered to the label, which is hard to argue against if the master has been released. Therefore, in this instance, the releasing artist would most likely either need to pay an additional 4% out of its royalty to the remixer, ask the label for an additional allocation, or negotiate with the original producer to reduce her royalty to accommodate some of the remixer's royalty.

Then to the songwriters, who most likely were not consulted prior to the remix being made. While their approval is not required in order to create a remix, if the remixer requests ownership in the derivative composition, the songwriters' approval may be required. In the absence of such a request by the remixer, however, the derivative composition would be owned by the songwriters in the same proportions as they currently own the original work. Since a copyright is indivisible, and each songwriter owns their share of 100% of the composition, any derivative work would be owned in the same shares as the original.

An example of a common negotiation may best illustrate the foregoing principle. If a remixer requests 25% of the remix, and there are five writers (including the releasing artist) on the original, each writer would need to separately agree to grant 5% from their share, or the releasing artist (assuming they own a percentage of the composition) would

need to reduce its share to accommodate. Of course, in this example, the releasing artist wouldn't have enough to give. While most songwriters are amenable to these requests, nothing requires a songwriter or publisher, who has not been made aware of the remix prior to the commission thereof, to agree to an approval of a reduction. If, in the present example, all of the songwriters (and/or their respective publishers) other than the releasing artist refuse to approve such a reduction, the remixer's share of the derivative composition could not exceed the aggregate amount held by the releasing artist (i.e., 20%), leaving the releasing artist with no portion of the derivative composition.

>> Features

This is where we see the most creative difficulty in remixes and the most unintended contract breaches. Remixers are generally granted a blank canvas by which to create a new work from the various stems provided. This includes vocal stems from artists featuring on the recording. This could include artists much more popular and successful than the releasing artists.

In cases like these, there are generally prohibitions in the feature artist contract with respect to the feature artist performances. A common requested restriction is that the feature artist's performance will not be "materially altered" or "lifted" without permission. Of course, requests such as these are often denied by the artist attorney and management team who are responsible for drafting the featured artist agreement and predictably do not want to agree to limit future uses of the master and any remixes.

Do you see where we are headed here? How many times do you think feature artists are consulted prior to remixes being made? Thankfully, more than you would think. However, they are generally only consulted with respect to high level features, i.e., the A-listers, when there are savvy managers or A+R's who know the protocol, and the features are subject to a label waiver from another label. We find that about 35-50% of the time, features are not consulted prior to remixes being procured and released. This can create a relationship issue if the featured artist doesn't approve creatively of the remix. Not to mention a possible breach of the featured artist's contract.

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Finally, as most features receive a royalty, you need to work that consideration into the new royalty to the remixer as discussed with regard to producer royalties in #3 above.

>> US Performance Income

Did you know that remixers are often accounted a pro-rata share of the so-called "performer share" of SoundExchange monies despite the fact that they sold the remix to the label for a fee (i.e. no royalty provided)? It happens often. It even happens with unauthorized remixes, since SoundExchange has no way of knowing what is authorized vs. unauthorized when it receives data from its reporting entities (e.g., Sirius).

This is because SoundExchange's policy is to treat credited remixers as a feature. Additionally, SoundExchange's policy with respect to features is to account each feature a pro-rata share, absent an agreement to the contrary. Also note that, while SoundExchange does not read and interpret agreements per its company policy, it will accept an executed repertoire chart denoting agreed-upon splits, an effective way to avoid remixers from automatically receiving a pro-rata share of such income. Thus, it is important as the releasing artist to make sure that registered SoundExchange splits are accurate, by ensuring that remixers sign a repertoire chart pursuant to which they agree not to claim any portion of the so-called "performer share".

So there you have it – the remix in all her glory and complication. As we continue to rapidly release singles and related remixes, watch for these potential issues to light up from time to time in controversy and solution.