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Sampling, Looping, and Mashing... Oh My!: How Hip Hop Music is Scratching More Than the Surface of Copyright Law

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Sampling, Looping, and Mashing . . . Oh My!: How Hip Hop Music is Scratching More Than the Surface of Copyright Law

Tonya M. Evans*

"The image of the lone author working in her garret is almost wholly obsolete. Today, most writing (indeed, most creativity of all sorts) is collaborative."

–William Fisher[1]

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* Assistant Professor of Law, Widener University School of Law; B.S., Communication Studies, Northwestern University; J.D., Howard University School of Law. The valuable research and writing assistance of Peri Fluger helped tremendously in the drafting of this article as did the valuable research and editing assistance of Anthony Czuchnicki. Many thanks to Juliet Moringello, John Dernbach, Chris Robinette, andré douglas pond cummings, Lateef Mtima, and Steven Jamar, for their guidance and support throughout the process of research and writing. The editorial assistance of colleagues at the 2010 IP Scholars Conference at Drake University School of Law, including Peter K. Yu, the 2010 IP Scholars Conference at Berkeley Law Center, and the 2009 Lutie Lytle Black Women Scholars Conference also helped in the revising and editing of this Article.

[1] William Fisher III, *Geistiges Eigentum—ein ausufernder Rechtsbereich: Die Geschichte des Ideenschutzes in den Vereinigten Staaten* [*The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States*], *in* EIGENTUM IM

"Intellectual (and artistic) progress is possible only if each author builds on the work of others. No one invents even a tiny fraction of the ideas that make up our cultural heritage."

–Judge Easterbrook in *Nash v. CBS, Inc.*[2]

INTRODUCTION

There is nothing new under the sun, or so the saying goes. The process of creating music is no exception. The fruit of this process, an artistic endeavor, is protected by copyright: an intellectual property monopoly created by federal statute to give authors certain exclusive rights in and to their creations for a certain period of time.[3] Congressional power to regulate artistic and inventive creations flows from the United States Constitution.[4] The Constitution directs that Congress regulate copyright and patent laws, respectively, to serve human values and social ends by promoting creativity and innovation.[5] However, twenty-first century technologies used to create and to disseminate music have stressed copyright's property-based rights framework beyond its fragile limits. And now copyright law, as applied to music generally, and sample-based works specifically, fails to meet this constitutional objective. This failure is made all too clear in the case of an intensive sample-based music genre like hip hop.

For decades hip hop producers have relied on the innovative use of existing recordings (most of which are protected by copyright) to create completely new works.[6] Specifically, cuttin'[7]

INTERNATIONALEN VERGLEICH 16 (1999) [hereinafter Fisher, *The Growth of IP*], *available at* http://www.cyber.law.harvard.edu/people/tfisher/iphistory.pdf.

2 Nash v. CBS, Inc., 899 F.2d 1537, 1540 (7th Cir. 1990).

3 *See* 17 U.S.C. §§ 101–06 (2006).

4 U.S. CONST. art. I, § 8, cl. 8.

5 *See id.*

6 *See infra* Part I.B and accompanying notes and text. For an extensive database of songs that have incorporated samples, visit WHO SAMPLED, http://www.whosampled.com (last visited July 11, 2011).

7 Cuttin' contemplates using a cross fader on the turntable mixer to switch back and forth from each of the two turntables.

and scratchin,'[8] digital sampling,[9] looping[10] and (most recently) mashing[11] are all methods of creating music and are all integral parts of the hip hop music aesthetic. In fact, collectively these creative processes are the hallmark of the type of creativity and innovation born out of the hip hop music tradition.[12] But when done without the permission of the borrowed work's rights holder, they are also at odds with copyright law.[13] Copyright fails to acknowledge the historical role, informal norms and value of borrowing, cumulative creation and citation in music.

Copyright of music protects both the performance embodied in the sound recording and the underlying musical composition itself.[14] Artistic works are deemed protectable if they are original (meaning independently created and not "copied") and exhibit minimal creativity.[15] However, different copyright infringement

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[8] Scratchin' is moving the vinyl back and forth against the stylus in different patterns and rhythms.

[9] A sample is the portion of pre-existing sound recordings that producers use to create new compositions. With the exponential growth of technology, this method is now commonplace in the hip hop industry. For a discussion on the sampler and the art of sampling see *infra* Part I.B and accompanying notes and text.

[10] A "loop" is a piece of sound that can be played again and again in a coherent sequence. Looping occurs when a loop is implemented by the DJ or producer. *Loop*, URBAN DICTIONARY, http://www.urbandictionary.com/define.php?term=loop (last visited Apr. 13, 2011).

[11] The process of mashing combines the music of one song with the lyrics of another. One famous example is DJ Dangermouse's *The Grey Album*. *The Grey Album* is a "mashed" album that mixed the a cappella tracks from rapper Jay-Z's *The Black Album* with instrumentals created from a wide array of unauthorized samples from The Beatles' *The White Album*. *See* Noah Shachtman, *Copyright Enters a Gray Area*, WIRED (Feb. 14, 2004), http://www.wired.com/entertainment/music/news/2004/02/62276. Another example is the work of DJ Gregg Gillis, a.k.a. "Girl Talk." *See* Phil Freeman, *Girl Talk: Master of the Mashup*, MSN MUSIC (Dec. 6, 2010, 5:15 PM), http://music.msn.com/girl-talk/interview/feature.

[12] *See Music History: Hip Hop*, ICONSCIOUS, http://www.iconscious.co.uk/musichistory/hiphop.htm (last visited Apr. 18, 2011) ("Hip-hop epitomizes [the reinterpretation of borrowed material]. Not only is music fragmented, flipped, and turned into something completely different, but traditional notions of musicality are renovated as well.").

[13] *See, e.g.*, Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005) ("Get a license or do not sample.").

[14] *See* 17 U.S.C. §§ 106, 114 (2006).

[15] *See infra* Part II and accompanying notes and text. Such a rigid requirement, however, is at odds with the collaborative and cumulative process of creating music, an

standards are applied to the two types of music copyright in some cases.[16] Additionally, and arguably more troubling, different infringement standards are being applied by the circuit courts to sound recording infringement cases, resulting in a split in the circuits. The per se infringement rule articulated in the leading hip hop digital sampling case, *Bridgeport v. Dimension Films*,[17] as compared to a recent decision with analogous facts but an opposite outcome under a traditional infringement analysis in *Saregama India Ltd. v. Mosley*,[18] is but one stark example.[19] Courts in the Sixth Circuit apply a per se infringement standard when a defendant copies *any* part of a sound recording.[20] This Circuit continues to value independent creation at *any* and *all* cost without regard to the role of collaboration and the custom of borrowing in the performance of music.[21] In contrast, courts in the Eleventh Circuit consider substantial similarity and the *de minimis* defense which is traditionally applied in sound recording infringement cases.[22] These differences, in turn, have led to unclear judicial definitions, distinctions and interpretations for the role of substantial similarity and what constitutes a *de minimis* use, a fair use, and a derivative work. The resulting incongruent decisions

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artistic medium generally permissive of borrowing. *See generally* Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop*, 84 N.C. L. REV. 547 (2006) [hereinafter Arewa, *Bach to Hip Hop*]; Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation and Context*, 41 U.C. DAVIS L. REV. 477 (2007) [hereinafter Arewa, *Freedom to Copy*] (discussing the incomplete nature in copyright doctrine of the theories of creative works and the process of creating them).

16 *See infra* Part II.E and accompanying notes and text.

17 410 F.3d at 800 (holding that any amount of unauthorized digital sampling constitutes per se copyright infringement).

18 687 F. Supp. 2d 1325, 1338–39 (S.D. Fla. 2009) (citing *Bridgeport*, 410 F.3d at 798–805).

19 *See infra* Part III.A for a discussion of both cases.

20 *See Bridgeport*, 410 F.3d at 800 ("If you cannot pirate the whole sound recording, can you 'lift' or 'sample' something less than the whole[?] Our answer to that question is in the negative.").

21 *See* Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277, 281 (2006) [hereinafter Arewa, *Catfish Row*] ("The treatment of musical borrowings under current copyright standards is far too often inequitable."); *see also infra* Part III.

22 *See* Leigh v. Warner Bros., Inc. 212 F.3d 1210, 1214 (11th Cir. 2000) (citing Original Appalachian Artworks, Inc. v. Toy Loft, Inc., 684 F.2d 821, 829 (11th Cir. 1982)).

reflect an inconsistent application of federal law. This inconsistency threatens to diminish both the quality and quantity of second-generation cumulative works. Accordingly, copyright law's fragmented application is proving troublesome for the music industry generally, and for music genres like hip hop in particular.

As noted by a number of leading intellectual property scholars, one of the greatest threats to the Constitution's directive to promote science and the useful arts is the stifling effect on creativity by onerous, overly restrictive copyright laws.[23] Accordingly, this Article examines the deleterious impact of copyright law on music creation. It highlights hip hop music as an example of a genre significantly and negatively impacted by the per se infringement rule applied in some cases to sound recordings and by traditional notions of independent creation.

Ultimately, this Article suggests that music copyright reform is needed and, perhaps, inevitable as technology continues to outpace and stress the law and the law continues to stress and under-perform in balancing the rights/access continuum.[24] Any short- or long-term fix should "sample patent to remix copyright." By this I mean copyright reform should contemplate and consider policies supporting reverse engineering in the patent context, which encourages and values cumulative creation to bolster innovation.[25]

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[23] *See generally* LAWRENCE LESSIG, FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY (2004); WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS (2009); Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE L.J. 1575 (2002). Note that early cases link copyright with "constitutional support of the useful arts." However, twenty-first century scholars and cases link "useful arts" to patent law and promotion of "science" to copyright. *See generally* Eldred v. Ashcroft, 537 U.S. 186 (2003).

[24] The "rights/access" continuum refers to the balance (or imbalance, as the case may be) of protection of a creator's rights with the public's access to her creation. *See generally* Alina Ng, *Rights, Privileges and Access to Information*, 42 LOY. U. CHI. L.J. 89, 100 (2010) ("[E]conomic growth is dependent not only on the production and dissemination of information to society but also on society's ability to generate new wealth from existing forms of information.").

[25] This Article uses the terms "creator" and "innovator," "create" and "innovate," and "creation" and "innovation" interchangeably. Despite credible assertions that the terminology should not be used in this fashion, I believe such a use furthers the argument that patent should be "sampled" to remix copyright. For a contrary view, see Doris Estelle Long, *When Worlds Collide: The Uneasy Convergence of Creativity and Innovation*, 25 J. MARSHALL J. COMPUTER & INFO. L. 653, 656–57 (2009).

This Article highlights the Semiconductor Chip Protection Act's *sui generis* framework by which Congress and the relevant industry sought to achieve the ideal balance between exclusive rights and access for cumulative creation in a hybrid law of (in theory, at least) the ideal components of copyright and patent law.[26]

Part I of this Article chronicles the history of hip hop music beginning with its oral tradition that originates in African and Jamaican culture to hip hop's genesis in the United States in the mid-seventies and through its transition into the mainstream. Part I also explores the essential and integral aesthetic value to hip hop music of incorporating and looping digital samples of pre-existing works to create new songs and the historical role of borrowing in music. Finally, Part I highlights the legal mythologies and realities of copyright in the hip hop music community and identifies some of the leading proposals in the legal discourse to address the issues raised in this Article.

Part II outlines briefly the history of copyright and the development of copyright protection for music. In particular, Part II focuses on copyright protection for the underlying music and lyrics (the musical composition), which is separate and distinct from protection for the actual performance of that song embodied in the master recording (the sound recording). In general, the musical composer initially controls the copyright in the musical composition and the recording company controls the sound recording. Two copyrights, one song.[27]

Part II then discusses the critical role of a substantial similarity analysis and the *de minimis* use and fair use defenses generally available to defendants in copyright infringement cases. Although substantial similarity, *de minimis* and fair use analyses are

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[26] I recognize that the resulting legal framework has been criticized for being inconsequential to the relevant industry. Nonetheless, the similarities between the concerns in the semiconductor and music industries regarding cumulative creation and the legislative response to remedy those concerns by enacting the Semiconductor Chip Protection Act prove insightful to suggest how Congress might remedy the issues raised in this Article. *See* Semiconductor Chip Protection Act of 1984, 17 U.S.C. §§ 901–14 (2006)).

[27] *See infra* Part II.E.

considered in all cases involving musical compositions, according to *Bridgeport v. Dimension Films*, they are not similarly available when infringement of the sound recording is alleged.[28] Therefore, separate infringement standards exist for each copyright composition and performance. Additionally, a circuit split has emerged regarding which defenses are available for sound recording infringement cases.[29]

Part III explores the consequences of a fractured music copyright regime. That section identifies the negative consequences of applying one infringement standard in music copyright cases for the underlying music composition and another for an artist's actual performance. Additionally, Part III critiques the incongruent treatment of sound recording infringement cases among the circuits, highlighting the divergent outcomes in the Sixth and Eleventh circuits. One such consequence, for example, is the "better safe than sorry" mindset in securing copyright clearances and negotiated licenses.[30] This type of industry practice drastically inflates transaction costs. It also undermines uses that, in other contexts, may actually be deemed fair or may not even rise to the level of an unlawful appropriation.[31]

Finally, Part IV urges courts and ultimately, Congress, to consider policies supporting "reverse engineering" in the patent law context to serve as a guidepost for how similar policies could and should be applied in the copyright context.[32] Specifically, this Part explores the policies and concerns that led Congress to enact the Semiconductor Chip Protection Act ("SCPA"), a law patterned after the Copyright Act that is also one of the only statutes to

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[28] 410 F.3d 792, 801–02 (6th Cir. 2005).

[29] *See* Saregama India Ltd. v. Mosley, 687 F. Supp. 2d 1325, 1338–41 (S.D. Fla. 2009) (contrasting the requirement in the Eleventh Circuit to prove substantial similarity with the Sixth Circuit's exception for sound recordings).

[30] *See* Henry Self, *Digital Sampling: A Cultural Perspective*, 9 UCLA ENT. L. REV. 347, 358 (2002) (discussing an industry custom that drives users to excessively license samples that might not infringe copyright).

[31] *See generally* Mickey Hess, *Was Foucault a Plagiarist? Hip-Hop Sampling and Academic Citation*, 23 COMPUTERS & COMPOSITION 280 (2006) (contrasting prohibited uses of sound recordings with permissible uses of academic works and finding no rational reason for such a distinction).

[32] *See infra* Part IV.

recognize expressly a reverse engineering privilege or defense traditionally available only in the patent law context. Part IV posits that acceptance of such policies in sound recording copyright reform would encourage greater latitude in the copyright law landscape for the type of unauthorized, but innovative and aesthetically integral, uses of copyrighted sound recordings and cumulative creation for which the hip hop genre has become infamous.

I. HIP HOP MUSIC: HISTORICAL AND LEGAL MYTHOLOGIES AND REALITIES

A. History of Hip Hop Music

> "People treat hip hop like an isolated phenomenon. They don't treat it as a continuum, a history or legacy. And it really is. And like all mediums or movements, it came out of a need."[33] – Mos Def[34]

Mos Def was most *definitely* correct. Hip hop has a rich, dynamic history and a complex legacy born out of a need for collective expression and collective experience by a marginalized community dying to be heard.[35] Similar to other movements throughout history, there exists a vast volume of not only cultural, media and pop culture artifacts, but also renowned books, movies and scholarly works that discuss in-depth the history of hip hop culture. The great majority of this history is outside the scope of this Article.[36] Instead, this Part focuses on the music. It explores

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[33] HIP HOP MATTERS, http://www.allagesmovementproject.org/venues/hip_hop_matters (last visited Aug. 4, 2010).

[34] Mos Def is an American actor and emcee. *See* Jason Birchmeier, *Mos Def: Biography*, ALLMUSIC.COM, http://www.allmusic.com/artist/mos-def-p291154/biography (last visited Apr. 4, 2011).

[35] *See generally* Tricia Rose, *Fear of a Black Planet: Rap Music and Black Cultural Politics in the 1990s*, 60 J. NEGRO EDUC. 276, 289 (1991).

[36] It would be impossible to sufficiently honor its depth and breadth herein because to do so would mean necessarily to involve aspects of politics, crime, misogyny, socioeconomics, civil rights, and police brutality. Although important, those topics are not squarely on point. *See generally* JEFF CHANG, CAN'T STOP WON'T STOP: A HISTORY OF THE HIP-HOP GENERATION (2007); MICHAEL ERIC DYSON, KNOW WHAT I MEAN? REFLECTIONS ON HIP-HOP (2007); NELSON GEORGE, HIP-HOP AMERICA (2005); TRICIA

the history of hip hop music to provide context and lays the foundation for an analysis of the incongruent and deleterious impact of copyright law on music creation.

1. Hip Hop Culture, Generally

Hip hop is a "style of dress, dialect and language, way of looking at the world, and an aesthetic that reflects the sensibilities of a large population of youth born between 1965 and 1984."[37] Hip hop is grounded on four principal elements: Emceeing, disc jockeying ("DJing"), break dancing, and graffiti.[38] Emceeing, also called "MCing" or "rapping," is based upon the commonly used phrase "Master of Ceremonies."[39] It is exhibited generally when an individual performs in front of an audience by rhyming, usually to the beat of music.[40] Emceeing is a form of verbal expression whose roots are deeply grounded in "ancient African culture and oral tradition."[41] Despite formal rules of engagement within the hip hop culture, as it were, there was one notable exception: no "biting." That is, MCs were required to make up their own verses

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ROSE, BLACK NOISE (1994); Akilah Folami, *From Habermas to "Get Rich or Die Tryin": Hip Hop, the Telecommunications Act of 1996, and the Black Public Sphere*, 12 MICH. J. RACE & L. 235 (2007); andré douglas pond cummings, *Thug Life: Hip-Hop's Curious Relationship with Criminal Justice*, 50 SANTA CLARA L. REV. 515 (2010); *HIP-HOP: Beyond Beats & Rhymes* (PBS television broadcast Feb. 20, 2007).

[37] Derrick P. Alridge & James B. Stewart, *Introduction: Hip Hop in History: Past, Present, and Future*, 90 J. AFR. AM. HIST. 190, 190 (2005). Hip hop operates as reflecting the "social, economic, political, and cultural realities and conditions" individuals go through and is related to them in an understandable context. *Id.*

[38] *See* Andre L. Smith, *Other People's Property: Hip Hop's Inherent Clashes with Property Laws and Its Ascendance as Global Counter Culture*, 7 VA. SPORTS & ENT. L.J. 59, 62 (2007).

[39] *See* Grandmaster Caz, *The MC: Master of Ceremonies to Mic Controller*, DAVEY D'S HIP HOP CORNER, http://www.daveyd.com/historyemceegmcaz.html (last visited Apr. 3, 2011).

[40] *See* Smith, *supra* note 38, at 62.

[41] Thea Stewart, *Exploring the Culture of Hip-Hop* 10 (2005) (mini-course developed for Graduate Student School Outreach Program, Cornell University), *available at* http://psc.ilr.cornell.edu/gssop/courses/Exploring_Culture_Hip-Hop/2005/Exploring_Culture_Hip-Hop.doc. Although there is some debate within the hip hop community regarding the terms "rap" and "hip hop," for purposes of this article I use the terms interchangeably.

or to note specifically in their rhymes that they were using another's lyrics to either honor or battle them.[42]

DJing is the backbone of hip hop, and represents the art of cuttin' and scratchin'. Break dancing involves an acrobatic, improvisational and energetic style of dance that includes poppin' and lockin,' head spins, backspins, flips and windmills.[43] Finally, graffiti is recognized quickly in urban areas by the use of spray paint or markers to illustrate the user's "tag" or unique mark or signature.[44] Although all of these together compose the culture of hip hop, as noted above, this Part and Article will focus specifically on emceeing and DJing (which, together, are the essence of hip hop music).[45]

2. The Boogie Down Bronx[46]

The birthplace and time of hip hop music is traced back generally to the Bronx, New York (a/k/a the "Boogie Down" Bronx) and the early 1970s.[47] However, the oral tradition that underpins hip hop music finds its origins in Africa by way of Jamaica, home to descendants of West Africa.[48] The period of hip

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[42] *See id.* at 11 (noting that MCs were required to be original and to rhyme on time with the beat). Thus, even within the hip hop culture, informal norms required "respect" for the creative endeavors of other creatives. This norm endures today. *See* Amanda Webber, *Digital Sampling and the Legal Implications of Its Use After* Bridgeport, 22 ST. JOHN'S J. LEGAL COMMENT. 373, 379 (2007) ("It is considered a violation of sampling ethics for a hip hop producer to sample a recording that has already been used by another producer.").

[43] *See* Smith, *supra* note 38, at 63.

[44] *See* Richard S. Christen, *Hip Hop Learning as an Educator of Urban Teenagers*, 17 EDUC. FOUNDS., no.4, Fall 2003, 57–82, *available at* http://www.graffiti.org/faq/graffiti_edu_christen.html.

[45] *See* Smith, *supra* note 38, at 62.

[46] The Bronx is the northernmost of the five boroughs of New York City. The Bronx is referred to in hip hop vernacular as "The Boogie Down Bronx" or simply "The Boogie Down" and is revered in hip hop culture as the birthplace of hip hop. *See 1520 Sedgwick Avenue: Birthplace of Hip-Hop—Bronx NY*, CINCY STREET DESIGN, http://www.cincystreetdesign.com/1520_Sedgwick/index.html (last visited Apr. 13, 2011).

[47] *See* Smith, *supra* note 38, at 63.

[48] For extensive coverage of the Afro-Jamaican history of hip hop, see generally Self, *supra* note 30, at 348.

hop from 1970 to 1986 is known as "The Roots."[49] Initially, it served as a medium for inner-city youth to gather together at parties in their neighborhoods.[50]

One of the foundational events in hip hop history can be traced back to the Bronx.[51] It is widely accepted within the hip hop community that this was where hip hop was born.[52] On August 11, 1973, a Jamaican DJ known as Kool Herc, was spinning reggae records but not receiving crowd approval ("moving the crowd").[53] He finally won them over, however, when he isolated a beat-heavy percussion portion of a recognizable R&B tune, and rhymed ("rapped") over the music simultaneously.[54] That defining moment sparked an immediate and irreversible reaction that formulated the essence of rap music.

Soon thereafter, Kool Herc's friend and a recognized pioneer of rap music, DJ Grandmaster Flash, perfected the concept of mixing familiar R&B records. He used classic R&B hits to serve as the background to the expressive foreground in which skillful rappers could demonstrate their lyrical prowess.[55] Afrika Bambaataa, another DJ from the South Bronx who is regarded widely as the founding father of the term "hip hop," went beyond American R&B to incorporate sounds from Caribbean, European electro and West African music.[56] Bambaataa is also noted for advancing technological innovation in hip hop music and

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49 *See* Stewart, *supra* note 41, at 4.

50 *See* Smith, *supra* note 38, at 64–68 (providing a substantive chronicle of hip hop's development and rise to world recognition); *see also Hip Hop, The History*, INDEPENDANCE, http://www.independance.co.uk/hhc_history.htm (last visited Sept. 4, 2010).

51 *See Birthplace of Hip Hop*, HISTORY DETECTIVES, http://www.pbs.org/opb/historydetectives/investigations/611_hiphop.html (last visited Sept. 4, 2010). The specific time and place are believed to be August 11, 1973 at 1520 Sedgwick Avenue. *Id.*

52 Davey D, *The History of Hip Hop*, DAVEY D'S HIP HOP CORNER, http://www.daveyd.com/raptitle.html (last visited Sept. 7, 2010).

53 *Id.*

54 *Id.*

55 *See id.*

56 *See* Zack O'Malley Greenburg, *The Man Who Invented Hip Hop*, FORBES (July 9, 2009, 4:00 PM), http://www.forbes.com/2009/07/09/afrika-bambaataa-hip-hop-music-business-entertainment-cash-kings-bambaataa.html.

furthering musical creativity by implementing the drum machine and synthesizer.[57]

After Kool Herc's legendary performance, Grandmaster Flash and Afrika Bambaataa began performing shows throughout the Bronx, and the term "hip-hop" began to spread throughout the African-American community.[58] Thus, hip hop music gained its distinctiveness by building on previously recorded songs; that is, by sampling manually. Much akin to visual collages, sampling is viewed within the hip hop community as a musical tapestry.[59]

In 1975, DJ Grand Wizard accidently discovered the turntable "scratch" that is now the touchstone of DJing.[60] Scratching is a technique understood generally to mean physically manipulating the vinyl or CD back and forth against the stylus in different patterns and rhythms.[61] The following year, Afrika Bambaataa engaged in the first "DJ battle" against Disco King Mario, thus starting the legendary "battle scene" among DJs in which DJs competed for best audience response.[62]

Throughout the late 1970s, various rap groups began to emerge into the mainstream. The first known commercial rap song, "Rapper's Delight" by the Sugarhill Gang, was released in 1979 and reached number thirty-six on *Billboard's Top 100*.[63] After reaching mainstream prominence, the artistry of hip hop began to catch on. DJs, mainly from the Bronx and Harlem, focused primarily on cutting and scratching popular dance records to

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[57] Nelson George, *Hip-Hop's Founding Fathers Speak the Truth*, *in* THAT'S THE JOINT!: THE HIP-HOP STUDIES READER 50 (Murray Forman & Mark Anthony Neal eds., 2004).

[58] *See* Greenburg, *supra* note 56.

[59] The RZA from Wu-Tung Clan explains: "I've always been into using the sampler more like a painter's palette than a Xerox." THE RZA, THE WU-TANG MANUAL 192 (2005).

[60] Billy Jam, *Creator of the Scratch: Grand Wizard Theodore*, HIP HOP SLAM, http://www.hiphopslam.com/articles/int_grandwizardtheo.html (last visited Aug. 4, 2010). Apparently, Grand Wizard Theodore discovered "scratching" when his mother was yelling at him to turn down his music and he abruptly moved the vinyl on the turntable platter. *Id.*

[61] *See supra* note 8.

[62] Henry Adaso, *Hip-Hop Timeline: 1925–Present*, ABOUT.COM, http://rap.about.com/od/hiphop101/a/hiphoptimeline.htm (last visited Apr. 3, 2011).

[63] *Id.*

solidify an entirely new genre of music into the industry's mainstream.[64] From the mid-1980s through the 1990s, major record labels, recognizing the public interest in hip hop, began to develop strategies to capitalize on a wealth of new talent and the demand of an underexploited market and created "urban music" departments.[65] Now, it can safely be proclaimed that hip hop music and culture have permeated not only the culture and economy of America but indeed the world.[66]

B. *Digital Sampling as an Essential and Integral Component to Create Hip Hop Music*[67]

> The sampler is a tool and a musical instrument. That's how I always thought about it.... [T]he sampler is an instrument that I *play*.[68]
> —The RZA from the Wu Tang Clan

The sampler is akin to a musical instrument or artistic tool despite the fact that it has also been referred to as an instrument or tool of theft.[69] It is essential to the collage-like artistry that sampling creates. The sampler has ingrained aesthetic value to hip hop music and, ultimately, to music creation as a whole. To understand the importance and pervasive presence of digital sampling in hip hop on a broader scale one need only turn to the *Billboard* charts of the most prominent albums. In 1989 only eight

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[64] Joanna Demers, *Sampling the 1970s in Hip-Hop*, 22 POPULAR MUSIC 41, 41 (2003). The records being scratched mainly focused on soul, funk and R&B, such as Isaac Hayes, James Brown, Curtis Mayfield and George Clinton. *Id.*

[65] *See Unofficial Hip Hop Timeline*, B-BOYS.COM, http://www.b-boys.com/classic/hiphoptimeline.html (last visited Apr. 14, 2011).

[66] *See generally* cummings, *supra* note 36, at 517 (citing Smith, *supra* note 38, at 68).

[67] *See* Self, *supra* note 30, at 347 (exploring the cultural motivations and cultural, artistic and legal impact of digital sampling on the music industry).

[68] THE RZA, *supra* note 59, at 190.

[69] *See* Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991). Judge Duffy begins his famous opinion by citing to the Ten Commandments and stating "Thou shalt not steal." *Id.* at 183. The court held that "[t]he conduct of the defendants herein, however, violates not only the Seventh Commandment, but also the copyright laws of this country." *Id.*

of the top 100 albums contained samples but by 1999 almost one-third of the *Billboard 100* incorporated samples in some capacity.[70]

In addition to ushering in a new musical genre, the 1980s also ushered in important new technological advancements. Manual cuttin' and scratchin' was slowly being replaced with digital sampling, which consists of copying a portion of one song and incorporating it "into the sonic fabric of a new song" by "playing" the recorded sounds via a keyboard.[71] At the height of the mid-eighties, digital sampling began to advance exponentially. Producers sampled any and everything ranging from country to heavy metal.[72] Although the sound of hip hop relied heavily on R&B and jazz influences, the ever-evolving "sound" of hip hop began to diversify substantially.[73]

A sampler is the actual digital audio tool used by music producers to sample.[74] It can be either a stand-alone machine or software.[75] It is similar to a synthesizer but instead of generating sounds as a synthesizer does, it captures pre-recorded sounds.[76] The sounds are captured, saved and then performed via keyboard like musical notes.[77] Although similar to magnetic tape and other analog methods of recording, digital sampling permits far greater control over the recorded sound and its manipulation.[78] With digital technology, the sampler can isolate and record specific instruments within a sound recording, change the tempo, alter the

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[70] *See* John Lindenbaum, Music Sampling and Copyright Law (Apr. 8, 1999) (unpublished B.A. thesis, Princeton University) (on file with Center for Arts and Cultural Policy Studies, Princeton University), *available at* http://www.princeton.edu/~artspol/studentpap/undergrad%20thesis1%20JLind.pdf.

[71] Demers, *supra* note 64, at 41.

[72] *See* Demers, *supra* note 64, at 41.

[73] For example, A Tribe Called Quest's "Go Ahead in the Rain" sampled Jimi Hendrix. For countless other examples, see *supra* note 6.

[74] *See Sampler*, ANSWERS.COM, http://www.answers.com/topic/sampler-musical-instrument (last visited Sept. 5, 2010).

[75] *See id.*

[76] *See id.*

[77] *See id.*

[78] *See* Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271, 276 (1996).

wave tempo and effectively "change its sonic characteristics."[79] Ultimately, sampled sounds (whether created live or copied from a preexisting work) are mixed with other sounds during production. Thus, "the artist can cut and paste sampled sounds into a new musical context, either in original or modified form."[80] Sampled sounds run the gamut from highly recognizable to obscure to undecipherable fragments of sound. In the former two cases, the source material can be identified by a listener, thus inviting the listener to experience the source material in a new way.[81]

1. Sampler as Musical Instrument

Far from being just an innovative technological tool, the sampler is viewed by hip hop producers as a musical instrument and an essential tool of the trade. Sampled copyright holders, however, often view the sampler as a theft device that threatens the commercial viability of their intellectual property.[82] Hip hop artists acknowledge this duality, and in many cases even embrace it as the type of counter-culture "Robin Hood-ism"[83] that historically has fueled resistance movements of the disenfranchised.[84]

Sampling is certainly not just a hip hop music phenomenon. The practice is used widely throughout the music industry.[85] But

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[79] *Id.* (citing E. Scott Johnson, *Protecting Distinctive Sounds: The Challenge of Digital Sampling*, 2 J.L. & TECH. 273 (1987)).

[80] *Id.* at 277.

[81] *Id.* at 279.

[82] THE RZA, *supra* note 59, at 191. Even hip hop producers recognize that the sampler can be used either as a tool of an artist or of a sluggard: "A lot of people still don't recognize the sampler as a musical instrument. I can see why. A lot of rap hits over the years used the sampler more like a Xerox machine." *Id.*

[83] I use the Robin Hood metaphor because most hip hop producers detest paying more money to corporate recording companies than to the composers of the music and/or lyrics. *See* Kembrew McLeod, *How Copyright Law Changed Hip Hop: An Interview with Public Enemy's Chuck D and Hank Shocklee*, STAY FREE!, *available at* http://www.alternet.org/module/printversion/18830.

[84] *See* Andrew Bartlett, *Airshafts, Loudspeakers, and the Hip Hop Sample: Contexts and African American Musical Aesthetics*, 28 AF. AM. REV. 639 (1994) (noting that rap artists and producers began to use the sampler in "an oppositional manner" to oppose capitalist notions of property ownership).

[85] *See* Tracy L. Reilly, *Debunking the Top Three Myths of Digital Sampling*, 31 COLUM. J.L. & ARTS 355, 383 (2008) (noting that the practice of sampling is common in

the cultural origins and artistic motivations of sampling within the hip hop music genre extend to and through New York, Jamaica and Africa, making sampling particularly significant to the genre and culture.[86]

Although hip hop music existed long before digital samplers, the process of integrating bits of one record with bits of another was part of the hip hop aesthetic from its dynamic inception in the Bronx.[87] In fact, is it the very act of borrowing bits of existing works in many instances that serves to connect culturally identifiable texts to new ones to further strengthen the community born of collective memory and collective experience.[88] The artistic process of digital sampling, like the resulting music, is rooted in and integrally linked to the African diasporic aesthetic that "carefully selects available media, texts, and contexts for performance use."[89] Part of that diasporic experience rests in Jamaica, birthplace of the DJ who brought the travelling parties of Jamaica to the Bronx.[90]

The RZA describes his use of the sampler as a "painter's palette."[91] Chuck D uses it to create a collage.[92] The point of

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creating all forms of music). "While African American rap artists have been taking most of the heat for unauthorized sampling, artists of other races and musical genres have also 'done their share' of sampling other artists' original material." *Id.* at 383. *See also* KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING (2011).

86 *See* Self, *supra* note 30, at 347 (exploring the legal implications of sampling in hip hop within the context of its cultural roots in New York, Jamaica and Africa).

87 *See supra* Part I.A.2.

88 *See* Fisher, *The Growth of IP*, *supra* note 1, at 16 ("Today, most writing (indeed, most creativity of all sorts) is collaborative."); *see also* Arewa, *Catfish Row*, *supra* note 21, at 332 ("Borrowing is often part of what makes cultural texts recognizable to other participants in the cultural context from which such texts emerge. New creations are frequently framed in light of and in relation to past experience.").

89 Bartlett, *supra* note 84, at 639.

90 *See supra* Part I.A.2.

91 *See* THE RZA, *supra* note 59, at 192.

92 *See* THE RZA, *supra* note 59, at 191–92.

> If you take four whole bars that are identifiable, you're just biting that shit. . . . [O]n every album I tried to make sure that I only have twenty to twenty-five percent sampling. Everything else is going to be me putting together a synthesis of sounds. . . . [On one song] it

visual art analogies is well made in light of the obvious (and not-so-obvious, but equally present) distinctions between textual works and performance-based and visual works of art. Hip hop legend Chuck D of Public Enemy explained that sampling evolved out of a tradition of rappers recording over live bands who were emulating sounds from popular music.[93] So it followed naturally that when synthesizers and samplers were introduced, they built on and enhanced the integral practice of incorporating popular and recognizable sounds so that rappers could still "do their thing over it."[94] Sampling was not used for expediency or to pass off another's creativity as one's own. On the contrary, sampling was another way of arranging and performing sounds (musical notations)—the "stock in trade" of music—in the creative process.[95] During the early stages of hip hop music, producers ran wild with the technology without any particular thought for, or concern with, the legal repercussions.[96] Public Enemy emerged and distinguished itself as a "sampling-as-art trailblazer" by incorporating hundreds of samples into their legendary 1988 album, *It Takes a Nation of Millions to Hold Us Back.* In an ingenious fashion, the group combined the samples in a unique way to create a "new, radical sound that changed the way music was created and experienced."[97] Incidentally, due to the vast

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took at least five to seven different records chopped up to make one two-bar phrase.

Id.; *see also* McLeod, *supra* note 83.

93 *See* McLeod, *supra* note 83.

94 *See* McLeod, *supra* note 83. Chuck D explained further in his interview with *Stay Free!*: "Eventually, you had synthesizers and samplers, which would take sounds that would then get arranged or looped, so rappers can still do their thing over it. The arrangement of sounds taken from recordings came around 1984 to 1989." *Id.*

95 *See* McLeod, *supra* note 83. ("We thought sampling was just another way of arranging sounds. Just like a musician would take the sounds off of an instrument and arrange them their own particular way.").

96 *See* McLeod, *supra* note 83. "In the mid- to late 1980s, hip-hop artists had a very small window of opportunity to run wild with the newly emerging sampling technologies before the record labels and lawyers started paying attention." *Id.* The first sound recording infringement case did not come until *Grand Upright Music, Ltd. v. Warner Bros. Records Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991).

97 McLeod, *supra* note 83.

number of samples used, it would now likely be cost-prohibitive to create *It Takes a Nation* today due to negotiated licensing fees.[98]

Hank Shocklee describes the intricate creative process of sampling as using the beat as rhythmic building blocks or the "skeleton" of a track.[99] The lyrics (a/k/a "the rhyme") were added on top of the beat based on how the lyricist felt, the direction of the track and "what worked."[100]

Hip hop grew in stature in mainstream music and the number of producers who sampled grew accordingly. But at that time, industry practice was to sample first and clear[101] (if ever) after release.[102] The music industry responded in kind to stamp out what it viewed as a hemorrhaging of potential licensing revenue by exploiting a new and viable legal claim to bolster its overall claims of infringing uses. As explained more fully in Part III, their new legal claim was based on a per se infringement of the sound recording.

Few prominent artists were as negatively impacted by sound recording infringement claims as Public Enemy. The change in

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[98] McLeod, *supra* note 83. Hank Shocklee noted in the interview that although it would not be impossible to create the album at that time, it would be very, very costly. *Id.* The pricing schedule generally included an initial fee with escalations tied to sales numbers. *Id.*

> You could have a buyout—meaning you could purchase the rights to sample a sound—for around $1,500. Then it started creeping up to $3,000, $3,500, $5,000, $7,500. Then they threw in this thing called rollover rates. If your rollover rate is every 100,000 units, then for every 100,000 units you sell, you have to pay an additional $7,500. A record that sells two million copies would kick that cost up twenty times. Now you're looking at one song costing you more than half of what you would make on your album.

Id.

[99] McLeod, *supra* note 83.

[100] McLeod, *supra* note 83. Shocklee described how he and Chuck D used sampling as an integral part of hip hop artistry: "Chuck would start writing and trying different ideas to see what worked. Once he got an idea, we would look at it and see where the track was going. Then we would just start adding on whatever it needed, depending on the lyrics." *Id.*

[101] "Clearing" a sample is obtaining copyright permission to use it. *See* Michael A. Aczon, *Sampling and Copyright—How to Obtain Permission to Use Samples*, ELEC. MUSICIAN (Mar. 1, 2002, 12:00 PM), http://emusician.com/tutorials/emusic_clear.

[102] *See* McLeod, *supra* note 83.

P.E.'s musical style between 1988 and 1991 was discernable, and, arguably not for the better. Their ascension to legendary status was mostly a result of P.E.'s "collage" style of music creation. The group amassed hundreds of independently unrecognizable pre-existing sounds (everything from vocal wails to police sirens) and used them to create powerful new musical tracks over which they delivered political commentary about issues of race, racism, economics, violence, police brutality and religion.[103]

Two primary reasons explain why collage-style sampling was so negatively impacted. First, the cost to secure copyright clearances on hundreds of aural fragments quickly became exorbitant. Second, samples of pre-existing sounds create a "purer" sound than re-creating the sound in the studio with live musicians due to master recording composition rates.[104]

Shocklee provides a somewhat less technical explanation of the difference as being the difference between hitting someone "upside the head" with a pillow versus a piece of wood.[105] The result? Now most producers generally sample and loop only one song so that there is only one or there are very few copyright holders involved in calling the shots rather than, conceivably, hundreds.[106] So for now it seems the highly artistic and innovative concept of the P.E.-style collage created with musical rather than notational

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[103] McLeod, *supra* note 83. When asked how the threat of litigation impacted the P.E. sound, Chuck D replied:

> Public Enemy's music was affected more than anybody's because we were taking thousands of sounds. If you separated the sounds, they wouldn't have been anything—they were unrecognizable. The sounds were all collaged together to make a sonic wall. Public Enemy was affected because it is too expensive to defend against a claim. So we had to change our whole style, the style of *It Takes a Nation* and *Fear of a Black Planet*, by 1991.

Id.

[104] This second reason is somewhat technical. The composition rates in a sampled sound are significantly higher and, therefore, of a better quality, than the same sound (an organic sound) created by live in-studio musicians. For a plain-English explanation of digital sampling rates and digitizing sound see *Sound Sampling*, FRIENDS OF ED, http://www.friendsofed.com/errata/1590593030/SoundSampling.pdf (last visited Sept. 7, 2010).

[105] McLeod, *supra* note 83.

[106] McLeod, *supra* note 83.

composition is dead.[107] The effect of per se sound recording infringement and negotiated licenses seems to have, in effect, thwarted the very creativity and artistry the Intellectual Property Clause of the Constitution sought to promote.

2. The Essential Role of Borrowing in Music

The Copyright Act protects original works of authorship fixed in a tangible medium of expression.[108] However, both traditional and current concepts of copyright are premised on a paradigm that presumes borrowing is generally antithetical to creativity and innovation and that creative works worthy of protection are always created independently.[109] This presumption, beyond being largely unsubstantiated, actually has an onerous impact on musicians who historically have used collaboration and borrowing regularly in the creative process.[110] Additionally, this unsupported presumption has disregarded the importance of copying in the creative process and has left its value "under-appreciated and under-theorized in copyright doctrine . . . ."[111]

This assertion is well illustrated by the real and burgeoning impact copyright creation requirements have had on hip hop music, the producers of which regularly use sampling, looping and

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[107] *See* Bartlett, *supra* note 84, at 640 (describing musical composition, as opposed to the traditional European practice of notational composition, as the central focus of hip hop).

[108] 17 U.S.C. § 102 (2006).

[109] *See* Arewa, *Bach to Hip Hop*, *supra* note 15, at 585 ("Current conceptions of authorship assume a dichotomy between copying and creativity and presume that borrowing is inimical to creativity and innovation. . . . [S]uch views of musical authorship fail to recognize that the use of existing works for new creations can be an important source of innovation.").

[110] *See* Arewa, *Bach to Hip Hop*, *supra* note 15, at 586; *see also* Arewa, *Freedom to Copy*, *supra* note 15, at 523 (noting that borrowing is an important part of creating many cultural productions, including music). Professor Arewa identifies terms used regularly in musicology to illustrate the point: "[T]erms used to discuss relationships between musical texts include borrowing, self-borrowing, transformative imitation, quotation, allusion, homage, modeling, emulation, recomposition, influence, paraphrase, and indebtedness." *Id.*

[111] Arewa, *Freedom to Copy*, *supra* note 15, at 482 (citing Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1152 (2007) (other citations omitted)). Professor Arewa notes further that "in legal discourse, the creative significance of copying and uses of existing works is often ignored." *Id.*

mashing as artistic tools to create a novel tapestry of music from existing bits of copyrighted works. From the perspective of the Copyright Act, the sampling artist is expected to license the right to use the copyrighted work (which requires obtaining the rights to both the musical composition and the sound recording) and to pay licensing fees. But the nature of music in general (hip-hop in particular) as collaborative and generally involving borrowing on the one hand, and the exclusive rights in a copyright holder to, among other things, copy and create adaptations from the original on the other, places this type of artistic innovation at odds with copyright law. Because of the historical relevance of borrowing which has permeated music throughout history, current copyright laws should be revised to reflect, encourage and protect such uses.[112]

Additionally, the policies underlying the existence and development of copyright law in the United States must be realigned with its constitutional underpinnings to focus on more than providing incentives for creation and innovation. Copyright policy must seek to balance an author's exclusive rights with the realities of how creative works are produced to foster the ideal conditions for, and access by second-comers to, creativity. If the fundamental goal of intellectual property laws is truly to promote the progress of science and useful arts then current copyright law lags behind its constitutional call and therefore fails to serve this fundamental goal.[113]

3. Legal Mythologies and Realities in Hip Hop

I assert the relationship between hip hop music producers, the artistic practice of sampling and the resulting legal implications can be summarized as follows:

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[112] *See* Arewa, *Bach to Hip Hop*, *supra* note 15, at 547 ("The pervasive nature of borrowing in music suggests that more careful consideration needs to be given to the extent to which copying and borrowing have been, and can be, a source of innovation within music.").

[113] *See* Leslie A. Kurtz, *Copyright, Creativity, Catalogs: Commentary: Copyright and the Human Condition*, 40 U.C. DAVIS L. REV. 1233, 1244 (2007) ("If copyright is to promote creativity, it will not be well served by rigid control over the ability to access and use cultural goods.").

1. They didn't think it was a problem.

2. Then it became a problem, which was a problem.

3. Then they did it knowing it was a problem.

4. Now they don't do it for fear of a problem.

5. Courts don't agree on how to assess whether the practice is a problem.

6. This is a problem.

a) Industry-Created Response

The industry response to this "problem" is to secure a rights holder's permission by negotiating copyright licenses.[114] This copyright clearance process is often left to the musician or producer rather than the record label and in many cases a third-party company is retained to handle the actual mechanics of the process.[115] Copyright clearance involves securing permission both from the composer or composers who control(s) rights in the musical composition and from the entity or entities that own(s) rights in the sound recording.[116] Because there is no agreement within the industry on actual standards and valuation, several factors are considered in each negotiation to determine these issues. These factors include the stature of the sampling and sampled artists, the success of the sampled song, the intended use, the duration and content of the sample (hook versus a beat, for example), and the number of times the sample is looped in the resulting track.[117]

This results in wide ranging and, at times, excessive licensing fees which diminish both the quantity and creative uses of sampling. In response to the limitations of the current system, numerous commentators have suggested varied and various short- and long-term remedies. The most commonly proposed suggestion is for Congress to create a compulsory licensing framework that

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[114] *See* Szymanski, *supra* note 78, at 290.

[115] *See* Szymanski, *supra* note 78, at 290–91.

[116] *See* JARED HUBER & BRIAN T. YEH, CONG. RESEARCH SERV., RL 33631, COPYRIGHT LICENSING IN MUSIC DISTRIBUTION, REPRODUCTION, AND PUBLIC PERFORMANCE 1 (2006), *available at* http://ipmall.info/hosted_resources/crs/RL33631_060830.pdf.

[117] *See* Szymanski, *supra* note 78, at 291.

encompasses a liability-based (instead of property-based) rule, as noted herein below.

b) Alternative Approaches

Property rights are described generally as a bundle of rights.[118] It is often stated the most essential stick in the bundle is the property owner's right to exclude.[119] But this concept does not fit neatly within the intellectual property rubric. The latter, a creature of legislative action, is a privilege-based monopoly granted for limited times. The former is often discussed as having the potential to last in perpetuity. However, copyright as applied to the creation and dissemination of new musical works operates as a property rule.[120]

Although traditional property law remedies seek in most circumstances to enjoin behavior antithetical to a property owner's interests, intellectual property owners should, in theory, receive liability-based remedies only substantial enough to offer protection while maintaining the delicate balance between private interest and the public benefit of encouraging further innovation.[121] But in recent years, courts have interpreted copyright law in ways more consistent with a property rule (I can exclude anyone for any reason) than a liability-based rule (you can use as long as you pay). This shift is referred to as the "propertization" of intellectual property.[122] Essentially, the right to control the use and

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[118] J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 712 (1996).

[119] Mark A. Lemley & Philip J. Weiser, *Should Property Rules or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 783 (2007) (citing Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979)).

[120] *See* Arewa, *Bach to Hip Hop*, *supra* note 15, at 638 ("[T]he current copyright system operates under a property rule theory, in which nonconsensual takings are discouraged." (citing Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L.J. 703, 704 (1996))).

[121] *See* Arewa, *Bach to Hip Hop*, *supra* note 15, at 638.

[122] Fisher, *The Growth of IP*, *supra* note 1, at 2–3 (noting that in the eighteenth century, lawyers and politicians were more apt to refer to copyright and patent as monopolies, not property).

dissemination of information became forms of property and were thus referred to and considered property in the traditional sense.[123]

A number of alternatives—from the entirely academic to the entirely plausible—have been presented in the last two decades to remedy the sampling dilemma. One commentator identifies certain unauthorized uses that constitute actionable "substantial" copying and suggests a coordination of the *de minimis* doctrine.[124] Another scholar offers a "freedom to copy" legislative framework premised on liability-based rather than property-based rights.[125] That author posits that a "freedom to copy" framework would disaggregate compensation and control rights to allow borrowing, copying and other uses of pre-existing copyrighted works for all but unfair uses.[126] Further, the author argues that such a framework best achieves the balance between protecting individual rights—especially those based on existing works—and promoting new creativity.[127] She and other commentators make a credible case for why ex-post determinations of liability may actually encourage the creation of new works, especially in the case of musical works where creation is often normatively cumulative.[128]

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[123] Fisher, *The Growth of IP*, *supra* note 1, at 2–3. The discourse switched to "one centered on the notion that rights to control the use and dissemination of information are forms of 'property.'" *Id.* From the perspective of a legal realist, words matter because they have the power through legal discourse to shape perceptions and can drive outcomes. Legal realism rests on the notion that law is indeterminate. Such indeterminacy creates an environment in which judges assume considerable discretion and latitude in assessing meaning and value to the underlying matter in questions and the litigants involved therein. In the case of hip hop music and its use of sampling, the concern is whether judges like the panel in *Bridgeport* find it easy to declare an otherwise innovative use to be unlawful and unworthy of protection. Smith, *supra* note 38, at 83–84.

[124] Reuven Ashtar, *Theft, Transformation, and the Need of the Immaterial: A Proposal for a Fair Use Digital Sampling Regime*, 19 ALB. L.J. SCI. & TECH. 261, 264 (2008).

[125] Arewa, *Freedom to Copy*, *supra* note 15, at 553.

[126] Arewa, *Freedom to Copy*, *supra* note 15, at 553. Professor Arewa explains that unfair use can be analogized to unfair trade (which promotes fair trade) and unfair competition (which promotes fair competition). *Id.* In those areas of law, "unfair" is used to delineate "what constitutes fair practices." *Id.* at 553 (citing Hale E. Sheppard, *The Continued Dumping and Subsidy Offset Act (Byrd Amendment): A Defeat Before the WTO May Constitute an Overall Victory for U.S. Trade*, 10 TUL. J. INT'L & COMP. L. 121, 121–22 (2002) (other citations omitted)).

[127] Arewa, *Freedom to Copy*, *supra* note 15, at 552.

[128] Arewa, *Freedom to Copy*, *supra* note 15, at 552–53.

Other scholars suggest varied approaches to a compulsory licensing scheme. The general assumption shared by most proponents is that compulsory licensing will help to offset the effects of overly restrictive copyright laws that threaten creative processes involving borrowing and other modes of cumulative creativity.[129] Compulsory licensing is not without its critics, however.[130] Nonetheless, a credible case exists for a compulsory sample-licensing scheme complemented by a robust transformative fair use standard. A key benefit of a liability-based rule is that such frameworks "have the potential to significantly reduce transaction costs in copyright by reducing the extent to which permissions are needed from existing copyright owners."[131]

The fact that so many commentators have suggested and indeed implored Congress to act in this regard, without any corresponding legislative action, suggests that although the issue is reaching a boiling point in legal discourse, the music industry and the courts, Congress has yet to begin even the nascent stages of reform. And to say Congress has been reluctant to sanction such legislation is, without question, an understatement, especially given its hands-off approach to copyright reform historically.[132]

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[129] Arewa, *Freedom to Copy*, *supra* note 15, at 552–53 (noting that compulsory licensing schemes can mitigate the economic side effects of intellectual property systems); *see also* William Fisher III, *Intellectual Property and Innovation: Theoretical, Empirical, and Historical Perspectives*, *in* INDUSTRIAL PROPERTY, INNOVATION, AND THE KNOWLEDGE-BASED ECONOMY, BELEIDSSTUDIES TECHNOLOGIE ECONOMIE 37 (2001) [hereinafter Fisher, *IP & Innovation*], *available at* http://cyber.law.harvard.edu/people/tfisher/Innovation.pdf. Professor Fisher's paper examines the pros, cons and alternatives for compulsory licensing and concludes that the benefits outweigh the associated concerns. Additionally, it outlines an insightful empirical analysis of implementing a compulsory licensing scheme by comparing the effect of compulsory fees to profit-maximizing price in pharmaceutical sales during the term of patent protection. *Id.*

[130] *See* Ed Felton, *Compulsory Licensing: Responses*, FREEDOM TO TINKER (Oct. 23, 2002, 12:30 PM), http://freedom-to-tinker.com/blog/felten/compulsory-licensing-responses.

[131] Arewa, *Freedom to Copy*, *supra* note 15, at 554 (citing Chris Johnstone, *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 (2004)).

[132] *See infra* notes 206–213 and accompanying text.

Congress must revisit this issue to clarify and reconcile the varied approaches to this critical topic and to ensure that it fashions a rule that protects copyright holders, preserves traditional defenses to copyright infringement and encourages innovative uses of technology to create new works from existing creative artifacts.[133]

II. COPYRIGHT: HISTORICAL AND LEGAL MYTHOLOGIES AND REALITIES

A. Brief History of Copyright Law

Today the United States outpaces other nations as the leading proponent of strengthened intellectual property rights in America and throughout the world.[134] The United States took an undeniably hard-lined approach in its negotiations of the Agreement on Trade-Related Aspects of Intellectual Property treaty ("TRIPS")[135] in the Uruguay Round in urging the adoption of its version of copyright and patent revisions.[136] In addition, serious and substantial concerns about wholesale piracy believed to be occurring in China lead the United States to respond more aggressively to those infringement concerns than to China's human rights violations.[137]

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[133] *See infra* Part II.C.

[134] *See* Fisher, *The Growth of IP*, *supra* note 1, at 11 (citing JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 3 (1996)).

[135] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (1994) [hereinafter TRIPS Agreement]. The World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights, negotiated in the 1986–94 Uruguay Round, introduced intellectual property rules into the multilateral trading system for the first time. *See generally Intellectual Property: Protection and Enforcement*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/ agrm7_e.htm (last visited Aug. 9, 2010).

[136] *See* Fisher, *The Growth of IP*, *supra* note 1, at 11 (citing Jerome H. Reichman, *Intellectual Property in International Trade and the GATT, in* EXPORTING OUR TECHNOLOGY: INTERNATIONAL PROTECTION AND TRANSFERS OF INDUSTRIAL INNOVATIONS 3 (Mistrale Goudreau et al. eds., 1995)).

[137] *See* Fisher, *The Growth of IP*, *supra* note 1, at 11 (citing Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1297–98 (1996)).

But the United States has not always been so zealous in its protection of intellectual property interests. From the early to mid-nineteenth century, the United States offered limited protections of domestic literary works and had little if any regard for piracy claims of foreign copyright holders alleged to occur within the country.[138] From the mid-twentieth century until today, however, the confluence of economic, ideological and political factors has compelled Congress to extend and expand the nature, scope and duration of the copyright monopoly far beyond "exclusive rights" to authors and inventors for "limited times."[139] This is clearly evident in the extension of the duration of copyright—now lasting for the life of the author plus seventy years after the author's death.[140] The point is also evident in the expansion of types of works protected by copyright.[141] Additionally, the legal discourse has changed the perception of copyright from monopoly to property right.[142] Accordingly, the United States has "transformed from the most notorious pirate to the most dreadful police."[143]

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[138] *See* Fisher, *The Growth of IP*, *supra* note 1, at 2–3 (noting that until the middle of the nineteenth century copyright protection was limited to "verbatim copying of his or her language"); *id.* at 11 (noting Charles Dickens' concerns that American publishers were reprinting his works without permission).

[139] *See* Fisher, *The Growth of IP*, *supra* note 1, at 10.

> Copyright has been expanded and extended within the last decade. Legal changes have increased the scope of protection (for example, the Copyright Act of 1976 formally conferred power over derivative works), lengthened its duration (the Sonny Bono Copyright Term Extension Act (CTEA) of 1998 increased it by twenty years), prohibited users from circumventing technical restrictions on using works (for example, the Digital Millennium Copyright Act forbids bypassing access control measures), reduced fair use's scope, increased civil and criminal penalties for infringement, and allowed license agreements to override countervailing rights and defenses such as fair use (for example, court decisions uphold license agreements banning reverse engineering even when it would be fair use).

Derek E. Bambauer, *Faulty Math: The Economics of Legalizing the Grey Album*, 59 ALA. L. REV. 345, 352 (2008) (citations omitted).

[140] 17 U.S.C. § 302(a) (2006).

[141] *See* Fisher, *The Growth of IP*, *supra* note 1, at 3–4 (noting the additions of photographs, sound recordings, software and architectural works).

[142] *See* Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1033–46 (2005) (noting the change in intellectual property discourse to

Article I, Section 8 of the United States Constitution empowers Congress "*To promote the Progress of Science and useful Arts*, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[144] The first national bill to establish copyright law in the United States was passed by Congress in 1790 and signed into law by George Washington on May 31, 1790 "for the encouragement of learning, by securing the copies of maps, Charts, And books, to the authors and proprietors of such copies, during the times therein mentioned."[145] Its English precursor, The Statute of Anne, took effect in 1710 and is viewed as the first modern copyright statute.[146] It granted "authors or their assigns" the exclusive right

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reflect real property rights discourse); *see also* Arewa, *Freedom to Copy*, *supra* note 15, at 499 (arguing that the "propertization approaches" are directly related to increased intellectual property protection in recent years); Fisher, *The Growth of IP*, *supra* note 1, at 20–23 (noting trend in intellectual property discourse to "propertize" copyright, patent and trademark).

[143] Michael Fuerch, *Dreadful Policing: Are the Semiconductor Industry Giants Content with Yesterday's International Protection for Integrated Circuits?*, 16 RICH. J.L. & TECH. 6, 23 (2010) (internal quotation marks omitted) (citing Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 353 (2003)). Fuerch explains that after being a notorious pirate of British novels in the nineteenth century, the United States emerged with its own cultural identity and "began to push for and implement greater international intellectual property protection." *Id.*

[144] U.S. CONST. art. I, § 8, cl. 8 (emphasis added). Interestingly, an earlier draft of this clause empowered Congress:

> To secure to literary authors their copy rights for a limited time; To encourage, by proper premiums and provisions, the advancement of useful knowledge and discoveries; To grant patents for useful inventions; To secure to authors exclusive rights for a certain time; and To establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades, and manufactures.

Fisher, *The Growth of IP*, *supra* note 1, at 14 n.69 (citing Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTELL. PROP. L. 1, 44–45 (1994)). Walterscheid opines that this language was not passed upon for ideological reasons but because it was too costly to implement. *Id.* at 14–15 (citing Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTELL. PROP. L. 1, 44–45 (1994)).

[145] Copyright Act of 1790, ch. 15, pmbl., 1 Stat. 124, 124 (repealed 1831).

[146] Statute of Anne, 1710, 8 Ann., c.19 (Eng.).

to publish books for fourteen years from the date of publication.[147] Both focused on written works and wholesale copying.[148] Congress has since made several substantial revisions to the law, including expanding the class of protected works to include limited rights in sound recordings via the Sound Recording Act of 1971.[149]

B. Rights of the Copyright Holder

Copyright exists *automatically* when a work is fixed for the first time in any tangible medium of expression[150] in a copy[151] or phonorecord.[152] "By 'copy' the Act means material objects—such as books, manuscripts, electronic files, Web sites, e-mail, sheet music, musical scores, film, videotape, or microfilm—from which a work can be read or visually perceived either directly or with the

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[147] *Id.* The term of protection was extended for an additional fourteen years if the author were still living upon expiration of the first term. *See id.*

[148] *See generally* Copyright Act of 1790, ch. 15, 1 Stat. 124 (repealed 1831); Statute of Anne, 1710, 8 Ann., c.19 (Eng.).

[149] Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (codified in scattered sections of 17 U.S.C.). *See infra* Part II.D.; *see also* Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 525 (2006) (citing 17 U.S.C. § 301 (2004)) ("[T]he rights in a sound recording are much more limited than those provided for other copyrighted works, including musical scores.").

[150] 17 U.S.C. § 102(a) (2006).

[151] The Copyright Act defines "copies" as:

> [M]aterial objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

Id. § 101.

[152] The Copyright Act defines "phonorecords" as:

> [M]aterial objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

Id. § 101.

aid of a machine or device."[153] Phonorecords are material objects—such as CDs or LPs.[154] "Thus, for example, a song (the work) can be fixed in sheet music (copies) or in a CD (phonorecord) or both."[155] This distinction is important because sound recordings (an artist's actual performance on the CD) and the underlying musical compositions (the music and lyrics) are considered separate works with separate and distinct copyrights.[156]

In general, the Copyright Act gives a copyright owner the exclusive right to do and to authorize others to reproduce the work, prepare derivative works based on the original, distribute copies of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending, perform the work publicly, display the work publicly, and in the case of sound recordings, to perform the work publicly by means of a digital audio transmission.[157] Collectively, these rights are often referred to as a copyright holder's exclusive bundle of rights.[158] These exclusive rights, however, do not include any right of public performance.[159] Essentially, this means a band can cover a song and pay compulsory royalties to the composer (or her publishing designee).[160] Accordingly, the protection afforded sound

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153 TONYA M. EVANS, COPYRIGHT COMPANION FOR WRITERS 11 (2007).

154 *Id.*

155 *Id.*

156 *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 796 n.3 (6th Cir. 2005) (citing 17 U.S.C. § 102(a)(2), (7)); *see also* Newton v. Diamond, 204 F. Supp. 2d 1244, 1248–49 (C.D. Cal. 2002) (citing 17 U.S.C. § 102(a)(2), (7)).

157 17 U.S.C. § 106(1)–(6).

158 For works created on or after January 1, 1978, copyright generally lasts for the life of the author plus seventy years after the author's death. *Id.* § 302(a). Interestingly, the right to "use" is not among the bundle of rights. *Id.* § 106. This highlights an important issue in copyright in the twenty-first century as users assert greater interests in access to copyrighted works, with or without permission.

159 *See* 17 U.S.C. § 114(a). "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." *Id.* § 114(b). Additionally "[t]he 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." *Id.*

160 "The exclusive rights of the owner of copyright in a sound recording . . . *do not extend to the making or duplication of another sound recording that consists entirely of*

recordings in digital sampling cases only extends to "the recorded sound—the stored electronic data digitally preserved by the composer."[161] If the exact sounds are re-created independently in another recording (i.e., "covered"), that recording is considered an independent creation.[162] This holds true "even though sounds imitate or simulate those in the copyrighted sound recording."[163] The notion of independent creation has been long established in case law[164] and questioned extensively in the legal discourse.[165]

C. *Infringement Analysis: Substantial Similarity*

Infringement occurs when someone—without right, permission or legal defense—exploits one or more of the exclusive rights of the copyright owner. There are several methods and varied terminology used among the circuits to assess infringement.[166] However, all contemplate the same basic analysis. To prove copyright infringement a copyright holder must establish that she owns a valid copyright,[167] the infringing party actually copied the copyright owner's work (proved either directly or circumstantially via an intrinsic "substantial similarity" analysis);[168] and that such

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an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sounds recording." *Id.* (emphasis added).

[161] Fharmacy Records v. Nassar, 248 F.R.D. 507, 527–28 (E.D. Mich. 2008) (finding that artist DMX's incorporation of a portion of plaintiffs' copyrighted beat, "ESS Beats" in his song, "Shot Down" (featuring 50 Cent and Styles) did not constitute an infringement of a sound recording because plaintiffs could not establish, and therefore a reasonable jury could not conclude, that defendants actually sampled).

[162] 17 U.S.C. § 114(b).

[163] *Fharmacy*, 248 F.R.D. at 528 (internal quotation marks omitted) (quoting Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 799–800 (6th Cir. 2005)).

[164] *See generally* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249 (1903) (citing Blunt v. Patten, 3 F. Cas. 763, 765 (C.C.S.D.N.Y. 1828) (No. 1,580) ("Others are free to copy the original. They are not free to copy the copy.").

[165] *See generally* Arewa, *Bach to Hip Hop*, *supra* note 15, at 550–51. Professor Arewa notes that copyright legal structures and classical music canons have both "relied on a common vision of musical authorship that embeds Romantic author assumptions" and views creation as "autonomous, independent and in some cases even reflecting genius." *Id.*

[166] Arewa, *Freedom to Copy*, *supra* note 15, at 484.

[167] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).

[168] *See* Arewa, *Freedom to Copy*, *supra* note 15, at 485–86 (citing Computer Assocs. Int'l, Inc. v. Altai, Inc., 775 F. Supp. 544, 557–58 (E.D.N.Y. 1991)) (noting that in the absence of direct evidence—an admission, for example—copying is often proven

copying amounts to an unlawful appropriation.[169] A finding of unlawful appropriation is required because not all instances of unauthorized copying rise to the level of an actionable appropriation.[170]

The notion that trivial uses of a protected work, though unauthorized, will not be deemed an infringing use in every case is well established in copyright jurisprudence.[171] Allowing for trivial uses reflects the familiar legal maxim *de minimis non curat lex* understood to mean "the law does not concern itself with trifles."[172] Thus, *de minimis* use and intrinsic substantial similarity are inextricably linked and often overlap.[173]

In the case of sampling, however, copying in fact is rarely litigated. The question is seldom whether a defendant copied a sound recording; the process of sampling necessarily entails making a direct copy. The question is whether the use was *de minimis* or fair, unless of course the jurisdiction applies a per se infringement analysis as did the court in *Bridgeport*. Thus, digital

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circumstantially). "Establishing copying also involves assessment of the degree of substantial or probative similarity between the two works, which constitutes the second aspect of the copying element." *Id.* Proving "copying in fact" is often referred to as involving "extrinsic substantial similarity." *Id.*

[169] *See* Newton v. Diamond, 388 F.3d 1189, 1192–93 (9th Cir. 2004) (citing Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74–75 (2d Cir. 1997)), *cert. denied*, 545 U.S. 1114 (2005). The test used to determine whether an appropriation was unlawful appropriation is a subjective one referred to as "intrinsic substantial similarity." *See* Arewa, *Freedom to Copy*, *supra* note 15, at 486–87.

[170] *Newton*, 388 F.3d at 1192–93 ("[E]ven where the fact of copying is conceded, no legal consequences will follow from that fact unless the copying is substantial.") (citations omitted); *see also* Arewa, *Freedom to Copy*, *supra* note 15, at 480 (citing Arnstein v. Porter, 154 F.2d 464, 468–69 (2d Cir. 1946)) ("The term copying is often taken to be the equivalent of infringement, but it may also be used to describe practices connected to the creation of new works, including borrowing practices in varied creative fields.").

[171] *See* West Publ'g Co. v. Edward Thompson Co., 169 F. 833, 861 (C.C.E.D.N.Y. 1909) ("Even where there is some copying, that fact is not conclusive of infringement. Some copying is permitted. In addition to copying, it must be shown that this has been done to an unfair extent.").

[172] *Newton*, 388 F.3d at 1193 (citing *Ringgold*, 126 F.3d at 74–75).

[173] *Id.* Additionally, substantial similarity tests are used both to establish copying in fact circumstantially and also in proving improper appropriation. *Id.*

sampling cases generally focus on unlawful appropriation.[174] Generally courts analyze "substantial similarity" by examining the "total concept and feel" of the copied and resulting works and determining "whether there is substantial similarity between the allegedly offending works and the protectable, original elements" of the sound recording.[175]

D. Affirmative Defenses in Infringement Cases

Once a copyright owner has met her burden to establish a prima facie case of infringement, the alleged infringer may assert affirmative defenses. These defenses include, but are not limited to, fair and *de minimis* uses, as well as estoppel, laches, misuse, innocent intent, and abandonment.[176] The defenses most relevant to this Article are those frequently asserted in sound recording infringement cases: *de minimis* use and fair use.

1. *De Minimis* Use

De minimis copying consists of "copying that is so trivial and insignificant that no liability can result . . . ."[177] Generally, in determining whether copying constitutes *de minimis* copying courts will consider the amount copied and the importance of what is copied in the alleged infringer's work.[178] This doctrine is important in the context of sampling in the music industry. Cases applying the *de minimis* doctrine do not set forth with any particular certainty where to draw the line between unauthorized use which is permissible or what quantum of similarity crosses the threshold of substantial similarity.[179]

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[174] Ponte, *supra* note 149, at 527 ("[Unlawful appropriation] is at the heart of the difficulties with applying standard copyright principles to digital sampling disputes.").

[175] Saregama India Ltd. v. Mosley, 687 F. Supp. 2d 1325, 1337 (S.D. Fla. 2009) (quoting Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters., Int'l, 533 F.3d 1287, 1300–01 (11th Cir. 2008)).

[176] *See generally* MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 487 (5th ed. 2010).

[177] *Id.* at 430.

[178] *Id.*

[179] *Id.* at 431.

2. Fair Use

If a court finds a defendant's copying to be more than *de minimis*, the defendant may nevertheless defend her use on fair use grounds. The fair use doctrine originated as a judicially created defense to copyright infringement.[180] The doctrine allows a third party to use a copyrighted work without the copyright owner's consent for certain purposes and under certain conditions. Fair use is determined on a case-by-case basis.[181] It was conceived originally to apply to textual works.[182] The fair use doctrine was crafted to create and to preserve enough creative "space" for a second author to copy a prior author's work within the context of protecting an original author's copyright monopoly.[183] However, the subject matter of copyright has expanded over time to include works like music derived, to some extent more commonly, from existing works. Accordingly, the shortcomings of both copyright law and the fair use doctrine have become increasingly more apparent over time.[184]

Congress codified the fair use defense in the 1976 version of the Copyright Act. The statutory language includes a non-exclusive list of permitted uses.[185] Courts apply a four-factor test

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[180] Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901) (articulating early fair use principles that were in sum and substance codified in the 1976 Act); *see also* Arewa, *Freedom to Copy*, *supra* note 15, at 546 (citing William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of* Eldred, 92 CAL. L. REV. 1639, 1644 (2004)).

[181] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985)).

[182] *See* Arewa, *Bach to Hip Hop*, *supra* note 15, at 555; *see also supra* note 145 and accompanying text.

[183] *See* Arewa, *Freedom to Copy*, *supra* note 15, at 547–48 ("[C]opying considered in this context typically related to reprinting existing works, at times in an abridged format.") (citing WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 5 (1985)). Therefore, concludes Professor Arewa, early uses of the fair use defense actually were focused on "fair abridgement," a condensed version of the same work. Arewa, *Freedom to Copy*, *supra* note 15, at 548.

[184] *See* Arewa, *Freedom to Copy*, *supra* note 15, at 549. ("This broader application of fair use doctrine in copyright cases is problematic and reflects the general difficulties apparent in copyright treatment of works derived from existing works.").

[185] 17 U.S.C. § 107 (2006). The non-exclusive enumerated purposes are: "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." *Id.*

to determine whether or not an unauthorized use is deemed fair.[186] Despite being codified, the fair use defense seems to have preserved its foundational nature "as an equitable rule of reason to be applied where a finding of infringement would either be unfair or undermine 'the Progress of Science and the useful Arts.'"[187] However, despite being—at least theoretically—"equitable and flexible" the fair use doctrine is also considered by practitioners, academics and judges alike as "the most troublesome in the whole law of copyright . . . ."[188]

Some scholars have noted that fair use reflects the same troubling assumptions about incentives to create, the concept of originality and the historical relevance of borrowing in some cases as does the overall justification for the monopoly itself.[189] Fair use doctrine, like copyright, is premised on the copyright being recognized and protected as a property rule.[190] Fair use is also based on the assumption that "borrowing is not the norm" in the creative process and, therefore, unauthorized uses should be regulated and limited accordingly.[191] As such, fair use is also limited in its applicability to cases involving music,[192] especially a

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[186] The four factors are:

> (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.

Id.

[187] LEAFFER, *supra* note 176, at 487 (quoting U.S. CONST. art. I, § 8, cl. 8).

[188] Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939).

[189] *See* Arewa, *Freedom to Copy*, *supra* note 15, at 550 ("The assumptions underlying fair use do not always translate well outside of the context of literary works and parodies.").

[190] *See* Arewa, *Freedom to Copy*, *supra* note 15, at 551; *see also supra* Part I.B.3.

[191] Arewa, *Freedom to Copy*, *supra* note 15, at 551.

[192] Arewa, *Freedom to Copy*, *supra* note 15, at 546 (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 594 (1994)) (noting the limitations of fair use doctrine). Professor Arewa notes that "[a]lthough fair use offers one basis upon which existing works may be used, it is limited in two significant respects." First is its limited applicability to types of cultural production other than commentary and parody (namely musical notes). Second is that fair use does not operate in an expansive or balanced way in the present copyright environment. This reality "may effectively hinder use of existing

genre like hip hop in which the methodology of creation relies so heavily on sampling.

Of the four fair use factors, the first factor (the purpose and character of the use) is the most relevant in a discussion of the legality of sampling.[193] The first factor assesses the productive or transformative nature of the new work.[194] A work is found to be transformative if it embodies contributions by the second author that are socially beneficial for a purpose or in a manner different from the copied work.[195] In theory, the transformative fair use standard is meant to permit the doctrine as a whole to be applied more broadly. Broader application, in turn, would allow for more unauthorized uses to be deemed fair.[196] A wider spectrum of permissible uses broadens access to copyrighted works by second-generation authors and the public and, accordingly, promotes "progress." But based on the enumerated criteria for the nature and purpose of use factor, it is unlikely that most samples will be deemed lawful appropriation under the circumstances.[197] Until fair use reflects the cultural context and norms of how art forms like music are produced, it will fail to encourage the production of innovative works like the musical collage.[198]

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works without prior consent, even seemingly clear instances of fair use." *Id.* at 547; *see also id.* at 550 (noting the ill fit of copyright to music) (citations omitted).

[193] Nonetheless, a court must also analyze the remaining three factors of the fair use doctrine. Additionally, courts' analysis of the fourth factor, the effect of the use upon the potential market, has been often characterized as the "single most important element of fair use." Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985). Courts focus generally on the potential harm to the market, not proof of actual harm. *See* LEAFFER, *supra* note 176, at 501.

[194] LEAFFER, *supra* note 176, at 495. "Productive use" occurs when another uses the copyrighted works by adding her own creative edge. *Id.* at 490. "Transformative use" occurs when value is added to the copyrighted work by "new information, new aesthetics, new insights and understandings." *Id.*

[195] *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

[196] *See* Arewa, *Freedom to Copy*, *supra* note 15, at 550 (citing Leval, *supra* note 195, at 1111).

[197] *See* Szymanski, *supra* note 78, at 312.

[198] *See supra* Part I.B.1 for a discussion of Public Enemy's use of aural fragments to create "musical collages" with the sampler.

E. A Tale of Two Music Copyrights

Copyright law as originally conceived did not contemplate or protect music. The 1909 version of the Copyright Act protected textual works (books, charts and maps) but it also included limited protection of musical compositions via the "canned music" clause.[199] Both the music and lyrics were protected by the 1831 extension of the 1790 version of the Act.[200] Until the mid-nineteenth century, composers were protected only against literal copying.[201] As copyright law expanded to include other literary and artistic works,[202] later versions failed to address adequately the differences in how literary and artistic works are created given that performance-arts like music have traditionally utilized collaboration (with and without attribution) and borrowing (with and without permission) in the creative process.[203] Such unattributed collaboration and unauthorized borrowing is contrary to the "independent creation" requirement in copyright law[204] and European notions of the Romantic Author who is seen as creator in isolation by way of inspiration alone.[205]

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[199] *See generally* Fisher, *The Growth of IP*, *supra* note 1, at 3 ("[T]he 'work' shielded by the statute was the literal text, nothing more."). Professor Fisher provides a substantive history of the development of copyright law in America as copyright holder entitlement continued to expand and the duration of protection continued to lengthen. *Id.* at 2. Further, he details the confluence of factors that lead to such expansion, not the least of which was a fundamental change to the foundation of the American economy from agriculture to manufacturing to industry to information technology. *Id.* at 10.

[200] Arewa, *Bach to Hip Hop*, *supra* note 15, at 558 (citing LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 201 (1968)).

[201] *See* Fisher, *The Growth of IP*, *supra* note 1, at 2–3.

[202] *See* Fisher, *The Growth of IP*, *supra* note 1, at 3–4.

[203] *See supra* Part I.B.2.

[204] *See supra* Part II.B.

[205] *See* Fisher, *The Growth of IP*, *supra* note 1, at 15–17 (noting the collaborative nature of most forms of literary and artistic expression). Professor Fisher argues that, despite the reality that "the extent to which every creator depends upon and incorporates into her work the creation of her predecessors is becoming ever more obvious[,] . . . American lawmakers cling stubbornly to the romantic vision." *Id.* at 16–17; *see also* Arewa, *Catfish Row*, *supra* note 21, at 333 ("The 'Romantic author' concept, which emphasizes the unique and genius-like contributions of individual creators and inventors, is a primary mechanism by which borrowing and collaboration are denied."); Arewa, *Freedom to Copy*, *supra* note 15, at 512 (noting that exclusive intellectual property rights are often justified by a focus on "romantic" notions of originality, labor, personality or sheer genius of the author in creating the work); Peter Jaszi, *On the Author Effect:*

In 1971, the Copyright Act was amended to provide copyright protection for sound recordings to prevent piracy of albums.[206] Prior to this amendment, the topic of creating a limited copyright in sound recordings had been considered for several years in connection with the overall revision of the Copyright Act.[207] At that time, only the copyright in underlying musical works was protected from unauthorized and uncompensated duplication but there was no federal protection of the recordings of those compositions.[208] As a result, sound recordings could be and were duplicated without violating the Copyright Act.

Trade sources estimated the annual volume of wholesale piracy of records at the time to exceed $100 million.[209] Although a statutorily prescribed mechanical royalty scheme already existed to compensate music composers whose music and lyrics were reproduced in copies of albums and tapes, no similar scheme existed to compensate the owners of the master recordings themselves.[210] A minority of states enacted statutes to combat unauthorized duplication of sound recordings.[211] The majority, however, had only unfair competition laws and limited remedies.[212] Further, the jurisdiction of states to regulate in this

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Contemporary Copyright and Collective Creativity, 10 CARDOZO ARTS & ENT. L.J. 293 (1992); Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279 (1992).

206 *See* THE HOUSE REPORT ON THE SOUND RECORDING AMENDMENT OF 1971, H.R. REP. NO. 92–487, at 2 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566.

207 *See id.* at 3.

208 *See id.* at 2.

209 *See id.* It has also been estimated that legitimate sales had an annual value of approximately $300 million, thus demonstrating that piracy had a substantial impact on potential sales: "The pirating of records and tapes is not only depriving legitimate manufacturers of substantial income, but of equal importance is denying performing artists and musicians of royalties and contributions to pension and welfare funds and Federal and State governments are losing tax revenues." *Id.*

210 *See id.*

211 *See id.* ("Eight States have enacted statutes intended to suppress record piracy . . . .").

212 *See id.*

> [I]n other jurisdictions the only remedy available to the legitimate producers is to seek relief in State courts on the theory of unfair competition. A number of suits have been filed in various States but even when a case is brought to a successful conclusion the remedies available are limited.

area was in question due to federal preemption of copyright issues.[213]

An alarmed record industry lobbied Congress aggressively to protect sound recordings and convinced the legislators to proceed in a piecemeal and expedited fashion to address "recordings piracy" before fleshing out completely the larger revision of the Act.[214] Efforts to complete the entire general amendment were stalled due to unresolved issues about cable television. Even the Register of Copyrights recommended that the sound recording issue be resolved quickly.[215] Instead of lawmakers drafting the language, they left the precise wording to the industry interest-holders themselves.[216] The resulting legislation was skewed heavily in favor of those interest-holders (music industry executives) and ultimately not reflective of any public benefit that justified creating such a copyright monopoly in the first instance.[217]

The Departments of State, Justice and Commerce and the Copyright Office all favored enactment of a limited right in sound recordings.[218] Congress also considered a proposal to create a

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Id.

[213] *See id.* at 2–3. ("[T]he jurisdiction of States to adopt legislation specifically aimed at the elimination of record and tape piracy has been challenged on the theory that the copyright clause of the Federal Constitution has preempted the field even if Congress has not granted any copyright protection to sound recordings.").

[214] *See id.*

[215] *See id.* at 10. The House Report quoted comments that L. Quincy Mumford, Librarian of Congress, wrote to the Chairman of the Judiciary Committee:

> [S]ome fundamental problems impeding the progress of general revision of the copyright law, notably the issue of cable television, have not yet been resolved. We agree that the national and international problem of record piracy is too urgent to await comprehensive action on copyright law revision, and that the amendments proposed in S. 646 are badly needed now.

Id.

[216] *See* Fisher, *The Growth of IP*, *supra* note 1, at 19 (noting that instead of drafting the language themselves, the Congressional committees and subcommittees charged with overseeing that reform forced the interested parties to negotiate for the content of the statute).

[217] *See* Fisher, *The Growth of IP*, *supra* note 1, at 16–17.

[218] *See* THE HOUSE REPORT ON THE SOUND RECORDING AMENDMENT OF 1971, H.R. REP. NO. 92–487, at 7 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566. Interestingly, at least

compulsory licensing scheme for sound recordings.[219] The proposal included statutorily prescribed amounts that users would be required to pay sound recording copyright holders to compensate them for reproductions of their recordings.[220] Initially it was deemed an appropriate and reasonable complement to the compulsory licensing of musical compositions.[221] This proposal was vigorously proffered in Senate Committee hearings and strongly reiterated in hearings before the House Subcommittee.[222] But ultimately it was rejected when the Senate Committee concluded the two situations (protection of musical compositions and protection of sound recordings) were not parallel.[223] Specifically, the Committee determined that while a compulsory license in the case of musical compositions gave necessary access to raw material, there was no analogous benefit to grant the same access to the "finished product."[224]

In the final analysis, the House Committee believed the need to protect albums from being pirated was strong but the case for compulsory licensing was weak.[225] In its explanation of sound recordings as the type of "copyrightable subject matter" to constitute a "work," the House Report explained the amendment was intended to apply to wholesale copying of *entire* sound recordings: "Aside from cases in which sounds are fixed *by some purely mechanical means* without originality of any kind, the

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one bill included a provision to add a public performance right so that record companies and performing artists would be compensated when their records were performed for commercial purposes. *Id.* at 3. Ultimately, however, no such right was included. *Id.*

219 *See id.* at 4 (citing S. REP. NO. 92–72, accompanying S. 646).

220 *See id.*

221 *See id.*

222 *See id.*

223 *See id.*

224 *See id.* ("In the view of the Senate Committee, there is no justification for the granting of a compulsory license to copy the finished product, which has been developed and promoted through the efforts of the record company and the artists." (internal quotation marks omitted)). Thus, the legislative history shows that both the industry and Congress were focused on preventing album piracy and not copying parts of the album. Of course, I acknowledge that the practice of sampling had not yet entered the equation. However, now that sampling involves using portions of sound recordings as creative "raw material," the "analogous benefit" to grant the same access to sound recordings should be reconsidered.

225 *See id.*

committee favors copyright protection that would prevent the reproduction and distribution of unauthorized reproductions of sound recordings."[226] It seems, therefore, it would have been illogical at the time to include compulsory licensing of entire sound recordings, the very issue Congress sought to remedy and avoid. It follows, then, that direct sampling of only a portion was not contemplated and no per se rule or departure from traditional infringement analysis was intended.

This distinction is critical in digital sampling infringement cases because, as discussed in Part II.C herein, the scope of an infringement inquiry is much narrower for sound recordings than for the underlying work.[227] Whereas "substantial similarity" is the primary inquiry in cases involving infringement of the musical composition, the only issue in the case of sound recordings based on a *Bridgeport* per se infringement analysis is whether any part or all of the actual sound recording has been used without permission.[228]

As a result, the *Bridgeport* approach rejects the substantial similarity inquiry in infringement cases involving sound recordings and examines only whether the defendant copied. If so, this approach finds infringement per se, without any consideration of whether a use might be deemed *de minimis* or fair. Anyone who samples a copyrighted work is required to secure a negotiated license in every case to avoid infringement regardless of how much (or little) is used.[229] However, the copyright monopoly—a

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[226] *Id.* at 5 (emphasis added).

[227] *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 798 n.6 (6th Cir. 2005).

[228] *See id.*

> In most copyright actions, the issue is whether the infringing work is substantially similar to the original work. . . . The scope of inquiry is much narrower when the work in question is a sound recording. The only issue is whether the actual sound recording has been used without authorization. Substantial similarity is not an issue. . . .

Id. (internal quotation marks omitted).

[229] *See* Szymanski, *supra* note 78, at 290 ("[R]ecord companies, music publishers, and artists have developed an *ad hoc* negotiated licensing scheme to address the issue of compensation for sampled artists."). There are three types of negotiated licenses in the industry: (1) flat fee; (2) negotiated mechanical license fee entitling the sampled owner to receive a payment for each record sold; and (most commonly) (3) a co-publishing

privilege—was never intended to be absolute. The limited sound recording copyright should not be more comprehensive than the broad rights in the underlying work.

III. CONSEQUENCES OF A FRACTURED MUSIC COPYRIGHT FRAMEWORK

A. Incongruent Treatment of Sound Recording Infringement Among the Circuits

1. *Bridgeport*: A Bright-Line Illuminates a Dark Reality

An example of the stifling effect of copyright law on music is the impact on the practice of sampling of the per se infringement rule articulated in *Bridgeport v. Dimension Films* for unauthorized copying of any amount of a sound recording without the copyright holder's permission.[230]

In 2001, plaintiffs Bridgeport Music, Inc., Southfield Music, Inc., Westbound Records, Inc., and Nine Records, Inc. (all related entities), became greatly concerned with what they considered to be rampant infringement of their sound recordings.[231] Accordingly, they went on the offensive to challenge the practice by filing nearly 500 copyright infringement counts against approximately 800 defendants.[232] Ultimately, the district court severed the original complaint into 476 individual actions, one of which was the case against No Limit Films.[233]

The relevant controversy arose out of the use of a digital sample of both the Funkadelic musical composition and sound

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agreement in which the sampled owner receives a legal and financial interest in the new work. *Id.* at 292.

[230] *See generally Bridgeport Music*, 410 F.3d 792 (6th Cir. 2005).

[231] *See id.* at 795. Bridgeport and Southfield are music publishers and Westbound Records and Nine Records are recording companies. *See id.*

[232] *See id.* All of the claims against Miramax Film Corp. and Dimension Films were dismissed with prejudice pursuant to a settlement agreement on June 27, 2002. *See id.* at 795 n.1.

[233] *See id.* at 795. Because neither Southfield nor Nine established they had any ownership interest in the copyrights at issue, the district court found them jointly and severally liable for 10% of attorneys' fees and costs. *Id.* at 795–96.

recording of "Get Off Your Ass and Jam" ("Get Off") in N.W.A.'s rap song "100 Miles and Runnin'" ("100 Miles").[234] "100 Miles" was included in the movie soundtrack for the motion picture "I Got the Hook Up" ("Hook Up") released by No Limit Films in May of 1998.[235] The sample at issue was an arpeggiated chord, defined as "three notes that, if struck together, comprise a chord but instead are played one at a time in very quick succession."[236] This chord, played on an unaccompanied electric guitar, is repeated several times at the opening of "Get Off."[237] The district court described the resulting sound as "a high-pitched, whirling sound that captures the listener's attention and creates anticipation of what is to follow."[238] The "Get Off" sample consists of a two-second portion of the arpeggiated chord section that was looped fourteen to sixteen times in "100 Miles" and appears at five separate points in the song.[239] The district court found that the looped segment lasted approximately seven seconds and therefore made up forty seconds of the four-minute-thirty-second song.[240]

After sorting through the numerous assertions by Bridgeport in support of its copyright infringement claim of the underlying work,[241] the court focused on the infringement claim that involved

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234 *See id.* at 795.

235 *See id.*

236 Bridgeport Music, Inc. v. Dimension Films LLC, 230 F. Supp. 2d 830, 839 (M.D. Tenn. 2002).

237 *See id.* To listen to and compare "Get Off" and "100 Miles" visit http://www.whosampled.com.

238 *Id.*

239 *See id.* at 841.

240 *See id.*

241 Although "100 Miles" was originally owned by four entities, in December 1998, Bridgeport acquired a 25% interest in the "100 Miles" musical composition as compensation for licensing the right to sample "Get Off" to be used in "100 Miles" that was owned by Bridgeport. *Id.* at 834. Apparently, No Limit had acquired from the other co-owners of "100 Miles" various oral and written licenses to use the musical composition in the film and asserted this fact as the basis of its defense. *Id.* at 833. Additionally, in the sample licensing agreement between the original "100 Miles" owners and Bridgeport that granted to Bridgeport the 25% interest in "100 Miles," Bridgeport licensed to the other parties *and their licensees and assigns* the irrevocable right to use the "Get Off" sample in "100 Miles." *Id.* at 834. Bridgeport challenged the retroactive effectiveness of this benefit to licensees of the parties to the agreement; namely, defendant Dimension Films. *Id.* at 833.

the unauthorized use of the "Get Off" sample in "100 Miles." No Limit moved for summary judgment defending its use on two grounds. First, No Limit attacked the chord's originality by arguing that the portion of "Get Off" used "was not original and therefore not protected by copyright law."[242] Alternatively, No Limit asserted a *de minimis* use defense arguing the sample was "legally insubstantial and therefore . . . [not] actionable copying under copyright law."[243] Accordingly, the court assumed—and No Limit did not contest—that the sample was in fact digitally copied directly from the sound recording rather than re-created in the studio.[244]

In support of No Limit's first "lack of originality" defense, it claimed the arpeggiated chord was a commonly used three-note chord.[245] Westbound countered that the chord was completely unique.[246] Taking into account the limited number of musical notes and chords available, the district court focused not on the originality of the chord but on the way it was used and its "aural effect" in the sampled work, especially "where copying of the sound recording is at issue."[247] The district court concluded that a jury could reasonably conclude that the way the chord is used in "Get Off" was both "original and creative and therefore entitled to copyright protection."[248] Accordingly, on this issue, No Limit's motion for summary judgment was denied.[249]

As for No Limit's *de minimis* use argument, the district court navigated its way through a detailed analysis of the law and principles traditionally applied in *de minimis* defense cases to "balance the interests protected by the copyright laws against the stifling effect that overly rigid enforcement of these laws may have on the artistic development of new works."[250] The court focused

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242 *Id.* at 838.
243 *Id.*
244 *Id.*
245 *Id.*
246 *Id.* at 839.
247 *Id.*
248 *Id.*
249 *Id.*
250 *Id.* at 840 (citing Warner Bros., Inc. v. Am. Broad. Cos., Inc., 720 F.2d 231, 240 (2d Cir. 1983)).

on the question of "substantial similarity" and the various ways courts can assess this element, namely the "qualitative/quantitative"[251] and the "fragmented literal similarity"[252] analyses. It concluded that under either approach, the sample did not amount to a "legally cognizable appropriation."[253] Accordingly, the district court granted No Limit's motion for summary judgment and plaintiffs appealed.[254]

On appeal, the circuit court dismissed the district court's effort to apply traditional infringement analyses to the case at hand.[255] Instead, it fashioned a per se infringement rule triggered whenever someone copies *any* part of a sound recording without any consideration for substantial similarity or *de minimis* use.[256] The court noted it preferred the "clarity" that bright-line rules provide despite the absence of such an approach in traditional infringement analysis.[257] The court attempted to justify its ruling by concluding that if one cannot pirate "the whole," one cannot copy less than the whole without permission either.[258] Further, the court read the derivative work right set forth in § 114(b) of the Act to mean a sound recording copyright holder has the *exclusive* right to sample.[259]

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[251] *See id.* at 841 (citing Newton v. Diamond, 204 F. Supp. 2d 1244, 1257 (C.D. Cal. 2002)).

[252] *See id.* at 841 (citing Williams v. Broadus, 60 U.S.P.Q.2d 1051, 1054 (S.D.N.Y. 2001)); 4-13 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][2] (Matthew Bender rev. ed. 2011).

[253] *See Bridgeport*, 230 F. Supp. 2d at 841.

[254] The procedural history of this case is somewhat convoluted. The Sixth Circuit issued an initial opinion in *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390 (6th Cir. 2004). Through an Order entered December 20, 2004, the full court denied No Limit Films' petition for rehearing en banc but granted a panel rehearing to reassess the issue of digital sampling of a copyrighted sound recording. *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005). All parties submitted additional briefs and arguments on rehearing. *Id.*

[255] *Bridgeport*, 410 F.3d at 798.

[256] *Id.* at 798.

[257] *Id.* at 799.

[258] *Id.* at 800.

[259] *Id.* at 801. For a substantive analysis and critique of the *Bridgeport* case, see M. Leah Somoano, Note, Bridgeport Music, Inc. v. Dimension Films: *Has Unlicensed Digital Sampling of Copyrighted Sound Recordings Come to an End?*, 21 BERKELEY TECH. L.J. 289 (2006).

The *Bridgeport* decision has received some criticism from other circuits.[260] Not all circuits apply a per se infringement standard in sound recording infringement cases.[261] Thus, a split has emerged. Of the countless laudable arguments asserted to justify amending the Act, a circuit split may prove to be the tipping point leading at a minimum to a judicial remedy, or more necessarily, a legislative one.

Further, a change in the way copyright law is applied to sound recording sampling is not only needed but inevitable to allow for these types of uses in order to encourage the development of a rich reservoir of cultural benefits from the musical arts and to bring music copyright in line with the traditions of music creation.[262] At a minimum, the *Bridgeport* per se infringement rule should be overturned and the traditional defenses of *de minimis* and fair use should be applied in all sound recording infringement cases. Such a shift—either by judicial decision or legislative action—would necessarily contemplate and honor the actual complexities in the process of creating music since a musician's or music producer's

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[260] *See generally* Saregama India Ltd. v. Mosley, 687 F. Supp. 2d 1325 (S.D. Fla. 2009).

[261] *See generally* Sandoval v. New Line Cinema Corp., 147 F.3d 215 (2d Cir. 1998); *see also* Part III.B.

[262] Scholars and students have been asserting this position since the early nineties. *See, e.g.*, Kenneth Achenbach, *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 (2004) (citing Jason S. Rooks, Note, *Constitutionality of Judicially-Imposed Compulsory Licenses in Copyright Infringement Cases*, 3 J. INTELL. PROP. L. 255 (1995)); Michael L. Boroni, *A Pirate's Palette: The Dilemmas of Digital Sound Sampling and a Proposed Compulsory License Solution*, 11 U. MIAMI ENT. & SPORTS L. REV. 65 (1993); Susan J. Latham, Newton v. Diamond: *Measuring the Legitimacy of Unauthorized Compositional Sampling—A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J. 119, 123 (2003); Ponte, *supra* note 149, at 515; Szymanski, *supra* note 78, at 271; 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, 2404 (2004); Neela Kartha, Comment, *Digital Sampling and Copyright Law in a Social Context: No More Color-Blindness!!*, 14 U. MIAMI ENT. & SPORTS L. REV. 218, 224 (1997); Randy S. Kravis, Comment, *Does a Song by any Other Name Sound as Sweet?: Digital Sampling and Its Copyright Implications*, 43 AM. U. L. REV. 231 (1993)). However, the issue has now reached a boiling point as even judges have commented on the unsoundness of a per se infringement rule for sound recordings. *See infra* Part III.A.2 (discussing Judge Seitz's critique of the *Bridgeport* decision in *Saregama*).

new work is often (if not always) informed by and built upon the foundation of existing works. Consistent application of copyright law would also provide "clarity" for the music industry without the need for a purportedly clarifying bright-line rule. It would also permit federal courts to engage in the type of balancing of rights and remedies to honor the Constitutional justification for intellectual property monopolies.[263]

2. *Saregama*: Light at the End of the Per Se Tunnel?[264]

The dispute in *Saregama* arose out of producer Tim Mosley's use of an Indian sound recording titled "Bagor Mein Bahar Hai" ("BMBH") in the song "Put You on the Game" ("PYOG") which appeared on Jayceon Taylor's 2005 album, "The Documentary."[265] Saregama asserted that it held a copyright interest in BMBH pursuant to an assignment of rights from its predecessors in interest, Shakti Films and Gramophone Co. of India.[266] After establishing its ownership interest in BMBH and accordingly, its standing to sue for infringement, Saregama moved for summary judgment because Mosley admitted he had used a sample of the BMBH sound recording in PYOG.[267]

The defendants asserted several arguments, two of which are relevant to this Article and consistent with the defenses proffered

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[263] Arewa, *Catfish Row*, *supra* note 21, at 338 ("Copyrights should be granted and enforced in a way that is informed by the context of their operation and consideration of the underlying rationales of copyright and actual uses of copyright.").

[264] *Saregama*, 687 F. Supp. 2d at 1325. This case involves a somewhat convoluted procedural history. Saregama filed its initial complaint in the Southern District of New York but the case was removed to the Southern District of Florida on defendants' motion to transfer venue. The court granted defendants' motion to dismiss with leave for Saregama to re-plead, which it did. Mosley, G-Unit and Desperado and remaining defendants, Warner Bros. and Universal, again filed a motion to dismiss which was granted in part and denied in part, leaving only the federal copyright claims involving the musical composition and sound recording. Thereafter, Saregama voluntarily dismissed the musical composition claims and the court thereafter focused on the alleged infringement of the sound recording. *Id.* at 1342.

[265] *Id.* at 1331. The other named defendants were G-Unit Records and Desperado, both of which apparently had no involvement in creating, distributing or selling "Put You on the Game" and were only involved as passive recipients of publishing income pursuant to contract. *Id.*

[266] *Id.* at 1327.

[267] *Id.*

but rejected by the Sixth Circuit in *Bridgeport*. The first argument challenged BMBH's originality and the second was based on lack of substantial similarity. The court noted the sample was a one-second snippet of a G minor chord looped four times in the chorus.[268] The parties cross-moved for summary judgment.[269] The question presented was whether such copying is legally actionable; that is, whether there is sufficient originality to be protectable and substantial similarity between the resulting work and the any protectable elements.[270]

As discussed in Part II.C, herein, two works are substantially similar if "an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work."[271] The similarity can be either literal (as in the case of direct copying) or non-literal. Even where there is but a small amount of literal similarity (known as "fragmented literal similarity"), substantial similarity can still be found if the fragmented copy is important to the copied work and of sufficient quantity.[272]

The court analyzed whether a resulting work was substantially similar to the copyrightable aspects of the sampled work. It focused on the songs, "taken as a whole" in its determination of whether there was any similarity and, if so, whether the similarity was substantial or merely *de minimis*.[273] The court found that other than the one-second snippet, the songs did not bear any similarities and therefore no copyright infringement existed.[274] Taken as a whole, the songs were deemed completely different, with different lyrical content, tempo, rhythms, and arrangements.[275] The court noted further that it was highly unlikely the average listener could recognize the sampled song in

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268 *Id.* at 1331.

269 *Id.*

270 *Id.* at 1336.

271 *Id.* at 1337.

272 *Id.* at 1337–38 (favoring the "single-inquiry" approach developed in Oravec v. Sunny Isles Luxury Ventures, L.C., 527 F.3d 1218 (11th Cir. 2008) over the "extrinsic" and "intrinsic" tests developed in prior Eleventh Circuit cases).

273 *Id.* at 1338.

274 *Id.*

275 *Id.*

the resulting work.[276] As sampling technology allows the sampled portion of an existing work to be manipulated to the point of being virtually (if not completely) unrecognizable, the *Saregama* court's holding is likely to result in a spike in infringement cases involving samples.[277]

With the court's decision rendered, Judge Patricia Seitz then turned her attention to the *Bridgeport* case to address the plaintiff's alternative argument: that sound recordings like BMBH should be treated differently than other copyrighted works in light of that case.[278] Judge Seitz made clear that the Eleventh Circuit "imposes a 'substantial similarity' requirement as a constituent element of *all* infringement claims . . . ."[279] Judge Seitz questioned the Sixth Circuit's decision to carve out an exception to the substantial similarity test for sound recordings.[280] She expressed confusion as to the basis on which the *Bridgeport* court chose to read § 114(b) so narrowly, especially in light of the fact that § 114(b) applies to the scope and protection of derivative works, not original works.[281]

Judge Seitz found no indication in the legislative history or legislative intent consistent with the *Bridgeport* court's reading of § 114(b) that essentially expands—rather than limits—the scope of protection for original works.[282] Specifically, Judge Seitz noted that *Bridgeport* redefined "derivative work" incorrectly as any work containing *any* sound from the original.[283] If the *Bridgeport* court's reading of that section is correct, then we must accept that Congress sought to expand the scope of copyright protection for original works "by redefining the term 'derivative work' to include all works containing *any* sound from the *original* sound recording"

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276 *Id.*

277 *See* Szymanski, *supra* note 78, at 306 ("In many cases, sampling involves extensive manipulation of the data sequence of an original work to create an entirely new work.").

278 *Saregama*, 687 F. Supp. 2d at 1338–39.

279 *Id.* at 1339 (citing Leigh v. Warner Bros., Inc., 212 F.3d 1210, 1214 (11th Cir. 2000)). Judge Seitz noted that although the facts of that case and *Bridgeport* were similar, that court's decision to disregard a substantial similarity analysis represents a departure from Eleventh Circuit precedent. *Id.*

280 *Id.* at 1340.

281 *Id.*

282 *Id.* at 1341.

283 *Id.* at 1339.

regardless of whether the works are substantially similar.[284] Like Judge Seitz, I find this reading implausible.[285]

Thus, as noted above, a split has emerged in the federal circuits regarding copyright protection afforded sound recordings. For this and other reasons set forth in this Article, I argue that Congress must revisit this issue to clarify and reconcile the varied approaches to this critical topic. Congress must ensure that it fashions a rule that protects copyright holders, preserves traditional defenses to copyright infringement and encourages innovative means to create new works from existing creative material.[286]

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[284] *Id.* at 1340 (explaining that the court's reading of § 114(b) in *Bridgeport* prevents it from concluding that PYOG is a "derivative work" of, and thereby infringes on, BMBH merely because it contains a one-second snippet of BMBH).

[285] *Id.* at 1341 ("[S]tatutory protection for sound recordings extends only to the particular sounds of which the recording consists, and would not prevent a separate recording of another performance in which those sounds are imitated."). Professor Nimmer concurs:

> By validating entire sound-alike recordings, the [independent creation provision] contains no implication that partial sound duplications are to be treated any differently from what is required by the traditional standards of copyright law which, for decades prior to adoption of the 1976 Act and unceasingly in the decades since, has included the requirement of substantial similarity.

Id. (quoting 4-13 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][2][b]).

[286] Despite the admonitions by undoubtedly esteemed copyright scholars like Doris Estelle Long, I intentionally blur the distinction between creativity (traditionally protected by copyright) and innovation (traditionally protected by patent). At a recent symposium, Professor Long argued that ever since Congress extended copyright protection to software, the constitutional line between creative and inventive acts and resulting works has become blurred in troubling ways. *See generally* Symposium, *When Worlds Collide: The Uneasy Convergence of Creativity and Innovation*, 25 J. MARSHALL J. COMPUTER & INFO. L. 653 (2009). However, it is precisely because the line between art and innovation has and continues to be eroded by technological advances that I argue it is appropriate to challenge the traditional legal fences erected to provide bright-lines in the laws and policies that govern and shape the rights/access paradigm in intellectual property jurisprudence. *See* Tonya M. Evans, Sampling Patent to Remix Copyright (July 10, 2011) (unpublished manuscript) (on file with author) [hereinafter Evans, Sampling Patent to Remix Copyright].

B. *Consequences of Incongruent Treatment of Musical Compositions and Sound Recordings*

In this post-*Bridgeport* era, it seems the traditional defenses to a copyright infringement action of *de minimis* use and uses deemed fair due to the "transformative" nature of the use are not available (at least in some circuits) when the infringement claim is based on alleged copying of the sound recording. However, these defenses remain viable for alleged infringement of the underlying musical composition.[287] Additionally, although a compulsory licensing scheme exists for unauthorized use of musical compositions,[288] no such regime exists for use of sound recordings.[289]

This incongruent treatment of musical compositions and sound recordings has several negative consequences: higher transaction costs to secure licenses to sample sound recordings,[290] inconsistent application of federal law among the circuits and dramatically reduced creative output.[291] This result, in turn, has led to a particularly onerous impact on the hip hop genre, which relies heavily on the artistic value of sampling and other innovative uses of technology to create entirely new works.[292]

IV. REMIXING COPYRIGHT TO ALLOW FOR CERTAIN INNOVATIVE USES OF TECHNOLOGY IN MUSIC CREATION

A. *The Tenuous Relationship Between the Intellectual Property Monopoly and Innovation*

"Progress of Science and useful Arts"[293] collectively may be categorized as a type of innovation traditionally referred to as a "public good."[294] A government can respond in myriad ways to

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287 *See supra* Part III.A.1.

288 *See* 17 U.S.C. § 115 (2006).

289 *See supra* Part I.B.3.

290 *Id.*

291 *Id.*

292 *See supra* note 98 for an example of the significantly higher transaction costs of negotiated licenses for sampling.

293 U.S. CONST. art. I, § 8, cl. 8.

294 Fisher, *IP & Innovation*, *supra* note 129 ("This paper examines from various angles the complex relationship between intellectual-property rights and technological

strike the balance between recognizing an innovator's right to exploit her creation with the benefit to society of reasonable access to innovation.[295] Copyright law is one such governmental response utilized to enhance and support a civil democratic society.[296] However, intellectual property rights regimes have several drawbacks: they are costly to administer, they sometimes impede innovation and they can be used offensively to price competitors out of the market with profit-maximizing pricing.[297]

An imbalance occurs in the rights/access dichotomy when a grant of exclusive rights impedes unnecessarily "cumulative

innovation."). Fisher, in an essay prepared for the Programme Seminar on Intellectual Property and Innovation in the Knowledge-based Economy, The Hague, suggests five strategies a government can employ to encourage innovation: (1) engage in technological innovation themselves; (2) subsidize innovative activities by private sectors; (3) issue post-hoc prizes or rewards to persons and organizations that provide the public socially beneficial innovations; (4) help innovators conceal from the general public information essential to implement their innovations (e.g., trade secret law); and (5) confer intellectual property rights upon innovators. The last strategy, the author argues, allows the innovator to recoup her investment and to profit from the innovation. *Id.* at 2–3.

[295] *See* Fisher, *IP & Innovation*, *supra* note 129, at 7 (examining the optimal scope of intellectual property laws based on a cost-benefit analysis). Fisher explains the view of many intellectual property law proponents that "[o]nly in the rare situations in which transaction costs would prevent such voluntary exchanges should intellectual-property owners be denied absolute control over the uses of their works—either through an outright privilege (such as the fair-use doctrine) or through a compulsory licensing system." *Id.*; *see also* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."). The notion that a person should own and/or control that which she created is commonly referred to as the labor-desert theory of property generally associated with John Locke. *See Fisher, The Growth of IP*, *supra* note 1, at 12 (citing John Locke, *The Second Treatise of Government*, *in* TWO TREATISES OF GOVERNMENT 303–20 (P. Laslett ed. 1970)).

[296] Neil Weinstock Netanel, *Copyright and a Democratic Society*, 106 YALE L.J. 283, 291 (1996) (asserting a "democratic paradigm" as a conceptual framework for copyright law that exists between neoclassisist overprotectionism and minimalism). "[T]his democratic paradigm views copyright law as a state measure designed to enhance the independent and pluralist character of a civil society." *Id.* Netanel argues that the "democratic paradigm" relies on copyright protection that is both sufficiently strong and limited "to make room for—and, indeed, to encourage—many transformative and educative uses of existing works." *Id.* at 288.

[297] *See* Fisher, *IP & Innovation*, *supra* note 129, at 4.

innovations."[298] A related concern is the increased transaction costs that effectively price some innovators out of the market.[299] Accordingly, copyright laws that limit or prohibit access, especially without the benefits of a substantial similarity, fair use or *de minimis* use analysis, "should be protected only when their benefits (i.e., increased productivity) outweigh the aforementioned social costs."[300] Stated more succinctly, "the question of how extensive copyright protection should be . . . depends on the costs as well as the benefits of protection."[301] Therefore, copyright law must be remixed to achieve an optimal balance between a copyright holder's exclusive rights and the legal space a second generation innovator needs to build upon existing works in order to create new ones in cumulative creative genres like music.

Congress attempted to do just that when it enacted the *sui generis* legislation titled the Semiconductor Chip Protection Act ("SCPA").[302] By enacting the SCPA, Congress sought to provide second generation creators in the semiconductor chip industry the "legal space" to allow for borrowing, cumulative works, and

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[298] *See* Fisher, *IP & Innovation*, *supra* note 129, at 4. The point, and one of the most pressing concerns in current music copyright law, is illustrated with the following example:

> Suppose Innovator #2 wishes to build upon the work of Innovator #1. The need to secure a license from Innovator #1 will, at a minimum, add to Innovator #2's costs. If, for some reason, Innovator #1 is unable or unwilling to grant the license, the work of Innovator #2 may be frustrated altogether.

Id.

[299] *See* Fisher, *IP & Innovation*, *supra* note 129, at 4. ("By empowering innovators to charge consumers more than the marginal cost of replicating their innovations, intellectual-property rights have the unfortunate effect of pricing some consumers out of the markets for the goods produced with those innovations.").

[300] Fisher, *IP & Innovation*, *supra* note 129, at 5; *see also* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEG. STUD. 325, 333 (1989), *available at* http://cyber.law.harvard.edu/IPCoop/89land1.html (acknowledging that all new works are created in the context of and built upon existing works and noting the merits of broader fair use protections and weaker copyright protections to encourage borrowing to create new works).

[301] WILLIAM M. LANDES, A HANDBOOK OF CULTURAL ECONOMICS 132, 133 (Ruth Towse ed., 2003).

[302] Semiconductor Chip Act of 1984, Pub. L. 98-620, 98 Stat. 3347 (codified as amended in scattered sections of 17 U.S.C.).

innovation in the field.[303] After assessing the needs and concerns of a unique industry, Congress fashioned a hybrid legal framework consisting of copyright and patent rights to balance optimally exclusive rights and innovation.[304]

B. Sampling Patent to Remix Copyright[305]

In *Kewanee Oil Co. v. Bicron Corp.*[306] the United States Supreme Court described the process of "reverse engineering" as "starting with the known product and working backward to divine the process which aided in its development or manufacture."[307] The general purpose of reverse engineering appears to be two-fold. First is to determine whether intellectual property rights have been infringed.[308] Second is to develop competing or interoperable products.[309] However, the fundamental purpose, posits treatise author James Pooley, is discovery, "albeit of a path already taken."[310]

In their noted Article, *The Law and Economics of Reverse Engineering*, Professors Pamela Samuelson and Suzanne Scotchmer explain reverse engineering generally as "the process of extracting know-how or knowledge from a human-made artifact."[311] The authors further define "human-made artifact" as an object that embodies knowledge or know-how previously discovered by others.[312] Reverse engineering is treated generally

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303 *See generally* Brooktree Corp. v. Advanced Micro Devices, Inc., 705 F. Supp. 491, 494 (S.D. Cal. 1988).

304 *See* Jonathan M. Barnett, *Property as Process: How Innovation Markets Select Innovation Regimes*, 119 YALE L.J. 384, 447 (2009) (noting that the semiconductor industry was a sharing regime from its inception). Professor Barnett provides an historical case study of the semiconductor industry that "begins in a sharing regime that supports a collective innovation pool largely bereft of robust propertization, then experiences substantially increasing adoption and enforcement of intellectual property rights, and then backtracks to a hybrid regime where cooperative arrangements are embedded within a property regime." *Id.*

305 *See* Evans, Sampling Patent to Remix Copyright, *supra* note 286.

306 416 U.S. 470 (1974).

307 *Id.* at 476.

308 *See* J.T. Westermeier, *Reverse Engineering*, 984 PLI/PAT 289, 293 (2009).

309 *See id.*

310 JAMES POOLEY, TRADE SECRET LAW § 5.02 at 5–19 (1997).

311 Samuelson & Scotchmer, *supra* note 23, at 1577.

312 Samuelson & Scotchmer, *supra* note 23, at 1577 n.1.

by the courts as an important factor in maintaining balance in patent law by allowing innovators to enjoy the exclusive right to exclude others for a certain period of time as long as they disclose sufficient information about their invention to the public for someone skilled in the pertinent art to build upon existing art to produce further innovative goods.[313]

Although the legal right to reverse engineer is well established in patent jurisprudence, no statutory reverse engineering right actually exists in the Patent Act.[314] Yet reverse engineering is characterized as both an essential component of market competition and innovation[315] and socially beneficial because "it erodes a first comer's market power and promotes follow-on innovation."[316] This Article posits that jurists and, ultimately, legislators faced with a fractured music copyright law framework can learn from the policies that protect and indeed encourage cumulative creation in the patent context. A relevant example of how this might work is Congress's *sui generis* hybrid statutory approach to the semiconductor industry.[317]

The SCPA sought to provide the optimum level of protection to creators while incorporating the industry customs of borrowing and cumulative creation and preserving the benefits of a richer, more vibrant, creative and innovative society.[318] Ideally, the balance intellectual property laws seek to achieve is "to design legal rules that protect information-rich products against market-destructive cloning while providing enough breathing room for reverse engineering to enable new entrants to compete and innovate in a competitively healthy way."[319]

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313 *See* Samuelson & Scotchmer, *supra* note 23, at 1583–84; *see also* Evans, Sampling Patent to Remix Copyright, *supra* note 286.

314 Samuelson & Scotchmer, *supra* note 23, at 1584.

315 *See* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 160 (1989).

316 Samuelson & Scotchmer, *supra* note 23, at 1660. Of course, for that very reason, current stakeholders would strongly oppose a similar provision applied in the case of sound recordings.

317 *See supra* note 302.

318 *See generally* Evans, Sampling Patent to Remix Copyright, *supra* note 286.

319 Samuelson & Scotchmer, *supra* note 23, at 1580.

Therefore, intellectual property rules should be most narrowly tailored when innovation in the field tends to be highly cumulative.[320] Such is the case in the creation of music, generally, and the art of sampling to create hip hop in particular; so too in the semiconductor chip industry.[321] The need for narrowly tailored intellectual property laws is especially valid in light of the essential roles of access to first-generation works and a firmly established custom of borrowing in the creation process.[322]

C. A Case Study: The Semiconductor Chip Protection Act

Until software was added to the mix of protected works, copyright was not even contemplated in a discussion of the reverse engineering privilege for two reasons. First, artistic and literary works generally do not need to be "reverse engineered" to be understood.[323] Second, the "know-how" generally associated with copyright exists on the face of the work.[324] However, Congress enacted the SCPA to protect the semiconductor industry from piracy.[325] The SCPA is the only statute to provide expressly for a reverse engineering defense that allows for more than interoperability.[326] It permits copying to study the layout of

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[320] *See* Fisher, *IP & Innovation*, *supra* note 129; *see also* Evans, Sampling Patent to Remix Copyright, *supra* note 286.

[321] *See* Samuelson & Scotchmer, *supra* note 23, at 1597 ("[S]emiconductors are a cumulative system technology in which the interrelatedness of inventions requires extensive cross-licensing of patents in order for industry participants to make advanced chips."); *see also* Evans, Sampling Patent to Remix Copyright, *supra* note 286.

[322] *See* Fisher, *IP & Innovation*, *supra* note 129.

[323] Samuelson & Scotchmer, *supra* note 23, at 1585.

[324] Samuelson & Scotchmer, *supra* note 23, at 1585 ("Books, paintings, and the like bear the know-how they contain on the face of the commercial product sold in the marketplace."). The authors noted further that "at least until the admission of computer programs to its domain, copyright law did not protect industrial products of the sort that firms typically reverse-engineer." *Id.*

[325] 17 U.S.C. §§ 901–914. In 1984, the Semiconductor Chip Protection Act amended Title 17 of the United States Code to add a new Chapter 9 entitled "Protection of Semiconductor Chip Products." Pub. L. No. 98-620, 98 Stat. 3347 (codified as amended at 17 U.S.C. §§ 901–914 (2006)). For in-depth coverage of the SCPA and its reception by, and impact on, the relevant industry, see generally Steven P. Kasch, *The Semiconductor Chip Protection Act: Past, Present, and Future*, 7 HIGH TECH. L.J. 71 (1992).

[326] 17 U.S.C. § 906(a)(1). The Digital Millennium Copyright Act also incorporates reverse engineering into its provisions. However, in the DMCA, reverse engineering is

circuits and incorporate the learned know-how into a new chip.[327] The SCPA also requires "forward engineering."[328] In creating this *sui generis* intellectual property framework specifically for the semiconductor chip industry, Congress patterned it after copyright law but incorporated much of patent law.[329] Notably, the SPCA basically codified an existing industry practice that permitted borrowing: collaboration in the form of, among other ways, reverse engineering.[330]

Semiconductors are information technology products that, like literary and artistic works, bear much of their know-how and value on their face.[331] They are also a "cumulative system technology" that can be analogized to the custom of borrowing in the music creation process.[332] The semiconductor chip industry, like the

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an exemption to the three anti-circumvention provisions in sections 1201(a)(1), 1201(a)(2) and 1201(b). *See* 17 U.S.C. § 1201(f). The purpose is to limit the DMCA provisions to allow for reverse engineering to achieve interoperability. *See* J.T. Westermeier, *Reverse Engineering*, *supra* note 308, at 306.

[327] 17 U.S.C. § 906(a)(1). Copying in this context is more than "mere copying" and contemplates "substantial effort to study the competitive chip" and requires "originality of the chip created through the process." Edward K. Esping, Annotation, *Reverse Engineering Under Semiconductor Chip Protection Act of 1984 (SCPA) (17 U.S.C.A. §§ 901 et seq.)*, 113 A.L.R. FED. 381, 381 (originally published in 1993).

[328] *See* 17 U.S.C. § 906(a) (2006); Kasch, *supra* note 325, at 73. Forward engineering is the opposite process of reverse engineering. Where reverse engineering begins at the desired end result and works backwards, forward engineering takes what already exists and transforms it into some new result. *See id.* at 73 n.4.

[329] *See* Samuelson & Scotchmer, *supra* note 23, at 1600–01 (citing *Copyright Protection for Semiconductor Chips: Hearing on H.R. 1028 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 98th Cong. 21–28 (1983) [hereinafter House Hearings] (statement of F. Thomas Dunlap, Jr., Corporate Counsel and Secretary, Intel Corp.) (explaining the industry's need for this legislation)).

[330] "Throughout its legislative history, the [SCPA] generated considerable interest among businessmen and lawyers. Substantial litigation was anticipated following its enactment in November 1984; however, eight years [after its passage], only one published case, *Brooktree v. Advanced Micro Devices, Inc.*, ha[d] been decided and the initial excitement has given way to largely academic interest." Kasch, *supra* note 325, at 72 (citing 977 F.2d 1555 (Fed. Cir. 1992)).

[331] Samuelson & Scotchmer, *supra* note 23, at 1595 (noting that this transparency makes semiconductor chips "vulnerable to rapid, cheap, competitive cloning" and impedes the first innovator's ability to recoup her research and development costs necessary to produce the chip).

[332] Samuelson & Scotchmer, *supra* note 23, at 1597.

music industry, had struggled to deter infringement without stifling innovation and was concerned with the impact of reverse engineering. The legislative history of the SCPA may help to illustrate how Congress could approach music copyright reform.[333] The SCPA fashioned rules that both further innovation and protect the rights of existing innovators.[334]

Originally, the industry's goal was to amend copyright law to add semiconductor chips to copyright's subject matter. But because the chips proved so different from the existing covered works, an unlikely alliance formed to oppose adding the chips to the existing copyright structure.[335] Eventually, Congress created the SCPA in 1984 to address the unique issues and concerns of the industry.[336]

Witnesses testified during congressional hearings that it was established industry practice to copy competitor masks to analyze the copied chip in order to design another chip with the same characteristics.[337] Further, witnesses asserted that custom should be captured in a *sui generis* rule patterned on the Copyright Act.[338] Essentially, the SCPA recognizes reverse engineering as a beneficial privilege that mirrors existing industry practice and distinguishes between legitimate and illegitimate appropriation, the latter being the "wholesale appropriation of the work and

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[333] *See generally* House Hearings, *supra* note 329.

[334] *Id.*

[335] Samuelson & Scotchmer, *supra* note 23, at 1600. Those who opposed adding semiconductor chips to copyright's subject matter included the Association of American Publishers and the Associate Register of Copyrights. *Id.* at 1599 n.113, 1600.

[336] SCPA mirrors many of the Copyright Act's provisions: The subject matter is referred to as "mask works," the work must be original, rights attach automatically by operation of law, registration is not required (but is beneficial), and the substantial similarity analysis is involved and is based on a "grant of exclusive rights to control reproductions and distributions of products embodying the protected work." Samuelson & Scotchmer, *supra* note 23, at 1601.

[337] Samuelson & Scotchmer, *supra* note 23, at 1602 (citing H.R. REP. NO. 98-781, at 21 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5750, 5770).

[338] Samuelson & Scotchmer, *supra* note 23, at 1600 (citing House Hearings, *supra* note 329, at 11–12 (statement of Jon A. Baumgarten, Copyright Counsel, Association of American Publishers).

investment in the creation of the first chip."[339] The SCPA permits what Professors Samuelson and Scotchmer refer to as "creative copying"—building upon existing works to create something new—known in the industry as reverse engineering.[340] Accordingly, reverse engineering is viewed generally as a "healthy way for second comers to get access to and discern the know-how embedded in an innovator's product."[341]

Since Congress enacted the SCPA, only a handful of cases have been litigated.[342] At first glance, the dearth of litigation could mean the SCPA successfully diminished piracy. Alternatively, it could mean the legislation proved unimportant for a number of reasons.[343] Regardless, the semiconductor industry continues to re-calibrate and re-define domestic and international laws and policies and therefore the SCPA appears to have been positive (or at least not harmful) for the industry and innovation. Despite increased "propertization" since 1988, an opposite and parallel track has apparently developed as well. Formal propertization "has been simultaneously limited" by efforts of that industry's leading firms to limit formal legal actions and to increase reciprocal access and strategic alliances.[344] In other words, the existence of a formal legal framework has led the industry to seek a more equitable balance of rights and access, and ultimately, to encourage further innovation in the field. The post-SCPA industry response, it seems, has led to lower transaction costs and further innovation

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339 Samuelson & Scotchmer, *supra* note 23, at 1602 (quoting H.R. REP. NO. 98-781, at 21 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5750, 5771)).

340 Samuelson & Scotchmer, *supra* note 23, at 1603.

341 Samuelson & Scotchmer, *supra* note 23, at 1650.

342 Samuelson & Scotchmer, *supra* note 23, at 1605; Altera Corp. v. Clear Logic, Inc., 424 F.3d 1079 (9th Cir. 2005); Sega Enters. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992); Atari Games Corp. v. Nintendo of Am., Inc., 975 F.2d 832 (Fed. Cir. 1992); Brooktree Corp. v. Advanced Micro Devices, Inc., 977 F.2d 1555 (Fed. Cir. 1992); Sega Enters. v. Accolade, Inc., 785 F. Supp. 1392 (N.D. Cal. 1992); Brooktree Corp. v. Advanced Micro Devices, Inc., 705 F. Supp. 491 (S.D. Cal. 1988).

343 *See, e.g.*, Samuelson & Scotchmer, *supra* note 23, at 1605–06 ("One way to interpret the scarcity of litigation under the SCPA is as a sign that the law successfully deterred chip piracy. However, most legal commentators have inferred from this that the SCPA is unimportant."); *see also* Kasch, *supra* note 325, at 72.

344 Barnett, *supra* note 304, at 453.

within the industry.[345] This Article argues that Congress should pursue a similar legislative remedy and result for the music industry by sampling patent policies to remix music copyright.

CONCLUSION

It seems clear from over two hundred years of copyright jurisprudence and the constitutional directive enshrined in the Intellectual Property clause that the intention of the Founding Fathers was to use the *means* of "exclusive rights" to achieve the *ends* of promoting "the progress of science and useful arts."[346] It was not, at least not primarily, to reward the labor of authors or to hamstring the ability of second-generation creators to build upon existing works in innovative ways never contemplated by early and even modern-day framers of copyright law and policy.[347]

Even at its best, then, copyright law creates a tenuous relationship and delicate balance of rights that assures authors the right to their "original expression," but encourages others to build freely upon the ideas and information conveyed by a work.[348] If intellectual property law is to fulfill its utilitarian goal, laws should be narrowly tailored and "should extend no further than necessary to protect incentives to innovate."[349] If left unchecked, intellectual property laws may be more protective than necessary to achieve the stated goals, thereby impeding creative innovation.[350]

In the case of music, the actual business practices of the music industry suggest that the underlying assumptions about robust intellectual property rights spurring innovation are not in fact being

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345 Barnett, *supra* note 304, at 455.

346 U.S. CONST. art. 1, § 8, cl. 8; Craig W. Dallon, *Original Intent and the Copyright Clause:* Eldred v. Ashcroft *Gets It Right*, 50 ST. LOUIS U. L.J. 307, 317 (2006).

347 Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991); *see also* Nash v. CBS, Inc., 899 F.2d 1537, 1542 (7th Cir. 1990) ("Copyright law does not protect hard work (divorced from expression), and hard work is not an essential ingredient of copyrightable expression . . . .").

348 Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556–57 (1985).

349 Samuelson & Scotchmer, *supra* note 23, at 1581.

350 Samuelson & Scotchmer, *supra* note 23, at 1581.

borne out.[351] In particular, the right to exclude seems to be used more as a weapon than as a tool of innovation.[352] This, coupled with the rapid acceleration of technological advancement that allows for even more innovative and creative uses of existing copyrighted works inconceivable both to the early and recent drafters of copyright legislation, is grounds for a compelling argument that the existing copyright law is not only inadequate to honor its goal to promote innovation and creativity but in fact thwarts the very advancement and valuable social benefits of robust creativity and innovation borne out of a creative genre like hip hop. Accordingly, Congress should act swiftly to provide clear guidance on how courts should address concerns raised by sampling in the music industry and reform music copyright to require all courts to apply traditional analyses of substantial similarity and *de minimis* use in sound recording infringement cases regardless of the jurisdiction in which the controversy arises.

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[351] *See generally* Olufunmilayo B. Arewa, Strategic Behaviors and Competition: Intangibles, Intellectual Property and Innovation (The Selected Works of Olufunmilayo B. Arewa, Working Paper, 2006) [hereinafter Strategic Behaviors], *available at* http://works.bepress.com/o_arewa/8 (unpublished paper cited with the permission of the author).

[352] *See* Arewa, Strategic Behaviors, *supra* note 351, at 23.