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DIGITAL SAMPLING AND THE LEGAL IMPLICATIONS OF ITS USE AFTER BRIDGEPORT

AMANDA WEBBER*

INTRODUCTION

The increase in digital sampling has been greatly attributed to the hip hop industry, one of the most influential and popular genres of music in the world today. “Old recordings are to the hip-hop producer what paint is to the painter—raw material to be manipulated into art.” Today’s “studio musicians” are able to manipulate and add effects to previously recorded music, creating an infinite amount of new and innovative sounds without fear of ruining the sound quality. However, to the world outside of the hip hop industry, music that utilizes digital

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2 See Susan Berfield, The CEO of Hip Hop, BUS. WK., October 27, 2003, at 90 (“Marketing experts estimate one-quarter of all discretionary spending in America today is influenced by hip-hop.”); see also Kevin Chappell, 30 Years of Hip Hop Music, EBONY, June 2005, at 52 (describing the $4 billion-a-year hip hop industry as an artistic phenomenon with an undeniable influence).


4 See A. Dean Johnson, Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits, 21 FLA. ST. U.L. REV. 135, 139-40 (1993) (noting sampling to create greater opportunities to manipulate sounds and provide a musician access to an entire orchestra with only minimal investment); Howard Reich, Send in the Clones The Brave New Art of Stealing Musical Sounds, CHI. TRIB., Feb. 15, 1987, at 8C (“The sampler’s greatest wonder . . . is the ease with which it can clone any sound it has recorded.”).
sampling has been written off as stealing. The Copyright Act of 1976 was created to protect existing works without stifling further creativity. The addition of the Sound Recording Act created a statutory right of protection in the actual fixed recording of a particular “musical composition.” Because neither the Copyright Act nor the Sound Recording Act was written with digital sampling in mind, courts have varied in how they choose to apply the various sections of the Acts, and how they interpret the overall purpose of copyright laws in the digital sampling context. In Bridgeport Music, Inc. v. Dimension Films, the Sixth Circuit created a bright-line rule making any sampling of a sound recording per se infringement. The court’s message, “[g]et a license or do not sample,” may have drastically changed the landscape of popular music in the future.

5 See SCHLOSS, supra note 3, at 1 (highlighting the belief that sample-based hip hop is neither music nor art, as the sounds are taken rather than created); see also K.J. Greene, Copyright, Culture & Black Music: A Legacy of Unequal Protection, 21 HASTINGS COMM. & ENT. L.J. 339, 381 n.197 (1999) (noting that while hip hop has been criticized the most for its heavy reliance on music sampling, other popular musical genres, rock in particular, have also used this practice); Reich, supra note 4, at 8C (purporting the digital sampler to be “creating an army of thieves”). See, e.g., David Zimmerman, Rap’s Crazy Quilt of “Sampled” Hits, USA TODAY, July 31, 1989, at 4D (“Sampling has edged into rock—U2, Peter Gabriel and Iggy Pop are practitioners.”).


9 383 F.3d 390 (6th Cir. 2004), amended on reh'g, 410 F.3d 792 (6th Cir. 2005).

10 Bridgeport Music v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005) [hereinafter Bridgeport II] (stating “get a license or do not sample”).

11 Id. at 801.

12 See Matthew R. Brodin, Comment, Bridgeport Music, Inc. v. Dimensions Films: The Death of the Substantial Similarity Test in Digital Sampling Copyright Infringement Claims—The Sixth Circuit’s Flawed Attempt at a Bright-Line Rule, 6 MINN. J.L. SCI. & TECH. 825, 826 (2005) (“The hip-hop industry is worried that [the Bridgeport decision] will negatively impact creativity by significantly limiting the amount of music that artists can legally sample.”); See, e.g., Eric Olsen, 3 Notes and Runnin’: Sample Ruling Protest, BLOGCRITICS.ORG (Sept. 15, 2004), http://blogcritics.org/archives/2004/09/15/200145.php (calling the ruling a “disaster”).
This paper will focus on: digital sampling\(^\text{13}\) and its positive impact on music; the chilling effects that will occur in both creative output by artists and economic input for the music industry if owners of sound recording copyrights are given absolute monopoly power over their works; and finally, the possible alternatives to the concerns behind digital sampling. These alternatives include a recommendation that Congress enact new laws specifically dealing with digital sampling as its own independent art form by creating a subgenre of fair use analysis in determining to what extent sampling constitutes infringement, along with a compulsory licensing system within the music industry.

I. DIGITAL SAMPLING IN HIP HOP, DIGITAL SAMPLING IS HIP HOP

Before delving into any kind of legal analysis, it is important to understand the history behind the practice of digital sampling—not only where it originated, but why. It is easy for many to draw the oversimplified conclusion that sampling is stealing and has no artistic value.\(^\text{14}\) However, by learning about the close historical and social relationship between disc jockeying (manipulation of turntables in live performance) and producing (the use of digital sampling in the studio), digital sampling can be re-cast as a true art form, worthy of as much protection as any other creative work.\(^\text{15}\)

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\(^{13}\) See SCHLOSS, supra note 3, at 5. There are different kinds of sampling. The type of sampling discussed in this Comment is the sampling of sounds from commercially released records or compact discs, ranging from one note to entire segments of previously recorded songs. Hip hop music has also branched out and there are hip hop producers who do not use sampling. However, any distinction between sample-based and non-sample-based hip hop is a distinction of genre, rather than one of individual technique. Many hip hop purists who sample place great importance on that fact, and find it difficult to adopt such different methods without compromising many of their foundational assumptions about the musical form.

\(^{14}\) See Reich, supra note 4, at 8C (“[F]ledgling musicians with small pocketbooks can pick up a Casio sampler for roughly $125, then start buying and selling black market sounds.”); see, e.g., Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (“Thou shalt not steal.”).

\(^{15}\) See Zimmerman supra note 5, at 4D. “Producer/rapper Daddy-O says sampling is a legitimate ‘collage,’ and compares it to ‘appropriationism’ in art, in which existing images are duplicated and used anew by such postmodern artists as Andy Warhol. It’s something you put together out of bits and pieces other people have done. Once you have the complete product, you have a completely different picture.” See also SCHLOSS, supra note 3, at 25. Hip hop producers view deejaying as an essential element in the production process.
A. The Beginnings of Hip Hop

Before there was "hip hop" as it has been coined today, there were disc jockeys. The original disc jockey's creative process involved searching through milk crates filled with records to find songs with great percussive sections to dance to, known as "break beats." The process of “digging in the crates” and searching for the next great beat has become fundamental to the hip hop tradition. Disc jockeys also began modifying the music they played using turntables and a stereo mixer. In the 1970s, “disc-jockeys experimented with stretching percussion breaks and instrumental passages” through manipulation in an attempt to find something new for their fans. “[B]y incorporating the bass and drum introduction of Chic's popular dance hit 'Good Times' into their musical mix, disc-jockeys gained instant dance floor credibility,” an attribute vital to their popularity and professional growth. Eventually, in the late 1970s the isolation of the break,

16 See SCHLOSS, supra note 3, at 21 (discussing the practice of creating hip hop music by using digital sampling to create sonic collages evolved from the practice of hip hop disc jockeying). See also 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, 122 (2003) (explaining that the origins of hip hop are traceable to the innovative disc jockeys or "selectors" in Jamaica in the late 1950's and early 1960's).


18 See SCHLOSS, supra note 3, at 92 (explaining that any present-day practice of digital sampling must always be linked back to the old-school practices of digging in the milk crates of old records searching for beats); see also Eric Shimanoff, The Odd Couple: Postmodern Culture and Copyright Law, 11 MEDIA L. & POL'Y 12, 24-25 (2002) (discussing the fast spreading popularity that disc jockeys enjoyed, particularly after the arrival of Kool Herc to the South Bronx).

19 See Shimanoff, supra note 18, at 24 (“During the 1960s, Jamaican DJs traveled around the island nation with portable sound systems, entertaining local communities in temporary makeshift discos.”); see also Wilson, supra note 17, at 182 (“Using two turntables and a stereo mixer, the DJs would extend and combine the break beats into new creations”).

20 Jeffrey H. Brown, Comment, "They Don't Make Music the Way They Used To": The Legal Implications of "Sampling" in Contemporary Music, 1992 Wis. L. REV. 1941, 1948 (1992) (illustrating the birth of hip hop music); see also SCHLOSS, supra note 3, at 92 (discussing how it was often the goal of these disc jockeys to surprise the audience with what songs they could get them to dance to); Shimanoff, supra note 18, at 25 (explaining how disc jockeys would sample and rap over break beats from popular Latin, R&B and disco music); Wilson supra note 17, at 182 (describing the 1970's Bronx-style disc-jockeys playing only the most percussive portions of a record, known as the break beat).

21 Brown, supra note 20, at 1948 (discussing the manipulation of hit records as the core of early disc jockeying); see also Don Snowdon, Sampling: A Creative Tool or License
along with other effects such as “scratching” and “cutting,” were slowly recognized as musical forms unto themselves,22 and hip hop became its own musical genre, rather than simply a style of musical reproduction.23

An important force in the shift from hip hop as a fun group activity to hip hop as a recognized musical form was the eventual interest shown by the music industry.24 However, the industry had difficulty figuring out how to harness this newly-created genre into a hard medium they could sell, because, although “playing a popular funk record [at a hip hop show made sense, playing a popular funk record] on another [record] did not.”25 The problem was soon remedied with the development of a new technology, the digital sampler.26 And just like that, these disc jockeys became producers.27

With the introduction of the musical instrumental digital interface (MIDI) synthesizer, these disc jockeys-turned-producers of hip hop were able to recreate the music they were performing live in the clubs in a recorded medium.28 With the digital sampler, producers were now able to manipulate sounds in many

to Steal?: The Controversy, L.A. TIMES, Aug. 6, 1989, at 61 (explaining that many early rap hits were built on the bass line to “Good Times”).

22 See SCHLOSS, supra note 3, at 33 (describing the developing recognition of hip hop as its own musical genre); see also Robert M. Szymanski, Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use, 3 U.C.L.A. ENT. L. REV. 271, 277 (1996) (describing “scratching,” using a beat box, and fading as techniques which have become common elements in contemporary rap and hip hop music).

23 See Bergman, supra note 8, at 644 (“Entirely new genres of music have developed because of the practice of sampling, including hip hop, electronica, and other forms of dance music.”); see also Latham, supra note 16, at 121 (describing the emergence of the “hip hop” musical genre).

24 See Schloss, supra note 3, at 33 (describing the difficulty in making a hip hop record before the incursion of the music industry); see also Wilson, supra note 17, at 182 (“The record industry took notice of the rising popularity of the new musical style.”).

25 See SCHLOSS, supra note 3, at 34 (stating that the recording industry was faced with one large “hurdle” prior to sampling’s invention).

26 See SCHLOSS, supra note 3, at 2; see also Latham, supra note 16, at 123 (explaining the introduction of technology into the creation of hip hop).

27 See SCHLOSS, supra note 3, at 2 (stating that DJs who had been using sampling methods in the clubs were now called “producers” as sampling gained popularity); see also Wilson, supra note 17, at 182 (noting that “many disc jockeys turned to audio production” after the introduction of the digital sampler and its ability “to reproduce [their] live performance onto a recorded medium”).

28 See Brodin, supra note 12, at 828 (describing the emerging competition among disc jockeys in finding new ways to “extract and mix beats”); see also Latham, supra note 16, at 123 (stating that developing technology now allowed producers to “recreate in the studio what the D.J.s had been doing by extreme manual dexterity in the clubs.”).
ways, including the ability to play the sound backwards, shortened, repeated, or "spliced" together with another sound.  

B. Musical Elitism and Criticism of Hip Hop as Art

Most academic literature has attempted to transcribe musical examples as a way to define or reject hip hop as an art form, and as a means to determine whether hip hop can really be characterized as music. Joseph Schloss believes this type of analysis suggests that there is some kind of debate over what the word "music" means:

[It contains the hidden predicate that music is more valuable than forms of sonic expression that are not music. If one believes that only live instruments can create music and that music is good, then sample-based hip-hop is not good, by definition . . . . Creating an analogous argument about painting: if you believe that musicians should make their own sounds, then hip-hop is not music, but by the same token, if you believe that artists should make their own paint, then painting is not art. The conclusion, in both cases, is based on a preexisting and arbitrary assumption.]

Many critics of hip hop presume that sampling is just a lazy man's music, created with the primary motive of saving money and time, and that it lacks the artistic creativity found in music made through traditional instruments. To those in the hip hop world however, "sampling is not valued because it is convenient,

29 Johnson, supra note 4, at 138 (noting the wide variety of sounds available to a producer); see 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) (discussing samplers' ability to "vary, delete, or reverse certain tonal qualities" once they have recorded sounds digitally).

30 See SCHLOSS, supra note 3, at 12 (explaining that transcriptions are "descriptive graphic representations of sound which objectify the results of musical processes in order to illuminate significant aspects of their nature that could not be presented as clearly through other means."); see also Robert Rogoyski, The Melody Machine: How to Kill Copyright, and Other Problems With Protecting Discrete Musical Elements, 88 J. PAT. & TRADEMARK OFF. SOC'Y 403, 410 (2006) (stating that transcription of music and "even direct copying" can lead to different end results from its underlying pieces).

31 SCHLOSS, supra note 3, at 23.

32 SCHLOSS, supra note 3, at 76; see Christopher D. Abramson, Digital Sampling and the Recording Musician: A Proposal for Legislative Protection, 74 N.Y.U. L. REV. 1660, 1668 (1999) (arguing that sampling "allows a producer of music to save money (by not hiring a musician) without sacrificing the sound and phrasing of a live musician in the song."
but because it is beautiful.” An example of the intrinsic benefits of the sampling aesthetic is the practices of one hip hop producer:

[H]er approach is to hire live musicians, record them in the studio, and then sample that recording and work with the resulting samples to create the finished work . . . . [T]here is something in the sampling process itself that cannot be duplicated with live instrumentation: . . . “The reason why people sample is because you get an instant vibe, and an instant sound, from that original recording that you can’t get by recording somebody playing a horn . . . . part of it’s the ambience, part of it’s the atmosphere . . . just recording it down straight, it’ll just sound too placid; it won’t have any vibe.”

Musicians in other genres often refuse to consider the fact that hip hop is not “aesthetically deficient, but simply operating from a different perspective.” Sample-based hip hop is by definition not a “performing” genre, as the hip hop musician’s instrument is the sampler. This fact “totally obliterates conventional distinctions between performing (or practicing) [music] and recording [music].”

In the hip hop community, any evaluation of the aesthetic quality of the music created is primarily based on how creatively the producer is able to use the sample, relative to the sample’s original context and form. Hip hop producers see finding music to sample and manipulate as a challenge. Through sampling, producers are able to take musical performances from a variety of sources and combine them in new ways.

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33 SCHLOSS, supra note 3, at 65. See generally Bergman, supra note 8, at 620-22 (discussing the rave reviews and artistic value credited to DJ Danger Mouse’s creation of The Grey Album which mixed the acapella version of Jay-Z’s The Black Album with all the music from the Beatle’s The White Album).

34 SCHLOSS, supra note 3, at 73-74 (quoting hip hop producer The Angel).

35 SCHLOSS, supra note 3, at 70.

36 SCHLOSS, supra note 3, at 46; see Wilson, supra note 17, at 182 (noting that many disc jockeys turned to audio production after the introduction of the digital sampler and its ability to reproduce their live performances onto a recorded medium).

37 SCHLOSS, supra note 3, at 46 (explaining that everything that is done with a sampler is by definition recorded, the output of which is almost always transferred to a conventional medium).

38 SCHLOSS, supra note 3, at 13 (concluding that any kind of traditional musical analysis simply cannot be utilized when trying to fit hip hop into a preconceived notion as to what “music” is supposed to be); see, e.g., Bergman, supra note 8, at 624 (demonstrating the process the creator of The Grey Album had to go through in order to “seamlessly mix” Jay-Z’s vocals from The Black Album with the musical components of The Beatle’s The White Album, making sure the samples “mesh[ed] with the lyrics” from the Beatle’s songs).
of recorded contexts and organize them into a new relationship with each other. To a hip hop producer, musicians playing musical instruments can technically play anything they want using any notes or combination of notes and chords, and are therefore not “constrained by the nature of a particular musical performance on a particular old record,” like a hip hop producer. While the ability to start from a blank canvas and play anything on a traditional instrument might be seen as more difficult, hip hop producers see it as cheating and taking the easier road, because there are less limitations and obstacles blocking the transformation of that blank canvas into a work of art.

C. Hip Hop Terms of Art

Generally speaking, there are four important terms of art within the hip hop sampling community: biting, flipping, chopping, and looping. “Biting” is a term used throughout the hip hop world referring to the use of material from other hip hop artists. It is considered a violation of sampling ethics for a hip hop producer to sample a recording that has already been used by another producer. This stresses the importance of originality in the hip hop community and demonstrates that the hip hop producer’s most basic ethic is to be original. “To do the same thing someone else does is not creative, but taking a new approach to familiar material is.” Sampling from another hip hop record would also be exploiting that previous effort. Hip

\[\text{\textsuperscript{39}}\text{SCHLOSS, supra note 3, at 151; see, e.g., Bergman, supra note 8, at 624-25 (noting how The Grey Album was created by mixing an album by Jay-Z with one by the Beatles).}\]

\[\text{\textsuperscript{40}}\text{SCHLOSS, supra note 3, at 69.}\]

\[\text{\textsuperscript{41}}\text{SCHLOSS, supra note 3, at 69 (discussing how hip hop producers see instrumental freedom); see Bergman, supra note 8, at 646 (noting that sampling cases are generally brought due to equating sampling with stealing).}\]

\[\text{\textsuperscript{42}}\text{See SCHLOSS, supra note 3, at 106; see also Matthew S. Garnett, Music: The Downhill Battle to Copyright Sonic Ideas in Bridgeport Music, 7 VAND. J. ENT. L. & PRAC. 509, 521 (discussing the different sampling terms in the hip hop community).}\]

\[\text{\textsuperscript{43}}\text{See SCHLOSS, supra note 3, at 106 (explaining that while it is rare for rap artists to sue each other over the use of samples, rappers generally do not tolerate the use of their signature sound or allow their work to be used in an endorsement without compensation); see also Brown, supra note 20, at 1958 n.92 (stating that rap artists do not mind being sampled in another’s work).}\]

\[\text{\textsuperscript{44}}\text{SCHLOSS, supra note 3, at 107.}\]

\[\text{\textsuperscript{45}}\text{See SCHLOSS, supra note 3, at 114 (noting the ethical restraint within the hip hop community); see also Garnett, supra note 42, at 515 (citing the Copyright Act of 1976, 17 U.S.C. § 114(b) (2009)).}\]
hop producers also believe that building from another producer's efforts is not sufficiently challenging, as they are not doing the proper "digging" for the beat.\textsuperscript{46} The rule against "biting" demonstrates the value of hard work and creativity among those in the hip hop community.\textsuperscript{47} An artist who samples from a hip hop record does not demonstrate either of these qualities because the record has already been discovered and optimized for its "hip hop aesthetic."\textsuperscript{48} This is an interesting example of how the hip hop community's own set of ethics runs parallel to a common legal concept, and yet is based on a different set of concerns.\textsuperscript{49} 

"Flipping" refers to creatively and substantially altering material, the idea being that one adds value through the creativity of his or her alterations.\textsuperscript{50} "Chopping" refers to altering a sampled phrase by dividing it into smaller segments and reconfiguring the segmented pieces in a different order.\textsuperscript{51} "Looping" refers to sampling a longer phrase (one or more measures) and repeating it, often with little or no alteration.\textsuperscript{52} Looping allows the sample to be completely recast, as the end of the phrase being looped is juxtaposed with its beginning.\textsuperscript{53} Through looping, the creator is able to hear things that the
original musician never intended, as the rhythm, melody, harmony, or timbre changes the entire sensibility within which this sound is interpreted.\textsuperscript{54}

D. The Magnitude of the Hip Hop Genre Within the Music Industry

Hip hop music has consistently generated significant sales for record labels, often ensuring that those labels remain profitable.\textsuperscript{55} The Billboard Top 200 Albums for 2005 showed the top two grossing albums as belonging to hip hop artists.\textsuperscript{56} The very creation of the ringtone craze has been partially attributed to hip hop music.\textsuperscript{57} Six out of the top ten ringtones on Billboard's "Hot 100 Ringtones" of 2005 were hip hop songs.\textsuperscript{58} Beyond music, hip hop has shown a huge influence in other markets.\textsuperscript{59} “Marketing experts estimate that one-quarter of all discretionary spending in America... is influenced by hip hop,”\textsuperscript{60} and its influence on popular culture has also had a dramatic effect on international markets, highlighting the potential expansion of the largely American based hip hop marketing machine on a global scale.\textsuperscript{61} Russell Simmons, the founder and CEO of Phat

\textsuperscript{54} See SCHLOSS, supra note 3, at 137; see also Achenbach, supra note 50, at 201-02 (explaining how a riff can be re-contextualized, giving it a dramatic transformative effect on the way the listener perceives the sound).

\textsuperscript{55} See Achenbach, supra note 50, at 204 (demonstrating the prominence of digitized and sample-based music in the music industry).

\textsuperscript{56} See The Billboard 200, available at http://www.billboard.com/bbcom/year-end2005/charts/bb200.jsp (last visited March 20, 2007), which lists 50 Cent's "The Massacre" as number one and Eminem's "The Encore" as number two. In 2006, Eminem also had the number six album for the year with his compilation album "Curtain Call: The Hits."

\textsuperscript{57} See Achenbach, supra note 50, at 204 n.88 (discussing the ringtone boom); Michael Cerrati, Article, Video Game Music: Where it Came From, How it is Being Used Today, and Where it is Heading Tomorrow, 8 VAND. J. ENT. & TECH. L. 293, 313 (noting that ringtones sample songs).

\textsuperscript{58} See Billboard Hot 100 Ringtones, available at http://www.billboard.biz/bb/biz/year-end-charts/2005/rtntitle.jsp (last visited Feb. 18, 2006) (showing that "Candy Shop" by 50 Cent featuring Olivia as number one and "Drop It Like Its Hot" by Snoop Dogg featuring Pharrell as number two).

\textsuperscript{59} See Paul Butler, Symposium, Much Respect: Towards a Hip Hop Theory of Punishment, 56 STAN. L. REV. 983, 993-95 (2004) (describing how hip hop's influence on the marketplace, the academy, and politics); see also Azell Murphy Cavaan, MOVIES; HIP HOP HURRAY; FILMS WITH URBAN FLAVA CROSS OVER AND TAKE BOX OFFICE BY STORM, B. HERALD, Apr. 17, 2003, at 57 (describing how movies about urban culture or starring hip hop artists consistently produced sales worth hundreds of millions of dollars).

\textsuperscript{60} Berfield, supra note 2, at 90.

\textsuperscript{61} See Achenbach, supra note 50, at 205 (stating that "[h]ip-hop music and its influence upon popular culture has had a dramatic effect on national and international markets, specifically the Japanese market."); see also Yo Takatsuki, JAPAN GROWS ITS
Fashions and co-founder of Def Jam Records, became the manager of hip hop group Run-DMC. Without the capital he drew from sample-based music, Mr. Simmons could not have established himself in the music industry and built his multi-million dollar business empire.

II. COPYRIGHT LAW

In its analysis of digital sampling, this article will next examine the origins of copyright law, and then break down the basic principles and provisions that apply to musical works.

A. Origins of Copyright Law

In order to understand United States copyright law, it is important to look at its origin: Great Britain's Statute of Anne. The United States Copyright Clause came from this 1710 British statute, which replaced the monopoly that publishers had over publishing in England for two centuries. The Statute of Anne's Preamble states the statute is "an act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors . . . of such copies." The statute goes on to state its purpose as "the Encouragement of Learned Men to Compose and Write useful Books." The Statute of Anne shifted the "focus of protection . . . from the publisher to the author [and] created a public domain [by requiring that] a new work be created in order


Achenbach, supra note 50, at 206.

See Berfield, supra note 2, at 90 (noting that Run-DMC was one of the first of such groups to achieve significant mainstream success, in large part due to their originally unlicensed incorporation of an Aerosmith sample into one of their songs); see Paul Butler, supra note 59, at 994 (recognizing Simmons for his prominence both in the Hip hop community and the political arena).


Statute of Anne, 1710, 8 Ann., c.19.
B. The Copyright Clause of the Constitution

The United States Copyright Clause can be found in Article I, Section 8, Clause 8 of the United States Constitution. Through this Clause, Congress is empowered “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Three purposes are advanced by this clause: (1) “to promote learning (“Progress of Science and useful Arts”), (2) to benefit authors (with an “exclusive right”), and (3) to ensure public access (with protection only for a limited time”). Of these three purposes, two benefit the public and one the author; and the benefit to the author is a means to the ends of promoting learning and protecting the public domain.” Statutory interpretation strongly suggests that the Constitution’s ultimate goal “is the promotion of “Science and the useful Arts,”

68 Rooks, supra note 65, at 256-57 (stating that “the driving force of the Statute of Anne, then, was to curtail publishers’ (Stationers’) control over publication, thereby ensuring public access to information”); see Statute of Anne, 8 Ann., c. 19.
69 Rooks, supra note 65, at 256 (stating that the limited term of the copyright further strengthened the public benefit); see Statute of Anne, 8 Ann., ch. 19.
70 Rooks, supra note 65, at 257 (postulating that the curtailing of publisher’s control was a driving force of the Statute of Anne); see Statute of Anne, 8 Ann., ch. 19.
71 See Rooks, supra note 65, at 257 (stating that the very existence of the statute showed that no common law right existed); Kristina Rosette, Back to the Future: How Federal Courts Create a Federal Common-Law Copyright Through Permanent Injunctions Protecting Future Works, 2 J. INTELL. PROP. L. 325, 337-38 (1994).
74 Rooks, supra note 65, at 257 (stating the three purposes of the United States Copyright Clause); see L. Ray Patterson, Copyright Overextended: A Preliminary Inquiry into the Need for a Federal Statute of Unfair Competition, 17 U. DAYTON L. REV. 385, 394-95 (1992).
75 Rooks, supra note 65, at 257; Patterson, supra note 65, at 24 (discussing the benefits of the Copyright Law).
and not simply the protection of a proprietary interest of an author in his work.”

The Copyright Clause is both a grant of and limitation on Congress’ power to define what copyright law is.77 As a result of this provision, Congress can grant copyright owners a “limited monopoly” over their work.78 Monopolies tend to have an undesirable effect on markets and are especially damaging to those markets that depend on the exchange of ideas for development.79 The “monopoly privileges” that Congress can authorize through the Copyright Clause are not meant to provide a private benefit to the author.80 “The use of this limited monopoly [by the author] . . . is a means of obtaining the goal of copyright: to stimulate artistic creativity for public good.”81 This public good is achieved when artists are provided with the necessary incentive and encouragement to continue making creative works.82

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76 See Achenbach, supra note 50, at 192 (citing U.S. CONST. art. I, §8, cl. 8).
77 Rooks, supra note 65, at 257 (stating that as a constitutional delegation, the Copyright clause is both a grant of, and limitation of Congress’ power); see United States v. Martignon, 346 F.Supp.2d 413, 424-25 (2004) (discussing Congressional limits on power).
78 Mary B. Percifull, Digital Sampling: Creative or Just Plain “CHEEZ-OID?”, 42 CASE W. RES. L. REV. 1263, 1270 (1992) (explaining the constitutional provisions and policies of copyright); see generally Scott L. Bach, Music Recording, Publishing, and Compulsory Licenses: Toward a Consistent Copyright Law, 14 HOFSTRA L. REV. 379, 381-84 (describing the limited monopoly policy of copyright law).
80 Rooks, supra note 66, at 258 (“[M]onopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit.”); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (stating that monopoly privileges are not unlimited or designed to provide a special benefit).
81 Percifull, supra note 78, at 1270 (explaining the limited monopoly grant of Congress through the constitution); see Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975), superseded by statute, 17 U.S.C.A. § 110 (2005) (stating the important public incentive of copyright law).
82 Percifull, supra note 78, at 1270 (explaining the limited monopoly grant of Congress through the constitution); see Twentieth Century Music Corp., 422 U.S. at 156 (stating the important public purpose of copyright law).
C. Copyright Law is a Creature of Statute; Common law Principles Do Not Apply

As the Constitution firmly demonstrates, copyright law is a "creature of statute" and "it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted." It is clear through the constitutional grant of power to Congress that Congress alone can define copyright infringement remedies. The courts cannot impose common law remedies under circumstances that might otherwise seem appropriate, specifically when copyright owners attempt to raise common law principles of property rights in copyright disputes between copyright owners and users. These types of arguments raised by copyright owners stem from their belief that the source of copyright is actually in natural law. While the common law theory that an author is entitled to the "fruits of his labor" may govern a work pre-publication, once the work is "published," statutory copyright laws preempt any natural law protection.

Courts have had a difficult time applying this concept, and have approached copyright issues from the proprietary, natural law perspective. The Supreme Court has taken a "quasi-property" approach to copyright, which helps further make clear that copyright is a regulatory concept "because the real subject of the copyright is not the work, but the use of the work." Courts

83 Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) (stating "the copyright is the creature of the federal statute passed in the exercise of the power vested in the Congress"); see Krafft v. Cohen, 117 F.2d 579, 580 (3d Cir. 1941) ("Copyright as distinguished from literary property is wholly a creature of statute.").
84 Rooks, supra note 65, at 259 (quoting Sony Corp., 464 U.S. at 429).
85 See Rooks, supra note 6, at 259; see generally Rosette, supra note 71 (discussing federal common law and its place in copyright law).
86 See Rooks, supra note 65, at 259 (referring to "copyright owners' attempts to persuade courts to apply common-law principles of property rights in . . . copyright disputes"); see generally Rosette, supra note 71.
87 See Rooks, supra note 65, at 259-60 (stating that copyright owners would rather consider copyright laws as a proprietary right of the author); see also Laws v. Sony Music Ent., Inc., 448 F.3d 1134, 1144 (2006).
88 Rooks, supra note 65, at 260 (explaining how common law protects the proprietary interest of authors up until the time of publication and then is preempted by statute); Patterson, supra note 65, at 8-9.
89 Rooks, supra note 65, at 261 (explaining the court's confusion between proprietary and regulatory concepts of copyright law); see, e.g., Cable News Network, Inc. v. Video Monitoring Serv. of Am., Inc., 940 F.2d 1471, 1478 (11th Cir. 1991) (questioned by Los Angeles News Service v. Tullo, 973 F.2d 791 (9th Cir. Cal. 1992)).
90 Patterson, supra note 74, at 37; see Int'l News Serv. v. Associated Press, 248 U.S. 215, 242 (1918) (characterizing the news reports as quasi-property).
have further difficulty applying the regulatory concept to the copyright setting because it can result in overreaching by the courts.91 "Frequently, the court is presented with a 'good guy' copyright owner and a 'bad guy' (pirate) copying. As a result, in affording relief, the interest of the public in the free flow and availability of ideas is often overlooked."92

D. Congress' Power to Define Copyright Law

Through the powers granted in the Constitution, Congress has created subsequent copyright law, beginning with the Copyright Act of 1790 to the most recent Copyright Act of 1976.93 Within each Act Congress has considered the interests of the three main parties involved: the authors, the disseminators (publishers and distributors of the works created), and the public users of copyrighted works;94 however, Congress has repeatedly stated that the main purpose of the Copyright Act is the public good of use and access to works of art,95 even if such a public good comes at the expense of the author of the work.96 In the Report concerning the 1909 Copyright Act, the House Judiciary Committee stated:

91 Cable News Network, 940 F.2d at 1483 (describing the court as allowing an "aggressive and overreaching copyright owner [to seduce] a court into affording it control over too broad a territory in which it seeks exclusive dominion"); see The National Basketball Ass'n v. Sports Team Analysis & Tracking Sys., Inc., 939 F. Supp. 1071, 1089 n.161 (1996) ("Discussing the need to 'assure contributors to the store of knowledge of a fair return for their labors,' on the one hand, and the need to avoid 'impeding the harvest of knowledge' available for public use, on the other hand." (quoting Feist Publ'n, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50 (1991))).
92 Cable News Network, 940 F.2d at 1483.
94 See Patterson, supra note 74, at 388 (explaining the purpose of copyright regulation); see Gates Rubber Co. v. Bando Chem. Indus., Lmt., 9 F.3d 823, 839 (10th Cir. 1993) ("Copyright policy is meant to balance protection . . . ensure fair return to authors and inventors and . . . establish incentives for development, with dissemination, which seeks to foster learning, progress and development.").
95 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) (stating that the basic role of copyright is protection of "public interest"); H.R. REP. NO. 2222, 60th Cong., 2d Sess. 7 (1909) (declaring that copyright law is "[n]ot primarily for the benefit of the author, but primarily for the benefit of the public").
96 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, 261 (1993) (stating that Congress puts the public good ahead of the rights of the author).
In enacting a copyright law Congress must consider... two questions... how much will the legislation stimulate the producer and so benefit the public... and how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.97

The Supreme Court has interpreted copyright laws as not holding the interests of these affected parties equally. In *Twentieth Century Music v. Aiken*98, the Court held:

Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to serve a fair return for an “author’s” creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.99

In *Fox Film v. Doyal*100, the Court stated “[t]he sole interest of the United States and primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”101 In *Sony Corp. v. Universal City Studios, Inc.*,102 the court stated “the purpose of copyright is to create incentives for creative effort.”103 These interpretations reaffirm that copyright laws exist primarily to serve the public interest, with the interests of the authors and publishers being secondary.104

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97  H.R. REP. NO. 2222, 60th Cong., 2d Sess. 7 (1909).
98  422 U.S. 151 (1975).
99  Id. at 156.
100  286 U.S. 123 (1932).
101  Id. at 127.
103  Id. at 450.
104  See Rooks, supra note 65, at 259 (stating that the Supreme Court has made it clear that the public interest is primary and the interests of authors and publishers are secondary); *Twentieth Century Music Corp.*, 422 U.S. at 156 (“The ultimate aim [of copyright] is... to stimulate artistic creativity for the general public good.”).
E. The Copyright Act of 1976

The 1976 Copyright Act protects "original works of authorship fixed in any tangible medium of expression."\textsuperscript{105} The Act itself does not define what is meant by "original," but courts have determined that the originality threshold is a very low one.\textsuperscript{106} In \textit{Batlin & Son, Inc. v. Snyder},\textsuperscript{107} the U.S. Court of Appeals for the Second Circuit held that an author need only contribute something more than a "merely trivial" variation, and the work simply has to be "recognizably his own" for the court to consider the work at issue to be original.\textsuperscript{108} An original work must also possess "independent creation," but it need not be an invention of striking uniqueness, ingeniousness, or novelty; rather, it simply must be a distinguishable creation of the author.\textsuperscript{109} Section 106 of the Act lists the five exclusive rights of a copyright owner: 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.\textsuperscript{110} Copyright infringement occurs when someone exercises one or more of the copyright owner's exclusive rights without permission from the copyright owner.\textsuperscript{111} Congress has not prohibited all copying.\textsuperscript{112} The House Report accompanying the Copyright Act of 1976 states that "infringement takes place whenever all or any substantial portion of the actual sounds that go to make up a copyrighted sound recording are reproduced" suggesting that the purpose of

\textsuperscript{105} 17 U.S.C. § 102(a).
\textsuperscript{107} 536 F.2d 486 (2d Cir. 1976), cert. denied, 429 U.S. 857 (1976).
\textsuperscript{108} Id. at 490.
\textsuperscript{109} Id.; see Mazer v. Stein, 347 U.S. 201, 218 (1954) (holding that copyright protects originality, not novelty), superseded by statute, 37 C.F.R. § 202.10(a) (1959); Dorsey v. Old Surety Life Ins. Co., 98 F.2d 872, 873 (10th Cir. 1938) (stating that in order to be copyrighted, the work must be original in that the author has created it by his own skill, labor, and judgment).
\textsuperscript{110} See 17 U.S.C.S. § 106.
\textsuperscript{111} Johnson, \textsuperscript{supra} note 4, at 140-41 (explaining basic copyright protection); see 17 U.S.C.S. § 501(a) (providing that "anyone who violates any of the exclusive rights of the copyright owner...is an infringer of the copyright.").
\textsuperscript{112} Mazer, 347 U.S. at 217 (holding that similar works can be made without infringing on copyright); Johnson, \textsuperscript{supra} note 4, at 141 (pointing out that copying of small samples is permissible).
the statute was to protect "substantial portions" of a copyrighted piece, and not the individual notes.113

There are two different types of copyrights within one recorded song: one for the musical composition, or the underlying words and music of the song114 (what is found on sheet music), and one for the sound recording, the recorded performance of that musical work.115 The copyright owner of the underlying musical work enjoys all five of the exclusive rights; however, the copyright owner of the sound recording only enjoys the exclusive rights to reproduce the sound recording, to prepare a derivative work of the sound recording, and to distribute copies of the sound recording.116 This suggests that Congress intended less, and not equal protection for a sound recording copyright holder than for a copyright holder in the underlying composition.117 The owner of the musical composition almost never owns the sound recording.118

It is important to note that under the Act as it is currently written, artists are allowed to record a "cover" of a previously recorded work and to imitate the performance of the original artist.119 Under the "compulsory license" provision of Section 115, anyone who follows the procedures set out in the statute and pays the statutorily stipulated fees can "cover" the original recording without the express permission of the copyright owner as long as the new version does not "change the basic melody or fundamental character of the work."120 The statutory fee is set by the Copyright Royalty Tribunal and revised biennially in direct proportion to changes in the Consumer Price Index.121 In

117 See 17 U.S.C.S § 114(a) (2007) (limiting the rights of sound recording copyright owners to less than the full breadth of rights available).
119 See 17 U.S.C. § 115(a)(2) (2005) ("A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved.").
121 See 37 C.F.R. § 307.3(f) (1991)( "On November 1, 1991, and each November 1 biennially thereafter until November 1, 1995 . . . the Copyright Royalty Tribunal . . . shall
creating this compulsory license, Congress tried to strike a balance between two of the competing interests of composers and the public by encouraging and rewarding those composers for their creative and artistic work, but also maintaining public access to such works. As a result, "the Act both limits the copyright owner's right to withhold the song from the public and provides compensation to the copyright owner for the use of the song." The practice of using cover songs has proven to be extremely successful for new, lesser-known artists wishing to attract audiences' attention. Not only does the new artist receive that attention, but the original composer also benefits from a renewed awareness of his or her work, often in new markets where that composer might not otherwise have received any exposure. Without the mechanical license provision, the practice of covering songs may not have ever had the impact it does in the industry today, as artists could have refused to license their composition to any perceived competitors in the market. "It is impossible to say what the state of music would be today without artists who used established hits to fuel their entry into the music industry." In 1967, Congress actually considered dismissing the compulsory license provisions from the Copyright Act, but record industry representatives argued for its continued existence claiming that it resulted in an "outpouring of recorded music, with the public being given lower prices, improved quality, and a greater choice."
Prior to 1972, nothing in the United States Copyright Law made it illegal to duplicate a master recording. The Sound Recording Amendment of 1971 offered the first federal protection of a “fixed” recorded performance for all recordings fixed on or after February 15, 1972. The protection is limited to protection against sound recordings “that directly or indirectly recapture the actual sounds fixed in the recording.” This limitation means that there is no protection against simulated recordings consisting solely of an “independent fixation” of sounds. To qualify as a copyrightable sound recording, the work must “result from the fixation of a series of musical, spoken, or other sounds.” Therefore, one note, chord, or sound effect alone cannot be copyrighted; an aggregate of sounds must exist.

III. THE CURRENT STATE OF COPYRIGHT LAW AND DIGITAL SAMPLING

A. Current practices in the music industry

Clearing samples is not easy because there is nothing in the law that requires the copyright holders to give the necessary permission, which gives record companies and publishers the power to stop the release of music containing such samples. Efforts to set a uniform royalty rate or some kind of industry-wide agreement governing payments and clearances of samples have been unsuccessful, so any bargaining done has been on a

\[129\] See Passman, supra note 118, at 309 (discussing “The Age of the ‘Lawful Duplicators’”); Percifull, supra note 78, at 1271 (“Although recording technology has been around since the late nineteenth century, sound recordings were not entitled to copyright protection until 1972.”).

\[130\] See Percifull, supra note 78, at 1271.

\[131\] See 17 U.S.C. § 114(b); Percifull, supra note 78, at 1271 (discussing the limitations of the Copyright Act).

\[132\] See 17 U.S.C. § 114(b); Percifull, supra note 78, at 1271 (noting that not all copying is prohibited by the act).

\[133\] See 17 U.S.C. § 101; Percifull, supra note 78, at 1271 (explaining the substantial portion analysis).

\[134\] See Johnson, supra note 4, at 141 (“Much controversy has arisen over musicians sampling one or two notes of a work . . . [b]y implication, one note, chord, or sound effect alone cannot be copyrighted—rather, an aggregate of sounds must exist.”); see also Percifull, supra note 78, at 1271 (detailing the Copyright Act of 1976).

\[135\] See Passman, supra note 118, at 307; see also RICHARD SCHULENBERG, LEGAL ASPECTS OF THE MUSIC INDUSTRY, 122 (Robert Nirkind & Silvia Warren eds., Billboard Books 1999) (stating that because of the wide variety of possible sources any one sample may require multiple consents).
case-by-case, sample-by-sample basis.\textsuperscript{136} "A substantial number of people, including artists, lawyers, copyright holders, and their various representatives and assistants, must approve any given sample request—and any one of them can veto it by simply ignoring, forgetting, or otherwise failing to respond to it."\textsuperscript{137}

Artists theoretically must obtain sampling licenses for both the underlying musical composition and the sound recording.\textsuperscript{138} A “master license” is a license to sample the sound recording, and is granted by the owner of the sound recording copyright, usually the performer or recording company.\textsuperscript{139} A “synchronization license” is a license to sample the underlying musical composition, and is granted by the owner composition’s copyright holder, usually the songwriter, or by assignment, a music publisher.\textsuperscript{140} Synchronization licenses are often necessary in conjunction with movies, where a song is used as part of a background for a scene.\textsuperscript{141}

According to Donald Passman, the author of \textit{All You Need to Know About the Music Industry}, "[i]f the usage is minor, and it’s a little-known song, a sampler might be able to buy out all the rights for a flat fee."\textsuperscript{142} The range for these fees will usually be in the range of $5,000 to $15,000 for the record company, and about the same for the publisher,\textsuperscript{143} however if the usage is more

\textsuperscript{136} See Brown, supra note 20, at 1954 (discussing current practices with regards to sample clearance); see also Szymanski, supra note 22, at 290 (explaining that the music industry has taken an ad hoc approach to license negotiations).

\textsuperscript{137} SCHLOSS, supra note 3, at 179.

\textsuperscript{138} See Bergman, supra note 8, at 644–45 (explaining the possible agreements artists can get in regards to the underlying musical composition); see also Brooke Shultz, \textit{Sound Recordings: "Get a License or Do Not Sample,"} \textit{7 TUL. J. TECH. & INTELL. PROP} 327, 329 (2005) (discussing the two distinct copyrights discussed within digital sampling context).

\textsuperscript{139} See Astride Howell, \textit{Sample This! A Ninth Circuit Decision Seems to be in Harmony with the Sixth Circuit’s Bright-Line Rule on What Constitutes Infringement in Digital Sampling,} \textit{28 L.A. LAWYER} 24, 25-26 (2005) (explaining the different underlying works of copyright protection regarding songs); see generally Shultz, supra note 138, at 329 (discussing who usually gives permission on sample clearance).

\textsuperscript{140} See Howell, supra note 139, at 25-26 (discussing sample clearance procedure); Shultz, \textit{supra} note 138, at 329 (discussing who usually gives permission on sample clearance).

\textsuperscript{141} See Passman, supra note 118, at 311 (defining synchronization license).

\textsuperscript{142} See Passman, supra note 118, at 307; see also SCHULENBERG, supra note 135, at 122 (stating that permissions have to be granted, usually for a flat fee, from all of the owners of the rights in and to the sampled materials before there can be any commercial exploitation of the recordings using the samples).

\textsuperscript{143} See Passman, supra note 118, at 307 (noting the typical price ranges for buying samples); U.S. Copyright Office, Copyright Royalty Rates: Section 115, the Mechanical License, http://www.copyright.gov/carp/m200a.html (last visited Oct. 23, 2006) (listing the copyright royalty rates).
significant, fees can go up to $50,000.144 Passman further notes that “[i]f the agreement is not for a flat fee buyout, the record company may want an advance against a royalty, usually in pennies and payable on worldwide sales.”145 Fees could also be in the form of a rolling payment, or a flat amount based on a certain number of sales, for example $5,000 for every 100,000 units sold.146 However, even when an artist wishing to sample can get past all these hurdles, the copyright holder may also limit the usage of the sample. For example, an artist could direct that the sample only be used in records and promotional videos, meaning that the artist may not get permission to license the song with the sample in a commercial without paying even more.147

Many producers feel that copyright infringement cases brought today are more often about money and power than of preserving creativity and artists' rights.148 Hip hop artists generally act under the belief that copyright laws as applied by courts today are not doing what the judges claim they are doing in their holdings; that is, protecting the original musician.149 In reality, it is usually the record company that receives most of the

144 See Passman, supra note 118, at 307 (discussing the freedom copyright owners have when choosing royalty prices for sampling); see also SCHLOSS, supra note 3, at 6 (noting that the growing expense of sample clearance and securing permission from the owner of a copyrighted recording have caused many major-label hip hop artists to reject the use of samples, which some producers see as a threat to their aesthetic ideals).

145 See Passman, supra note 118, at 307-08; see also Bergman, supra note 8, at 645 (explaining the possible agreements artists can get in regards to the underlying musical composition).

146 See Passman, supra note 118, at 308 (“Publishers rarely give a buyout”); see also Brown, supra note 20, at 1959 (discussing that most owners of the original master recordings prefer to issue licenses for a flat fee).

147 See Passman, supra note 118, at 308 (stating that if an artist “lifted an entire melody line . . . [the publisher] might take 50% or more; for less significant uses, the range is 10% to 20%.”); see also SCHULENBERG, supra note 135, at 122 (stating that permission granted may contain other conditions or restrictions).

148 SCHLOSS, supra note 3, at 177. If publishing companies own musical composition copyrights and record labels own sound recording copyrights, then they will be bring the infringement action, and receive damages therefrom. See Howell, supra note 139, at 25-26 (stating that a “musical composition is owned by the songwriter or, by assignment, a music publisher.”).

149 SCHLOSS, supra note 3, at 177. Language within infringement-action opinions suggest that judges reach their decisions based on feelings that the creator of a work must be compensated for that work and any appropriation without compensation is unjust; however, the parties before them are the owners of the copyrights, usually parties who had nothing to do with the work's creation. See Howell, supra note 139, at 25-26 (stating that an artist seeking to utilize a sample from a song generally must obtain permission from the copyright holder in the form of a license).
compensation of a sample clearance.\textsuperscript{150} Following this same logic, there is also a concern with the idea of nonmaterial art as a transferable commodity.\textsuperscript{151} If copyright is supposed to be about protecting the rights of a creative individual, how then can the moral value of creativity be traded on the open market\textsuperscript{152} and "[w]hy should someone pay Michael Jackson for sampling the Beatles?"\textsuperscript{153}

B. Recent Court Decisions – Grand Upright, Newton, and Bridgeport

On December 16, 1991 the first judicial opinion to address the issue of digital sampling was announced in Southern District of New York, the very district the practice was said to have begun.\textsuperscript{154} In \textit{Grand Upright Music Ltd. v. Warner Bros. Records, Inc.},\textsuperscript{155} one person owned both the copyright in the underlying composition and the copyright in the master recording, a relatively rare phenomenon.\textsuperscript{156} The copyright owner brought an infringement action against rapper Biz Markie, who had used three words and a portion of the music from the master recording.

\textsuperscript{150} See \textit{Schloss, supra} note 3, at 177 ("Once money and power have been factored out, may producers will argue, the situation [of increased artistic freedom] becomes much more relative."); see also \textit{Howell, supra} note 139, at 25-26 (explaining how publishing companies and record labels often own the copyrights to works in question).

\textsuperscript{151} See \textit{Schloss, supra} note 3, at 177 (explaining that holding music as commodities is not viable); see also \textit{Howell, supra} note 139, at 25-26 (discussing that songwriters can assign all rights to their underlying work to anyone, suggesting that someone's creative idea can be transferred, and become someone else's.

\textsuperscript{152} See \textit{Schloss, supra} note 3, at 177-78 (stating that many producers feel that copyright law is more often a matter of money and power than of creativity and artists' rights.); see also \textit{Howell, supra} note 139, at 25-26 (discussing compulsory licenses to allow for retention of a license without the express permission from the copyright owner).

\textsuperscript{153} See \textit{Schloss, supra} note 3, at 178; see also Robert Hilburn, \textit{Beatles Sue Nike Over Use of Song}, \textit{L.A. Times}, July 29, 1987, at F1 (stating that Michael Jackson owns the publishing rights to "Revolution' and other John Lennon-McCartney songs").

\textsuperscript{154} See \textit{Grand Upright}, 780 F. Supp. at 185 (holding that "it is clear that the defendants knew they were violating the plaintiff's rights as well as the rights of others"); see also Robert G. Sugarman & Joseph P. Salvo, \textit{Sampling Litigation in the Limelight}, 207 N.Y. L.J. 1, 1 (1992) (stating that no court had addressed sampling prior to the \textit{Grand Upright} decision).

\textsuperscript{155} See \textit{Grand Upright}, 780 F. Supp. at 183 (stating that the only issue seems to be who owns the "copyright to the song 'Along Again (Naturally)' and the master recording thereof made by Gilbert O'Sullivan").

\textsuperscript{156} See \textit{Johnson, supra} note 4, at 163 (stating that unique facts of the \textit{Grand Upright} decision limit its holding); see also Sugarman & Salvo, \textit{supra} note 154, at 1 (stating that "allegations against a premier rap artist may have opened yet a new chapter in the continuing saga of sampling litigation").
of the original song.157 Interestingly enough, Biz Markie's attorney tried to seek out permission for use of the song from both the artist and the artist's agent (his brother) by sending a letter requesting use of the song along with a tape copy of Biz Markie's recording; but, before the two reached an agreement, Biz Markie went ahead and released the song anyway.158 Without addressing any defense of fair use issues, the court ruled that once the plaintiff proved ownership, infringement had occurred by the simple fact that Biz Markie had sampled the song.159 The court used Biz Markie's request for permission against him, both as proof of infringement and proof of ownership.160 In response to the defendants' argument that sampling was such a widespread practice in hip hop music, the court said that attempts to excuse lawlessness by noting a common disregard for the law are always destined for abject failure.161 The issue of why permission was not granted became a large part of the defendants' cross-examination. The artist claimed that, although his song had been covered hundreds of times, every cover version was "faithfully sung" according to the spirit of his original version, a standard that Biz Markie's version did not meet.162 While Biz Markie's counsel vowed to appeal the decision, two weeks later a settlement was announced for a substantial cash payment.163

157 Grand Upright, 780 F. Supp. at 183. The three words used from the Gilbert O'Sullivan song were three words from the title, and the music used was the first eight bars of "Alone Again (Naturally)." See Sugarman & Salvo, supra note 154, at 1, 5 for a discussion of the Grand Upright decision.

158 See Grand Upright, 780 F. Supp. at 183-85 (stating that counsel for Biz Markie wrote to Terry O'Sullivan, Gilbert O'Sullivan's agent, and enclosed copy of the song that incorporated the original and sought "terms" for use of song).

159 Id. at 183. The frequently cited opening of the opinion, "[t]hou shalt not steal," gives a good indication of the frame of mind the court had.

160 Id. at 184 ("One would not agree to pay to use the material of another unless there was a valid copyright!").

161 See Grand Upright, 780 F. Supp. at 185 n.2 (stating the argument was "totally specious . . . [Its] mere statement . . . [was] its own refutation").

162 Falstrom, supra note 8, at 376 (discussing motives behind O'Sullivan's refusal to grant permission to Biz Markie's sample use); see Sugarman & Salvo, supra note 154, at 15 (stating that the licensor had a "custom and practice of permitting releases of a record containing sampled material in the absence of formalized, executed licenses or without the parties having agreed to all the principal licensing terms").

The decision failed to support its sweeping conclusions with any sound legal reasoning and further discouraged samplers from attempting to obtain clearance before sampling—as such an attempt might later be used against them as evidence of willful infringement, an unfortunate “catch-22.” Licensors typically require a submission of the piece featuring the sample before issuing a license; however, this practice requires samplers to violate copyright law by creating the piece in the first place. As the Southern District of New York handles a substantial percentage of all copyright and entertainment law cases in the country, this decision had a strong impact on digital sampling in the music industry, leaving behind an impression of a per se bar to unlicensed digital sampling. It became binding authority on all subsequent cases in the district and controlling authority on a large percentage of future sampling cases.

Soon after this litigation ended, the case of Newton v. Diamond arose. In Newton I, the artist had recorded the original performance, but then licensed all his rights in the sound recording to ECM Records for $5,000, making ECM Records the copyright owner of the sound recording. In February of 1992, the Beastie Boys paid ECM Records a one-time flat fee of $1,000 appropriates a small piece of someone else’s music without permission, it is referred to as “sampling”.

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164 Kravis, supra note 96, at 270 (stating that the absurd result of the Grand Upright Music decision “may force artists to abandon sampling altogether and to explore possible alternatives”); see also Sugarman & Salvo, supra note 154, at 6 (noting that licensors typically require submission of piece featuring sample before issuing license although this process requires samplers to violate copyright law by creating piece).

165 See Sugarman & Salvo, supra note 154, at 6 (noting that licensors typically require submission of piece featuring sample before issuing license but this process requires samplers to violate copyright law).


167 See Kravis, supra note 96, at 265 (noting that the “Southern District of New York, which decided Grand Upright Music, handles a substantial percentage of all copyright and entertainment law cases in this country”).

168 See Newton v. Diamond, 204 F. Supp. 2d 1244, 1260 (C.D. Cal. 2002) (holding that “[d]efendants’ motion for summary judgment granted and plaintiff’s motion for summary judgment denied.”), aff’d by 349 F.3d 591 (9th Cir. 2003) (affirming “the district court’s grant of summary judgment”).

169 See Newton I, 204 F. Supp. 2d at 1246 (citing First Amended Complaint (“FAC”) P 26, Ex. D); see also Latham, supra note 16, at 127.
in exchange for the rights to sample the recording. Pursuant to this license, the Beastie Boys digitally sampled and looped the opening six seconds of the sound recording, so that the loop appeared over forty times total throughout their final recording. The Beastie Boys did not obtain a license for the underlying composition, still in the possession of the artist Newton. Newton alleged that the Beastie Boys were legally obligated to obtain this separate license from him for their derivative use of his musical composition. The Beastie Boys argued that even if the sample was protectable, their use of it was merely de minimis and thus, not actionable.

Because the artist was not the owner of the sound recording and the Beastie Boys had properly licensed the sound recording, the court's decision depended on the resolution of two issues: (1) Whether the three-note sequence as embodied in the musical composition, absent the distinctive sound elements created by the artist's performance techniques, was protectable under copyright law and, (2) if the composed sequence was protectable by copyright, whether the Beastie Boys' unauthorized use of it infringed the artist's exclusive rights in the composition. The court determined that even if the three-note segment of the artist's composition had been found to be protectable, the doctrine of de minimis use would apply to make the Beastie Boys'
sampling of it non-actionable as a matter of law.\textsuperscript{177} De minimis use operates to prevent a finding of substantial similarity, which is a requirement for actionable copying.\textsuperscript{178} The court referred to prior court decisions to explain the de minimis standard: \textit{Sandoval v. New Line Cinema Corp.},\textsuperscript{179} \textit{Jean v. Bug Music, Inc.},\textsuperscript{180} and \textit{Fisher v. Dees}.\textsuperscript{181} In \textit{Sandoval}, in order to establish de minimis use, “the alleged infringer must demonstrate that the copying of the protected material is so trivial as to fall below the quantitative threshold of substantial similarity.”\textsuperscript{182} In \textit{Jean}, the court stated that substantial similarity would not be found if only a small, common phrase is copied, unless the copied portion is especially unique or qualitatively important.\textsuperscript{183} In \textit{Fisher}, the court stated that copying is de minimis “if the average audience would not recognize the misappropriation.”\textsuperscript{184}

The \textit{Newton I} court identified the practice of digital sampling as involving “fragmented literal similarity.”\textsuperscript{185} Following this analysis, the court stated that the general approach in analyzing de minimis use is to consider both quantitative and qualitative factors, so that even if the amount copied is quantitatively trivial, the threshold of substantial similarity might still be crossed if the portion used by the defendant is particularly unique to the original work.\textsuperscript{186} The court emphasized that with de minimis use

\textsuperscript{177} \textit{Id.} at 1256, 1260 (holding that even if there were copyright protection, the infringement of it would be de minimis in both the discussion and conclusion sections of the opinion).

\textsuperscript{178} \textit{See id.} at 1256-57 (discussing the doctrine of de minimis use); \textit{see also} Latham, \textit{supra} note 16, at 132 (“[D]e minimis use operates to prevent a finding of substantial similarity, a requirement for actionable copying”).

\textsuperscript{179} 147 F.3d 215 (2d Cir. 1996).

\textsuperscript{180} 2002 WL 287786 (S.D.N.Y. 2002).

\textsuperscript{181} 794 F.2d 432 (9th Cir. 1986).

\textsuperscript{182} \textit{Sandoval}, 147 F.3d at 217; \textit{Newton I}, 204 F. Supp. 2d at 1256 (discussing the threshold of substantial similarity).

\textsuperscript{183} \textit{Jean}, 2002 WL 287786 at 7 (“No ‘substantial similarity [will] be found if only a small, common phrase appears in both the accused and complaining songs... unless the reappearing phrase is especially unique or qualitatively important.”); \textit{Newton I}, 204 F. Supp. 2d at 1256-57 (quoting \textit{Jean} omitting internal quotations).

\textsuperscript{184} \textit{Fisher}, 794 F.2d at 434 (“[A] taking is considered de minimis only if it is so meager and fragmentary that the average audience would not recognize the appropriation.”); \textit{Newton I}, 204 F. Supp. 2d at 1257 (“A taking is de minimis if the average audience would not recognize the misappropriation.”).

\textsuperscript{185} \textit{Newton I}, 204 F. Supp. 2d at 1257 (citing \textit{Nimmer on Copyright} 13.03 [A][2]); \textit{see} Jarvis v. A & M Records, 827 F. Supp. 282, 289 (D.N.J. 1993) (stating a case involving digital copying “is a case of what Professor Nimmer has termed ‘fragmented literal similarity’ (citing \textit{Nimmer on Copyright} 13.03[A][2])).

\textsuperscript{186} \textit{Newton I}, 204 F. Supp. 2d at 1257 (discussing both prongs of the analysis).
analysis, what is at issue is whether the average listener might recognize the plaintiff’s musical composition as the underlying source from a performance of the composition as written (as opposed to whether the average listener might recognize the segment as taken from the sound recording). The court concluded that the artist failed to identify any factors separate from those attributable to his unique performance that rendered the three-note sequence qualitatively important, and as a matter of law, the digital sampling by the Beastie Boys was non-infringing due to its quantitatively and qualitative trivial nature.

On April 7, 2003, the artist’s appeal of the California district court’s decision was argued in the Ninth Circuit, and seven months later the majority opinion was issued, affirming the Newton I court’s grant of summary judgment to the Beastie Boys, basing its decision solely on the ground of de minimis use. The Ninth Circuit began its de minimis use analysis by showing that a relationship between de minimis use and substantial similarity centered upon the determination of actionable copying. The Ninth Circuit relied solely upon a footnote in its 1986 opinion in Fisher v. Dees to establish the standard for de minimis use, where it stated that a taking is considered de minimis only if it is so meager and fragmentary that the average audience would not recognize the appropriation. Similar to the district court’s analysis, the Ninth Circuit identified digital sampling as a problem of fragmented literal similarity and stated that substantiality is determined by considering the qualitative and

187 Id. at 1258 ("The issue is not whether someone might recognize the snippet as coming from Plaintiff’s sound recording—for which Defendants obtained a license; the question is whether someone might recognize—from a performance of the notes and notated vocalization alone—the source as the underlying musical composition.").
188 Id. at 1259 ("The court concludes that any use by Defendants was de minimis and cannot form the basis of a copyright infringement action.").
189 Newton v. Diamond, 349 F.3d 591, 592 (9th Cir. 2003), amended 388 F.3d 1189 (9th Cir. 2004), cert. denied, 545 U.S. 1114 (2005).
190 Newton III, 388 F.3d at 1192-93 ("For an unauthorized use of a copyrighted work to be actionable, the use must be significant enough to constitute infringement."); Newton II, 349 F.3d at 594 (continuing in this respect to be good law after amendment).
191 794 F.2d 432, 434 n.2 (9th Cir. 1986).
192 Newton III, 388 F.3d at 1193 (quoting Fisher, the court stated, “a taking is considered de minimis only if it is so meager and fragmentary that the average audience would not recognize its use”); Newton II, 349 F.3d at 594 (using the same language to define de minimis use).
quantitative importance of the copied segment in relation to the plaintiff's work as a whole.\textsuperscript{193}

The most recent line of litigation of digital sampling matters came in \textit{Bridgeport Music, Inc. v. Dimension Films}.\textsuperscript{194} In 1998, Dimension Films released the film “I Got the Hook Up,” whose soundtrack included the song “100 Miles and Runnin’” by the rap group Niggaz With Attitude (NWA).\textsuperscript{195} The song included a sample from “Get Off Your Ass and Jam” by George Clinton, Jr. and the Funkadelics.\textsuperscript{196} In this case, the defendant-sampler entered into a synchronization license agreement, but did not get a copyright to sample the digital recording.\textsuperscript{197} In 2001, Plaintiff Westbound Records, a distributor and producer of sound recordings, brought suit against Dimension Films, No Limit Films, and approximately 800 others.\textsuperscript{198} The plaintiffs’ expert testified that “a two-second sample from the [three-note] guitar solo was copied, the pitch was lowered, and the copied piece was ‘looped’ and extended to 16 beats.”\textsuperscript{199} The sample appeared five times in the four-and-a-half minute song, each looped sample lasting approximately seven to eight seconds.\textsuperscript{200} The defendant did not dispute that their song sampled the artist’s.\textsuperscript{201}

At trial, No Limit argued that even if a valid copyright did exist, the use of the sample from “Get Off” was de minimis and not actionable.\textsuperscript{202} The district court determined that based on a qualitative-quantitative de minimis analysis or the fragmented literal similarity test, the use of the sample in question did not

\textsuperscript{193} \textit{Newton III}, 388 F.3d at 1195 (citing 4 Nimmer on Copyright 13.03 [A][2], at 13-47, 48, n.97); \textit{Newton II}, 349 F.3d at 596 (arguing the same premise).

\textsuperscript{194} 230 F. Supp. 2d 830 (M.D. Tenn. 2002), rev’d, 383 F.3d 390 (6th Cir. 2005), amended on reh’g, 410 F.3d 792 (6th Cir. 2005).

\textsuperscript{195} \textit{Bridgeport I}, 230 F. Supp. 2d at 833 (reciting the undisputed facts for summary judgment purposes).

\textsuperscript{196} \textit{Bridgeport II}, 410 F.3d at 796 (noting these facts are undisputed).

\textsuperscript{197} See \textit{Passman}, supra note 118, at 311 (defining synchronization license).

\textsuperscript{198} \textit{Bridgeport II}, 410 F.3d at 795. Plaintiff Bridgeport Music and Southfield, both music publishers, along with Westbound Records and Nine Records, both distributors and producers of sound recordings, brought the suit. \textit{Id.}

\textsuperscript{199} \textit{Id. at 796.}

\textsuperscript{200} See \textit{id.} (noting “this sample appears in the sound recording ‘100 Miles’ in five places; specifically, at 0:49, 1:52, 2:29, 3:20 and 3:46’); see also \textit{Bridgeport I}, 230 F. Supp. 2d 830 at 841.

\textsuperscript{201} See \textit{Bridgeport II}, 410 F.3d at 796 (“There seems to be no dispute either that ‘Get Off’ was digitally sampled or that the recording ‘100 Miles’ was included on the soundtrack”).

\textsuperscript{202} See \textit{id. at 797} (asserting that the sample was legally insubstantial and thus not actionable under copyright law).
rise to a level of infringing use.\textsuperscript{203} The district court further stated that the de minimis standard was a “derivation of the substantial similarity element” and that the key question was whether the average listener would be able to discern the original source of the sampled recording from the new work created.\textsuperscript{204} After listening to both George Clinton’s and NWA’s work, the court found that no reasonable juror, even one familiar with George Clinton’s music, could have known the original source without having been told.\textsuperscript{205} Further, the court found that the small amount of actual copying, as well as the actual difference between the songs, supported a finding of no copyright infringement.\textsuperscript{206} The court concluded that because musical borrowing was an essential element of creating new works, and that “even an aficionado of George Clinton’s music might not readily ascertain that his music has been borrowed, the purposes of copyright law would not be served by punishing the borrower for his creative use”\textsuperscript{207} and granted defendant’s motion to dismiss the sound recording infringement claim.\textsuperscript{208}

The United States Court of Appeals for the Sixth Circuit unanimously reversed the district court’s decision, accepting Westbound’s claim that neither a substantial similarity nor de minimis analysis were appropriate because No Limit Films did not dispute that it digitally sampled the sound recording.\textsuperscript{209} The court based its conclusion on its interpretation of the sound recording copyright holders right as absolute, and felt that a bright-line rule would benefit other courts in creating a more

\textsuperscript{203} See id. (concluding the use was de minimis and not actionable).
\textsuperscript{204} Id. at 797; see Bridgeport I, 230 F. Supp. 2d at 840-41. The court held that the de minimis analysis was based on the substantial similarity element. It stated that a common substantial similarity test is “whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.” Id. at 840 (quoting Tuff ‘N’ Rumble Management v. Profile Records, 1997 U.S. Dist. LEXIS 4186).
\textsuperscript{205} Bridgeport II, 410 F.3d at 798 (finding reasonable user could not recognize “Get Off” sample unless informed).
\textsuperscript{206} See Bridgeport I, 230 F. Supp. 2d at 841-42 (determining that each looped segment lasted seven or eight seconds, and that at most 40 seconds of the total four and a half minute length of “Get Off” are used in the sample).
\textsuperscript{207} Id. at 842.
\textsuperscript{208} See id. at 842-43 (dismissing Westbound’s sound recording infringement claim).
\textsuperscript{209} See Bridgeport II, 410 F.3d at 798 (“The heart of Westbound’s arguments is the claim that no substantial similarity or de minimis inquiry should be undertaken at all when the defendant has not disputed that it digitally sampled a copyrighted sound recording. We agree and accordingly must reverse the grant of summary judgment.”).
efficient marketplace for copyright clearance. The court found that a “license or do not sample” standard would create easy enforcement and help promote a self-regulating market for sampling clearance licenses. Additionally, the court contended that the rule would not stifle creativity, as artists wishing to use a section of an existing recording could simply recreate the desired piece of music in the studio, instead of sampling the original, if they so desired. Positing that the sound recording owner could not exact a license fee greater than the actual cost of recreating the sounds, the court felt its holding would assist in setting the boundaries upon which the fees exacted by the sound recording owners could be set. The court concluded that no matter how small, even taking three notes of a sound recording took something of value from the copyright owner, and an inquiry into how much of, or the intent behind, the sampling was irrelevant. The court further stated that in regards to the sound recording copyright, the value was not in the notes, but in the sounds fixed in the recording, and therefore any taking directly from the sound recording was not intellectual, but rather a physical misappropriation.

The Bridgeport analysis is flawed in several respects. The court suggested that fair use analysis would only be reserved when the sampling artist has obtained a sound recording copyright and has no license to the underlying music, so that in the instance where the sampler does not have a sound recording copyright, infringement will be found. However, Section 114

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210 See id. ("[T]he courts, are best served if something approximating a bright-line test can be established."); see also id. at 801 ("[A] sound recording owner has the exclusive right to 'sample' his own recording.").

211 See id. at 801-02 (stating the need for bright-line rule).

212 See id. at 801 (noting artists’ ability to recreate sounds).

213 See id. (suggesting that copyright owners cannot set a fee greater than what it would cost the person seeking the license to just duplicate the sample in the course of making the new recording).

214 See id. at 801-02 ("[E]ven when a small part of a sound recording is sampled, the part taken is something of value.").

215 See Bridgeport II, 410 F.3d at 802 (analogizing digital sampling with physical taking); but see Rooks, supra note 65, at 261 (explaining that courts tend to use property-law principles in deciding conflicts between copyright owner and copyright user and that this is incorrect because copyright law is statutory and preempts conflicting common law principles).

216 See Bridgeport II, 410 F.3d at 801 n.10 ("[D]igital sampling of a copyrighted sound recording must typically be licensed to avoid an infringement" (quoting Latham, supra note 16, at 125 (2003))).
seems to stipulate that the sound recording copyright owner is "limited" in sampling the actual fixed copy of the work. Therefore, this section does not operate as a stronger or additional right to the copyright owner, but rather as a limitation upon the more general provisions of Section 106, which include the substantial similarity test in proving infringement. The legislative history of Section 114 also suggests that Congress intended the substantial similarity test to be included when analyzing sound recording copyright infringement.

The court's likening of digital sampling to an actual physical taking is also faulty in two respects. First, it is applying a common law concept of misappropriation to an area that has been pre-empted by congressional statute, and second, it misconstrues the nature of sampling. "Digital sampling is the creation of a copy, not the seizure of the original sound." Digital sampling leaves the original sound recording intact, so

217 See id. at 800 ("Section 114(b) provides that "the exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality." Further, the rights of sound recording copyright holders under clauses (1) and (2) of section 106 "do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording." (quoting 17 U.S.C. § 114(b) (emphasis added))).


219 See Kim, supra note 218, at 124 (criticizing the court's interpretation of the statutory language of Section 114 as well as the legislative history); see also Recent Case, supra note 218, at 1359-60 (stating that the Sixth Circuit did not consider legislative history of Section 114 in their analysis).

220 See Bridgeport II, 410 F.3d at 802 (proposing sampling is a physical taking and not an intellectual one).

221 See Rooks, supra note 65, at 259 (referring to copyright owners' attempts to persuade courts to apply common-law principles of property rights in copyright disputes); see generally Rosette, supra note 72 (discussing federal common law and its place in copyright law).

222 See Brief of Amici Curiae Brennan Center for Justice at NYU School of Law and the Electronic Frontier Foundation in Support of Appellee at 10, Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390 (6th Cir. 2004) (No. 02-6521); see also Kim, supra note 219, at 125 (discussing how the court misconstrued the nature of sampling in their analysis).

categorizing digital sampling as a physical taking does not make sense, or allow for any kind of argument that sound recordings should deserve greater copyright protection.\footnote{See id. at 10 (proposing that a distinction between physical and intellectual taking is not meaningful and does not distinguish copying of sound recordings from other types of copying); see also Kim, supra note 218, at 125 (discussing the misunderstanding of the court as to the nature of digital samples).}

Lastly, the court is mistaken in believing that market equilibrium can be reached through this decision.\footnote{See Bridgeport II, 410 F.3d at 801 (concluding recording industry and recording artists possess ability to create meaningful guidelines for licensing).} The court believed its holding would assist in setting the boundaries upon which the fees exacted by the sound recording owners could be set, as it assumed the sound recording owner could not exact a license fee greater than the actual cost of recreating the sounds.\footnote{Id. (suggesting that copyright owners cannot set a fee greater than what it would cost the person seeking the license to just duplicate the sample in the course of making the new recording).} Drawing this conclusion, the court misses the point of sampling completely, and the value to the sampler of the “unique nature of the original recorded sounds and the creative choices that were made in the actual fixation of the composition.”\footnote{See Achenbach, supra note 50, at 199 (critiquing Sixth Circuit’s failure to acknowledge unequal bargaining power); see also Kim, supra note 218, at 125-26 (critiquing Sixth Circuit’s belief that the per se infringement holding will lead to market equilibrium).} It is the actual embodied performance that contains the value, not the configuration of a particular combination of notes.\footnote{Kim, supra note 218, at 126 (remarking on the court’s failure to realize that an artist often seeks to harness the uniqueness of the sound he samples, not just the compilation of sound).} Further, the assumption that the court’s holding will somehow facilitate the creation of a sampling license market, without something more, also ignores the reality of the current sampling market’s failure.\footnote{Newton, 349 F.3d 591, 595 (9th Cir. 2003) (noting the importance of original performance); see also Kim, supra note 218, at 126 (discussing the value in the original work to the sampler).} The copyright owner is in a unique position of power, and will be able to set a fee much higher than the cost of recreating the sounds in the studio, because as suggested above, the value to the sampler of the original recording is much greater.\footnote{See Achenbach, supra note 50, at 200 (claiming that the bargaining process for copyrights places a potentially deterring financial burden on the sampler); Kim, supra note 218, at 125-26 (remarking on the court’s failure to realize that an artist often seeks to harness the uniqueness of the sound he samples, not just the compilation of sound).} This all assumes that the copyright owner is even
willing to license the copyright in the first place, which is not a guarantee.\footnote{See Achenbach, supra note 50, at 200 (criticizing the court’s holding requiring artists to seek permission from both copyright holders as unduly prohibitive); Kim, supra note 218, at 126-27 (noting that some copyright holders will be unwilling to allow their recordings to be sampled).}

\section*{IV. LOOKING TO THE FUTURE}

\subsection*{A. Case Recap}

Before considering possible solutions to the digital sampling issue, it helps to summarize what the major digital sampling cases stand for, based on their individual (and unique) set of facts. In \textit{Grand Upright}, one person owned both the copyright in the underlying composition and the copyright in the master recording, permission was sought by Biz Markie and not received, and the final court ruling was in favor of the original artist.\footnote{See \textit{Grand Upright}, 780 F. Supp. at 183-84; see also Johnson, supra note 4, at 163 (stating that the unique facts of the \textit{Grand Upright} decision limit its holding); Sugarman & Salvo, supra note 154, at 1 (restating the facts of the case and the grounds upon which the court based its decisions).} In \textit{Newton}, the Beastie Boys paid for the rights to sample the sound recording but did not obtain a license for the underlying musical composition from the original recording artist, but still won the case under the substantial similarity and de minimis tests.\footnote{See \textit{Newton II}, 349 F.3d at 596-98.} In \textit{Bridgeport}, the defendant-sampler had entered into a license agreement for the musical composition copyright but did not get a copyright to sample the digital sound recording, and eventually lost against the company owning the sound recording copyright under the theory that any sampling of a sound recording is per se infringement.\footnote{\textit{Bridgeport}, 410 F.3d 792, 801 (stating the artists must get a license or simply not sample the piece).}
B. New Legislation - Creating a Subgenre of Fair Use in the Digital Sampling Context

Copyright itself is a regulatory concept, and the real subject of the copyright is not the work, but the use of the work. Therefore, common law principles of property rights have no place in copyright disputes. It should follow from this that there is no reason for the application of the fair use doctrine to depend on whether the copyright infringement issue is one of a lack of sound recording copyright or lack of copyright in underlying musical composition. If a sample is altered to the point that the underlying work is no longer recognizable, then the sampled artist is not injured. Congress should thus “embrace a subgenre of fair use analysis that would allow for determining to what extent a particular sampling constitutes infringement.” Under such a provision, the court would only have to determine whether a work contained a sample. If indeed the work contained a sample, the court would then consider the purpose and character of the use, the amount and substantiality of the portion used, and the effect on the potential markets. A major flaw with such a system is that it could lead to potential over-saturation in the marketplace of certain samples if prospective samplers were able to sample the same sources at the same time. However, this concern fails to consider the fact that artists will doubtfully want to be releasing songs with the same

235 Patterson, supra note 74, at 29-30 (discussing the separation principle); see Int’l News Serv. v. Associated Press, 248 U.S. 215, 242 (1918) (characterizing the news reports as quasi-property).

236 Rooks, supra note 65, at 259 (referring to copyright owners’ attempts to persuade courts to apply common-law principles of property rights in copyright disputes); see generally Rosette, supra note 71 (discussing federal common law and its place in copyright law).

237 See generally Szymanski, supra note 22 at 312 (discussing the fair use defense generally as a judicial mechanism for immunizing defendants from copyright infringement when its use is deemed socially desirable); Patterson, supra note 74, at 29-30 (explaining, generally, the separation principle).


239 Bergman, supra note 8, at 648 (suggesting the factors that a court should consider when determining if a piece has been sampled).

240 Falstrom, supra note 8, at 380; see Bergman, supra note 8, at 648 (discussing how fair use could be applied to the digital sampling context).

241 See Szymanski, supra note 22, at 321-22; see also Bergman, supra note 8, at 648 (discussing the possible drawbacks of allowing fair use in all digital sampling contexts).
samples as other artists already have (as the public would likely not want to listen to and thus would not pay to hear such songs), and thus may be an unnecessary concern.\textsuperscript{242} Another concern with such a subgenre of fair use analysis is what happens when the sample is not deemed a fair use. At this point, the sampling artist would be back at square one and would have to only hope that the sampled artist would agree to some kind of licensing arrangement, and that such an arrangement would be fair and set at a reasonable rate.\textsuperscript{243} This brings us back to the issues of bargaining power, and the ability for the sampling artist to contact and communicate with the appropriate copyright owner in order to obtain permission to use the sample, a practice that has been proven difficult as demonstrated by the cases mentioned above.\textsuperscript{244}

C. Compulsory Licensing System

Another possible answer to the digital sampling inquiry is creating a compulsory licensing system (alongside the pre-existing system for cover songs).\textsuperscript{245} Section 115 of the Copyright Act is the mechanical licensing provision already in place that allows for the creation of cover songs.\textsuperscript{246} The compulsory licensing scheme ensures that once the copyright owner licenses out his or her work to be covered by another, the copyright owner is compelled to license that work to others.\textsuperscript{247} The activities

\textsuperscript{242} See generally Szymanski, supra note 22, at 321-22 (describing how sampling may over-saturate the market with a particular artist's music); Johnson, supra note 4, at 135-38 (describing the unique method by which artists use "samples").

\textsuperscript{243} See Achenbach, supra note 50, at 199 (explaining how the court's decision which requires artists to obtain permission from all copyright holders could lead to exploitive or unequal bargaining power and refusal to license by any one of the copyright holders would proscribe the artist from sampling the work); Shultz, supra note 138, at 335 (noting generally that artists who have not yet experienced financial success may not be able to afford the restrictive licensing fees).

\textsuperscript{244} See e.g., Grand Upright, 780 F. Supp. at 183-85 (stating the defendant's inability to obtain a license to use the copyrighted material); Achenbach, supra note 50 at 199 (noting generally the obstacles associated with obtaining permission to use copyrighted material).

\textsuperscript{245} See Achenbach, supra note 50, at 206 (suggesting that the Copyright Act could be altered to encompass sampling); Bergman, supra note 8, at 649 (noting that the most popularly proposed solution for the sampling dilemma is the statutory licensing scheme).

\textsuperscript{246} 17 U.S.C. § 115 (2007); see Falstrom, supra note 8, at 381 n.94 (observing that cover songs are covered by 17 U.S.C. § 115).

\textsuperscript{247} 17 U.S.C. § 115 (2007) (stating that an artist can obtain a compulsory license for any song as long as he does not change the "basic melody or fundamental character" of the
involved in covering a song that are "protected through this section, share a structural and methodological similarity to the process of sampling." To cover a song, all an artist has to do is go into the studio with his or her own musicians, and play from another artist’s original written composition, eventually making a separate recorded piece, with the idea that that new artist will attempt to emulate the sound of the original recording as closely as possible. Sampling is much the same, except that it is technology that enables the sampling artist to reinterpret the work, without having to "filter his reinterpretation" through hired studio musicians. Because the fundamental principles behind the compulsory license of Section 115 already in affect are similarly applicable to the area of digital sampling, it is clear that some kind of modification to this statute might be just the legislation needed to assist artists in the digital sampling area. The compulsory licensing scheme under Section 115 resulted in “an outpouring of recorded music, with the public being given lower prices, improved quality and a greater choice," suggesting that newer forms of creating music, such as sampling, would also benefit from uniform rates and schemes such as those under Section 115, creating more compositions for the public in the process.

There are drawbacks in creating a compulsory licensing scheme for samples as well, the most obvious being that qualitative value of one sample compared to another vary drastically, and any kind of multi-tiered payment structure could result in seemingly arbitrary rates being set, perhaps no

original); see Achenbach, supra note 50, at 208 (commenting on the benefits of a compulsory licensing system).

248 See Achenbach, supra note 50, at 210 (discussing the mechanical licensing provision and how it relates in the digital sampling context).

249 See Achenbach, supra note 50, at 210 (discussing the practice of covering songs); see Falstrom, supra note 8, at 381 n.94 (explaining what it means to "cover" a song).

250 See Achenbach, supra note 50, at 211 (comparing covering a song to digital sampling); Kim supra note 230, at 103 (defining digital sampling).

251 See 17 U.S.C. § 115 (2007) (delineating the copyright rules for "cover" songs); see also Achenbach, supra note 50, at 212 (explaining how, given the similarity between sampling and recording, section 115 of the Copyright act might be the most effective way of resolving the current conflict).

252 See Bergman, supra note 8, at 649-50 (quoting Lawrence Lessig, Keynote Speech at the Hastings Music Law Summit West (Feb. 25, 2004)).
different than the ones currently set by the music industry. Two possible solutions to this would be to set either a flat fee, or provide for a particular cost-per-second. Any sort of flat fee provision would also have to provide for a maximum length of sample to prevent inequities that could otherwise occur when very large and very small samples have the same price. Another issue with a compulsory licensing scheme is that it does not take into account the importance of the sampled artist and success of the sampled song in determining the true market value of the end work, something only private negotiations can truly decipher.

D. Combination Fair Use and Compulsory Licensing Scheme

Given the concerns with both the fair use analysis and compulsory licensing of samplings, what the courts, Congress, and the music industry should do is apply a combination compulsory licensing and fair use scheme in the context of digital sampling. The compulsory licensing scheme is the most obvious answer to the legal issues involved in digital sampling, but the major unknown is how the fees should be set so that sampled artists are compensated fairly and they retain some sort of control in assuring that their music is not over-saturated in the market through other artist's works. An artist who wishes to

253 See Szymanski, supra note 22, at 295 (noting the possible drawbacks to a compulsory licensing scheme for samples); see also Bergman, supra note 8, at 650 (discussing the problem with setting rates in a compulsory licensing system).

254 See Achenbach, supra note 50, at 218 (stating that a flat rate should be charged for digital samples, and that “limiting the duration of a sample would prevent any gross inconsistencies in the cost per second of a particular sample”); see also Lucille M. Ponte, Article, 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, 555 (2006) (noting that under the modified fair use system a provision limiting the length of the digital sample could alleviate concerns about excessive copying).

255 See Szymanski, supra note 22, at 295-96 (stating that copyright law itself does not distinguish between copying major and minor talents and in turn compulsory licensing would not as well); see also Bergman, supra note 8, at 650 (discussing the possible drawbacks to a compulsory licensing scheme in the digital sampling context).

256 See Peter K. Yu, Article, P2P and the Future of Private Copying, 76 U. COLO. L. REV. 653, 711 (2005) (noting that copyright owners and critics fear that a compulsory licensing scheme would convert private copying into a serious threat to copyright revenue and would limit the ability of copyright owners to price discriminate and otherwise price their own works); see also Glynn S. Lunney, Jr., The Death of Copyright: Digital Technology, Private Copying and The Digital Millennium Copyright Act, 87 VA. L. REV. 813, 857-58 (2001) (stating that copyright owners worry that compulsory licensing levies
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sample a work should have to pay a small fee (on a cost-per-second basis) to obtain “temporary” rights to create an original work that includes the sample. The completed piece (inclusive of the sample) would then be submitted to the proper authority to determine whether further fees should be exacted, based on a “fair use fee” analysis, keeping in mind that this analysis is not for determining whether or not the sampling artist can use the sample, but how much it will cost him or her to use the sample.\(^{257}\) Specifically, the two factors that should be considered are the “amount and substantiality of the portion used” and the “effect on the market or value of the copyrighted work.”\(^{258}\)

As to the amount and substantiality of the portion used, although the sampled artist would have paid a small, per-second fee for the initial “temporary” use of the sample, once the recording has been worked into the final, new composition, a lot of changes could have been made which require further assessment. This analysis concerns the amount and substantiality of the portion used in relation to the copyrighted work as a whole.\(^{259}\) Because of this, the factors that would need to be considered in determining the final fee required would include the length of the sample actually used in the new work, the number of times it is repeated, or looped, and its prominence in the song (whether it is in the foreground or background).\(^{260}\) A

\(^{257}\) See Ponte, supra note 254, at 550-51 (noting that accounting for what percentage of a work has been sampled is crucial to a fair royalty system and that an automated system, as opposed to a system in which samples are evaluated on a case by case basis, would not be advisable); see also John Lindenbaum, Music Sampling and Copyright Law 94 (Apr. 8, 1999) (undergraduate thesis, Princeton University Center for Arts and Cultural Policy Studies) available at http://www.princeton.edu/~artspol/Studentpap/undergrad%20thesis1%20JLind.pdf (advocating for the creation of an independent clearinghouse to determine the percentages of ownership in all songs which contain samples).

\(^{258}\) See generally 17 U.S.C. § 107 (laying out the actual fair use factors from which this proposed legislation is based upon); Percifull, supra note 78, at 1279-81 (describing how the fair use factors from 17 U.S.C. § 107 are applied on the context of digital sampling).

\(^{259}\) See generally 17 U.S.C. § 107 (stating the actual fair use factors); Percifull, supra note 78, at 1279-81 (discussing the use of the fair use factors).

\(^{260}\) See Note, A New Spin On Music Sampling: A Case For Fair Pay, 105 HARV. L. REV. 726, 741 (1992) (reasoning that samples used in the foreground to form a hook or chorus must be distinguished from a sample used only in the background of a new song); Lindenbaum, supra note 257, at 97-98 (noting that important factors to be considered in evaluating the royalties owed to an artist whose work has been sampled include the importance of the sample in the new work and the length of the sample); Ponte, supra note 254, at 530, 537-38 (stating that the exploitive nature of looping samples makes the
new composition whose main chorus or title is based on the sample (like the sample used in *Grand Upright*) would be required to pay a fee greater than an artist who altered the sample greatly and used it only as a background sound effect (as was the case in *Bridgeport*).  

Secondly, and perhaps most importantly, would be the analysis of the effect on the market and the value of the copyrighted work from which the sample was taken. Under the traditional fair use doctrine, the inquiry made under this factor was “whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for or value of the plaintiff’s present work.” The court’s task has been to balance the interests of the plaintiff and defendant to determine whether the use of the protected material was fair. Again, in the context of a new compulsory licensing provision, this analysis would be done to determine the “fair use fee” assessed to the sampling artist, and not to determine whether or not there has been infringement. Under the “effect on the market” analysis, if the sampling artist has completely altered the sample, to the point that it is

original sample both qualitatively and quantitatively significant in the new song and that looping must be considered, because when it is not “an artist may record an entire compact disc worth of de minimis samples and then loop the de minimis samples so that they become quantitatively paramount in the infringed work”).

261 See *A New Spin*, supra note 260, at 741 (stating that a sample that forms the basis of a melody or a chorus that is used repetitively in a new song will generate more royalties for the original artist than a sample used only once for minor background support); *Lindenbaum*, supra note 257, at 98 (noting that sampling several notes to formulate the entire melody of a song would entitle the original artist to more royalties than sampling of a single noise meshed among numerous other sounds).

262 See Nicholas B. Lewis, Note, *Shades of Grey: Can The Copyright Fair Use Defense Adapt to New Re-Contextualized Forms of Music and Art?*, 55 AM. U.L. REV. 267, 273 (2005) (stating that Justice Story, in crafting the fair use doctrine, suggested that the degree in which the use of a sample may prejudice the sale, or diminish the profits, or supersede the objects, of the original work may affect a court’s judgment as to whether the original work was infringed or not); see also Ponte, supra note 254, at 548 (noting that an alternative method of determining fees could be based upon a percentage of sample use in relation to the percentage of materials sampled nationally).


264 See generally 17 U.S.C. § 107 (stating the actual fair use factors); *Percifull*, supra note 78, at 1279-82 (explaining how the fair use factors from 17 U.S.C. § 107 are applied on the context of digital sampling).

265 See Ponte, supra note 254, at 550-51 (highlighting the importance of accounting for what percentage of a recording has been sampled is crucial to a fair royalty system); see also *Lindenbaum*, supra note 257, at 98 (taking the position that an independent clearinghouse with the authority to determine the percentages of ownership in all songs which contain samples would promote consistency).
unrecognizable, no further analysis would be required and no further fee necessary (beyond that assessed under the “amount and substantiality” factor). The amount of times a particular artist’s work had been sampled would be considered under this analysis as well. This would address the concerns of over-saturation and consequential depreciation of the value of the original work. The more times a particular song had been sampled, the more it would cost-per-second to sample from that song for every later artist wishing to sample. The stature of the sampling artist would also be considered, by taking into account the possible resulting popularity of the new work containing the sample based on such factors of the sampling artists’ present exposure on the sales charts and by radio airplay. While it might seem unfair to charge a more popular artist more per second for the same sample, release of the more popular artist’s works would be more likely to bring greater exposure to the sampled work, and more likely to reap larger benefits from using the sample, and should have to pay incrementally more based on their established reputation and resources.

After this analysis is completed, and a final fee for use of the sample is assessed, the sampling artist would be required to pay that final fee in order to obtain the official license to use the sample in the song created. This proposed licensing scheme would require setting up the “proper authority” to carry it out. The best place for this type of regulation to begin would be within the music industry, as they know better than any other authority how their industry should be run. Taking away the “discretionary” nature of permission to sample might make evaluating fees for samples easier. Determining the exact initial cost-per-second and then how much each of those factors is worth

266 See Lewis, supra note 262, at 275 (noting that the degree to which a sample has been “transformed” affects a Court’s analysis of whether the use of such a sample constitutes infringement); see also Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (stating that “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works,” and that “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use”).

267 But see Lindenbaum, supra note 257, at 96-97 (noting that a central clearinghouse agency designed to control digital sampling should not be left in the hands of individuals from the music industry alone in order to avoid potential corruption).
in the overall final fee assessment is something best left to those who work in the industry.\textsuperscript{268}

\section*{CONCLUSION}

Copyright protection, as stated in the Constitution, was created to promote artistic creativity and innovation that will be beneficial to the public.\textsuperscript{269} Any private benefit that creators of musical works receive is incidental to the purpose of maximizing public benefit from the arts. The reason that copyright owners are given rights at all in their sound recordings is so that they are encouraged to create new works.\textsuperscript{270} It seems highly unlikely that an artist will decide not to create new music because a few seconds of their sound recording may be copied and altered into a new altered sound, and incorporated into a new work very different from the original.

While the creation of a fuller marketplace for licenses ideally may have a positive effect on new forms of music containing samples, such a marketplace does not currently exist. Currently, the ability of transformative, sample-based music to be released to the public resides in the hands of copyright holders, often not the creators of the work themselves.\textsuperscript{271} Without any kind of compulsory licensing scheme, these copyright holders are given enormous bargaining power, power that is often abused, resulting in certain creative works never reaching the public.\textsuperscript{272}

\textsuperscript{268} \textit{But see} Lindenbaum, supra note 257, at 96-97 (arguing that a central clearinghouse agency should not be left in the hands of the music industry in order to avoid corruption).

\textsuperscript{269} U.S. CONST. art. I, § 8 ("The Congress shall have power... to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.").

\textsuperscript{270} \textit{See} Lewis, supra note 262, at 268 (finding that part of the goal of copyright protection is to provide incentives for authors to create new works of art, literature, music); \textit{see also} A New Spin, supra note 260, at 731 (noting that the rationale underlying copyright protection reflects efficiency because "the overall output of creative works would decrease without some measure of protection for creative works").

\textsuperscript{271} \textit{See} Matthew Fagin, Frank Pasquale & Kim Weatherall, Article, Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution, 8 B.U. J. SCI. \& TECH. L. 451, 467 (2002) (stating that record companies own copyright in a vast majority of sound recordings); Percifull, supra at note 78, at 1273 (noting that "in many situations, the record company will be the sole owner of the copyright interest").

\textsuperscript{272} \textit{See} Niva Elkin-Koren, Article, Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace, 14 CARDOZO ARTS \& ENT L.J. 215, 294 (1996) (noting that the inability of users to use and act upon copyrighted works, along with their absolute dependency on licensing by the copyright owner is dangerous because the copyright owner has the power to deny the license completely); \textit{but see} Percifull, supra
Because any copyright legislation should take into account both the artists' interest as well as that of the public, an effective result can be reached through the use of a multi-tiered licensing scheme that takes into account factors created under the fair use doctrine already in place. The current lack of compulsory licensing in the sampling context reduces the pool of sounds available to create new, original works, ultimately working against the purpose of the Copyright Act, and in turn, the Constitution.

note 78, at 1273 n.86 (stating that a few record companies control the vast majority of the music industry, and as such, sampling infringement cases will seldom be brought either because a record company sampled from its own recordings or because the person who claims the infringement is unable to bring suit because he has sampled before and therefore is barred by the clean hands doctrine).