

**THEFT, TRANSFORMATION, AND THE  
NEED OF THE IMMATERIAL: A PROPOSAL  
FOR A FAIR USE DIGITAL SAMPLING  
REGIME**

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## I. INTRODUCTION

The real act of discovery is not in finding new lands,  
but in seeing with new eyes.

- Marcel Proust<sup>1</sup>

Me and Marley Marl, we designed it well  
You added some percussion, thought we could not tell . . . .  
Beat biters I devour like a three-course meal  
So be careful next time whose beat you steal.

- MC Shan<sup>2</sup>

From their inception in American copyright law, monopolies have been lamented as “the greatest nuisances in Government” and yet, in the same breath, recognized for promoting ingenuity.<sup>3</sup> Digital sampling, the process of manipulating pre-existing sound recordings and incorporating them in one’s music, highlights their shortcomings. A practice that should be burgeoning due to a cultural and technological revolution, sampling is being smothered—with Congressional and judicial fiat—by opportunistic rights holders who are seldom the authors of the protected works. Creative samplers are branded as thieves under legislation that has been incoherent from the outset. Reform is sorely needed.

This paper focuses on the state of sampling in the United States,<sup>4</sup> but I hope to foster a general discussion of user rights in the realms of compositional and other forms of borrowing,

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<sup>1</sup> Wheel Words, <http://www.texaschapbookpress.com/wheelwords.htm> (last visited May. 6, 2009).

<sup>2</sup> M.C. Shan, “Beat Biter” Lyrics, <http://www.lyrics007.com/M.C.%20Shan%20Lyrics/Beat%20Biter%20Lyrics.html> (last visited May 6, 2009). “Beat Biter” was a response to LL Cool J’s “Rock the Bells,” which, Shan charged, appropriated “Marley Scratch:” “its [sic] directed to my man L.L. Cool J, yo [sic] brand new jam sure [sic] does sound sweet - you rocked the bells; but ya [sic] stole my beat !!” Interview by JayQuan with M.C. Shan (Sept. 3, 2002), *available at* <http://www.jayquan.com/shan.htm>.

<sup>3</sup> Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* POWER AND POLICY IN QUEST OF LAW: ESSAYS IN HONOR OF EUGENE VICTOR ROSTOW 103, 103 (Myres S. McDougal & W. Michael Reisman eds., 1985).

<sup>4</sup> I chose to focus on the US since most commercial music is covered by its laws, and sampling litigation as well as the policy behind it tends to originate there. This is due to the copyright holder-friendly regime and the fact that the system has yet to adjust to the globalization of the commercial market. Cases that could have clarified the international scope of copyright have been settled out of court.

regardless of medium.<sup>5</sup> I illustrate systemic problems affecting musical copyrights, and suggest both a harmonization of current juridical approaches and a skeletal structure for a sample licensing mechanism that would serve creative artists, rights holders, and the listening public.

I argue for an expanded fair use defense featuring compulsory licenses,<sup>6</sup> grounded in the twin principles of “transformativeness” and effect on the original work’s derivative market. Part II discusses the incoherence of the current licensing regime for copyrights in musical compositions and recordings, and how it favors rights holders. Copyright’s primary goal of benefiting the public is the focus of Part III’s opening, as I demonstrate that the limited monopolies it confers were originally offered reluctantly to facilitate art for public enjoyment. Next, I present the history of quotation and establish that the desire to borrow and manipulate existent music is deep-seated, has multiple purposes, and is facilitated by technological advances. I explain what constitutes actionable “substantial” copying and suggest a coordination of the *de minimis* doctrine.

The issue of non-*de minimis* copying is tackled in part IV, where I introduce the concept of “transformative fair use” as a safety valve for facilitating creativity. I discuss the doctrine’s genesis, and evaluate the four-factor test under which it operates today. In light of its accordance with their ideology and means, I lament its scant use by samplers.

Part V makes the case for a compulsory sample-licensing scheme complemented by a transformative fair use standard. Explaining Congress’s reluctance to sanction such legislation, I examine its pros, cons, and alternatives. Finding that the benefits outweigh the associated concerns, I introduce a rudimentary proposal that aims to reward copyright holders, streamline access, increase exposure for artists (both up-and-

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<sup>5</sup> The terminology is inconsistent throughout the literature. Carl A. Falstrom, Note, *Thou Shalt Not Steal: Grand Upright Music Ltd. v. Warner Bros. Records, Inc. and the Future of Digital Sound Sampling in Popular Music*, 45 HASTINGS L.J. 359, 359 n.2 (1994) (stating that “borrowing” is a loaded term with pejorative connotations to theft and piracy). Here, I consider “quotation” the use of compositional elements rather than parts of actual sound recordings, and I use the term “borrowing” for the reuse of recorded sounds, i.e. sampling.

<sup>6</sup> The current compulsory scheme applies only to a restricted form of compositional quotation, allowing artists to perform strict imitations, or “covers,” of copyrighted songs. See 17 U.S.C. § 115(a) (2008) (stating that a compulsory license includes the privilege of reproducing a musical composition so long as it conforms to the fundamental character of the original).

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coming and passé), and provide the listening public with novel, creative music.

## II. MUSICAL COPYRIGHT IS INCOHERENT

### A. SAMPLING AS THEFT

#### 1. Grand Upwrong

In the primary decision on unauthorized sampling, Justice Kevin Thomas Duffy cut to the chase: “‘Thou shalt not steal.’ has been an admonition followed since the dawn of civilization.”<sup>7</sup> Addressing neither *de minimis* nor fair use concerns, the court ruled that once the plaintiff satisfied the ownership requirement, there was *prima facie* infringement by virtue of sampling.<sup>8</sup> Initially, Markie, the sampling defendant, had sought permission to use the material, enclosing a copy of the song he intended to

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<sup>7</sup> *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (quoting *Exodus* 20:15 (King James)). Biz Markie was sued for using three words and a snippet of music from “Alone Again (Naturally)” by Raymond “Gilbert” O’Sullivan. *Id.* at 183. The labels of “thief” and “pirate” have been applied, as one might expect, by the content industry. See, e.g., RIAA, Piracy: Online and On The Street, [http://www.riaa.com/physicalpiracy.php?content\\_selector=piracy\\_details\\_street](http://www.riaa.com/physicalpiracy.php?content_selector=piracy_details_street) (last visited May 6, 2009) (“But what is the crime? Why is this important? Who gets hurt? The answers are simple. The crime is theft.”). Yet, they have also been applied by the courts. See Isabella Alexander, *Criminalising Copyright: A Story of Publishers, Pirates and Pieces of Eight*, 66 CAMBRIDGE L.J. 625, 626 (2007) (explaining that terming unauthorized reproduction of copyrighted music as piracy dates back to the beginning of the twentieth century); see also Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993, 1008–1045 (2006) (chronicling “three centuries of copyright as ‘literary property,’ often subject to ‘theft’ and ‘piracy’” from the time of the Statute of Anne to its inception in the U.S., and from courts’ view of copyright as property to their railing against any related “piracy”); Mickey Hess, *Was Foucault a Plagiarist? Hip-Hop Sampling and Academic Citation*, 23 COMPUTERS & COMPOSITION 280, 289 (2006), available at <http://courses.kathiegossett.com/pdfs/hess-foucault.pdf> (stating that throughout the late 80’s and early 90’s, “[m]edia attention to hip-hop sampling tended to label it a transgressive act”); Falstrom, *supra* note 5, at 370–75 (arguing against assertions that sampling is theft of sound, personality, and money).

<sup>8</sup> See *Grand Upright*, 780 F. Supp. at 183 (discussing that in a copyright infringement action, the only issue was whether plaintiff owned the copyright to a song which was used by defendant). Markie relied on the argument that the plaintiff did not hold a valid copyright. *Id.* at 184; see also Jeremy Beck, *Music Composition, Sound Recordings and Digital Sampling in the 21st Century: A Legislative and Legal Framework to Balance Competing Interests*, 13 UCLA ENT. L. REV. 1, 4 (2005) (arguing that “the defense in *Grand Upright*[] was poorly articulated.”).

release and inquiring as to the conditions that would attach to its license, but the court used this request against him.<sup>9</sup> This is demonstrative of the catch-22 created by licensors' demand that prospective samplers submit their work before granting their consent.<sup>10</sup> The court declared Markie's argument that sampling was a widespread hip hop practice "totally specious," providing a less-than-thorough analysis: "The mere statement of the argument is its own refutation."<sup>11</sup>

Citing the sampler's "callous disregard for the law," the court granted injunctive relief and referred the matter to federal prosecutors for criminal prosecution.<sup>12</sup> Rather than properly scrutinizing the matter and devising standards, the court created a bright-line rule.<sup>13</sup> A similar failure can be ascribed to the Sixth Circuit for its subsequent, more substantial, but no less misguided, *Bridgeport Music* decision.<sup>14</sup>

The formative condemnation in *Grand Upright* is particularly incongruous in light of the sampler's motivations. Markie is a notorious "digger"<sup>15</sup> who searches for the most esoteric music.<sup>16</sup>

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<sup>9</sup> *Grand Upright*, 780 F. Supp. at 184 ("One would not agree to pay to use the material of another unless there was a valid copyright! What more persuasive evidence can there be!").

<sup>10</sup> See Amanda Webber, Note, *Digital Sampling and the Legal Implications of Its Use After Bridgeport*, 22 ST. JOHN'S J. LEGAL COMMENT. 373, 395-97 (2007) (citing *Grand Upright*, 780 F. Supp. at 184; Randy S. Kravis, *Does a Song by Any Other Name Still Sound as Sweet?: Digital Sampling and its Copyright Implications*, 43 AM. U. L. REV. 231, 270 (1993); Robert G. Sugarman & Joseph P. Salvo, *Sampling Litigation in the Limelight*, 207 N.Y. L.J. 1, 1 (1992)) (detailing how the *Grand Upright* decision discouraged samplers from trying to get clearance before using samples because such clearance could be used as evidence against the sampler).

<sup>11</sup> *Grand Upright*, 780 F. Supp. at 185 n.2; see, e.g., Wayne Marshall, *Giving up Hip-Hop's Firstborn: A Quest for the Real After the Death of Sampling*, 29 CALLALOO 868, 868 (2006) (discussing the pervasiveness of the practice in Markie's day).

<sup>12</sup> *Grand Upright*, 780 F. Supp. at 185.

<sup>13</sup> See *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 185 (S.D.N.Y. 1991) (holding that the mere finding of an intentional use of copyrighted material was clear evidence of a violation).

<sup>14</sup> *Bridgeport Music, Inc. v. Dimension Films LLC*, 230 F. Supp. 2d 830 (M.D. Tenn. 2002) [hereinafter *Bridgeport Music I*], *rev'd*, 383 F.3d 390 (6th Cir. 2004), *amended by* 410 F.3d 792 (6th Cir. 2005) [hereinafter *Bridgeport Music II*].

<sup>15</sup> "Digging," or "crate digging," is a term which originates from the process of sifting through voluminous record crates. See JOSEPH G. SCHLOSS, *MAKING BEATS: THE ART OF SAMPLE-BASED HIP-HOP* 79-80 (2004) (describing the process of digging and its importance to hip-hop sampling).

<sup>16</sup> Anecdotes detail an extensive search to identify a particular sample,

His choice of a white pop star's most famous song was indicative of a tendency to jest,<sup>17</sup> and would likely qualify for the subsequently-affirmed fair use allowance for "parodic" sampling.<sup>18</sup> The laconic decision, framing unauthorized sampling as automatic copyright infringement, had an immediate chilling effect.<sup>19</sup>

The experience of pioneering hip hop group Public Enemy is instructive.<sup>20</sup> In the pre-*Grand Upright* days, the group made

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asking "record collectors, deejays, producers, damn near EVERYBODY" and then purchasing both the source material and mix-tapes made by the person who had identified it. The Biz Never Sleeps: Biz, the Soulman and School of Hard Knocks, <http://thebiznever sleeps.blogspot.com/2007/05/biz-soulman-and-school-of-hard-knocks.html> (last visited May 6, 2009).

<sup>17</sup> See Touré, *All Samples Cleared*, ROLLING STONE, Sept. 30, 1993, available at [www.rollingstone.com/reviews/album/201759/review/5941529/allsamplescleared](http://www.rollingstone.com/reviews/album/201759/review/5941529/allsamplescleared) ("He's as funny as anyone in rap and invites you to laugh along.").

<sup>18</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994) ("It is this joinder of reference and ridicule that marks off the author's choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.").

<sup>19</sup> See Dave Kerr, *Here Comes the Rain: Buck 65 Reads DiS the Weather*, <http://www.drownedinsound.com/articles/3058657> (last visited May 6, 2009) (detailing Buck 65's lamentations in regard to the decline in sampling at large); Mike Suppappola, *Confusion in the Digital Age: Why the De Minimis Use Test Should Be Applied to Digital Samples of Copyrighted Sound Recordings*, 14 TEX. INTELL. PROP. L.J. 93, 103 (2005) ("The [*Grand Upright*] decision initially caused a 'chilling effect throughout the recording industry, causing increased internal policing of sampling for fear of adverse and inconsistent judicial treatment.'" (quoting Chris Johnstone, Note, *Underground Appeal: A Sample of the Chronic Questions in Copyright Law Pertaining to the Transformative Use of Digital Music in a Civil Society*, 77 S. CAL. L. REV. 397, 407 (2004))); William Y. Durbin, *Recognizing the Grey: Toward a New View of the Law Governing Digital Music Sampling Informed by the First Amendment*, 15 WM. & MARY BILL RTS. J. 1021, 1028 (2007) (arguing that "the [*Grand Upright*] court left no room for de minimis or fair use exceptions . . ."); Webber, *supra* note 10, at 397 (explaining how the Southern District of New York's prominence in handling copyright and entertainment law has led to *Grand Upright* having a strong impact on sampling); Lauren Fontein Brandes, Comment, *From Mozart to Hip-Hop: The Impact of Bridgeport v. Dimension Films on Musical Creativity*, 14 UCLA ENT. L. REV. 93, 119 (2007) (identifying how the hip hop community recognized the impact of *Grand Upright's* bright-line rule against unauthorized sampling).

<sup>20</sup> The group was ranked as the 44<sup>th</sup> greatest of all time (of any genre) by ROLLING STONE as they "completely changed the game musically. No one was just putting straight-out noise and atonal synthesizers into hip-hop, mixing elements of James Brown and Miles Davis; no one in hip-hop had ever been this hard, and perhaps no one has since." See Adam Yauch, *The Immortals - The Greatest Artist of All Time: 44) Public Enemy*, 946 ROLLING STONE, Apr. 15, 2004, available at [http://www.rollingstone.com/news/story/5939238/the-immortals\\_the\\_greatest\\_artists\\_of\\_all\\_time\\_44\\_public\\_enemy](http://www.rollingstone.com/news/story/5939238/the-immortals_the_greatest_artists_of_all_time_44_public_enemy); *The Immortals: The First Fifty*, 946 ROLLING STONE, Apr. 15, 2004, available at [http://www.rollingstone.com/news/story/5939238/the-immortals\\_the\\_greatest\\_artists\\_of\\_all\\_time\\_44\\_public\\_enemy](http://www.rollingstone.com/news/story/5939238/the-immortals_the_greatest_artists_of_all_time_44_public_enemy).

collages of thousands of sounds, but was then forced to abandon its “whole style” as it became impractical to attain numerous rights.<sup>21</sup> Markie’s next album—*All Samples Cleared!*—was released two years later, in an era of reduced sampling and stifled creativity.<sup>22</sup>

## 2. Trolling for Samples

While technology for musical creation and access has improved dramatically, the law has failed to evolve, and samplers wearily navigate its terrain. A particularly vicious predator is the “sample troll;”<sup>23</sup> unlike offended composers or performers, such as O’Sullivan, for whom the matter is personal, the troll strategically stockpiles musical rights (sometimes through unscrupulous means).<sup>24</sup> Using first threats and then lawsuits, it shakes musicians and labels down for suspected sampling “no matter how minimal and unnoticeable.”<sup>25</sup>

A pair of companies working in tandem embody this phenomenon: Westbound Records, which holds recording rights, and Bridgeport Music, which owns composition rights.<sup>26</sup> A man named Armen Boladian runs both (for simplicity, I refer to them as “Bridgeport”).<sup>27</sup> Attesting to the extent of its litigiousness, in 2001 Bridgeport launched some 500 counts of copyright infringement,<sup>28</sup> and in the case I discuss at length below, it sued

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rollingstone.com/news/story/5939214/the\_immortals\_the\_first\_fifty.

<sup>21</sup> Interview by Kembrew McLeod with Public Enemy’s Chuck D (June 1, 2004), available at <http://www.alternet.org/story/18830/>.

<sup>22</sup> See Posting of Dennis Romero, [http://www.dennisromero.com/2008\\_06\\_01\\_archive.html](http://www.dennisromero.com/2008_06_01_archive.html) (June 26, 2008) (speaking to the riskiness of sampling around the time of Biz Markie’s ‘93 album).

<sup>23</sup> Tim Wu, *Jay-Z Versus the Sample Troll: The Shady One-Man Corporation That’s Destroying Hip-Hop*, SLATE, Nov. 16, 2006, <http://www.slate.com/id/2153961/>.

<sup>24</sup> See *id.* (noting that George Clinton is one of many artists claiming to have been deprived of his rights through trickery and forged signatures by entities such as Bridgeport).

<sup>25</sup> *Id.*; see, e.g., *Bridgeport Music, Inc. v. Justin Combs Publ’g (Combs Publ’g)*, 507 F.3d 470, 476–77 (6th Cir. 2007) (demonstrating Bridgeport’s tactic of sending samplers letters retroactively demanding 25% of the allegedly infringing song’s copyright).

<sup>26</sup> *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 393 (6th Cir. 2004).

<sup>27</sup> See Gil Kaufman, *Notorious B.I.G. LP Sales Halted Over Sample; New Team Probes Rapper’s Murder*, MTV, Mar. 20, 2006, [http://www.mtv.com/news/articles/1526567/20060320/notorious\\_big.jhtml](http://www.mtv.com/news/articles/1526567/20060320/notorious_big.jhtml).

<sup>28</sup> Wu, *supra* note 23.



more than 800 parties in a single instance.<sup>29</sup>

### 3. Malice and Deceit

A court recently declared that the use of a short brass sample caused Bridgeport “harm [that] was the result of intentional malice or deceit,” with punitive damages set at \$3.5 million.<sup>30</sup> Furthermore, it was ordered that the infringing record—one of the most critically acclaimed of its genre—be pulled of the shelves.<sup>31</sup> Bridgeport audaciously claimed to be a “financially vulnerable victim.”<sup>32</sup>

Another instance of a rights holder crying wolf is the recent charge by Ralph Vargas that BT copied one of his short drumbeats.<sup>33</sup> Anthony Falzone (the executive director of Stanford’s Fair Use Project) successfully represented the defendant: convincing the court that he created the sound entirely independently.<sup>34</sup> Under the current regime, the burden of proof rests on samplers such that mounting defenses, even when charges are baseless, can be debilitatingly expensive.<sup>35</sup>

### B. THE DISJOINTED LICENSING SCHEME

The current licensing regime is muddled, as neither the Copyright Act<sup>36</sup> nor the Sound Recording Act<sup>37</sup> was written with sampling in mind.<sup>38</sup> Ostensibly, in order to sample a song, one

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<sup>29</sup> *Bridgeport Music II*, 410 F.3d at 795.

<sup>30</sup> *Combs Publ’g*, 507 F.3d at 476, 486 (referring to the Ohio Players’ song “Singing in the Morning” used on the Notorious B.I.G.’s “Ready to Die” song). The court held that the conduct was only “somewhat reprehensible,” the compensatory damages award of \$366,939 was reasonable, but remanded the case to the district court to set a ratio for punitive damages “closer to 1:1 or 2:1.” *Id.* at 486, 490.

<sup>31</sup> *Id.* at 491–92; *see, e.g.*, Josh Tyrangiel & Alan Light, *The All-Time 100 Albums*, TIME, Nov. 13, 2006, available at [http://www.time.com/time/2006/100\\_albums/index.html/](http://www.time.com/time/2006/100_albums/index.html/).

<sup>32</sup> *Combs Publ’g*, 507 F.3d at 487.

<sup>33</sup> *Vargas v. Transeau*, 514 F. Supp. 2d 439, 440–41 (S.D.N.Y. 2007).

<sup>34</sup> *Id.* at 440, 444.

<sup>35</sup> *See id.* at 443, 445–46 (calling in expert witnesses, videotaping a recreation of the sound, and leaping through various other hoops—all with the potential to generate high legal costs).

<sup>36</sup> Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-1332 (2009)).

<sup>37</sup> Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (codified as amended in scattered sections of 17 U.S.C.).

<sup>38</sup> The focus was on piracy. Webber, *supra* note 10, at 374, 387;

[T]he growth of the recording industry following the musical revolution of

needs rights to both “master use” (recording) and “synchronization” (composition) licenses,<sup>39</sup> but case law shows the disjunction between them.

### 1. Master Use & Synchronization Licenses

A master use license permits the use of an actual sound recording, and is granted by the owner of its copyright, usually the performer or record label.<sup>40</sup> A synchronization license allows the use of the underlying musical composition and is usually granted by the songwriter or publisher to whom it was assigned.<sup>41</sup>

### 2. The Scope of Musical Copyrights

A musical composition copyright provides five exclusive rights: the right of reproduction, the right to prepare a derivative work, the right to distribute the work, the right to perform the work, and the right to publicly display the work.<sup>42</sup> Rights in a sound recording, however, only permit reproduction, the preparation of derivative works, the distribution of copies, and the public performance of the work “by means of a digital audio transmission.”<sup>43</sup>

Section 115 of the Copyright Act allows anyone to serve notice of their intention to perform a compositional “cover” of a song, so long as they pay the statutorily stipulated fees<sup>44</sup> and do not

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the 1960’s brought the problem of unauthorized reproduction and sale of musical works to Congress’s attention. In response, Congress passed the Sound Recording Act of 1971, which addressed the perceived flaw in the 1909 Act by granting sound recordings full copyright protection, including criminal penalties for profit motivated infringement.

United States v. LaMacchia, 871 F. Supp. 535, 539 (D. Mass. 1994) (citation omitted).

<sup>39</sup> Michael R. Egger et al., *Multimedia Content and the Super Highway - Rapid Acceleration or Foot on the Brake?*, 2 MURDOCH U. ELECTRONIC J.L. 2 (1995), available at <http://www.murdoch.edu.au/elaw/issues/v2n2/greguras22.html>.

<sup>40</sup> Webber, *supra* note 10, at 393; see 17 U.S.C. § 106 (2009) (describing the scope of a copyright owner’s bundle of rights).

<sup>41</sup> Webber, *supra* note 10, at 393.

<sup>42</sup> 17 U.S.C. § 106.

<sup>43</sup> *Id.*

<sup>44</sup> Webber, *supra* note 10, at 390 (citing 17 U.S.C. § 115(a)(2) (2005)); Durbin, *supra* note 19, at 1026; see The Harry Fox Agency, Inc., Statutory Royalty Rates, <http://www.harryfox.com/public/licenseeRateCurrent.jsp> (last visited May 6, 2009) (illustrating how the statutory rate increases as the song length increases); Music Publishing & Songwriting, <http://ericbeall.berkleemusic>

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change its basic melody or character.<sup>45</sup> The provision benefits composers, performers, and rights holders in terms of payment and/or exposure.<sup>46</sup> The general listening public, for whom copyright law is primarily intended, thus enjoys greater quality and selection. As I discuss below, however, Congress is not inclined to extend such a scheme to recording rights or musical quotation, and, if anything, is leaning towards the removal of the existing mechanism.

So, as it stands, nothing in the law compels copyright holders to grant licenses to prospective samplers or users of composition rights (for any quotation other than straightforward covering), giving rights holders unlimited power to set exorbitant terms or deny use altogether.<sup>47</sup> Moreover, courts have interpreted the ambits of recording and composition rights inconsistently.<sup>48</sup> As a result, bargaining for licenses is done on a case-by-case basis and conditions make the use of numerous samples prohibitive.

### 3. Moral Rights

A further wrinkle in the regime is that derivative works are ones based upon copyrighted ones, such that some consider works containing a sample (or quote) derivative.<sup>49</sup> Under section 115, copyright owners have a right to refuse licenses for covers that “change the basic melody or fundamental character of the[ir]

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blogs.com/ (Mar. 29, 2008) (illustrating that, in practice, most record labels only pay three-quarter rate for covers using a “controlled composition clause” and employ a “cap” limiting the top end of royalty payments).

<sup>45</sup> 17 U.S.C. § 115(a)(2).

<sup>46</sup> See Public Knowledge, Copyright Tutorial for Musicians, <http://www.publicknowledge.org/tutorial/copyright-for-musicians> (last visited May 6, 2009) (showing how the copyright provisions affect all types of musicians and how they allow an individual to gain economic value by giving them rights to his or her music).

<sup>47</sup> See *id.* (explaining that a copyright owner has a series of rights that only he or she can implement or allow others to implement); Herbert Hovenkamp et al., *Unilateral Refusals to License*, 2 J. COMPETITION L. & ECON. 1, 2–4 (2006) (describing how owners of intellectual property rights are under no obligation to grant licenses to others but can enforce their rights when infringed).

<sup>48</sup> See Bob L. Sturm, *Concatenative Sound Synthesis and Intellectual Property: An Analysis of the Legal Issues Surrounding the Synthesis of Novel Sounds from Copyright-Protected Work*, 35 J. NEW MUSIC RES. 23, 25–27 (2006), available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=4485&context=postprints> (illustrating how case law concerning digital sampling has been inconsistent and yielded conflicting results).

<sup>49</sup> See 17 U.S.C. § 101. As I detail in part V.B, transformative sampling or quoting works should not be considered derivative.

work.”<sup>50</sup> This appears to accord with moral rights—the concept of natural rights vested in authors’ products functioning independently of economic ones.<sup>51</sup>

While there is a fundamental difference between how moral rights are treated under common and civil law jurisdictions,<sup>52</sup> both recognize the rights of attribution and integrity.<sup>53</sup> Indeed, sampling seems to run afoul of the Berne Convention provision allowing a composer or musician “to object to *any* distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”<sup>54</sup>

In reality, while the US has signed on to Berne Convention, it has taken a “minimalist” approach to its accompanying obligations.<sup>55</sup> While section 115 of the Act seems to embody moral rights, there is practically no case law on it.<sup>56</sup> In fact, the

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<sup>50</sup> 17 U.S.C. § 115(a)(2).

<sup>51</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 [hereinafter *Berne Convention*], available at [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html); Melissa Hahn, *Digital Music Sampling and Copyright Policy—A Bittersweet Symphony? Assessing the Continued Legality of Music Sampling in the United Kingdom, the Netherlands, and the United States*, 34 GA. J. INT’L & COMP. L. 713, 722 (2006); Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 551 (2006) (citing Johnstone, *supra* note 19, at 431; Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271, 296 (1996); Rajan Desai, *Music Licensing, Performance Rights Societies, and Moral Rights for Music: A Need in the Current U.S. Music Licensing Scheme and a Way to Provide Moral Rights*, 10 U. BALT. INTELL. PROP. L.J. 1, 6, 11, 20 (2001); Monica E. Antezana, *The European Union Internet Copyright Directive as Even More than It Envisions: Toward a Supra-EU Harmonization of Copyright Policy and Theory*, 26 B.C. INT’L & COMP. L. REV. 415, 421 (2003); Patrick G. Zabatta, *Moral Rights and Musical Works: Are Composers Getting Berned?*, 43 SYRACUSE L. REV. 1095, 1103–04 (1992)).

<sup>52</sup> See Jennifer R. R. Mueller, *All Mixed Up: Bridgeport Music v. Dimension Films and De Minimis Digital Sampling*, 81 IND. L.J. 435, 439 (2006) (citing MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 6 (3d ed. 1999); *Mazer v. Stein*, 347 U.S. 201, 219 (1954)) (differentiating between European and American copyright law: whereas the former gives the artist more control over the work’s use, the latter focuses on advancing public welfare via economic incentives).

<sup>53</sup> Hahn, *supra* note 51, at 722.

<sup>54</sup> Berne Convention, *supra* note 51 (emphasis added).

<sup>55</sup> See Graeme W. Austin, *The Berne Convention as a Canon of Construction: Moral Rights After Dastar*, 61 N.Y.U. ANN. SURV. AM. L. 111, 116–17 (2005) (citing H.R. REP. NO. 100-609, at 7 (1988)).

<sup>56</sup> See *id.* at 130–31 (illustrating how the importance of the Berne Convention was primarily ignored in American case law).

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Supreme Court has recognized authors' tendency to refuse sampling requests that intend to poke fun at them as justification for *sanctioning* unlicensed parodic sampling.<sup>57</sup> As I discuss below, transformatively sampling works are not "derivative," and artists are rarely litigious rights holders.<sup>58</sup>

#### 4. Licensing Rates

Fees and conditions vary greatly, and some rights holders refuse to license outright, but general parameters can be sketched out.<sup>59</sup> When a song is not well known and only a small portion of it is intended for use, flat fees are generally made available, with prices set between one and five thousand dollars.<sup>60</sup> Otherwise, prices tend to hover between five and fifty thousand dollars per license.<sup>61</sup> There are extraordinary examples, such as the millions of dollars Sean "Diddy" Combs (Diddy) reportedly paid upfront for his extensive use of two mega-hits.<sup>62</sup> If there is no one-shot flat rate, "rollover" ones may be stipulated, so that an initial advance against royalties is complemented by payments at fixed sales levels.<sup>63</sup>

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<sup>57</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994) (remarking on the unlikelihood of creators sanctioning critical works and the importance of allowing such critiques or parodies).

<sup>58</sup> See, e.g., discussion *infra* Part V.B.1; see *infra* note 67 and accompanying text.

<sup>59</sup> Webber, *supra* note 10, at 392–93 (citing Jeffrey H. Brown, "They Don't Make Music the Way They Used to": *The Legal Implications of "Sampling" in Contemporary Music*, 1992 WIS. L. REV. 1941, 1954 (1992); Bryan Bergman, *Into the Grey: The Unclear Laws of Digital Sampling*, 27 HASTINGS COMM. & ENT. L.J. 619, 644–45 (2005); SCHLOSS, *supra* note 15, at 179).

<sup>60</sup> Brandes, *supra* note 19, at 124 (citing Szymanski, *supra* note 51, at 295; MUSIC AND COPYRIGHT 147 (Simon Frith & Lee Marshall eds., 2d ed. 2004)).

<sup>61</sup> Webber, *supra* note 10, at 393–94 (citing DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 307 (Simon & Schuster 2000) (1991)). These prices are for recording and composition rights and are generally payable to the record company and publisher respectively. Brandes, *supra* note 19, at 126 (citing Christopher D. Abramson, Note, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection*, 74 N.Y.U. L. REV. 1660, 1669 (1999)).

<sup>62</sup> JOANNA DEMERS, STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY 90 (2006) (discussing two of Diddy's—then recording under the moniker "Puff Daddy"—most profitable songs: "I'll Be Missing You" and "Come with Me," which sampled the Police and Led Zeppelin, respectively). I reintroduce these samples in IV.F and argue that such uncreative, wholesale, and mechanical use of samples is nontransformative and should continue to be dealt with under the current regime.

<sup>63</sup> See Brandes, *supra* note 19, at 124 (citing Interview by Kembrew McLeod with Public Enemy's Chuck D, *supra* note 21); Webber, *supra* note 10, at 394

Aside from pecuniary restrictions there may be a host of others, such as a bar to use of the sampling song in advertisements.<sup>64</sup> Critically, rights holders may command a percentage of copyright ownership in the new work ranging from 15 to 66 percent (or in cases such as The Verve-Rolling Stones debacle, 100 percent).<sup>65</sup> These demands frustrate copyright's primary goal of stimulating creative output for the public benefit, as the use of more than one sample results in *prima facie* forfeiture of rights to one's creation.<sup>66</sup> Paradoxically, in most cases, licensing decisions are made by, and fees go to, publishers and record companies, rather than artists.<sup>67</sup>

The regime disincentivizes the use of assorted samples, as every sample sought involves increased costs, time, frustration, and forfeited rights.<sup>68</sup> Resultantly, would-be sampling artists are

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(citing PASSMAN, *supra* note 61, at 308; Brown, *supra* note 59, at 1959).

<sup>64</sup> See Webber, *supra* note 10, at 394 (citing PASSMAN, *supra* note 61, at 308; RICHARD SCHULENBERG, LEGAL ASPECTS OF THE MUSIC INDUSTRY 122 (1999)).

<sup>65</sup> See Brandes, *supra* note 19, at 124 (citing Josh Norek, Note, "You Can't Sing Without the Bling": The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System, 11 UCLA ENT. L. REV. 83, 90 (2004); MUSIC AND COPYRIGHT, *supra* note 60, at 147); Webber, *supra* note 10, at 394 (explaining that a copyright holder can still control usage of a sample). The Verve's sampling of an orchestrated version of The Rolling Stone's "The Last Time" in "Bittersweet Symphony" resulted in legal suits and the band suffered major losses: it was forced to give up 100% of its rights in the song, other artists (Mick Jagger and Keith Richards) were nominated for a Grammy for the song, and the song was featured in a Nike advertisement. Steve Collins, *Good Copy, Bad Copy: Covers, Sampling and Copyright*, M/C JOURNAL, Jul. 2005, <http://journal.media-culture.org.au/0507/02-collins.php> (describing the substantial price the Verve paid for sampling the Rolling Stones song); Adam C. Weitz, Horror Stories of Sampling, <http://www.superswell.com/samplelaw/horror.html> (last visited May 6, 2009).

<sup>66</sup> Danger Mouse's *Grey Album*, for instance, which inventively fuses music from just two sources (the Beatles' *White Album* and Jay-Z's *Black Album*), would have resulted in him giving the rights holders of the source materials. See discussion *infra* Part IV.E.; Bill Werde, *Defiant Downloads Rise From Underground*, N.Y. TIMES, Feb. 25, 2004, available at <http://www.nytimes.com/2004/02/25/arts/music/25REMI.html?ex=1233378000&en=ff024cb3bd2464cb&ei=5070>.

<sup>67</sup> See Brandes, *supra* note 19, at 126 (citing Szymanski, *supra* note 51, at 327; Abramson, *supra* note 61, at 1669-70). "The vast majority of the nation's valuable copyrights are owned not by creators, but by stockpilers of one kind or another." Wu, *supra* note 23.

<sup>68</sup> See, e.g., Brandes, *supra* note 19, at 119 (citing SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 143 (2001)) (illustrating how, following the *Grand Upright* decision, sampling became cumbersome and costly for artists).

less creative in their production.<sup>69</sup> Independent and up-and-coming artists find the process of attaining licenses overly complicated and expensive,<sup>70</sup> and while major labels have greater resources at their disposal, they exercise risk-averse self-regulation.<sup>71</sup> Represented artists are generally held individually liable for sampling lawsuits.<sup>72</sup>

A case in point is Buck 65, an artist who originally intended to release *Situation* as “patch-work, collage-style assembly”—a sample-based record.<sup>73</sup> The legal teams at his labels gave him pause, and the completed record was scrapped in its entirety as he found his “back up against the wall both legally and financially [in] trying to deal with sample clearance.”<sup>74</sup> Similarly, while 2ManyDJs’ “mash-up”<sup>75</sup> album took seven days to create, clearing it took three years, “hard labour, 865 e-mails, 160 faxes and hundreds of phone calls to contact over 45 major and independent record-companies,” and the use of 62 tracks was still refused.<sup>76</sup>

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<sup>69</sup> See Brandes, *supra* note 19, at 119–20 (citing VAIDHYANATHAN, *supra* note 68, at 140; MUSIC AND COPYRIGHT, *supra* note 60, at 147).

<sup>70</sup> I was inspired to undertake this project when my talented friend, David Levy, found the process to acquiring the rights to a snippet of James Brown’s “Cold Sweat” too expensive and arduous. He sought to use the singer’s exclamation “excuse me while I do the boogaloo,” which comprises a fraction of the seven-and-a-half-minute song, for a track on an album by that name. Levy acknowledges James Brown’s heavy influence on his work in his liner notes. See JazzWax, <http://www.jazzwax.com/2008/02/marty-sheller-w.html> (Feb. 11, 2008).

<sup>71</sup> See Derek E. Bambauer, *Faulty Math: The Economics of Legalizing the Grey Album*, 59 ALA. L. REV. 345, 390–91 (2008).

<sup>72</sup> See, e.g., *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 185 (S.D.N.Y. 1991) (explaining that Biz Markie was complicit in violating Grand Upright’s copyright and just as liable as the rest of the defendants).

<sup>73</sup> Kerr, *supra* note 19.

<sup>74</sup> *Id.*; Michael Barclay, “Sample this? No, thanks”, [http://www.socan.ca/jsp/en/news\\_events/feature\\_stories/SampleThis\\_07.jsp](http://www.socan.ca/jsp/en/news_events/feature_stories/SampleThis_07.jsp) (last visited May 6, 2009).

<sup>75</sup> A term traditionally referring to the combination of significant portions of two or more source songs and little added content, often with an *a cappella* of one placed over the instrumentation of another. Wikipedia, Mashup (music), [http://en.wikipedia.org/wiki/Mashup\\_\(music\)](http://en.wikipedia.org/wiki/Mashup_(music)) (last visited May 6, 2009). I do not distinguish between mash-ups and sampling works, as I consider mash-ups a type of sampling work, such that the less the source material is modified in the sampling one, the less “transformative” it is.

<sup>76</sup> 2manydJs, *The Un-authorized, Un-official Story*, <http://www.2manydjs.com/v2/story.htm> (last visited May 6, 2009).

## 5. Penalties

Compounding these problems is the fact that user rights are limited and penalties for unlicensed use are harsh. Successful plaintiffs may receive actual damages and the samplers' profits,<sup>77</sup> or they may elect for statutory damages as high as \$30,000 for a single act of infringement.<sup>78</sup> Even where samplers have no reasonable basis to believe they are infringing a copyright, the court may not reduce damages past \$200.<sup>79</sup> Compensatory damages running as high as \$150,000 may be assigned, alongside injunctions, punitive damages, and attorney fees; criminal charges may also be recommended.<sup>80</sup>

### C. COURTS MUDDLE THE REGIME

#### 1. Bridgeport Music

In light of the system's intricacy, it is not surprising that the courts have confounded it. In *Bridgeport Music*, while the group Niggaz With Attitude (NWA) had attained its composition rights, they had not licensed the recording rights to "Get Off Your Ass and Jam" by George Clinton, Jr. and the Funkadelics.<sup>81</sup> NWA took a two-second sample from a three-note guitar solo, lowered its pitch and looped it to a 16-beat length.<sup>82</sup> When the song came out on a movie soundtrack, Bridgeport sued some 800 related parties on nearly 500 charges.<sup>83</sup>

The district court concluded that since "even an aficionado of George Clinton's music might not readily ascertain that his music has been borrowed," the sample was non-infringing.<sup>84</sup> Yet the Sixth Circuit Court of Appeals unanimously reversed the decision, branding sound-recording copyrights absolute.<sup>85</sup> A "license or do not sample" standard, it reasoned, enables the

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<sup>77</sup> 17 U.S.C. § 504(b) (2008).

<sup>78</sup> 504(c)(1).

<sup>79</sup> 504(c)(2).

<sup>80</sup> 502(a), 504–506(a).

<sup>81</sup> *Bridgeport Music I*, 230 F. Supp. 2d at 833, 842; *Bridgeport Music II*, 410 F.3d at 796; see David M. Morrison, *Bridgeport Redux: Digital Sampling and Audience Recoding*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 75, 105 (2008) (discussing the main issue in *Bridgeport Music*: NWA's sampling of "Get Off Your Ass and Jam" by Funkadelic on "100 Miles and Runnin").

<sup>82</sup> *Bridgeport Music II*, 410 F.3d at 796.

<sup>83</sup> *Id.* at 795.

<sup>84</sup> *Bridgeport Music I*, 230 F. Supp. 2d at 842–43.

<sup>85</sup> *Bridgeport Music II*, 410 F.3d at 798.



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market to self-regulate rates without stifling creativity, as artists wishing to use a section of an existing recording may recreate it in a studio.<sup>86</sup>

The decision's fundamental flaws are indicative of some general misunderstandings related to sampling. The court wrongly: (i) read the statute mechanically in contravention of a Supreme Court directive; (ii) protected copyright holders at the expense of the public; (iii) equated sampling to physical taking; (iv) propagated the "sweat of the brow" theory of copyright; (v) guaranteed market equilibrium and fair access; and (vi) expanded the ambit of sound recording licenses in relation to composition ones.

a) Mechanically Reading the Statute at the Public's Expense

The court admitted that its "analysis begins and largely ends with the applicable statute."<sup>87</sup> The resultantly mechanical reading of Section 114(b) contravened the Supreme Court instruction that, in periods of rapid technological change, the Act is to be construed with the purpose of encouraging the creation of new works and expanding the public domain.<sup>88</sup>

b) Labeling Sampling as Physical Taking

The court declared that "even when a small part of a sound recording is sampled, the part taken is something of value."<sup>89</sup> This constricted rationale recalls the "sweat of the brow" theory disavowed by the Supreme Court in *Feist*, which affirmed that copyright's objective is to promote the arts, rather than reward authors' labor.<sup>90</sup> The court suggested that recorded material is never necessary to create something new, equating sampling to theft.<sup>91</sup>

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<sup>86</sup> See *Bridgeport Music II*, 410 F.3d at 801 (showing how the Sixth Circuit reasoned that the standard enables the market to self-regulate rates without stifling creativity); see discussion *infra* Part IV.E (discussing the growing popularity of sampling various recordings to create unique work).

<sup>87</sup> *Bridgeport Music II*, 410 F.3d at 799.

<sup>88</sup> *Feist Publ'n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991) (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556–57 (1985)); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 495–97 (1984).

<sup>89</sup> *Bridgeport Music II*, 410 F.3d at 801–02.

<sup>90</sup> *Feist*, 499 U.S. at 349, 352.

<sup>91</sup> *Copyright Law -- Sound Recording Act -- Sixth Circuit Rejects De Minimis Defense to the Infringement of a Sound Recording Copyright. -- Bridgeport*

Sampled sounds, the court proclaimed, are “taken directly from [the] fixed medium. It is a physical taking rather than an intellectual one.”<sup>92</sup> Yet sampling is no more a “physical taking” than photocopying; following the court’s logic is tantamount to alleging that transferring data between a hard-drive and a CD removes it from the source, when it remains intact on both.<sup>93</sup>

c) Guaranteeing Market Equilibrium and Fair Access

The court guaranteed that artists will remain “free” to either recreate sounds in a studio or attain rights to their original recordings as the “market will control the license price and keep it within bounds.”<sup>94</sup> The former notion is spurious as a composition license may be necessary even if a recording one is not; the latter claim discounts rights holders’ absolute power over licensing conditions.

d) Expanding the Ambit of Sound Recording Copyrights

The court rationalizes its bizarre contention that recording rights infringement claims do not necessitate substantial similarity inquiries while broader composition ones do, by asserting that “there is no Rosetta stone for the interpretation of the copyright statute.”<sup>95</sup> Yet it fails to discharge its duty to use the fundamental evidence at its disposal: the provision’s text and its legislative history.

Section 114 establishes that a copyright holder’s exclusive right in a sound recording is “limited,”<sup>96</sup> and the accompanying House Report affirms the applicability of the *de minimis* doctrine as infringement “takes place whenever *all or any substantial portion* of the actual sounds that go to make up a copyrighted

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*Music, Inc. v. Dimension Films*, 383 F.3d 390 (6th Cir. 2004), 118 HARV. L. REV. 1355, 1361 (2005) [hereinafter *Harvard*] (discussing the court as doubtful that sampling is ever necessary to create something new); *Bridgeport Music II*, 410 F.3d at 801 (arguing that when one samples another’s sound recording, that person is knowingly taking the other’s work product).

<sup>92</sup> *Bridgeport Music II*, 410 F.3d at 802.

<sup>93</sup> Mueller, *supra* note 52, at 449–50 (citing Jeffrey R. Houle, *Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just a Bad “Rap”?*, 37 LOY. L. REV. 879, 881 (1992); *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 399 (6th Cir. 2004)).

<sup>94</sup> *Bridgeport Music II*, 410 F.3d at 801.

<sup>95</sup> *Id.* at 797–98, 805.

<sup>96</sup> See Suppappola, *supra* note 19, at 117 (quoting 17 U.S.C. § 114(b)); Brandes, *supra* note 19, at 104 (quoting 17 U.S.C. § 114(b)).

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sound recording are reproduced.”<sup>97</sup> The provision was designed so that sound recording rights holders do not mistakenly believe they enjoy benefits associated with the broader composition right.<sup>98</sup>

Unfortunately, the court confounded the distinction, acknowledging that its own “analysis admittedly raises the question of why one should, without infringing, be able to take three notes from a musical composition, for example, but not three notes by way of sampling from a sound recording.”<sup>99</sup> The resultant bright-line rule, created in the face of “no existing . . . judicial precedent,”<sup>100</sup> is overbroad and ill-considered. While the *Newton* court is more sympathetic to the sampling practice, it is also guilty of muddling the rights’ ambits.<sup>101</sup>

## 2. Newton

“Pass the Mic” was a hit on the Beastie Boys’ multi-platinum *Check Your Head*, but James Newton, its sampled song’s performer and composer, only heard about it eight years after its release.<sup>102</sup> The Beastie Boys sampled and looped the opening six seconds of Newton’s “Choir” over forty times, but while they paid ECM Records a flat fee of \$1,000 for the recording rights license, they never acquired a composition rights license from him.<sup>103</sup>

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<sup>97</sup> H.R. REP. NO. 94-1476, at 106 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5721 (emphasis added).

<sup>98</sup> H.R. REP. NO. 94-1476, at 107; see Brandes, *supra* note 19, at 105 (stating that the language of Section 114(b) was designed to clearly distinguish the intent to grant narrower rights to sound recording copyright holders than other types of copyright holders).

<sup>99</sup> *Bridgeport Music II*, 410 F.3d at 801; see *Harvard*, *supra* note 91, at 1360 (arguing that the court’s reasoning in *Bridgeport Music II* relied on tenuous distinctions and faulty logic).

<sup>100</sup> *Bridgeport Music II*, 410 F.3d at 802.

<sup>101</sup> *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1259 (C.D. Cal. 2002) (*Newton*), *aff’d*, 349 F.3d 591 (9th Cir. 2003) (ruling that any use by the sampler was *de minimis* and that would make the sampling non-actionable).

<sup>102</sup> See *Newton v. Diamond*, 388 F.3d 1189, 1192 (detailing how Newton brought his law suit in 2000, nearly eight years after the release of “Pass the Mic”); Kendra Hamilton, *Cal State Music Professor Sues Rap Group for Copyright Infringement; Case Opens up New Debate on Intellectual Property Rights – Faculty Club – James Newton – Beastie Boys*, BNET, Oct. 10, 2002, [http://findarticles.com/p/articles/mi\\_m0DXK/is\\_17\\_19/ai\\_92800209](http://findarticles.com/p/articles/mi_m0DXK/is_17_19/ai_92800209) (recalling when, at a University of California at Irvine jazz performance class, one of Newton’s students inquired: “Professor Newton, I didn’t know you had recorded with the Beastie Boys.”)

<sup>103</sup> Hamilton, *supra* note 102; *Newton*, 204 F. Supp. 2d at 1249; Webber, *supra* note 10, at 397–98.

The court determined that the three-note segment was not protectable, and that, even if it was, the doctrine of *de minimis* use would apply to make the sampling non-actionable.<sup>104</sup>

While the *Newton* decision is laudable for its consideration of user rights and explicit recognition of the *de minimis* doctrine's application in sampling cases,<sup>105</sup> it regrettably confuses the ambits of recording and composition rights. *Newton*, for instance, appropriately based part of his infringement claim on the fact that the Beastie Boys were performing the song live and selling DVD copies of the performance—rights reserved to holders of composition rights.<sup>106</sup>

The decision was the first to question the need for both licenses, but problematically, if anything, composition rights are broader, and no specifications were provided for when either is needed. Further, it seems inherently unfair that *Newton*'s work is recognizable throughout the Beastie Boys', yet he receives no credit. My proposed system addresses these concerns by allowing creative samplers to use any source material, but only when they provide payment and recognition for it according to the proportion of the new song it comprises.

### III. CREATIVE SAMPLING & COPYRIGHT

In part II, I deemed the current licensing regime incoherent and predisposed to favor rights holders. In this section, I address the foundations of copyright law, finding that the present regime contravenes its primary goal—benefiting the public through the creation of original and creative art—and argue for a unified *de minimis* inquiry.

What are the constitutional underpinnings of the statutory regime? Copyright law is intended to promote artistic progress by granting authors temporary monopolies.<sup>107</sup> Endeavoring to encourage creative work, its short-term effect is to compensate authors for their labor, but its “ultimate aim is, by this incentive,

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<sup>104</sup> *Newton*, 204 F. Supp. 2d at 1256, 1258–60.

<sup>105</sup> See *Bridgeport Music II*, 410 F.3d at 801 n.10 (quoting Susan J. Latham, *Newton v. Diamond: Measuring the Legitimacy of Unauthorized Compositional Sampling—A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J. 119, 125 (2003)) (explaining how a reading of § 114(b) precludes the use of a substantial similarity test).

<sup>106</sup> Ponte, *supra* note 51, at 536 n.105 (citing Lucille M. Ponte, *Too Few Notes? Digital Sampling and Fragmented Literal Similarity in Newton v. Diamond*, 38 BUS. L. REV. 141, 154 n.94 (2005)).

<sup>107</sup> U.S. CONST. art. I, § 8, cl. 8.

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to stimulate artistic creativity for the general public good.”<sup>108</sup> Congress’s “sole interest” in conferring monopolies is to facilitate public access and benefit,<sup>109</sup> yet under the current sampling regime, copyright holders wield absolute power as the public is denied access.

### A. THE ORIGINS OF COPYRIGHT

#### 1. English Origins

From its inception, copyright was designed for the public benefit.<sup>110</sup> Parliament sought to break up the British publishing monopoly with the Statute of Anne, “An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned”.<sup>111</sup> The legislation granted authors copyright in their creative work and the exclusive right to publish it, and abridged the copyright term from perpetuity to fourteen years.<sup>112</sup> *Donaldson v. Beckett* subsequently affirmed that copyright was a statutory right rather than a natural and perpetual one.<sup>113</sup>

#### 2. American Origins

While the Framers found the idea of a monopoly anathema,<sup>114</sup>

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<sup>108</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

<sup>109</sup> *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

<sup>110</sup> See John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. DAVIS L. REV. 465, 467 (2005) (citing Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 49 J. COPYRIGHT SOC’Y U.S.A. 675, 677 (2002)) (noting copyright protection originally stemmed from anti-monopolistic concepts intended to benefit the public, such as encouraging the introduction and development of foreign trade manufactures and practices into England).

<sup>111</sup> Statute of Anne, 1710, 8 Ann., c. 19 (Eng.), available at <http://www.copyrighthistory.com/anne.html>.

<sup>112</sup> With the possibility of a one-term extension for living authors and a 21-year term for works already in print. See Tehranian, *supra* note 110, at 468 (citing Statute of Anne, 1710, 8 Ann., c. 19 (Eng.)).

<sup>113</sup> *Donaldson v. Beckett*, 98 Eng. Rep. 257 (H.L. 1774), available at <http://www.copyrighthistory.com/donaldson.html>.

<sup>114</sup> See Hughes, *supra* note 7, at 998 (discussing how Jefferson famously wrote to James Madison in 1788 that while a limited-duration monopoly may serve as “incitement to ingenuity,” its benefit “is too doubtful to be opposed to that of their general suppression” (quoting Letter from Thomas Jefferson to James Madison (July 31, 1788), in 5 THE WORKS OF THOMAS JEFFERSON 424, 428

they recognized that ideas should spread freely around the globe,<sup>115</sup> and saw temporary monopolies as necessary “compensation for a benefit actually gained to the community as a purchase of property which the owner might otherwise withhold from public use.”<sup>116</sup> Copyright is constitutionally entrenched and Congress is responsible for “defining the scope of [its] limited monopoly”<sup>117</sup> in order to incentivize artistic development.<sup>118</sup>

Problematically, while the legislation was designed for the benefit of the public,<sup>119</sup> when matters are litigated, all too “[f]requently, the court is presented with a ‘good guy’ copyright owner and a ‘bad guy’ (‘pirate’) copyist. As a result, in affording relief, the interest of the public in the free flow and availability of ideas is often overlooked.”<sup>120</sup> As the following investigation demonstrates, creative sampling demands access to source material for practical and artistic reasons.

### B. THE HISTORY OF SAMPLING

Lesser artists borrow, great artists steal.

-Stravinsky

#### 1. Why Sample?

At this stage, a discussion of why artists want to sample is

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(Paul Leicester Ford ed., 1904)).

<sup>115</sup> Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in THOMAS JEFFERSON, WRITINGS, at 1291 (Merrill D. Peterson ed., 1984).

<sup>116</sup> JAMES MADISON, WRITINGS, at 756 (Jack N. Rakove ed., 1999). See also Tehranian, *supra* note 110, at 471–72.

<sup>117</sup> Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 429 (1984). U.S. CONST. art. I, § 8, cl. 8.

<sup>118</sup> See Mazer v. Stein, 347 U.S. 201, 219 (1954) (quoting Washingtonian Publ'g Co. v. Pearson, 306 U.S. 30, 36 (1939)). See also Gates Rubber Co. v. Bando Chem. Indus., Ltd., 9 F.3d 823, 839 (10th Cir. 1993).

<sup>119</sup> See *Copyright Law Revision: Hearings Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 63, 65 (1965) (statement of Abraham L. Kaminstein, Register of Copyrights, accompanied by Barbara Ringer, Assistant Register) (copyright is primarily meant to benefit the “public interest”), reprinted in 8 GEORGE S. GROSSMAN, OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, at 65 (2001); H.R. REP. NO. 60-2222, at 7 (1909) (stating that copyright is “[n]ot primarily for the benefit of the author, but primarily for the benefit of the public”), reprinted in 8 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, app. at 13-11 (Lexis Nexis 2008).

<sup>120</sup> Cable News Network, Inc. v. Video Monitoring Servs. of Am. Inc., 940 F.2d 1471, 1483 (11th Cir. 1991).

warranted. The concept of borrowing is as old as music itself. In the Medieval period, religious music utilized “melodies and texts from existing songs to pay tribute to or compete with the prior works.”<sup>121</sup> Composers such as Beethoven and Mendelssohn quoted and manipulated past styles,<sup>122</sup> and techniques such as looping were conceived before they were technologically feasible. In the 1950’s the Parisian *musique concrète* movement used analog tape machines to cut and loop pre-recorded sounds from melodies to water droplets, changing their tempo, direction, and applying various other manipulations.<sup>123</sup>

Disc jockeying (DJ’ing) differs from production, which fuses sounds in studio settings, in that it is performed live. It developed in Jamaica in the 1960’s as individuals performed with turntables, mixers, and microphones.<sup>124</sup> The hip hop movement started around 1974 in the South Bronx as DJ’s sought to isolate beats and maintain a continuous danceable “break” by manipulating records and utilizing the mixer.<sup>125</sup> They created fresh and exciting sounds from “riffs, solos, traps, and thousands of other snippets of sound in the[ir] audio treasure chests”—i.e., their record crates.<sup>126</sup>

## 2. The Contemporary Landscape

Today’s sample-based production is indebted to both Paris’s bourgeois tape sessions and the Bronx’s wild block parties. The introduction of the MIDI (Musical Instrument Digital Interface) synthesizer in the early 1980’s, allowing musicians to digitally record, alter, and play back sounds, resulted in a sea change.<sup>127</sup> This simplified the sampling process which previously necessitated, for instance, “ten machines with people holding pencils on the loops—some only inches long and some a yard

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<sup>121</sup> Brandes, *supra* note 19, at 100.

<sup>122</sup> *Id.* at 101.

<sup>123</sup> FRANCIS PREVE, POWER TOOLS: SOFTWARE FOR LOOP MUSIC: ESSENTIAL DESKTOP PRODUCTION TECHNIQUES 1–2 (Backbeat Books 2004); Beck, *supra* note 8, at 23.

<sup>124</sup> DROPPIN’ SCIENCE: CRITICAL ESSAYS ON RAP MUSIC AND HIP HOP CULTURE 6 (William Eric Perkins ed., Temple University Press 1996).

<sup>125</sup> *Id.* at 5–6.

<sup>126</sup> *Id.* at 6.

<sup>127</sup> See Gareth Loy, *Musicians Make a Standard: The MIDI Phenomenon*, 9 COMPUTER MUSIC J. 8, 8 (1985); MICHAEL CHANAN, REPEATED TAKES: A SHORT HISTORY OF RECORDING AND ITS EFFECTS ON MUSIC 161 (Verso 1995).

long.”<sup>128</sup> Digital sampling devices receive sounds as analog waves and transfigure them into computer code, which artists then use to change features such as pitch, tempo, and timbre.<sup>129</sup> Technology has improved drastically and devices that cost tens of thousands of dollars in the 1970’s can now be purchased for less than one hundred dollars.<sup>130</sup>

Like quoting, sampling may have a myriad of purposes and effects, from giving new meaning to work to paying homage to past musicians, evoking a time, person or place, or aiming for a certain musical aesthetic.<sup>131</sup> For most producers, digging for sounds is seen as aesthetically superior to simply plugging in popular ones,<sup>132</sup> and some see re-contextualizing existent sounds as a greater creative challenge than starting from scratch with traditional instruments.<sup>133</sup>

### 3. Sampling: Bigger Than Hip Hop<sup>134</sup>

Quotation has a rich history in the realms of rock and pop music as pioneering performers established a tradition of borrowing; just as singer-songwriters’ quotation can function

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<sup>128</sup> Preve, *supra* note 123, at 2–3 (John Lennon describing his experience of piecing together “Revolution 9” for the *White Album*) (quoting BARRY MILES, PAUL MCCARTNEY: MANY YEARS FROM NOW 484 (Henry Holt and Co. 1997)).

<sup>129</sup> See Durbin, *supra* note 19, at 1024 (quoting Bergman, *supra* note 59, at 623).

<sup>130</sup> See, e.g., digital samplers which cost less than two hundred dollars on <http://www.buy.com>, <http://www.etrronics.com>, and <http://www.techronics.com>. Compare *id.* with SpeedyLook Encyclopedia, Mellotron, <http://www.speedylook.com/Mellotron.html> (last visited May 6, 2009) (The Mellotron, an early sampler, was sold for \$5,200 in 1973, equivalent to about \$25,000 today.) See U.S. Dept. of Labor, CPI Inflation Calculator, [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm) (last visited May 6, 2009).

<sup>131</sup> David Levy’s prospective usage of James Brown’s exclamation, “excuse me while I do the boogaloo” (see *supra* note 70) would have been comparable to Kool Moe Dee’s sampling on “How Ya Like me Now,” which begins with James Brown calling out: “All aboard. The night train!” (from “Night Train”). In that instance, “James Brown is affirmed and valorized, Kool Moe Dee is situated within an Afro-American music tradition, and a self-constructed resistive history is sounded.” Tricia Rose, *Orality and Technology: Rap Music and Afro-American Cultural Resistance*, MASS MEDIA & SOCIETY 207, 214 (Alan Wells & Ernest A. Hakanen, eds., Ablex Publishing Corp. 1997).

<sup>132</sup> See, e.g., Hess, *supra* note 7, at 284 (MF Doom, a hip hop artist, shares his disdain for “beats that sound like karaoke” by virtue of their unimaginative copying and poor sound on “Hey.”).

<sup>133</sup> See Webber, *supra* note 10, at 379–80.

<sup>134</sup> Lyrics from DEAD PREZ, *Hip Hop, on LET’S GET FREE* (Loud Records 2000) (a song encouraging innovative musical production), available at <http://artists.letssingit.com/dead-prez-lyrics-hip-hop-658mkh8> (last visited May 7, 2009).



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without intentional commentary on its source material, sampling may also simply serve an aesthetic function. Exemplary of this phenomenon is one of the first popular sampling songs, the Beatles' "Revolution 9."<sup>135</sup>

The song was recorded after the band was introduced to *musique concrète* by producer George Martin.<sup>136</sup> Sampled sounds were taken from label EMI's archival material—including a test tape of a sound engineer saying "number 9"—and British radio and television broadcasts.<sup>137</sup> For the song "I Am the Walrus," Lennon mixed the track with random sounds playing on the studio's AM radio, including a broadcast of the play *King Lear*.<sup>138</sup>

In today's musical landscape, digital sampling is complemented by access to an unprecedented array of source sounds due to their Internet proliferation.<sup>139</sup> Terming sampling a purely hip hop practice is misguided. Samplers' corpora have expanded wildly as artists borrow from sources as diverse as aboriginal music,<sup>140</sup> foreign film, industrial sounds, and even press conferences.<sup>141</sup>

Unfortunately, the courts overseeing this new recording landscape rely on outdated laws designed for Tin Pan Alley and folio songs, when melody and harmony reigned supreme.<sup>142</sup>

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<sup>135</sup> Kembrew McLeod, *Confessions of an Intellectual (Property): Danger Mouse, Mickey Mouse, Sonny Bono, and My Long and Winding Path as a Copyright Activist-Academic*, 28 POPULAR MUSIC & SOC'Y 79, 82 (2005). Another prominent example is the first sampling work to reach the Billboard charts: William Burroughs and Brion Gysin's 1956 *The Flying Saucer*. Created with magnetic tape recorders, it was a fictional and comical account of a Martian invasion replete with portions of actual news broadcasts and songs by musicians including Fats Domino and Elvis. The project, evoking Orson Welles's 1938 *War of the Worlds*, sold more than a million copies. *Id.* at 81.

<sup>136</sup> Chanan, *supra* note 127, at 141, 143.

<sup>137</sup> McLeod, *supra* note 135, at 82; Durbin, *supra* note 19, at 1024.

<sup>138</sup> KEMBREW MCLEOD, FREEDOM OF EXPRESSION: RESISTANCE AND REPRESSION IN THE AGE OF INTELLECTUAL PROPERTY 152 (Univ. of Minn. Press 2007).

<sup>139</sup> See Barry Sandywell & David Beer, *Stylistic Morphing: Notes on the Digitisation of Contemporary Music Culture*, 11 CONVERGENCE 106, 106, 118 (2005). See also, Durbin, *supra* note 19, at 1022 (remarking on the wide distribution of Danger Mouse's "The Grey Album" via the Internet).

<sup>140</sup> See Hahn, *supra* note 51, at 715–16 (discussing the music group Enigma's unauthorized sampling of the Kuos, an aboriginal Taiwanese couple, on "Return to Innocence").

<sup>141</sup> See *DJ Jazzy Jeff Releases Greatest Track Ever*, THE PHILADELPHIA WEEKLY, May 31, 2007, available at <http://willdo.pwblogs.com/2007/05/31/dj-jazzy-jeff-releases-greatest-track-ever/> ("It took almost five years, but somebody finally turned that Allen Iverson press conference into the best sample the recording world has ever seen.").

<sup>142</sup> Alan Korn, *Issues Facing Legal Practitioners in Measuring Substantiality*

Leading treatises still limit protectable originality in music to “rhythm, harmony and melody,”<sup>143</sup> and most courts abide by the archaic demarcation.<sup>144</sup> This is exacerbated by the difficulty in conventionally transcribing and analyzing forms such as jazz, improvisation, turntablism,<sup>145</sup> and sample-based music, where aspects of sound cannot be depicted in traditional written notation.<sup>146</sup>

### C. INFRINGING USE

In musical copyright infringement cases, it is the courts’ role to resolve how much taking is fair, and under what conditions. To qualify as a copyrightable sound recording, a work must “result from the fixation of a *series* of musical, spoken, or other sounds,”<sup>147</sup> and as the Ninth Circuit reasoned, it has “long been a part of copyright law”, that “no legal consequences will follow” unless copying is substantial.<sup>148</sup> Still, measuring the substantiality “presents one of the most difficult questions [in] copyright law.”<sup>149</sup>

While the standard used by the *Bridgeport Music* Court of Appeals is blunt, the one adopted by the district court and *Newton*—“fragmented literal similarity,” is more nuanced.<sup>150</sup> Infringement actions evaluate the sample’s relation to the

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*of Contemporary Musical Expression*, 6 J. MARSHALL REV. INTELL. PROP. L. 489, 490 (2007).

<sup>143</sup> *Id.*; 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.05(D) (2008).

<sup>144</sup> *But see* Swirsky v. Carey, 376 F.3d 841, 849 (9th Cir. 2004) (citing Ellis v. Diffie, 177 F.3d 503, 506 (6th Cir. 1999) (recognizing features such as phrasing, chord progressions, and melodic contour)).

<sup>145</sup> Turntablism is the art of manipulating sounds from vinyl records. *See* Berklee-Press Release, *Berklee Turns Tables On Music Education*, <http://www.berklee.edu/opi/2004/0217.html> (last visited May 6, 2009) (describing turntablism as “[t]he skill of rhythmically and melodically manipulating vinyl”).

<sup>146</sup> *See, e.g.*, *Newton v. Diamond*, 204 F. Supp.2d 1244, 1251, 1259 (C.D.C.A. 2002) (The harmonic complexity of *Newton*’s “multiphonic” technique did not match the simplicity of the written score deposited with the Copyright Office, so the court ruled the notes in question: C, ascending to D-Flat, and returning to C, insufficiently original to be protected.).

<sup>147</sup> 17 U.S.C. § 101 (2006) (emphasis added).

<sup>148</sup> *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004).

<sup>149</sup> 4 MELVILLE B. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 13.03(A) (2008).

<sup>150</sup> *Id.* at § 13.03[A][2][b]. The term applies to sampling (“[T]he practice of digitally sampling prior music to use in a new composition should not be subject to any special analysis. . .”).

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plaintiff's work as a whole, as the court evaluates "whether 'so much is taken[] that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another.'"<sup>151</sup> To pursue such claims, copyright-holding plaintiffs must fulfill a number of criteria.

First, plaintiffs must prove that the sampled work is itself copyrightable and that their ownership is valid.<sup>152</sup> Second, actual copying must be proven with evidence that "the alleged infringer had access to the original work and that the new work bears a 'probative similarity' to the copyrighted work."<sup>153</sup> If these conditions are satisfied, plaintiffs must prove that the copying, even if blatant, is actionable by virtue of the infringing work's substantial similarity.<sup>154</sup>

Testing substantial similarity depends on whether the sampled material is of value and "pleasing to the ear[]," rather than merely an abstract idea or insignificant fragment.<sup>155</sup> Qualitative and quantitative considerations are made, as well as a determination of the extent to which the new work benefits or harms the original work's copyright holder.<sup>156</sup>

#### *D. DE MINIMIS USE*

*De minimis non curat lex* is the maxim that "[t]he law does not concern itself with trifles."<sup>157</sup> An all-encompassing concept, it "is part of the established background of legal principles against which all enactments are adopted."<sup>158</sup> In the artistic context, copying that does not amount to substantial similarity is non-actionable by virtue of the doctrine.<sup>159</sup>

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<sup>151</sup> *Newton v. Diamond*, 349 F.3d 591, 596–97 (9th Cir. 2003) (quoting *Folsom v. Marsh*, 9 F.Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901)).

<sup>152</sup> 17 U.S.C. §§ 102, 201 (2006). § 102 lists what works are copyrightable. § 201 sets forth restrictions on the ownership of the copyright.

<sup>153</sup> *Johnstone*, *supra* note 19, at 405. *See also* *Harvard*, *supra* note 91, at 1358 (noting that a successful copyright claim required "[actual] copying and improper appropriation.") (quoting *Arnstein v. Porter*, 154 F.2d 464, 469 (2d Cir. 1946)).

<sup>154</sup> *Harvard*, *supra* note 91, at 1358–59.

<sup>155</sup> *Arnstein*, 154 F.2d at 473.

<sup>156</sup> *See* *Suppappola*, *supra* note 19, at 98–99; *Harvard*, *supra* note 91, at 1359.

<sup>157</sup> BLACK'S LAW DICTIONARY 464 (8th ed. 2004). *See* *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997).

<sup>158</sup> *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992).

<sup>159</sup> *See, e.g., Ringgold*, 126 F.3d at 74.

In practice, articulating the range of acceptable copying has proven difficult for the judiciary, and the “*de minimis*” and “fair use” principles remain jumbled. Sampling cases have been resolved with findings ranging from per se infringement, to *de minimis* use, to exemptions under fair use doctrine.<sup>160</sup> While some courts separate the fair use and *de minimis* defenses,<sup>161</sup> the Supreme Court has affirmed their “partial marriage.”<sup>162</sup>

I contend that in the sampling context the appropriate approach is to begin with the *de minimis* inquiry and then, if the copying is found to exceed it, proceed to the fair use analysis. Indeed, “it makes more sense to reject the claim on that basis and find no infringement, rather than undertake an elaborate fair use analysis in order to uphold a defense.”<sup>163</sup> The Court has affirmed this procedure in the context of visual work,<sup>164</sup> and it is just as fitting in the musical realm.

### 1. Quantitative & Qualitative Indicia

Some courts, such as the Second Circuit, dub their evaluation purely “quantitative.”<sup>165</sup> Yet in measuring the duration of the copied work’s appearance in the allegedly infringing work, their “observability” test also considers qualitative “factors [such] as focus, lighting, camera angles, and prominence.”<sup>166</sup>

In *Newton*, the Ninth Circuit explicitly conducted both quantitative and qualitative inquiries, and found itself divided over the latter, as it attempted, with the aid of expert testimony, to filter out components of the “Choir” recording.<sup>167</sup> The majority

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<sup>160</sup> Ponte, *supra* note 51, at 519–20.

<sup>161</sup> See *Ringgold*, 126 F.3d at 76–78 (analyzing *de minimis* and fair use arguments separately).

<sup>162</sup> *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 451 n.34 (1984) (quoting ALAN LATMAN, FAIR USE OF COPYRIGHTED WORKS 34 (1958)) (addressing where the copyright owner has not been significantly harmed).

<sup>163</sup> *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 76 (2d Cir. 1997).

<sup>164</sup> See *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217 (2d Cir. 1998) (stating that it was erroneous “to resolve the fair use claim without first determining whether the alleged infringement was *de minimis*.”).

<sup>165</sup> *Ringgold*, 126 F.3d at 74 quoted in *Sandoval*, 147 F.3d at 217.

<sup>166</sup> *Ringgold*, 126 F.3d at 75 (using cases involving visual works). *But see* Latham *supra* note 105, at 145 (“[G]iven the symbiotic relationship between the concepts of substantial similarity and *de minimis* use, it is doubtful that . . . a different quantitative approach should pertain to other types of works, such as compositions and sound recordings.”).

<sup>167</sup> *Compare* *Newton v. Diamond*, 388 F.3d 1189, 1194–96 (9th Cir. 2004) (noting quantitatively that the sampled portion appeared only once in the composition, and qualitatively, that the section of the composition was no more

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concluded that factors attributable to Newton's unique performance (such as breath control and portamento)<sup>168</sup> do not appear in the score and are thus filtered out as part of the licensed recording rights.<sup>169</sup>

Thus, in sampling cases, both quantitative and qualitative measures should be considered. Favoring the former would permit unscrupulous copiers to dilute their sampling by lowering its percentage in their own works while incorporating qualitatively high portions. Meanwhile, courts relying on the latter factor risk punishing incidental use of qualitatively high portions in transformative ways.

## 2. An "Average" Audience?

A more serious discrepancy between the federal circuit courts is the audience taken into account. A majority, including the Ninth Circuit, views the substantiality of a plaintiff's work from the perspective of the "average audience" or "ordinary observer."<sup>170</sup> Yet the Third, Fourth, and Sixth Circuits consider such listeners incapable of appreciating complex and technical works, applying the "intended" audience standard instead.<sup>171</sup>

In the Second Circuit's *Arnstein* decision, the court framed its analysis in terms of "what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed."<sup>172</sup> The Fourth Circuit approved of the decision's underlying economic incentive theory, but found the grouping too broad and amorphous, choosing to look at "intended audience" of the plaintiff's work.<sup>173</sup> This inquiry involves testimony from members of, or experts "with reference to the tastes and

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significant than the others), *with id.* at 1197–98 (Graber, J. dissenting) (arguing that Newton had presented sufficient evidence that "reasonable ears could differ over the qualitative significance of the composition"). A defense expert, in one instance, asserted that the copied elements were insignificant as they did "not represent the heart or the hook" of the composition. *Id.* at 1196.

<sup>168</sup> *Id.* at 1194 (Showing these and other features have been dubbed the "Newton Technique.").

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 1193; *see also* Korn, *supra* note 142, at 495.

<sup>171</sup> *See* Korn, *supra* note 142, at 496.

<sup>172</sup> *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946).

<sup>173</sup> *Dawson v. Hinshaw Music, Inc.*, 905 F.2d 731, 734 (4th Cir. 1990), *cert. denied*, 498 U.S. 981 (1990); *see also* Reid Miller, Newton v. Diamond: *When a Composer's Market is not the Average Joe: The Inadequacy of the Average-Audience Test*, 36 GOLDEN GATE U. L. REV. 1, 11–12 (2006).

perceptions of the intended audience.”<sup>174</sup> The court lambasted judges using the ordinary observer test for their “reckless indifference to common sense” and “betrayal” of copyright doctrine.<sup>175</sup>

Methinks the court doth protest too much. The average audience is a more effective standard, particularly in light of the dissolution of traditional musical genres and the difficulty of ascertaining samplers’ intentions. Material is taken from a plethora of sources and used in complex work as genres blend together such that audiences cannot be distilled into fixed categories. Besides, even if they were, who would deem who the work’s “intended” audience was? The sampling artist? The plaintiff? Court experts? The average audience standard allows for more consistent analysis, with a premium placed on the sampling’s effect on the market for the original work.

### 3. Original v. Sampling Work

Lastly, courts measuring substantiality tend to solely look at the plaintiff’s work when they should examine the original work as well. Consider the *Bridgeport Music* district court’s comparison of the sampling and sampled songs, respectively:

“100 Miles” is a song about four black men on the run from the F.B.I. who appear to be wrongfully pursued for some unmentioned crime. The looped segment evokes the sound of police sirens; it is a background element in the song. Qualitatively, the looped segment bears only passing resemblance to the original chord that was copied. The looped segment has been slowed down to match the tempo of the rest of “100 Miles,” which also results in a lowering of the pitch of the notes. Instead of producing a rising sense of anticipation, the effect of the sample is to create tension and apprehension at the sound of pursuing law enforcement. This effect is amplified by the repeated use of the sample as the rapper describes the men’s anger, anxiety and fatalism as the chase continues.

In comparison, “Get Off” is a celebratory song—it is essentially about dancing. The work as a whole is characterized by a strong dance beat and a display of intricate electric guitar playing. The only lyrics are two expletives followed by “Get off your ass and jam” repeated over and over. There are no similarities in mood

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<sup>174</sup> *Dawson*, 905 F.2d at 736.

<sup>175</sup> *Id.* at 735, 738.

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or tone between the two works. The guitar introduction, where the sampled chord is found, can be compared to the trumpet call at the start of an anthem or march—an attention-grabbing moment meant to create anticipation. It bears no resemblance in tone or purpose to the sound of sirens in “100 Miles.”<sup>176</sup>

The Court of Appeals’ dramatic reversal of this judgment is indicative of the antiquated fear that “a work could be immune from infringement so long as the infringing work reaches a substantially different audience than the infringed work.”<sup>177</sup> The *Newton* court similarly warned that a contrary rule would allow unscrupulous defendants to “bury” significant copying in their own work.<sup>178</sup> This concern has led to an almost blind adherence to the examination of the source material *in situ* rather than its incorporation in the new work, allowing samplers to incorporate small portions excessively and find their own use “immune.”

A telling example of the folly of the Court’s approach is *Williams v. Broadus*,<sup>179</sup> where plaintiff Marlon Williams (aka Marley Marl) sued Calvin Broadus (aka Snoop Dogg) for his unlicensed sampling of “The Symphony” on “Ghetto Symphony.” Broadus countered that Williams had himself taken the sample from Otis Redding’s “Hard to Handle” and looped it in 124 of “The Symphony’s” 140 measures.<sup>180</sup> Justice Mukasey only found Broadus blameworthy, holding that Williams merely copied a small part of Redding’s composition and the test inquires whether the sample is a “substantial portion of [the preexisting] work—not . . . a substantial portion of [the allegedly infringing] work.”<sup>181</sup>

Similarly, in *Bridgeport Music*, while the sample comprised only two seconds of original work, it constituted about forty seconds of the defendant’s.<sup>182</sup> And while the *Newton* sample only

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<sup>176</sup> *Bridgeport Music Inc. v. Dimension Films, LLC*, 230 F. Supp. 2d 830, 841–42 (M.D. Tenn 2002).

<sup>177</sup> *Jarvis v. A & M Records*, 827 F. Supp. 282, 290 (D.N.J. 1993).

<sup>178</sup> *Newton v. Diamond*, 388 F.3d 1189, 1195 (9th Cir. 2004).

<sup>179</sup> *Williams v. Broadus*, No. 99 Civ. 10957(MBM), 2001 U.S. Dist. LEXIS 12894, \*1 (S.D.N.Y. Aug. 27, 2001).

<sup>180</sup> *Id.* at \*2–3, \*17.

<sup>181</sup> Justice Mukasey is a former Attorney General of the United States. See Biographies of the Attorneys General, Michael B. Mukasey, <http://www.usdoj.gov/jmd/lis/agbiographies.htm> (last visited Apr. 2, 2009); *Williams*, 2001 U.S. Dist. LEXIS 12894, at \*10 (quoting MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03 [A][2][a] (vol. 4 2008)).

<sup>182</sup> *Bridgeport Music Inc. v. Dimension Films, LLC*, 230 F. Supp. 2d 830, 841 (M.D. Tenn 2002).

accounted for six seconds of the original recording it was looped throughout the four-and-a-half-minute composition.<sup>183</sup> The rationale for only examining the plaintiff's work is ostensibly economic, as his "legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public's approbation of his efforts."<sup>184</sup>

Yet, in my eyes, Congress's economic-incentive copyright paradigm—that "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors"<sup>185</sup> — cuts both ways. The regime should encourage both songs' original creators and subsequent creative users' efforts and my scheme achieves just this.

#### 4. Suggested De Minimis Scheme

*Bridgeport Music's* bright-line rule negating *de minimis* use runs counter to the doctrine's extensiveness and Congress's express intentions. Precedent suggests that the "[a]pplication of *de minimis* is particularly important in cases . . . where stark, all-or-nothing operation of the statutory language would have results contrary to its underlying purposes."<sup>186</sup> Its adoption would prevent substantial taking while allowing for innovative use and public access. While they would be more subjective, as Justice Learned Hand once noted, such determinations are inherently *ad hoc*.<sup>187</sup>

Both works should be compared using the average audience standard and quantitative and qualitative measures. The court ought to consider how much was used, how much was added, and how substantially the use affects the original's derivative rights market. As I will now discuss, when samplers use work in a non-*de minimis* manner, the doctrine of transformative fair use should be introduced.

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<sup>183</sup> *Newton v. Diamond*, 204 F. Supp. 2d at 1246.

<sup>184</sup> *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946).

<sup>185</sup> *Mazer v. Stein*, 347 U.S. 201, 219 (4th Cir. 1954).

<sup>186</sup> *Alcan Aluminum Corp. v. United States*, 165 F.3d 898, 903 (Fed Cir. 1999) (citing *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992)).

<sup>187</sup> *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).



## IV. TRANSFORMATIVE FAIR USE

Part III demonstrated that copyrights were only grudgingly bestowed to help spur innovative creation. Our inclination to access, borrow, and adapt existent music was outlined, and it was argued that technological advances facilitate this urge and a *de minimis* scheme should permit it. In this section I contend that the fair use doctrine—a safety valve accommodating non-*de minimis* use—accords with sampling, particularly in light of its transformative qualities.

In *Amsinck v. Columbia Pictures Industries, Inc.*, the defendants' film included scenes where the plaintiff's artwork was visible in the background.<sup>188</sup> The court ruled that no actionable copying had occurred, and noted that even had the plaintiff made the case for *prima facie* copyright infringement, the copying would have constituted privileged fair use.<sup>189</sup> The court found that “where the copyright owner suffers no demonstrable harm from the use of the work, fair use overlaps with the legal doctrine of *de minimis*, requiring a finding of no liability for infringement.”<sup>190</sup>

Ten years later, the Sixth Circuit issued a two-sentence amendment to its blistering *Bridgeport Music* decision, explicitly affirming that trial judges are “free to consider” the affirmative defense of fair use.<sup>191</sup> This accords with the Constitutional prerogative of promoting the arts, the Congressional declaration not “to freeze the doctrine . . . during . . . period[s] of rapid technological change,” and the Supreme Court's admonition that copyright infringement analysis was “not to be simplified with bright-line rules.”<sup>192</sup>

Fair use is intended to permit courts “to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”<sup>193</sup> As an affirmative defense, it is applied after the substantial similarity

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<sup>188</sup> *Amsinck v. Columbia Pictures Indus., Inc.*, 862 F. Supp. 1044, 1046 (S.D.N.Y. 1994).

<sup>189</sup> *Id.* at 1050.

<sup>190</sup> *Id.* at 1049 (referencing the fourth fair use factor).

<sup>191</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 805 (6th Cir. 2005).

<sup>192</sup> U.S. CONST. art. I, § 8, cl. 8; H.R. REP. NO. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.A.N. 5659, 5680; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

<sup>193</sup> *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (quoting *Iowa State Univ. Research Found., Inc. v. Am. Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980)).

inquiry and found by the court as a matter of fact.<sup>194</sup>

So defendants can argue: (i) that the sampled material is not copyrightable as a matter of law; or that (ii) if the material is copyrightable and protected, their use is *de minimis*; or that (iii) if the material is copyrightable and protected and their use does not qualify as *de minimis*, it qualifies as fair use.<sup>195</sup> Under my proposal, transformative sampling would be considered a fair use requiring payment and attribution based on the proportion in which the sampled work figures into the sampling one.

It has been recognized that “[t]he ‘fair use’ exception applies where the Copyright Act’s goal of encouraging creative and original work would be better served by allowing the use than by preventing it.”<sup>196</sup> Sampling embodies this spirit and courts should be required to use it where not doing so “would stifle the very creativity which [copyright] . . . law is designed to foster.”<sup>197</sup> I contend that fair use should be a standard analysis in sampling cases and discuss why it has only been introduced in a single instance.<sup>198</sup>

### A. ORIGINS OF THE FAIR USE DOCTRINE

#### 1. A Storied Past

The origins of the doctrine can be traced to Justice Joseph Story, who affirmed that: “Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.”<sup>199</sup> In *Folsom v. Marsh*, the court was asked to determine whether one could republish letters by George Washington.<sup>200</sup> Such evaluations, Justice Story

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<sup>194</sup> See Beck, *supra* note 8, at 9; see also MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 12.10 [B][4] (vol. 3 2008); Fisher v. Dees, 794 F.2d 432, 435 (9th Cir. 1986) (explaining fair use is also described as an equitable defense, allowing “a limited privilege in those other than the owner of a copyright to use the copyrighted material in a reasonable manner without the owner’s consent.”).

<sup>195</sup> See 17 U.S.C. § 107 (2006) (listing factors determinative of whether a particular work constitutes fair use).

<sup>196</sup> Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1077 (2d Cir. 1992).

<sup>197</sup> *Campbell*, 510 U.S. at 577 (quoting *Stewart*, 495 U.S. at 236).

<sup>198</sup> *Campbell* remains the sole case to have considered fair use in the sampling context. 2 Live Crew’s “Pretty Woman” sampled portions of Roy Orbison’s “Oh, Pretty Woman,” and the court deemed their song a parody that could constitute a non-infringing fair use. *Id.* at 572–73, 579, 583.

<sup>199</sup> Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436).

<sup>200</sup> *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4,901).

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announced, should “look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”<sup>201</sup> The use in question was ruled unfair as three hundred and nineteen pages of the letters, which were previously published by the plaintiff, formed one-third of the defendant’s work.<sup>202</sup>

## 2. The Copyright Act

The Copyright Act’s preamble affirms that fair use of copyrighted works is permitted in certain circumstances.<sup>203</sup> The factors to be considered include: “(1) the purpose and character of the use,” including its commerciality; “(2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;” and (4) the use’s effect on the copyrighted work’s potential market.<sup>204</sup> This list of factors is non-exclusive, and they are to be examined jointly.<sup>205</sup> I will examine each in the context of sampling inquiries.

### *B. THE FAIR USE FACTORS*

#### 1. Factor #1: The Purpose and Character of the Use

##### a) Purpose and Character

Sampling rarely sets out to “comment” on, or criticize, its source material in the conventional sense. While it may involve some sort of comment on past musicians, styles, or cultural motifs, it is more aptly characterized as re-contextualization. Such a categorization would weigh in samplers’ favor, but is unfortunately incongruent with the Court’s current demand that sampling be parodic, non-satirical, commentary. This requirement results in unoriginal work using substantially more

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<sup>201</sup> *Id.* at 348.

<sup>202</sup> *Id.* at 349.

<sup>203</sup> 17 U.S.C. § 107 (2006).

<sup>204</sup> *Id.*

<sup>205</sup> *See id.* (“In determining whether the use made of a work in any particular case is a fair use *the factors to be considered shall include . . .*”) (emphasis added); *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577–78 (1994) (noting fair use factors are weighed together).

copyrighted material in order to quickly “conjure up” the original.

b) Commerciality

The second part of the first factor evaluation involves a determination of whether the use in question is commercial. Sampling works tend to either be available on conventional marketed releases or through freely-downloadable Internet avenues.<sup>206</sup> The former instances clearly weigh against samplers in this inquiry, but I contend that the latter do not. While courts have held that commerciality can be found even where the potentially-infringing works are freely distributed, sampling musical works can be distinguished as they do not cause consumers to forgo purchase of the sampled work.<sup>207</sup>

In *A&M Records, Inc. v. Napster, Inc.*, peer-to-peer file sharing was found to constitute commercial use since the “customary price” of the copyrighted works was forgone.<sup>208</sup> The same rationale applied in *UMG Recordings, Inc. v. MP3.com, Inc.*<sup>209</sup> and *Sega Enters. Ltd. v. Maphia*<sup>210</sup> with freely-downloadable music and games (respectively). While these downloads were of products identical to those that could be purchased, creatively sampling work endeavors to differentiate itself from its source material.<sup>211</sup> It is unlikely that someone who downloads Danger

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<sup>206</sup> See Robert Levine, *Steal This Hook? D.J. Skirts Copyright Law*, N.Y. TIMES, Aug. 7, 2008, available at <http://www.nytimes.com/2008/08/07/arts/music/07girl.html> (discussing sampling artist Girl Talk’s choice to distribute his last album on a website where customers could choose whether to pay for the album or not, as well as selling it through record stores and iTunes.).

<sup>207</sup> See *infra* Part IV (E) (discussing freely-downloadable Danger Mouse, Game Rebellion, and Amplive albums).

<sup>208</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014–15 (9th Cir. 2001) (finding commercial use even with no mandatory uploads); see also *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) (“The crux of the profit/nonprofit distinction is . . . whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”).

<sup>209</sup> *UMG Recordings, Inc. v. MP3 Com, Inc.*, 92 F. Supp. 2d. 349, 351 (S.D.N.Y. 2000).

<sup>210</sup> *Sega Enters. Ltd. v. Maphia*, 857 F. Supp. 679, 687 (N.D. Cal. 1994).

<sup>211</sup> See Aaron Power, *15 Megabytes of Fame: A Fair Use Defense for Mash-Ups as DJ Culture Reaches its Postmodern Limit*, 35 SW. U. L. REV. 577, 594–95 (2007). But see *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1117–18 (9th Cir. 2000), cert. denied, 532 U.S. 958 (2001) (holding that giving away free copies of a religious work constituted commercial use because the defendant received an advantage or benefit, thereby profiting from the use by attracting new members, who eventually contributed to the organization by tithing). This suggests that distributing sampling music for

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Mouse's *Grey Album*, for instance, would avoid purchasing albums by the Beatles; they may actually find their interest in the source material sparked.

**2. Factor #2: The Nature of the Copyrighted Work**

This factor, examining the nature of the copyrighted work, favors the plaintiff when the original copyrighted work is creative or fictional, and the defendant when the original work is noncreative or factual, so that it tends to work against samplers. Still, *Campbell* suggests that the fact that a plaintiff's work is creative does not weigh against fair use in cases of parody,<sup>212</sup> and that exception should be extended.

**3. Factor #3: The Amount and Substantiality of the Portion Used**

The third factor asks whether the amount and substantiality of the portion used, in relation to the work as a whole, is reasonable given the purpose of copying.<sup>213</sup> It relates to the other factors, as strong similarity may be indicative of a lack of transformative use under the first factor, and a greater likelihood of market harm under the fourth. The analysis favors samplers quantitatively, as the amount taken "in relation to the copyrighted work as a whole"<sup>214</sup> is small, and qualitatively where the portion does not go to the "heart of the original work."<sup>215</sup>

**4. Factor #4: The Use's Effect on the Copyrighted Work**

The effect on the potential market for, or value of, the original is the most important factor.<sup>216</sup> Creative and transformative sampling, I contend, is unlikely to adversely affect the market for the original work, and may actually improve it. Sampling sparks an interest in commercially passé songs or artists, generating

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free to promote a wider audience for concerts, album purchases, or even just increased web traffic may be considered commercial.

<sup>212</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

<sup>213</sup> *Id.*

<sup>214</sup> 17 U.S.C. § 107 (2006). Under my proposed standard, having the sampled portion comprise a smaller portion of the new work, by virtue of it being short or complemented by a lot of other material, will assist samplers in this inquiry.

<sup>215</sup> M. Leah Somoano, *Bridgeport Music, Inc. v. Dimension Films: Has Unlicensed Digital Sampling of Copyrighted Sound Recordings Come to an End?*, 21 BERKELEY TECH L.J. 289, 307 (2006).

<sup>216</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

license fees and increased record sales and exposure for copyright holders.<sup>217</sup> Contemporary sampled works tend to be from different genres, such that the sampling work will, if anything, increase the sampled work's market through cross-pollination.<sup>218</sup> Even where sampled work is from the same genre, consumers are interested in variations (as is the case with covers).

Since the fair use analysis seems auspicious for samplers that make transformative use of copyrighted material, why do they not invoke it? The sole case dealing with fair use confined it to parody,<sup>219</sup> and even samplers who have won infringement cases, such as the Beastie Boys, have not introduced it.<sup>220</sup>

### C. THE DEFENSE'S SCARCITY

A number of reasons may explain the dearth of fair use arguments in sampling cases. There is the lack of precedent, the fact that copyright owners are reluctant to allow the introduction of transformative findings so that they opt for out-of-court settlements in borderline cases, and the fact that defendants are unable to afford protracted litigation. Indeed, such cases are inevitably complex and expensive in light of the difficulty of winning a summary judgment motion on fair use.<sup>221</sup>

It has also been suggested that the state of ambiguity in samplers' right to the defense is attributable to mega-artists/producers such as Sean "Diddy" Combs, Jay-Z, and Dr. Dre.<sup>222</sup> Anthony Falzone insinuates that the seeming paradox of

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<sup>217</sup> See Brandes, *supra* note 19, at 116.

<sup>218</sup> Hahn, *supra* note 51, at 716 (noting Eminem's song "Stan," which sampled Dido's "Thank You," increased the popularity of both artists' albums—Dido credited Eminem for introducing her album to a different audience).

<sup>219</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590–91 (1994).

<sup>220</sup> See *Newton v. Diamond*, 388 F.3d 1189, 1190, 1192–93 (9th Cir. 2004) (holding defendant's use was *de minimis* and not reaching a fair use analysis).

<sup>221</sup> See *Harper*, 471 U.S. at 560 ("Fair use is a mixed question of law and fact."); Somoano, *supra* note 215, at 307.

<sup>222</sup> Anthony Falzone, *Why Hasn't Diddy Tried to Save Sampling?*, SLATE, Nov. 2, 2007, <http://www.slate.com/id/2177238> (discussing the paradoxical relationship Sean Combs, who serves as the head of Bad Boy Records and as a rapper and producer on its production, has with the practice of sampling). Others are similarly situated, including Jay-Z, who is the former president of Def Jam as well as a rapper and producer at the label. Jeff Leeds, *Jay-Z to Quit His Day Job as President of Def Jam*, N.Y. TIMES, Dec. 25, 2007, available at <http://www.nytimes.com/2007/12/25/business/25music.html>. Dr. Dre is the CEO of Aftermath Entertainment where he is also a rapper and producer. Aftermath Music, *Biography*, [http://www.aftermathmusic.com/blog/?page\\_id=170](http://www.aftermathmusic.com/blog/?page_id=170) (last visited May 15, 2009).

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such individuals not protecting the sampling practice, a mainstay of their business, is actually an anti-competitive ploy.<sup>223</sup> Their labels can afford to pay for sampling, so they opt to maintain their dominant positions as minor and independent artists shy away from unauthorized sampling.<sup>224</sup> The resultant oligopoly forces these artists to limit their exposure to lawsuits by either joining the mega-labels or keeping their releases underground.

*D. BEYOND PARODY*

According to the *Campbell* court, parody deserves to be protected commentary since “it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one”<sup>225</sup> and artists seldom license work poking fun at them.<sup>226</sup> While I agree that parodic sampling is entitled to the fair use defense, other forms of recontextualization<sup>227</sup> should also be explicitly recognized. This section makes the case for the defense’s extension beyond commentary and parody.

The court’s role should be to distinguish between “[b]iting criticism [that merely] suppresses demand[] [and] copyright infringement [which] usurps it[,]”<sup>228</sup> not to serve as arbiter for what brands of commentary are most artistically meritorious. I contend that for sampling work, the focus of the inquiry should not be on its parodic nature, but rather on the extent of its transformativeness and effect on the original’s derivative product market.

Under the defective parody-satire distinction the court currently relies on, parody, which uses copyrighted material to quickly conjure up a reference for its audience, is entitled to the fair use defense, while satire, which merely uses the substance or style of recognizable work in order to make fun of something else, is not.<sup>229</sup> The distinction’s arbitrariness is demonstrated by

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<sup>223</sup> See Falzone, *supra* note 222.

<sup>224</sup> *Id.*

<sup>225</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>226</sup> *Id.* at 592.

<sup>227</sup> “Recontextualize” means “to place (as a literary or artistic work) in a different context.” MERRIAM-WEBSTER ONLINE DICTIONARY (1978), *available at* <http://www.merriam-webster.com/dictionary/recontextualizes>.

<sup>228</sup> *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986).

<sup>229</sup> See *Dr. Seuss Enter. v. Penguin Books U.S.A., Inc.*, 109 F.3d 1394, 1400–01 (9th Cir. 1997) (ruling that the defendant’s book imitating Dr. Seuss’ verses and illustrations to provide a humorous take on the O.J. Simpson murder trial did not use Dr. Seuss’ style to make fun of Dr. Seuss, but merely “to get

Judge Posner's differentiation between burlesque and parody, which disallows the former when it aims to be humorous,<sup>230</sup> since the United States Supreme Court has defined parody (in *Campbell*) as literary or artistic imitation "for comic effect or ridicule."<sup>231</sup>

Why should parody be elevated to such a special status in the first place? Judge Pierre Leval, whose writings form the basis of the Supreme Court's parody protection, does not bestow it with any.<sup>232</sup> His protectable transformative uses include commentary and "also may include parody, symbolism, aesthetic declarations, and innumerable other uses."<sup>233</sup> Indeed, some consider parody even less deserving; authors like Ernest Hemingway have disparaged it as "the last refuge of the frustrated write . . . [and a step below] writing on the wall above the urinal."<sup>234</sup>

Besides, the days of when the establishment sets an arbitrary ordering of styles, such as the Academy's "hierarchy of genres"—where history paintings were ranked as "superior to . . . portraits, still lifes, and landscapes"<sup>235</sup>—should be behind us, as this does a disservice to copyright's goal of encouraging creative and original work. Furthermore, even were such ranking deemed worthwhile, parody would not function as a stable designation. The category has never been fixed, and some charge that it is even more indefinable today.<sup>236</sup> For instance, a recent viral video featuring three women singing about their support of a John McCain presidency is indicative of a new breed of media that makes

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attention" (quoting *Campbell*, 510 U.S. at 580)).

<sup>230</sup> *E.g.*, *Ty, Inc. v. Publications Int'l Ltd.*, 292 F.3d 512, 518 (7th Cir. 2002) (citing *Benny v. Loew's Inc.*, 239 F.2d 532, 536-37 (9th Cir. 1956)).

<sup>231</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994) (citing *THE AMERICAN HERITAGE DICTIONARY* 1317 (3d ed. 1992)).

<sup>232</sup> *See generally* Pierre N. Leval, *Commentary, Toward a Fair Use Standard*, 103 *HARV. L. REV.* 1105, *passim* (1990) (Judge Leval's discussion of fair use only makes mention of parody once, and there it is lumped together with other forms of commentary).

<sup>233</sup> *Id.* at 1111.

<sup>234</sup> *See Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1278 n.1 (11th Cir. 2001) (Marcus, J., concurring).

<sup>235</sup> *See, e.g.*, *ART IN THEORY 1648–1815: AN ANTHOLOGY OF CHANGING IDEAS* 108 (Charles Harrison et al. eds., 2000) (citing *ANDRE FÉLIBIEN, SEVEN CONFERENCES HELD IN THE KING OF FRANCE'S CABINET OF PAINTINGS vi-lx* (Henri Testelin trans., London: printed for T. Cooper 1749)).

<sup>236</sup> *See* LINDA HUTCHEON, *A THEORY OF PARODY: THE TEACHINGS OF TWENTIETH-CENTURY ART FORMS* xi (Univ. of Ill. Press 2000) ("Parody changes with the culture; its forms, its relations to its 'targets' . . . its intentions . . . [a]nd theories of parody have changed along with parody's aesthetic manifestations.").



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“it . . . impossible to tell parody/irony/performance art from completely sincere product.”<sup>237</sup>

Even where the court adopts what some critics consider a broader “post-modern” view of parodies, direct commentary on the copyrighted work is still required,<sup>238</sup> although, from a utilitarian perspective, it is unnecessary.<sup>239</sup> All that should matter is whether the new work is sufficiently transformative such that it does not adversely affect the original’s derivative market. I propose an expanded standard, and contend that technological advances make a comprehensive and clear rule evermore timely.

### *E. SAMPLING REQUIRES ACCESS*

#### 1. Listeners Crave Reinterpretation

Congress has declared that “there is no disposition to freeze the doctrine in the [copyright] statute, especially during a period of rapid technological change.”<sup>240</sup> The technology behind music modification and transmission is evolving at breakneck speed, such that its proliferation and consumption is challenging our conception of “popular music.”<sup>241</sup> This “flourishing . . . technology gives amateurs and home-recording artists powerful tools to build and share interesting, transformative, and socially valuable art drawn from pieces of popular culture.”<sup>242</sup> The inconvenient

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<sup>237</sup> Posting of Atrios to ESCHATON, [http://www.eschatonblog.com/2008\\_03\\_16\\_archive.html#9197121312102259305](http://www.eschatonblog.com/2008_03_16_archive.html#9197121312102259305) (Mar. 22, 2008, 17:41 EST) (emphasis omitted).

<sup>238</sup> Power, *supra* note 211, at 591; Kane v. Comedy Partners, No. 00 Civ. 158(GBD), 2003 WL 22383387, at \*3–4 (S.D.N.Y. Oct. 16, 2003), *aff’d*, No. 03-9136, 2004 WL 1234062, at \*1 (2d Cir. Jun. 4, 2004) (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579–80 (1994)).

<sup>239</sup> See Tehranian, *supra* note 110, at 498 (explaining that it is unnecessary to address the original work).

<sup>240</sup> H.R. REP. NO. 94-1476, at 155 (1976).

<sup>241</sup> See Demers, *supra* note 62, at 8–9 (noting the prevalence of equipment such as digital samplers, synthesizers, turntables, and cheap and simple home studio software); see also Jeff Leeds, *In Rapper’s Deal, a New Model for Music Business*, N.Y. TIMES, Apr. 3, 2008, available at [http://www.nytimes.com/2008/04/03/arts/music/03jayz.html?\\_r=2&hp&oref=slogin&oref=slogin](http://www.nytimes.com/2008/04/03/arts/music/03jayz.html?_r=2&hp&oref=slogin&oref=slogin) (“The popularity of music downloads has revolutionized how music is consumed, and widespread piracy has contributed to an industry meltdown in which traditional album sales — composed mostly of the two-decades-old CD format — have slumped by more than a third since 2000”); Miller, *supra* note 173, at 4 (“[P]opular music is not as easily defined as it once was.”).

<sup>242</sup> Werde, *supra* note 66 (quoting Jonathan Zittrain, “a director of the Berkman Center for Internet and Society at Harvard Law School.”).

truth for unscrupulous rights holders, but welcome news for samplers and the listening public, is that the time has come for musical copyright doctrine to thaw.

Postmodern artists, from Marcel Duchamp (with his “ready-made” art) to the Dadaists (who used “collage”) to Jeff Koons (and his “appropriation art”), break down genres in commenting on ideas of art and ownership.<sup>243</sup> Their expressive works feature recontextualized material, defying conventional structures and styles.<sup>244</sup> The same can be said of creative sampling artists, and Danger Mouse’s innovative *Grey Album* is emblematic of the appeal and merit of such creation.

a) The *Grey Album*

Danger Mouse (a.k.a. Brian Burton) made the *Grey Album* to publicize his mixing and producing talents, intending to keep it underground by only distributing 3,000 free “promo” copies.<sup>245</sup> He expected neither the rampant dissemination nor critical acclaim that ensued. EMI, representing the sound-recording copyright owners—the Beatles—and Sony Music/ATV Publishing, which owns the composition rights for the *White Album*, soon sent cease and desist orders, and Danger Mouse complied.<sup>246</sup>

Seeing the album as a form of ‘post-modern protest music,’ however, Downhill Battle, a music activism organization, organized a day of civil disobedience (“Grey Tuesday”) during which various websites offered free downloads of the album.<sup>247</sup> Over a million tracks were downloaded, making it one of the

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<sup>243</sup> Beatmuseum.org, Marcel Duchamp 1887-1968, <http://www.beatmuseum.org/duchamp/marcelduchamp.html> (last visited May 16, 2009); Dadart.com, The Dada Movement: The Collages, <http://www.dadart.com/dadaism/dada/025-dada-collages.html> (last visited May 16, 2009); Gagosian.com, Gagosian Gallery: Artist Biography, <http://www.gagosian.com/artists/jeff-koons> (last visited May 16, 2009).

<sup>244</sup> See Power, *supra* note 211, at 586 (explaining how “mash-ups” are part of the post-modern art wave because of their nonconformist structure); see also Brandes, *supra* note 19, at 103 (discussing how post-modern art moves away from the traditional notions of authorship).

<sup>245</sup> See Durbin, *supra* note 19, at 1022; see also Corey Moss, *Grey Album Producer Danger Mouse Explains How He Did It*, MTV.COM, Mar. 11, 2004, [http://www.mtv.com/news/articles/1485693/20040311/jay\\_z.jhtml?headlines=true#](http://www.mtv.com/news/articles/1485693/20040311/jay_z.jhtml?headlines=true#) (describing methods used by Danger Mouse in sampling and mixing the two albums).

<sup>246</sup> Durbin, *supra* note 19, at 1022.

<sup>247</sup> Power, *supra* note 211, at 580 (citation omitted).

largest single-day downloads in history.<sup>248</sup> Ironically, Virgin Records, an EMI subsidiary, signed Danger Mouse to their megagroup, Gorillaz, shortly thereafter.<sup>249</sup>

The other rights holders affected, “Jay-Z and his record label, Roc-A-Fella Records, did not object to [Danger Mouse’s] use of *The Black Album*; in fact, they tacitly encouraged” it.<sup>250</sup> Breaking from the label’s tradition of not releasing a *cappella* records,<sup>251</sup> the *Black Album* was released in that format so that artists could “remix the hell out of it.”<sup>252</sup> Recognizing the appeal of cross-pollination and additional exposure in the hip hop market, the label allowed online projects such as the “Jay Z Construction Set” and releases like the *Grey Album* to proliferate.<sup>253</sup> A boom in *Black Album* remixes available for free download resulted, with one non-exhaustive list of albums—submitted over just a six-month period—listing 142 unique albums.<sup>254</sup> Their creators range from hip hop illuminati like Pete Rock to unknown teenagers, with themes ranging from the Grateful Dead and Marvin Gaye to TV shows like *Saved by the Bell* (the *Zack Album*).<sup>255</sup>

Such production is often referred to as “mash-up” music, by virtue of its blend of two or more musical sources with little added material.<sup>256</sup> I term any work which incorporates copyrighted recorded sounds “sampling” music, but under my

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<sup>248</sup> *Id.* at 580–81 (downloading occurred on February 21, 2004).

<sup>249</sup> Power, *supra* note 211, at 581.

<sup>250</sup> Durbin, *supra* note 19, at 1022.

<sup>251</sup> See generally Discogs.com, Roc-A-Fella Records Discography at Discogs, <http://www.discogs.com/label/Roc-A-Fella+Records> (last visited May 16, 2009) (listing only three *a cappella* records produced by this label). “A *cappella*” means with vocals but no underlying music. THE RANDOM HOUSE COLLEGE DICTIONARY 7 (Revised ed. 1975).

<sup>252</sup> SHAHEEM REID & JOSEPH PATEL, *Remixers Turn Jay-Z’s Black Album Grey, White and Brown*, MTV.COM, Jan. 26, 2004, [http://www.mtv.com/news/articles/1484608/20040126/jay\\_z.jhtml](http://www.mtv.com/news/articles/1484608/20040126/jay_z.jhtml) (last visited May 16, 2009).

<sup>253</sup> See *id.*; see also Jay-Z Construction Set, <http://www.jayzconstructionset.com> (last visited May 16, 2009) (explaining how a collection of downloadable software, sounds, and images were designed to enable remixing of the *Black Album*).

<sup>254</sup> See e.g., Jon Pareles, *Music Playlist; Silver, Brown, Gray: Jay-Z Every Which Way*, N.Y. TIMES, Mar. 7, 2004, available at <http://www.nytimes.com/2004/03/07/arts/music-playlist-silver-brown-gray-jay-z-every-which-way.html>; Jay-Z All the Black Album Remixes, <http://www.geocities.com/REMIXALBUMS/> (last visited Feb. 18, 2009).

<sup>255</sup> *Id.*

<sup>256</sup> Philip Meehan, *Bootcamp - Mashing for Beginners*, PAINTINGBYNUMBERS, 2004, <http://www.paintingbynumbers.com/bootcamp/>.

scheme, the more recontextualized the original content is through modification and supplementation, the more transformative it is. The following projects are demonstrative of samplers' capacity to create innovative fair use music.

b) *Rainydayz*

Radiohead released their blockbuster album *In Rainbows* under a ground-breaking pay-what-you-choose online scheme in 2007.<sup>257</sup> Oakland-based producer/DJ Amplive, a big fan of the band, subsequently announced his plans to release a free celebratory remix album, which would only be available to those who provided proof that they either paid for Radiohead's album or contributed to a charity approved by its frontman Thom Yorke.<sup>258</sup> Amplive received a cease-and-desist order, and petitioned the band and its management to permit the release via a Youtube plea (which elicited fan videos supporting the initiative).<sup>259</sup> The band permitted the release—with downloading entirely free of conditions—once Amplive apologized and acknowledged that he could, and should, have asked for permission before starting on the project.<sup>260</sup> The resultant album *Rainydayz* features samples from *In Rainbows* alongside original vocals by West-Coast MC's,<sup>261</sup> and reviewers praise its transformative qualities.<sup>262</sup>

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<sup>257</sup> *All Things Considered: Radiohead's 'In Rainbows' Sets Its Own Terms* (NPR radio broadcast Oct. 10, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=15152703>.

<sup>258</sup> Nate Chinen, *New Sounds, Somewhere Beyond 'In Rainbows'*, N.Y. TIMES, Dec. 30, 2007, available at <http://www.nytimes.com/2007/12/30/arts/music/30play.html?ex=1199682000&en=1bb189ea77c17092&ei=5070&emc=eta1>.

<sup>259</sup> See Onesevensesix.com, *History of Rainydayz Remixes*, <http://www.onesevensesix.com/amplive/index.html> (last visited May 16, 2009); see also Posting of VVeerrgg to Lx7—The Something in that Square, <http://lx7.ca/470/radiohead-does-the-right-thing-with-amplive-remix-album/> (Feb. 13, 2008, 2:18 EST).

<sup>260</sup> See *Rainydayz Remixes*, *supra* note 259, (publishing the apology on the site where download of the tracks are available); see also Youtube.com, *Radiohead Rainydayz Remixes are here!!!*, <http://www.youtube.com/watch?v=jFuyJunFrdM> (last visited May 16, 2009) (presenting the apology by Amp\_Live and thanking his fans for their support).

<sup>261</sup> See *Rainydayz Remixes*, *supra* note 259 (recognizing original contributions by Too \$hort, MC Zumbi, Chali2na, Codany Holiday, and Del the Funky Homosapien). "MC" is a term interchangeable with "master of ceremonies" or "rapper." NationMaster.com, *NationMaster—Encyclopedia: Master of Ceremonies*, <http://www.nationmaster.com/encyclopedia/Master-of-Ceremonies> (last visited May 16, 2009).

<sup>262</sup> See Steve Yates, *Amplive, Rainydayz*, THE GUARDIAN, Jan. 20, 2008,

## c) Searching for Rick Rubin

In another contemporary project, Brooklyn-based all-black metal/hip hop band Game Rebellion teamed up with DJ/producer J. Period to create a tribute to Rick Rubin.<sup>263</sup> Rubin, Columbia Records' 46-year-old Jewish co-chairman, whose award-winning production credits include acts such as the Dixie Chicks, Neil Diamond, and Red Hot Chili Peppers, is, at first blush, an odd choice for a band whose lyrics center on the experience of urban black youth.<sup>264</sup> In reality though, he founded Def Jam and launched the careers of performers such as LL Cool J, Run-DMC, and the Beastie Boys, helping to establish the hip hop movement in New York and metal movement in Los Angeles.<sup>265</sup> The critically-acclaimed project reinterprets Rubin-produced songs through multilayered arrangements of live instrumentation, samples, and original lyrics.<sup>266</sup>

## 2. Users, Creation, and the Computer Age

The sampling albums discussed above are demonstrative of both the propensity to create cross-pollinating music and the culture and technology fostering its proliferation. While artists have always “dug” for source material, the process no longer demands the eponymous grueling manual sifting connoted by the

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available at <http://www.guardian.co.uk/music/2008/jan/20/urbanmusic.shopping> (explaining that the album “transform[s] ‘Weird Fishes’ into a gentle drift downstream”); see also J. Edward Keyes, *Single Minded* <http://www.rollingstone.com/rockdaily/index.php/2007/11/30/single-minded-live-cure-nick-cave-covers-the-beatles-radiohead-al-green-and-sugababes/> (Nov. 30, 2007, 10:37a.m. EST) (“Wow. [He] slices and dices a (let’s face it, kind of bloodless) . . . song and turns it into a sleek and simmering hip-hop track.”); Chinen, *supra* note 258 (Amplive “transform[s] a synthesizer-and-guitar odyssey into an ominous electro-trance expedition.”).

<sup>263</sup> DJ RTC, *Game Rebellion - Searching for Rick Rubin*, RUBYHORNET.COM, Mar. 20, 2008, [http://rubyhornet.com/index.php?option=com\\_content&view=article&id=197:game-rebellion-searching-for-rick-rubin&catid=22:reviews&Itemid=51](http://rubyhornet.com/index.php?option=com_content&view=article&id=197:game-rebellion-searching-for-rick-rubin&catid=22:reviews&Itemid=51) (last visited May 16, 2009).

<sup>264</sup> See Lynn Hirschberg, *The Music Man*, N.Y. TIMES, Sept. 2, 2007, available at <http://www.nytimes.com/2007/09/02/magazine/02rubin.t.html>.

<sup>265</sup> *Id.*

<sup>266</sup> See Alexander Fruchter, *SoundSlam Reviews: Searching For Rick Rubin*, SOUNDSLAM, [http://www.soundslam.com/articles/reviews/reviews.php?reviews=jperiod\\_rickrubin](http://www.soundslam.com/articles/reviews/reviews.php?reviews=jperiod_rickrubin) (last visited May 16, 2009) (“This is way beyond a ‘remix’ album, Game Rebellion and J. Period serve up pure and original recreations, while paying homage to one of music’s best producers ever.”); see also Game Rebellion, *supra* note 263.

term.<sup>267</sup> File-sharing programs and websites, the increasing digitization of new and old media, and the availability and facility of technology used to generate, modify, and spread art by anyone, including amateurs, have led to a boom in production.

User-generated content creation for such as Flickr (for images); YouTube (for video); ccMixter (for audio); and file-sharing programs, blogs and collaborative publishing environments, are “translating industrial-age ideas of content production into an informational-age, social software, Web 2.0 environment.”<sup>268</sup>

As far as music is concerned, aside from the phenomenon of file-sharing contemporary hits, these developments also facilitate the discovery of original music that is sampled and quoted. A plethora of websites are user-friendly and album-specific, such as a fan-made entry for the Beastie Boys’ 1989 album *Paul’s Boutique*, which lists over 180 samples and their assumed sources.<sup>269</sup> Other user-submitted sites identify samples and covers, and are searchable by terms, including label, release date, and genre.<sup>270</sup>

More general sites such as Wikipedia have also expanded such that album and song entries regularly identify sampled source material. Youtube searches often result in comments and related material tabs or videos that describe sampling processes connected to particular songs or artists. Were a sampling regime to be implemented, the process of discovering and accessing this music could be centralized, serving the interests of rights

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<sup>267</sup> Some artists, however, will no doubt continue to seek their ideal materials – whether they be an Yves Klein creating his own shade of blue, *see generally* Benjamin H. D. Buchloh, *The Primary Colors for the Second Time: A Paradigm Repetition of the Neo-Avant-Garde*, 37 *OCTOBER* 41, 51 (1986), a Michelangelo searching for a slab of marble in Carrara; *see* Michael Hirst, *Michelangelo in Florence: ‘David’ in 1503 and ‘Hercules’ in 1506*, 142 *THE BURLINGTON MAGAZINE*, Aug. 2000, at 487–88, or a DJ Shadow sifting through a cavernous basement crammed with vinyl, *see* SCRATCH (Doug Pray 2001), *available at*, <http://www.imdb.com/title/tt0143861/> (last visited May 16, 2009).

<sup>268</sup> Axel Bruns, Senior Lecturer, Queensland University of Technology, Presentation at Creativity & Cognition Conference, *Prodisage: Towards a Broader Framework for User-Led Content Creation* (June 14, 2007), *available at* <http://portal.acm.org/toc.cfm?id=1254960&type=proceedingProdisage>.

<sup>269</sup> *See generally* PaulsBoutique.info, About the Paul’s Boutique Samples and References List, <http://paulsboutique.info/index.php> (last visited May 16, 2009) (listing the samples and sources).

<sup>270</sup> *See* Ishkur.com, The Great Samples Database, <http://www.ishkur.com/samples/> (last visited Feb. 18, 2009) (showing the different ways to search tracks). *See generally* SecondHandSongs.com, The Second Hand Song Database, <http://secondhandsongs.com/> (last visited May 16, 2009) (demonstrating different ways to search the database).

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holders, samplers, and most importantly, the general listening public.

### 3. Genuine Source Material, Not Approximations

At this stage I must take a moment to debunk one of the key rationales put forth by sampling detractors, such as Congress or the Court of Appeals for the Sixth Circuit in *Bridgeport Music*: that a “[g]et a license or do not sample” rule would not stifle creativity, as artists wishing to use a section of an existing recording remain free to duplicate—or interpolate—it in a studio.<sup>271</sup> First, composition rights may need to be attained.<sup>272</sup> Second, duplicating a sound is extremely expensive and difficult, if not impossible, such that employing numerous samples is out of the question for most musicians. Third, the actual act of sampling from original source material has artistic merit.

Interpolating is a demanding process, as the right musicians and equipment must be attained for each sound involved. An expert recalls that people often tell him that a sound can be recreated by one guitar and a flute, but then examination of the source material reveals that “two guitars, flute, Rhodes [keyboard], bass, tambourine and maybe three other things” are needed.<sup>273</sup> Furthermore, the gear needs to correspond to the particular sound for faithful renditions, such as period microphones, outboards, amplifiers, and instruments. Beyond these crucial components, the acoustics of the physical recording space are often difficult to recreate—Stax Records sessions, for instance, were held in a modestly-converted abandoned movie theatre.<sup>274</sup> And, furthermore, how are distinctive voices to be convincingly replicated?

For all but the most well-heeled artists, even were the above feats achieved through some combination of luck and Herculean effort,<sup>275</sup> the costs of production would be astronomical compared

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<sup>271</sup> *Bridgeport Music, Inc.*, 410 F.3d 792, 801 (6th Cir. 2005).

<sup>272</sup> Even if the portion of the composition in question is short it could still be found to go “to the heart” of the composition.

<sup>273</sup> Jason Scott Alexander, *Beat Redux*, REMIXMAG, Oct. 1, 2007, [http://remixmag.com/production/tips\\_techniques/beat\\_redux\\_technical\\_feature/](http://remixmag.com/production/tips_techniques/beat_redux_technical_feature/).

<sup>274</sup> SoulsvilleUSA.com, About STAX, <http://www.soulsvilleusa.com/about-stax/> (last visited May 16, 2009).

<sup>275</sup> See, e.g., Video: RZA on the Beatles’ “My Guitar Gently Weeps,” <http://elbo.ws/video/QfjqZC5iTU8/> (Oct. 7, 2007, 3:25 EST) (detailing RZA’s efforts to interpolate the guitar progression from the Beatles’ “While My Guitar Gently Weeps.”). The project took eight months and involved the head of a

to a home studio recorded sampling album costing less than \$500.<sup>276</sup> Professional studio rates range from between \$50-80 per hour and musicians require \$600 per session, such that generating a single sample could cost some \$2000 for just two session musicians.<sup>277</sup> Logically, booking a studio for a short session is inefficient, and setting sessions up for the duplication of a variety of sounds would be enormously expensive and impractical.<sup>278</sup> Resultantly, forcing artists to interpolate would result in less diverse and creative creation as studio sessions are only properly set up for one uniform sound.

Besides, “[i]t is the actual embodied performance that contains the value, not the configuration of a particular combination of notes.”<sup>279</sup> Sampled recordings have a particular sound; “[a] guitar sampled off a record is going to hit . . . the tape harder. It’s going to slap you.”<sup>280</sup> Moreover, there is artistic value to the act of incorporating the original recording, akin to Picasso’s and Braque’s use of contemporary newspapers in their collages.<sup>281</sup>

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major film studio; Dhani Harrison—composer George Harrison’s son; John Frusciante, of the Red Hot Chili Peppers; the Wu Tang Clan; Erykah Badu; and a vintage Gretsch guitar Russell Crowe gave RZA for his efforts on the “American Gangster” soundtrack. *Id.*

<sup>276</sup> See Mueller, *supra* note 52, at 457–58.

<sup>277</sup> *Id.* (noting artists reluctant to pay for sample licensing can opt to use live musicians to duplicate the sound). A \$600 per-session cost for live musicians, when added to the price of an eight-hour session for two musicians at \$80 per-hour, would amount to nearly \$1,880 *before* factoring in other overhead costs. See also SaddleRecords.com, Studio Recording Rates, [http://www.saddle-records.com/studio\\_rates.htm](http://www.saddle-records.com/studio_rates.htm) (last visited May 16, 2009).

<sup>278</sup> See *PaulsBoutique*, *supra* note 269, at “Shake Your Rump,” [http://paulsboutique.info/Shake\\_Your\\_Rump](http://paulsboutique.info/Shake_Your_Rump) (last visited on May 16, 2009) (listing one listener’s identification of the various musical sources in the Beastie Boys’ song “Shake your Rump,” which included: The Sugar Hill Gang, Funky 4+1, James Brown, Afrika Bambaataa, Bob Marley, Paul Humphrey, Led Zeppelin, Harvey Scales, Rose Royce, Ronnie Laws, and Alphonze Mouzon, to sundry other sounds including what may be a “bong hit” and an “an African percussion instrument known as a ‘cuica’ (kwee-kuh)”).

<sup>279</sup> Webber, *supra* note 10, at 405 (quoting Steven D. Kim, *Taking De Minimis Out of the Mix: The Sixth Circuit Threatens to Pull Plug on Digital Sampling in Bridgeport Music, Inc. v. Dimension Films*, 13 VILL. SPORTS & ENT. L.J. 103, 126 (2007) (citing *Newton v. Diamond*, 349 F.3d 591, 595 (9th Cir. 2003))).

<sup>280</sup> Brandes, *supra* note 19, at 123 (quoting Kembrew McLeod, *How Copyright Law Changed Hip Hop: An Interview with Public Enemy’s Chuck D and Hank Shocklee*, STAYFREEMAGAZINE, available at [http://www.stayfree magazine.org/archives/20/public\\_enemy.htm](http://www.stayfree magazine.org/archives/20/public_enemy.htm)).

<sup>281</sup> See VisualArtsCork.com, Synthetic Cubism: Final Stage of the Cubist Movement Invented by Braque & Picasso, <http://www.visual-arts-cork.com/history-of-art/synthetic-cubism.htm> (last visited May 16, 2009) (discussing



*F. TRANSFORMATIVE FAIR USE*

The Court has recognized that copyright's goal of promoting the arts "is generally furthered by the creation of transformative works."<sup>282</sup> Unfortunately, its judicial analysis tends to favor criticism and parody over other transformative uses, inhibiting such progress.<sup>283</sup> Sampling is a form of pastiche that does not necessarily comment on its source material in the conventional sense, but the courts can, and should, apply fair use to it beyond the parodic context.

Courts investigating transformativeness inquire how much has been added to the borrowed material and the extent to which its tone or expression has been changed.<sup>284</sup> These questions suit the sampling inquiry, as they supplement the seminal examination of the effect of the work on the original's market: "parodies are merely examples of types of work that quote or otherwise copy from copyrighted works yet constitute fair use because they are complements of . . . rather than substitutes for the copyrighted original."<sup>285</sup> An investigation of the transformative doctrine's origins affirms the need for an expansion of the fair use regime for creatively sampling work.

## 1. Judge Pierre Leval

The Court adopted the concept of transformativeness based on the writings of Judge Pierre Leval,<sup>286</sup> who framed it as the primary measure of the extent to which one should be permitted to use a protected work, given that the objective of copyright law is "to stimulate creativity for public illumination".<sup>287</sup> Rather than

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Georges Braque's and Pablo Picasso's incorporation of everyday materials, such as newspaper clippings and tobacco wrappers, into their collages).

<sup>282</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10, 579 (1994).

<sup>283</sup> See, e.g., Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common With Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 26 (2000).

<sup>284</sup> See *Castle Rock Entm't, Inc. v. Carol Publ'g Group*, 150 F.3d 132, 142–43 (2d Cir. 1998).

<sup>285</sup> *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 517–18, 522 (7th Cir. 2002).

<sup>286</sup> United States Court of Appeals for the Second Circuit, Biographical information: Pierre N. Leval, <http://www.ca2.uscourts.gov/judgesbio.htm#pn> (last visited May 16, 2009) (writing *Toward A Fair Use Standard*, *supra* note 232, in 1990 while still a federal judge for the Southern District of New York, where numerous sampling suits have been initiated, before taking his current position on the Court of Appeals for the Second Circuit).

<sup>287</sup> Leval, *supra* note 232, at 1111.

merely “repackag[ing] or republish[ing] the original [work,]”<sup>288</sup> transformative use adds value by using the quoted matter “as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings . . . .”<sup>289</sup> Such transformative uses include criticism, commentary, “parody, symbolism, aesthetic declarations, and *innumerable* other uses.”<sup>290</sup>

## 2. Subjectivity

Some jurists have expressed concern about expanding transformative fair use beyond parody, but their charges are fallacious. Take Justice Kennedy’s *Campbell* concurrence, where he warns that “[a]lmost any revamped modern version of a familiar composition can be construed as a ‘comment on the naiveté of the original’ because of the difference in style and because it will be amusing to hear how the old tune sounds in the new genre.”<sup>291</sup> If anything, parodies have that propensity, while more creative and original transformative use remains prohibited.

Transformative sampling and quoting works abound. Talib Kweli’s “Get By,” for instance, utilizes a sample from Nina Simone’s “Sinnerman,” an American spiritual, “referenc[ing] the West-African subtext of much of [her] music and notions of Afro-religiosity.”<sup>292</sup> Still, critics may fairly charge that evaluating such artistic merit would result in subjective judgments, and hence my reliance on both transformative nature and the related issue of market effect.<sup>293</sup> The sampling of a lesser-known folk song, “The People in the Front Row,”<sup>294</sup> demonstrates the

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<sup>288</sup> *Id.* at 1115 (according to Justice Story, such work would merely “supersede the objects’ of the original” and be unlikely to pass the test (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841))).

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* (emphasis added).

<sup>291</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 599 (1994) (Kennedy, J., concurring) (citations omitted).

<sup>292</sup> See Mark Anthony Neil, *Nina Simone: She Cast a Spell—and Made a Choice*, SEEINGBLACK, June 4, 2003, [http://seeingblack.com/2003/x060403/nina\\_simone.shtml](http://seeingblack.com/2003/x060403/nina_simone.shtml).

<sup>293</sup> In *Folsom*, Justice Story aptly described fair use questions as “intricate and embarrassing [ones where] . . . it is not, from the peculiar nature and character of the controversy, easy to arrive at any . . . general principles applicable to all cases.” *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841).

<sup>294</sup> MELANIE SAFKA, *People in The Front Row, on GARDEN IN THE CITY*

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unsuitability of the commentary requirement. Melanie Safka sings in her distinctive voice:

“These chords that I’m using are usually sad,  
I had to use them, they’re the best chords that I have,  
Oh yeah, this progression is usually sad,  
But it felt my sorrow and I wanted it to feel me glad, yeah.”<sup>295</sup>

Contrast these lyrics to:

“Rough like whisky straight, no chaser,  
Went through fifty breaks, no flavour,  
‘Till I found this one, and made the,  
Bass hook with the drum, my saviour,”

from the hard-hitting 2003 release “The Nosebleed Section,” by the Hilltop Hoods, an Australian band which sampled Safka.<sup>296</sup>

There are numerous levels of analysis as to what “comment” the Hoods intended. Safka was an unabashed hippie, performing at Woodstock and the Powder Ridge Rock Festival, where she was the sole artist to defy a court order prohibiting performance.<sup>297</sup> The Hoods’ release, meanwhile, comes at a time when exorbitant ticket prices leave many fans unable to get front row seats.

Having a court attempt to decipher the extent to which the Hoods’ work comments on Safka’s calls Justice Holmes’s *Bleistein v. Donaldson Lithographing Co.* admonition to mind: “It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of . . . [expressive works], outside of the narrowest and most obvious limits.”<sup>298</sup>

There are narrow and obvious limits to be applied in sampling cases, and the *Campbell* decision contains their seeds. The fair use analysis may be undertaken with the reasonableness of the amount sampled depending on “the extent to which the song’s overriding purpose and character is to . . . [transform] the original or . . . may serve as a market substitute for the

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(Buddah 1972).

<sup>295</sup> *Id.*, lyrics available at [http://freespace.virgin.net/robert\\_ian.smith/Songindex/Peoplein.htm](http://freespace.virgin.net/robert_ian.smith/Songindex/Peoplein.htm).

<sup>296</sup> HILLTOP HOODS, *The Nosebleed Section*, on *THE CALLING* (Obese Records 2003); Melanie Safka: Biography, <http://www.spiritus-temporis.com/melanie-safka/> (last visited May 16, 2009).

<sup>297</sup> See *Music is Heard at Rock Festival: Singer and Groups Perform Despite Connecticut Ban*, N.Y. TIMES Aug. 1, 1970, available at <http://www.chronos-historical.org/rockfest/articles/PR801nyt2.html>.

<sup>298</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

original.”<sup>299</sup> More heavily transformative sampling will lessen “the significance of other factors, like commercialism, that may weigh against a finding of fair use.”<sup>300</sup>

Under my proposed standard, courts considering transformative fair use would focus on “character” rather than “purpose,” and the amount sampled in terms of the proportion of the new work it forms. The extent to which the sampling work recontextualizes the original work would be evaluated alongside the corollary question of its effect on the original’s market.

To be termed transformative, then, sampling work would embody, in Justice Story’s prescient words, “real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors.”<sup>301</sup> Sampling works that merely take source material and apply extensive chunks of it in a wholesale mechanical fashion would not qualify.<sup>302</sup>

## V. REFORM THROUGH TRANSFORMATIVE FAIR USE

Part V continues with the argument that fair use doctrine is compatible with sampling and should be broadened beyond the parodic context. The case is made for a compulsory licensing scheme complemented by a transformative fair use standard. Congress’s reluctance to legislate such a system is evaluated and a skeletal proposal for a unified regime is proposed.

### A. A JURIDIC BALANCING ACT

The *Bridgeport Music* district court properly recognized its role as “balanc[ing] the interests protected by the copyright laws against the stifling effect that overly rigid enforcement of these laws may have on the artistic development of new works.”<sup>303</sup> Yet the Court of Appeals that reversed it and others have failed in

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<sup>299</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588 (1994). The original quote has “parody” in the place of “transform.”

<sup>300</sup> *Id.* at 579.

<sup>301</sup> *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841).

<sup>302</sup> The Diddy songs discussed in note 61 are prime examples of this. Such sampling requires negotiated rights, and under my proposed scheme this would continue for uncreative, non-transformative use; Hess, who sympathetically likens samplers to academic writers, castigates this type of behavior as plagiarism rather than citation. See Hess, *supra* note 7, at 284.

<sup>303</sup> *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 840 (M.D. Tenn. 2002).

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this charge.<sup>304</sup> Sample trolls opportunistically extort users of minimal or nearly non-existent sampling.<sup>305</sup>

Artists whose oeuvre helps shape the modern musical psyche—such as the Beatles, Jefferson Airplane, and Pink Floyd—refuse access to their work.<sup>306</sup> Meanwhile, ones who broke through thanks to sampling, such as the Chemical Brothers, Missy Elliot, Beck, and the Beastie Boys, exclude others from their own in a heavy-handed fashion.<sup>307</sup> With such restraints on artistic sampling, when are the purposes of copyright law “served by punishing the borrower for his creative use” of such source material?<sup>308</sup>

### B. CONGRESS'S POSITION

Since it is Congress's duty to define the scope of musical copyright, it would, in a perfect world, reform the regime in order to promote transformative musical work. It would recognize the benefit of a compulsory scheme for sound recordings and an expanded one for composition rights. Unfortunately, it is not only refusing to consider such extensions, but is considering canceling the compulsory scheme for cover versions instead.<sup>309</sup>

In 1967 Congress considered removing the compulsory licensing mechanism for cover versions, but record industry representatives fought for its retention, insisting that it resulted in an “outpouring of recorded music, with the public being given lower prices, improved quality, and a greater choice.”<sup>310</sup> While the legislature ultimately decided to retain the mechanism, it revised the administrative system it deemed unfair to copyright owners and increased the statutory royalty fees.<sup>311</sup> More recently, the idea of removing the compulsory provision

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<sup>304</sup> See *Bridgeport Music v. Dimension Films*, 383 F.3d 390, 398, 401–02 (6th Cir. 2004); *Palladium Music, Inc. v. EatSleepMusic, Inc.*, 398 F.3d 1193, 1199 (10th Cir. 2005); *King Records, Inc. v. Bennett*, 438 F. Supp. 2d 812, 850 (M.D. Tenn. 2006).

<sup>305</sup> Wu, *supra* note 23.

<sup>306</sup> See Brandes, *supra* note 19, at 124–25.

<sup>307</sup> See Power, *supra* note 211, at 596. To be fair, their labels play a part in this, but such high-profile artists likely help set the policy.

<sup>308</sup> *Bridgeport Music I*, 230 F. Supp. 2d at 842.

<sup>309</sup> See, e.g., *Hearing Before the Subcommittee on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. 20 (2004) (statement of Marybeth Peters, Register of Copyrights).

<sup>310</sup> Webber, *supra* note 10, at 391 (quoting Bergman, *supra* note 59, at 650).

<sup>311</sup> H.R. REP. NO. 94-1476, at 89–91 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5704–75.

altogether has again been floated in the House.<sup>312</sup>

A compulsory scheme for recording rights was rejected by Congress in 1971, as it reasoned that while composition rights only permit access to raw materials, recording rights would allow artists to forgo efforts such as attaining musicians and studio space.<sup>313</sup> While some public benefit to such a provision was conceded, the “complicated procedural machinery” involved was found to make determining fair royalty rates and their division impracticable.<sup>314</sup>

Looking back to Congress’s original intentions in enacting the compulsory regime for covers, one finds them remarkably applicable to today’s sampling and quotation spheres. The scheme was designed to protect against “a great music trust” whereby rights holders would prevent rerecording of their work by demanding exorbitant fees or denying requests outright.<sup>315</sup>

There are numerous benefits to a regime sanctioning compulsory licenses for both creative sampling and quotation, including the automatic and fair rewarding of copyright holders, reduction in transaction costs and streamlined access to prior art, increased exposure for both up-and-coming sampling artists and passé sampled ones, and the cross-pollination of music.<sup>316</sup> The arguments against a compulsory scheme can generally be distilled to moral rights and “free market” ones.

### 1. Moral Rights

While critics charge that compulsory schemes are unlawful as they allow for derivative works to be manipulated against authors’ wishes in contravention of the Berne Convention and s. 115 of the Copyright Act,<sup>317</sup> case law clarifies that “if a secondary

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<sup>312</sup> One commentator stated that section 115’s compulsory license provision “should be repealed and that licensing of rights should be left to the marketplace.” Peters, *supra* note 309, at 21. Peters is a recognized critic of the fair use doctrine. See generally Nate Anderson, *What the Copyright Office Thinks About Fair Use*, ARS TECHNICA.COM, May 20, 2007, <http://arstechnica.com/articles/culture/fair-use.ars>.

<sup>313</sup> H.R. REP. NO. 92-487 (1971), reprinted in 1971 U.S.C.C.A.N. 1566, 1569.

<sup>314</sup> *Id.* at 1569–70.

<sup>315</sup> See H.R. REP. NO. 60-2222, at 6 (1909), as reprinted in MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT*, app. 13, 11–13 (vol. 8 2008).

<sup>316</sup> Carlos Ruiz de la Torre, *Digital Music Sampling & Copyright Law: Can the Interests of Copyright Owners and Sampling Artists be Reconciled?*, 7 VAND. J. ENT. L. & PRAC. 401, 403 (2005).

<sup>317</sup> See *supra* Part II.B.2.

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work sufficiently transforms the expression of the original work such that the two works cease to be substantially similar, then the secondary work is not a derivative work and, for that matter, does not infringe the copyright of the original work.”<sup>318</sup>

The current compulsory mechanism’s restriction on cover songs—that users cannot change a work’s basic character—prevents artists from innovatively interpreting copyrighted music. Ironically, while covering artists are forced to mimic source material, samplers are cast as thieves when replicating prior art and tricksters when modifying it.<sup>319</sup> The rights holder in Biz Markie’s case, for instance, complained that while “his song[s] had previously been covered hundreds of times,” the renditions had been faithful.<sup>320</sup> Why should the regime encourage the release of hundreds of identical songs at the expense of inventive creation?

## 2. Free Market

Advocates of a free market approach contend that compulsory licenses are ill-suited to intellectual property settings and emerging fields like digital media in particular.<sup>321</sup> Sampling-specific concerns include allegations that: the market will become oversaturated with the same samples; qualitative differences between samples and the popularity of the sampled artist or song necessitate a multi-tiered payment scheme; and that the scheme would be unwieldy and feature subjective determinations resulting in rates no less arbitrary than the current ones.<sup>322</sup>

Conversely, some promoters of user rights object on the grounds that a compulsory system would serve to extend copyright’s reach as it “raise[s] the possibility of potentially infinite demands for compensation. Why stop at quotation? Why

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<sup>318</sup> Williams v. v. Broadus, No. 99 Civ. 10957(MBM), 2001 WL 984714, at \*2 (quoting Castle Rock Entm’t, Inc., 150 F.3d 132, 143 (2nd Cir. 1998) (citing Nimmer, *supra* note 119, at § 3.01, 3-3)).

<sup>319</sup> Since samplers’ purposes vary from paying homage to achieving a sonic aesthetic, they need to be able to freely choose either approach.

<sup>320</sup> See Webber, *supra* note 10, at 396; Falstrom, *supra* note 5, at 376.

<sup>321</sup> See, e.g., Robert P. Merges, *Compulsory Licensing vs. the Three “Golden Oldies”*: Property Rights, Contracts, and Markets, CATO INST. POLICY ANALYSIS No. 508 (2004), available at <http://www.cato.org/pubs/pas/pa-508es.html>.

<sup>322</sup> See Webber, *supra* note 10, at 407, 409–10; Ponte, *supra* note 51, at 550–51 (citing H.R. REP. NO. 92-487, 1569-1570 (1971)); Durbin, *supra* note 19, at 1047.

not add in payment for discussion, or for inspiration?”<sup>323</sup> My scheme addresses both sets of concerns as users borrowing minimally and creatively transforming will pay the least, while rights holders of heavily-used material will be compensated most generously.

### C. PROPOSED FAIR USE STANDARD

This need of the immaterial is the most deeply rooted of all needs. One must have bread; but before bread, one must have the ideal. One is a thief, one is a street-walker . . . . Astarte becomes platonic. The miracle of the transformation of monsters by love is being accomplished. Hell is being gilded. The vulture is being metamorphosed into a bluebird.<sup>324</sup>

The Beastie Boys admitted to using what they considered “the best bit of ‘Choir,’”<sup>325</sup> but why would they take anything else? Listeners deserve to have access to the best and most creative music, and copyright law is supposed to encourage its generation; the legislature and judiciary have, however, failed to foster it.

A sampling advocate recently suggested the legislation of a *Newton*-type *de minimis* rule whereby a “fixed amount of a sound recording, say, seven notes or less” would count as a non-infringing use.<sup>326</sup> Yet just as the Sixth Circuit’s bright-line rule preventing unauthorized sampling wholesale is dysfunctional, so is this one: artists wishing to sample even infinitesimally larger amounts would be shut out of potentially creative copying, while others’ use would result in rights holders getting nothing.

While bright-line rules may seem appealing in light of the courts’ difficulty in moderating artistic matters,<sup>327</sup> they are not suited to the sampling inquiry. Further, although private bodies such as Creative Commons<sup>328</sup> and sampling clearing houses<sup>329</sup>

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<sup>323</sup> Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L. J. 535, 590 (2004).

<sup>324</sup> Victor Hugo, THE MEMOIRS OF VICTOR HUGO, (Bibliobazaar, LLC 2008) available at <http://www.fullbooks.com/The-Memoirs-of-Victor-Hugo2.html> (last visited May 16, 2009).

<sup>325</sup> *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1259 (C.D. Cal. 2002).

<sup>326</sup> Wu, *supra* note 23.

<sup>327</sup> See, e.g., Edward L. Glaeser & Andrei Shleifer, *Legal Origins*, 19, 21 (Harv. Inst. of Econ. Research, Working Paper No. 1920, 2001), available at <http://www.economics.harvard.edu/pub/hier/2001/HIER1920.pdf> (last visited May 16, 2009). Especially “Section III. The Adoption of Bright Line Rules.”

<sup>328</sup> See generally Creative Commons, <http://creativecommons.org/> (last visited May 16, 2009) (serving as a non-profit organization that permits artists to decide which rights pertaining to their work are to be reserved).



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provide a laudable service to samplers and rights holders in facilitating transactions, a generalized solution allowing access to all works must be devised for the public benefit. Otherwise, holders of creatively valuable source material will act as spoilers by hoarding it or acting in a predatory manner.

Access to source material must be improved while rights holder compensation is protected, as “artistic[] progress is possible only if each author builds on the works of others” and rules calling for overcompensation inhibit it.<sup>330</sup> Suggestions on how to achieve this include a compulsory licensing system akin to, or tagged onto, the section 115 cover regime; drafting unique sampling legislation; or expanding fair use doctrine through common law or legislative reform.

I am not certain which of these is ideal, but my transformative fair use proposal would apply to any of them. While it is primarily designed to address digital sampling concerns, it may also prove helpful in discussions of musical quotation and other instances of artistic borrowing, as evolving technological and cultural shifts make the conversation increasingly necessary.

Under my scheme, a sample that has been altered so drastically or is so minute that an average lay audience member would not recognize it, qualifies as non-infringing *de minimis* use and thus requires no license.<sup>331</sup> If a sample is sufficiently transformative, it counts as fair use and can be used with no fear of legal repercussions, but its rights holders must be compensated. They are to receive a payment based on the proportion of the sampling song that features their work.<sup>332</sup> These fees will be collected by a third party agency,<sup>333</sup> and split between the composition and recording right holders.

If a use is insufficiently transformative, then the current regime of negotiating with rights holders will apply. Rights holders who feel that unauthorized samples of their music have been used in a non-transformative fashion may seek to convince the courts of this and be entitled to the current legislated relief.

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<sup>329</sup> A private market-based response, common in Europe, that features large volumes of transactions and specialized staff, reducing transaction costs.

<sup>330</sup> *Nash v. CBS*, 899 F.2d 1537, 1540 (7th Cir. 1990).

<sup>331</sup> *See, e.g., Webber, supra* note 10, at 407.

<sup>332</sup> Musicians, industry representative, scholars, legislators, and members of the general public would need to coalesce in order to develop a suitable methodology for the payment schedule.

<sup>333</sup> Setting up this body could, for instance, be headed up by the Librarian of Congress, who oversees the Copyright Office.

Authors and performers associated with samples will be comprehensively credited and a practical split of composition rights could be applied, but these would have to be in substantially lower percentages than today's customary ones, in order to facilitate the use of a myriad of sources.

## VI. CONCLUSION

The current legislative regime for sample use is archaic and needlessly complex. Attaining licenses is an expensive<sup>334</sup> and demanding process and commercial musical production utilizes it sparingly. Courts inconsistently circumscribe the ambit of recording and composition rights and apply copyright statute in a manner both overly rigid and excessively friendly to rights holders.<sup>335</sup> Independent and lesser-known artists lack the resources to attain licenses for the material they wish to incorporate; and while record companies have entire subdivisions dedicated to sample clearance, their artists' sampling output is limited because the licensing of numerous sources is not commercially viable.

As a result, creativity is sacrificed and copyright's goal of fostering innovative and original work for the public benefit is frustrated. Copyright law is not served by punishing creative borrowers, but courts have facilitated precisely that by distorting *de minimis* doctrine and restricting the fair use defense. Transformative fair use accords with samplers' inclination to modify fragments of existing work and recontextualize them for their listeners' benefit. Extending sampling rights beyond the parodic context accords with the Court's pronouncement that the "germ of parody lies in the definition of the Greek *parodeia* . . . 'a song sung alongside another.'"<sup>336</sup> The cacophony should be amplified, not stifled.

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<sup>334</sup> Ruiz de la Torre, *supra* note 316, at 402.

<sup>335</sup> *Id.*

<sup>336</sup> Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994) (quoting Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1440 (Nelson, J., dissenting)).