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Recognizing the Grey: Toward a New View of the Law Governing Digital Music Sampling Informed by the First Amendment

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RECOGNIZING THE GREY: TOWARD A NEW VIEW OF THE LAW GOVERNING DIGITAL MUSIC SAMPLING INFORMED BY THE FIRST AMENDMENT

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INTRODUCTION

A trio of rappers from New York,[1] working with a pair of producers from California,[2] broke new musical ground in 1989 with the release of the album *Paul's Boutique*.[3] The Beastie Boys and Dust Brothers wove together a complex tapestry of samples and highly referential raps[4] the likes of which the music industry had never seen.[5] Fortunately for the Beasties and their producers, they released the album at a time when the laws governing sampling were not clearly defined.[6] Nor were they strictly enforced. With the subsequent tightening of laws governing the use of sampling in music,[7] however, it became unlikely such an album would ever be seen again.

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[1] The Beastie Boys, consisting of Michael Diamond ("Mike D"), Adam Horovitz ("King Ad-Rock"), and Adam Yauch ("MCA"), began as a punk band in the early 1980s, morphed into irreverent party rock-rappers, and eventually, through their ability to reinvent themselves and be open to new styles, became one of the most influential hip-hop acts of all time. *See, e.g.*, PETER SHAPIRO, THE ROUGH GUIDE TO HIP-HOP 15–18 (2001).

[2] Mike Simpson and John King, collectively known as The Dust Brothers, made a name for themselves as remixers and producers in the 1980s and 1990s through their innovative cut-and-paste musical compositions. *See* Jason Ankeny, The Dust Brothers: Biography, http://www.allmusic.com/cg/amg.dll?p=amg&sql=llrnd9kectkg79~T1 (last visited Oct. 25, 2006).

[3] Although the album initially received tepid commercial and critical responses, it has become widely acclaimed as one of the most innovative and influential albums of the period for its pioneering use of digital sampling. *See* Stephen Thomas Erlewine, Paul's Boutique: Review, http://www.allmusic.com/cg/amg.dll?p=amg&sql=10:Xn8b5x4tsqg~T1 (last visited Oct. 25, 2006); *see also* Rob Sheffield, *Review of* Paul's Boutique, ROLLING STONE, Feb. 6, 2003, at 65, *available at* http://www.rollingstone.com/reviews/album/_/id/117996.

[4] By one count, the album incorporates more than 135 samples and at least 180 lyrical references into 15 song tracks. *See* Paul's Boutique Samples and Reference List, http://www.paulsboutique.info/index.php (last visited Feb. 17, 2007). For a complete discussion of what is meant by "samples" and "sampling," see *infra* Part I.A–B.

[5] *See* Sheffield, *supra* note 3.

[6] *See* Noah Shachtman, *Copyright Enters a Gray Area*, WIRED, http://www.wired.com/entertainment/music/news/2004/02/62276 (last visited Jan. 10, 2007).

[7] One of the earliest and most significant cases to bring about this tightening involved a singer-songwriter's claim of copyright infringement against a rap artist for his incorporation

Fifteen years later, an equally ground-breaking, sample-rich album surfaced. In early 2004, DJ Danger Mouse[8] released *The Grey Album*, mixing the vocals of rapper Jay-Z's *The Black Album* with the instrumentation of The Beatles' self-titled album commonly referred to as *The White Album*.[9] Producing just 3,000 copies of the album and intending it to remain "underground," Burton never thought he would need permission to use the other artists' material.[10] But once the album found its way to the Internet, it reached an audience far wider than Burton had envisioned.[11] The album met immediate critical acclaim, with *Rolling Stone* calling it an "ingenious hip-hop record that sounds oddly ahead of its time."[12]

With this wider audience and critical acclaim, it was soon no secret that Burton never received permission to use *The Black Album* or *The White Album* in his new composition.[13] For their part, Jay-Z and his record label, Roc-A-Fella Records, did not object to Burton's use of *The Black Album*; in fact, they tacitly encouraged the use of the album in remixes, going so far as to release a vocals-only version that made mixing it with other music all the easier.[14] But EMI, which represented the owner of the Beatles' sound-recording copyrights, Capitol Records, and Sony Music/ATV Publishing, owner of the compositions on *The White Album*, sent Burton letters claiming he was infringing upon their copyrights and ordering him to cease and desist in distributing *The Grey Album*.[15] The music industry thus demonstrated that it was determined to protect its monopoly on the music by hook or by crook.

Neither EMI nor Sony Music/ATV Publishing filed suit against Burton or those distributing *The Grey Album* online because they complied with the companies' cease-and-desist letters and discontinued distribution of *The Grey Album*.[16] Although music activists staged a one-day protest by putting the album back online, and links to download the album remain in a few hard-to-reach corners of the Internet, for the

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of the singer-songwriter's recording into the rap recording. *See* Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991).

[8] DJ Danger Mouse's real name is Brian Burton, a 26-year-old disc jockey from White Plains, New York, who prior to the release of *The Grey Album*, had made a small reputation for himself in the underground hip-hop scene. He intended *The Grey Album* only to be a promotional piece to showcase his talents as a DJ. *See* Bryan Bergman, Note, *Into the Grey: The Unclear Laws of Digital Sampling*, 27 HASTINGS COMM. & ENT. L.J. 619, 620 (2005); *see also* Shachtman, *supra* note 6.

[9] *See* Shachtman, *supra* note 6.

[10] *See* Fredrich N. Lim, Note, *Grey Tuesday Leads to Blue Monday? Digital Sampling of Sound Recordings After* The Grey Album, 2004 U. ILL. J.L. TECH. & POL'Y 369, 371.

[11] *See id.*; *see also* Bergman, *supra* note 8, at 621–22.

[12] Lauren Gitlin, *DJ Makes Jay-Z Meet Beatles*, ROLLING STONE, Feb. 5, 2004, *available at* http://www.rollingstone.com/news/story/5937152/dj_makes_jayz_meet_beatles.

[13] *See* Bergman, *supra* note 8, at 621.

[14] *Id.*

[15] *Id.*

[16] *See* Lim, *supra* note 10, at 373.

most part, the record industry succeeded in burying *The Grey Album* under a pile of dusty legal arguments.[17] Given the record industry's threats of legal action, and given its greater ability to outlast any opponent it would be likely to face in such litigation, it is unlikely that such a sample-rich album will ever be seen again—that is, unless the law evolves to allow for more creativity and freedom in the art.

This Note addresses what happened to the law governing the use of samples in music during those fifteen years between *Paul's Boutique* and *The Grey Album*, how it has succeeded, and how it may be improved. It begins by defining and contextualizing the musical technique known as sampling and by discussing the technology and the cases that have helped shape the law in recent years. Part I takes a closer look at the law governing sampling in music, including its constitutional and statutory bases. More specifically, this Note looks at recent developments in the case law as well as the goals the law seeks to achieve.

In Part II, this Note revisits *The Grey Album* events as a case study in the law governing sampling. It addresses how the law succeeded and failed with respect to that work and why, given the current state of the law, such a work might not appear again. Part III considers how the law governing sampling in music is broken—how, in its current state, the law fails to meet its goals. It considers possible improvements to the law, including a compulsory licensing system and a First Amendment-based solution. Finally, it hypothesizes how *The Grey Album* events might have played out under these proposed "fixed" systems.

This Note concludes that the current law governing sampling in music is indeed broken, failing to achieve its goals and conflicting with the Constitution. There may be several ways to fix the law so as to comport with the goals of copyright law and the Constitution, but none is perfect. Congress should consider the problem thoughtfully and craft a solution—or statutorily recognize a system already in place but heretofore ignored[18]—that accounts for the interests of the copyright owners as well as those of other artists while being faithful to the Constitution.[19]

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[17] *See* Bergman, *supra* note 8, at 621–22.

[18] As argued in Part III.B, *infra*, the First Amendment may properly inform the law governing copyright generally and sampling in particular as a matter of constitutional law.

[19] The topic of digital music sampling has received a good deal of scholarly treatment in recent years. Articles have focused on a variety of issues related to the topic. *See, e.g.*, Bergman, *supra* note 8 (considering in detail the problems exposed by *The Grey Album* experience and offering several possible solutions); 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 (2004) (considering the question of how to determine whether a sample is more than de minimis use and suggesting a new test for de minimis use); Lim, *supra* note 10 (summarizing current sampling law and positing future developments); Carlos Ruiz de la Torre, Essay, *Digital Music Sampling and Copyright Law: Can the Interests of Copyright Owners and Sampling Artists Be Reconciled?*, 7 VAND. J. ENT. L. & PRAC. 401 (2005) (discussing the current law and articulating five goals that should be taken into account by any proposed solution). But none has synthesized a discussion of the state of the law with proposed revisions to it incorporating arguments rooted in the First Amendment, as this Note does.

A. Sampling Defined and Contextualized

"Sampling," or more completely, "digital music sampling," is the process of appropriating elements of previous sound recordings to produce new music.[20] The process allows an artist to borrow from and refer to existing sound recordings in order to construct a sort of musical collage. Built upon the thoughts, feelings, and experiences evoked by the various constituent sonic elements, bringing them together in a new way, the resultant work takes on its own meaning and significance. The technique has become increasingly popular in contemporary music, particularly in the genres of hip-hop, electronic dance music, and rock.[21]

As it is used to create new music today, sampling consists of three steps: (1) digital recording, (2) computer sound analysis and possible modification, and (3) playback.[22] Once in digital format, the sampled recording "can be manipulated and altered to produce a desired effect on playback, including changes in pitch, speed, and dynamics."[23] This technique affords tremendous opportunities for artistic expression, but these opportunities "make it difficult to determine how much of the new expression should be attributed to the original work and how much is created by the person utilizing this [technique]."[24]

One of the earliest widely disseminated songs to incorporate samples was "Revolution 9," by The Beatles, which employed snippets of British radio and television broadcasts.[25] The Sugar Hill Gang's 1979 single "Rapper's Delight," which looped a portion of Chic's "Good Times," was the first commercial hit to make substantial use of samples.[26] Since then, numerous and disparate songs have employed samples to make new music, from Dee-Lite's "Groove Is In The Heart"[27] and MC Hammer's "U Can't Touch This"[28] to Jessica Simpson's "I Think I'm In Love With You."[29]

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[20] 26 AM. JUR. 3D *Proof of Facts* § 537 (2005); *see* AL KOHN & BOB KOHN, KOHN ON MUSIC LISTENING 1479–81 (3d ed. 2002).

[21] *See* Ruiz de la Torre, *supra* note 19.

[22] Bergman, *supra* note 8, at 623; *see also* Jeffrey S. Newton, Note, *Digital Sampling: The Copyright Considerations of a New Technological Use of Musical Performance*, 11 HASTINGS COMM. & ENT. L.J. 671–75 (1989).

[23] Bergman, *supra* note 8, at 623 (citing 26 AM. JUR. 3D *Proof of Facts* § 537 (2003)).

[24] Blessing, *supra* note 19, at 2403.

[25] *See* Josh Norek, Comment, *"You Can't Sing without the Bling": The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System*, 11 UCLA ENT. L. REV. 83, 86–87 (2004). This early foray into sampling evinced that the technique need not necessarily involve the incorporation of a music recording—other sound recordings, including spoken words from a variety of sources, can also serve as musical constituents.

[26] *See id.* at 87.

[27] *See* Wikipedia.org, List of Sampled Songs, http://en.wikipedia.org/wiki/List_of_sampled_songs (last visited Oct. 26, 2006) (listing Dee-Lite's "Groove Is In The Heart" as sampling Herbie Hancock's "Bring Down The Birds").

[28] *See id.* (listing MC Hammer's "U Can't Touch This" as sampling Rick James's "Super Freak").

[29] *See id.* (listing Jessica Simpson's "I Think I'm In Love With You" as sampling John

The present system for "clearing," or gaining permission to use samples, is costly for samplers in terms of both time and money.[30] Samplers must obtain two licenses, one for the sound recording itself and another for the musical composition.[31] General industry practice mandates that, "if a sample is recognizable to the ordinary listener, it must be cleared."[32]

To obtain the license for the sound recording, a sampler must receive permission from the holder of the sound recording copyright, which is typically the record label that produced the recording.[33] A sampler needs additional permission, however, from the owner of the compositional copyright, which is usually the artist himself or a music publishing company.[34] Often the licensing fees for both the sound recording and musical composition sample can vary based on the stature of the artist and record label seeking the license, and often, as just suggested, the two copyrights are owned by different entities.[35]

One commentator has summarized the byzantine "clearing" scheme this way:

> A sound recording license fee for a three-second sample used only once in a new major label work may cost $1500 as an advance on future royalties from album sales. For a looped sample

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Mellencamp's "Jack & Diane").

[30] *See* Norek, *supra* note 25, at 89.

[31] *Id.*

[32] *Id.*; *see also* M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, THIS BUSINESS OF MUSIC 199-200 (9th ed. 2003). Although neither statutorily codified nor well settled, the de minimis defense has been samplers' most reliable shield when faced with legal action. *See generally* Blessing, *supra* note 19. The defense amounts to the defendant arguing that his re-use is inconsequential and does not rise to the level of infringement. *See id.* at 2408–10. Courts consider whether an "ordinary" listener would find a "substantial similarity" between the original work and the new work, or whether the "quantitative and qualitative" appropriation of elements of the original is significant. *See, e.g.*, Newton v. Diamond, 349 F.3d 591, 594, 596 (9th Cir. 2003), *amended and superseded on denial of reh'g by* 388 F.3d 1189 (9th Cir. 2004), *cert. denied*, 545 U.S. 1114 (2005); Sandoval v. New Line Cinema Corp., 147 F.3d 215 (2d Cir. 1998); Ringgold v. Black Entm't Television, Inc., 126 F.3d 70 (2d Cir. 1997); Bridgeport Music, Inc. v. Dimension Films, 230 F. Supp. 2d 830 (M.D. Tenn. 2002); *see also* McDonald v. Multimedia Entm't, Inc., 1991 Copyright L. Dec. (CCH) ¶ 26,809, at 24,771 (S.D.N.Y. 1991), *available at* 1991 WL 311921. *But cf.* Jarvis v. A & M Records, 827 F. Supp. 282 (D.N.J. 1993) (simplifying de minimis test by asking whether the defendant appropriated original constituent elements, either quantitatively or qualitatively).

[33] *See* Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 686, 697–98 (2003).

[34] *See id.* at 679, 697–98.

[35] *See* Matthew R. Brodin, Comment, Bridgeport Music, Inc. v. Dimension Films: *The Death of the Substantial Similarity Test in Digital Sampling Copyright Infringement Claims—The Sixth Circuit's Flawed Attempt at a Bright-Line Rule*, 6 MINN. J. L. SCI. & TECH. 825, 829 (2005); Norek, *supra* note 25, at 89.

> of three seconds or less, the fee varies from $1500 to $5000, while a looped sample greater than three seconds can run into the tens of thousands of dollars.
>
> Upon clearing the sound recording, the sampler must still obtain the musical composition license from the original author's music publisher. A typical deal structure involves giving the original copyright holder a percentage ownership in the new work's musical composition copyright, as well as an advance on the expected publishing income.
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> For single use *de minimis* musical composition samples, a major label-sampling act can expect to turn over 15% of the new work's musical composition copyright to the sampled work's author. When the sampled portion is looped and constitutes a more important part of the new work, that percentage often leaps to 66%. Music publishers that represent the original composition's author usually impose the full eight-cent statutory rate, rather than the six-cent "3/4 rate" that is industry custom for covers. The figure charged as an advance is then likely based upon a 100,000-unit base, pro-rated by the percentage of copyright ownership held by the original work's author. Thus, a new major label act would likely pay a $4000 advance for the musical composition license if the sampled work's author possessed 50% of the publishing in the new work.[36]

Given the complexity and potential for great cost, this system may be so cumbersome, particularly on emerging and independent artists, that it becomes preventative. It should be simplified to encourage the use of sampling.

B. Developments Leave the Law Governing Sampling Ripe for Change

Sampling as a musical technique got its start in the 1960s and 1970s as DJs experimented with portable turntable sound systems to mix sounds from multiple vinyl albums to create a single work.[37] Soon vocalists, eventually called "rappers," began reciting lyrics over the synthesized work to create the hip-hop sound popular today.[38] With the advent of the digital synthesizer in the 1980s, sampling transitioned from

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[36] Norek, *supra* note 25, at 89–90 (citations omitted). The statutory rate has steadily increased over time, standing, after the most recent jump on January 1, 2006, at 9.1 cents per song. The Harry Fox Agency, Inc., Statutory Royalty Rates, http://www.harryfox.com/public/licenseeRateCurrent.jsp (last visited Jan. 10, 2007); *id.*, Historical Royalty Rates, http://www.harryfox.com/public/historicalrates.jsp (last visited Jan. 10, 2007).

[37] *See* Norek, *supra* note 25, at 86; *see also* Bergman, *supra* note 8, at 623.

[38] *See* Norek, *supra* note 25, at 86.

"merely a performance medium" to an important studio recording technique.[39] More recent technological advances have lowered the cost and increased the ease of employing sampling as a means of making music.[40] In addition, the increasing popularity and availability of the Internet and associated file-sharing systems allow new songs to reach ever-wider audiences, with the potential for more significant commercial impact.

To date, no specific statutory scheme has been developed to govern sampling, and, as "most disputes regarding sampling have been settled out of court . . . [,] few judicial standards have been set."[41] Still, an important body of case law is growing, built on the law of copyright, that provides ground rules for what constitutes infringement with respect to the use of samples in new music.

1. Early Cases

In the first few years of the 1990s, courts began to address the issue of sampling head-on. An important preliminary case, *McDonald v. Multimedia Entertainment, Inc.*,[42] provided a convenient formulation of the elements required to show copyright infringement in musical compositions—again, one of the two copyrights implicated in sampling. In *McDonald*, plaintiff composers alleged a media company, to whom they had submitted compositions for possible use in promotions or "jingles," copied substantial material from those compositions in the theme music for one of its television programs.[43] The United States District Court for the Southern District of New York stated a two-part test for establishing copyright infringement: "(1) that defendant copied [plaintiffs'] work, and (2) that the copying was illicit in that defendant's work is 'substantially similar' to plaintiffs'—i.e.[,] that defendant's work unlawfully appropriates plaintiffs' protected creative expression in that it contains a substantial degree of similarity to copyrightable elements of plaintiffs' work."[44]

Under this "substantial similarity" standard, the court held that there was no infringement of the jingles because the alleged infringement was of one rather unimportant note in two otherwise entirely dissimilar compositions, even though the jingles and the theme music shared several elements, including the use of a saxophone as a lead instrument, a similar tempo, a common three-note sequence, and the use of five notes set to the same lyric.[45] But on its way to that holding, the court made a crucial observation: that "a defendant is not liable for [copyright] infringement even if he copies, if the copied material is not protectable."[46] The ruling left open the question: What is "protectable"?

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[39] Bergman, *supra* note 8, at 623; *see also* Blessing, *supra* note 19, at 2403.

[40] *See* Blessing, *supra* note 19, at 2404.

[41] Bergman, *supra* note 8, at 623–24.

[42] 1991 Copyright L. Dec. (CCH) ¶ 26,809 (S.D.N.Y. 1991), *available at* 1991 WL 311921.

[43] *Id.* at 24,771–72.

[44] *Id.* at 24,772.

[45] *See id.* at 24,773–75.

[46] *Id.* at 24,773.

Just five months later, the same court provided a partial answer to that question with respect to sampling in *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*[47] In *Grand Upright*, the court held that a rap artist's partial incorporation of another artist's copyrighted composition into a rap recording infringed on the artist's valid copyright.[48] Accordingly, the court decided not only what was protectable[49]—in other words, what was copyrightable—but also what constituted a violation of that protection[50]—in other words, what constituted infringement of that work's copyright. Also, the court condemned the increasingly widespread practice of sampling in the music industry as mere stealing.[51] In issuing its laconic ruling, harsh in comparison to its holding in *McDonald*, the court seemed to leave no room for de minimis or fair use exceptions;[52] when a copyright is validly issued, the work is protected, and any copying of that work without permission is a violation.

Grand Upright was "the first federal ruling that viewed unsanctioned sampling as an infringement of the copyright owner's exclusive rights," rendering all unauthorized sampling legally suspect and thus susceptible to infringement actions.[53] The decision glossed over any nuance in the *McDonald* decision and treated the copying as "stealing," without any searching inquiry into the "copyrightability" or "protectability" of the plaintiff's work. "Due to the court's 'disinclination to discuss applicable standards of law, the potentially landmark decision [is] of little value either as precedent or advice.'"[54]

Not long after the *Grand Upright* decision, and in a courtroom not far away, samplers received another blow. In *Jarvis v. A & M Records*,[55] the United States District Court for the District of New Jersey held that defendant music producers, who admitted to actually copying the plaintiff's sound recording and did not ask permission to do so, could be liable for copyright infringement for having sampled several short lyrical and musical sections from plaintiff's recording, despite defendants' argument that the

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[47] 780 F. Supp. 182 (S.D.N.Y. 1991).

[48] *Id.* at 185.

[49] The court implied that a valid copyright on the original work created a presumption of protection for any portion of that work. *See id.* at 183–85. Other courts have held that copyright protection extends only to component parts of the work only to the extent that those component parts are original to the author. *See, e.g.*, Quinn v. City of Detroit, 23 F. Supp. 2d 741, 746–47 (E.D. Mich. 1998) (citing Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991)).

[50] *See Grand Upright*, 780 F. Supp. at 185.

[51] *See id.* at 183.

[52] For more complete treatment of "fair use" as an affirmative defense to copyright infringement in the context of sampling, see *infra* Part I.B.3.

[53] Bergman, *supra* note 8, at 625–26.

[54] *Id.* (quoting Carl A. Falstrom, Note, *Thou Shalt Not Steal:* Grand Upright Music Ltd. v. Warner Bros. Records, Inc. *and the Future of Digital Sound Sampling in Popular Music*, 45 HASTINGS L.J. 359, 362 (1994)). Put simply, the *Grand Upright* court's terse and narrow opinion provides little analytical help, let alone any black-letter guidance to those who would counsel would-be samplers.

[55] 827 F. Supp. 282 (D.N.J. 1993).

sampled portions were insignificant.[56] On its way to this holding, the court simplified the prevailing test[57] for the de minimis defense in digital sampling cases to a single question: "whether the defendant appropriated, either quantitatively or qualitatively, 'constituent elements of the work that are original' . . . ."[58]

Not surprisingly, the rulings in *Grand Upright* and *Jarvis* made sampling more expensive, forcing artists to clear samples before releasing their work rather than take the risk of employing unlicensed samples.[59] Those artists who could not afford to pay for clearance, as well as those who unsuccessfully sought clearance from the copyright holders, experienced the "chilling effect" on their craft brought on by these rulings.

Samplers received a bit of good news a year later, when the Supreme Court issued its decision in *Campbell v. Acuff-Rose Music, Inc.*[60] In holding that the commercial character of a rap song, which parodied an existing work, did not create a presumption against fair use,[61] the Court provided a standard for musicians to look to when borrowing from other musicians, if not a standard for samplers as such. The Court stated that the creation of transformative works generally furthers the goal of copyright, which is to promote science and the arts.[62] "Such [transformative] works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[63] Thus, treating songs incorporating samples as "transformative" of the original work could allow sampling to be permitted under fair use.

2. Recent Cases

For approximately another decade, samplers trod softly, and the case law remained essentially intact. But in 2002, the United States District Court for the Central District of California gave samplers a bit more breathing room than the *Grand Upright*

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[56] *Id.* at 292.

[57] The standard typically applied is that of "fragmented literal similarity," that is, a portion of the original work is copied such that there is literal verbatim similarity between the two works but that the original work's overall essence or structure is not taken. *See* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][2], at 13-53 (2006). Courts will also sometimes employ a qualitative/quantitative similarity analysis. *See, e.g.*, Bridgeport Music, Inc. v. Dimension Films LLC, 230 F. Supp. 2d 830 (M.D. Tenn. 2002). Occasionally, courts blur the distinction between the two formulations. *See, e.g.*, Newton v. Diamond, 349 F.3d 591 (9th Cir. 2003), *amended and superseded on denial of reh'g by* 388 F.3d 1189 (9th Cir. 2004), *cert. denied*, 545 U.S. 1114 (2005).

[58] *Jarvis*, 827 F. Supp. at 291 (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991)).

[59] Norek, *supra* note 25, at 87.

[60] 510 U.S. 569 (1994).

[61] *Id.*

[62] *See id.* at 579.

[63] *Id.* (citation omitted).

court in New York. In *Newton v. Diamond*,[64] the court held that even though they did not get permission to use plaintiff's composition, defendants were not liable for copyright infringement for sampling a recording to which plaintiff held the compositional rights because, as purely compositional elements, the three notes at issue were not sufficiently original to warrant copyright protection, and, in any event, the use was de minimis.[65] In other words, the court held that the portion of plaintiff's work copied by defendants was not, in the words of the *McDonald* court, "protectable."[66]

Meanwhile, the United States District Court for the Middle District of Tennessee was moving in a similar direction. In *Bridgeport Music, Inc. v. Dimension Films LLC*,[67] the owner of a partial copyright interest in a rap song sued a movie producer for using a sample of both the composition and the sound recording of the song in a movie soundtrack.[68] The court dismissed all claims arising from infringement of the musical composition after determining that the licenses defendant received were valid, leaving only the sound recording at issue.[69] Largely because the sound recording and not the musical composition was at issue, the *Bridgeport* court diverged from the *Newton* court in rejecting defendant's argument that the sampled portion of plaintiff's work was not original.[70] Still, the court found the use to be de minimis—i.e., that the sampled sound recording did not rise to the level of a legally cognizable appropriation—because (1) "no reasonable jury . . . would recognize the source of the sample without having been told of its source," (2) the "minimal quantitative [nature of the] copying," and (3) "the lack of qualitative similarity between the works."[71] In allowing defendant's use under the de minimis standard, the court said, "[A] balance must be struck between protecting an artist's interests, and depriving other artists of the building blocks of future works."[72]

The plaintiff in *Newton* appealed to the United States Court of Appeals for the Ninth Circuit, but was unsuccessful.[73] The Ninth Circuit took a different analytical approach than the district court when it assumed the notes at issue to be original.[74] Still, it affirmed the lower court's decision, holding the defendants did not need a license

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[64] 204 F. Supp. 2d 1244 (C.D. Cal. 2002), *aff'd*, 349 F.3d 591 (9th Cir. 2003), *amended and superseded on denial of reh'g by* 388 F.3d 1189 (9th Cir. 2004), *cert. denied*, 545 U.S. 1114 (2005). It is worth noting that the defendants in this case were the Beastie Boys, and the work at issue was a song from their follow-up album to *Paul's Boutique*.

[65] *Id.* at 1256, 1259.

[66] *Id.*; *see* McDonald v. Multimedia Entm't, Inc., 1991 Copyright L. Dec. (CCH) ¶ 26,809, at 24,773 (S.D.N.Y. 1991), *available at* 1991 WL 311921.

[67] 230 F. Supp. 2d 830 (M.D. Tenn. 2002).

[68] *Id.*

[69] *Id.* at 838.

[70] *Id.* at 839.

[71] *Id.* at 842.

[72] *Id.*

[73] Newton v. Diamond, 349 F.3d 591 (9th Cir. 2003), *amended and superseded on denial of reh'g by* 388 F.3d 1189 (9th Cir. 2004), *cert. denied*, 545 U.S. 1114 (2005).

[74] *Id.* at 594.

to the underlying composition because defendants' use was de minimis, that is, an "average audience" would not recognize the appropriation.[75]

The most recent case in this arena, however, went against the preceding trend of allowing de minimis sampling. The plaintiffs in *Bridgeport* appealed to the United States Court of Appeals for the Sixth Circuit, which reversed the district court's decision.[76] In *Bridgeport II*, the court interpreted the Copyright Act as prohibiting *any* use of a copyrighted sound recording for sampling without proper authorization.[77] As a result, the court greatly limited the ability of artists to lawfully incorporate samples into their work, even if the samplers altered the original sound recording. Specifically, the *Bridgeport II* court removed any de minimis defense that a defendant might raise where the defendant undeniably sampled a copyrighted sound recording.[78] As the Sixth Circuit perfunctorily put it, "a sound recording owner has the exclusive right to 'sample' his own recording."[79] This dealt a serious blow to the practice of sampling and underscored the need for the law governing sampling to be revised.

I. LEGAL BASES AND GOALS FOR THE LAW GOVERNING SAMPLING

Copyright law provides the foundation for the law governing digital music sampling, granting protection to the owners of the sound recording copyright in the rearranging, remixing, and altering of the sounds fixed in the recording as well as to owners of the musical composition copyright embodied in that recording.[80] Any analysis of the law governing sampling, then, begins with its roots in the Constitution and copyright law.

A. The Constitution

Congress's authority to regulate copyright comes from the Copyright Clause, which grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[81] Congress "first utilized this authority . . . [in 1790] by adopting a federal Copyright Act," amending it several times since.[82] The most recent comprehensive revision to the Copyright Act is the Copyright Act of 1976.[83]

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[75] *Id.* at 598.

[76] Bridgeport Music, Inc. v. Dimension Films (*Bridgeport II*), 410 F.3d 792 (6th Cir. 2005).

[77] *Id.* at 798.

[78] *Id.*

[79] *Id.* at 801.

[80] *See* 17 U.S.C. § 114(b) (2000 & 2006 Supp.), *amended by* Pub. L. No. 109-303, 120 Stat. 1478 (2006); *see also* Loren, *supra* note 33, at 697–98.

[81] U.S. CONST. art. I, § 8, cl. 8.

[82] Blessing, *supra* note 19, at 2405.

[83] 17 U.S.C. §§ 101–1332 (2000).

Arguably, another section of the Constitution addresses copyright law in general and sampling more specifically. Some scholars have posited that the First Amendment[84] ought to inform copyright law and protect some derivative works.[85] But when confronted with the prospect, courts have generally dismissed such an argument.[86] This Note contends the First Amendment should, in fact, inform the legal analysis of the law governing digital music sampling, because such an analysis would improve the copyright law's fidelity to its root principles and, as a practical matter, make more manageable the currently problematic practice of sampling.[87]

B. The Copyright Act

1. Generally

In general, the constitutional charge "[t]o promote the Progress of Science" motivates the Copyright Act.[88] The Act grants copyright protection to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either

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[84] U.S. CONST. amend. I.

[85] *See, e.g.*, Charles C. Goetsch, *Parody as Free Speech—The Replacement of the Fair Use Doctrine by First Amendment Protection*, 3 W. NEW ENG. L. REV. 39 (1980); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1 (2002).

[86] *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (stating that, because the First Amendment and Copyright Clause "were adopted close in time," the Framers viewed copyright's limited monopolies as "compatible with free speech principles," though not explicitly addressing the aspect of derivative works), *reh'g denied*, 538 U.S. 916 (2003); Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1440 n.2 (6th Cir. 1992) (recognizing but rejecting the idea of "turning every copyright case into a mini-*Marbury v. Madison* or *New York Times Co. v. Sullivan*"), *rev'd*, 510 U.S. 569 (1994); Fisher v. Dees, 794 F.2d 432, 434 n.2 (9th Cir. 1986) (rejecting the notion that "the First Amendment gives parodists a blanket protection from copyright infringement actions"). In *Campbell*, the Sixth Circuit, quoting the Supreme Court's landmark decision in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984), concluded that "'[a]s the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors.'" *Campbell*, 972 F.2d at 1440 n.2.

[87] *See infra* Part III.B, C.2.

[88] The complete clause, "[t]o promote the Progress of Science and useful Arts," U.S. CONST. art. I, § 8, cl. 8, does not apply completely to the Copyright Act. Indeed, at the time the Constitution was drafted, "science" was relevant to copyright while "useful arts" pertained to patents. *See* 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, 51–52 (1994) (explaining that the Framers understood "science" to mean "knowledge" and "learning," and "useful arts" to mean "helpful or valuable trades").

directly or with the aid of a machine or device."[89] The Act also grants the owner of the copyright the exclusive right to reproduce the work, prepare derivative works, distribute copies of the work publicly, perform the work publicly, display the work publicly, and, "in the case of sound recordings," perform the work publicly "by means of a digital audio transmission."[90] A "derivative work" is defined to be "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction . . . or any other form in which a work may be recast, transformed, or adapted."[91] Songs incorporating samples from preexisting copyrighted works seem to meet the definition of derivative works.[92]

2. Distinguishing Between Rights in Sound Recordings and Rights in Musical Compositions

In 1971, Congress amended copyright law to include protection for sound recordings fixed and published on or after February 15, 1972.[93] The Act defines "sound recordings" as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied."[94] The change allowed an artist composing and recording a musical work to hold two copyrights: one in the sound recording and another in the composition itself.[95] As amended, the Copyright Act distinguishes between sound recordings and musical compositions, and rights in sound recordings do not extend to the songs themselves.[96] For the purposes of sampling, the Copyright Act covers all musical compositions and all sound recordings made after

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[89] 17 U.S.C. § 102(a) (2000).

[90] 17 U.S.C. § 106 (2000); *see also* 17 U.S.C. § 114(b) (2000 & 2006 Supp.), *amended by* Pub. L. No. 109-303, 120 Stat. 1478 (2006).

[91] 17 U.S.C. § 101 (2000).

[92] *See, e.g.*, Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 n.10 (6th Cir. 2005) (relying on Susan J. Latham, Newton v. Diamond*: Measuring the Legitimacy of Unauthorized Compositional Sampling—A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J. 119, 125 (2003)).

[93] U.S. COPYRIGHT OFFICE, COPYRIGHT REGISTRATION FOR SOUND RECORDINGS 1 (rev. 2006), *available at* http://www.copyright.gov/circs/circ56.pdf. Although sound recordings fixed before February 15, 1972, may remain protected under common law or state statutes, because "[a]ny rights or remedies under state law for sound recordings fixed before [then] are not annulled or limited by the 1976 Copyright Act until February 15, 2047," *id.*, this Note confines its discussion to federal law.

[94] 17 U.S.C. § 101.

[95] T.B. Harms Co. v. Jem Records, 655 F. Supp. 1575, 1576 n.1 (D.N.J. 1987).

[96] *See id.*; WILLIAM F. PATRY, LATMAN'S THE COPYRIGHT LAW 209 (6th ed. 1986).

February 15, 1972.[97] The Copyright Act does not provide for federal protection in sound recordings made prior to that date.[98]

The scope of the copyright holder's exclusive rights in a sound recording is defined by § 114.[99] First, the copyright owner's "right to duplicate the sound recording in the form of phonorecords or copies [is limited to those] that directly or indirectly recapture the actual sounds fixed in the recording."[100] Second, the copyright owner's "right to prepare a derivative work [is limited to one] in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality."[101] Third, the rights of the copyright holder "do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording."[102] These provisions factor significantly into the analysis of the propriety of digital music sampling.[103]

3. The Fair Use Exception

Section 107 of the Copyright Act provides an exception to the copyright law under "fair use" and codifies what was once a common law doctrine.[104] The preamble of § 107 provides a nonexclusive list of favored purposes that are deemed "fair": "criticism, comment, news reporting, teaching . . . , scholarship, or research."[105] Through the Copyright Act, Congress instructs courts to consider whether an unlicensed use of copyrighted material ought to be afforded an affirmative defense, once infringement has been proved, by considering whether the new work serves some important social purpose or public good.[106] The Copyright Act dictates that courts consider, along with other relevant factors of each particular case, the following statutory factors:

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[97] *See* PATRY, *supra* note 96, at 209.

[98] *See* Fantasy, Inc. v. La Face Records, No. C96-4384-SC-ENE, 1997 WL 627544, at *2 (N.D. Cal. June 24, 1997) (citing Dowling v. United States, 473 U.S. 207, 211 n.4 (1985); Lone Ranger Television, Inc. v. Program Radio Corp., 740 F.2d 718, 720 (9th Cir. 1984)).

[99] *See* 17 U.S.C. § 114(b) (2000 & 2006 Supp.), *amended by* Pub. L. No. 109-303, 120 Stat. 1478 (2006). The section lays out four exclusive rights; three of the rights, which are relevant to this discussion, are outlined here. The fourth right, which deals with recordings used in educational programs distributed by public broadcasting entities, is not germane to this discussion and therefore has been ignored.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *See, e.g.*, Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 800–02 (6th Cir. 2005).

[104] *See* Lim, *supra* note 10, at 376 (citing 17 U.S.C. § 107 (2000)).

[105] 17 U.S.C. § 107; *see also* Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1629 (2004) (quoting 17 U.S.C. § 107).

[106] *See* Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 477–78 (1984) (Blackmun, J., dissenting) (citations omitted); Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271, 312 (1996).

> (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.[107]

Courts have seldom granted the fair use defense in the sampling context, focusing on "whether the song in question comments on or criticizes the original. If so—and only if so—" the defense will apply and the song in question will be protected by law.[108] So far, in the context of music, the Supreme Court has recognized the defense only for parody.[109]

The fair use defense and the de minimis defense are generally the only two affirmative defenses available to samplers accused of infringement.[110] But, as the next subpart illustrates, recent court decisions have put at least one of those defenses in jeopardy.

C. Current Case Law

Two conflicting circuit court decisions[111] handed down in the past several years—the most recent appellate-level authority on this issue—have drawn into focus the need for more clarity in the law governing digital music sampling. Although one addressed the appropriation of a musical composition[112] and the other a sound recording,[113] the two take fundamentally differing attitudes toward the practice of sampling.

1. *Newton II*

The first of these cases, *Newton v. Diamond* (*Newton II*),[114] came before the Ninth Circuit Court of Appeals in 2003. The dispute in *Newton II* stemmed from the

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[107] 17 U.S.C. § 107; *see also* Lim, *supra* note 10, at 376 (quoting 17 U.S.C. § 107).

[108] Madeleine Baran, Copyright and Music: A History Told in MP3's, http://www.illegal-art.org/audio/historic.html (last visited Apr. 1, 2006).

[109] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

[110] *See* Ruiz de la Torre, *supra* note 19, at 402.

[111] Bridgeport Music, Inc. v. Dimension Films (*Bridgeport II*), 410 F.3d 792 (6th Cir. 2005); Newton v. Diamond (*Newton II*), 349 F.3d 591 (9th Cir. 2003), *amended and superseded on denial of reh'g by* 388 F.3d 1189 (9th Cir. 2004), *cert. denied*, 545 U.S. 1114 (2005).

[112] *Newton II*, 349 F.3d at 592.

[113] *Bridgeport II*, 410 F.3d at 796.

[114] 349 F.3d 591.

Beastie Boys' use of a six-second, three-note sample in their song "Pass the Mic."[115] The question before the court was whether the Beastie Boys could be liable for copyright infringement for appropriating the sample, to which they had obtained the sound recording license, without obtaining a license from the holder of the musical composition right, jazz flutist James Newton.[116]

Newton performed and recorded a song called "Choir," from which the sample was taken, licensing all rights in the sound recording to ECM Records for $5,000 but retaining the underlying compositional right.[117] Although the Beastie Boys paid ECM Records $1,000 to use portions of the song "Choir" in their song "Pass the Mic," they failed to obtain a license from Newton regarding the underlying composition.[118]

The lower court held that, as a matter of law, the sampled portion of "Choir" was not original enough to be copyrightable; it also concluded that, even if it were copyrightable, the Beastie Boys' use of the sample was "de minimis and therefore not actionable."[119] Asserting its prerogative to affirm the grant of summary judgment on any reason supported by the record, the Ninth Circuit assumed the sampled portion of the song was "sufficiently original" to be copyrightable and based its decision on de minimis grounds.[120]

Proceeding from the principle that substantial similarity between the original work and the copying work is required in order to maintain an infringement action, the Ninth Circuit considered whether an "average audience would . . . recognize the appropriation."[121] The court went on to suggest that when "a use is de minimis because no audience would recognize the appropriation . . . the works are not substantially similar."[122] In this way, the court rooted its de minimis analysis in the doctrine of substantial similarity.[123]

Because the Beastie Boys had obtained a license for the sound recording, only the compositional elements of the song, not the particular performance of the song captured by the licensed recording, were at issue.[124] The score to "Choir," the embodiment of the musical composition, included instructions that the performer play the entire song "slowly/without-measure," while "sing[ing] into the flute and finger[ing]

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[115] *Id.* at 593.

[116] *Id.* at 592.

[117] *Id.*

[118] *Id.* at 593.

[119] *Id.* at 592 (citing Newton v. Diamond, 204 F. Supp. 2d 1244, 1256, 1259 (C.D. Cal. 2002)).

[120] *Id.* at 594.

[121] *Id.* (citing Fisher v. Dees, 794 F.2d 432, 434 n.2 (9th Cir. 1986)). The court also noted that both the general test for substantial similarity and the de minimis analysis consider "the response of the average audience to . . . determine whether a use is infringing." *Id.*

[122] *Id.* at 595.

[123] *See id.* at 595–96.

[124] *Id.*

simultaneously."[125] Relying on this orchestration, Newton argued that his performance technique was embodied in the musical composition and not solely a function of the particular sound recording.[126]

The court concluded, however, that the composition did not fully capture "Newton's highly developed performance techniques" found in the sound recording, which was not, in the court's view, "the result of a generic rendition of the composition."[127] Therefore, even if the average audience recognized Newton's technique in "Pass the Mic," such performance elements were outside the scope of his claim for infringement on the musical composition.[128]

In determining the degree and substantiality of the works' similarity, the court further concluded that the Beastie Boys' use of the composition was not substantial enough to sustain an infringement action.[129] The court suggested that even when a sampler does not modify the sampled work in any way, thus retaining the highest degree of similarity possible, there need not be a finding of substantial similarity.[130] Indeed, "'[if] the similarity is only as to nonessential matters, then a finding of no substantial similarity should result.'"[131] Calling this a case of "fragmented literal similarity,"[132] the court considered "the qualitative and quantitative significance of the copied portion in relation to [Newton's] work as a whole" to determine whether the similarity goes to trivial or to substantial elements.[133] Because the sampled segment constituted "roughly two percent" of the "Choir" recording, the court found the sample not to be quantitatively significant.[134] Likewise, the court found the sampled segment not to be qualitatively significant because, though representative of the scored, as opposed to improvised, portions of the composition, the segment proved to be "no more significant than any other."[135] Therefore, the court reasoned, the works lacked substantial similarity, the average audience would not recognize the appropriation, and the Beastie Boys' use was de minimis.[136]

2. *Bridgeport II*

A year and a half later, the Sixth Circuit handed down its final decision in a similar case, *Bridgeport Music, Inc. v. Dimension Films* (*Bridgeport II*).[137] The dispute

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[125] *Id.* at 593.

[126] *See id.* at 593–96.

[127] *Id.* at 595.

[128] *Id.* at 596.

[129] *Id.* at 597.

[130] *Id.* at 596.

[131] *Id.* (quoting 4 NIMMER & NIMMER, *supra* note 57, § 13.03[A][2][a], at 13-56 (2006)).

[132] *Id.* For a brief discussion of the term, see *supra* note 57.

[133] *Newton II*, 349 F.3d at 596.

[134] *Id.* at 597.

[135] *Id.*

[136] *Id.* at 598.

[137] 410 F.3d 792 (6th Cir. 2005). Although the court made its initial decision in September

in *Bridgeport II* arose out of the use of a three-note, four-second guitar riff from the musical composition and sound recording "Get Off Your Ass and Jam" in the song "100 Miles and Runnin'," which appeared on the soundtrack to the movie *I Got the Hook Up*.[138]

The relevant issue on appeal was whether defendant No Limit Films, the producer of *I Got the Hook Up*, infringed on the copyright interest of Westbound Records, Inc., which claimed sound recording rights in "Get Off Your Ass and Jam."[139] No Limit Films did not deny that the soundtrack to *I Got the Hook Up* used portions of "100 Miles and Runnin'" that incorporated the sample from "Get Off Your Ass and Jam."[140] Instead it argued that the sample was not protected because it was not original and, alternatively, that the sample was legally so insubstantial, or de minimis, as to not constitute infringement.[141]

The court below held that there must be a balance between protecting an artist's existing work and barring others from having building blocks for future works.[142] Although it found the sample to be original, the district court allowed the defendant's use under the de minimis standard.[143] Relying largely on No Limit Films' failure to dispute that it digitally sampled portions of the sound recording "Get Off Your Ass and Jam," the Sixth Circuit reversed.[144]

Explicitly stating its goal of formulating a bright-line test for "what constitutes actionable infringement with regard to the digital sampling of copyrighted sound recordings,"[145] the Sixth Circuit relied heavily on the language of § 114 of the Copyright Act[146] to reach its conclusion.[147] The court seemed to take a "best we can do" approach, acknowledging later in its opinion that Congress might be able to afford a better solution because the statute, passed in 1971, had not contemplated digital music sampling.[148]

The court read Congress's grant of the exclusive right to duplicate the sound recording in § 114(b) to mean that the world was free to recreate the work, assuming musical composition rights, but that the holder of the sound recording right alone could employ that recording.[149] It concluded that if the only one who could control

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2004, it later granted a panel rehearing on the issues discussed herein; as a result of the rehearing, the court amended its opinion in June 2005 to further clarify its reasoning. *Id.* at 795.

[138] *See id.* at 795–96.

[139] *See id.* at 795–97.

[140] *Id.* at 796.

[141] *Id.* at 796–97.

[142] Bridgeport Music, Inc. v. Dimension Films, 230 F. Supp. 2d 830, 842 (M.D. Tenn. 2002).

[143] *See Bridgeport II*, 410 F.3d at 797.

[144] *Id.* at 798.

[145] *Id.* at 799.

[146] 17 U.S.C. § 114 (2000 & 2006 Supp.), *amended by* Pub. L. No. 109-303, 120 Stat. 1478 (2006).

[147] *See Bridgeport II*, 410 F.3d at 799–801.

[148] *Id.* at 805; *see also* Bergman, *supra* note 8, at 646 n.159.

[149] *Bridgeport II*, 410 F.3d at 800.

the whole recording was the holder of the sound recording copyright, then the only one who can appropriate something less than that whole is that same holder of the sound recording copyright.[150] In the court's view, the language of the statute precluded the use of a substantial similarity test.[151] In so concluding, the *Bridgeport II* court removed any de minimis defense that a defendant might raise where the defendant undeniably sampled a copyrighted sound recording.[152]

The court extolled the virtues of its ruling, citing the ease of enforcement, the market forces that would keep licensing costs in line, and the purposeful, as opposed to accidental, nature of sampling.[153] But the court acknowledged that its opinion need not be the last word on the issue, saying that if the rule turned out not to be in the interest of the recording industry, it should lobby Congress for a change or clarification in the law.[154] In addition, the court left open the possibility of a fair use defense on remand.[155]

After beginning to offer samplers more breathing room, judicial interpretation of the law governing digital music sampling took an abrupt anti-sampler turn with the decision in *Bridgeport II*. This decision, the decision in *Newton II* to a certain extent, and the anti-sampler decisions of the early 1990s have all made the task of one who wishes to sample legally confusing at best and all but impossible at worst. But these decisions have strayed from the guiding principles of the law and as such may properly be viewed with suspicion.

D. Goals of the Law

As with any sound analysis, a return to first principles is required in order to analyze the propriety of developments in the law governing digital music sampling. Although the "immediate effect[s]" of copyright protection are "to secure a fair return for an 'author's' creative labor," copyright protection is ultimately aimed at promoting "artistic creativity for the general public good."[156] This ultimate aim comes from the Constitution's directive "[t]o promote the Progress of Science."[157] To achieve these ends, the Copyright Act grants copyright holders a limited monopoly over their work, which provides an incentive for creation by providing a financial benefit—the exclusive right to the revenue from licensing fees, sales, royalties, and performance fees.[158]

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[150] *See id.* (concluding that because one may not pirate an entire sound recording, one may not also pirate a smaller portion of it).

[151] *Id.* at 801 n.10.

[152] *Id.* at 798.

[153] *Id.* at 801.

[154] *Id.* at 805.

[155] *Id.*

[156] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

[157] U.S. CONST. art. I, § 8, cl. 8.

[158] Eric Shimanoff, *The Odd Couple: Postmodern Culture and Copyright Law*, 11 MEDIA L. & POL'Y 12, 18 (2002).

But "the benefits of copyright protection are intended to promote maximization of public benefit," and "[a]ny private benefit experienced by creators is incidental to this purpose."[159] Indeed, "courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry."[160]

The fundamental question in any infringement action, asked by Justice Story at a time when digital music sampling could hardly have been imagined, is whether "so much is taken . . . that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another."[161] Because sampling, by definition, consists of appropriating existing and usually copyrighted material to create new works, conflicts under copyright law are bound to arise with some regularity. Although the copyright law seeks to promote creativity, "the current state of the law . . . discourage[s] the creativity of sampling artists" by creating substantial barriers to working in and experimenting with their chosen medium.[162] As exemplified by *Bridgeport II*, the current law, which provides complete protection to at least the holder of the sound recording rights, fails to strike a balance between the competing interests of artistic progress on the one hand, and on the other, authorial incentives to create the expressions that ensure this progress.

One commentator has suggested that such a balance may be struck, distilling the purpose of the law down to a set of five goals:

> (1) set clear, predictable boundaries for sampling artists, (2) keep costs reasonable for sampling artists, (3) minimize the use of litigation to settle infringement questions, (4) minimize the difficulties involved in negotiating licenses, and (5) provide adequate economic benefits for copyright owners (so they will have an incentive to produce new works).[163]

Although this is not the only set of considerations by which to measure a solution,[164] it provides a manageable number of considerations without favoring either economic or creative interests. These considerations will provide a means of assessing the appropriateness of the current law and proposed changes to the law.[165]

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[159] Brodin, *supra* note 35, at 830.

[160] Berlin v. E.C. Publ'ns, Inc., 329 F.2d 541, 544 (2d Cir. 1964), *cert. denied*, 379 U.S. 822 (1964).

[161] Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C. Mass. 1841) (No. 4,901).

[162] Ruiz de la Torre, *supra* note 19, at 403.

[163] *Id.*

[164] *See, e.g.*, Blessing, *supra* note 19, at 2421–22 (suggesting considerations that favor creative interests).

[165] For a more complete analysis of the appropriateness of the law governing digital music sampling, see *infra* Part II.B–C.

II. *THE GREY ALBUM* EXPERIENCE

A. The Grey Album *Narrative*

Brian Burton channeled the Beastie Boys and Dust Brothers in his own way in late 2003 when he began creating a new sound out of old material on *The Grey Album*. He combined Jay-Z's vocals with more than the unaltered musical accompaniment of The Beatles but rather with the dissected, augmented, and looped portions of that accompaniment, similar to what might come out of a drum machine and a synthesizer—staples of hip-hop production.[166] Burton accomplished this task of layering and modifying tracks over the course of just two weeks, using a relatively simple software program called ACID Pro.[167]

In so doing, Burton not only established a new standard in digital music sampling as its own genre but also cross-pollinated the rock and rap fan bases, thereby making substantial contributions to the progress of the art.[168] After the album found its way to the public, largely via the Internet, it became one of the most sought-after albums at the time; in fact, the album achieved the equivalent of gold status, or selling more than 100,000 complete copies, in a single day.[169]

But because Burton had not received permission from the copyright owners of *The Black Album* and *The White Album*, he violated copyright law when he released *The Grey Album* to the public.[170] EMI, which controls the sound recording rights of *The White Album*,[171] and Sony Music/ATV Publishing, which owns the musical compositions, objected to Burton's use of their copyrighted material.[172] Apart from Burton's admission that the samples came from *The White Album*, listeners, including those at EMI and Sony/ATV, could discern the source of the samples from famous lyrics and instrumental sections that Burton added to reinforce the feeling that the original works were manipulated to create a new work of art.[173] Shortly after the album's release

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[166] *See* Noah Balch, Comment, *The Grey Note*, 24 REV. LITIG. 581, 583 (2005).

[167] *See* Lim, *supra* note 10, at 371 (citing Corey Moss, Grey Album *Producer Danger Mouse Explains How He Did It*, MTV NEWS, Mar. 11, 2004, http://www.mtv.com/news/articles/1485693/20040311/jay_z.jhtml).

[168] *See* Balch, *supra* note 166, at 582 (quoting Shaheem Reid & Joseph Patel, *Remixers Turn Jay-Z's* Black Album *Grey, White and Brown*, MTV NEWS, Jan. 26, 2004, http://www.mtv.com/news/articles/1484608/01262004/jay_z.jhtml).

[169] *See id.* (citing Grey Tuesday, http://www.greytuesday.org (last visited Nov. 21, 2006)).

[170] *See id.*

[171] *Id.* at 583. It has been suggested that EMI does not control the sound recordings for *The White Album* because it was released in 1968, four years before federal copyright protection for sound recordings went into effect. *See* Electronic Frontier Foundation, Grey Tuesday: A Quick Overview of the Legal Terrain, http://www.eff.org/IP/grey_tuesday.php (last visited Oct. 30, 2006). Some record labels have argued that "digital remastering" creates a new work that is protected, but there is as yet no case law or other binding authority to support this position. *Id.*

[172] *See* Balch, *supra* note 166, at 583.

[173] *See id.*

in early 2004, EMI sent cease-and-desist letters to Web sites and record stores that were distributing the album, asserting its exclusive rights in the recordings.[174] Although the album mostly disappeared from public access as distributors complied with EMI's letters, many staged a one-day protest on Tuesday, February 24, 2004, calling it "Grey Tuesday," and once again made the album available.[175] The "Grey Tuesday" participants hoped to show the record labels that they deemed the copyright law (as the labels saw it) to be unworthy of respect.[176] They sought to give credence to their position by demonstrating the commercial potential of *The Grey Album*.[177]

B. Current Law Succeeds in Several Respects[178]

The current copyright law as applied to digital music sampling at and around the time Burton released *The Grey Album* succeeded in meeting several of its goals, namely (1) establishing a bright-line rule for samplers, (2) minimizing the use of litigation to resolve disputes, and (3) providing economic benefits to copyright owners to ensure future creative works. Although these successes indicate the law continues to function on some level, they fail to prove the law is sufficiently tailored to satisfy all the interests at issue.

First, although *Bridgeport II* had not yet been decided at the time the events surrounding the release of *The Grey Album* took place, the bright-line rule enunciated in the case, as an interpretation of § 114 of the Copyright Act, seemed to be what EMI had in mind when sending out its cease-and-desist letters. As stated by the Sixth Circuit in its decision, such a reading of the statute had strong scholarly support.[179] In this way, the law succeeded by providing a "clear, predictable boundar[y]" for Burton as to what was permissible unlicensed sampling of *The White Album* sound recording: none.[180]

By the same token, the categorical rule that no unlicensed sampling is permissible served to "minimize the use of litigation to settle [the] infringement question[]" at issue.[181] That nothing more than cease-and-desist letters went out is evidence of

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[174] *See id.*

[175] *See* Grey Tuesday, *supra* note 169.

[176] *See id.*

[177] *See id.*

[178] This subpart and the one that follows consider the events surrounding the release of *The Grey Album* in the context of current interpretation of the law governing digital music sampling, including the decisions in *Newport II* and *Bridgeport II*, even though one of those decisions may not have applied for jurisdictional reasons and the other had not yet been handed down.

[179] Bridgeport Music, Inc. v. Dimension Films (*Bridgeport II*), 410 F.3d 792, 802–03 & n.18 (6th Cir. 2005) (citing KOHN & KOHN, *supra* note 20, at 1486–87).

[180] *See supra* text accompanying notes 149–53. This answer is notwithstanding the debate over whether the sound recording of *The White Album*, made before the 1971 amendments to the Copyright Act, is protected by federal copyright law.

[181] Ruiz de la Torre, *surpa* note 19, at 403.

this success. Similarly, *Newton II*'s rule that the unlicensed use of a musical composition may be permissible if shown to be de minimis provides, if not a bright-line rule, at least a reliable analytical rubric to ascertain the likelihood a court would find infringement. In this way, its predictability should guide samplers in determining what they can and cannot use, ultimately leading to a reduction in litigation as a method of dispute resolution.

Finally, the holders of both the musical composition and sound recording rights were able to defend their interests in those aspects of *The White Album* and thereby protect their pecuniary interest therein. Because the rights-holders involved in the dispute were not the artists themselves, no direct incentive aimed at promoting creativity was involved in this case. EMI and Sony/ATV stepped into the shoes of the artists, who transferred their interests in those rights to those entities, presumably in some bargained-for exchange. At the time of such an exchange, the artists received a current benefit in exchange for their rights to receive future benefits designed to incent their creativity. If the law diminished or ignored those rights, artists would be less inclined to create future works because any associated rights from which the artists derive financial benefit may not be enough for them to invest in creating the original work in the first place.[182] In the case of *The Grey Album*, because EMI and Sony/ATV were able to prevent Burton's use of their copyrighted material, the value of the copyrights was preserved and the artists' and, in turn, the corporations' expectations were honored.[183]

C. Current Law's Successes are Uncertain but Its Failures are Apparent

Despite its successes, the current law has failed in meeting several crucial goals. Not only may the current law fail, rather than succeed, with respect to the factors discussed in the preceding subpart,[184] but the law already has failed to (1) keep costs reasonable for sampling artists and (2) minimize the difficulties involved in negotiating licenses.

First, although the rule governing the use of musical compositions enunciated in *Newton II* provides some guidance to sampling artists as to what they may sample without obtaining a license, it does not provide "clear, predictable boundaries."[185] A sampler must consider the substantial similarity between his contemplated work and the original work in order to assess whether his planned sampling will run afoul of the law. As the *Newton II* court indicated in its analysis, a court can reach its decision through a combination of the fragmented literal similarity test and the qualitative and

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[182] *See, e.g., id.*

[183] *See supra* Part II.A.

[184] Namely, (1) establishing a bright-line rule for samplers, (2) minimizing the use of litigation to resolve disputes, and (3) providing economic benefits to copyright owners to ensure future creative works.

[185] *See* Ruiz de la Torre, *supra* note 19, at 403.

quantitative substantiality test.[186] But those formulations may also be utilized individually and need not lead to the same result.[187] Therefore, because the formulation of the test is not certain, the answer to the question of whether the unlicensed sampling is permissible is equally uncertain. Even if the test were clear, the answer would remain heavily dependent on the individual facts of the case and the court's determination. As a result, the issue may well still be litigated, particularly in jurisdictions outside the Ninth Circuit and in situations involving well-financed complainants.

Second, although it makes much of its bright-line rule regarding sound recordings, the *Bridgeport II* decision acknowledges that the defendant in the case can argue fair use on remand.[188] This substantially undermines the court's attempt at settling the law regarding unlicensed use of sound recordings, allowing blurriness to persist around the bright line it set out to draw. In this way, the benefits of clarity and predictability are reduced and, again, the issue may still be litigated, particularly in other jurisdictions.

Even accepting that the bright-line rule suggested by the *Bridgeport II* court provides at least some clarity for sampling artists like Burton, it is drawn sharply in favor of the original artist and to the detriment of the sampling artist. The court argues that, because an artist is free to independently fix new sounds in order to re-create or re-record a "sample" in the studio, its rule will not "stifl[e] creativity in any significant way."[189] But this position ignores, or at least gives short shrift to, the artistic value of incorporating the original recording itself. Sampling, as an art form involving sonic collage or pastiche, depends on the use of the original recording to maintain its integrity.[190] A re-recording of a riff may sound similar or even identical, but the authenticity as a sample is utterly lacking, making the court's proposal unacceptable from an artistic point of view.

The *Bridgeport II* court goes on to justify its ruling by saying that market forces will keep the cost of licenses within reasonable bounds.[191] But the court bases this assertion on the faulty assumption, addressed above, that the re-recording of a sample is equivalent to the original recording.[192] Relying on this faulty assumption, the court asserts that the rational marketplace will prevent the cost of licensing from exceeding the cost of re-recording.[193] Because of the uniqueness of the original work to be sampled, the copyright holder commands a monopoly position. Market forces are of

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[186] *See* Newton v. Diamond, 349 F.3d 591, 596 (9th Cir. 2003), *amended and superseded on denial of reh'g by* 388 F.3d 1189 (9th Cir. 2004), *cert. denied*, 545 U.S. 1114 (2005).

[187] *See supra* note 57 and accompanying text.

[188] *See* Bridgeport Music, Inc. v. Dimension Films (*Bridgeport II*), 410 F.3d 792, 805 (6th Cir. 2005).

[189] *Id.* at 801.

[190] *See generally* Jason H. Marcus, Note, *Don't Stop That Funky Beat: The Essentiality of Digital Music Sampling to Rap Music*, 13 HASTINGS COMM. & ENT. L.J. 767 (1991).

[191] *See Bridgeport II*, 410 F.3d at 801.

[192] *See id.*

[193] *Id.*

little help to the earnest sampler who, without the consent of the copyright holder, cannot obtain the essential materials he needs to create the art he envisions.

Apart from *Bridgeport II*'s bright-line rule, "the lack of discernable guidelines could have a chilling effect on musicians since they may be afraid to follow through with their artistic visions for fear of [suit] for copyright infringement."[194] Small-time and emerging artists are especially harmed by the current law, as they most lack the time, money, and negotiating clout to bargain for the licenses.[195] The cost of clearing samples is prohibitive for most artists, particularly such smaller and emerging artists, and it entirely prevents them from realizing their creative vision legally.[196] The Sixth Circuit's observation that "it would appear to be cheaper to license than to litigate"[197] is of little comfort to the emerging artist who lacks resources to do either. In addition, because the current system requires licensing from both the sound recording copyright holder and the musical composition copyright holder, it creates economic inefficiencies.[198] In this way, the law fails to keep costs reasonable for sampling artists and fails to minimize the difficulties involved in negotiating licenses. In so doing, the law stifles creativity and goes against its fundamental basis, namely, to "promote the Progress of Science."[199]

Third, complete protection of the copyright holders' exclusive right to the sound recording and, in most cases, the musical composition preserves the economic incentives to produce new works. The current system works well for upfront compensation of copyright owners, but it may fail to capture long-term compensation. Allowing a sampler to use the copyrighted work may in fact indirectly enhance creative incentives, rather than diminish them. If the sample is effective, those who hear it in the new work will be reminded of the original work, rekindling an interest in it and perhaps even related works by the sampled artist. Those unfamiliar with the sampled work or artist may become new fans of the sampled artist. In this way, sampling should be seen as a sharing or common enterprise rather than an adversarial appropriation.[200]

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[194] Bergman, *supra* note 8, at 646.

[195] In theory, such small-time and emerging artists might be helped under the current system when their works are sampled. In practice, however, such artists will not likely be sampled much themselves because a sample derives much of its force, and thus its desirability, from its recognizability.

[196] *See* Norek, *supra* note 25, at 91 ("For an independent artist, the price for clearing a single sample can run more than an entire album's recording budget. . . . This creates a barrier to entry for independent or developing acts. Even for major label artists, record companies typically require the artist to bear the cost of licensing samples, and any master use fee and mechanical royalty payments will be deducted from those otherwise payable to the artist. . . . [T]his makes it very difficult for a developing hip-hop artist to recoup the costs of producing and creating the album, much less to make a profit.").

[197] *Bridgeport II*, 410 F.3d at 802.

[198] *See* Bergman, *supra* note 8, at 646–47 (quoting Loren, *supra* note 33, at 697–98).

[199] U.S. CONST. art. I, § 8, cl. 8.

[200] *See* Rubenfeld, *supra* note 85, at 21.

Similarly, the sampled and sampling artist could enter into a more direct common-enterprise arrangement through the sampler's granting the samplee a partial interest in the new work. Although such an arrangement might be negotiated, the current problems confronting sampling would not be relieved unless such a system were universally compulsory, giving all artists an equal opportunity to benefit. After all, "in many instances, today's sampler is tomorrow's samplee."[201] Therefore, by squeezing out small-time artists like Burton and preventing them from being able to negotiate a deal, the current system may deny copyright owners economic opportunities to take risks on emerging artists with significant potential for commercial success—a doubly bad result.

III. POTENTIAL IMPROVEMENTS TO THE LAW GOVERNING DIGITAL MUSIC SAMPLING

As the foregoing analysis suggests, the current law fails to meet its goals in significant ways. But the law is not beyond repair. Considering the goals of the law, this Part outlines ways in which the law might be improved.

A. Compulsory Licensing System

A popular solution for addressing the failings of the current law governing digital music sampling involves a compulsory licensing system.[202] Seeking to strike a balance between the "domination via copyright[] and . . . insufficient incentives to create works in the first place, compulsory licensing" falls midway between the two extremes—on one end, granting full copyright, which gives owners very broad powers, and on the other, denying copyright protection altogether.[203] Such a system would resemble the one currently in place for granting permission to play "cover" songs, which are new versions of existing songs performed by someone other than the original artist.[204] This system governing entire compositions compels a copyright owner to license his work to others once he has licensed it to one.[205] Because samples can vary in length and quality,[206] however, any such compulsory licensing system applied to

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[201] *Bridgeport II*, 410 F.3d at 804.

[202] This approach has many respected advocates, including Professor Lawrence Lessig of Stanford University. *See* LAWRENCE LESSIG, THE FUTURE OF IDEAS 241–59 (2001).

[203] *See* Robert P. Merges, *Compulsory Licensing vs. The Three "Golden Oldies: Property Rights, Contracts, and Markets,"* POL'Y ANALYSIS (Cato Institute, Washington, D.C.), January 15, 2004, at 1, 4, *available at* http://www.cato.org/pubs/pas/pa508.pdf.

[204] *See* Ruiz de la Torre, *supra* note 19, at 403 ("When an artist covers a song, they must purchase a compulsory mechanical license from the copyright holder pursuant to Section 115 of the Copyright Act. . . . [This fee is] paid to the original work's publisher for every copy of the track sold." (citations omitted)).

[205] *See* Bergman, *supra* note 8, at 649 (citing 17 U.S.C. § 115 (2003)).

[206] "Samples vary drastically in terms of their qualitative value, as there is a major difference between sampling a 'hook' and a background element of a song." *Id.*

sampling would require the rate paid to be determined by categorizing the sample employed.[207]

Such a system would largely achieve the goals set out in Part I.D of this Note: copyright owners would be quickly and adequately compensated, sampling artists would pay reasonable licensing fees up front, tailored to the substantiality of their re-uses, and negotiation time would generally be minimized, thereby lowering transaction costs. The uniqueness of samples could be taken into account. Samplers would also be relatively free to ply their trade, allowing for almost unfettered progress in the art. But a certain amount of subjectivity would remain in any proposed bucketing system, so the need for litigation may not be entirely eliminated.[208]

Drawbacks to the system include: (1) subjective judgments by the Librarian of Congress, who oversees the Copyright Office, in determining the rate, with no guarantee that those rates will be any less arbitrary than those currently in place; (2) an inability to take into account the popularity of the sampled song and artist; (3) an inability of sampled artists to control how their work is used; and (4) a lack of a reputational check on bad-faith dealing as exists in the current system.[209] Most important, opponents argue, market forces are taken out of the equation and long-run incentives to create new works are diminished.[210] Although the music industry seems content with the current system, it once defended the compulsory licensing system under similar circumstances.[211] It might do well to do so again.

B. First Amendment-Augmented Fair Use

A more radical but perhaps necessary approach would be to grant samplers partial rights in the work sampled, or at least shield them from an infringement claim from

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[207] This notion of bucketing different types of samples based on the substantiality of the re-use for purposes of determining the amount of payment to the copyright owner has wide acceptance. *See, e.g.*, Charles E. Maier, *A Sample for Pay Keeps the Lawyers Away: A Proposed Solution for Artists Who Sample and Artists Who are Sampled*, VAND. J. ENT. L. & PRAC., Spring 2003, at 100–02; Bergman, *supra* note 8, at 649.

[208] Ruiz de la Torre, *supra* note 19, at 403–04.

[209] Bergman, *supra* note 8, at 650–51 (citing Szymanski, *supra* note 106, at 295–97).

[210] A compulsory rate would create an inflexible, top-down, "legislative lock-in," preventing "voluntary, arm's-length deals negotiated to fit the dynamics of individual buyers and sellers." Merges, *supra* note 203, at 4.

[211] *See* Bergman, *supra* note 8, at 649–50 ("Interestingly, in 1967, when Congress was considering dismissing the compulsory license provisions from the Copyright Act, record industry leaders argued vigorously to retain it, claiming 'performers need unhampered access to musical material on non-discriminatory terms.' They claimed that the compulsory licensing scheme resulted in 'an outpouring of recorded music, with the public being given lower prices, improved quality and a greater choice.' If compulsory licensing was so beneficial to the music industry in terms of creating new compositions, then under these arguments, a newer form of creating music, such as sampling, would also greatly benefit from uniform rates and schemes." (quoting Lawrence Lessig, Keynote Speech at the Hastings Music Law Summit West (Feb. 25, 2004))).

the copyright holder, based on a type of fair use grounded in the First Amendment. Fair use on its own, as an express exception in the copyright law, has been suggested as a potential safe harbor for samplers.[212] Such a system would embrace sampling as an art form and provide a clear standard for judges to apply.[213] But traditional fair use analysis generally does not permit the use if it is commercial in nature.[214]

It is possible, on the other hand, that copyright could be limited by the First Amendment, providing a more flexible approach than traditional fair use analysis.[215] If that were the case, even the "commercial speech" of digital music sampling could be protected because it is creative.[216]

It has been argued that "fair use exists to supply creativity that the market economy fails to induce,"[217] and that fair use analysis "consists of balancing (in economic terms, or in broader social welfare terms) the interests of the individual copyright holder against the interests of 'society' or 'the public.'"[218] The Copyright Act's § 107 factors seek to rectify the failure and achieve that balance. But, as Professor Michael J. Madison argues, such factors are not, by themselves, capable of attaining those goals.[219] Rather, because the issue of individual use of copyrighted works is really the issue of use of those works at a social level, he suggests that the question of whether a use is "fair" should be a question of whether the use "is undertaken in the context of a recognized social or cultural pattern, and the four statutory fair use factors should be interpreted and applied as part of an overall pattern-oriented framework."[220] "That pattern should exist largely independent of the legal system itself and be adjacent to, but not ordinarily part of, the market economy."[221] Applying such an analysis to digital music sampling justifies affording it this "pattern-oriented" protection under fair use. Sampling has arguably taken on the status of a social or cultural pattern, which, under Madison's analysis, would afford it shelter from the copyright law.

Supporting this idea of taking a more sociological approach to exceptions in the copyright law, particularly with respect to digital music sampling, another commentator, Professor Jed Rubenfeld, has argued that the First Amendment ought to clear some space in the copyright law for certain artistic works.[222] He has suggested that

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[212] *Id.*

[213] *See* Falstrom, *supra* note 54, at 380.

[214] *See* Maier, *supra* note 207, at 100–01.

[215] Even the copyright power is limited by the freedoms secured by the First Amendment. *See* Lee v. Runge, 404 U.S. 887, 892–93 (1971) (Douglas, J., dissenting); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970).

[216] *See, e.g.*, Rubenfeld, *supra* note 85, at 46–48.

[217] Madison, *supra* note 105, at 1624; *see also id.* at 1565.

[218] *Id.* at 1624; *see also id.* at 1567.

[219] *See id.* at 1623.

[220] *Id.*

[221] *Id.* at 1530.

[222] Rubenfeld, *supra* note 85.

"the constitutional protection of art is best understood through a principle [called] 'the freedom of imagination,'" under which a person cannot "be penalized for imagining or for communicating what he imagines . . . [n]or can a person be required to obtain permission from anyone in order to exercise his imagination," and that "copyright . . . must answer to this freedom."[223] Rubenfeld argues that "the enormous and growing set of prohibitions imposed by modern copyright law on so-called 'derivative' works" is in conflict with this freedom and concludes that "copyright's prohibition of unauthorized derivative works is unconstitutional."[224] The basic question is "how government may constitutionally block some people, but not everyone, from engaging in certain otherwise protected speech acts."[225]

Rubenfeld suggests that copyright law ignores three fundamental principles of free speech jurisprudence: (1) content-based restrictions get strict scrutiny, (2) no prior restraints, and (3) viewpoint-based restrictions are unconstitutional per se.[226] Moreover, the Supreme Court has never listed copyrighted works among the classes of speech that do not receive First Amendment protection.[227] In fact, courts have almost universally declined, either explicitly or implicitly, to consider seriously whether the First Amendment ought to apply in copyright infringement cases.[228] He also convincingly dismisses as inadequate the four explanations offered for copyright's insulation from First Amendment speech protections: (1) Congress's express power to grant copyrights, (2) the idea/expression distinction and fair use doctrine already handle free speech concerns, (3) copyrights increase overall speech production, and (4) there is no free speech right to steal someone else's property.[229]

First, the argument that Congress's express power to grant copyrights insulates copyright law from free speech protections "gets backward the relationship between powers and rights."[230] The power is one that Congress can exercise, but it is subordinate to the right to free speech guaranteed by the First Amendment.[231] As Rubenfeld puts it simply, "[r]ights trump powers, not vice versa."[232]

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[223] *Id.* at 4.

[224] *Id.* at 5.

[225] *Id.* at 20.

[226] *Id.* at 5–6.

[227] *Id.* at 7.

[228] *Id.* Even though a work is not a parody, it may still deserve the benefit of First Amendment protection. The Supreme Court has left open such a possibility in prior decisions. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 221 (2003) (addressing only the question of duration of copyrights and suggesting copyright is not categorically immune to First Amendment challenge), *reh'g denied*, 538 U.S. 916 (2003); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 582–83 (1994). An appropriate case has not come before the Court to afford it an opportunity to reach the issue.

[229] Rubenfeld, *supra* note 85, at 12–30.

[230] *Id.* at 12.

[231] *Id.*

[232] *Id.*

Second, by claiming to regulate only the expression and not the idea, copyright law runs afoul of the notion that certain expressions cannot be substituted and must be protected.[233] In addition, fair speech is not free speech.[234] In other words, there are constitutional minimums at play that copyright law must respect.

Third, the First Amendment's goal "is not maximization of total speech production . . . [or] the achievement of an efficient speech market, generating exactly as much speech as people are willing to pay for."[235] The policy objectives of copyright and free speech are at odds, as free speech cannot be "reduced to efficient or wealth-maximizing speech."[236]

Finally, the analogy to ordinary property law fails because "[copyright law] make[s] people liable for *speaking*, whereas ordinary property law does not . . . [, and it] create[s] a kind of *private power over public speech* that ordinary property law does not."[237] Just as there is a difference between arson and flag burning, there is a difference between stealing and speaking.[238]

Rubenfeld thus argues that copyright law, as currently formulated, is unconstitutional.[239] For practical reasons, this Note does not take quite such an extreme stance. Rather than advocate for the abrogation of copyright law on constitutional grounds, this Note seeks to bring copyright law into constitutional balance by modifying the fair use analysis. Rubenfeld says it makes sense for the fair use doctrine to be economically oriented because it serves copyright's goal of creating incentives to stimulate production of creative works.[240] But such a system cannot capture freedom of speech concerns and is, on its own, insufficient.[241]

Under current law, a sampler who fails to negotiate licenses from those who own the copyrights to the underlying work is subject to liability for copyright infringement.[242] Rubenfeld would argue that such liability conflicts with the First Amendment and the freedom of imagination because the sampler would be punished simply for "speaking."[243] Although one might counter that the sampler is not being punished for "speaking" but for "stealing," such an argument fails because, as Rubenfeld suggests,

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[233] *Id.* at 14–15. Rubenfeld roundly rejects the notion that copyright regulates only expression. In support of his position, Rubenfeld relies on *Cohen v. California*, 403 U.S. 15 (1971), in which the conviction of a man whose jacket read "Fuck the Draft" was overturned. Rubenfeld says that "[i]f the First Amendment protected *only* ideas, and *not* particular expressions thereof, Cohen should have gone to jail." *Id.* at 15.

[234] *Id.* at 18.

[235] *Id.* at 23.

[236] *Id.* at 23–24.

[237] *Id.* at 25.

[238] *See id.* at 26.

[239] *See generally id.*

[240] *Id.* at 20.

[241] *Id.* at 21.

[242] *See supra* Introduction.B.

[243] *See* Rubenfeld, *supra* note 85, at 41.

the sampler is being punished for conduct that cannot be dissociated from its communicative or expressive nature.[244] In this way, the sampler's First Amendment rights have been trammeled by a power that is properly subordinate to those rights.

A system granting nearly unfettered use would address Rubenfeld's concerns. Under such a system, almost all unlicensed sampling should be permitted. But economic concerns, precisely those that the current fair use doctrine sets out to protect, cannot be ignored. To prevent complete copying and outright piracy, therefore, unlicensed sampling should be permitted unless the market for the original underlying work is supplanted or adversely affected, as an indication that the speech was not done in artistic good faith but purely for profit. This would be a factual determination left to a court.

There are many reasons to recommend such a system, as it largely meets the goals set out above.[245] First, samplers will have clear, predictable boundaries when practicing their art—all sampling is allowed unless it is done in bad faith as outright piracy.[246] Second, costs for sampling artists are kept to a minimum, requiring only access to the digital sound recording to be employed. Third, while infringement questions may still crop up at the margins, most sampling will be done in good faith and litigation will rarely be needed to settle disputes. Fourth, because negotiation is no longer required, associated difficulties disappear.

The fifth factor, providing adequate economic benefits for copyright owners so that they will have an incentive to produce new works, seems most problematic. Indeed, copyright owners will not be compensated directly for the use of their sound recording or musical composition. But an artist whose work is sampled may receive an indirect financial benefit from the increased interest in the original work and a more dynamic music industry on the whole. Such concerns are minimized when taking a macro view, in which the "sampler becomes samplee" mechanism can take effect. The marketplace of ideas should be allowed to operate and listeners should be able to decide what they want to listen to. In the worst case, an action for profit-allocation can resolve the economic interests and incentives.

C. How Might The Grey Album *Events Have Played Out Under Proposed Solutions?*

Had a compulsory licensing system been in place, Burton, EMI, and Sony/ATV all could have benefited directly. Given the demand demonstrated on Grey Tuesday,[247] even under a compulsory system in which the copyright holders' financial stake is set,

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[244] *See id.*

[245] *See supra* Part I.D.

[246] Rubenfeld would rightly exclude piracy from First Amendment protection on the basis that it constitutes a "fail[ure] to exercise . . . imagination" and thus finds no safe harbor in a notion of imaginative or communicative activity. Rubenfeld, *supra* note 85, at 48.

[247] Grey Tuesday, *supra* note 169.

such a system could have been mutually beneficial for the sampler and the samplee. Although the question of profit maximization is an empirical one impossible to answer at this point, it is the wrong question. As long as the artists, or the corporate entities standing in their shoes, are compensated adequately at the same time the sampler is allowed to express himself, the system succeeds in promoting the progress of science.

Alternatively, under the proposed First Amendment-based fair use analysis, Burton would have been free to sample at will to create his art, without direct or indirect payments to EMI or Sony/ATV. Although the financial interests of the copyright holders would not have been taken into account directly, Burton's use of their work would have provided more diffuse benefits—first, through increased interest in and sales of the underlying works, and second, through the passive "what goes around comes around," "sampler becomes samplee" system.

CONCLUSION

The Framers and Congress did not create and amend copyright law with digital music sampling in mind. The law that has come to govern sampling is broken, failing to achieve its constitutional goals by giving too much control to copyright holders. The law may be mended in several ways so as to comport with the Constitution, including the creation of a compulsory system, which has a good deal of support, as well as a First Amendment-based system, which, though novel, may even be constitutionally mandated. Although compensation to copyright holders may not be maximized directly, it may still provide the appropriate creative incentives while allowing the "science" of art to progress in other important and constitutionally significant ways. In this way, future artists in the mold of the Beastie Boys and DJ Danger Mouse will earn recognition for their "grey" work and be able to push the state of the art to such great heights.