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A. Dean Johnson
1@1.com

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A. Dean Johnson

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MUSIC COPYRIGHTS: THE NEED FOR AN APPROPRIATE FAIR USE ANALYSIS IN DIGITAL SAMPLING INFRINGEMENT SUITS

A. DEAN JOHNSON*

I. INTRODUCTION

DIGITAL sampling has become both the music industry's boon and bane. Its introduction into the consumer market was hailed as a great technological advance for the music industry,[1] as well as an insidious conspiracy against musicians.[2] Copyright owners and studio musicians assert that digital sampling denies them just compensation for the use of their work.[3] Artists who use samples, however, believe this fertile source of musical inspiration will become prohibitively expensive if they must license each use of previously recorded music.[4] In

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* This Comment was awarded second prize in the 1993 Florida State University Nathan Burkan Memorial Competition sponsored by the American Society of Composers, Authors and Publishers. The author, who received his bachelor's degree in Music Theory and Composition with a minor in Music Business from Belmont College in 1991, and is currently a juris doctorate candidate at Florida State University College of Law, has attempted to present a balanced analysis of this problem from both an artistic and a legal standpoint.

1. *See* Jon Pareles, *Digital Technology Changing Music*, N.Y. TIMES, Oct. 16, 1986, at C23 ("Artistically, sampling offers musicians unparalleled flexibility. It puts virtually any sound—live or recorded, natural or synthetic—at a performer's finger tips, allowing musicians to reshape borrowed sound in new contexts.").

2. *See* David Goldberg & Robert J. Bernstein, *Reflections on Sampling*, N.Y.L.J., Jan. 15, 1993, at 3 ("Sampling has been called everything from an 'art form' to 'stealing' and has provoked much litigation since its advent . . . ." (citations omitted)); Pareles, *supra* note 1, at C23 ("Taking one note off a cassette and mucking about with it is one thing. But if you have a session musician in and sample him and don't hire him for the next track, that's a very bad thing." (quoting Trevor Horn, producer)); Chuck Philips, *Songwriter Wins Large Settlement in Rap Suit*, L.A. TIMES, Jan. 1, 1992, at F1 (Sampled songwriter's attorney stated "[s]ampling is a euphemism that was developed by the music industry to mask what is obviously thievery." Another sampled musician added that "[a]nybody who can honestly say sampling is some sort of creativity has never done anything creative."); *Send in the Clones: Digital Sampling a Sound Revelation*, CHI. TRIB., Oct. 10, 1986, at 86 [hereinafter *Send in the Clones*]; Terri Thompson et al., *Music is Alive with the Sound of High Tech*, BUS. WK., Oct. 26, 1987, at 114.

3. *See* Robert G. Sugarman & Joseph P. Salvo, *Sampling Gives Law A New Mix; Whose Rights?*, NAT'L L.J., Nov. 11, 1991, at 21.

4. *See* Richard Harrington, *The Groove Robbers' Judgement; Order on 'Sampling' Songs May Be Rap Landmark*, WASH. POST, Dec. 25, 1991, at D1, D7 ("[A]rtists often ask ridiculous prices for permission to sample their works. Fees can range from $500 to $50,000, and some albums have been delayed, and tracks removed, when clearances proved either too

effect, the music industry is fighting against itself as it tries to legitimize this recent musical innovation.

Many artists use sampling in composition, production, and performance. The digital sampler, a powerful musical tool, enables musicians to record, or "sample," any sound and play it back at the touch of a button. Companies that market digital samplers, including Fairlight, E-mu, Ensoniq, Casio, and Roland, make available to their customers a library of studio-recorded samples.[5] Typical samples include traditional instruments, such as grand pianos, pipe organs, violins, cellos, wind and percussion instruments, as well as choirs, screams, and other simple vocal sounds. Non-traditional samples include industrial sounds, such as the starting of an automobile or a metal pipe dragging across concrete, and naturally occurring sounds, such as birds, falling rain, or the barking of a dog. Many recording artists, including Peter Gabriel, Kate Bush, Art of Noise, Fishbone, Kraftwerk, and Depeche Mode, use digital samples like these to add a rich texture to their music.[6]

The use of these types of sampled sounds, however, did not spark the debate that now plagues the recording industry. Rather, the controversy arose when recording artists began to use samples of previously released songs in their own creations. For instance, rap music largely depends upon sampling technology.[7] Indeed, this genre has its foundation in the reuse and rearrangement of older songs.[8] For exam-

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expensive or were simply not negotiable."); *see also* Sugarman & Salvo, *supra* note 3, at 22 (the average fee for the use of a master recording ranges between $1,500 and $3,000).

That sampling may become too expensive for the recording artist may actually have some positive implications. *See* Sheila Rule, *Record Companies Are Challenging 'Sampling' in Rap*, N.Y. TIMES, Apr. 21, 1992, at C13.

> The high cost of sampling, combined with a desire to keep rap fresh and innovative, has also led some artists to use more original music and real musical instruments; L.L. Cool J has toured with a band, and Hammer made his most recent album, "Too Legit to Quit," entirely without samples.

Id. at C18.

5. *See* E. Scott Johnson, Note, *Protecting Distinctive Sounds: The Challenge of Digital Sampling*, 2 J.L. & TECH. 273, 275 (1987); Tom Moon, *Music Technology Opens a Pandora's Box[:] Digital Sampling Creates New Frontiers for Musicians—and Potential Chaos for Copyrights*, MIAMI HERALD, Jan. 10, 1988, at 1K.

6. For representative recordings, listen to PETER GABRIEL, SECURITY (Geffen Records 1982); KATE BUSH, THE DREAMING (EMI America Records 1982); ART OF NOISE, IN-NO-SENSE? NONSENSE (Chrysalis Records, Inc. 1987); FISHBONE, THE REALITY OF MY SURROUNDINGS (Columbia Records 1991); KRAFTWERK, ELECTRIC CAFE (Warner Brothers Records 1986); and DEPECHE MODE, BLACK CELEBRATION (Sire Records 1986).

7. *See* Rule, *supra* note 4, at C13.

8. *See* Elizabeth Drake & John Swenson, *What Future for Musical Sampling?*, PHILA. INQUIRER, May 24, 1987, at H11.

ple, in "Rapper's Delight,"[9] the song that signaled the beginning of the rap era, the SugarHill Gang used the instrumental music from Chic's hit "Good Times"[10] as the song's underlying theme.[11]

The reuse of previously recorded music has prompted various legal developments in the music industry. When bodyguard-turned-rapper Tone-Loc's surprise hit song "Wild Thing"[12] used the opening drum fill and bits of music from Van Halen's "Jamie's Crying,"[13] his record label negotiated a license for that use.[14] Nonetheless, some recording artists, such as De la Soul, the Beastie Boys, and Biz Markie, have sampled portions of other artists' recordings without authorization from the original copyright owner and have altered the samples in some fashion,[15] used the samples as sound bites, or simply "looped"[16] the samples, thereby adding to their new creation.[17] This practice of verbatim copying directly challenges the copyright law.

Typically, artists only sample very small portions of vocals and/or music. Musicians usually pick samples for their quintessence. Because such samples usually constitute fairly brief portions of the original songs, most musicians do not acknowledge the source of the sample or seek consent from the original copyright owners under the auspices of the *de minimis* or fair use doctrines.[18] Some rap artists, such as Hammer and Vanilla Ice, have sampled much longer portions of music and have avoided liability by sharing writing credits with the au-

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9. SUGARHILL GANG, *Rapper's Delight, re-recorded on* RAP HALL OF FAME (K-Tel Int'l (USA) 1992).

10. CHIC, *Good Times, on* DANCE, DANCE, DANCE - THE BEST OF CHIC (Atlantic Records 1979).

11. Harrington, *supra* note 4, at D7.

12. TONE-LOC, *Wild Thing, on* LOCED AFTER DARK (Delicious Vinyl 1988).

13. VAN HALEN, *Jamie's Crying, on* VAN HALEN (Warner Bros. Records 1978).

14. *See* John Horn, *Borrowed Performances May Get Rappers in Trouble*, DET. FREE PRESS, June 7, 1989, at 1B. Tone-Loc apparently paid a flat fee of several hundred dollars to use the samples. *Id.*

15. For an example of an altered sample and its possible legal repercussions, see Bruce L. Flanders, *Barbarians at the Gate: New Technologies for Handling Information Pose a Crisis Over Intellectual Property*, 22 AM. LIBR. 668 (July-Aug. 1991) (De la Soul sampled the Turtles' "You Showed Me," THE TURTLES, *You Showed Me, re-recorded on*, THE BEST OF THE TURTLES (Rhino Records 1984), for their song "Transmitting Live From Mars," DE LA SOUL, *Transmitting Live From Mars, on* 3 FEET HIGH AND RISING (Tommy Boy Records 1989), and were sued for $ 1.7-million).

16. Looping is achieved when the sound or sample returns to its beginning upon reaching its end.

17. For an example of a looped sample and its legal repercussions, see Grand Upright Music, Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991); *see also infra* notes 169-90 and accompanying text.

18. *See* Horn, *supra* note 14, at 1B; Harrington, *supra* note 4, at D7.

thors of the sampled compositions.[19] By recycling previously recorded material, these artists have created a new and enduring form of music. Although many have characterized rap as a temporary musical trend, similar to disco or punk rock, its apparent staying power has surprised critics and brought to the forefront various legal issues associated with digital sampling technology.

This Comment describes the evolution of digital sampling and its compatibility with traditional fair use analysis.[20] It argues that the fair use doctrine should remain a viable defense to claims that sampling constitutes copyright infringement. In addition, this Comment demonstrates that copyright law, particularly the fair use doctrine, provides an adequate means by which to address the legal disputes that have emerged as a result of digital sampling. Specifically, the fair use doctrine permits courts to consider factors not enumerated by statute when addressing infringement issues. This Comment evaluates judicial application of the statutory fair use factors, as well as several optional factors specific to digital sampling, in a digital sampling context. Finally, the Comment examines recent case law regarding digital sampling and its impact upon the music industry.

II. THE EVOLUTION OF DIGITAL SAMPLING

Essentially, a digital sampling keyboard, or digital sampler, is a highly sophisticated tape recorder capable of reproducing any sound or an aggregate of sounds at any desired pitch. Musicians can enter sounds into the sampler from either a microphone or a direct line, such as a tape or compact disc player. The sampler stores the waveform produced by the sound as a stream of binary numbers, allowing for perfect reproduction.[21] The data entered into the sampler may be freely manipulated. For instance, the sampler can alter each sound, or portions of a sound, by playing it backwards, truncating or shortening it, repeating it, splicing it together with another sound, or a combination of any of these methods. In addition, the sampler can transpose one sampled note across the entire keyboard to replicate the original range of the sampled instrument. The sampler's ability to alter and manipulate recorded sounds gives it a significant advantage

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19. *See* Guy Garcia, *Play It Again, Sampler; A Revolutionary Device Turns Pop on its Ear by Enabling Musicians to Beg, Borrow and Steal Sounds From All Over*, TIME, June 3, 1991, at 69.

20. For an explanation of the fair use doctrine, see *infra* notes 52-61 and accompanying text; *see also infra* notes 62-143 and accompanying text.

21. For a thorough explanation of digital recording methods, see STANLEY R. ALTEN, AUDIO IN MEDIA 185-90 (2d ed. 1986).

over a synthesizer, which merely electronically emulates traditional instruments.

Using tape recordings to compose a piece of music is not a new phenomenon. Throughout modern history, each new musical era has paid homage to its predecessors by "quoting" the previous era's musical stylings in its own music.[22] For example, in the early 1940s, "musique concrète"[23] composers, such as Pierre Schaeffer and Pierre Henry, cut, spliced, and manipulated pre-recorded tapes in creating their music.[24] In the early 1960s, the Mellotron, the precursor to the modern string synthesizer, entered the music scene.[25] This instrument used tape loops of pre-recorded sounds to create new sounds.[26] The digital sampler differs from the Mellotron only in the medium it uses to store the pre-recorded sound. Instead of saving the sound as complex magnetic fluctuations on standard audio tape, as is done in analog recordings,[27] the sampler stores the sound as a series of numbers in a computer. This eliminates any possibility of sound deterioration due to physical erosion of, or any actual damage to, the tape.

Anytime new technology emerges that displaces studio musicians or drastically reduces the amount of time spent recording in the studio, the music industry becomes alarmed.[28] The introduction of the synthesizer caused just such an effect, as did the advent of affordable digital sampling.[29] The combination of a sampler and a multi-track tape recorder[30] essentially grants musicians access to an entire orches-

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22. Musical "quotation" is the analog corollary to digital sampling. A musical "quote" is the taking of a distinctive and recognizable portion of another era's or composer's music and using it in a new context. *See* Garcia, *supra* note 19, at 69 ("The arts have a long tradition of allusion and quotation, often with resonant effects.").

23. "Musique concrète" is a musical style developed by French electrical engineers and radio broadcasters that combined all kinds of incidental musical, nonmusical, and unmusical sounds and noises into a sonic collage. *See* THE NEW HARVARD DICTIONARY OF MUSIC 281 (Don Michael Randel ed., rev. ed. 2d ed. 1986); SCHIRMER PRONOUNCING POCKET MANUAL OF MUSICAL TERMS 147 (Theodore Baker ed., 1978).

24. Bernard Krause, *Electronic Music*, *in* MAKING MUSIC: THE GUIDE TO WRITING, PERFORMING & RECORDING 126 (George Martin ed., 1983) [hereinafter MAKING MUSIC].

25. *See* Pareles, *supra* note 1, at C23; Johnson, *supra* note 5, at 274.

26. Simon Frith, *Popular Music 1950-1980*, *in* MAKING MUSIC, *supra* note 24, at 18, 48.

27. Analog recording involves the encoding and decoding of an audio signal whose waveform resembles that of the original. For a more thorough explanation of analog recording, see ALTEN, *supra* note 21, at 181-85.

28. *See* Thompson, *supra* note 2, at 116 ("Now that entire orchestras can be replaced by synthesizers, some worry that thousands of musicians may be put out of work.").

29. *See* Johnson, *supra* note 5, at 274-75.

30. A multi-track tape recorder is a cassette recorder that enables sounds recorded at different times to be stored separately on the same tape. It allows one to record an instrument on one portion ("track") of the tape, and then record another instrument on another track in synchronization with it, all without erasing the previously-recorded track.

tra, including brass and percussion, with only minimal investment. This technology makes large, expensive studio sessions unnecessary and places today's most popular instrumental sounds at the musician's fingertips.

Although digital sampling can accurately reproduce the sound of a specific instrument, it does have limitations. A sampler cannot faithfully reproduce a musician's technique, phrasing, and "feel."[31] For instance, a musician can sample Andrés Segovia[32] playing a note on his classical guitar, but a musician could never use a sampler to accurately duplicate Segovia playing a Bach transcription. Similarly, the sampler permits an artist to sample the sound of a vintage instrument, such as a Stradivarius violin; but the sampler cannot replicate the style and technique of a virtuoso violinist playing such an instrument. Thus, professional musicians have not been totally displaced by this new technology and still have much to offer by way of their technique, skill, and personalized sound.

Digital sampling technology is a powerful creative tool for musicians. But of more import, for the purposes of this Comment, is the ability to use the sampler to incorporate another's copyrighted material into a new work. Because some musicians do not obtain permission to use this copyrighted material, the legal implications of digital sampling must be discussed.

III. COPYRIGHT PROTECTION AND THE FAIR USE DOCTRINE

Copyright protection has its roots in the United States Constitution. Article I, section 8, clause 8, provides that Congress shall have the power "[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."[33] Indeed, "[t]he purpose of copyright is to create incentives for creative effort."[34] Section 106 of the 1976 Copyright Act codified the five exclusive rights of the 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.[35]

Copyright infringement occurs when someone, without authorization from the copyright owner, exercises one or more of the copyright

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31. *See* Pareles, *supra* note 1, at C23; Moon, *supra* note 5, at 10K.

32. Andrés Segovia (1893-1987) was a virtuoso classical guitarist and the founding father of the modern classical guitar movement.

33. U.S. CONST. art I, § 8, cl. 8.

34. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 450 (1984).

35. 17 U.S.C. § 106 (1988).

owner's exclusive rights.[36] Generally, a plaintiff claiming copyright infringement must prove that he or she owns the copyright and that the defendant has copied the work.[37] In a copyright infringement case involving digital sampling, the court must distinguish between two separate copyrights: the copyright in the underlying musical work and the copyright in the sound recording.[38] The author or composer of the underlying musical work owns a copyright in the music and any accompanying words.[39] Separate and distinct from the copyright in the underlying musical work is the copyright in the recorded performance of that musical work, or the "sound recording."[40] The copyright owner of the underlying musical work enjoys all five of the exclusive rights;[41] however, the copyright owner in 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.[42] While a sample may infringe upon the sound recording by appropriating a small but distinctive part of the recording, it may not infringe upon the underlying musical work as the portion sampled may qualify as *de minimis*.[43] Therefore, the outcome of an infringement case depends upon which of the copyright owners is involved.

An issue that often emerges in digital sampling infringement cases is whether the sampled material is copyrightable in itself. Much controversy has arisen over musicians sampling one or two notes of a work.[44] To qualify as a copyrightable sound recording, the work must "result from the fixation of a *series* of musical, spoken, or other sounds . . . ."[45] By implication, one note, chord, or sound effect alone cannot be copyrighted—rather, an aggregate of sounds must exist.

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36. *Id.* § 501(a).

37. *See generally* MELVILLE B. NIMMER & DAVID NIMMER, 3 NIMMER ON COPYRIGHT § 13 (1992).

38. *See* 17 U.S.C. §§ 101 (definition of sound recording), 102(2) (1988).

39. *Id.* § 102.

40. The Copyright Act defines sound recordings as "works that result from the fixation of a series of musical, spoken, or other sounds . . . regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." *Id.* § 101.

41. *Id.* § 106. If a delineation of affected works is absent from the first three exclusive rights in section 106, and the remaining two explicitly apply to "musical . . . works," the copyright owner in the musical work enjoys all five exclusive rights. *Id.*

42. *Id.* § 114(a).

43. *See* Johnson, *supra* note 5, at 290.

44. *See* Flanders, *supra* note 15, at 668.

45. 17 U.S.C. § 101 (emphasis added).

Many artists use samples that contain only one note. Common examples of these one-note samples include orchestra "hits"[46] and drum samples. Frequently, artists and producers use unauthorized drum samples of Phil Collins, drummer and vocalist of the group Genesis, in their commercial recordings. In fact, Phil Collins is probably the most sampled drummer today.[47] Many musicians have sampled his distinctive drum sound and used it in their own drum tracks.[48]

Although some believe that sampling even one note or chord of someone's trademark sound constitutes infringement, no infringement occurs in this situation under present copyright law.[49] Sampling complete drum patterns from other's recordings, however, may subject an artist to an infringement suit.[50] Yet, the ease with which technology allows someone to sample the recording of a drum machine, together with the low cost of purchasing a drum machine and replicating the same drum pattern, present significant evidentiary hurdles in infringement suits.[51] Accordingly, unless the plaintiff can prove that the defendant has sampled a copyrightable portion of either the underlying composition or the sound recording, the court may not find the defendant liable for copyright infringement. As most of today's samples are of uncopyrightable material, the possibility of infringement remains minimal.

Of all the limitations imposed upon a copyright owner's exclusive rights, the fair use doctrine is probably the most significant.[52] Even

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46. An example of an orchestra "hit" is the last chord of any John Phillip Sousa march, like "Stars and Stripes Forever." JOHN PHILLIP SOUSA, *Stars and Stripes Forever*, *re-recorded on* GREATEST AMERICAN MARCHES II (Angel Records 1992). For an example of a sampled orchestra hit and its use, listen to KATE BUSH, *The Dreaming*, *on* THE DREAMING (EMI America Records 1982).

47. *See* Flanders, *supra* note 15, at 668.

48. *Id.*

49. *See* Jon Pareles, *In Pop, Whose Song Is It, Anyway?*, N.Y. TIMES, Aug. 27, 1989, § 2, at 1, 26. It could be argued that a sample such as an orchestra "hit" is copyrightable because it qualifies as an aggregate of sounds due to the many instruments sounding at once. The statute and the legislative history, however, do not define what constitutes a series or aggregate of sounds. An orchestra "hit" could be analogized to a chord, a simultaneous sounding of single notes which is, by definition, not copyrightable. For a thorough discussion of digital sampling and distinctive sound copyrights, see Johnson, *supra* note 5.

50. *See* Robert G. Sugarman & Joseph P. Salvo, *Sampling Case Makes Music Labels Sweat*, NAT'L L.J., Mar. 16, 1992, at 34.

51. *Id.* Lawrence Stanley, an attorney who runs a sample clearing house, estimates that approximately 99 percent of the drum samples embodied in recordings currently out on the market are not cleared. Rule, *supra* note 4, at C13.

52. ROBERT A. GORMAN, COPYRIGHT LAW 93 (1991). Many authors have dismissed the fair use defense in a digital sampling infringement context. *See, e.g.*, Bruce J. McGiverin, *Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of*

though a copyright owner may prove an infringement, a defendant may assert the fair use defense and avoid liability. This judicially-created doctrine first appeared in the 1841 case of *Folsom v. Marsh*.[53] Justice Story delineated the doctrine's underlying policies, specifying that quotations of copyrighted material in works such as biographies or critical commentaries may be excusable as a fair use;[54] nonetheless, "[i]f so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another," then an infringement has occurred.[55] Additionally, Justice Story stated that the court should consider "the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."[56]

In 1976, Congress codified the common law fair use doctrine in section 107 of the 1976 Copyright Act.[57] Today, section 107 of Title 17 provides, in pertinent part:

> "[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, . . . scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

Sounds, 87 COLUM. L. REV. 1723, 1736-38 (1987); Jeffrey S. Newton, *Digital Sampling: The Copyright Considerations of a New Technological Use of Musical Performance*, 11 HASTINGS COMM. & ENT. L.J. 671, 709-12 (1989); Note, *A New Spin on Music Sampling: A Case for Fair Pay*, 105 HARV. L. REV. 726, 736-39 (1992) [hereinafter *A New Spin on Music Sampling*]; *but see* Molly McGraw, *Sound Sampling Protection and Infringement in Today's Music Industry*, 4 HIGH TECH. L.J. 147, 167 (1989)("[T]o deny a fair use defense would be to effectively eliminate the use of digital splicing as an avenue of creative expression."); James P. Allen, Jr., Comment, *Look What They've Done to My Song Ma—Digital Sampling in the 90's: A Legal Challenge for the Music Industry*, 9 U. MIAMI ENT. & SPORTS L. REV. 179, 197-98 (1992).

53. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).
54. *Id.* at 348.
55. *Id.*
56. *Id.*
57. 17 U.S.C. § 107 (1988).

> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.'"[58]

Defendants may assert the fair use doctrine in any copyright infringement case, including cases involving infringement of a book,[59] a photograph,[60] or a computer program.[61] The court will decide each case on its own particular facts, weighing each of the statutory factors.

The four fair use factors in the statute, however, are not the only ones a court may consider; they are merely illustrative rather than exclusive. The language of the statute, which reads "factors to be considered shall include," implies the consideration of non-enumerated items.[62] Thus, the law grants the trial judge the discretion to weigh other factors in the analysis.[63] Accordingly, judicial discretion can play a significant role in digital sampling infringement cases if judges choose to consider various factors that are better suited for an accurate fair use determination. The next section provides an analysis of each statutory factor and assesses its weight in a sampling infringement case. A listing and evaluation of the additional factors that are relevant to a sampling infringement suit follows the analysis of the statutory factors.

A. The First Factor: The Purpose and Character of the Use

1. Commercial Use vs. Non-Profit Use

Congress has identified certain uses that typically fall within the scope of fair use. The statute lists "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" as possible candidates for fair use.[64] Additionally, within the legislative history itself, Congress has suggested other possible fair uses, such as parody, a summary of an address, and an inadvertent reproduction in a news broadcast of a work located at the scene of the broadcast.[65] Nevertheless, quoting another's work *only*

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58. *Id.*, *as amended by* Pub. L. No. 102-492, 106 Stat. 3145 (1992).

59. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

60. *See* Rogers v. Koons, 960 F.2d 301, 310-12 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992).

61. *See* Atari Games Corp. v. Nintendo of Am., Inc., 975 F.2d 832, 843 (Fed. Cir. 1992).

62. 17 U.S.C. § 107 (1988). Additionally, section 101 states that "[t]he terms 'including' and 'such as' are illustrative and not limitative." *Id.* § 101.

63. *See infra* notes 144-68 and accompanying text.

64. 17 U.S.C. § 107 (1988).

65. H.R. REP. No. 1476, 94th Cong., 2d Sess. 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679 [hereinafter 1976 HOUSE REPORT 1476].

in news stories, critical comments, or educational materials will not automatically absolve the user of liability for copyright infringement.[66] Because fair use is "an equitable rule of reason," an exclusive list of fair uses does not and should not exist, as each case is to be determined on an ad hoc basis.[67]

While many commentators have suggested that Congress should revise the copyright laws to accommodate the legal implications of digital sampling,[68] attorneys in the Copyright Public Information Office in Washington, D.C. believe the current copyright law effectively addresses the sampling issue.[69] The drafters of section 107 built flexibility into the fair use doctrine to accommodate periods "of rapid technological change,"[70] such as the evolution of digital sampling. Nevertheless, musicians are taking added precautions to protect their work. For example, rock musician Frank Zappa placed his own no-sampling notices on his albums.[71] Despite concern among musicians, current copyright law can effectively accommodate the legal ramifications produced by sampling technology, provided the courts adequately consider additional factors that are relevant to sampling.

Section 107(1) provides that the court, when determining whether a particular use is a fair use, shall consider "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[72] The United States Supreme Court, in *Harper & Row Publishers, Inc. v. Nation Enterprises*,[73]

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66. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) (rejecting defendant's fair use defense, as defendant published excerpts from unpublished biography without copyright owner's permission); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991) (rejecting the fair use defense asserted by a photocopying service that compiled excerpts from plaintiff's books).

67. *See* 1976 HOUSE REPORT 1476, *supra* note 65, at 5679.

68. "Copyright attorney Bill Krasilovsky, working with the American Federation of Music, suggests that the copyright laws will have to be rewritten, so that an artist's individual sounds can be protected, as well as a specific sequence of sounds." *Send in the Clones*, *supra* note 2, at 86. Bill Krasilovsky, along with Sidney Shemel, authored THIS BUSINESS OF MUSIC, (Billboard Publications, Inc. 5th rev. ed. 1985), which has become the authoritative handbook of the music business; *see also* Elizabeth Drake, *Digital Sampling: Looming Copyright Problem*, UPI, May 8, 1987, BC Cycle (Frank Zappa states that because the 1976 Copyright Act was drafted before the advent of sampling, the law should be updated).

69. *See* Drake, *supra* note 68.

70. *See* 1976 HOUSE REPORT 1476, *supra* note 65, at 5680.

71. Horn, *supra* note 14, at 1B (Zappa's warning states: "Unauthorized reproduction-sampling is a violation of applicable laws and subject to criminal prosecution.").

72. 17 U.S.C. § 107(1) (1988).

73. 471 U.S. 539 (1985). In *Harper & Row*, THE NATION magazine received, from an undisclosed source, a copy of President Ford's then unpublished autobiography. *Id.* Without authorization, the magazine then published quotes from the manuscript which resulted in the cancellation of the exclusive publishing agreement between President Ford and TIME. *Id.* The United States Supreme Court ultimately rejected the defendant's assertion of fair use. *Id.*

stated that a commercial or for-profit purpose "*tends* to weigh against a finding of fair use."[74] Moreover, in *Sony Corp. of America v. Universal City Studios, Inc.*,[75] the Court noted that although this presumption is strong, the defendant can rebut it.[76] In *Harper & Row*, the Court explained that the thrust of the profit/nonprofit distinction lies not in whether the user's sole motive was financial gain, but in "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[77] Accordingly, if the alleged infringer stands to make *any* profit from the use of the sample, this first factor will automatically weigh against a finding of fair use.

The presumptions that arise from *Harper & Row* and *Sony* are not entirely proper in a digital sampling context. First, because sampling technology is so new, no set customary price exists for the use of a sample. Second, in *Harper & Row*, the Court noted that the defendant intended to supplant Harper & Row's "commercially valuable right of first publication."[78] In a digital sampling context, the sample is almost always taken from an already distributed work. As such, the user of the sample usually cannot usurp the sampled composition's market, as it already has claimed its share. Third, a musician almost always writes a song for commercial purposes. Consequently, if the presumptions from *Harper & Row* and *Sony* are followed in sampling infringement suits, musicians will generally never be able to establish that this first fair use factor weighs in their favor. Allowing this first factor to weigh against a finding of fair use simply because

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74. *Id.* at 562 (emphasis added); *but see* Maxtone-Graham v. Burtchaell, 803 F.2d 1253 (2d Cir. 1986)("[C]ommercial nature of a use is a matter of degree, not an absolute . . . ."), *cert. denied*, 481 U.S. 1059 (1987).

75. 464 U.S. 417 (1984). The Supreme Court, in *Sony*, used the fair use doctrine to absolve Sony of liability for, *inter alia*, contributory copyright infringement caused by its video tape recorder's ability to time-shift television broadcasts. *Id.*

76. *Id.* at 451.

77. 471 U.S. at 562; *but see* New Era Publications Int'l, ApS v. Carol Publishing Group, 729 F. Supp. 992, 996 (S.D.N.Y)("[T]he mere fact that a work [which uses copyrighted materials] may produce pecuniary gain for its author or publisher is not dispositive of a claim of fair use." (citation omitted)), *aff'd in part, rev'd in part on other grounds*, 904 F.2d 152 (2d Cir.), *cert. denied*, 111 S. Ct. 297 (1990).

78. *Id.* Congress recently amended section 107 by adding the following sentence after the fourth factor: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." Pub. L. No. 102-492, 106 Stat. 3145 (1992). Apparently as a reaction to the *Harper & Row* decision and its progeny (*Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987), and *New Era Publications v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989), *cert denied*, 493 U.S. 1094 (1990)), Congress added this amendment to quash any court's *per se* finding of no fair use simply because the work quoted was unpublished. *See* David Goldberg & Robert J. Bernstein, *The 102d Congress*, N.Y.L.J., Nov. 20, 1992, at 3.

the musician used the sample in a song runs counter to the statute's requirement of an ad hoc determination.[79] Thus, the *Harper & Row/Sony* profit/nonprofit analysis is improper in the digital sampling context.

2. *Transformative/Productive Uses*

Courts have distorted the presumption that commercial uses are unfair by strictly applying it beyond its original context. They have practically converted this presumption into a *per se* rule weighing heavily against fair use.[80] Courts should, however, recognize that varying degrees of commercial uses exist. In *Sony*,[81] the Supreme Court noted that "[t]he distinction between 'productive' and 'unproductive' uses may be helpful in calibrating the balance" of the interests of the copyright owner and the alleged infringer.[82] Likewise, in *Basic Books, Inc. v. Kinko's Graphics Corp.*,[83] the district court adopted a more preferable "transformative use"/"commercial use" comparison.[84] A transformative use is one that "must employ the quoted matter in a different manner or for a different purpose from the original."[85] In contrast, a pure commercial use simply re-employs the quoted matter in the same mode as its original use.[86] Although *Basic Books* dealt

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79. *See supra* note 67 and accompanying text.

80. *See* Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429 (6th Cir. 1992), *cert. granted in part*, 113 S. Ct. 1642 (1993); Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 185 (S.D.N.Y. 1991) (showing hostility toward unauthorized sampling, and citing, among other factors, that defendants' sole aim "was to sell thousands upon thousands of records").

81. 464 U.S. 417 (1984).

82. *Id.* at 455 n.40.

83. 758 F. Supp. 1522 (S.D.N.Y. 1991).

84. *Id.* at 1530-31.

85. *Id.* at 1530 (citation omitted). In *Basic Books*, District Judge Motley stated that "[i]n this case, there was absolutely no literary effort made by Kinko's to expand upon or contextualize the materials copied." *Id.* at 1530-31. Therefore, it could be argued that simply placing the sample in a different context (i.e., a different song) would suffice as a transformative use. *But see id.* at 1531 n.5 (Weinreb argued that the efficiency of a transformative use analysis is overstated and asserted that "[a] use may serve an important, socially useful purpose without being transformative, simply by making the copied material available." (quoting Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1143 (1990)). With respect to this issue, Lloyd L. Weinreb has stated:

> One may wonder whether the publication of material in a new 'package' may not itself constitute a transformative use. For example, the publication of a volume of Salinger's letters would have a purpose entirely different from that which prompted Salinger to write and send the letters contained in the volume. Preparing the collection involves effort and, perhaps, judgment of a kind that often is enough to sustain a copyright.

Weinreb, *supra*, at 1143.

86. *See Basic Books, Inc.*, 758 F. Supp. at 1530 (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).

with bulk copying and repackaging of selected reading materials for educational "class packs,"[87] the productive (transformative)/non-productive (commercial) analysis that it applied is more appropriate in a digital sampling infringement action than the *Harper & Row/ Sony* presumption that all commercial uses are unfair.

Within a transformative/commercial analysis, an exploitative or "commercial" use, one purely for financial gain and without the addition of any substantial new material, would weigh heavily against a finding of fair use. For example, if Hammer had not obtained a license to use Rick James' "Super Freak,"[88] but had instead sampled the two bars upon which the song is built and added his own lyrics, it is doubtful that a court would find Hammer's use of the sample to be a fair use. Without the licensing, Hammer's arrangement of the song and the addition of his own lyrics would most likely not have risen to the level of substantial creativity needed to satisfy the standard for transformative use. Accordingly, without sufficient creativity, the first enumerated factor will not support a finding of fair use.

In contrast, the United States Court of Appeals for the Sixth Circuit, in *Acuff-Rose Music, Inc. v. Campbell*,[89] placed a great deal of emphasis on the commercial use of the plaintiff's copyright in rejecting the defendants' assertion of fair use.[90] The Supreme Court has granted certiorari on this case and, hopefully, will provide a definitive ruling regarding *Acuff-Rose*'s narrow analysis.[91] Notwithstanding the Sixth Circuit's conclusion, a per se finding for the copyright owner on this first factor, based solely on the fact that the alleged infringer profited in some way from the use, is inappropriate in a sampling infringement case. That a musician makes money from a song, which he or she created by employing a small sample of another's sound recording, should not compel a finding of infringement. Although sampling may theoretically violate black letter copyright law, not all infringements are actionable. As aptly put by Trevor Horn, record producer for groups such as Yes and Art of Noise, "In the end, it's the song that sells—not the sample."[92]

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87. *Id.* at 1526.

88. RICK JAMES, *Super Freak*, *on* STREET SONGS (Motown Records 1981).

89. 972 F.2d 1429 (6th Cir. 1992), *cert. granted in part*, 113 S. Ct. 1642 (1993).

90. *Id.* at 1436-37. Although *Acuff-Rose* was a parody case, its emphasis on the commercial nature of the recording may be analogized to a sampling infringement case. The court, in its analysis, essentially created a *per se* rule in favor of the copyright owner with respect to the use factor where the parodist made *any* profit. *Id.*

91. 113 S. Ct. 1642 (1993).

92. *See* Pareles, *supra* note 1, at C23. Exceptions to this general rule exist, as demonstrated by Hammer's song, "U Can't Touch This," M. C. HAMMER, *U Can't Touch This*, *on*

Most artists who use samples simply combine old and new material to produce a composition entirely different from the sampled copyright.[93] When a musician uses a sample in a context different from the sampled copyright's original context, a court may be inclined to find that use transformative. Accordingly, the appropriate issue in a digital sampling infringement case should be whether the sample is a foundation for a new musical statement or merely an effect.[94] If the sample is the foundation for a new musical statement, the court should classify the use as transformative and weigh this factor in favor of a finding of fair use. If the musician simply uses the sample as an effect, the analysis should then hinge upon the first three fair use factors: the length of the sample, its prominence within the context of the new song and in relation to the original recording, and the nature of the use. Accordingly, courts should analyze the purpose of the sample's use according to *Basic Books*' transformative analysis rather than *Sony*'s simple focus upon potential profits.

B. The Second Factor: The Nature of the Copyrighted Work

The second factor focuses upon the nature of the copyrighted, or sampled, work. In evaluating this factor, courts have examined whether the work is published or unpublished, and/or factual or fictional. In addition, courts have considered "whether the work was creative, imaginative, and original, . . . and whether it represented a substantial investment of time and labor made in anticipation of a financial return."[95] This second factor proves extremely important in cases concerning appropriations of, or quotes from, sources containing factual material, such as telephone directories or biographies.[96] In a sampling suit, however, this factor assumes a different significance.

PLEASE HAMMER, DON'T HURT 'EM (Capitol Records 1990), which used Rick James' music from "Super Freak," *supra* note 88, as its underlying musical theme. Other examples include "Rapper's Delight," *supra* note 9, by the SugarHill Gang and Biz Markie's use of "Alone Again, Naturally," GILBERT O'SULLIVAN, *Alone Again, Naturally, re-recorded on* 70's GREATEST ROCK HITS VOL. 9 (Priority Records 1991), for his song "Alone Again," BIZ MARKIE, *Alone Again, on* I NEED A HAIRCUT (Cold Chillin' Records 1991). Biz Markie, however, was recently enjoined from distributing this song as he did not secure a license to use the copyrighted material. *See infra* notes 169-86 and accompanying text.

93. *See* David Browne, *No Free Samples?*, ENT. WKLY, Jan. 24, 1992, at 54.

94. *See* Tom Moon, *Music Sampling or Stealing: Who Owns Sounds of Music?*, ST. LOUIS POST DISPATCH, Jan. 24, 1988, at 3E (statement of producer/engineer Bruce Miller).

95. MCA, Inc. v. Wilson, 677 F.2d 180, 182 (2d Cir. 1981) (citations omitted).

96. *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., 111 S. Ct. 1282 (1991); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985); Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987).

The sample's function in the new composition is probably insignificant when compared to the remainder of the new song.[97] That a copyright owner could enjoin an artist from using a sample of the copyright owner's composition, even though the sample is but a very minor part of the new composition, seems ironic. The typical rap song uses many different samples, presenting them in the same manner as a graphic artist would present a collage.[98] A large amount of creativity goes into choosing which portions of songs to sample and placing those samples in the new work. Additionally, if each of the samples consists of only a small phrase or even a single word, the copyright owner may have difficulty trying to assert an infringement claim.[99] A musician, however, cannot ride another's wave of musical reputation without authorization or compensation.[100] Thus, unless the use constitutes more than a mere reproduction of the original copyright in its original context, this second factor will probably weigh in the favor of the plaintiff.

This second factor also focuses on the published or unpublished nature of the copyrighted work. In *Harper & Row*, the Court relied heavily upon the unpublished status of President Ford's autobiography in rejecting the defendant's assertion of fair use.[101] *Harper & Row* is distinguishable from a digital sampling infringement scenario because it involved the extensive and unauthorized quotation of President Ford's soon-to-be-published autobiography.[102] As an unpub-

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97. *See* Pareles, *supra* note 1, at C23 (quoting Trevor Horn, *supra* note 2).

98. *See* Don Snowden, *Sampling: A Creative Tool or License to Steal?; The Technology*, L.A. TIMES, Aug. 6, 1989, at 61 ("Advocates argue that using samples creatively can give a new dimension to the original song fragment by placing it in a different context. The effect is akin to an audio collage."); *see also* Goldberg & Bernstein, *supra* note 2, at 3 ("Sampling has developed into a popular and inexpensive way to create a new musical composition from a mosaic of old sounds."); Garcia, *supra* note 19, at 69.

99. *See supra* notes 44-51 and accompanying text.

100. In addition to copyright infringement, one who rides on another's reputation may be liable for false publicity and/or substantial similarity, among other charges. For a discussion of possible actions against musicians who sample, see Allen, *supra* note 52, at 185.

101. 471 U.S. 539, 564 (1985). Writing for the Court in *Harper & Row*, Justice O'Connor stated:

> The fact that a work is unpublished is a critical element of its "nature." Our prior discussion established that the scope of fair use is narrower with respect to unpublished works. While even substantial quotations might qualify as fair use in a review of a published work or a news account of a speech that had been delivered to the public or disseminated to the press, the author's right to control the first public appearance of his expression weighs against such use of the work before its release. The right of first publication encompasses not only the choice whether to publish at all, but also the choices when, where and in what form first to publish a work.

Id.

102. *Id.* at 542-43.

lished work, President Ford's autobiography commanded more protection.[103] The exclusive right of distribution is a valuable one, especially for a biographical work of a President.[104] As presidential autobiographies usually sell in vast quantities, publishers typically demand the exclusive right to publish them. The copyright owners of songs that are sampled, however, already have published their works, making this distinction irrelevant. Therefore, the unpublished nature analysis is improper in the digital sampling context.

C. The Third Factor: The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

The third factor is probably the most critical of the enumerated fair use factors in a digital sampling infringement case. The statute provides that the court consider "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[105] As sampling involves the verbatim re-recording of portions of songs, the outcome of a sampling infringement case may hinge upon this factor.

1. The Applicability of Taxe *to the Third Fair Use Factor*

One of the first cases addressing copyright infringement by re-recording was *United States v. Taxe*.[106] Although the district court decided the case upon state law misappropriation grounds, the court's analysis applies equally well to copyright infringement claims involving digital sampling. In *Taxe*, the defendants re-recorded tapes of the plaintiff's songs and sped them up, slowed them down, deleted certain frequencies, added echoes, or added synthesizers.[107] As will be later discussed, alteration of the original sound recording serves as an additional unlisted factor that courts should consider in sampling infringement suits.[108] The *Taxe* court stated that "[i]f the work is produced by re-recording the original sounds, or 'recapturing' those sounds, the work infringes."[109] Essentially, this statement describes exactly what musicians do when they sample portions of copyrighted

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103. *See supra* note 101.

104. *See Harper & Row*, 471 U.S. at 564 (stating the copyright owner's interest in confidentiality was paramount as the exclusive publication contract required anyone to whom the manuscript was shown sign an agreement to keep its contents confidential).

105. 17 U.S.C. § 107(3) (1988).

106. 380 F. Supp. 1010 (C.D. Cal. 1974), *aff'd in part, vacated in part*, 540 F.2d 961 (9th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977).

107. *Id.* at 1012.

108. *See infra* notes 159-60 and accompanying text.

109. *Taxe*, 380 F. Supp. at 1014.

sound recordings. The court further stated that "the type of changes involved in this case . . . have no bearing on the question of infringement . . . . So long as the allegedly infringing work is a product of re-recording, rather than an independent production, an infringement exists."[110] According to this analysis, any sampling would make out a prima facie case of copyright infringement.

In *Taxe*, the defendants posed two questions:

> First, whether the most trivial re-recording (the re-recording of one or two notes) would be an infringement, and second, whether re-recording combined with such comprehensive changes that the work is no longer recognizable as the original work (i.e., extreme speed changes or running the record in reverse) would constitute an infringement.[111]

These issues may also arise in a sampling infringement suit. In particular, issues pertaining to the first question frequently arise because such trivial re-recordings comprise the bulk of the samples used by rap musicians.

As to the first issue, the court accurately stated that re-recordings may be so "insubstantial . . . as to not infringe."[112] This conclusion is consistent with a *de minimis* use analysis, where the portion of the copyrighted work that is sampled is so small or trivial that its use would neither diminish the original's value nor displace the original's market.[113] The Beastie Boys' sample of the phrase "Yo' Leroy," from Jimmy Castor's hit "Return of Leroy, Part I,"[114] for their song "Hold It Now, Hit It"[115] serves as an example of a *de minimis* use.[116]

Some *de minimis* uses, however, may be subject to causes of action other than copyright infringement. For example, James Brown's distinctive yells are a very small portion of his recordings, yet, they are also so closely associated with him as to be instantly recognizable.[117] Estimates place the number of unauthorized samples of James Brown

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110. *Id.*

111. *Id.*

112. *Id.*

113. *See supra* notes 44-51 and accompanying text.

114. JIMMY CASTOR BUNCH, *Return of Leroy, Part I, on* MAXIMUM STIMULATION (Atlantic Records 1977).

115. BEASTIE BOYS, *Hold It Now, Hit It, on* LICENSE TO ILL (Columbia Records 1986).

116. *See* Robin Hoffman, *Digital Sampling—Lawyers Debate the Legal Realities of an Emerging New Art Form*, BACK STAGE, Oct. 27, 1989, at 34. Additionally, the phrase "Yo' Leroy" probably could not be copyrighted as one cannot copyright a small phrase. *See supra* notes 44-51 and accompanying text.

117. *See supra* notes 44-51 and accompanying text.

anywhere from 134[118] to 2000.[119] Although an unknown number of musicians have sampled Brown without authorization, Brown has successfully sued some artists who have sampled his recordings.[120] In addition to copyright infringement, courts may find that sampling one of James Brown's yells is an infringement upon another one of his rights.[121]

In addressing the second question, which dealt with extreme alterations of the original copyright, the *Taxe* court found that the case did not involve this particular issue; however, it intimated that such comprehensive alterations may be far from Congress' idea of prohibited infringement.[122] Both of the questions posed in *Taxe* frequently arise in sampling infringement suits and, therefore, should be addressed by the courts.

2. *Quantitative v. Qualitative Use Analysis*

The third statutory factor contains both quantitative and qualitative elements that permit different degrees of copying in each individual case, depending upon the facts involved. The quantitative analysis compares the percentage of the copyrighted work appropriated by the user to the copyrighted work as a whole.[123] This type of analysis is not a very efficient means of determining whether such a use is fair because the percentage of the copyrighted work used is not dispositive by any means. Most courts simply use the quantitative analysis to support whatever ruling they make. For example, in *Maxtone-Graham v. Burtchaell*,[124] the United States District Court for the Southern District of New York found a fair use where the defendant quoted 4.3% of the plaintiff's book, which was being phased out of publication.[125] One year later, the same court, in *Craft v. Kobler*,[126] rejected a fair use defense even though the defendant quoted only 3%

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118. Garcia, *supra* note 19, at 69.

119. Ann E. Andrews, *Claim That Tune*, U.S. NEWS & WORLD REP., Jan. 13, 1992, at 14.

120. *Id.* Brown sued the makers of the film *The Commitments* for $3 million, claiming unauthorized use of his music and likeness. *Id.* Brown's lawyer, Thomas Hart, stated that "Brown expects payment when he is copied." *Id.*

121. *Id.*; *see* Allen, *supra* note 52, at 185.

122. *Taxe*, 380 F. Supp. at 1014; *see infra* notes 159-62 and accompanying text.

123. *See* 17 U.S.C. § 107(3) (1988); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1533-34 (S.D.N.Y. 1991)(court examined the percentage of the work copied and determined that excerpts copied were quantitatively substantial).

124. 631 F. Supp. 1432 (S.D.N.Y.), *aff'd*, 803 F.2d 1253 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987).

125. *Id.* at 1437-38.

126. 667 F. Supp. 120 (S.D.N.Y. 1987).

of the plaintiff's book.[127] Accordingly, courts rarely engage in this type of analysis in music copyright cases. Although neither *Craft* nor *Maxtone-Graham* are music copyright cases, their inconsistent holdings aptly illustrate the futility of the quantitative analysis approach.

A qualitative analysis provides a more efficient and reliable approach to the issue. The dispositive question in this type of analysis is, "Did the sample contain the heart of the original composition?" The Supreme Court has stated that a taking which is "insubstantial with respect to the infringing work" does not necessarily qualify as a fair use.[128] Because the fair use defense has only been raised in the music field in infringement actions involving parodies or satires,[129] the qualitative analysis has not yet been tested in a digital sampling case.[130] Notwithstanding the Supreme Court's reservation, due to the typical use of such samples and the brevity of the portion generally sampled, this third factor should not weigh too heavily against a finding of fair use in a sampling case.

D. *The Fourth Factor: The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work*

Courts have characterized this factor as "undoubtedly the single most important element of fair use."[131] In considering this factor, the court must weigh the benefit gained by the copyright owner when use is deemed unfair against the benefit gained by the public when use is deemed fair.[132] According to the Supreme Court, "[a]ctual present harm need not be shown . . . . Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists."[133] Further, "if the defendant's work adversely affects the value of *any of the rights* in the copyrighted work . . . the use is not fair."[134] Thus, if any of the five exclusive rights of the copyright owner of the underlying musical composition[135] or any of

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127. *Id.* at 129.

128. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565 (1985).

129. *See* Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429 (6th Cir. 1992), *cert. granted in part*, 113 S. Ct. 1642 (1993).

130. The qualitative analysis allows a larger appropriation of material in the parody or satire context than in the literary field. *Compare Acuff-Rose*, 972 F.2d at 1429 *with Harper & Row*, 471 U.S. at 539.

131. *Harper & Row*, 471 U.S. at 566.

132. *See Acuff-Rose*, 972 F.2d at 1438.

133. Sony Corp. of Amer. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).

134. *Harper & Row*, 471 U.S. at 568 (citation omitted)(emphasis added).

135. *See supra* note 41 and accompanying text.

the three exclusive rights of the copyright owner of the sound recording[136] are either actually or potentially adversely affected, the use is presumptively unfair.[137] Additionally, courts have interpreted this factor to include a consideration of whether the challenged use or practice, if widespread, would have a detrimental effect on the industry as a whole.[138] Indeed, massive amounts of sampling without payment of compensation to the copyright owners would have such an effect upon the music industry. Theoretically then, this factor will almost always weigh against a finding of fair use in a sampling infringement case.

Consistent with this analysis, the Sixth Circuit, in *Acuff-Rose*, stated "[i]t is the blatantly commercial purpose of the derivative work that prevents this parody from being a fair use."[139] In a digital sampling context, the logical implication of this decision is that if the infringing user makes *any* amount of profit from the infringing sample, more than likely a court will make a per se finding against fair use. Such an interpretation is inappropriate and entirely too stringent for sampling infringement purposes. First, such a per se rule essentially forecloses the possibility of having any unauthorized commercial parodies. This runs counter to both the statute's purpose in allowing such parodies for criticism or comment[140] and the copyright clause's intent to stimulate creativity.[141] Second, it is generally expected that a sample will be used for commercial purposes. Rarely, however, will the user build the new composition entirely upon the sample alone.[142] Thus, the *Acuff-Rose* presumption is inappropriate in the digital sampling context.

Although courts have emphasized the importance of this fourth fair use factor, it should be the least significant factor in a digital sampling infringement analysis, with one small exception.[143] This factor is insignificant because the material typically sampled is but a small fraction of the original composition. Additionally, the sample's use in the new composition is generally minimal. The sample is often used only for novelty or sonic effect. Consequently, it is difficult to

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136. *See supra* note 42 and accompanying text.

137. Only if the respective copyright owner of the right infringed upon is a party to the suit will this presumption come into effect. *See supra* notes 37-43 and accompanying text.

138. Sony Corp. of Amer. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).

139. Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1439 (6th Cir. 1992), *cert. granted in part*, 113 S. Ct. 1642 (1993).

140. *See supra* notes 64-65 and accompanying text.

141. *See supra* notes 33-34 and accompanying text.

142. *See supra* note 92.

143. *See infra* note 148 and accompanying text.

say that this type of limited use harms the potential market of the original.

IV. ADDITIONAL FACTORS COURTS SHOULD CONSIDER IN DIGITAL SAMPLING CASES

The current copyright statute simply mandates that courts weigh at least the four factors listed.[144] Additional factors more suitable for a digital sampling analysis may include: the importance of the sampled material, both to the original recording and the allegedly infringing work; the frequency with which the sample is used in the allegedly infringing work; the popularity of the original recording; alteration of the sampled material; attempts by the user to negotiate a license for the use of the sample with the sampled artist; and acknowledgments by the user of the sampled material. Each additional factor will be addressed herein and evaluated as to its applicability to a fair use determination in a digital sampling infringement case.[145]

A. The Importance of the Sampled Material Both to the Original Recording and the Allegedly Infringing Work

An entire copyright infringement case may hinge upon this factor alone. Because the copyright law exists to encourage artistic endeavors and creative efforts,[146] the more creative and innovative the musician is in using the sample, the less likely a court will be to find that an infringement has occurred.[147] On the other hand, if the musician uses the sample as the entire underlying composition, or as a significant portion of it, then the musician has expended little if any creativity and the court is less likely to protect that particular use.[148]

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144. 17 U.S.C. § 107 (1988) ("[T]he factors to be considered shall include . . . .").

145. Many of these additional factors have been previously suggested in several sources. *See, e.g.*, Judith Greenberg Finell, *How a Musicologist Views Digital Sampling Issues*, N.Y.L.J., May 22, 1992, at 5, 5-7; *A New Spin on Music Sampling*, *supra* note 52, at 740-42.

146. *See supra* notes 33-34 and accompanying text.

147. *See, e.g.*, Runstadler Studios, Inc. v. MCM Ltd. Partnership, 768 F. Supp. 1292, 1297-98 (N.D. Ill. 1991). The court in *Runstadler Studios* stated:

> As a work embodies more in the way of particularized expression, it . . . receives broader copyright protection . . . . [T]he 'strongest' works [receiving the greatest copyright protection are those] in which fairly complex or fanciful artistic expressions predominate over relatively simplistic themes and which are almost entirely products of the author's creativity rather than concomitants of those themes.

Id. (citation omitted).

148. Rapper Vanilla Ice, who sampled a very distinctive portion of "Under Pressure," DAVID BOWIE & QUEEN, *Under Pressure*, *on* HOT SPACE (Hollywood Records 1982), for his No. 1 hit "Ice Ice Baby," VANILLA ICE, *Ice Ice Baby*, *on* TO THE EXTREME (SBK Records 1990),

Another way to evaluate this factor is to determine if the challenged piece can stand on its own without the use of the sample.[149] If the answer is no, then the court should weigh this against a finding of fair use.

Determining the significance of the sampled portion to the original copyright relates back to the previous discussion of qualitative analysis under the third statutory fair use factor.[150] If the musician samples a recognizable chorus or melody, often referred to as the "hook" of the song, then the musician has appropriated what may be termed the "heart" of the work.[151] If the new work relies heavily upon the sampled "heart" of the original composition, this should weigh against a finding of fair use. Accordingly, this factor, which emulates the third statutory factor, is of primary significance in a digital sampling fair use analysis.

B. The Frequency With Which the Sample Is Used in the Allegedly Infringing Work

This factor mirrors the futile quantitative analysis that emanates from the third statutory fair use factor.[152] Accordingly, any hard and fast rule limiting the number of times a musician may use a sample in a song would prove unworkable. For example, with the sample of a snare drum, the sample may sound hundreds of times in one song, yet its multiple use is no more infringing than if it was only used once.[153] Because sampled musicians are denied the compensation commensurate with their employment in a recording session, they have a right to be upset.[154] Consequently, sampled artists, in addition to copyright owners, may argue that multiple use, like the single use

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avoided a lawsuit by adding their names to the composer credits. Garcia, *supra* note 19, at 69. Rapper Hammer followed the same route with his song "U Can't Touch This," *supra* note 92, which used extensive samples of Rick James' *Super Freak*, *supra* note 88. *See* Garcia, *supra* note 19.

149. *See* Finell, *supra* note 145, at 5.

150. *See supra* notes 44-51 and accompanying text.

151. Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1438 (6th Cir. 1992), *cert. granted in part*, 113 S.Ct. 1642 (1993).

152. *See supra* notes 123-27 and accompanying text.

153. *See* Johnson, *supra* note 5, at 282 ("Before digital sampling, a one-note recording had no commercial value. Today, single-note and few-note sound recordings do have commercial value."); *see id.* at 292 ("Distinctive sounds repeated throughout a sound recording may become timbral 'hooks' analogous to the musical hooks in popular music.").

154. *See* Pareles, *supra* note 1, at C23.

of one long sample,[155] significantly infringes upon the sampled work. Musicians' arguments for giving more consideration to this inquiry, however, will prove unavailing. As no general rule can be established allowing for adequate examination of this factor, its contribution to infringement analysis is minimal.

C. *The Popularity of the Original Recording*

Copyright law treats all copyrights the same, regardless of popularity.[156] Theoretically then, the amount of commercial success enjoyed by a copyright will not be relevant in an infringement analysis. Nevertheless, if a musician samples a copyright owner's only commercial "hit," as was the case in *Grand Upright Music Ltd. v. Warner Bros. Records*,[157] the court may be prone to sympathize with the copyright owner and, as a result, give the original recording slightly more protection. Further, if the sampled copyright is part of an out-of-print, obscure composition, this fact may influence the court, either consciously or subconsciously, to make a finding of fair use.[158] Therefore, although the popularity of the original work should not be a significant factor in this analysis, it may directly or indirectly influence the court's decision.

D. *Alteration of the Sampled Material*

The greater the amount of alterations to the original, the more likely this factor will support a finding of fair use. For example, courts may be more likely to find fair use where the alterations to a

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155. *See* Grand Upright Music, Ltd. v. Warner Bros. Records, 780 F.2d 182 (S.D.N.Y. 1991); *see also infra* notes 156-62 and accompanying text.

156. Section 102 states: "Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . ." 17 U.S.C. §102 (1988). The statute does not base the degree of protection given a copyright upon either the amount of success or the artistic merit of a work. *See, e.g.*, Trifari, Krussman & Fishel, Inc. v. Charel Co., 134 F. Supp. 551, 552 (S.D.N.Y. 1955) ("The relative artistic merit of a work is not material in determining eligibility for copyright.") (decided under section 5 of the 1909 Copyright Act (section 102 of the 1976 Copyright Act)); Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852 (5th Cir. 1979) (immoral works are afforded copyright protection), *cert. denied*, 445 U.S. 917 (1980); *see also* HomerLaughlin China Co. v. Oman, 1991 WL 154540 at *3 (D.D.C. 1991). In *HomerLaughlin China Co.*, the court, relying on the Supreme Court's rejection of the "sweat of the brow" doctrine in *Feist Publications, Inc. v. Rural Telephone Service, Inc.*, 111 S. Ct. 1282 (1991), rejected plaintiff's argument that the work's commercial success, professional skills, and artistic recognition qualify it for copyright protection. *Id.* The court stated that "*Feist* . . . and the 1976 revisions to the Copyright Act leave no doubt that originality, not 'sweat of the brow' is the touchstone of copyright protection . . . ." *Id.* (quoting *Feist*, 111 S. Ct. at 1295).

157. 780 F. Supp. 182 (S.D.N.Y. 1991); *see infra* notes 164-86 and accompanying text.

158. *See supra* notes 124-25 and accompanying text.

particular piece make the original recording unrecognizable. If the musician simply altered the tempo of the sample, however, the court's finding of infringement might depend upon how drastic the tempo change actually is. A slight tempo change would tend to weigh against a finding of fair use because the sampled composition would probably remain recognizable. Conversely, an extreme tempo change would tend to mask the original recording and make it unrecognizable, thereby favoring a finding of fair use.[159]

If the musician simply transposes the original work by electronically changing the key, then the musician has only minimally altered the original work. Such minimal alterations would weigh against a finding of fair use.[160] If the musician played the sample backwards, however, the general public would probably not recognize the original copyrighted work. Consequently, no claim of infringement could be successfully asserted. If the musician digitally rearranged the sample, an infringement suit might lie depending upon the result of the rearrangement. For example, if the sampled portion was a vocal line saying "All I want is you, love," and the sampler rearranges the words to say "I love you all," dropping the words "want" and "is," it is unlikely that an infringement action would lie. Thus, depending upon the amount and type of alteration, verbatim sampling may or may not qualify as an infringement.

Additionally, the copyright statute provides that sound recording copyright owners have the exclusive right "to prepare a derivative work[161] in which the *actual* sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality."[162] This may pose a problem for rap artists, as their samples do use the actual sounds from the sound recording. Additionally, rap artists rearrange, remix, or otherwise alter in sequence or in quality the actual sounds in the sound recording. Thus, they may infringe upon the sound recording copyright owner's exclusive right to prepare a derivative work. Accordingly, alteration of the sample may help, as well as hinder, the alleged infringer's defense.

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159. *See* Finell, *supra* note 145, at 5. When the rap group De la Soul sampled a portion of the Turtles' song "You Showed Me," *supra* note 15, electronically slowed the tempo, and used it for their song "Transmitting Live From Mars," *supra* note 15, they were faced with a $1.7 million lawsuit. *See* Flanders, *supra* note 15, at 668.

160. Finell, *supra* note 145, at 5; *see also*, Robin Givhan, *The Next Sound You Hear*, DET. FREE PRESS, Feb. 4, 1990, at 6.

161. Section 101 defines a derivative work as "a work based upon one or more preexisting works, such as a . . . musical arrangement, . . . [or] sound recording . . . ." 17 U.S.C. § 101 (1988).

162. *Id.* § 114(b) (emphasis added).

E. Attempts by the User to Negotiate a License With the Sampled Artist for the Use of a Sample

This factor tends to demonstrate the sampling artist's good faith and fair dealing and would only prove significant in a case where the musician could not locate the copyright owner.[163] As a result of the United States' adherence to the Berne Convention,[164] a sampling artist might have difficulty locating the copyright owner, as registration of the copyright is not required for protection.[165] If a copyright owner is found and consequently denies an artist's request for permission to use a sample of the copyright, then any use of that work will more than likely constitute an infringement. Accordingly, as fair use is partly based on good faith and fair dealing,[166] a sampling artist who has been denied permission in writing to use a sample could probably not assert a fair use defense.

F. The User's Acknowledgment of the Owners of the Sampled Material

This factor, like the previous factor, may indicate good faith on the part of the musician using the sample. If the sampling artist could not locate the copyright owner, but knows who the owner is and gives the owner credit in the liner notes,[167] the artist's good faith efforts may subtly influence the court's decision. An acknowledgment may reduce the amount of damages or support an estoppel argument

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163. *Cf.* Grand Upright Music Ltd. v. Warner Bros. Records, 780 F. Supp. 182 (S.D.N.Y. 1991); *see infra* notes 178-83 and accompanying text. In *Grand Upright*, defendant rapper was enjoined from distributing an album containing a sample of plaintiff's copyright as plaintiff denied permission for its use. 780 F. Supp. at 182. The district court found the defendant's request-for-consent letter, which had been sent to the plaintiff and subsequently denied, the most persuasive evidence in the case. *Id.*

164. The United States became a member of the Berne Convention in 1987. It amended its copyright laws to conform with the Berne Convention effective March 1, 1989. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (Oct. 31, 1988) (effective March 1, 1989). As a result, United States' copyrights now enjoy protection in any country that is a member of the Convention. Berne Convention for the Protection of Literary and Artistic Works (Paris Text, 1971), art. I.

165. As a part of this amendment to the Berne Convention, copyright registration is no longer a prerequisite for copyright protection. 17 U.S.C. § 408(a) (1988). If the copyright notice is absent from distributed copies of the work or if the copyright has not been registered with the Register of Copyrights, then the copyright owner is denied statutory damages or attorney's fees. *Id.* § 412. Alternatively, if the copyright notice is present on copies distributed and the copyright is registered with the Copyright Office, then the innocent infringement defense is precluded and the plaintiff may prove actual damages. *Id.*

166. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985) ("Fair use presupposes 'good faith' and 'fair dealing.'" (citation omitted)).

167. Liner notes consist of the credits listed on the album jacket or the inside of the cassette or compact disc jewel box.

against a copyright owner who asserts that he or she had no notice but who also willfully concealed his or her identity.[168] Thus, while not completely absolving the sampling artist from liability, an acknowledgment cannot hinder a fair use defense.

V. IMPLICATIONS OF RECENT COURT DECISIONS

Until recently, no court had addressed the sampling issue. In 1991, however, *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*[169] came before the United States District Court for the Southern District of New York. The plaintiff, Raymond "Gilbert" O'Sullivan, sought a preliminary injunction prohibiting rap artist Biz Markie, his record label (Warner Brothers), and his music publishing company (Cold Chillin' Records) from distributing Biz Markie's album entitled *I Need A Haircut*,[170] which contained the song "Alone Again."[171] In 1972, O'Sullivan had composed and recorded the song "Alone Again (Naturally)"[172] which turned out to be his biggest, and only, hit.[173] Biz Markie's version sampled twenty seconds, the first eight bars, of O'Sullivan's original recording, "looped"[174] it, and used it as the underlying music of his song.[175] Biz Markie then added a drum track and his vocals on top of the sample and used O'Sullivan's lyrical refrain, consisting of the words "alone again, naturally."[176]

Before the release of the album, the attorney for Biz Markie sent a letter and a copy of the song to O'Sullivan's agent.[177] The letter explained that Biz Markie's song incorporated parts of O'Sullivan's song and asked for O'Sullivan's consent in using the samples.[178] Cold Chillin' Records, however, released the album before receiving final clearance from O'Sullivan to use the samples.[179] Thereafter, O'Sulli-

168. Although an estoppel argument and a good faith attempt at locating the copyright owner may be possible legal strategies, no cases to date have been defended on these grounds.

169. 780 F. Supp. 182 (S.D.N.Y. 1991).

170. BIZ MARKIE, *supra* note 92.

171. *Grand Upright*, 780 F. Supp. at 183.

172. GILBERT O'SULLIVAN, *supra* note 92.

173. *Grand Upright*, 780 F. Supp. at 183; *see also* Sugarman & Salvo, *supra* note 50, at 34.

174. To "loop" a sample, one directs it to automatically return to the beginning of the sample when it reaches the end. Thus, the sample continues to be heard for as long as a key is depressed.

175. Philips, *supra* note 2, at F1.

176. Sugarman & Salvo, *supra* note 50, at 34.

177. Grand Upright Music Ltd. v. Warner Bros. Records, 780 F. Supp. 182, 184 (S.D.N.Y. 1991).

178. *Id.*

179. Sugarman & Salvo, *supra* note 50, at 34.

van refused to give his permission to use the sample and demanded that the record company remove the album from the market.[180]

When District Judge Duffy began his opinion with the quote "Thou shalt not steal,"[181] the defendants knew they were in for a rough ride. Whether O'Sullivan actually owned the copyright and the master sound recording of the original song served as the only disputed issue.[182] The court found the request-for-consent letter the most persuasive evidence in this case.[183] The court discussed neither the fair use defense nor the innumerable copyright issues and subtleties implicated by sampling. These issues were not discussed due to Biz Markie's exclusive reliance upon the relatively long sample of a section of O'Sullivan's song, which definitely hindered any *de minimis* or fair use defense that he might have raised.[184] The court did, however, evidence its hostility toward unauthorized sampling. Judge Duffy, so incensed at this violation of the copyright laws, referred this matter to the United States Attorney for possible criminal prosecution.[185] The dispute was ultimately settled out of court for an undisclosed, but "substantial," payment.[186]

Despite its subject matter, this case sheds little, if any, light upon the subject of sampling infringement. Nor does it provide guidance to musicians seeking to use samples in their work. Indeed, this decision may discourage artists from sending written consent requests to copyright owners, as these requests might serve as "smoking guns" rather than safety measures. If an artist should decide to release an album containing the samples regardless of the response, or lack of response, received from a copyright owner with regard to consent, the letter may constitute evidence of willful infringement.[187]

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180. *Grand Upright*, 780 F. Supp. at 184.

181. *Id.* at 183 (quoting *Exodus* 20:15).

182. *Id.* The district court found that O'Sullivan did own both copyrights notwithstanding some minor irregularities in their registration. *Id.* at 185.

183. *Id.* at 184. Judge Duffy stated: "In writing this letter, counsel for Biz Markie admittedly was seeking 'terms' for the use of the material. One would not agree to pay to use the material of another unless there was a valid copyright! What more persuasive evidence can there be!" *Id.*

184. Robert G. Sugarman & Joseph P. Salvo, *Sampling Litigation in the Limelight*, N.Y.L.J., Mar. 16, 1992, at 1. The pleadings and supporting documents did not seriously argue either defense. The defendants argued that because "Alone Again," *supra* note 92, was only one of thirteen cuts on the album and was not set to be released as a single or otherwise, that the use was de minimis. *Id.*

185. *Grand Upright*, 780 F. Supp. at 185.

186. Philips, *supra* note 2, at F1.

187. Sugarman & Salvo, *supra* note 50, at 34; *see also* Harrington, *supra* note 4, at D7. Monica Lynch, president of Tommy Boy Records, said the *Grand Upright* decision "won't discourage people from sampling or even make the rates go up, but it will make labels, artists and producers a lot more cautious about making sure their t's are crossed and their i's are dotted before they put music out in the marketplace." *Id.*

The unique facts of *Grand Upright* narrowly limit its holding. Here, one person owned both the copyright in the underlying composition and the copyright in the master recording, a relatively rare phenomenon.[188] In the typical situation, a record company will own the master recording rights and a music publisher will own the rights in the underlying composition.[189] These entities are usually more amenable to licensing the use of samples than individual artists such as O'Sullivan.[190]

Another case indirectly addressing the sampling issue is *Acuff-Rose Music, Inc. v. Campbell*.[191] As stated earlier,[192] *Acuff-Rose* addressed the interaction between parody and the fair use defense. While the majority quickly passed over the sampling issue because it was not raised, the dissent provided some hint as to what courts might do when faced directly with the digital sampling issue.[193] In his dissent, Circuit Judge Nelson stated that "'sampling' of no more than a few notes should be governed by the maxim *de minimis non curat lex* [the law does not concern itself with trifles]."[194] Therefore, even in the Sixth Circuit, where music lobbyists carry great weight,[195] some hope exists for a fair use defense to a sampling infringement suit. With the Supreme Court's grant of certiorari in this case,[196] some light may soon be shed upon the sampling issue.

VI. CONCLUSION

As a result of actual, as well as threatened, litigation in the area of digital sampling infringement, several developments have occurred. Sampling clearinghouses serve as one recent outgrowth.[197] These companies are similar to publisher clearinghouses in that they are authorized by member copyright owners to clear samples for use on albums according to an agreed upon fee structure. In addition, record companies and most music publishers have instituted certain licensing policies as more and more artists routinely seek clearance for their samples with the hope of avoiding litigation.[198] These developments

188. Sugarman & Salvo, *supra* note 184, at 1.
189. *Id.*
190. *Id.*
191. 972 F.2d 1429 (6th Cir. 1992), *cert. granted in part*, 113 S. Ct. 1642 (1993).
192. *See supra* note 90.
193. *Acuff-Rose*, 972 F.2d at 1444 (Nelson, J., dissenting).
194. *Id.* at 1444 n.5.
195. One seat of the Sixth Circuit is located in Nashville, Tennessee.
196. 113 S. Ct. 1642 (1993).
197. *See* John Leland, *The Moper vs. the Rapper*, NEWSWEEK, Jan. 6, 1992, at 55.
198. *See* Goldberg & Bernstein, *supra* note 2, at 31.

will help ease the tension between those who sample and those who are sampled.

Another beneficial development is a sliding fee scale arrangement. Under such an agreement, those who want to use a sample would pay a small royalty (a few cents or less) upon the sale of each album that contains that sample.[199] This system conforms to today's standard royalty payment scheme for songwriters and artists.[200] Many other licensing alternatives for samples already exist, such as the grant of a mechanical license[201] for a flat one-time fee, the grant of a mechanical license for a royalty plus a percentage of the performance royalties generated by the new composition, or the seeking of co-ownership of the new song.[202] Admirably, the music industry is heading in the direction of *pro forma* licensing of samples before they are used in any new composition.[203]

Notwithstanding the music industry's current direction toward such licensing practices, fair use should remain a viable defense. The courts should not completely bar its assertion simply because the sample is of an original sound recording. The copyright clause, which was established to encourage creativity, supports this contention. Although the fair use defense initially only applied to literary works, it can be successfully applied to digital sampling as well. To this end, courts must refrain from limiting their analysis to the four factors enumerated in the statute. The additional factors listed in this Comment, combined with the transformative/productive use analysis, will provide a more efficient determination of whether the challenged use of the sample is a fair one.

As technology progresses, so should the analysis under the copyright statute. The courts can no longer simply rely on examination techniques or presumptions that are outdated and inappropriate in

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199. *See* John Horn, *Rap Stars' "Sampling" Is Stealing to Some*, S.F. CHRON., May 18, 1989, at E2.

200. *See generally* 17 U.S.C. §§ 115(c) (compulsory license royalty payment scheme); 116(b) (compulsory license royalty payment scheme for coin-operated phonorecord players) (1988).

201. A mechanical license is a license that authorizes one to make reproductions of a musical composition for distributing them to the public for private use. *See* AL KOHN & BOB KOHN, THE ART OF MUSIC LICENSING 307 (1992).

202. For a thorough discussion of sample licensing and clearing practices, see KOHN & KOHN, *supra* note 201, at 816-27.

203. *See* Goldberg & Bernstein, *supra* note 2, at 31.

> Over the past year, every major and most minor record and music publishing companies have instituted policies and procedures for handling sampling clearances. Companies are now fully equipped to handle sampling requests, and artists are aware that they may have to make the requests. Most musicians and copyright owners in the music community are ready to give credit where credit is due.

Id.

the context of this new digital technology. Rather, the courts should apply a contemporary analysis, one that includes consideration of the additional factors described here. Such an analysis, coupled with the music industry's push toward more reasonable licensing procedures, will better serve copyright owners by protecting their legal rights, as well as musicians by protecting against economic stifling of their creativity.