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Sampling the Circuits: The Case for a New Comprehensive Scheme for Determining Copyright Infringement as a Result of Music Sampling

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SAMPLING THE CIRCUITS: THE CASE FOR A NEW COMPREHENSIVE SCHEME FOR DETERMINING COPYRIGHT INFRINGEMENT AS A RESULT OF MUSIC SAMPLING

INTRODUCTION

Music sampling continues to be the linchpin of a variety of musical styles including rap, hip-hop, house, and dance music, and has even become prevalent in rock music.[1] The practice of sampling involves taking pre-existing sound recordings and using portions of those recordings as elements in a new musical composition.[2] The amount of the work sampled can range from taking the entire "hook" or chorus/refrain from a musical composition to smaller elements, such as a riff or even one or two notes or words.[3]

Music sampling, as it pertains to copyright law and copyright licensing, is a real and current issue. As recently as November 3, 2010, the United States Copyright Office began taking comments, at the direction of Congress, as to whether copyright protection should be extended to pre-1972 sound recordings.[4] Among the peripheral issues implicated by this potential extension was how such an extension might affect sampling of pre-1972 recordings.[5] Moreover, one example that perfectly illustrates the

1. KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE 1 (2011).

2. *Id*. (describing sampling as a "technique that incorporates portions of existing sound recordings into a newly collaged composition"); JOSEPH G. SCHLOSS, MAKING BEATS: THE ART OF SAMPLE-BASED HIP-HOP 150 (2004) ("Sampling allows producers to take musical performances from a variety of recorded contexts and organize them into a new relationship with each other. It is this relationship that represents the producers' art [] and . . . reveals the producers' aesthetic goals.").

3. *See generally* SCHLOSS, *supra* note 2, at 79–100 (discussing selection of source materials for samples in the hip-hop genre).

4. Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972, 75 Fed. Reg. 67,777 (Nov. 3, 2010); *see also infra* notes 100–03 (discussing of the current state of copyright protection for sound recordings). The Copyright Office ultimately issued a December 2011 report recommending that copyright protection should be extended to pre-1972 recordings. UNITED STATES COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS (2011), *available at* http://www.copyright.gov/docs/sound/ (last visited May 14, 2012).

5. Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972, 75 Fed. Reg. at 67,780. The Copyright office specifically asked for comments regarding the following questions: (1) "[w]ould business arrangements concerning sampling of sound recordings be affected by bringing pre-1972 recordings under federal law; and if so, how would they be affected?"; and (2) "[a]re pre-1972 sound recordings currently treated differently with respect to sampling?" *Id*. Notably, however, the answers to these questions were not specifically addressed in the Copyright Office's 2011 report.

current implications of sampling on copyright law is what one commentator calls "the Girl Talk dilemma," referring to the mash-up artist Girl Talk.[6] On November 15, 2010, Girl Talk made available downloads of his album *All Day*[7] free of charge on the record label Illegal Art.[8] This freely distributed album, which contains a high number of samples—none of which have been licensed—raises serious questions regarding the legality of this release. Upon first listen to the opening track, "Oh No,"[9] I easily identified samples of Black Sabbath's "War Pigs,"[10] Ludacris' "Move Bitch,"[11] Cali Swag District's "Teach Me How to Dougie,"[12] Jane's Addiction's "Jane Says,"[13] the Ramones' "Blitzkrieg Bop,"[14] and Missy Elliot's "Get Ur Freak On,"[15] just to name a few.[16] In light of current industry practices,[17] it is hard to imagine how Girl Talk could release such a record without raising questions as to whether his uses of these samples constitutes copyright infringement[18] or fair use.[19] While this

6. David Mongillo, *The Girl Talk Dilemma: Can Copyright Law Accommodate New Forms of Sample-Based Music?*, 9 U. PITT. J. TECH. L. POL'Y 3 (2009).

7. GIRL TALK, ALL DAY (Illegal Art 2010).

8. *See Girl Talk—All Day*, ILLEGAL ART, http://illegal-art.net/allday/ (last visited May 12, 2012). Girl Talk intimates on his website in statements regarding transformative fair use of his own work that the unlicensed samples contained on his record are a fair use of the underlying musical compositions and sound recording. The relevant statement explains

> *All Day* by Girl Talk is licensed under a Creative Commons Attribution-Noncommercial license. The CC license does not interfere with the *rights you have under the fair use doctrine, which gives you permission to make certain uses of the work even for commercial purposes.* Also, the CC license does not grant rights to non-transformative use of the source material Girl Talk used to make the album.

Id. (emphasis added).

9. GIRL TALK, *Oh No*, *on* ALL DAY (Illegal Art 2010).

10. BLACK SABBATH, *War Pigs/Luke's Wall*, *on* PARANOID (Vertigo 1970).

11. LUDACRIS FEATURING MYSTIKAL & I-20, *Move Bitch*, *on* WORD OF MOUF (Def Jam 2002).

12. CALI SWAG DISTRICT, *Teach Me How to Dougie*, *on* THE KICKBACK (Capitol 2010).

13. JANE'S ADDICTION, *Jane Says*, *on* NOTHING'S SHOCKING (Warner Brothers 1988).

14. RAMONES, *Blitzkrieg Bop*, *on* RAMONES (ABC 1976).

15. MISSY ELLIOTT, *Get Ur Freak On*, *on* MISS E . . . SO ADDICTIVE (Elektra 2001).

16. Girl Talk thanks each of the sampled artists and provides a list of all artists and songs that have been sampled on the record. *Girl Talk—All Day Samples List*, ILLEGAL ART, http://illegal-art.net/allday/samples.html (last visited May 12, 2012). One fan has even gone as a far as to identify each sampled work in each song on Girl Talk's new release, synchronizing visual markers indicating which sample is being heard as the track plays. *Girl Talk—All Day*, ALLDAYSAMPLES.COM, http://alldaysamples.com (last visited May 12, 2012).

17. *See infra* Part I.C (discussing music licensing).

18. *See infra* Part II.A.2 (discussing copyright infringement).

19. *See infra* Part II.A.3 (discussing fair use); *see also* Mongillo, *supra* note 6, at 3. Mongillo notes that Girl Talk's previous album *Feed Animals* contained over 300 unlicensed samples. *Id.* Mongillo suggests that Girl Talk has yet to be sued for copyright infringement because record companies are concerned that such legal action might create precedent that would be unfavorable to them. *Id.* Further, Mongillo argues that fair use should be extended to sampling analogous to Girl

is an extreme example of the use of sampling in contemporary music—as one commentator notes, Girl Talk's work adds virtually no original content to accompany the samples of other artists' work[20]—it clearly illustrates the point that copyright infringement by way of music sampling is a current issue.

In its current state, copyright law and judicial interpretation of the same have been relatively hostile to samplers who fail to obtain licenses from the relevant copyright holders of musical compositions or sound recordings[21]—both of which are protected as separate copyrights under Title 17 of the United States Code.[22] Due to this hostility, the licensing and clearing of samples has become a major source of revenue for record companies and music publishers alike.[23] For example, the famous record *Paul's Boutique* by the Beastie Boys,[24] which was comprised of nearly 95 percent samples, required over $250,000 in licensing fees alone.[25] More recently, Kanye West reportedly came very close to licensing a small sample from Lauryn Hill's *MTV Unplugged* record for over $150,000.[26] Unfortunately, in light of evidence suggesting that the financial viability of record companies has diminished significantly, these licensing agreements will likely continue to become more expensive due to an effort by record companies to generate sufficient revenue to remain viable business organizations.[27] Due to legal uncertainty regarding the contours of what is

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Talk's practices. *Id.* This Note will challenge that proposition, ultimately concluding that stretching fair use doctrine as far as Mongillo suggests is not prudent. *See infra* notes 239–46 and accompanying text.

20. *Accord* Mongillo, *supra* note 6, at 2. Of course, this comment should not be construed as an indictment of the great skill and great deal of work necessary to create Girl Talk's mashups. Indeed, his arrangements would likely be protectable derivative works, provided he acquired the proper licenses for the samples. *See* 17 U.S.C. § 101 (2006) ("A 'derivative work' is a work based upon one or more preexisting works, such as . . . musical arrangement."); 17 U.S.C. § 103 (2006) ("The subject matter of copyright as specified by section 102 includes . . . derivative works."). However, any such protection "extends only to the material contributed" by Girl Talk "and does not imply an exclusive right in the preexisting material." 17 U.S.C. § 103 (2006).

21. *See infra* Part II.B (discussing cases involving copyright infringement claims, generally holding in favor of the plaintiff regardless of the objective standard used to determine infringement).

22. *See infra* notes 98, 99, 101 and accompanying text.

23. *See, e.g.*, AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 1548–1549 (4th ed. 2010) (noting that flat fees to sample a master recording range from $2,500 to $20,000 and royalties often include advances starting at $5,000 with rates of 1/2¢ to 5¢ per unit).

24. THE BEASTIE BOYS, PAUL'S BOUTIQUE (Capitol Records 1989).

25. KEMBREW MCLEOD, FREEDOM OF EXPRESSION 89 (2007).

26. *Id.*

27. *See 2008 Consumer Profile*, RIAA, http://76.74.24.142/CA052A55-9910-2DAC-925F-27663DCFFFF3.pdf (last visited May 12, 2012) (showing that sales have declined at an alarming rate, decreasing from approximately $14 billion in revenue in 1999 to approximately $8 billion in 2008). This is not to say, however, that the entertainment industry is not currently thriving. Indeed, one report shows, inter alia, that sales and marketing of music through untraditional channels (i.e., not through

and what is not actionable infringement, by and large, in order to avoid litigation, artists are encouraged to either license even the smallest samples or refrain from sampling—one of musical artists' most creative tools—altogether.[28]

In light of the aforementioned issues, this Note suggests that in order to make copyright law conform to the constitutional purpose of copyright protection, promote creativity, and provide clarity for musical artists, a more robust paradigm for determining infringement as a result of sampling is needed. Part I of this Note provides a discussion of the history and industry practices regarding music sampling, describing how sampling works, the technology involved, and why sampling is valuable to musical artists. Part II lays out the general law that affects sampling. Part III examines the legal difficulties resulting from the way copyright law treats music sampling and the impact of this treatment on creativity. Finally, Part IV suggests a comprehensive scheme to balance the competing interests of samplers and copyright holders by creating realistic and appropriate protections for copyright holders, while still accommodating the creativity encouraged by the "Copyright and Patent Clause" of the Constitution and embracing technology-based creativity involving the use of sampling.

I. SAMPLING: THE RECORDING INDUSTRY, TECHNOLOGY, AND WHY MUSICIANS SAMPLE

A. History

At the outset, one might inquire, why sample? To understand why sampling is such a prevalent practice, it is necessary to briefly examine sampling's historical roots. Sampling is a derivative of deejaying.[29]

major record companies) has been quite successful and profitable. *See generally* MICHAEL MASNICK & MICHAEL HO, THE SKY IS RISING: A DETAILED LOOK AT THE STATE OF THE ENTERTAINMENT INDUSTRY 23–29 (2012). This, of course, only further substantiates the claim that record companies will be looking for sampling revenues (either through licensing or litigation) in order to offset artists' use of these alternative channels rather than the traditional business models implemented by record companies. *See id*. at 29. Masnic and Ho explain that "[i]n many cases, there seem to be significant barriers for musical startups, but the toughest barrier doesn't seem to be a lack of consumer demand or prohibitive costs for music production. It's more likely that major music labels will sue music startups out of existence." *Id*. Although the claim that "major music will sue music startups out of existence" may be over exaggerated given the data Masnic and Ho present regading profitability, no doubt litigation and licensing will be prevelant means by which record companies will attempt to remain viable.

28. KOHN & KOHN, *supra* note 23, at 1619.

29. SCHLOSS, *supra* note 2, at 31. Deejaying, as referenced here, generally involves the use of two turntables connected by a mixer, allowing the "DJ" to switch from one record to another. *Id*.

Deejays, of course, wanted to keep dancers on the dance floor; as such, they maintained a practice of playing only the pieces of songs that were popular with dancers and omitting the remainder of the song.[30] In particular, the use of drumbeats, otherwise known as "breaks," was particularly prevalent.[31]

In the 1980s, inventors, in an attempt to increase the capabilities of synthesizers, created the digital sampler—a device that "allows the musician to record sounds from other instruments, nature, or even non-musical sources, and transpose and play them chromatically on a standard piano or organ keyboard."[32] Eventually, as digital samplers became more sophisticated,[33] deejays began using digital samplers for unintended purposes, sampling not only drums and drumbeats from records, but sampling melodies and bass lines, among other things.[34] Once these elements were sampled, the digital sampler could be played like an instrument. This implementation provided a much more sophisticated manner of producing music that was similar to the methodology deejays had previously produced using turntables.[35] Furthermore, these new digital samplers allowed users to edit samples—whether they were presets or recorded material—and "sequence" various samples to make entire musical arrangements.[36]

Of course, it was not a far stretch for deejay-turned-producer types to incorporate this methodology into hip-hop music produced for mass distribution by record companies.[37] Eventually, sample-based music moved from being a more efficient means of replicating live performances by deejays to a sophisticated form of studio-based music, often producing music that would be quite difficult to create by means of live instrumentation or in an improvisational setting such as deejaying at a party or club.[38] For example, at its height in 1980—often referred to as the

30. *Id*. at 32.

31. *Id*. Often these drum beats came from records that would not traditionally be considered dance music and were often unpopular with the dance club audience.

32. *Id*. at 34–35. Schloss notes, the inclusion of the digital sampler was intended to be a novelty. *Id*. at 34. For a more in-depth discussion of sampling technology and recording technology more generally, see *infra* Part I.B.

33. An example of such a sampler is the Em-u SP-12, which was intended to be used as a drum machine and had sampling capabilities for the purposes of recording live drum samples. SCHLOSS, *supra* note 2, at 35.

34. *Id*.

35. *Id*.

36. *Id*.

37. *Id*. Marley Marl, a hip-hop producer from New York, is generally credited as the first person to make use of the digital sampler in this manner. *Id*.

38. *Id*. at 41–43.

golden age of hip-hop[39]—artists such as Public Enemy and the Bomb Squad began producing hip-hop records, often characterized as "sound collages," which contained massive numbers of small samples and would have been nearly impossible to create with turntables alone.[40] Of course, at the time, these artists were generally unaware of the legal consequences of their actions.[41]

While it is unnecessary (and beyond the scope of this Note) to chronicle more recent developments in the art of sampling, it is sufficient to say that sampling has continued to be a prevalent practice and powerful tool in modern musical composition. However, in 1991, following the Southern District of New York's holding in *Grand Upright Music, Ltd. v. Warner Bros. Records*[42] that unlicensed use of a sample in a hip-hop recording constituted copyright infringement, copyright infringement by way of music sampling became a complication artists needed to consider.[43] While this may have reduced the quantity of samples included in newer music—due to the fact that using large quantities of samples has become economically unfeasible[44]—sampling is still prevalent and relevant in current musical culture, as clearly shown by Girl Talk's most recent offering.[45]

B. Making Music Using Samples: Recording, Technology, and Sampling

As alluded to above, music technology is particularly important when addressing issues of music sampling, primarily because use of this technology supplies the means by which sampling is used as a creative tool in the creation of musical works. There are two basic forms of technology used for recording—analog and digital—both of which are viable methods of sampling.[46] Analog recording is traditionally

39. *Id*. at 39. No doubt, this label in part is due to the fact that this era occurred prior to the legal turmoil experienced by many hip-hop artists as a result of lawsuits related to the unlicensed sampling of copyrighted material.

40. FREEDOM OF EXPRESSION, *supra* note 25, at 81.

41. *Id.* Chuck D, of Pubic Enemy has been often quoted as saying, "[w]e just thought sampling was just a way of arranging sound. Just like a musician would take sounds of an instrument and arrange them in their own particular way. We actually thought we was quite crafty with it." *Id.*

42. 780 F. Supp. 182, 185 (S.D.N.Y. 1991).

43. FREEDOM OF EXPRESSION, *supra* note 25, at 85.

44. *Id*.; *see also infra* notes 86–91 (illustrating how the need to license samples, and cost of said licenses, has the effect of reducing the number of samples an artist can feasibly afford to use on a particular record).

45. *See supra* notes 7–20.

46. FRANCIS RUMSEY & TIM MCCORMICK, SOUND RECORDING: AN INTRODUCTION 162, 200 (4th ed. 2004). As stated, both digital and analog methodologies are perfectly viable means for

accomplished via two primary mediums: magnetic tape and vinyl.[47] Digital recordings are created by sampling the amplitude of a particular waveform at a particular frequency, which is then converted into binary code.[48] These amplitudes are then reassembled to recreate the waveform of the original signal.[49] Eventually, these formats are converted into digital media, such as a CD or an MP3, for mass consumption.

Today, most recordings are digital and are created using a tool called Digital Audio Workstations (DAWs).[50] DAWs are powerful recording and non-linear editing tools as they allow samplers to digitally import works they want to sample and easily edit, sequence, and mix those samples with other samples or newly recorded audio.[51] Another popular means of sampling—perhaps even more popular in particular genres, such as hip-hop—is the use of digital samplers such as the Akai MPC 2000 and related models, particularly in the context of hip-hop and contemporary R & B production.[52]

The last topic of relevance to digital sampling in the recording industry is signal processing. Signal processing consists of processes that "manipulate a sound in various ways, often to make it sound different than the original source, or to bring out a particular characteristic in the

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creating samples; as such, legal scholars' reference to sampling as "digital sampling" is inaccurate. MCLEOD & DICOLA, *supra* note 1, at 1. Examples of analog sampling include using multiple turntables (many deejays use this method) or cutting and splicing magnetic tape. *Id*.; *see also* THE BEATLES, *Being for the Benefit of Mr. Kite!*, *on* SGT. PEPPER'S LONELY HEART CLUB BAND (Apple Records 1967) (using samples that were cut and spliced from a sound effects reel, reversed, and rerecorded as a backing track). In this light, this Note refers to the practice of what is commonly and inaccurately called "digital sampling" as "music sampling" in order to encompass analog sampling methodologies. However, the prevalence of sampling today seems to be attributable to the relative ease by which sampling can be accomplished though modern digital methodologies, such as Digital Audio Workstations ("DAWs") and digital samplers as discussed *infra*.

47. RUMSEY & MCCORMICK, *supra* note 46, at 200. In the case of magnetic tape, microphones convert changes in voltage into a pattern of varying magnetization, which can then be replayed using a tape machine. Alternatively, in the case of vinyl, recordings are made by a "groove of varying deviation," which represents the waveform and is played back using the stylus on a record player. *Id*.

48. *Id*. Typical sample rates range from 44100 Hz to upwards of 194000 Hz. Of course, the higher the rate of sampling and the greater the bit depth of these samples, the better the recording. *Id*. These types of records are then stored in a number of different mediums such as digital tape or hard drive. *Id*. at 227, 249.

49. *See generally id*. at 203–15.

50. *Id*. at 249. Examples of popular digital audio workstations are Avid's Pro Tools, Apple's Logic, and Steinberg's Nuendo.

51. "'You don't have to learn how to play guitar,' . . . . 'You don't have to know nothing. All you have to do is get a sound editing program for your computer, and you're right there. You can make the next big record in the world.'" MCLEOD & DICOLA, *supra* note 1, at 5 (quoting remix artist Steinski); *see also* RUMSEY & MCCORMICK, *supra* note 46, at 245–49 (discussing generally the benefits of non-linear editing accomplished via digital audio workstations).

52. SCHLOSS, *supra* note 2, at 30, 35.

source."[53] These processes include compression/limiting,[54] equalization,[55] reverberation and delay,[56] modulation,[57] pitch shifting and pitch correcting,[58] and changes to the gain structure,[59] to name some general

53. DANIEL M. THOMPSON, UNDERSTANDING AUDIO: GETTING THE MOST OUT OF YOUR PROJECT OR PROFESSIONAL RECORDING STUDIO 24 (2005); *see also* GARY DAVIS & RALPH JONES, THE SOUND REINFORCEMENT HANDBOOK 243 (2d ed. 1989) ("A signal processor is a device (or circuit) which alters the audio signal in some non-linear fashion."). Thompson explains signal processing in the analog domain—as in a traditional recording studio—noting that once sounds have been captured "[t]he signals can then be processed using equalizers or 'EQs' to adjust the tone or 'timbre,' compressors for dynamic level control and 'punch,' noise gates to eliminate unwanted sounds." THOMPSON, *supra* note 53, at 7. "Just as processing operations like equalisation [sic], fading and compression can be performed on analogue [sic] sound signals, so they can on digital sound signals." RUMSEY & MCCORMICK, *supra* note 46, at 217. "Digital signal processing (DSP) involves the high speed manipulation of the binary data representing audio samples[] . . . [c]arried out by computing devices capable of performing fast mathematical operations on data . . . ." *Id.*

54. Compression or limiting (two species of the same process) "control the swing in the level of a signal, reducing, for instance, the difference in signal level between the softest and loudest notes of a vocal performance." THOMPSON, *supra* note 53, at 24; *see also* DAVIS & JONES, *supra* note 53, at 270. Even more so, compressors and limiters will be used in a more creative way to "change the sound of the signal, adding 'punch' or 'tightness.'" THOMPSON, *supra* note 53, at 24.

55. Equalizing and filtering (a common type of equalizing) are processes that alter the tone or timbre of a particular sound. *See* THOMPSON, *supra* note 53, at 7. Equalization refers to a process that boosts or cuts a particular range of frequencies. DAVIS & JONES, *supra* note 53, at 244. Filtering, on the other hand, typically refers to a process that cuts all frequencies that are above (low-pass filters) or below (high-pass filters) a particular frequency. *Id*. at 244, 256–58.

56. Reverberation is a naturally occurring phenomenon in indoor environments "caused by reflection from walls, floor, ceiling and other surfaces which do not absorb all the sound" from a particular source. DAVIS & JONES, *supra* note 53, at 259. Devices such as reverb chambers, ducts, springs, and digital reverb devices and software can be used to emulate this phenomenon and add this effect to a "dry" source. *Id*. at 261–66. Delay refers to an exact digital or analog copy of the source signal reproduced later in time, commonly referred to by the layman as "echo." *Id*. at 259, 266–69.

57. Modulation includes a number of processes including, but not limited to, flanging and phasing. Flanging is a sound "described as swishing or tunneling" caused by two or more identical signals, heard simultaneously, where one of the signals is slightly delayed at varying times resulting in a phenomenon called comb filtering. *Id*. at 277. This effect derives its name from the analog methodology of creating the effect, accomplished by intermittently pressing on the flange of a tape reel. *Id*. Phasing occurs when a portion of a source signal is altered with one or more comb filters that change frequencies over time. *Id*. at 278. The resulting sound is similar, yet distinguishable, from flanging. *Id.*

58. Pitch shifting is a process by which an entire source or portions thereof can be transposed. Devices and software producing this effect accomplish it by slicing the audio file "and then lengthening each section where the pitch is to be decreased, or shortening each section where the pitch is to be increased." Paul White, *Effects: All You Need to Know . . . And a Little Bit More*, SOUND ON SOUND (May 2007), http://www.soundonsound.com/sos/may07/articles/effects.htm. Pitch correction processors such as Auto-Tune, on the other hand, "monitor the pitch of the incoming signal, then compare it to a user-defined scale, which can be a simple chromatic scale or any combination of notes. Pitch-shifting techniques are then used to nudge the audio to the nearest semitone in the user's scale." *Id*. "The main creative application for pitch correction is the so-called 'Cher effect,'" which can be described as a "robotic-sounding" vocal effect. *Id*.

59. Usually, altering the gain structure of a particular sound involves increases or decreases in the perceived volume of particular sounds. DAVIS & JONES, *supra* note 53, at 28. However, this can involve creating distortion—that is, a change in the signal that alters the amplitude or phase, or creates

categories. The use of such processes—often referred to as "effects" by laypersons[60]—is typical in the recording industry for the purposes of mixing.[61]

Samplers, however, often use signal processing more dramatically to hide or transform samples—making them virtually unrecognizable—in order to avoid licensing copyrights and for creative reasons.[62] This Note argues that such processes, although generally viewed by samplers and copyright holders as evading legal obligations under copyright law,[63] should not be viewed as such. Furthermore, these processes become important in the music-sampling context because they have the potential to be what this Note refers to as adequate "transformative processes." As argued, transformative processes, to some extent, would absolve samplers from obtaining licenses for those samples that are sufficiently transformed.[64] Of course, under current copyright law, the issue raised by samples that are severely altered is whether unrecognizable or severely altered samples should constitute infringement or whether this transformation is sufficient to warrant a finding of fair use.[65]

C. Sample Clearing: Licensing Samples

To this point, the discussion regarding sampling has answered why artists sample and how sample-based music is created. Perhaps more relevant to legal discourse is, what happens once an artist samples, using another artist's work as source material. There are two basic scenarios: (a) the artist licenses the sample from the relevant copyright holders, or (b) they do not license the sample and hope they are not sued for

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different frequencies not perceived in the original signal. *Id.* at 81. Practically speaking, the term "distortion" in creative applications "is more commonly used to describe processes that change the waveform in some radical and often level-dependent way." White, *supra* note 58. Often, distortion may be undesirable; however, where distortion is intentional, it can be a powerful tool for altering audio. Common uses "include guitar overdrive, fuzz, and simply overdriving analogue [sic] circuitry or tape to achieve 'warmth'." *Id.*

60. DAVIS & JONES, *supra* note 53, at 243 (noting this common term and indicating a preference for the term signal processor "because it covers [a] device in all cases, whether used for mild enhancement or extreme special effects").

61. THOMPSON, *supra* note 53, at 23 (describing the use of signal processing in the mixing process).

62. FREEDOM OF EXPRESSION, *supra* note 25, at 90. Artists such as Cypress Hill, a popular rap group, have noted that, when making beats, "the trick is to really fuck [the sample] up so that you don't even have to ask for permission." *Id.*

63. FREEDOM OF EXPRESSION, *supra* note 25, at 90.

64. *See infra* Part IV.B (discussing transformative processes).

65. *See supra* Part II.A.3 (discussing fair use under § 107 of the Copyright Act).

infringement.[66] Provided that the sampled work was fixed after February 15, 1972,[67] a sampler who chooses the former route must obtain a license from the holder of the copyright in the musical composition and the sampled sound recording.[68] Adding to an already arduous task, these two copyrights are rarely owned by the same entities.[69]

For licensing purposes, copyrights in sound recordings and copyrights in musical compositions are treated differently. Choosing to license a sound recording is exclusively at the discretion of the copyright holder.[70] Owners of musical compositions, however, do not enjoy complete exclusivity with regard to licensing. Under the Copyright Act, a sound recording is considered a derivative work of the underlying musical composition.[71] In order to fix and distribute a sound recording of a musical work, a distributor must obtain a mechanical license from the owner of the copyright in the musical composition.[72] Under 17 U.S.C. § 115, Congress has provided that once a recording of a non-dramatic musical composition has been distributed in the United States, the owner of the copyright in the musical composition is compelled to grant a license in the work to make and distribute the recordings of that work.[73] While § 115 compels the

66. Kohn and Kohn note in their treatise on music licensing that although juries are often the final arbiter as to whether the sample is recognizable or whether an association between the original work and the sampled work can be made, the possibility remains that a court could find infringement where only an expert is capable of making such a distinction. As such, they strongly advise artists to obtain licenses, even if the sample is well hidden within the new work. KOHN & KOHN, *supra* note 23, at 1607.

67. *See* Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971), amended by Pub L. No. 93-573, 88 Stat. 1873 (1974) (codified as amended at 17 U.S.C. § 102 (2006)) (providing for copyright protection for sound recordings created after February 15, 1972).

68. KOHN & KOHN, *supra* note 23, at 1598.

69. *Id*. at 1607.

70. *Id*. at 1608.

71. *Id*. For an in-depth discussion of copyright law and how the law affects samplers, see *infra* Part II.

72. KOHN & KOHN, *supra* note 23, at 732. The term "mechanical license" derives from the term "mechanical reproductions," which refers to any fixed form embodying a recording of music including piano rolls, music boxes, records, tapes, compact discs, and digital files. *Id*.

73. 17 U.S.C. § 115(a)(1) (2006). The relevant language contained in § 115 is as follows:

> When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. . . .

Id. Obtaining a mechanical license for the purpose of "covering" a work that has already been sold commercially is a relatively streamlined process. Provided that (1) the work is a nondramatic musical work, (2) it has been previously recorded and distributed, (3) the new recording does not change the fundamental character of the work, and (4) is only used as a phonorecord, the owner of the copyright in the musical composition is compelled to license the musical composition. DONALD PASSMAN, ALL

owner of a musical composition to license the composition to any party who wishes to create a new sound recording of the work, there are limitations on this requirement. Under § 115(a)(2), a person who obtains a compulsory license is only permitted to alter the arrangement and not the "basic melody or fundamental character of the work."[74] This provision has been interpreted to exclude samples from the compulsory licensing requirement.[75]

The entire process of licensing samples is referred to in the music industry as clearing samples or sample clearance.[76] Beginning in the early 90s, following a slew of lawsuits regarding unlicensed samples,[77] record labels instituted a policy requiring artists to complete a "sample clearance report" where an artist divulges all of the samples used on a particular record.[78] Once identified by the artist, the record label attempts to clear the samples—that is, it contacts the relevant copyright holders to get permission to use the sample and negotiate a licensing agreement.[79] Copyright holders of sampled works are at liberty to take a number of actions in response to a request for a license that include, but are not limited to, refusing to license the work,[80] granting a license for a flat fee,

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YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 209 (Free Press 7th ed. 2009). Generally speaking, the Harry Fox Agency will issue licenses and make sure that users are paying the compulsory licensing fee for a small fee. *Id*. at 221.

74. 17 U.S.C. § 115(a)(2) (2006). Section 115(a)(2) states:

> 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, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

Id.; *see also* PASSMAN, *supra* note 73, at 209–11 (describing the conditions necessary to obtain a license under § 115(a)(2)).

75. KOHN & KOHN, *supra* note 23, at 1608. Kohn explains that Congress included § 115(a)(2) because they "recognized the legitimate interests of songwriters who might wish to prevent their musical works from being 'perverted, distorted, or travestied.'" *Id*. (quoting H.R. REP. NO. 94-1476, at 109 (1976)).

76. PASSMAN, *supra* note 73, at 318–19.

77. Most of the cases producing published decisions are discussed *infra* in Part II.

78. FREEDOM OF EXPRESSION, *supra* note 25, at 86. As McLeod notes, this didn't stop artists from lying about the use of samples they didn't think anyone would ever discover. *Id*.

79. FREEDOM OF EXPRESSION, *supra* note 25, at 86.

80. As noted above, owners of the sound recording may refuse to license the sampled recording because they are not compelled to license the work under the Copyright Act. *See supra* note 70 and accompanying text. Moreover, 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"—precisely what is being licensed by the copyright holder in the sound recording when a sound recording is sampled—fits squarely within the rights of the copyright holder. 17 U.S.C. § 114(b); *see also infra* notes 98–103 and accompanying text (discussing the exclusive rights of copyright holders in sound recordings). Likewise, nor are owners of the copyright in the sampled musical composition compelled

granting a license for a royalty, or asking for an ownership stake in the copyright in the new composition containing the sample.[81] Leverage in this situation depends on whether the use of the sample would constitute infringement—and, without a license, there is usually a high probability of infringement.[82] For the most part, whether the work constitutes an infringing use and what demands the holder of the underlying copyright will have in order to permit its use will be unknown until the new work containing the sample has already been created and is a finished product.[83]

One might ask, what is so bad about this process? The inherent problem is that the entire process is cost-prohibitive; the cost of clearing small samples has a tendency to eat up a recording budget, and thus the average artist will often forego sampling in order to avoid the cost.[84] Moreover, a related concern is the substantial waste of creative time and energy that results when the cost of licensing ultimately prevents the commercial exploitation of the newly created work.

Consider the following example. Assume, in the interest of simplicity, that a sample is being licensed for a flat fee from both the owner of the sound recording and the musical composition.[85] The average flat fee license ranges from $2,500 to $20,000.[86] The average recording agreement for a new artist to record an album for a major record label is between $100,000 and $250,000.[87] Add in attorney's fees or the cost of hiring a

to license their copyrights because sampling changes "the basic melody or fundamental character of the work," thus giving complete discretion to the copyright holder. 17 U.S.C. § 115(a)(2) (2006); *see also supra* note 74.

81. KOHN & KOHN, *supra* note 23, at 1609.

82. *Id.*

83. PASSMAN, *supra* note 73, at 319.

84. *See* MCLEOD & DICOLA, *supra* note 1, at 158–63 (discussing the expense of licensing samples). McLeod and DiCola note that often those artists who do sample must "abandon the traditional commercial-recording model" in order to afford the costs of sampling. *Id.* at 161.

85. As noted above, flat fee licensing is but one of the many types of licensing agreements that are negotiated by samplers. *See supra* note 81 and accompanying text.

86. KOHN & KOHN, *supra* note 23, at 1548–49.

87. PASSMAN, *supra* note 73, at 91. This figure can vary depending on the notoriety of the artist—that is, whether the artist has already achieved some level of fame or is virtually unknown in the United States or elsewhere. *Id.* As such, depending on the artists' level of notoriety or fame, funds made available by record companies to record a single album can range from zero to $1,000,000 or higher. *Id.* Indeed, this paradigm may provide an explanation as to why famous artist can still afford to sample when licensing costs border on astronomical. *See supra* notes 25 and 26 and accompanying text (describing extreme licensing fees paid by famous artists in order to include samples on their records).

As Passman explains, these recording budgets are basically "structured as funds." PASSMAN, *supra* note 73, at 91. Thus, the advance comprises both a payment to the artist to survive on and the budget for the recording of the album. As such, the artist takes home any surplus not spent on recording. *Id.* Furthermore, although artists are usually paid royalties, those royalties are generally not payable until the record company has recouped the advanced funds. *Id.* at 79.

sample-clearance house[88] to negotiate the license and draw up the necessary paperwork, and it becomes apparent how quickly a recording budget can be swallowed because the artist used a few samples.[89] An artist is often better off creating a replay.[90] A replay is a term of art referring to a musical fragment rerecorded by a studio musician to mimic a work an artist wishes to sample. By making a replay, the would-be sampler avoids licensing the sound recording he or she wishes to sample, and thus only has to pay a licensing fee to the holder of the copyright in the musical composition, usually the publisher.[91] What follows, as more fully discussed *infra*, is that these economic hurdles have a negative effect on the choice of the creative means used to create new music.[92]

II. THE LAW OF SAMPLING

A. The Copyright Act and Copyright Law Theory

This Note has identified some licensing issues that implicate copyright law, specifically the compulsory licensing requirements contained in 17 U.S.C. § 115.[93] As intimated by discussions in preceding parts, the law that generally governs in sampling litigation is federal copyright law.[94] The following discussion provides a general overview of the aspects of copyright that are relevant to music sampling. Additionally, it chronicles important court decisions that have shaped the legal issues that are implicated when musicians sample.

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88. Sample-clearance houses are third-party companies whose sole purpose is to negotiate sampling licenses. FREEDOM OF EXPRESSION, *supra* note 25, at 87.

89. *See id*. at 86.

90. PASSMAN, *supra* note 73, at 319.

91. *Id*.; *see also* FREEDOM OF EXPRESSION, *supra* note 25, at 87. McLeod notes that it is now common practice for hip-hop artist to hire musicians and specifically instruct the musician to mimic a known performance. *Id*. More specifically, he recounts that Chuck D., a member of the famous rap group Public Enemy, went as far as to hire Stephen Stills to sing a portion of a Buffalo Springfield song (Stills was the writer and lead singer for Buffalo Springfield), because it was cheaper to merely license the copyright from Stills' music publisher than to pay Atlantic Records for the rights to sample the original recording. *Id*.

92. *See infra* Part III.B.

93. *See supra* Part I.C.

94. Of course, when dealing with licensing issues, the law of contracts may be at issue. However, any such issues are beyond the scope of this Note.

1. Rights

The United States Constitution provides Congress with 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."[95] Pursuant to this power, Congress enacted the Copyright Act, which has been amended over time.[96] As necessary, Congress has made such amendments in order to accommodate a number of technological advances and has expanded copyright law, providing specialized protections in particular fields.[97]

As previously mentioned, under the Copyright Act and its various amendments, sampling of sound recordings implicates the rights of two copyright holders, which may or may not be the same person or entity: (1) copyright in the sampled sound recording and (2) the copyright in the underlying musical composition.[98] Those who own copyrights in these works enjoy certain exclusive rights regarding their copyrights. In the case of musical compositions, copyright owners enjoy the right to (1) reproduce, (2) make derivative works, (3) distribute copies or phonorecords of the work, (4) perform the work publicly, and (5) display the work publicly.[99] In 1971, Congress extended certain protections to owners of sound recordings fixed after February 15, 1972.[100] The owner of a copyright in a sound recording retains the exclusive right to (1) reproduce, (2) make derivative works, (3) distribute copies or phonorecords of the work, and (4) perform the recording "publicly by means of a digital audio transmission."[101] However, these rights are

95. U.S. CONST. art. I, § 8, cl. 8. The Supreme Court has recognized that the introductory phrase of this article, and particularly the word "promote," indicates that action by Congress should be intended to stimulate, encourage, and induce artists and inventors to create new things and to further the progress of the arts and sciences. Goldstein v. California, 412 U.S. 546, 555 (1973); *see also* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A] (2010).

96. *See generally* Title 17 of the United States Code.

97. *See, e.g.*, Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971), amended by Pub L. No. 93-573, 88 Stat. 1873 (1974) (codified as amended at 17 U.S.C. § 102 (2006)) (providing protection for sound recordings); Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended in scattered sections of 17 U.S.C.) (providing owners of sound recordings with the exclusive right to perform works by means of digital audio transmission); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.) (addressing issues regarding copyright and the Internet).

98. KOHN & KOHN, *supra* note 23, at 1598.

99. 17 U.S.C. § 106(1)-(5) (2006).

100. *See generally* Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971).

101. 17 U.S.C. § 106(1)-(3), (6) (2006).

significantly curtailed by 17 U.S.C. § 114(b).[102] The limitation most significant to music sampling is that the right to prepare derivative works of a sound recording 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."[103]

2. Infringement

In *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*,[104] the Court held that establishment of copyright infringement requires proof of two elements: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original."[105] The first element—ownership—is easily established in cases where the copyright is registered with the United States Copyright Office. Under the Copyright Act, a valid registration is prima facie evidence of ownership.[106]

As to the second element—copying—proof of actionable copying is much more complicated. Proving that there was in fact copying boils down to two basic components: (1) whether the alleged copier had access to the copyrighted work and (2) whether the works are substantially similar.[107] Since most sampled works are widely available, access to the sampled work generally will not be at issue.[108] Hence, at the heart of the inquiry in sampling cases is whether the works are substantially similar.[109]

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102. 17 U.S.C. § 114(b) (2006). The relevant text is as follows:

> The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. 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. The exclusive rights of the owner of copyright in a sound recording 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. The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of section 106 do not apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined by section 118(g)): Provided, [t]hat copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.

Id.

103. *Id.*

104. 499 U.S. 340 (1991).

105. *Id.* at 361; *see also* 4 NIMMER, *supra* note 95, § 13.01.

106. 17 U.S.C. § 410(c) (2006); *see also* 4 NIMMER, *supra* note 95, § 13.01[A].

107. 4 NIMMER, *supra* note 95, § 13.01[B].

108. *See, e.g.*, Bridgeport Music, Inc. v. UMG Recordings, Inc. (*Bridgeport II*), 585 F.3d 267, 273

In his treatise, Nimmer—the leading expert on copyright law—explains that there are two categorizations of substantial similarity: comprehensive non-literal similarity[110] and fragmented literal similarity.[111] The latter of these two theories—fragmented literal similarity—is implicated in the sampling context.[112] Under this theory of substantial similarity, the alleged infringer appropriates, in a literal manner, a portion of the allegedly infringed copyright.[113] The most salient question with regard to this theory is "[a]t what point does such fragmented similarity become substantial so as to constitute the borrowing an infringement?"[114] Thus, courts must determine the importance of the fragment and whether the fragment is quantitatively and qualitatively important enough to amount to infringement.[115] Nimmer notes that even where the quantity of the fragment is small, a court may still find substantial similarity if the small portion is qualitatively important.[116]

3. Defenses

The most common defenses to allegations of copyright infringement in the sampling context are that (1) the sampling is a fair use[117] or (2) the

(6th Cir. 2009) (noting that the sampled work was one that was widely used by rap and hip-hop artists).

109. *Id*. at 273–74.

110. 4 NIMMER, *supra* note 95, § 13.03[A][1].

111. *Id*. § 13.03[A][2]. Although these terms are products of Nimmer's scholarship and do not originate from judicial opinions, Nimmer notes that this terminology has been cited with approval by courts in a number of opinions. *Id*. § 13.03[A] n.9.

112. *Id*. § 13.03[A][2][b] ("On general principles, it would seem that the practice of digitally sampling prior music to use in a new composition should not be subject to any special analysis: to the extent that the resulting product is substantially similar to the sampled original, liability should result.") (footnotes omitted).

113. *Id*. § 13.03[A][2][a].

114. *Id*. § 13.03[A][2]. Nimmer further explains that one must ascertain "whether the similarity relates to matter that constitutes a substantial portion of plaintiff's work—not whether such material constitutes a substantial portion of defendant's work." *Id*. § 13.03[A][2][a]. Using sampling as an example of this principle Nimmer explains that "the fact that the sampled material is played throughout *defendants'* song cannot establish liability, if that snippet constitutes an insubstantial portion of *plaintiff's* composition." *Id.* § 13.03[A][2][a].

115. *Id*. § 13.03[A][2][a].

116. *Id*. Specifically addressing the music context, Nimmer explains that "[a]lthough it could be safely said that a similarity limited to a single note never suffices, the superstition among many musicians that the copying of three bars from a musical work can never constitute an infringement is, of course, without foundation. . . . Rather, the evaluation must occur in the context of each case, both qualitatively and quantitatively." *Id*.

117. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); Bridgeport Music, Inc. v. UMG Recordings, Inc. (*Bridgeport II*), 585 F.3d 267 (6th Cir. 2009).

sampling is de minimis.[118] The fair use doctrine is a statutory affirmative defense,[119] which provides that "fair use of a copyrighted work, including such use by reproduction in copies or phonorecords . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[120] In applying this doctrine, the statute prescribes application of a four-part balancing test to determine whether a particular use is a fair use. The statute states:

> 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.[121]

As discussed in Parts II.B.1 and III.A.1, application of the fair use doctrine in the sampling context has not provided much solace for samplers. In light of the Supreme Court's jurisprudence finding that commercial uses are presumptively unfair,[122] many courts have erroneously relied on this proposition to dismiss claims of fair use.[123] However, in *Campbell v. Acuff-Rose, Inc.*[124]—which held that a commercial work, which was a parody, was a fair use[125]—the Supreme

118. *See, e.g.*, Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2004); Bridgeport Music, Inc. v. Dimension Films (*Bridgeport I*), 410 F.3d 792 (6th Cir. 2005).

119. The doctrine of fair use finds its roots in the common law and was codified in 1976. Copyright Act of 1976, Pub. L. 94-553, 90 Stat. 2541 (Oct. 19, 1976) (codified at 17 U.S.C. § 107 (2006)). According the House Report, codifying the fair use doctrine was "intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H.R. REP. NO. 94-1476, at 66 (1976).

120. 17 U.S.C. § 107 (2006).

121. *Id.*

122. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) ("[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright . . . .").

123. *See* 4 NIMMER, *supra* note 95, § 13.05[A][1][c].

124. 510 U.S. 569 (1994).

125. *Id.* at 594.

Court explained that none of the four factors is conclusive, and that the commercial quality of the work simply "tends to weigh against a finding of fair use."[126] Regardless of the explanation of *Sony Corp. of America v. Universal City Studios, Inc*. contained in *Acuff-Rose*,[127] it appears that the fair use defense as it is currently applied will not be a successful defense for samplers, even when the use is transformative, primarily due the commercial quality of the work and the impact on the exploitability of the sampled work.[128]

The de minimis use doctrine applies the legal maxim of de miminis non curat lex—meaning "the law does not concern itself with trifles"—in the copyright context.[129] Nimmer eloquently states that in copyright law, de minimis copying "represents simply the converse of substantial similarity"—i.e., that the copying is so small that it is negligible, and thus not actionable.[130] With regard to sampling litigation, this defense has met two significant obstacles. First, courts must discern where to draw the line with regard to how much sampling is too much.[131] This is determined by evaluating whether an "average audience [member] would not recognize the appropriation."[132] The second, and more controversial, obstacle comes as a result of the Ninth Circuit's holding in *Bridgeport Music, Inc. v. Dimension Films*,[133] which rejects application of the de minimis use doctrine in the sampling context with regard to sound recordings.

B. The Cases Addressing Music Sampling and Copyright Infringement

In the early 1990s, courts began to encounter lawsuits regarding unauthorized sampling of musical works. In one of the earliest cases

126. *Id*. at 585; *see also* 4 NIMMER, *supra* note 95, § 13.05[A][1][c] (explaining that "[t]aken literally, [the] statement [in *Sony* quoted above] would cause the fair use analysis to collapse . . . .").

127. *See supra* note 126 and accompanying text.

128. *See, e.g.*, Bridgeport Music, Inc. v. UMG Recordings, Inc. (*Bridgeport II*), 585 F.3d. 267, 278 (6th Cir. 2005) (finding that although the use of various samples was transformative, a finding of fair use would cause the plaintiff to "lose substantial licensing revenue if it were deprived of its right to license content such as that used by [the defendant]."); *see also infra* Part III.A.1 (discussing the application of fair use in the sampling context in greater depth).

129. BLACK'S LAW DICTIONARY 496 (9th ed. 2009); *see also* 2 NIMMER, *supra* note 95, § 8.01[G].

130. 2 NIMMER, *supra* note 95, § 8.01[G].

131. *Compare* Newton v. Diamond, 388 F.3d. 1189, 1196–97 (concluding that as a matter of law a three note sample was de minimis), *with id*. at 1197 (Graber, J., dissenting) (concluding that there was sufficient evidence that a finder of fact could determine that a three not sample was not de minimis and thus substantially similar).

132. *Id*. at 1193 (citing Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986)).

133. 410 F.3d 792, 800–01 (6th Cir. 2005) (declining to apply the *de minimis* use doctrine and holding that, in the case of sound recordings, any unlicensed sampling is an infringement).

addressing sampling, *Grand Upright Music, Ltd. v. Warner Bros. Records*,[134] the court took a firm stance regarding infringement. The opening words of the opinion are illustrative: "Thou shalt not steal."[135] In *Grand Upright Music*, Biz Markie—a famous rap artist—sampled a portion of Raymond "Gilbert" O'Sullivan's "Alone Again (Naturally)."[136] The sampled portion—a three-word sample—appeared on Markie's album *I Need A Haircut* on the track "Alone Again."[137] The defendants had contacted O'Sullivan and Upright Grand Music in an effort to obtain a license to use the sample, but O'Sullivan declined the request.[138] Once the court had determined O'Sullivan and Grand Upright Music were in fact the owners of the copyright in both the master recording and the underlying composition, it held that the combination of the defendants being aware that they needed to obtain a licensing to use the sample and their "callous disregard for the law and for the rights of others" was sufficient grounds to grant a preliminary injunction preventing the infringing use.[139] Beyond this bald holding, the opinion in *Grand Upright Music* contains almost no reference to the substantive law of copyright or Title 17.

In 1993, the United States District Court for the District of New Jersey dealt with the issue of digital sampling in the music context in *Jarvis v. A & M Records*.[140] In *Jarvis*, the defendants sampled a portion of Boyd Jarvis's "The Music Got Me,"[141] which appeared in defendant's song "Get Dumb! Free Your Body."[142] The court stated that "[i]n order to prove copyright infringement, the plaintiff must establish that he or she owns a valid copyright, that the defendants copied a protectable expression, and

134. 780 F. Supp. 182 (S.D.N.Y. 1991).

135. *Id*. at 183.

136. *Id*.

137. *Id*.

138. *Id*. at 184.

139. *Id*. at 185. Additionally, the court referred the matter to the United States District Attorney for the Southern District of New York for possible criminal prosecution under 17 U.S.C. § 506(a) and 18 U.S.C. § 2319. *Id.* Following the aftermath of *Grand Upright Music*, Biz Markie re-released the album *I Need a Haircut* in 1995; however, "Alone Again" was omitted. *See* BIZ MARKIE, I NEED A HAIRCUT (Cold Chillin' Records 1995) (omitting "Alone Again" from the track listing).

140. 827 F. Supp. 282 (D.N.J. 1993).

141. Jarvis' group, Visual, recorded the song. *Id*. at 286. Jarvis was the owner of the copyright in the composition and the arrangement, while Prelude Records owned the copyright in the sound recording. *Id.* In addition to a claim for copyright infringement of the musical composition, Jarvis brought a claim for infringement of the sound recording. *Id.* The court granted summary judgment on this claim, finding that Jarvis had no copyright in the sound recording. *Id*. at 292–93.

142. *Id*. at 286. The two sampled portions were (1) "the bridge section, which contains the words 'ooh . . . move . . . free your body'" and (2) "a distinctive keyboard riff, which functions as both a rhythm and melody." *Id*. at 289.

that the copying is substantial enough to constitute improper appropriation of plaintiff's work."[143] After disposing of the first two prongs,[144] the court found that it was "not clear as a matter of law that the portions copied from plaintiff's song were insignificant to plaintiff's song" and thus denied defendant's motion for summary judgment.[145]

Following these initial cases regarding sampling, as discussed above, samplers have used two primary defenses when accused of infringement as a result of sampling: fair use and de minimis use.[146]

1. Fair Use Cases

The Supreme Court delivered its only opinion pertaining to music sampling in 1994 when it decided *Campbell v. Acuff-Rose Music, Inc.*[147] The primary issue in the case was whether a commercial parody of a song constituted a fair use in the music sampling context.[148] 2 Live Crew, a popular rap group at the time, released a song entitled "Pretty Woman"[149] which was a rap parody of "Oh, Pretty Woman," a song famously performed by Roy Orbison.[150] The 2 Live Crew composition featured parodic lyrics[151] that were allegedly intended to "satirize the original

143. *Id*. at 288.

144. The court relied on the following evidence: (1) plaintiff had a certificate from the United States Copyright Office showing he owned the copyright in the musical composition and arrangement and (2) the defendants had admitted to using the sample. *Id*. at 289.

145. *Id*. at 292. The court's analysis was predicated on acceptance of Nimmer's theory of "fragmented literal similarity." *See supra* notes 111–16 and accompanying text (explaining the theory of fragmented literal similarity).

146. *See supra* Part II.A.3.

147. 510 U.S. 569 (1994).

148. *Id*. at 571–72.

149. *Id*. at 572. Luther R. Campbell, who was a member of 2 Live Crew, composed the work. *Id*.; *see also* 2 LIVE CREW, *Pretty Woman*, *on* AS NASTY AS THEY WANNA BE (Lil' Joe Records, Inc. 1989).

150. *Acuff-Rose*, 510 U.S. at 572. For an orginal recording of this Roy Orbison classic, see ROY ORBISON, *Oh, Pretty Woman*, *on* ORBISONGS (Monument Records 1965). "Oh, Pretty Woman" was composed by Orbison and William Dees in 1964. *Acuff-Rose*, 510 U.S. at 572. Both Orbison and Dees assigned their copyright in the composition to Acuff-Rose Music, Inc., a music publisher, who was the plaintiff in the original action and the respondent in the instant case. *Id*. Note that the copyright in the sound recording was not at issue because (1) Monument Records, the owner of the original master recording was not a party to the lawsuit, and (2) the Copyright Act has not yet been extended to provide protection for sound recordings recorded prior to 1972 ("Oh, Pretty Woman" was recorded in 1965). *See supra* notes 100–03 and accompanying text.

151. *See Acuff-Rose*, 510 U.S. at 594–96 apps. A–B. The Court's opinion rests largely on the similarities between the lyrics and melodies of "Oh, Pretty Woman" and "Pretty Woman" and largely ignores the actual sampling of the original sound recording and the implications of this sampling on the infringement of the underlying musical composition. *See infra* note 153 and accompanying text.

work"[152] in addition to a sampled portion of a very recognizable guitar riff.[153] Prior to releasing the work, 2 Live Crew's management contacted Acuff-Rose and offered to give credit to Acuff-Rose, Orbison, and Dees, and pay for the use; however, Acuff-Rose declined and refused to permit 2 Live Crew's use.[154] Nonetheless, 2 Live Crew released "Pretty Woman" without Acuff-Rose's permission.[155] In determining whether 2 Live Crew's use constituted a fair use, the Court conducted an in-depth analysis of the fair use factors set forth in § 107 of the Copyright Act.[156] The Court ultimately found that the Court of Appeals for the Sixth Circuit erred in finding "that the commercial nature of 2 Live Crew's parody of 'Oh, Pretty Woman' rendered it presumptively unfair" and that "no such evidentiary presumption [was] available . . . in determining whether a transformative use, such as a parody, is a fair one."[157] In its rationale supporting this conclusion, the Court set forth a number of important propositions that might be relevant to the application of fair use in the music-sampling context. First, the Court clarified that when considering the first factor of the fair use test,[158] "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."[159] With regard to the third factor,[160] the Court emphasized, "this factor calls for thought not only about the quantity of the materials used, but about their quality and importance, too."[161]

The most recent case dealing with the fair use defense in the music-sampling context, decided in 2009, comes from the Sixth Circuit. In *Bridgeport Music, Inc. v. UMG Recordings, Inc.*,[162] the court examined a jury verdict finding that the fair use defense did not apply to a particular sampling of a composition.[163] The sampled work was a composition by

152. *Id*. at 572.

153. *Compare* ROY ORBISON, *supra* note 150, at 0:02 (famous guitar riff), *with* 2 LIVE CREW, *supra* note 149, at 0:04, 1:04, 1:46, 2:15, and 2:52 (locations where the famous guitar riff appears in the 2 Live Crew recording).

154. *Acuff-Rose*, 510 U.S. at 572–73.

155. *Id*. at 573.

156. *Id*. at 576–94.

157. *Id*. at 594.

158. 17 U.S.C. § 107(1) (2006) (stating that said test relies upon "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes").

159. *Acuff-Rose*, 510 U.S. at 579.

160. 17 U.S.C. § 107(3) (2006) (stating that this factor turns upon "the amount and substantiality of the portion used in relation to the copyrighted work as a whole").

161. *Acuff-Rose*, 510 U.S. at 587.

162. 585 F.3d 267 (6th Cir. 2009).

163. *Id*. at 277–78.

David Spradley, Garry Shider, and George Clinton entitled "Atomic Dog."[164] The samples at issue were the use of the word "dog," "rhythmic panting," and the "Bow Wow" refrain.[165] The samples appeared in "D.O.G. in me," a recording by artist Public Announcement.[166] Finding that the jury was properly instructed as to the standards regarding a finding of substantial similarity, fair use, and willfulness,[167] the court stated a number of important propositions regarding findings of infringement as a result of music sampling. First, the court found no error in instructing a jury as to Nimmer's theory of fragmented literal similarity and acknowledged "the copying of a relatively small but qualitatively important or crucial element can be an appropriate basis upon which to find substantial similarity."[168] As an evidentiary matter, the court held that where a song is composed in the studio, the original sound recording may serve as the fixed form of the copyrighted composition.[169] The court also conducted a fair use inquiry, concluding that there was no fair use defense available.[170] The rationale behind this holding was that, although the use was transformative, the sampled parts were recognizable and protectable by copyright and revenues from licenses would likely be lost if Bridgeport was deprived the right to license the work.[171]

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164. *Id*. at 272; *see also* GEORGE CLINTON, *Atomic Dog*, *on* COMPUTER GAMES (Capitol Records 1982) (original recording of "Atomic Dog"). The court noted in its opinion that expert testimony established that Atomic Dog was an "anthem of the funk era" and "one of the most famous songs of the whole repertoire of funk and R & B." *Bridgeport II*, 585 F.3d at 273.

165. *Bridgeport II*, 585 F.3d at 273. The word "dog" in the original work was described as a "stand alone melody of one word." *Id*. at 276. The "Bow Wow" refrain referenced by the court is the famous lyric "bow wow wow yippie yo yippie yay, bow wow yippie yo yay." *See* GEORGE CLINTON, *supra* note 164.

166. *Bridgeport II*, 585 F.3d at 273; *see also* PUBLIC ANNOUNCEMENT, *D.O.G. in me*, *on* ALL WORK, NO PLAY (Universal Records 1998). The original release was on A & M Records; however, A & M became a division of UMG a year after the record's initial release. *Bridgeport II*, 585 F.3d at 273. Because of this merger, UMG was the named defendant in this lawsuit. *Id*.

167. The scope of this Note is limited to determinations of infringement; as such, an examination of the willfulness holding is omitted from this discussion as willfulness is a factor used to determine the extent of remedial measures prescribed by the court. *See* 17 U.S.C. § 504(c)(2) (2006).

168. *Bridgeport II*, 585 F.3d at 275. This recognition is a departure from the court's holding in *Bridgeport I*. *Id*. This holding could be interpreted to implicitly recognize that relatively small elements that are not qualitatively significant may not qualify for protection for lack of substantial similarity.

169. *Id*. at 276. Under this theory, the elements contained in the original sound recording are identical to the elements of a composition regardless of the improvisational elements that may have not been contemplated prior to recording. This created a temporal issue as to whether the first fixed form or the registered fixed form was the embodiment of the composition. *Id*. In any event, the court essentially eviscerates any perception or requirement that sheet music is required as evidence of a copyright in an original composition. *Id*.

170. *Id*. at 278.

171. *Id*.

2. De Minimis Use Cases

A virtual circuit split[172] has developed as a result of holdings in *Newton v. Diamond*[173] and *Bridgeport Music, Inc. v. Dimension Films*.[174] Both of these cases dealt primarily with the issue of whether the doctrine of de minimis use was applicable in the sampling context.[175] *Newton* involved the Beastie Boys' use of a three-note sample from a song entitled "Choir"[176] composed by jazz flutist and composer James W. Newton in their song "Pass the Mic."[177] Prior to releasing "Pass the Mic," the Beastie Boys obtained a license from ECM, the owner of the sound recording, to sample the recording.[178] Therefore, the claim of infringement was solely based on the Beastie Boys' unauthorized use of the underlying composition.[179] As such, the court's holding only addressed whether the "unauthorized use of the composition itself was substantial enough to sustain an infringement claim."[180] The court ultimately concluded that, although the three-note sequence appeared in the score, no reasonable juror could find that the three-note sequence sampled was a "quantitatively or qualitatively significant portion of the composition."[181] Accordingly,

172. This Note uses this categorization because the cases are distinguishable: the scope of the *Newton* opinion is limited to infringement of a musical composition, whereas *Bridgeport I* is limited to infringement of sound recordings. Newton v. Diamond, 388 F.3d 1189, 1193 (9th Cir. 2004) ("[O]ur inquiry is confined to whether the unauthorized *use of the composition itself* was substantial enough to sustain an infringement claim.") (emphasis added); Bridgeport Music, Inc. v. Dimension Films (*Bridgeport I*), 410 F.3d 792, 798 (6th Cir. 2005) ("We address this issue *only as it pertains to sound recording copyrights.*") (emphasis added). However, as discussed *infra* in Part III.A.2, a distinction on this basis is problematic for a number of reasons, and thus this Note argues that the conflict can be fairly categorized as a circuit split although other commentators may argue to the contrary. At least one commentator has argued that the cases do not represent a circuit split. *See* Tracy L. Reilly, *Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court's Attempt to Afford "Sound" Copyright Protection to Sound Recordings*, 31 COLUM. J.L. & ARTS 355, 370 (2008).

173. 388 F.3d 1189 (9th Cir. 2004).

174. 410 F.3d 792 (6th Cir. 2005).

175. *Newton*, 388 F.3d at 1190 ("[W]hether the incorporation of a short segment of a musical recording into a new musical recording, i.e., the practice of 'sampling,' requires a license to use both the performance and the composition of the original recording."); *Bridgeport I*, 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.").

176. *See* JAMES NEWTON, *Choir*, *on* AXUM (EMC Records 1982) (sampled recording).

177. *Newton*, 388 F.3d at 1191; *see also* THE BEASTIE BOYS, *Pass the Mic*, *on* CHECK YOUR HEAD (Capitol Records, Inc. 1992).

178. *Newton*, 388 F.3d at 1191.

179. *Id*. at 1193.

180. *Id*.

181. *Id*. at 1195.

the Ninth Circuit held the Beastie Boys' use of the three-note portion of Newton's composition was de minimis; thus, the Beastie Boys' failure to clear the sample and pay mechanical royalties to Newton was not actionable.[182]

The Sixth Circuit reached a very different conclusion when evaluating the music sampling issue in *Bridgeport Music, Inc. v. Dimension Films*.[183] *Bridgeport I* resulted from action taken by Bridgeport Music, Southfield Music, Westbound Records, and Nine Records.[184] In *Bridgeport I*, Westbound Records sued No Limit Films[185] for using an unlicensed sample from the sound recording of "Get Off Your Ass and Jam"[186] in the movie soundtrack for *I Got the Hook Up*.[187] The sample used was a three-note guitar solo taken from the introduction of "Get Off Your Ass and Jam."[188] The sample was altered in two ways: (1) the sample was looped and extended to sixteen beats and (2) the pitch was altered.[189] Limiting its holding as being applicable only in the context of sound recordings, the Sixth Circuit rejected the de minimis use paradigm, holding that "[i]f you cannot pirate the whole sound recording" you cannot "'sample' something less than the whole" without being subject to liability for infringement.[190] Thus, if *Bridgeport I* and *Newton* are read together, one of two conclusions must be reached: either (1) the specific exclusive rights in sound recordings and musical compositions respectively are, broadly

182. *Id*. at 1192.

183. 410 F.3d 792 (6th Cir. 2005).

184. *Bridgeport I*, 410 F.3d at 795. This action began with a complaint alleging almost 500 counts of copyright infringement and state law claims against approximately 800 different defendants. *Id*. The District Court severed the complaint, resulting in 476 separate actions. *Id*. Bridgeport Music, Inc. v. UMG Recordings, Inc. (*Bridgeport II*), 585 F.3d 267 (6th Cir. 2009) is one such action. For a discussion of this case and its implications on the application of the fair use doctrine in sampling cases see *supra* notes 162–70 and accompanying text.

185. Copyright infringement claims by plaintiffs Bridgeport Music, Inc., Southfield Music, Inc., and Nine Records, Inc. were dismissed on summary judgment by the District Court and were not appealed. *Bridgeport I*, 410 F.3d at 795; Bridgeport Music, Inc. v. Dimension Films, L.L.C., 320 F. Supp. 2d 830, 838 (M.D. Tenn. 2002). Claims against defendants Miramax Film Corp. and Dimension Films were settled and dismissed with prejudice. *Bridgeport I*, 410 F.3d. at 795 n.1.

186. *See* FUNKADELIC, *Get Off Your Ass and Jam*, *on* LET'S TAKE IT TO THE STAGE (Westbound Records Inc. 1975).

187. *Bridgeport I*, 410 F.3d at 795. The original recording at issue was N.W.A.'s "100 miles and Runnin'," which appeared on the soundtrack for the movie. *See* I GOT THE HOOK UP (Dimension Films 1998). For an original recording of "100 Miles and Runnin'," see N.W.A., *100 Miles and Runnin'*, *on* N.W.A.: GREATEST HITS (Priority Records, Inc. 1996).

188. *Bridgeport I*, 410 F.3d at 796.

189. *Id*. The sample appeared in the recording five times. *Id.*

190. *Id*. at 800.

speaking, entitled to different levels of copyright protection,[191] or (2) one of these courts has incorrectly applied the de minimis use doctrine.

III. PROBLEMS WITH THE CURRENT STATE OF COPYRIGHT LAW AND ITS EFFECTS ON MUSIC SAMPLING

A. Problems Resulting from Judicial Application of Legal Standards in Sampling Litigation

As previously mentioned, the application of available defenses in the sampling context seems to offer little protection for samplers. The fair use doctrine appears to fall short of providing any leeway for samplers except where the sampler has created a parodic work.[192] Additionally, the de minimis use doctrine seems to be problematic as there is a split among the circuits as to whether they should be applicable in sampling cases.[193] The following analysis examines both of these doctrines and attempts to ascertain whether the doctrines are simply misapplied by judges or conversely whether, although problematic, the judicial application of these doctrines is sound.

1. Problems with the Application of the Fair Use Doctrine

The major obstacle regarding the application of the fair use doctrine is that under the first factor of the fair use analysis—"whether such use is of a commercial nature or is for nonprofit educational purposes"[194]—the Supreme Court has held that, where the use is commercial, although not presumptively unfair as intimated in *Sony*, this factor tends to weigh against a finding of fair use.[195] Although the Court explained in *Acuff-Rose* that the more transformative the work, the less relevant the commercial nature of the work becomes,[196] commentators have observed that the

191. As noted above, it is true that sound recordings are afforded fewer exclusive rights. *See supra* notes 99 and 101 and accompanying text. However, what is being suggested here is that this interpretation of the cases would indicate the degree to which each of those rights is enforced is different depending on the subject matter sought to be protected (i.e., whether the work is a musical composition or sound recording).

192. *See supra* notes 122–28 and accompanying text (discussing the holding in *Campbell v. Acuff-Rose, Inc.*, 510 U.S. 569 (1994)).

193. *Compare* Bridgeport Music, Inc. v. Dimension Films (*Bridgeport I*), 410 F.3d 792, 805 (6th Cir. 2005), *with* Newton v. Diamond, 388 F.3d 1189, 1196 (9th Cir. 2004).

194. 17 U.S.C. § 107(1) (2006).

195. *Acuff-Rose*, 510 U.S. at 585 (1994).

196. *Id.* at 579 ("[T]he 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.").

overwhelming nature of the commercial quality of most works containing samples will, in practical application, result in a finding that the use was not a fair one for purposes of the Copyright Act.[197] Similarly, the forth factor—"the effect of the use upon the potential market for or value of the copyrighted work"[198]—would not support a finding of fair use due to the fact that, in most cases, permitting unlicensed sampling would, at least to some extent, reduce the market for derivative works of underlying copyrighted work.[199] Thus, under *Harper & Row, Publishers, Inc. v. Nation Enterprises*, the fourth factor would weigh against a finding of fair use.[200] Metaphorically speaking, samplers are essentially coming up to the plate with two strikes against them based on the commercial quality of the works alone. As to the third factor—"the amount and substantiality of the portion used in relation to the copyrighted work as a whole"[201]—one commentator suggests that most samples are found to be qualitatively substantial, otherwise they would not have been sampled in the first place.[202] Due to jurisprudence that would militate against a finding of fair use, unless the sample appears in parodic work like 2 Live Crew's "Pretty Woman," success of theories based on the fair use doctrine to justify the unlicensed use of even the smallest samples looks bleak at best.

2. Problems with the Application of the De Minimis Use Doctrine

Judicial decisions interpreting the de minimis use doctrine in sampling litigation are problematic, as they seem to misapply this defense. The holding in *Bridgeport Music, Inc. v. Dimension Films* poses a number of problems. First, the "literal reading approach" taken by the court in interpreting provisions of the Sound Recording Act of 1971 is problematic.[203] If accepted, the court's "no sampling without a license" approach, which rejects the de minimis use doctrine, would presumably

197. *See, e.g.*, KOHN & KOHN, *supra* note 23, at 1604–05.

198. 17 U.S.C. § 107(4) (2006).

199. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 417 U.S. 539, 568 (1985) ("[T]o negate fair use one need only show that if the challenged use 'should become widespread, it would adversely affect the *potential* market for the copyrighted work.'" (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 539, 568 (1985))); KOHN & KOHN, *supra* note 23, at 1606.

200. KOHN & KOHN, *supra* note 23, at 1606.

201. 17 U.S.C. § 107(3) (2006).

202. KOHN & KOHN, *supra* note 23, at 1605. This Note would challenge this proposition, and suggest that samples of say, a snare drum, might not be qualitatively significant. Yet, samplers tend to sample drums from other works regularly. *See* KEMBREW MCLEOD, OWNING CULTURE 90 (Peter Lang 2001) (describing the practice of using multiple sampled kick drums in combination to create a new kick drum sound).

203. *Bridgeport I*, 410 F.3d at 805.

provide copyright holders in sound recordings with greater protections against unauthorized sampling than the copyright holder in the underlying musical work embodied in the sound recording.[204] This is because, although de minimis amounts of musical compositions may be sampled per *Newton* without a license, similar quantities of sound recordings are absolutely off limits unless the sample is licensed. This simply cannot be correct. The legislative history regarding the enactment of the Sound Recording Act explains that Congress intended to grant a limited right for the owner of a sound recording that was no broader than rights afforded to musical compositions.[205] Further, 17 U.S.C. § 106 clearly indicates that the number of rights afforded to sound recording copyrights are fewer than those granted musical composition copyrights.[206] What follows seems clear, although it is not explicit: sound recordings are afforded fewer protections than musical compositions, not greater protections. As such, it seems inherently incorrect to provide sound recordings with such robust protection when the same or similar protection would not be afforded to musical compositions.[207]

A second issue, which is problematic in the court's analysis in *Bridgeport I*, is that it removes the judicial inquiry into whether substantial similarity exists.[208] Substantial similarity is a basic element of copyright infringement analysis and is necessary for a finding of infringement as a matter of law.[209] As Nimmer indicates in his treatise, it is hard to justify sound recordings as being of such a special nature that they should be immune to the substantial similarity analysis when determining infringement.[210]

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204. *See supra* notes 99–103 and accompanying text (comparing the exclusive rights pertinent to musical compositions and sound recordings).

205. JOHN MCCLELLAN, CREATION OF A LIMITED RIGHT IN SOUND RECORDINGS, S. Rep. No. 92-72, at 6 (1971) ("In approving the creation of a limited copyright in sound recordings it is the intention of the committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17."); *see also* KASTENMEIER, PROHIBITING PIRACY OF SOUND RECORDINGS, H.R. Rep. No 92-487, at 2–3 (1971) (indicating that the primary purpose of the sound recording act was to eliminate piracy and unauthorized distribution of records). Note that this runs contrary to Judge Guy's statement that "legislative history is of little help." *Bridgeport I*, 410 F.3d at 805.

206. 17 U.S.C. § 106 (2006).

207. *See* Newton v. Diamond, 388 F.3d 1189, 1196 (9th Cir. 2004) (applying de minimis use doctrine in the sampling context).

208. 4 NIMMER, *supra* note 95, § 13.03[A][2][b].

209. *Id.* § 13.01[B].

210. *Id.* § 13.03[A][2][b]; *see also* S. Rep. No. 92-72, *supra* note 205.

The application of the de minimis use doctrine is also problematic in *Newton v. Diamond*.[211] First, the majority finds that the sample at issue—a three-note, two-part melody consisting of the notes C—Db—C played on a flute while a C note is sung into the flute—is sufficiently original to be protectable; however, the majority concludes that the sample is nonetheless de minimis.[212] This is inherently contradictory: how can a work be protectable, yet infringing uses of the protectable portion cannot be actionable? Second, Judge Graber indicates that when applying the de minimis doctrine, there is an important question regarding who determines whether a particular use is de minimis.[213] The majority determines that as a matter of law, the sample is de minimis.[214] However, as the dissent explains, where there is a sufficiently original sample, it is up to a jury or the trier of fact to make a factual inquiry as to whether the sample is de minimis.[215] Thus, where "reasonable ears differ over the qualitative significance of the composition of the sampled material, summary judgment is inappropriate."[216] Furthermore, when determining whether a work is de minimis, equal weight must be given to the quantitative significance of the sample and the qualitative importance of the sampled segment to the underlying work.

B. Negative Effects on Creativity

While clarity and consistency regarding the application of defenses to copyright infringement, as illustrated above, are two major problems with sampling litigation, commentators have also highlighted that, in its current state, the law has a profoundly negative effect on creativity.[217] The problem, as articulated by one commentator, is that "[e]thnocentric notions of creativity and maldistribution of political power in favor of established artists and media companies have already served to stifle expression—the exact opposite of the declared purpose of copyright law."[218] Of course, the purpose referenced in this quote is to provide protection as a means of

211. 388 F.3d 1189 (9th Cir. 2004).
212. *Id*. at 1192, 1197.
213. *Id*. at 1197 (Graber, J., dissenting).
214. *Id*. at 1192.
215. *Id*. at 1198.
216. *Id*.
217. *See generally* JOANNA DEMERS, STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY (2006); *see also* FREEDOM OF EXPRESSION, *supra* note 25, at 107–13; SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 132–48 (2001).
218. VAIDHYANATHAN, *supra* note 217, at 148.

encouraging and promoting science and the useful arts, not giving complete monopolies to holders of existing copyrights.[219] Essentially, this problem may stem from a lack of understanding: as this commentator highlights, the stifling of creativity stems from the fact that the persons who make and interpret the law are largely ignorant to the process and methods by which creativity occurs.[220] This problem is only further highlighted by the fact that sampling could be seen as analogous to quotation—yet, when quoting from a literary work, the restrictions and implications are hardly as severe as those that result from unlicensed sampling.[221]

Whatever the reason for the disparate treatment outlined above, it nonetheless has a negative effect on creativity. The primary cause of these negative effects is economic in nature, although criminal penalties are additional deterrents for samplers.[222] As previously discussed, samplers either must pay extremely high licensing fees for samples or risk being sued—which ultimately results in paying considerable attorney's fees and a possible judgment.[223] In light of these high costs, would-be samplers without the financial means to absorb these costs are making conscious decisions to sample less or not sample at all.[224] As such, for many artists, the creative choice to sample has been supplanted by an economic choice not to sample.[225]

IV. SOLVING THE PROBLEM: A PROPOSED COMPREHENSIVE SCHEME

As highlighted by the previous parts, the current copyright regime is difficult to apply in cases of music sampling. Furthermore, licensing

219. U.S. CONST. art. I, § 8, cl. 8; *see also supra* note 95.

220. VAIDHYANATHAN, *supra* note 217, at 148. For an in-depth discussion of the psychological underpinnings of creativity and creative processes, see generally R. KEITH SAWYER, EXPLAINING CREATIVITY: THE SCIENCE OF HUMAN INNOVATION (2d ed. 2012).

221. LAWRENCE LESSIG, REMIX 53–55 (2008). Lessig notes that, although there are similarities between quoting and sampling, the "norms governing [sampling] are far more restrictive that the norms governing text." *Id*. at 54. He further questions why text is treated in such a liberal manner, while "quoting" music, art, or film is treated in a much more restrictive manner. *Id*. at 55.

222. 17 U.S.C. § 506 (2006) (proscribing criminal penalties for copyright infringement).

223. *See supra* Part I.C.; *see also* DEMERS, *supra* note 217, at 9. Demers notes that "the cost of legally licensing master recordings is prohibitive, while unauthorized appropriation carries the risk of lawsuits with heavy monetary and criminal punishment." *Id*.

224. OWNING CULTURE, *supra* note 202, at 89–99. McLeod notes that, in lieu of sampling freely, samplers often choose to (1) replicate samples with live musicians, saving from paying the owner of the master recording, (2) limit sampling to records which are in their own record companies' catalog, or (3) more effectively hide samples with effects (or signal processing). *Id*. at 94–95.

225. OWNING CULTURE, *supra* note 202, at 93 (quoting Redman on his choice not to use sampling on his newer recordings because of the high cost of licensing).

practices and expensive litigation have prevented samplers from using sampling in a creative sense. As such, clarity by way of legislative reform is a much-needed commodity. The idea of copyright reform as it applies to sampling, and to other new technology and creative processes that pose interpretive problems when applying current copyright regulations, is hardly a new idea. The following part provides a general overview of some of the solutions proposed by other commentators, but is by no means an exhaustive review of all the solutions proposed by commentators. Part IV concludes by proposing a different solution and applying it to the fact patterns presented in some of the previous litigation discussed above in order to examine its effectiveness in resolving some of the issues described in Part III.

A. Solutions That Have Been Proposed By Other Commentators

Commentators have suggested a number of ways to resolve the problems with determining to what extent unlicensed sampling is an infringement of a copyright. One approach has been to attempt to remedy the problems with the de minimis use jurisprudence. In this vein, one commentator has recently argued that the bright-line rule articulated in *Bridgeport I*[226] is appropriate, at least until Congress decides to amend the Copyright Act.[227] In attempting to "debunk" what she has identified as the "top three myths" in the music industry about sampling, she suggests the following: (1) sampling is not akin to borrowing, quoting, or imitation of other works, primarily due to the fact that samplers physically take portions of the sampled work; (2) the legitimacy of sampling as an art form does not entitle samplers to sample freely; and (3) that samplers who suggest that "it is wiser to err on the side of encouraging" creation rather than overprotection of copyrighted works are misguided.[228] While points two and three might be considered reasonable propositions, this Note expresses some skepticism as to whether the analogy between sampling and quotation is as misplaced as suggested.[229] Concluding that amendment to the Copyright Act is unlikely in the near future, this commentator recommends that the music industry "take charge of the sampling dilemma by uniting all of its producers, recording companies and musicians under a

226. As you will recall, *Bridgeport I* articulated the following rule: "[i]f you cannot pirate the whole sound recording, [you cannot] 'lift' or 'sample' something less than the whole." Bridgeport Music, Inc. v. Dimension Films (*Bridgeport I*), 410 F.3d 792, 800 (6th Cir. 2005).

227. *See generally* Reilly, *supra* note 172.

228. Reilly, *supra* note 172, at 375–402, 386.

229. *See supra* notes 218–21 and accompanying text.

comprehensive, voluntary licensing scheme."[230] This Note argues, however, this is precisely what the music industry has done. And, as illustrated above, this methodology has failed miserably, striking a balance that favors record companies and music publishers[231] and stifles musical creativity to some extent.[232]

Other commentators advocate for application of the de minimis use doctrine as applied in *Newton* to be applied to both sound recordings and musical compositions.[233] Of course, as argued above, simply accepting the *Newton* holding poses problems—questions persist, as indicated in the *Newton* dissent, as to whether the majority's articulated standard was in fact correctly applied.[234] Tweaking this approach slightly, others have suggested a middle ground, such as adding to the de minimis use analysis some of the fair use elements regarding the commercial effects of sampling on the exploitability of the work[235] or adding an inquiry as to whether the infringing sampling frustrates authors' incentive to create new works.[236] The former of these two solutions may provide little help largely because most sampling occurs in commercial works, generally tipping those factors in favor of a finding of infringment.[237] With regard to the

230. Reilly, *supra* note 172, at 407–08.

231. *See supra* Part I.C (offering a detailed explanation of current sample clearing and licensing practices). To be explicit, while the songwriter of the underlying musical composition, of course, gets compensated through the present sample licensing scheme employed by the music industry, it is important to recognize that the entities who are negotiating and benefiting financially from licenses are music publishers. PASSMAN, *supra* note 73, at 218. Publishers, in most cases—provided that the artist does not have a co-publishing deal—usually take home 50 percent of the licensing fee. *Id*. at 216. In the case of licensing sound recordings, since record companies generally own the copyright in the master recording, licensing fees for the sound recording go to the record label and not the artist. *Id.* at 318. Since the exploitation of these rights are important to publishers' and record companies' business models, they have little to no incentive to strike a different balance, making revisions to the current voluntary licensing scheme a questionable solution.

232. *See supra* Part III.B, discussing the effects of the current licensing regime and sampling jurisprudence on creativity.

233. *See* Mike Suppapola, *Confusion in the Digital Age: Why the De Minimis Use Test Should Be Applied to Digital Samples of Copyrighted Sound Recordings*, 14 TEX. INTELL. PROP. L.J. 93, 130 (2006); Matthew R. Brodin, Comment, Bridgeport Music, Inc. v. Dimension 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, 866–67 (2005) (arguing that the district court, which largely based its opinion on the *Newton* holding, provided the correct analysis and should not have been reversed by the Sixth Circuit in *Bridgeport I*).

234. *See supra* notes 213–16 and accompanying text.

235. Jeremy S. Sykes, Note, *Copyright—The De Minimis Defense in Copyright Infringement Actions Involving Music Sampling*, 36 U. MEM. L. REV. 749, 780 (2006).

236. David S. Blessing, Note, *Who Speaks Latin Anymore?: Translating De Minimis Use for Application to Music Copyright Infringement and Sampling*, 45 WM. & MARY L. REV. 2399, 2421–22 (2004).

237. *See supra* notes 194–200 and accompanying text; *see also infra* note 272 and accompanying text (considering this issue in light of the proposed scheme).

latter solution, empirical evidence suggests that extrinsic factors—in this case, inability to stop certain infringements—are not the pimary motivation for creative output. Rather, "expression of human creativity is primarily driven by intrinsic rather than by extrinsic factors."[238] Thus, adding this inquiry would not be empirically supported as probative or useful.

Another commentator has suggested that an extremely liberal application of the fair use doctrine would provide samplers with creative leeway, while still providing sufficient protections for owners of the underlying copyrights.[239] Relying heavily on the fair use analysis used in *Campbell v. Acuff-Rose Music, Inc.*,[240] this commentator analyzes what he calls "the Girl Talk Dilemma" under the fair use provision.[241] Considering each factor in turn, his analysis concludes that Girl Talk's work could be defensible under the fair use provision because (1) his use of samples could be viewed as parody, transformative, or a criticism of the sampled work,[242] (2) his works are "creative and highly original,"[243] (3) mash-ups, like parody, must copy well-known works to be successful,[244] and (4) there is little to moderate overlap with the market for the sampled works, and Girl Talk does not intend to compete with the sampled works.[245] However

238. Diane L. Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRES IN LAW 29, 43 (2011).

239. Mongillo, *supra* note 6.

240. 510 U.S. 569 (1994).

241. Mongillo, *supra* note 6, at 23–31; *see also supra* notes 6–19 and accompanying text (explaining "the Girl Talk Dilemma").

242. Mongillo, *supra* note 6, at 23–29. A similar argument has been accepted with regard to an artist using a copyrighted photograph to comment on "the social and aesthetic consequences of mass media." Blanch v. Koons, 467 F.3d. 244, 253 (2d Cir. 2006). This Note is skeptical as to whether this is Girl Talk's actual intent. Moreover, the Supreme Court has stated that "[i]f, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention . . . the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish)." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994); *see also Blanch*, 467 F.3d. at 252 (noting that merely repurposing another's work would not be sufficient for a finding of transformative use under current fair use jurisprudence). Thus, it is suggested here that Girl Talk is not commenting on the underlying works—instead he is merely using the most popular parts of the works to garner attention and "sell" records.

243. Mongillo, *supra* note 6, at 29.

244. *Id*. at 30. However, it does not logically follow that mash-ups as such are deserving of robust protection merely because they require recognizable elements to be successful. The Supreme Court has explained that protection afforded to parody is in large part due to the fact that parody "[l]ike less ostensibly humorous forms of criticism, . . . can provide social benefit, by shedding light on an earlier work . . . . [T]hus . . . like other comment or criticism, may claim fair use under § 107." *Acuff-Rose*, 510 U.S. at 579. It follows from this statement that parody is afforded protection under the Copyright Act because of the analogy between parody and commentary or criticism, not because a parodic work necessarily requires the parodist to use elements of the parodied composition.

245. Mongillo, *supra* note 6, at 31. Although this author suggests that lack of intent to compete

creative or innovative these arguments may be, in light of recent precedent, it seems unlikely that courts would be willing to interpret *Acuff-Rose* so liberally.[246]

Finally, a number of commentators have suggested that the problem can be solved through licensing schemes.[247] One scheme that has been offered by a number of commentators is a compulsory sampling license similar to the compulsory license provision in § 115 of the Copyright Act, although generally requiring more specificity.[248] Benefits of such a scheme are said to ensure adequate compensation for copyright holders, while maintaining economic incentives to create new works and encouraging musical innovation via access to source material for samplers.[249] Critics of this approach have identified a number of problems. Some of these criticisms include (1) that works will be associated with works that the author finds morally objectionable; (2) that the compulsory system would put all samples on the same level, thus failing to provide a distinction between samples of "basic underlying instruments" and the artist's "signature sound"; and (3) that session musicians would be harmed, even more so than they are under the current regime.[250] One commentator further suggests that the strength of this plan—reducing exorbitant licensing fees—is the exact reason that the recording industry will never

with the sampled works and the low probability of competition with the original works from a market perspective are reasons why Girl Talk's "sound collages" or mashups do not have a negative effect on the market for the work, he neglects to acknowledge that sample licensing would of course be affected—if Girl Talk can sample for free, so can everybody else. *See supra* Part I.C (illustrating the substantial revenues derived from sample licenses); *see also* Bridgeport Music, Inc. v. UMG Recordings, Inc. (*Bridgeport II*), 585 F.3d 267, 278 (6th Cir. 2009) (holding that fair use did not apply in part due to loss of revenues from sampling).

246. *See, e.g.*, *Bridgeport II*, 585 F.3d at 278 (concluding that although the use of a sample was transformative, the fair use defense was not applicable to a work containing an unlicensed sample because the sampled parts were recognizable and revenues from licenses would likely be lost if Bridgeport Music was deprived of the right to license the work).

247. *See supra* notes 230–32 and accompanying text (evaluating the voluntary licensing scheme proposed by Tracy Reilly).

248. Kenneth M. Achenbach, Comment, *Grey Area: How Recent Developments in Digital Music Production Have Necessitated the Reexamination of Compulsory Licensing for Sample-Based Works*, 6 N.C. J. L. & TECH. 187, 206–21 (2004); Joshua Crum, Comment, *The Day the (Digital) Music Died: Bridgeport, Sampling Infringement, and a Proposed Middle Ground*, 2008 BYU L. REV. 943, 966–69 (2008); Chris Johnstone, Note, *Underground Appeal: A Sample of the Chronic Questions in Copyright Law Pertaining to the Transformative Use of Digital Music in a Civil Society*, 77 S. CAL. L. REV. 397, 424–32 (2004); Josh Norek, Comment, "*You Can't Sing Without the Bling": The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System*, 11 UCLA ENT. L. REV. 83, 93–101 (2004); Note, *A New Spin on Music Sampling: A Case for Fair Pay*, 105 HARV. L. REV. 726, 742–43 (1992); *see also supra* notes 73–74 (discussing section 115 and the compulsory mechanical license).

249. Crum, *supra* note 248, at 967–69.

250. Reilly, *supra* note 172, at 402–05.

embrace such a strategy.[251] Additionally, while compulsory license schemes would appear to resolve some of the economic problems inherent in the current method by which artists acquire permission to use samples, this method fails to, inter alia, remedy the normative problems associated with enhanced protection for media, like music and sound recordings, and providing more leniency with regard to appropriation or quotation associated with text.[252]

B. A Better Solution: The Proposed Scheme

This Note argues that a legislative solution can provide an effective means for dealing with sampling appropriately and comprehensively. This Note's proposed legislative solution to the problem is as follows:

> Copyright Infringement: Sampling as a Fair Use—
>
> 1. This provision applies equally to musical compositions and sound recordings;
>
> 2. Sampling shall be an infringing use if the unlicensed use of a sample constitutes a sufficiently substantial use of the underlying musical composition or sound recording. To determine whether a sample is sufficiently substantial to indicate infringement of a musical composition and/or sound recording, the following must be ascertained:
>
> (a) *Ownership, Copying, and Originality*. The party alleging infringement bears the burden of proving that the party owns a valid copyright in the allegedly infringed work and that the sampled portion of the allegedly infringed work is protectable when examined in isolation as it appears in the allegedly infringed work.

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251. DEMERS, *supra* note 217, at 142–43. Demers, commenting on compulsory schemes, explains that "[i]ronically, the strength of this plan is the very reason why it will never be implemented: it proposes a statutory rate that would reduce the standard fees for sample licensing considerably. . . . [T]his plan probably cannot be integrated into the Copyright Act because it would encounter too much resistance from the recording industry." *Id*.

It should be noted that, § 115 of the Copyright Act primarily benefits record companies, providing cheaper rates for licensing songs from writers than before § 115 was enacted. Furthermore, record companies often contract around the statutory rate by requiring artists to take a discount on controlled compositions (compositions the artist composed). PASSMAN, *supra* note 73, at 223. The same benefit would not be present for record companies with regard to a compulsory sampling license because they would be losing revenues on sample licenses as Demers suggests.

252. *See* LESSIG, *supra* note 221, at 54; *see also supra* note 199 and accompanying text.

> (b) *Substantiality of the Sample*. Provided that the sample is sufficiently original under section 2(a), the alleged infringing party bears the burden of proving that the following factors weigh in its favor in order for the sampling to constitute a fair use:
>
> (i) the quantitative significance of the sample to the sampled work;
>
> (ii) the qualitative significance of the sample to the sampled work;
>
> (iii) the nature, quality, and extent of transformative processes used to transform the sample.
>
> 3. Definitions—
>
> "Sampling"—sampling is the practice of using a portion of a musical work and/or sound recording, which is less than the whole, and is used as an element in a new work.

The scheme encompasses a number of traditional theories from copyright law, tailoring them to the concerns at issue in music sampling cases. Section 1 is aimed at resolving the question of whether sampling of a sound recording and the sampling of the underlying musical composition should be treated the same.[253] Of course, as this section clearly states, it applies to both in equal fashion.[254]

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253. *See supra* Part II.B.2 (illustrating the dissonance between the Ninth Circuit and the Sixth Circuit holdings where de minimis use doctrine applies in the case of musical compositions but not in the case of sound recordings).

254. Due to the limited scope of this Note—which only addresses sampling in the music industry—the scheme does not address other types of works such as video or visual art. This approach is consistent with the architecture of the Copyright Act, which addresses the scope of certain rights in particular copyrightable subject matter individually. *See, e.g.*, 17 U.S.C. § 114 (2006) (addressing the scope of exclusive rights in sound recordings); 17 U.S.C. § 115 (2006) (addressing the scope of exclusive rights in non-dramatic musical works). However, this Note recognizes this scheme as an affirmative defense. As such, it may be more effective to employ this provision as a limitation on exclusive rights. *See, e.g.*, 17 U.S.C. § 107 (2006) (providing for the fair use limitation on exclusive rights generally). In this vein, modifying the scheme to cover all types of copyrightable subject matter, including things such as collage in the visual arts, would be a novel approach. For cases involving sample-like paradigms in other areas such as the visual arts, see Blanch v. Koons, 467 F.3d. 244 (2d. Cir. 2004) (litigating the use of a photograph in a mixed media work by the famous visual artist Jeff Koons); Ringgold v. Black Entm't Television, Inc., 126 F.3d. 70 (2d Cir. 1997) (litigation regarding the unlicensed use of a reproduction of visual art piece in a television show); Sandoval v. New Line Cinema Corp., 147 F.3d 215 (2d Cir. 1998) (litigation over the unlicensed use of photographs in a motion picture).

In order to be infringing, the sample must be sufficiently substantial. To determine whether a sample is infringing, the scheme employs a burden-shifting framework. The purpose of the burden-shifting framework is to provide a means by which the court can dispose of a claim for infringement as a result of music sampling on a motion to dismiss or a motion for summary judgment.

Section 2(a) lays out the burden of proof for the plaintiff alleging infringement. As with other infringement actions, this provision requires that the plaintiff show "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original."[255] This provision is aimed at clearly requiring that the plaintiff show that the *sampled portion of the work in isolation* satisfies the standards for copyright protection. Analysis based on the originality of the sample alone has been embraced in music sampling infringement actions.[256] Under this scheme, originality should not be assumed. If the plaintiff fails to allege in its complaint that the sample meets the originality requirements, the court could, on a motion to dismiss, dismiss for failure to state a claim upon which relief can be granted. Furthermore, the court could hold as a matter of law that the sampled portion is not sufficiently original to be protected and dispose of the case on summary judgment.[257]

Provided that the plaintiff meets its burden of proof, the burden shifts to the defendant to prove the sample is a fair use. Section 2(b) attempts to tailor the substantial similarity inquiry required for a finding of infringement under *Feist* to be applicable in determining whether a sample is infringing.[258] Section 2(b) contains a factor test, which is intended to provide a balancing framework similar to that used for determining fair use in the copyright context[259] and likelihood of confusion[260] or dilution[261]

255. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991); *see also supra* notes 104–09 and accompanying text.

256. *See, e.g.*, Newton v. Diamond, 388 F.3d 1189, 1192 (9th Cir. 2004). Although the court looked to the originality of only the sampled portion of the work, the court simply assumed the sample met the originality requirements. *Id*.

257. For example, a defendant might argue that the sampled portion of the work is *scenes a faire* and as such is not protectable. *See, e.g.*, Griffin v. J-Records, 398 F. Supp. 2d 1137, 1141, 1143 (E.D. Wash. 2005) (granting summary judgment for defendants where defendants alleged that seven-note melodic sequence was *scenes a faire*, and thus unprotectable). Alternatively, a defendant could argue that the idea expressed in a sampled work is only capable of being expressed in a limited number of ways, and as such providing protection for the expression contained in the work would result in a "monopolization of the subject idea." 4 NIMMER, *supra* note 95, § 13.03[B][3]. Under this theory, known as merger doctrine, a defendant could present a reasonable argument for summary judgment.

258. *See supra* note 107 and accompanying text.

259. 17 U.S.C. § 107 (2006); *see also supra* note 121 and accompanying text (listing the factors used to determine fair use).

in the trademark context. Factors (i) and (ii) codify the de minimis use doctrine, thus resolving the question that arises when comparing *Bridgeport I* and *Newton* of when and whether the doctrine is applicable to musical compositions and sound recordings: under this scheme it applies to both.[262] Similarly, these factors could be seen as a two-part analysis of the third fair use factor.[263] Most importantly, these two factors make explicitly clear that courts should evaluate the qualitative and quantitative significance of the sample in relation to the plaintiff's work—how significant the sampled portion is to the defendant's work is immaterial.[264] Factor (iii) borrows from the fair use context, making it relevant whether the sampler has made some type of transformative and creative alterations to the sample rather than simply using the sample verbatim from the original source.[265] The more drastic the transformative process, the more likely this factor will weigh in favor of the defendant, and thus the more likely the sample will be found to be non-infringing. What is perhaps more important about borrowing from fair use is that the scheme does not borrow factors regarding the commercial nature of the work and the effect on the market for or value of the work.[266] Most works containing samples are commercial works, and as such, neither of these factors is particularly helpful in determining where the line should be drawn for samples appearing in commercial works.[267]

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260. GRAEME B. DINWOODIE & MARK D. JANIS, TRADEMARK AND UNFAIR COMPETITION: LAW AND POLICY 506–07, figure 7-1 (3d. ed. 2010) (listing the factor tests for each circuit for likelihood of confusion).

261. 15 U.S.C. § 1125(c)(2)(A)–(B) (2006).

262. *See supra* Part II.B.2.

263. 17 U.S.C. § 107(3) (2006) ("the amount and substantiality of the portion used in relation to the copyrighted work as a whole"); *see also supra* note 121 and accompanying text (listing the factors used to determine fair use).

264. *See* 4 NIMMER, *supra* note 95, § 13.03[A][2][a]. Nimmer has advocated for this position, stating:

> The question in each case is whether the similarity relates to matter that constitutes a substantial portion of plaintiff's work—not whether such material constitutes a substantial portion of defendant's work. Thus, for example, the fact that the sampled material is played throughout *defendants'* song cannot establish liability, if that snippet constitutes an insubstantial portion of *plaintiff's* composition.

Id.

265. *See* 17 U.S.C. § 107 (2006).

266. 17 U.S.C. § 107(1), (4) (2006); *see also supra* note 121 and accompanying text (quoting the text of 17 U.S.C. § 107).

267. To be clear, this scheme is not intended to replace the fair use inquiry. In cases where the allegedly infringing work, for example, is a parody, as in *Acuff-Rose*, or a criticism, a traditional fair use analysis would likely be more permissive than the scheme being proposed. *See supra* Part II.B.1 (discussing the court's holding and analysis in *Acuff-Rose*).

The solution presented is aimed at solving a number of problems and issues. First, this scheme provides a comprehensive framework for courts to analyze sampling problems, solving the issue of what standard to apply.[268] Second, the scheme is prescriptive—it is instructive to samplers and their lawyers, providing a framework to analyze works and determine whether their use of sampling is infringing, thus requiring a license, or non-infringing, which does not.[269] From an economic standpoint, the scheme is intended to explicitly provide that not every unlicensed sample constitutes an infringement. As such, the scheme will give samplers more leverage in negotiations for licenses, and hopefully make licensing fees more reasonable and commensurate with the value of the sample without compelling copyright holders to license the sample. Third, artists who are already making drastic transformative alterations to small samples will be vindicated[270]—they are no longer evading the law; they are complying with it.

Legislative implementation of this scheme would provide courts with a uniform manner to address sampling cases, in effect remedying discrepancies among the circuits.[271] Of course, while legislative implementation might be best, enacting such a scheme can be a time consuming and lengthy process. As such, in the alternative, courts could implement the proposed scheme as a modified version of the fair use defense. Section 107 provides that when determining whether a particular use of copyrighted subject matter is a fair one, courts should use the factors, which "include" those factors that are listed.[272] Section 101 provides that "the [term] 'including' . . . [is] illustrative and not limitative."[273] By interpreting § 107 in light of the definition of "including" in § 101, courts could modify the fair use inquiry as suggested in the proposed scheme when determining whether primarily commercial works containing unlicensed samples are infringing or non-infringing under § 107.

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268. As evidenced by the discussion of the cases involving music sampling, the theories upon which samplers rely and the courts' interpretations of these theories are hardly congruent. *See supra* Part II.B.

269. As Nimmer notes, there are a number of myths amongst musicians about what constitutes a permissible appropriation. 4 NIMMER, *supra* note 95, § 13.03[A][2][a].

270. *See supra* notes 62–63 and accompanying text.

271. *See, e.g.*, Part III.A.2 (illustrating the discrepancy between Sixth Circuit and Ninth Circuit cases with regard to application of the de minimis use doctrine).

272. 17 U.S.C. § 107 (2006). For the text of § 107, see text accompanying *supra* note 121.

273. 17 U.S.C. § 101 (2006).

C. Application: Applying the Proposed Scheme to Prior Litigation

Maybe the best way to illustrate how the proposed scheme will operate is to analyze the scheme as applied to previous litigation. As an example, consider *Bridgeport Music, Inc. v. UMG Recordings, Inc.*,[274] which contains a clearly infringing sample, but also contains a non-infringing one, under the new scheme.[275] As previously discussed, this case involved alleged copyright infringement of the song "Atomic Dog" performed by George Clinton,[276] which was sampled by Public Announcement and included in their song "D.O.G. in Me."[277]

As a preliminary matter, this litigation did not involve a suit by Capitol Records, the owner of the copyright in the sound recording.[278] However, for purposes of illustration, suppose Capitol Records was a party to this lawsuit, claiming infringement of its sound recording of "Atomic Dog." As the court notes, the composition and the sound recording are identical—this is because the song was spontaneously composed in the studio and the sound recording is the fixed expression of the musical work.[279] As such, the analysis as to whether there is infringement of the sound recording or the musical work is virtually identical.[280]

The sample that would be clearly infringing in *Bridgeport II* under the proposed scheme was Public Announcement's use of the "Bow Wow" refrain.[281] First, the "Bow Wow" refrain is sufficiently original to warrant protection as copyrightable subject matter; thus, the plaintiffs would likely meet their burden of proof under § 2(a). Therefore, the defendant would have the burden of showing that the sample is not sufficiently substantial to constitute infringement. As to factor (i)—quantitative significance to the sampled work—the sample is relatively small, only lasting about four seconds. However, it is the refrain to the song and is repeated a number of times in the allegedly infringed work. As such, this factor would weigh in favor of the plaintiffs. Factor (ii)—qualitative significance—similarly

274. 585 F.3d 267 (6th Cir. 2009).

275. For a more thorough discussion of this fact pattern and the Sixth Circuit's holding in the case, see *supra* notes 162–70.

276. GEORGE CLINTON, *Atomic Dog*, *on* COMPUTER GAMES (Capitol Records 1982).

277. PUBLIC ANNOUNCEMENT, *D.O.G. in Me*, *on* ALL WORK, NO PLAY (Universal Records 1998).

278. The plaintiffs in this case were Bridgeport Music, Inc. and Southfield Music, Inc., which only retained ownership rights in the composition. *Bridgeport II*, 585 F.3d at 272.

279. *Bridgeport II*, 585 F.3d at 272.

280. Of course, this assumes that it has been proven by the plaintiffs that the actual recording was sampled. Otherwise, the sample may just be "replay" and thus not infringing of the sound recording. *See supra* notes 90–91 and accompanying text (explaining the concept of replay).

281. *See supra* note 165 (describing the "Bow Wow" refrain).

weighs in favor of the plaintiff. The chorus or refrain of a song is particularly important to the song—it is often referred to as the hook because it hooks the audience into listening to the song. Finally, factor (iii) gives weight to any transformative processes that have been used to alter the sample. Here, it appears that there was at least some alteration to the sample including pitch shifting and some editing.[282] However, this type of alteration, particularly pitch shifting—which in effect is just a transposition—is not sufficiently transformative to have factor (iii) weigh in defendant's favor.[283] At best, this factor is neutral. Since the balance of the three factors appears to weigh in favor of the plaintiffs, Public Announcement's sampling of the "Bow Wow" refrain should be found to be infringing.

Alternatively, the "dog" sample used in Public Announcement's song should not be found to be infringing under the proposed scheme. First, the sample is simply George Clinton saying the word "dog" in a low voice. In *Bridgeport II*, the district court found this sample was infringing.[284] However, saying the word "dog" in a low voice taken out of context of the entire song can hardly be seen as sufficiently original to be afforded copyright protection. As such, § 2(a) weighs in favor of the defendants. Under § 2(a) of the scheme, lack of sufficient originality to be afforded protection should result in dismissal. Nonetheless, factors (i) and (ii) weigh in favor of defendants; the sample is less than one second in length, only appears two times in "Atomic Dog," and qualitatively is not a prominent or important part of the song. It would be more appropriate to characterize the "dog" sample as akin to a drum hit, horn stab, or guitar strum, none of which should be found qualitatively or quantitatively important to any song or recording once taken out of context. Finally, as to factor (iii), the sample appears to be relatively unaltered, and thus, this factor weighs in favor of plaintiffs. Since most of the factors weigh in favor of the defendants, the sample should be found to be non-infringing even if the court finds the sample is sufficiently original to be protectable.

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282. *See* PUBLIC ANNOUNCEMENT, *D.O.G. in Me*, *on* ALL WORK, NO PLAY (Universal Records 1998). At approximately 4:00, the sampled refrain is heard in the song. It is slightly edited and the sample is transposed and layered—producing a harmony.

283. Of course, more severe editing or more severe alterations to the chorus may have tipped this factor in favor of the defendants.

284. *Bridgeport II*, 585 F.3d at 273.

CONCLUSION

Sampling is not new. The practice, as it currently exists, has been around since the 1980s, and there are no signs that this it is going away. Nor should it. The idea of musical quotation, or borrowing musical ideas, has been practiced throughout music history.[285] Unfortunately, due to normative views regarding the value of certain media—particularly music and visual media, such as film—and courts' robust copyright protection of that media, the quotation of such media has been overvalued by copyright holders and overprotected by copyright law.[286] Because little has changed since Judge Duffy uttered his famous words "Thou shalt not steal" in *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*[287]—indeed, evidence of the persistence of Judge Duffy's attitude toward samplers are clearly affirmed by Judge Guy's opinion in *Bridgeport Music, Inc. v. Dimension Films*[288]—it seems it is time for Congress to remedy the matter.

In its current state, copyright law appears to be ill-equipped to deal with many of the problems and challenges that music sampling presents. This may be due in large part to the fact that Congress, when drafting the Sound Recording Act of 1971, did not contemplate music sampling.[289] Although dissonance occurs between the arguments advanced by this Note and Judge Guy's opinion for the Ninth Circuit in *Bridgeport Music, Inc. v. Dimension Films*, there is consonance on one point: "[t]o properly sort out [the problems with music sampling] with its complex technical and business overtones, one needs the type of investigative resources . . . possessed by Congress."[290] In short, this complex issue would be most adequately addressed through congressional action.

The proposal above does not abandon the vast body of copyright jurisprudence in favor a completely different approach. Quite to the contrary, it attempts to use the tools articulated in past cases and commentary to create legislation that both comports with traditional notions and theories of copyright law and adapts them to confront the issue of music sampling, which has yet to be adequately and expressly

285. *See* Jeremy Beck, *Music Composition, Sound Recordings, and Digital Sampling in the 21st Century: A Legislative and Legal Framework to Balance Competing Interests*, 13 UCLA ENT. L. REV. 1, 23–30 (2005) (describing practices of musical quotation and borrowing and tracing the origins of these practices back to classical music).

286. LESSIG, *supra* note 221, at 54.

287. 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

288. 410 F.3d 792, 800 (6th Cir. 2005).

289. *See generally* S. Rep. 92-72, *supra* note 205; H.R. Rep. 92-487, *supra* note 205.

290. *Bridgeport I*, 410 F.3d at 805.

addressed in Title 17. The scheme attempts to strike a better balance, allowing samplers to take small samples and creatively alter them without fear of impending litigation or excessively high licensing fees for these small samples. What the scheme does not do is give samplers an unbridled license to sample as much as they want without compensating the writer and owner of the sound recording.

Modifying existing copyright legislation to account for new technologies has been done in the past. Congress has time and time again made modifications to the copyright statute to accommodate new technologies in the recording industry with legislation such as the Sound Recording Act of 1971 and the Digital Performance Right in Sound Recordings Act of 1995.[291] This Note highlights, at the very least, that similar reforms are needed with regard to music sampling.

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291. *See supra* note 97.

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