Music Composition, Sound Recordings and Digital Sampling in the 21st Century: A Legislative and Legal Framework to Balance Competing Interests

Jeremy Beck*

TABLE OF CONTENTS

* Jeremy Beck is a published composer of new classical music whose work has been presented by such organizations as New York City Opera and American Composers Orchestra. A former tenured professor of composition and music theory, he holds a D.M.A. and M.M.A. from the Yale School of Music (1995, 1992), an M.A. from Duke University (1989) and a B.S. from the Mannes College of Music (1984), all in music composition. Beck is currently a third-year student in the evening division of the Brandeis School of Law at the University of Louisville (Kentucky). The author expresses his gratitude to Acting Dean David Ensign of the Brandeis School of Law for his early support and encouragement of this article, to the accomplished jurists and writers from whose thoughtful work it emerged, and to his wife, Christine Ehrick, for her patient understanding and intellectual *savoir-faire.*

I. INTRODUCTION

A. *Music Composition and the New Technology*

Digital sampling ("sampling") has revolutionized the way music is created.[1] Composers using this technique manipulate a recorded fragment of sound from a preexisting recording and then use it as a part of a new composition, realized as another recording.[2] The advent of this compositional technique where creators of new music make use of protected material has raised issues of copyright infringement that are still unresolved.[3]

Music industry practices related to sampling were described in 1993 as "unpredictable and probably unfair."[4] The effort required by artists, record companies and their lawyers to police the use of samples

[1] *See* Sherri Carl Hampel, Note, *Are Samples Getting a Bum Rap?: Copyright Infringement or Technological Creativity?*, 1992 U. ILL. L. REV. 559, 560 (1992).

[2] *See generally* Jeffrey R. Houle, *Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just a Bad "Rap"?*, 37 LOY. L. REV. 879, 880-82 (1992).

[3] *See, e.g.*, Grand Upright Music, Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991); for further discussion of this case, see *infra* notes 14-16 and accompanying text.

[4] Michael L. Baroni, *A Pirate's Palette: The Dilemmas of Digital Sound Sampling and a Proposed Compulsory License Solution*, 11 U. MIAMI ENT. & SPORTS L. REV. 65, 91 (1993) (internal quotations omitted).

was considered an "unproductive, time-wasting chore."[5] Over a decade later, both providers and users of samples are still weighed down by "excessive time and financial costs."[6] The remedy for this continuing state of confusion and waste lies in more focused legislation and judicial guidance. In undertaking this task, Congress and the courts should refrain from devising a "one size fits all" approach to the use of samples. Because each creative situation involving sampling will be different, retaining a case-by-case evaluative method within more consistent guidelines would best balance competing interests.

Creators of sound recordings need protection from piracy and other forms of infringement, including provisions for fair compensation that would not overly expand the Constitutional limits of their monopoly. Creators who utilize sampling should have a spectrum of possibilities available to them to make legitimate uses of preexisting recordings without a *per se* licensing requirement or fear of litigation. At the same time, such creators should not be granted *carte blanche* for any and all uses without ever having to pay for those uses.[7] The tension between these two classes of creators has been described as a struggle between "the established entities in the music business and those trying to get established."[8] This article explores this dichotomy and the available options to facilitate a balance between them. It then makes the argument that any bright-line rule in the search for fairness is overbroad and unconstitutionally limits the scope of protection to be afforded new creators of music who use sampling. The article thus supports the position that rulings on such matters should be decided on an *ad hoc* basis, with allowances for finding:

(1) the material used uncopyrightable as a matter of law;[9] or

(2) that the use is *de minimis*; or

(3) that an affirmative defense of fair use controls.

Further, artists who would like to utilize larger samples of material that would not be protected by (1-3) should be able to:

---

[5] *Id.* at 92.

[6] 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, 84 (2004).

[7] *See* Molly McGraw, Comment, *Sound Sampling Protection and Infringement in Today's Music Industry*, 4 HIGH TECH. L.J. 147, 169 (1989).

[8] SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 133 (2001).

[9] *See* A. Dean Johnson, Comment, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits*, 21 FLA. ST. U. L. REV. 135, 141-142 (1993) ("An issue that often emerges in digital sampling infringement cases is whether the sampled material is copyrightable in itself.").

(4) apply for a statutory mechanical sampling license; and

(5) this mechanical sampling license should be inclusive of the concomitant license from the copyright holder of the musical composition, thus extinguishing the burden on such artists to seek (and pay for) two licenses in order to utilize the sample.[10]

B. *A Legal Overview*

When analyzing claims of copyright infringement, courts have employed several methods in attempting to balance the competing interests of copyright holders and creators of new works. Some courts have applied tests based on the concept of *de minimis* use[11] while others have found the affirmative defense of fair use applicable.[12] Unfortunately, the analyses and decisions in some of the cases that actually involve questions of sampling are less useful for their precedent.[13]

For example, in the 1991 case of *Grand Upright Music, Ltd. v. Warner Bros. Records., Inc.*, a rap musician known as Biz Markie incorporated into his recording "Alone Again" a portion of the music and three words from a preexisting recording, "Alone Again (Naturally)" by Raymond "Gilbert" O'Sullivan.[14] Biz Markie did not acquire a license prior to the making or release of his recording.[15] Without undertaking an analysis of the underlying issues, the court declared that any use of a preexisting recording constituted a *per se* violation of copyright law.[16] This decision has been criticized for "failing to grasp the issue . . . [and for] unwittingly creat[ing] a bright-line rule in an area that needed standards instead."[17] However, to be fair to the court, the defense in *Grand Upright Music* was poorly articulated, consisting of an incomplete chain-of-title argument (averring that the plaintiff did not own the copyright and therefore had no standing to bring suit) and an

---

[10] For a discussion of compulsory licenses, see *infra* section VI.

[11] *See generally* 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).

[12] *See, e.g.*, Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986) (parody as fair use); for a discussion and comparison of *de minimis* use and the defense of fair use, see *infra* sections III-IV.

[13] Chris Johnstone, Note, *Underground Appeal: A Sample of the Chronic Questions in Copyright Law Pertaining to the Transformative Use of Digital Music in a Civil Society*, 77 S. CAL. L. REV. 397, 406-07 (2004) ("[The court in Grand Upright Music] provided scant legal analysis . . . by declining to conduct an analysis on the issues of de minimis copying or fair use, the opinion has been severely criticized.").

[14] *Grand Upright Music*, 780 F. Supp. at 183.

[15] *Id.*

[16] *Id.*

[17] 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, 378 (1994).

argument that sampling was an industry-wide practice in rap music.[18] Because the defense raised neither a *de minimis* claim nor a fair use defense, the court had no obligation to address these critical areas.

Generally, it has been observed that the law has lagged far behind the growth of sampling in the burgeoning digital world.[19] The variability of legal approaches and court holdings does little to provide any sense of predictability and consistency for recording artists, whether copyright holders of preexisting recordings or creators who utilize sampling in making new recordings. In the absence of clear parameters from court decisions, some writers have suggested that the most equitable solution would be for Congress to expand the compulsory license provisions of the Copyright Act to include sampling.[20] While on its face this might seem like a proper resolution of the issues involved, such an approach may create more problems than it would solve.[21]

C. *A Judicial Attempt at Clarity*

A recent ruling in the Sixth Circuit attempted to bring some clarity and guidance to the issue of sampling.[22] On September 7, 2004, in *Bridgeport Music, Inc. v. Dimension Films*, the Sixth Circuit announced a new bright-line rule: any taking from a preexisting recording constitutes infringement.[23] This holding thus declares that any *de minimis* analysis is preempted by statute,[24] and that artists utilizing digital samples in their work must seek licenses.[25] While the Sixth Circuit's attempt to bring consistency to this area of the law is laudatory, the result is ill-considered and overbroad.[26] In addition, the Sixth Circuit's decision did not reflect the admonition it had received in 1994 from the

---

[18] *Grand Upright Music*, 780 F. Supp. at 184-85 n.2.

[19] David Sanjek, *"Don't Have To DJ No More": Sampling and the "Autonomous" Creator*, 10 CARDOZO ARTS & ENT. L.J. 607, 617-19 (1992) ("[T]he law must catch up with advancing technology.").

[20] *See generally* Norek, *supra* note 6.

[21] Sanjek, *supra* note 19, at 621 ("[One] alternative is for the record companies to establish an industry-wide rate structure for licensing of and royalty payments for samples, but that could lead to complaints of price fixing.").

[22] Bridgeport Music v. Dimension Films, 383 F.3d 390 (6th Cir. 2004); *aff'd on rehearing*, 410 F.3d 792 (6th Cir. 2005); for a discussion of the details of this case and its subsequent developments, see *infra* notes 78-102 and the accompanying text.

[23] *Id.*

[24] *Id.* at 399.

[25] *Id.* at 398 ("Get a license or do not sample."); the same quote may be found in *Bridgeport*, 410 F.3d at 801.

[26] *See* Recent Case: *Copyright Law - Sound Recording Act - Sixth Circuit Rejects De Minimis Defense to the Infringement of a Sound Recording Copyright*, 118 HARV. L. REV. 1355, 1359 (2005) [hereinafter Recent Case] ("a purely textual analysis of the statute proves this interpretation misguided.").

Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*[27] In that earlier sampling case, the Supreme Court overruled a presumption found in the Sixth Circuit's opinion by declaring that infringement analysis is "not to be simplified with bright-line rules."[28] However, the Sixth Circuit may have recalled this reproach when, significantly, it later issued an amendment to its September ruling, specifically suggesting that the doctrine of fair use might be applicable to sampling.[29] This amendment is in accord with the concerns of scholars who perceive a growing imbalance in United States copyright law favoring the limited protection afforded the copyright holder over what should be the primary Constitutional objective of copyright law: "To Promote the Progress of Science and useful Arts" for the general public good.[30] The court's position also is congruent with the historical practice of Western music composition; while the digital technology involved in sampling is new, many of the ideas underlying this compositional technique have been used by composers for centuries.[31]

II. Scope of the Copyright Statute and Sound Recordings; Legislative Intent

"Sound recordings" is one of the categories of works of authorship specifically protected by the 1976 Copyright Act (hereinafter "the Act").[32] The bundle of rights afforded authors of sound recordings includes the rights of reproduction, preparation of derivative works, distribution of copies, and public performance by means of digital audio transmission.[33] Significantly, Congress did not afford protection for either public performance or display.[34] In the case of the latter provision, Congress extended protection to the "individual images of a motion picture or other audiovisual work."[35] By analogy, Congress also could have indicated a willingness to protect "individual portions" of a sound

---

[27] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); this case is discussed further *infra*, in section IV.

[28] *Id.* at 577 (the Court's admonishment here is specifically in the context of a fair use analysis, but seems to imply that such bright-line rules are disfavored in copyright law).

[29] Bridgeport Music v. Dimension Films, 383 F.3d 390 (6th Cir. 2004), *amended* December 20, 2004; this suggestion was rearticulated by the 6th Circuit in its rehearing, *see Bridgeport*, 410 F.3d at 805.

[30] U.S. Const. art. I, § 8, cl. 8; *see generally* Vaidhyanathan, *supra* note 8.

[31] For a discussion on antecedents to sampling in Western music composition, see *infra* section VII.

[32] 17 U.S.C. § 102(a)(7) (2003) (incorporating the Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971)).

[33] 17 U.S.C. §§ 106(1)-(3), (6) (2003).

[34] *Id.* §§ 106(4) & (5).

[35] *Id.*

recording but instead specifically omitted such protection from the statute. This theoretical defense to sampling has yet to be tested; it has not been raised in any published decision involving sampling.[36] Even some of those who decry unauthorized sampling as "theft"[37] have noted this lack of specificity in the statute.[38]

Congress circumscribed the scope of exclusive rights in sound recordings later in the Act.[39] In part, the statute reads:

> The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 [i.e., preparation of derivative works] is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed or otherwise altered in sequence or quality.[40]

The statutory language has been read to preclude any *de minimis* analysis in sampling cases.[41] However, when the statute is read in conjunction with the omission of protection for individual portions of the sound recording under § 106(4), it raises a question of Congressional intent: did Congress intend to extend protection to every individual part of a sound recording under § 114(b) when the language refers to rearrangement, remixing or sequential or qualitative alteration of the actual sounds fixed in a sound recording, or is the plural form of "fixed sounds" an operative component of the statute? In other words, is the protected right only applicable to situations where the *entire* sound recording is rearranged, remixed or sequentially or qualitatively altered?

Furthermore, a "derivative work" is a term of art, defined in the statute as "a work based upon one or more preexisting works, such as a . . . sound recording . . . in which a work may be recast, transformed, or adapted."[42] If a new sound recording borrows a two-second fragment from a preexisting recording to use as a part of its mosaic,[43] is the new work still "based" on that preexisting work? Is such a new sound re-

---

[36] *Accord* Sanjek, *supra* note 19, at 619 ("[T]he 1971 Sound Recording Act] is meant to protect the reproduction of a whole recording, not the appropriation of separate sounds on that recording which digital technology permits.").

[37] Baroni, *supra* note 4, at 93.

[38] *Id.* at 79 ("[T]here is considerable controversy and ambiguity over the extent to which [sound recordings] are protected. . . . Even if the Act's language does not expressly protect against sampling, the Act should be amended to do so.").

[39] 17 U.S.C. § 114 (2003).

[40] *Id.* § 114(b).

[41] *Bridgeport*, 383 F.3d at 399; rearticulated on rehearing, 410 F.3d at 801.

[42] 17 U.S.C. § 101 (2003).

[43] VAIDHYANATHAN, *supra* note 8, at 65 (using the term "mosaic" to describe some approaches to sampling, and finding a 19th-century precedent in a description by Mark Twain of the creative process).

cording actually recasting, transforming or adapting the preexisting work?

Fortunately, the legislative history of the Act offers guidance on these questions. Despite court findings to the contrary,[44] copyright protection under § 114(b) of the Act is not absolute and Congress never intended to afford such a broad scope of protection to sound recordings.[45] As stated in the House of Representatives Report, "Infringement takes place whenever *all or any substantial portion* of the actual sounds that go to make up a copyrighted sound recording are reproduced."[46] The language used is key because it forestalls a narrow reading of the statute; Congress does not state that *any* taking constitutes infringement. This legislative history implicitly supports the applicability of a *de minimis* analysis in the context of sampling of preexisting recordings.[47]

III. *De Minimis* Analysis and the Defense of Fair Use

A. *Distinguishing the Two Doctrines*

De minimis use in the context of copyright law has been defined as "copying [which] has occurred to such a trivial extent as to fall below [a finding of] substantial similarity."[48] It is important to note that this is a threshold consideration and is not a part of a fair use analysis. Fair use is an affirmative defense which only need be raised if a *prima facie* case has been made that copyright infringement has indeed occurred. Although a *de minimis* analysis should be a mixture of law and of fact, by definition, a *de minimis* finding means that the use is non- infringing. Should a court determine a use of protected material is *de minimis*, then the plaintiff has not satisfied the initial burden of proof and the suit must be dismissed.[49]

However, if a court determines that a use is not *de minimis*, then the court may find that infringement has occurred. It is at this point in

---

[44] *Bridgeport*, 383 F.3d at 399; rearticulated on rehearing, 410 F.3d at 801.

[45] H.R. Rep. No. 94-1476 at 106 (1976).

[46] *Id.* (emphasis added).

[47] *See* Recent Case, *supra* note 26, at 1359-60.

[48] Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997).

[49] 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, 141-45 (2003). Additionally, a court may also determine as a threshold matter of law that the material used is not copyrightable in the first place and therefore not protected at all. *See, e.g.*, Newton v. Diamond, 204 F. Supp. 2d 1244, 1256 (C.D. Cal. 2002), *aff'd on other grounds*, Newton v. Diamond, 349 F.3d 591 (9th Cir. 2003) ("six-second, three-note sequence with a single background note . . . cannot be protected as a matter of law").

the analytical process that a fair use analysis may be undertaken.[50] The fair use analysis generally involves questions of law and fact to be determined by the court and the fact-finder.[51] In other words, when a defendant is answering a claim of copyright infringement, if appropriate, it would be wise to argue in the alternative:

(a) the material claimed as protected is not copyrightable as a matter of law (and therefore the use is not an infringement), or

(b) if the material is copyrightable and protected, the use is *de minimis* (and thus no infringement has occurred); or

(c) if the material is copyrightable and protected and the use is not *de minimis* (and therefore infringement may have occurred), the use is still one which satisfies the four-factor fair use test, and thus there is no infringement under copyright law.[52]

Unfortunately, some writers confuse these two individual doctrines and conflate the threshold analysis of *de minimis* use with the affirmative defense of fair use.[53] It is important to keep these doctrines distinct, for they provide different safe harbors for creators who may make use of protected material.

B. De Minimis *Use and Current Analytical Standards*

Before examining fair use more closely, it is important to understand the general analytical standards courts employ in attempting to determine whether a use may be declared *de minimis*. Any such analysis attempts to find whether or not a substantial similarity exists between the source material and the claimed infringing use.[54] Substantial similarity may be found when either (i) the two works as a whole are similar, but not identical;[55] or (ii) only a small fragment of the two

---

[50] *See* Sandoval v. New Line Cinema, Corp., 147 F.3d 215, 217 (2d Cir 1998) (finding use of photographs in background of scenes of film not an infringement) ("[I]t was error [for the District Court] to resolve the fair use claim without first determining whether the alleged infringement was *de minimis*.").

[51] MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT vol. 3-12, § 12.10 [B][4], 193 (Matthew Bender & Co. 2004) (but if a case only requires a conclusion based on a set of undisputed facts, a court "may resolve the fair use defense as a matter of law on summary judgment").

[52] 17 U.S.C. § 107 (2003).

[53] *See, e.g.*, Charles E. Maier, Note, *A Sample for Pay Keeps the Lawyers Away: A Proposed Solution for Artists Who Sample and Artists Who Are Sampled*, 5 VAND. J. ENT. L. & PRAC. 100 (2003).

[54] *See* NIMMER, § 13.03 [A] at 33-36.

[55] *Id.* (This circumstance is described by Nimmer with the unfortunate phrase "comprehensive nonliteral similarity.").

works is identical.[56] In pursuing this analysis, courts examine the disputed use from both a quantitative and a qualitative perspective.[57] When undertaking the inquiry courts "must balance the interests protected by the copyright laws against the stifling effect that overly rigid enforcement of these laws may have on the artistic development of new works."[58]

A quantitative analysis considers the amount of material involved,[59] but this evaluation is not determinative. "[E]ven if a copied portion [is] relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find substantial similarity."[60] Many of the cited cases in which *de minimis* analysis has evolved into tests or guidelines have been cases concerning the visual arts.[61]

C. *Real Time v. Fixed Time: Aural and Visual Arts Distinguished*

Discussions of *de minimis* analysis have been somewhat muddied by commentators who hypothetically apply tests and guidelines generated by cases involving the visual arts or visual media (e.g., television and film) to sound recordings and sampling.[62] Such applications by analogy are not a good fit. The tests that have evolved for the visual arts utilize an "observability" factor.[63] Some writers have taken this notion of the "ordinary observer" and turned such an observer into the "ordinary listener."[64] This transformation raises a problem because visual art is distinguishable from the aural art form of music, particularly as realized in sound recordings that use sampling.

The visual arts and the individual frames of a film or video may be examined in fixed time; like the pages of a novel or a printed musical

---

[56] *Id.* at 53; Nimmer describes the second situation with an equally tortuous phrase: "fragmented literal similarity." It is this second situation which is most often raised in cases of sampling.

[57] *See* Jarvis v. A&M Records, 827 F. Supp. 282, 291 (D.N.J. 1993).

[58] Bridgeport Music, Inc. v. Dimension Films, 230 F. Supp. 2d 830, 840 (M.D. Tenn. 2002), *rev'd on other grounds*, 383 F.3d at 406.

[59] *See Ringgold*, 126 F.3d at 75.

[60] Cybermedia, Inc. v. Symantec Corp., 19 F. Supp. 2d 1070, 1077 (N.D. Cal. 1998).

[61] *See Blessing*, *supra* note 11, at 2415 ("no court has applied this [visual arts] test for de minimis use in the music sampling arena").

[62] *See, e.g.*, Brett I. Kaplicer, Note, *Rap Music and De Minimis Copying: Applying the Ringgold and Sandoval Approach to Digital Samples*, 18 CARDOZO ARTS & ENT. L.J. 227, 252 (2000).

[63] *See Ringgold*, 126 F.3d at 75; *accord Sandoval*, 147 F.3d at 217.

[64] *See* Stephen R. Wilson, *Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense?*, 1 HIGH TECH. L.J. 179, 185 (2002) (conflating standards from a case involving an ornamental design by citing the case as if the court had invoked a "listener" as opposed to an "observer").

score, visual images may be studied in minute detail due to their immobility.[65] In stark contrast, sound recordings, and any sampling therein, may only be examined in real time. How many times would a fact finder need to listen in real time to a pair of recordings in order to analyze them? Would such incessant repetition - and the resulting familiarity - present a greater risk of finding infringement? These questions have not been addressed by the writers who introduce theories derived from the visual arts into hypotheticals that involve sampling.

Further, in disputed uses relating to the visual arts, fixed time allows comparisons by the fact finder to be made simultaneously (i.e., side by side). Even in disputes involving the real time presentation of film, comparisons may be made side by side on two screens. Such an approach is not available for comparing sound recordings; it is doubtful that even a highly-trained musician would be able to listen simultaneously to two individual sound recordings and come to any sort of a reasonable analytical conclusion. The hypothetical application of *de minimis* standards derived from cases involving the visual arts is simply inappropriate, for this application negates the very nature of aural art forms – they exist in real time.[66]

IV. Fair Use and Public Policy

"Fair use" may be defined as "an equitable defense [creating] a limited privilege in those other than the owner of a copyright to use the copyrighted material in a reasonable manner without the owner's consent."[67] This affirmative defense need be addressed only after a plaintiff has presented a *prima facie* case for infringement.[68] A successful defense will abrogate the claim and the defendant will avoid liability.[69]

The statute itself indicates some uses which may invoke this defense, including "criticism, comment, news reporting, teaching . . . scholarship, or research."[70] It is important to note that this list is illustrative and not restrictive.[71]

---

[65] While motion pictures may be observed by the fact finder in real time, when a film or video is paused individual frames may be studied in fixed time; this opportunity for analysis is not available when a sound recording is so paused. Cases involving television and film such as *Ringgold* and *Sandoval* do not indicate whether the analysis involved only real time observation or a combination of real time and fixed time.

[66] Other art forms which exist in real time include any live performances (musical or theatrical) as well as readings, lectures or debates.

[67] *Fisher*, 794 F.2d at 435.

[68] *See* Nimmer, § 13.05 at 149-52.

[69] Johnson, *supra* note 9, at 143.

[70] 17 U.S.C. § 107 (2003).

[71] *Id.* ("for purposes such as").

In *Campbell v. Acuff-Rose Music, Inc.*, the rap group 2 Live Crew contended that its commercial parody of Roy Orbison's song *Oh, Pretty Woman*, entitled *Pretty Woman*, was not infringement because it was protected by fair use.[72] In addressing this argument, the Supreme Court stated that the "task [of fair use analysis] is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."[73]

Any analysis of fair use involves four statutory factors:

(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.[74]

These four factors are not to be viewed in isolation; they are to be explored and weighed together.[75] This integrated approach to the analysis is critical, for most composers who utilize sampling do so in a commercial context (i.e., to sell recordings). In the prior appeal of the *Campbell* case, the Sixth Circuit had reversed the district court's finding of no infringement, concluding that the commercial nature of 2 Live Crew's use of Orbison's song under the first factor of the fair use analysis created a presumption of infringement that barred a finding of fair use.[76] The Supreme Court found this error to be a fundamental misunderstanding of the law and of Congressional intent.[77]

---

[72] *Campbell*, 510 U.S. at 571-72.

[73] *Id.* at 577. While the central focus of this case asks whether or not sampling in the context of the genre of parody constitutes fair use, the underlying analysis need not be so limited.

[74] 17 U.S.C. § 107 (2003).

[75] *Campbell*, 510 U.S. at 578.

[76] Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1435-37 (6th Cir. 1992).

[77] *Campbell*, 510 U.S. at 584. Unfortunately, other writers have mistakenly made similar presumptions in looking at the four-factor analysis of fair use. *See* Maier, *supra* note 53, at 101 ("[factors] 1 and 2 will almost always . . . weigh against a finding of fair use"); *see also* Bruce J. McGiverin, Note, *Digital Sound Sampling, Copyright and Publicity: Protecting Against The Electronic Appropriation of Sounds*, 87 COLUM. L. REV. 1723, 1745 (1987) ("[A] plaintiff whose work has been sampled for commercial purposes should withstand a defense of fair use.").

V. *BRIDGEPORT MUSIC, INC. V. DIMENSION FILMS* OR HOW THE DISTRICT COURT GOT IT RIGHT

A. *An Unfortunate Development:* De Minimis *Use Rejected*

In the recent case which was heard on appeal by the Sixth Circuit, Westbound Records claimed that one of its sound recordings (*Get Off Your Ass and Jam* by George Clinton, Jr. and the Funkadelics) had been digitally sampled for use in another recording (*100 Miles and Runnin'*) and that this constituted infringement.[78] The recording was included in the soundtrack to the film *I Got the Hook Up*, produced by No Limit Films.[79] The actual sample involved was a "two-second sample from [a] guitar solo [where] the pitch was lowered and the copied piece looped and extended to 16 beats."[80] Utilizing a *de minimis* analysis, the district court found that the sampling involved did not "rise to the level of a legally cognizable appropriation" and granted summary judgment to the defendant.[81]

On appeal and again on rehearing, the Sixth Circuit rejected the court's *de minimis* analysis and found that any use of preexisting sound recordings constituted an infringement *per se* according to the statute.[82] This recent holding, where the court admittedly "followed no existing judicial precedent,"[83] has already drawn criticism.[84]

The court further concluded that "The music industry, as well as the courts, are best served if something approximating a bright-line test can be established."[85] This statement is questionable not only given the Supreme Court's admonition in *Campbell*,[86] but also in light of the rea-

---

[78] *Bridgeport*, 383 F.3d at 393.

[79] *Id.* (stating that Dimension Films is the lead co-defendant with No Limit Films).

[80] *Id.* at 394.

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

[82] *Bridgeport*, 383 F.3d at 399; *aff'd on rehearing*, 410 F.3d at 801-02; *contra* United States v. Taxe, 540 F.2d 961, 965 (9th Cir. 1976) (holding that district court's jury instruction that any unauthorized copying of a sound recording constitutes infringement was erroneous and that substantial similarity required to find infringement).

[83] *Bridgeport*, 383 F.3d at 400; rearticulated on rehearing, 410 F.3d at 802.

[84] Kenneth M. Achenbach, Comment, *Grey Area: How Recent Developments in Digital Music Production Have Necessitated the Reexamination of Compulsory Licensing for Sample-Based Works*, 6 N.C. J.L. & TECH. 187, 199 (2004) ("[T]he court made its decision on an incomplete and fundamentally biased set of facts."); *see also* Recent Case, *supra* note 26, at 1359 ("a purely textual analysis of the statute proves this interpretation misguided"); *accord* Steve Seidenberg, *George Clinton's Record Label Takes On Music Samplers - Sixth Circuit Takes Aim At Recording Industry's Copyright Practices* CORP. LEGAL TIMES, Dec. 2004, at 26 (quoting an anonymous intellectual property attorney, "The court turns the statute upside down - it gives more protection for sound recordings when the statute is intended to give them less protection.").

[85] *Bridgeport*, 383 F.3d at 397; rearticulated on rehearing, 410 F.3d at 802.

[86] *Campbell*, 510 U.S. at 577.

sonable consideration that "[s]ampling jurisprudence incorporates cases involving both widely ranging fact patterns and a continually evolving technological landscape."[87] In this regard, Learned Hand expressed the view that analysis of copyright infringement should rely on a judge's instinctual impression of the totality of the works involved, and that a judge should use common sense on a case-by-case basis while guided by some general principles.[88]

Moreover, in dismissing the possibility of a *de minimis* analysis in sampling cases by stating "even when a small part of a sound recording is sampled, the part taken is something of value," the Sixth Circuit introduces a policy statement that swerves dangerously close to reintroducing the "sweat of the brow" doctrine.[89] This doctrine, which held that "copyright was a reward" for "hard work,"[90] was explicitly rejected by the Supreme Court in *Feist Publ., Inc. v. Rural Tel. Serv. Co., Inc.* because "[t]he primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.'"[91] The doctrine was further criticized by the Court because "the only defense to infringement [would be] independent creation."[92] Other courts have subsequently held that "the underlying tenets of *Feist* inform the entire body of copyright jurisprudence."[93] Seen in this light, the Sixth Circuit's economic analysis is inapposite.

Further, the court attempts to distinguish sampling from other types of uses by focusing on it as a "physical taking."[94] However, sampling is no more a "physical taking" than the photocopying of a musical score;[95] nothing has been literally removed from the original sound recording (i.e., there is no resultant gap in the source recording). Such a misapprehension of sampling is not isolated. The singer James Brown has criticized sampling by asking rhetorically "Is it all right if I take some paint off your house and put it on mine? Can I take a button off your shirt and put it on mine? Can I take a toenail off your foot—is that all right with you?"[96] While the emotion behind these analogies

[87] Achenbach, *supra* note 84, at 200.

[88] Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930) as discussed in VAIDHYANATHAN, *supra* note 8, at 107 (discussing the comparison of a play and a motion picture); *accord* Achenbach, *supra* note 84, at 200 ("While a bright-line rule can be convenient at times, it is not the most appropriate approach to sampling cases.").

[89] *Bridgeport*, 383 F.3d at 399; rearticulated on rehearing, 410 F.3d at 802.

[90] Feist Publ., Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 352 (1991).

[91] *Id.* at 349 (quoting U.S. CONST. art. I, § 8, cl. 8; internal bracket included in original).

[92] *Id.* at 353.

[93] Earth Flag, Ltd. v. Alamo Flag Co., 153 F. Supp. 2d 349, 355 (S.D.N.Y. 2001).

[94] *Bridgeport*, 383 F.3d at 399; rearticulated on rehearing, 410 F.3d at 802.

[95] Recent Case, *supra* note 26, at 1360.

[96] McGraw, *supra* note 7, at 152.

may be heartfelt, it reflects a fundamental misunderstanding of the technique and its application. And even if sampling did constitute some sort of "physical taking," courts have applied a *de minimis* analysis "even when actual, physical artwork [has been] used in a movie, television show, or play."[97]

B. *Might Fair Use Be Applicable in* Bridgeport?

If, in the absence of a *de minimis* analysis, a defendant has the opportunity to claim fair use, why was that defense not raised in this case?

In *Bridgeport*, the fair use defense was not raised because the district court had ruled there was no infringement.[98] By holding that the plaintiff had not satisfied the initial burden of proof, the appropriate result was summary judgment for the defendant.[99] Because the Sixth Circuit reversed and remanded this ruling on appeal and on rehearing, the defense has yet to be addressed.[100] Without the possibility of a *de minimis* analysis, the fair use defense becomes even more critical for the protection of those creative artists who work with the technique of sampling. Significantly, the Sixth Circuit comes very close to making this point themselves.

C. *The Amended Opinion*

The final paragraph of Part II of the Sixth Circuit's opinion in *Bridgeport* simply stated "These conclusions require us to reverse the entry of summary judgment on Westbound's claims against No Limit Films."[101] It is noteworthy that only three months later the Sixth Circuit amended this one-sentence paragraph to hold:

> These conclusions require us to reverse the entry of summary judgment in favor of No Limit Films on Westbound's claims of copyright infringement. Since the district judge found no infringement, there was no necessity to consider the affirmative defense of "fair use." On

---

[97] Recent Case, *supra* note 26, at 1360 (referencing *Ringgold*, 126 F.3d at 77 (holding that the use of a poster reproduction of artist's painting in several scenes of a television show was not *de minimis*)).

[98] *Bridgeport*, 230 F. Supp. 2d at 842.

[99] *Id.* at 842-43.

[100] The broad claim by Joseph Salvo, senior counsel for Sony BMG Music Entertainment that "this ruling has swept the fair-use defense away" is questionable. *Quoted in* Steve Seidenberg, *A Few Notes Play A Wrongful Tune: Court Comes Down on Unlawful Sampling in Rap Song*, 3 No. 37 A.B.A. J. E-Rep. 2 (Sept. 17, 2004).

[101] *Bridgeport*, 383 F.3d at 402.

> remand, the trial judge is free to consider this defense and we express no opinion on its applicability to these facts.[102]

Did the court feel it was necessary to suggest a safe harbor in order to mitigate the effects of its new bright-line rule? Certainly it is the intent of Congress that the applicability of fair use be construed broadly ("there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change.")[103]

D. *The Purpose of Fair Use*

The defense of fair use is a bulwark against the "copyright-rich,"[104] those who have attempted to circumvent the primary purpose of copyright under the Constitution by demanding ever-greater protection for existing copyrights.[105] These owner-creators subvert the very reason the Founders included a limited monopoly in the Copyright Clause of the Constitution: to benefit the public good.[106] This view has been consistently upheld by federal courts as the principal focus of the Clause,[107] and the Supreme Court has clearly stated that "the primary object in conferring the monopoly lie[s] in the general benefits derived by the public from the labors of authors."[108]

Although some commentators would disagree, seen in terms of the above, the defense of fair use is particularly applicable to sampling.[109]

---

[102] Bridgeport Music, Inc. v. Dimension Films, 401 F.3d 647, 651 (2004); rearticulated on rehearing, 410 F.3d at 805; *accord* Recent Case, *supra* note 26, at 1357 n.18. *See also* Stan Soocher, *Bit Parts,* 20 No. 10 ENT. L. & FIN. 8 (Jan. 10, 2005).

[103] H.R. REP. NO. 94-1476, at 66 (1976); *accord* McGraw, *supra* note 7, at 166 ("Congress intended the defense [of fair use] to be a flexible doctrine to accommodate rapid technological change.").

[104] VAIDHYANATHAN, *supra* note 8, at 82 (contrasting the evolution of the motion picture industry from being "copyright-poor" at the beginning of the twentieth century (adapting literary works by writers such as Mark Twain and Jack London without compensation) to becoming "copyright-rich" by the 1970's).

[105] *Id.* at 116 ("[T]wentieth-century copyright law has been a battle of strong interested parties seeking to control a market, not a concerted effort to maximize creativity and content for the benefit of the public."); *accord* Eldred v. Ashcroft, 537 U.S. 186, 266 (2003) (Breyer, J., dissenting) ("I cannot find any constitutionally legitimate, copyright-related way in which the statute [extending the duration of basic copyright protection by 20 years] will benefit the public.").

[106] JAMES MADISON, WRITINGS 756-57 (Jack N. Rakove ed., Penguin Putnam 1999).

[107] *See, e.g.*, Berlin v. E.C. Publications, Inc., 329 F.2d 541, 543-44 (2d Cir. 1964) (upholding parody of lyrics as fair use) ("[T]he financial reward guaranteed to the copyright holder is but an incident of [the] general objective [to benefit the public], rather than an end in itself.").

[108] Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

[109] VAIDHYANATHAN, *supra* note 8, at 145 ("[Sampling] could and should be considered fair use. . . . if copyright law is to conform to its constitutional charge . . . it should allow transgressive and satirical sampling without having to clear permission from original copyright owners."); *contra* Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate*

The Supreme Court has observed, it is "an equitable rule of reason that permits courts to avoid rigid application of copyright statute when, on occasion, such application would stifle the very creativity which that law is designed to foster."[110] Such rigid applications, as notably represented by the decision in *Grand Upright Music* and perpetuated by the Sixth Circuit's holdings in *Bridgeport*, have already had a negative effect on the development of hip-hop music.[111]

VI. LEGITIMATE ECONOMIC CONCERNS

A. *"Mash-Ups"*

Outside of any moral condemnation of sampling as "theft,"[112] some writers have expressed legitimate concern about the possible economic harm sampling may cause.[113] While free dissemination of ideas is essential, it is equally important in some circumstances to protect the preexisting work of other creative artists. There may well be situations where a composer decides to use a larger portion or more significant portion of a source recording rather than a mere two seconds or so which would render the "quantitative" and "qualitative" analyses superfluous.[114] For example, an artist who samples may wish to blend an entire preexisting recording with original material or with other preexisting recordings, creating a new transformative work through this juxtaposition. The resulting works are called "mash-ups."[115]

Copying, Fair Use, 3 UCLA ENT. L. REV. 271, 329 (1996) ("While the fair use defense has some appeal, it is unlikely that it will be upheld by courts outside the context of parody.").

[110] Stewart v. Abend, 495 U.S. 207, 236 (1990).

[111] "Public Enemy's music was affected more than anybody's [by lawsuits and enforcement of copyright laws in the early 1990's] because we were taking thousands of sounds. If you separated the sounds, they wouldn't have been anything—they were unrecognizable. The sounds were all collaged together to make a sonic wall. Public Enemy was affected because it is too expensive to defend against a claim. So we had to change our whole style." Kembrew McLeod, *How Copyright Law Changed Hip Hop*, STAY FREE! MAGAZINE (interview with Public Enemy's Chuck D.) *at* http://www.alternet.org/story/18830 (last accessed Mar. 8, 2005; on file with author).

[112] *Grand Upright Music*, 780 F. Supp. at 183 ("Thou shalt not steal" was the judge's opening statement in this opinion); that quote was noted with approval in *Bridgeport* upon its rehearing, 410 F.3d at 801, n.12.

[113] *See* Szymanski, *supra* note 109, at 322 ("In the absence of a market mechanism to rationally allocate the samples of popular artists [such as the Isley Brothers], it is conceivable that these signature sounds would be wasted by a scramble to use them up as quickly as possible.").

[114] For a discussion of quantitative and qualitative analyses, review *supra* notes 54-60 and the accompanying text.

[115] Annalee Newitz, *Protest Music*, http://www.alternet.org/columnists/story/19164 (July 7, 2004) ("Mash-ups [are] digitally knitted-together compositions made up of two or more popular songs.") (last visited Mar. 8, 2005; on file with author).

One recent, controversial example of a mash-up involves the work of record producer Brian Burton in Los Angeles.[116] Burton, known as "DJ Danger Mouse," layered tracks from The Beatles critically-acclaimed *White Album* (1968) with vocal tracks from rapper Jay-Z's more recent *Black Album*.[117] Calling the resulting CD *The Grey Album*, Burton began sending out copies of his recording until EMI, the Beatles' record company, stopped the distribution.[118] In response to EMI's cease-and-desist action, the activist group Downhill Battle facilitated a one-day download of 100,000 illegal copies of *The Grey Album* over the Internet.[119] While at least one reviewer calls Burton's mash-up "brilliant,"[120] criticism also has been levied that "[i]t's the Beatles' musicianship, songwriting and performing that you're benefiting from. It's the actual recording. That's what they own. They own the masters. You can't take something someone else owns."[121]

If a new recording like *The Grey Album* exceeds the bounds of fair use, might there be another mechanism which could still facilitate its creation and release?

B. *The Byzantine Landscape of Legal Sampling*

"Get a license or do not sample" admonished the Sixth Circuit.[122] But some groups, like the Beatles, never give approval for sampling requests,[123] so even if DJ Danger Mouse had sought to sample the *White Album* through legitimate channels, he never would have received permission to do so.[124] This situation highlights only one of the many problems artists may encounter when seeking to legally sample another artist's preexisting work.[125]

---

[116] *See* Jon Healey & Richard Cromelin, *Pop Music; When copyright law meets the 'mash-up'; Sampling has spawned new art forms - and a complex battle over how to treat them*, L.A. TIMES, Mar. 21, 2004, at E1.

[117] *Id.*

[118] *Id.*

[119] *See* John Soeder, *Listen Up*, CLEVELAND PLAIN DEALER, Mar. 7, 2004, at J6 (the date of the group download, February 24, 2004, was therefore dubbed "Grey Tuesday").

[120] *Id.*

[121] *See* Healey & Cromelin, *supra* note 116 (quoting Chris Carter, host of "Breakfast with the Beatles" on Los Angeles radio station KLSX-FM).

[122] *Bridgeport*, 383 F.3d at 399; rearticulated on rehearing, 410 F.3d at 801.

[123] Healey & Cromelin, *supra* note 116.

[124] One wonders what either of the two deceased members of the Beatles (John Lennon and George Harrison) would have thought about the practice of sampling.

[125] Some commentators do not see these issues as problems; rather they are seen as merely aspects of a functioning free market. *See, e.g.*, Szymanski, *supra* note 109, at 294-98 ("The music industry's private ordering system, while imperfect, is preferable to a compulsory licensing scheme.").

Because the sampling licensing scheme currently utilized in the music industry is *ad hoc*,[126] as noted above, a copyright owner may simply refuse the use of the requested material.[127] Such a refusal could occur whether or not there is unequal bargaining power between the parties.[128] An owner could deny the proposed use if he or she believes it to be controversial (for example, if a new song addresses sex, drugs or violence).[129] Would a refusal like this be a form of censorship or merely an artist choosing to exert control over the integrity of his or her work? Seen from another perspective, although potentially one that is just as troubling, an owner might agree to a proposed use, but then charge an outrageous licensing fee that is disproportionate to the material requested.[130] In a struggle between the haves and the have-nots in the world of copyright, the inequities in bargaining power can have deleterious results.[131]

Further, an artist who samples is under a burden which affects no other type of art form: anyone seeking a license to sample must actually seek *two* licenses: one from the owner of the copyright in the sound recording and one from the owner of the copyright in the underlying musical composition which is embodied in that recording.[132] The owner of one copyright is rarely the owner of both;[133] artists could find

---

[126] *Id.* at 290.

[127] VAIDHYANATHAN, *supra* note 8, at 140 ("When the Beastie Boys wanted to sample the Beatles song *I'm Down*, Michael Jackson informed them that he owned the rights to the song and denied them permission to use it.").

[128] *See, e.g.*, Evans C. Anyanwu, Note and Comment, *Let's Keep It on the Download: Why the Educational Use Factor of the Fair Use Exception Should Shield Rap Music from Infringement Claims*, 30 RUTGERS COMPUTER & TECH. L.J. 179, 189 (2004) (making the point that rap artists generally have weaker bargaining power in licensing negotiations).

[129] VAIDHYANATHAN, *supra* note 8, at 143; *accord* Healey & Cromelin, *supra* note 116 (David Bowie states, "I would not give permission if I felt the work to be morally or politically repugnant.").

[130] *See* Baroni, *supra* note 4, at 91 ("[T]he rap group 2 Live Crew paid roughly $100,000 to use sampled dialogue from the 1987 movie FULL METAL JACKET in their single *Me So Horny*.").

[131] *See* Anyanwu, *supra* note 128, at 199 ("licensing fees . . . financially burden rap artists and frustrate the creative nature of rap music"); *accord* VAIDHYANATHAN, *supra* note 8, at 140 ("the potential costs of sampling . . . retard[ ] the creative process"); *see also* Madeleine Baran, *Copyright and Music: A History Told in MP3's*, http://www.illegal-art.org/audio/historic.html (noting that The Verve, having sampled four bars of the Rolling Stones song *The Last Time* (which became only one track out of 48), was forced by the Rolling Stones' publisher ABKCO "to cede the song's copyright to ABKCO owner Allan Klein, and to give all royalties to Mick Jagger and Keith Richards.") (last visited Mar. 8, 2005; on file with author).

[132] *See* Szymanski, *supra* note 109, at 290-91.

[133] *See* Baroni, *supra* note 4, at 97 ("Most often, the record company that produces the sound recording has exclusive rights to it, and the artist retains the composition rights.").

that they might receive permission and a license from one source but a rejection from the other.[134]

C. *What About Compulsory Licenses?*

To address the roadblocks an artist might encounter in seeking permission to sample a preexisting work, some writers have suggested that sampling be incorporated into the current statutory mechanical licensing scheme.[135] This mechanical licensing scheme enables a new artist to record another artist's work once the latter's recording has been released. In doing so, the new artist need only pay the proper licensing fee; there is no need to seek permission to make the new recording.[136] This licensing scheme was initially devised by Congress as a part of the 1909 Copyright Act to protect against monopolistic practices in the music industry.[137] Such an approach might well work to break similar types of monopolistic practices currently employed in the digital world.[138] However, attractive as this solution might sound, it does not address the economic hardship imposed on new artists if they are required to pay for two licenses to sample.[139]

D. *The Dual Licensing Puzzle*

The dual licensing problem was created by the 1976 Copyright Act; when Congress drafted it, no one could have foreseen the development of sampling in a future digital world of composition. Copyright law provides protection, and separate ownership, for music compositions and sound recordings.[140] The challenge that this structure creates for artists seeking licenses to sample has been recognized and addressed by numerous scholars, though other writers make no mention of such a distinction.[141]

One compromise would be to define the sampling license as a single license wherein the license to the music composition and the license

---

[134] *See* Latham, *supra* note 49, at 146.

[135] 17 U.S.C. § 115 (2003); *see, e.g.*, Achenbach, *supra* note 84, at 206-21.

[136] 17 U.S.C. § 115(a)-(c) (2003).

[137] *See* Achenbach, *supra* note 84, at 207.

[138] *Id.* at 210-11; *accord* Randy S. Kravis, Comment, *Does a Song by Any Other Name Sound as Sweet?: Digital Sampling and its Copyright Implications*, 43 AM. U. L. REV. 231, 273-75 (1993).

[139] *See* McLeod, *supra* note 111 (interview with Public Enemy's Hank Shocklee) ("[Price structures for samples on] one song [can cost] you more than half of what you would make on your album.").

[140] 17 U.S.C. §§ 102(a)(2) & (7) (2003).

[141] *Compare, e.g.*, Szymanski, *supra* note 109, at 292-95 (discussing the two licenses) *with, e.g.*, Maier, *supra* note 53, at 102 (no acknowledgement of two fees).

to the sound recording are merged.[142] The statutory scheme could then divide the rate between the two copyright owners, simplifying the process of application and collection so that the only split would occur on distribution.[143] However, exploring any modification of the statutory license may prove moot. In a recent statement before the Subcommittee on Courts, The Internet and Intellectual Property of the House Committee on the Judiciary, The Register of Copyrights, Marybeth Peters suggested that the § 115 statutory license "should be repealed and that licensing of rights should be left to the marketplace."[144]

E. *And What About Musicians' Rights?*

Finally, some writers have expressed concern that the practice of sampling is taking away the livelihood of musicians and that therefore musicians who have played on sampled recordings also should be compensated by licenses.[145] While the former may be true, the conclusion is misguided. When musicians are owners or part-owners of the sound recording on which they have participated, then the above proposed licensing scheme would fairly address any compensation that they might be due. A musician who is not a participant in the ownership of the copyright (which is more often the case) does not need the same statutory protection since he or she is compensated for the work at the time of the recording session. Musicians concerned about the possibility of their work being sampled certainly can negotiate that consideration into their fee, or the American Federation of Musicians can do it for them, which, in fact, it has.[146] While musicians might ask why they should not be compensated for the sampled use of their playing, one might equally ask why those musicians should be compensated for not having to do anything at all.[147] A sound recording should not be

---

[142] Some writers contend that only the copyright holder of the sound recording should be compensated; that the copyright holder of the underlying musical composition should have no claim on the use of a recording. *See* Baroni, *supra* note 4, at 98 ("sampling does not violate composition rights at all").

[143] *But see* Johnson, *supra* note 9, at 425 ("The benefits of simplification afforded by a compulsory scheme along the lines of section 115 are purely illusory.").

[144] *Section 115 Compulsory License: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the House Comm. On the Judiciary*, 108th Cong. (Mar. 11, 2004) (statement of Marybeth Peters, The Register of Copyrights), *available at* http://www.copyright.gov/docs/regstat031104.html (last accessed Mar. 8, 2005).

[145] Christopher D. Abramson, Note, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection*, 74 N.Y.U. L. REV. 1660, 1662 (1999).

[146] *Id.* at 1674-76; Abramson later claims that the "current agreement between the AFM and the record companies is inadequate." *Id.* at 1683. Even if this were true, it is unclear why Congress should intervene in the contract negotiations.

[147] The line must be drawn somewhere. Should recording engineers who are non-owners be legislatively compensated? How about the technicians who set up the recording session?

equated with a share of stock, the value and dividends of which may be a perpetual source of future income. Such a view does little to support the primary aim of copyright: to further the dissemination of new works for the general public good.

VII. TECHNIQUES OF WESTERN MUSIC COMPOSITION: SAMPLING IS NOTHING NEW

Much has been written about sampling, in both legal journals and the popular press. An unfortunately large selection of this writing demonstrates little, if any, perspective or knowledge of the larger history and methodology of musical composition as it has existed in Western practice for over a thousand years.[148] Sampling is merely a recent technological development that continues underlying concepts found in that practice. As noted above, sampling is the compositional technique of manipulating a recorded fragment of sound from a preexisting recording and then using that fragment as a part of a new composition, realized as another recording.[149] While the technological methodology that enables digital sampling is new, the underlying compositional concepts of borrowing, quotation, commentary and collage are not; these ideas are collectively referred to as "eclecticism."[150]

Eclecticism has been a significant element of the art of music since its early history. J.S. Bach, for example, "was notably eclectic, both for quoting and for manipulating different styles."[151] Further, many of the techniques now associated with sampling (e.g., looping)[152] preexist the development of the technology which enabled their application in a digital context, having been introduced by composers during the forma-

---

Those getting pizza for the band? Significantly, the AFM represents musicians, but excludes composers, who are generally left to fend for themselves in the marketplace. Why shouldn't similar legislation be required to address any inadequate agreements between this latter group of musicians and record companies? Abramson is silent on this matter.

[148] For a welcome and informed exception, *see* Hampel, *supra* note 1.

[149] *See generally* Houle, *supra* note 2, at 880-82.

[150] Bryan R. Simms, Music of the Twentieth Century - Style and Structure 383 (2d ed., Schirmer Books 1996) (1986).

[151] *Id.* Some writers trace the history of sampling solely in the context of African-American and African-Caribbean culture. *See, e.g.*, Henry Self, Comment, *Digital Sampling: A Cultural Perspective*, 9 UCLA ENT. L. REV. 347 (2002) ("The conceptual—though not technological—roots of sampling originate primarily in the rich musical tradition of Jamaica."). Such an analysis is accurate but unnecessarily limiting; it belies the larger reach and importance of the underlying concepts, and how these are shared by composers across time, space and culture. The latter perspective in no way disparages the stream of influence from those more specific generative sources.

[152] "Looping" is the technique of duplicating a short fragment of sound multiple times to create a continuous stream of that sound's particular pattern or content.

tive years of electronic music composition.[153] For example, one of the earliest organizations of composers devoted solely to the composition of electronic music (using tape machines) was formed in Paris in 1951.[154] Out of this association "emerged tape techniques that became standard for decades to follow [including] . . . continuous sound loops, and intercutting (splicing together unrelated or reordered fragments of sound)."[155] Certain of these techniques were developed further by other composers in the 1960's who found parallels to the techniques in other world cultures.[156] Additionally, some conceptual ideas incorporated in manipulating samples (e.g., elongation of certain musical pitches or notes) have antecedents in Western music that are hundreds of years old.[157] In general, these underlying concepts are often central components of music composition, past and present.[158] It is unfortunate that recent technological advances in digital recording media have distracted from these historical antecedents.[159]

A. *Borrowing*

The notion of borrowing musical material to create new works is as old as the history of music.[160] Beginning in the ninth century, the practice of polyphony emerged when composers layered new musical mate-

---

[153] *See generally* ELLIOTT SCHWARTZ & DANIEL GODFREY, MUSIC SINCE 1945: ISSUES, MATERIALS, AND LITERATURE 110-20 (1993).

[154] *Id.* at 112 (The "Group for Research on Musique Concrète" [translation in original] was formed by composers Pierre Schaeffer and Pierre Henri).

[155] *Id.* A thorough discussion of the development of electronic music composition is outside the scope of this article.

[156] *See* STEVE REICH, WRITINGS ABOUT MUSIC 40 (1974) (West African drumming).

[157] *See, e.g.*, PAUL HENRY LANG, MUSIC IN WESTERN CIVILIZATION 130 (1941) (describing how melodies from the earlier part of the Middle Ages [i.e., ninth-century Gregorian chant] were used later in that same period as the underlying foundation for new, transformative compositions; this foundation is called a "cantus firmus" [fixed song] and in the eleventh century it "becomes more and more drawn out while the upper part begins to spin melodies over its sluggish line."). For further references to chant, see *infra* note 161.

[158] *See* Hampel, *supra* note 1, at 586 (arguing that sampling is simply a continuation of long-standing and accepted practices in music composition, such as the use of quotation). A thorough analysis of the general history of music composition is outside the scope of this article.

[159] There are writers who suggest the reason for this seemingly disparate treatment is one of cultural bias (or, more strongly, racism). Because sampling lies at the heart of the creative work found in hip-hop music, which is itself based in African-American culture, such perceptions may not be unreasonable. *See* Neela Kartha, Comment, *Digital Sampling and Copyright Law in a Social Context: No More Colorblindness!!*, 14 U. MIAMI ENT. & SPORTS L. REV. 218, 218-19 (1997); *accord* Anyanwu, *supra* note 128, at 199. The analysis of this position is outside the scope of this article.

[160] *Bridgeport*, 230 F. Supp. 2d at 842 ("Since the advent of Western music, musicians have freely borrowed themes and ideas from other musicians.").

rial on preexisting plainsong melodies.[161] The conceptual essence of this approach had not changed nearly one thousand years later when Beethoven composed sets of variations for the piano, most of which were inspired by popular tunes or contemporary operas.[162] In our own time, the borrowing of musical material from another's work is not only unquestioned as an acceptable compositional technique, it is affirmatively included as a pedagogical tool in the education of student composers, as demonstrated by this assignment in David Cope's *Techniques of the Contemporary Composer*:

> Quote a small segment of your favorite piece of music (other than one of your own) in a work for voice and three available instruments. Make sure the quotation is generally *recognizable*, at least in style, and set it with an appropriate text so that the quote produces a viable and meaningful context for the work as a whole.[163]

Note that one point of the assignment is to produce a work wherein the quotation is clear and recognizable. In light of that direction, it is significant that the assignment makes no mention of any necessity to seek permission or a license to quote the source material. This is not an instruction to student composers to steal preexisting material; rather, it is indicative of a deep-rooted compositional practice that has become accepted over centuries of use.

B. *Distinguishing Borrowing from Adaptation (Derivative Work)*

Borrowing should be distinguished from adaptation. The latter involves the creation of a new work which is based on a preexisting work. Under the statutory definition, a derivative work is one that is based upon a copyrighted work.[164] Therefore, adaptation, as opposed to borrowing, is properly seen as the creation of a derivative work. For example, orchestration (or transcription) of a preexisting work is one type of compositional adaptation. An arrangement of a preexisting work is an-

---

[161] "Plainsong" (also known as plainchant or Gregorian chant) connotes single melodies sung to Latin texts for liturgical purposes. "Polyphony" is the simultaneous singing (or playing) of two or more interdependent musical parts. THE HARVARD BRIEF DICTIONARY OF MUSIC 228-29 (Willi Apel & Ralph T. Daniel eds., 1960). For the development of polyphony, *see generally* ALBERT SEAY, MUSIC IN THE MEDIEVAL WORLD 78-94 (2d ed. 1975).

[162] LEWIS LOCKWOOD, BEETHOVEN: THE MUSIC AND THE LIFE 140 (2003) (Beethoven's variations are "based on themes ranging from Salieri's *Falstaff*... to Singspiel tunes by Peter Winter and Franz Xaver Süssmayr.").

[163] DAVID COPE, TECHNIQUES OF THE CONTEMPORARY COMPOSER 238 (1997) (emphasis added). David Cope is a composer and Professor of Music at the University of California at Santa Cruz.

[164] 17 U.S.C. § 101 (2003).

other such type.[165] Both of these practices have existed for hundreds of years.[166]

For example, Maurice Ravel's *Pictures at an Exhibition* (1929) for orchestra is a complete "retelling" of Modeste Mussorgsky's original composition of 1874 for piano solo.[167] Other examples include Emerson, Lake and Palmer's 1972 rock arrangement of Aaron Copland's *Hoedown* from his ballet suite *Four Dance Episodes from Rodeo* (1942),[168] and Igor Stravinsky's singular arrangement and orchestration of the familiar tune *Happy Birthday*, retitled as *Greeting Prelude*.[169] These compositions are based entirely upon a preexisting foundational source. Unlike borrowing, the totality of these new works is organically affixed to the spine of the generative work. Borrowing finds mere inspiration or a symbolic reflection in the preexisting work; such an approach should invite courts to use a *de minimis* analysis rather than apply the statutory definition of "derivative work."

C. *Quotation*

The compositional technique of quotation should be seen as a form of borrowing, since a composer will generally only be using a small fragment of a preexisting work, rather than an entire work.[170] The essence of the concept is that a composer means to evoke an idea, mood or correlative thought (or multiple such evocations) via associations a

---

[165] *See, e.g.*, SAMUEL ADLER, THE STUDY OF ORCHESTRATION 667 (3d ed., W.W. Norton 2002) (clarifying the difference between transcription and arrangement). The practices of orchestration, transcription and arrangement may or may not overlap, depending on the circumstances involved. Despite this possibility of overlap, the differences between these practices are still more than semantic, but because all three should be considered derivative applications, any such difference is irrelevant to this discussion.

[166] *Id.* at 666 (referring to examples such as Bach's versions of Vivaldi's violin concertos and Franz Liszt's transcriptions of all of Beethoven's symphonies, among others).

[167] MODESTE MUSSORGSKY & MAURICE RAVEL, TABLEAUX D'UNE EXPOSITION (musical score) (Boosey & Hawkes, pocket score, 1942) (translated in the original as "Pictures from an Exhibition"); MODESTE MUSSORGSKY, PICTURES AT AN EXHIBITION (musical score) (Paul Lamm, ed., International Music Co. 1952).

[168] AARON COPLAND, *Hoedown*, *in* FOUR DANCE EPISODES FROM RODEO (musical score) (Boosey & Hawkes, pocket score, 1942); Emerson, Lake & Palmer, *Hoedown*, *in* TRILOGY (Cotillion/Atlantic Records 1972) (LP) (re-release, Rhino Records 1996) (CD).

[169] IGOR STRAVINSKY, GREETING PRELUDE (musical score) (Boosey & Hawkes 1956). Stravinsky wrote this 45-second piece in 1955 to honor the 80th birthday of conductor Pierre Monteux.

[170] A notable exception is the third movement of Luciano Berio's SINFONIA (1968) which is constructed using the entire *Scherzo* from Gustav Mahler's SYMPHONY NO. 2 (1897). For a further discussion of this work in the context of collage, see *infra* notes 197-99 and the accompanying text.

listener may have developed with the quoted material.[171] By placing this material in a new context, the composer uses it not necessarily for the inherent properties of the material itself, but for its symbolic nature (e.g., borrowing as metaphor).[172] While this technique dates back hundreds of years, its use grew dramatically over the course of the twentieth century.[173]

For example, the early American composer Charles Ives (1874-1954) is renowned for his use of quotation, whether for satirical, political or nostalgic purposes.[174] One Ives scholar, John Kirkpatrick, compiled an "Index of Tunes" quoted by the composer in his music.[175]

> This [index] includes over fifty hymns, more than twenty patriotic songs and military tunes, some thirty-five popular songs, about a dozen popular tunes (primarily instrumental), and the same number of college songs, besides 'other music' (quotations from Handel, Haydn, Beethoven, Brahms, Tchaikovsky, Debussy - and his own father).[176]

Ives' resulting complex of original material synthesized with quotations from multiple sources has been described as a "combinational" approach to composition.[177] Here, the art of composition becomes "a matter of balancing and reconciling these divergent elements, and an important aspect of the expressive content derives from the unexpected associations called up by the conjunction. . . . [The borrowed materials thus] are transformed by their surroundings."[178] Compare this analysis to the following description of sampling as a transformational practice in hip-hop music:

> [S]amples are more often than not small portions of songs. These portions are being used in completely different ways in the new songs. Because they are not working in the same way as in the original song, they are inherently different from their sources. . . . They

---

[171] *See* Christopher Ballentine, *Charles Ives and the Meaning of Quotation in Music*, 65/2 THE MUSICAL QUARTERLY 167, 168 (Apr. 1979) ("[The purpose of quotation] is the communication of an *attitude* toward that original occasion - a way not only of hearing but also of responding, feeling, relating, thinking - which is incarnated in the dialectic between, on the one hand, the fragment and the association it activates - its role as a *symbol* - and, on the other, the new musical context.") (italics in original).

[172] *Id.*; *accord* ROBERT P. MORGAN, TWENTIETH-CENTURY MUSIC: A HISTORY OF MUSICAL STYLE IN MODERN EUROPE AND AMERICA 411 (1991) ("[The evocation] . . . placed in unfamiliar surroundings . . . can be transformed into something new and strange, reinterpreted and revitalized through confrontation with the present.").

[173] MORGAN, *supra* note 172, at 410-11.

[174] *Id.* at 141.

[175] GILBERT CHASE, AMERICA'S MUSIC, FROM THE PILGRIMS TO THE PRESENT 415 (rev. 2d ed. 1966).

[176] *Id.* (quotation marks and parentheses in original).

[177] MORGAN, *supra* note 172, at 143.

[178] *Id.*

are pieces of language that generate new meanings in their new contexts. The new meanings are clear and distinct from their original meanings.[179]

D. *Quotation as Comment*

One of the explicit exceptions to copyright infringement under the fair use doctrine is the use of quotation for "comment."[180] Whether the comment is for a political, historical, ironic or some other purpose (or any combination thereof) should be broadly construed in the constitutional interests of free expression. Often, the use of quotation as comment involves multiple layers of interpretation. One such example may be found in a scene from Stephen Sondheim's musical *Merrily We Roll Along* (1984).[181] Based on a 1934 play of the same name,[182] the musical is broadly about friendship.[183] Structured with a reverse chronology, the show begins with the principal characters bitter and isolated from one another and then leads us back through the various stages of dissolution in their relationships. By the finale of the show we encounter three youthful artists and friends, expressing their optimistic hope for the future. This expression of hope is poignant and bittersweet, as we have already seen the tragic scope of their future, crushed by the vicissitudes of life and abetted by their own character flaws.

In a specific scene from Act II, we see a young composer and his lyricist partner auditioning one of their songs for a Broadway producer. Before the quotation is introduced, Sondheim's scene is already layered: the song being auditioned by the characters (*Who Wants to Live in New York?*) is a fragment within the larger musical framework of Sondheim's song (*Opening Doors*), which is ultimately propelling the story.[184] In the scene, the producer hears the composer play a fragment of the song while his lyricist partner sings, but the producer soon interrupts them and "says" (sings):

---

[179] VAIDHYANATHAN, *supra* note 8, at 145. This suggests a more sophisticated use than the Sixth Circuit's limited perspective that artists sample merely to "save costs" or "add something to the new recording." *Bridgeport*, 410 F.3d at 802.

[180] 17 U.S.C. § 107 (2003).

[181] STEPHEN SONDHEIM (music & lyrics) & GEORGE FURTH (book), MERRILY WE ROLL ALONG (musical score) (Revelation Music & Rilting Music 1984).

[182] GEORGE S. KAUFMAN & MOSS HART, MERRILY WE ROLL ALONG (Random House 1934).

[183] CRAIG ZADAN, SONDHEIM & CO. 270 (2d ed., Harper & Row 1986) (1974).

[184] SONDHEIM, *supra* note 181, at 199-224. This structure is itself a reference to the age-old theatrical device of a play within a play (*see, e.g.*, WILLIAM SHAKESPEARE, HAMLET, act 3, sc. 2, 92 (Tucker Brooke & Jack Randall Crawford eds., rev. ed., Yale University Press 1947) (1917)).

Write more, work hard -
Leave your name with the girl.
Less avant-garde -
Leave your name with the girl.
Just write a plain old melodee-dee-dee-dee-dee-dee. . .
Dee-dee-dee-dee-dee-dee. . .[185]

The repetition of the last syllable from the word "melody" is sung to the signature tune of the Richard Rodgers and Oscar Hammerstein II song *Some Enchanted Evening* from their musical *South Pacific* (1949),[186] but it is layered on top of Sondheim's own music, which continues as the accompaniment.[187] The slightly disharmonious result is intended to place what is, by itself, a romantic melodic phrase into a somewhat darker context. The commentary associated with this quotation is subtle, brilliant and amusing in its multiple effects. With one phrase of music, Sondheim simultaneously:

(a) criticizes the conservative nature of Broadway producers who only want to hear more of the same, rather than explore the new;

(b) ironically paints a picture of the way his own work has been received and characterized by some producers and critics;[188] and

(c) acknowledges a debt to one of his most significant forebears, his early mentor, Oscar Hammerstein II.[189]

By using the quotation in this particular dramatic context, Sondheim communicates by symbolic means with those in his audience who understand the *lingua franca* of the American musical theater in the late twentieth century - its musical dialect, history and politics. Sondheim did not seek, nor did he need to seek, permission to utilize this quotation from Rodgers and Hammerstein's musical in order to obtain these effects; such a transformation of the musical fragment involved clearly qualifies as fair use. When rap musicians similarly communicate via comparable uses of preexisting fragments, albeit in the

---

[185] SONDHEIM, *supra* note 181, at 215-16.

[186] RICHARD RODGERS & OSCAR HAMMERSTEIN II, SOUTH PACIFIC 23, at mm. 3-4 (musical score) (Williamson Music 1949); Sondheim alters the last note of the tune.

[187] SONDHEIM, *supra* note 181, at 215-16 (specifically in mm. 164-70).

[188] *Accord* JOANNE GORDON, ART ISN'T EASY: THE THEATER OF STEPHEN SONDHEIM 258 (updated ed. Da Capo Press 1992).

[189] STEPHEN BANFIELD, SONDHEIM'S BROADWAY MUSICALS 12-15 (University of Michigan Press 1993); Sondheim as a teenager lived in Doylestown, Pennsylvania, near the estate of Oscar Hammerstein II. Sondheim recounts an afternoon spent with Hammerstein during which the successful lyricist criticized some of Sondheim's earliest efforts: "I learned in that afternoon more than most people learn about song writing in a lifetime." BANFIELD, *supra*, at 14.

context of sampling, how can one reasonably suggest such communication is not a fair use?[190]

E. *Collage*

In a further examination of this idea, musical works that incorporate fragments of other compositions may "serve as commentaries on memory, time, history and taste."[191] This approach is one that is generally recognized as an accepted aesthetic of postmodern art and culture.[192] For example, collage technique is one of the central ideas behind the work of classical composer Bernd Alois Zimmermann (1918-70). In his orchestral work *Musique pour les Soupers du Roi Ubu* (Music for the Repasts of King Ubu, 1966), fragments of music by Paul Hindemith, Wagner, Mussorgsky and Beethoven are all linked in a fantastic mosaic, presented against a background of Renaissance dances.[193] Zimmermann's entire work is created from these borrowed materials, assembled by the composer using a combinational approach to composition.[194] Underlying this method is Zimmermann's interest in the concept of time. Zimmermann states, "In composition (which is: organization of time) time is in a certain sense 'overcome'; it is brought to a standstill . . . what we call present is only a barrier between past and future."[195] Parallels to this re-contextualization of time have been drawn in discussions on the use of sampling in rap music, described by one writer as "the infusion of urban contemporary styling to classic songs."[196]

---

[190] *See, e.g.*, Greg Dimitriadis, *Hip-Hop: From Live Performance to Mediated Narrative*, 15 No. 2 POPULAR MUSIC 179, 186 (1996) ("[The rap group] Public Enemy envisioned an Afro-American community which could be linked together through postmodern media technology.").

[191] SCHWARTZ & GODFREY, *supra* note 153, at 243.

[192] *See, e.g.*, Jonathan D. Kramer, *Beyond Unity: Toward an Understanding of Musical Postmodernism*, *in* CONCERT MUSIC, ROCK, AND JAZZ SINCE 1945: ESSAYS AND ANALYTICAL STUDIES 28 (Elizabeth West Marvin & Richard Hermann eds., 1995) ("Pastiche and collage, primary forms of postmodern discourse, encourage the perceiver to make his or her own perceptual sense of a work of art."). A closer examination of the aesthetics of postmodernism is outside the scope of this article.

[193] SCHWARTZ & GODFREY, *supra* note 153, at 246; *see also* MORGAN, *supra* note 172, at 411-12.

[194] While the music of Wagner, Mussorgsky, Beethoven and the Renaissance dances would all be public domain, the music of Zimmermann's contemporary, Paul Hindemith, conceivably would have been protected by copyright.

[195] SCHWARTZ & GODFREY, *supra* note 153, at 246-47 (parentheses and ellipsis in original).

[196] Anyanwu, *supra* note 128, at 191 ("[The use of] samples that are immediately apparent [is] a technique that I call creative nostalgia.").

Another example of collage is the third movement of Luciano Berio's orchestral work *Sinfonia* (1968).[197] Berio utilizes the *Scherzo* from Gustav Mahler's *Symphony No. 2* (1897) as the foundation for his own assemblage of both musical and spoken material.[198] In Berio's composition, the Mahler work serves as the primary layer, while other fragments are built upon it.[199] This compositional concept (the layering of materials) harkens back to Medieval polyphony[200] but has been a central part of the postmodern aesthetic since the late twentieth century. It surely is not a coincidence that such layering appeared in the world of hip-hop composition at exactly the same time:

> As it emerged on the American music scene in the late 1970s, hip-hop music was composed of two layers of creative raw material. On the top was the vocalization, the rap itself; underlying the rap tracks is the bed of music.[201]

VIII. WHITHER MUSIC?

As this brief overview of Western music composition demonstrates, the underlying concepts and aesthetics of sampling have long been a part of this art form's history. While the recent technological development of sampling clearly raises issues in relation to copyright law, it should not be seen as some Hydra that will bring about the ruin of music and the livelihood of musicians.[202] Gradually extending copyright protection in both length and scope is contrary to the growth of a healthy creative environment and culture. It is also contrary to constitutional principles that support the higher purpose of furthering the public good, rather than mere profit-taking and near-perpetual control of art by "owners." What has been lost in the debate over sampling is this simple point: the incentive of copyright protection is not the goal. When such a metamorphosis takes place, furthered by ill-considered bright-line rules, then we may truly fear the ruin of Music.

---

[197] LUCIANO BERIO, SINFONIA (musical score) (Universal Edition 1968).

[198] GUSTAV MAHLER, SYMPHONY NO. 2 (musical score) (rev. ed., Universal Edition 1971). The musical references range from Monteverdi to Stockhausen; the spoken text includes excerpts from Samuel Beckett's novel THE UNNAMEABLE. *See* MORGAN, *supra* note 172, at 412-13.

[199] *Id.*

[200] See *supra* note 161 and the accompanying text.

[201] VAIDHYANATHAN, *supra* note 8, at 134-35.

[202] *See, e.g.*, Abramson, *supra* note 145, at 1668; *contra*, The Norman Lear Center, *Ready to Share: Fashion and the Ownership of Creativity*, http://www.learcenter.org/html/projects/overview1.php?cm=ccc/fashion (this was an event held January 29, 2005, at the USC AnnenbergNorman Lear Center in Los Angeles which "explored the fashion industry's enthusiastic embrace of sampling, appropriation and borrowed inspiration, core components of every creative process.") (last visited Mar. 8, 2005; on file with author).

A balance needs to be struck between copyright holders and creators of new work, and Congress and the courts must strive for equity in seeking this balance. In doing so, a variety of options should be woven into the fabric of the law. Courts should maintain the possibility of a *de minimis* analysis and support the doctrine of fair use if it is applicable to the circumstances of a given case. Additionally, Congress should redesign the compulsory license system to accommodate more significant uses of preexisting recordings. Such a legal and legislative framework will better address copyright issues within the complex nexus of music composition, sound recordings and digital sampling in the twenty-first century.

* * *

A rose, carefully preserved and framed under glass, may be a thing of beauty and a fascinating object to ponder, but - once taken from the garden and so mounted - it becomes incapable of regeneration. While part of the basis of its beauty is this timeless perfection, the illusory order and calm invites moribundity. When creative musical thought is so encased, can the withering of culture, and perhaps its death, be far behind?