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Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court's Attempt to Afford "Sound" Copyright Protection to Sound Recordings

Tracy Reilly



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Tracy L. Reilly*

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* Assistant Professor of Law, University of Dayton School of Law, Program in Law & Technology. The Author would like to thank Megan Thomas for her excellent research and editorial efforts, as well as Dean Kloppenberg and the UDSL faculty and staff for their support. She is also grateful to Mark Budka for his technological insights and constant inspiration, Joe Bogdan for his helpful comments and Professors Dave Myers and Derrick Carter for their assistance and encouragement. Thanks also to the staff members of the *Columbia Journal of Law & the Arts* for recognizing the potential in this article.

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INTRODUCTION

Imagine you are a markedly successful and famous lawyer who has laboriously worked your way up the long ladder of success through the years and is now enjoying the fruits of your labor. You are renowned for your unique style and contributions to the legal field and have gained deserved respect from your colleagues and clients, who flock to you in droves for your services. Now imagine that you head into the office one morning to find a first-year associate from another law firm with radically divergent ideologies than your own, sitting in your office, at your stuffed leather chair, going through your computer files and lifting exact portions of the language written in your latest appellate brief to incorporate into his own work. When you question this behavior, his response is that, as a "new" lawyer, he is constitutionally "entitled" to "borrow from" and "quote" your work product in order to develop his own. Besides, you shouldn't have the right to balk; you are accomplished and financially secure; you likely won't even notice that he has taken a tiny portion of this one brief of the many for which you are famous. In fact, you should be *honored* that he is paying homage to your material and not that of some other lawyer, regardless of the nature and quality of his resultant work in which your original material will appear and regardless of the fact that a majority of your peers would find that his work contains your "signature" style and essence and, therefore, your imprimatur.

The legal field would not tolerate such insidious behavior—it would be called what it is: breaking and entering and intellectual property infringement—and would be prosecuted accordingly. Why then, should the music industry tolerate similar behavior that is being rampantly undertaken in the form of digital sampling?

While the technological advancement of recording equipment through the years has enabled musicians to perform more efficiently in the studio to produce quality recordings, that same technology has caused other "riffs" in the recording industry. The studio recording technique known as digital sampling, whereby one musician uses another musician's previously recorded material in order to help create his new recording, has caused a divide in the music industry between those who believe that such use amounts to an art form in itself and should be tolerated and others who believe that it is theft of another musician's art, analogous to the situation in the preceding example.

Since the emergence of technology in the late 1970's that enabled the practice of sampling, courts and legal scholars alike have failed to fully appreciate the true

nature and consequences of allowing legally unchecked digital sampling—that is, until the recent decision in *Bridgeport Music, Inc. v. Dimension Films*, holding that defendants' unlicensed sampling of three notes of a copyrighted sound recording constituted a *per se* infringement or a taking that could not be defended with a *de minimis* argument.¹ The *Bridgeport Music* decision marked the first time a court hearing a sampling case (a) truly discerned the subtle but existent differences between sampling a musical composition and sampling a sound recording and (b) applied the Copyright Act accordingly.

The *Bridgeport Music* court recognized that the recording studio is the place where all the talents and creative ideas of each individual band member are technologically intertwined to produce a single melodic expression of the group as a whole.² The band often spends numerous hours in the studio "getting the sound right,"³ and the final cut often results in a top-selling hit song that reflects what is commonly referred to as the band's "signature sound,"⁴ or a distinctively recognizable combination of instrumental and vocal sounds by which the listening audience identifies the band and forms an affiliation with, or "following" of, the band.

Written with full support for the position that the sampling technique is properly recognized as an art form in and of itself,⁵ this Article nonetheless asserts that unethical and unlawful use of a certain kind and/or a certain amount of a sampled musician's⁶ prior work amounts to copyright infringement if the owner of the sound recording that has been sampled has not consented to such use. Part I of this Article will provide an overview of the history and continued growth of the modern technology that enables digital sampling. Part II will discuss the response of the courts and the music industry to sampling, including the courts' various and inconsistent attempts to reconcile sampling practices with the current language of

1. *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830 (M.D. Tenn. 2002), *rev'd.*, 383 F.3d 390 (6th Cir. 2004), *aff'd on reh'g*, 410 F.3d 792 (6th Cir. 2005).

2. See *Bridgeport Music*, 410 F.3d at 801-02 (appreciating that "even when a small part of a sound recording is sampled, the part taken is something of value").

3. For example, members of the popular rock band of the 1970's, Led Zeppelin, spent several twelve-hour days in the studio while recording the band's seventh album, *Presence*. Guitarist Jimmy Page laid down at least six overdubs for one song, "only stopping when his aching fingers could no longer move." When the song, "Achilles Last Stand" was finished, it was over ten minutes long. See RICHARD COLE WITH RICHARD TRUBO, *STAIRWAY TO HEAVEN: LED ZEPPELIN UNCENSORED* 274 (1992).

4. See Jason H. Marcus, *Don't Stop That Funky Beat: The Essentiality of Digital Sampling to Rap Music*, 13 HASTINGS COMM. & ENT. L.J. 767, 769 (1991). Other commentators characterize the unique sounds of an individual musician's work as her "creative persona." See 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, 371 (1994).

5. See *infra* note 182 and accompanying text.

6. Throughout the remainder of this article, the "sampled" musician or the "original" musician will refer to the musician or musicians who create(s) a new song by playing original material on musical instruments in the studio (including, where applicable, contributors such as sound engineers, producers and mixers) while the "sampling" musician or the "sampler" refers to the musician or musicians (and other relevant contributors) who digitally sample(s) a prior existing recording owned by someone else in order to create a new song.

the Copyright Act and other laws. It will also include a detailed discussion of the *Bridgeport Music* case. Part III will summarize the continuing moral and ethical debate in the music industry over whether sampling is "art" or merely "theft" by dispelling three common myths about the process of sampling that have been asserted as truths by legal scholars in the last few decades: (1) that sampling is a practice that is analogous to borrowing, quoting or imitating prior works owned by others; (2) that sampling is a legitimate art form such that samplers should be entitled to freely use other musicians' original copyrighted material; and (3) that society must err on the side of giving more protection to samplers than to original musicians in order to achieve the proper balance of copyright protection as mandated by the Constitution. This part will also illustrate why—up until the *Bridgeport Music* ruling—legal precedent and industry practices that had evolved based upon these myths protected neither the sampling musician nor the sampled musician. Finally, Part IV of this Article will provide a proposed solution that is in accordance with the general legal principles set forth by *Bridgeport Music* and that would, if adopted, encourage the growing art of sampling while protecting the rights of those artists who are sampled—a proposal that the music industry develop a voluntary licensing scheme to regulate the sampling process which would foster the process of creating new musical compositions while protecting against unauthorized sampling.

I. THE NATURE AND HISTORY OF SAMPLING A SOUND RECORDING

Before any meaningful debate over the extent to which songs can be legally sampled occurs, it is imperative to fully understand the history of and technology behind sampling. Importantly, it must be clear that the technology enabling cost-effective and viable digital sampling did not even *exist* as a creative option for musicians until the late 1970s. In fact, the capacity to record sounds in *any* manner dates back only around one hundred years to inventions created by Thomas Edison in the late nineteenth century, prior to which time "sound was bound inherently to its source."⁷

A precursor to what would later develop into the procedure known today as sampling actually began as a live, manual procedure whereby Jamaican disc jockeys would use analog sound systems in discotheques to "engage in audio combat with one another" by chanting over records or improvising lyrics.⁸ Engineers later realized that elements of a recording could be manipulated to create a "dub," or an infinite number of versions from the raw components of any recording.⁹ In the 1960s, the dub made its way from Jamaica to the United States where disc jockeys began to establish the techniques that would eventually lead to

7. Tyrone McKenna, *Where Digital Music Technology and Law Collide – Contemporary Issues of Digital Sampling, Appropriation and Copyright Law*, J. OF INFO., L. AND TECH. (2000), http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000_1/mckenna/.

8. David Sanjek, "Don't Have to D.J. No More": *Sampling and the "Autonomous" Creator*, 10 CARDOZO ARTS & ENT. L.J. 607, 610-11 (1992).

9. *Id.* at 611.

sampling in the recording studio by means of digital technology.¹⁰

The first sampling machine that became widely available was the 1979 Fairlight Computer Music Instrument ("CMI"), which sold for \$28,000.¹¹ As with all technology, however, the development of sampling machinery through the years has led to the availability of far less expensive and more efficient applications to the public at large.¹² In 1986, the Fairlight Series III Synclavier Digital Music System was considered the top of the line, selling from approximately \$70,000 to \$300,000, whereas a more moderately priced system such as the Emulator keyboard made by E-mu Systems could have been purchased for around \$2,600.¹³ At that same time, Casio's SK-1 micro keyboard with a built-in microphone sold for around \$100, proving that "sampling for the masses [had] arrived."¹⁴ In the mid-1990s, high-end sampling equipment such as the E-mu E-4 series was available for purchase for around \$6,000.¹⁵ The latest E-mu Systems version, Emulator X2, currently sells for approximately \$400 and allows the sampler "to record samples directly into software using techniques familiar to hardware sampler users."¹⁶

All of this technology has allowed musicians to accomplish in the studio something that they had not been able to do before: literally "lift" another musician's identical work by recording an existing fragment of the actual work from analog to digital format, after which the resulting stream of numbers representing a sonic wave form can be manipulated by the sampling musician in various ways to become part of his new work.¹⁷ To achieve these results, the

10. *Id.* Local disc jockeys would team together to provide a show of rhymes, commentary and catch phrases over the mixed music and drum beats. Original sounds were created when the disc jockeys "scratched" on two or more turntables. See Marcus, *supra* note 4, at 769-70.

11. See Falstrom, *supra* note 4, at 360 n.5.

12. Matthew S. Garnett, *The Downhill Battle to Copyright Sonic Ideas in Bridgeport Music*, 7 VAND. J. ENT. L. & PRAC. 509, 510 (2005).

13. Steven Dupler, *Digital Sampler Prices*, BILLBOARD, Aug. 2, 1986, at 74.

14. *Id.*

15. Telephone interview with Kurt Boesinger, Professional Audio Technician for *Electronic Innovations*, in Detroit, Michigan (Oct. 21, 1995). Prices for the most sophisticated sampling equipment manufactured by companies such as Fairlight and Synclavier remained at \$50,000 and higher in the 1980s. These systems provided optical disc-based recording, so that the musician could record and sample at the same time on an unlimited number of tracks. Regardless, many professionals in the studio recording industry will use a range of different sampling machines for different needs throughout the span of their careers. See Lily Moayeri, *Strategic Alliance*, REMIX (Jan. 1, 2005), available at http://remixmag.com/artists/remix_strategic_alliance/ (last visited April 3, 2008).

16. See Geary Yelton, *Powerhouse Samplers*, ELECTRONIC MUSICIAN (June 1, 2007), available at http://emusician.com/sfinstruments/powerhouse_samplers/index1.html (last visited Mar. 26, 2008). For an interesting history of the development of E-mu sampling technology and a description of current machinery, software and other accessories, see *Product History*, <http://www.emu.com/corporate/history/timeline.asp> (last visited Mar. 26, 2008).

17. For example, the sampling musician can alter some parameters of the sampled work (e.g., pitch), while leaving others (e.g., timbre) intact. See Marcus, *supra* note 4, at 768-69. Other ways that sampled material can be manipulated include running the sounds backwards, chopping beats and deleting or adding beats. See Mac Randall, *Riffs for Sale*, MUSICIAN, Aug., 1995, at 54. Though there is a wide range of potential manipulation, sounds produced by sampling are largely dependent on the original sounds. Since sampling cannot manipulate the timbre (distinctive tonal qualities) of sampled sounds, the sampled sounds "invariably retain their unique qualities." See Michael L. Baroni, *A Pirate's*

modern musician uses computer technology known as Musical Instrument Digital Interface ("MIDI") that was produced in 1983 by industry-wide cooperation and allows sampling machines manufactured by different companies to "communicate seamlessly."¹⁸ MIDI converts sounds into a series of computer signals that can be stored on, and retrieved and manipulated by, a computer.¹⁹ Playback of the stored sounds is accomplished by connecting a piano-type keyboard to the sampler and striking its keys.²⁰ Sampled material is "mapped" in different patterns to the MIDI keyboard; when the keyboard is then played loudly or softly, resultant patterns of different sounds can emerge.²¹ The process of recording a sample requires only setting a level and pressing the record button.²²

The popularity of sampling has also created an additional market for "sample libraries," or CD-ROM discs that feature sounds and effects of various artists or particular instruments.²³ Many sample libraries include samples from exotic or cumbersome instruments that many musicians cannot afford, find or tolerate to work with in the studio or onstage.²⁴ While sample libraries were at first intended for use by the very artists who created the original recordings for convenience purposes in recording,²⁵ they can now be easily and cheaply purchased by the ordinary consumer.²⁶ In fact, some of the world's most renowned musicians are now selling their most famous sounds to other musicians.²⁷

Palette: The Dilemmas of Digital Sound Sampling and a Proposed Compulsory License Solution, 11 U. MIAMI ENT. & SPORTS L. REV. 65, 70 (1993). For an explanation of the various techniques and methods of sampling from using a minimal underlying beat to a process called "quilt pop," where several old recordings are used to create a musical "montage," see Sanjek, *supra* note 8, at 612-15. For an exhaustive technical explanation of sampling, see Molly McGraw, *Sound Sampling Protection and Infringement in Today's Music Industry*, 4 HIGH TECH. L. J. 147, 148-51 (1989).

18. Garnett, *supra* note 12, at 510.

19. Sanjek, *supra* note 8, at 608. Before the sound is stored onto the computer in digital form known as "bits", it is sent through a microphone and a converter. See Sherri Carl Hampel, Note, *Are Samplers Getting a Bum Rap?: Copyright Infringement or Technological Creativity?*, 1992 U. ILL. L. REV. 559, 560 (1992).

20. Sanjek, *supra* note 8, at 612.

21. Randall, *supra* note 17, at 54. For an excellent discussion of the history of sound recording technology, including sampling, see generally McKenna, *supra* note 7.

22. Sanjek, *supra* note 8, at 612. As one commentator describes the process, "in effect, if one can type, one can compose." *Id.* at 608.

23. While most sample libraries for sale feature basic instrumental sounds and effects, others go as far as including whole riffs, phrases, and slides. Randall, *supra* note 17, at 47-48.

24. *Id.* A good example of such an instrument is the EMS VCS3 synthesizer. The hit Led Zeppelin song "In the Light" was created with the EMS VCS3 in the studio, but was never performed live because the EMS VCS3 was difficult to keep in tune and caused too many problems onstage. See CHARLES R. CROSS & ERIK FLANNIGAN, *LED ZEPPELIN: HEAVEN AND HELL* 139 (1991).

25. Randall, *supra* note 17, at 48.

26. For example, a music magazine advertisement entitled *The New Wave of Samples* offers over twenty different sample libraries for purchase by mail order. One library entitled *Drumscapes* contains thirteen complete studio drum tracks plus 450 samples from the drummers of the bands Foreigner and Quarterflash. See *MUSICIAN*, Aug., 1995, at 53. Utilizing a few of these discs, the ordinary consumer may find it possible to assemble "the world's greatest session band" in his own home. See Randall, *supra* note 17, at 47.

27. Keith Emerson, from the band Emerson, Lake & Palmer, has released a sample library entitled *World's Most Dangerous Synth and Organ*, which contains a sample of the band's famous song.

Sampling has become widespread, not only in the professional recording industry, but also in the home of the "everyday" musician.²⁸ Today, synthesizers, drum machines, effects processors, and other "instruments" all work in conjunction with digital sampling machines and are often "bundled" into software packages for use on personal computers; therefore, any person who can purchase such software (for around \$500) and who also has a microphone, a computer and a collection of CDs has most of the tools necessary to produce a hit song.²⁹

With such rapid technological advancement of sampling instrumentality in recent years, several questions have arisen regarding both the ethical and the legal ramifications of the phenomenon. The rights and responsibilities both of the sampled musician and the sampling musician continue to be a topic of heated debate throughout the music industry and in the courts.

II. THE DEVELOPMENT OF LAWS AND RECORD INDUSTRY POLICIES IN RESPONSE TO DIGITAL SAMPLING PRACTICES

Digital sampling has been a source of legal controversy due to a lack of uniform standards by which to assess its legitimacy.³⁰ Because the commercial use of samples is a relatively new phenomenon, there are many gray areas surrounding the legal ramifications of the practice.³¹ Due to this lack of certainty, many musicians find themselves speculating as to whether their sampled use of another musician's material will result in a legal controversy.³²

Although many commentators³³ have rightly noted that musicians who use sampled material in their works are in a quandary because the laws are "all mixed up," it cannot be disputed that the original musician finds just as much discomfort in existing laws regarding the process of sampling. When an original musician believes that a sampling musician has appropriated his prior work, the original

"Lucky Man." Whereas musicians have done "anything and everything" to imitate the sounds from this song for years, today it is possible to get the exact reproduction with the push of a computer key. See Randall, *supra* note 17, at 47.

28. In the early days of sampling, there were mainly two groups who extensively used the sample libraries: professionals who sought multi-sampled instrument sounds, and "hip hoppers" who sought phrase samples; however, as sampling scholars in the 1990's predicted, now that technology has become more affordable these groups have expanded to include the "gigging player" and the "home-brew producer." *Id.* at 48.

29. Garnett, *supra* note 12, at 511 (demonstrating that because software products such as "Cubase SX" and "Reaktor 4" incorporate all necessary components of a professional recording studio, musicians with "deep pockets" and expensive studios no longer represent the exclusive market for today's sampling technology).

30. Falstrom, *supra* note 4, at 360.

31. Calix Lewis Reneau, *The Last Word on the Legality of Home Studios*, pt.1, RECORDING, Mar., 1995, at 32.

32. See Jim Aiken, *Safe Sampling: How to Use Loop Source CDs & Still Sleep Soundly*, KEYBOARD, Feb., 1995, at 67 (offering practical and common-sense guidelines for the sampling musician who wishes to use sampled material without suffering adverse legal consequences).

33. See, e.g., Amanda Webber, *Digital Sampling and the Legal Implications of its Use After Bridgeport*, 22 ST. JOHN'S J. LEGAL COMMENT 373, 392-406 (2007) (noting the lack of clear legal precedent in the area of digital sampling).

musician has historically turned to existing laws, such as the Copyright Act and various state law doctrines for protection and compensation.³⁴ These laws, which have varied in meaning and effect on a state-by-state basis and case-by-case determination, largely shaped music industry standards that were also conflicting and unpredictable. As the following discussion will show, prior to the Sixth Circuit's holding in *Bridgeport Music*, neither sampling musicians nor sampled musicians were protected sufficiently by these laws and music industry practices.

A. THE COPYRIGHT ACT

The United States Constitution grants Congress the authority to promote creative original works by enacting laws that secure exclusive rights to those works.³⁵ Exercising this power, Congress first codified exclusive rights to authors of works in the Copyright Act of 1790.³⁶ Currently, the Copyright Act of 1976, as amended (the "Copyright Act" or the "Act"), is the set of federal laws that protects works of authors and artists, including musicians.³⁷

Under the Copyright Act, a musician has established a copyright in a song if it is an original work of authorship that is fixed in a tangible medium of expression.³⁸ Once a musician has secured a copyright in his work, the Act provides that musician with various exclusive rights that he may exercise in reference to the copyrighted work: reproduction, derivation, distribution, performance and transmission.³⁹ When another person interferes with any of these exclusive rights, the copyright owner can bring a cause of action for copyright infringement.⁴⁰

The first problem with the Copyright Act in the area of digital sampling is that

34. See 17 U.S.C. § 101 *et seq.* (2006); see generally Note, *A New Spin on Music Sampling: A Case For Fair Play*, 105 HARV. L. REV. 726 (1992). For a complete discussion of how some musicians have attempted to rely on the state doctrines of the "right of publicity," "misappropriation" and the doctrine of "moral rights," see *infra* Section III.B and accompanying notes.

35. Specifically, Congress has the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

36. See DONALD S. CHISUM & MICHAEL A. JACOBS, UNDERSTANDING INTELLECTUAL PROPERTY §4B, 4-7-4-9 (1992).

37. 17 U.S.C. § 101, *et seq.* (2006).

38. 17 U.S.C. § 102(a)(2) (2006) (protecting under copyright "musical works, including any accompanying words"). Besides the federal copyright law, there also exists a body of American common law rights that developed around the Act which has produced two separate concepts of copyright regimes: the common law copyright and the federal statutory copyright. See ARTHUR R. MILLER AND MICHAEL H. DAVIS, INTELLECTUAL PROPERTY: PATENTS, TRADEMARKS, AND COPYRIGHT 290-91 (2000). For a succinct, yet thorough, explanation of the history and scope of common law and statutory copyright, see generally Dale P. Olson, *Copyright Originality*, 48 MO. L. REV. 29 (1983).

39. 17 U.S.C. § 106. Unlike the copyright in "musical works" and in other types of works, which give authors additional rights, the Copyright Act limits the exclusive rights for "sound recordings" by protecting only against physical misappropriation and digital transmission. See CHISUM & JACOBS, *supra* note 36, §4C[1][e] at 4-37.

40. A lengthy discussion of the procedures and requirements of establishing a cause of action for copyright infringement is beyond the scope of this article. For an exhaustive treatment, see CHISUM & JACOBS, *supra* note 36, §4F at 4-153. See also Sanjek, *supra* note 8, at 618-20 (discussing how the Copyright Act specifically relates to digital sampling).

sampling implicates two distinct copyrights—one in the underlying musical composition and another in the sound recording itself.⁴¹ The copyright in the underlying musical composition protects only the arrangement of notes and lyrics that together make up a song.⁴² Once a composition is created, the musician can take the work into the studio and create an infinite number of different sound recordings of the composition (commonly referred to as mixes, versions or cuts), each of which is the subject of a separate copyright.⁴³ For example, once the Beatles wrote the musical score and lyrics for the popular song “Eight Days a Week”, they had created a musical composition. Every time they took that particular composition into the studio thereafter and recorded a different version of it (e.g., one with a flute accompaniment, another with female back-up singers and a third as an acoustic guitar mix), they were creating separate sound recordings, each of which was separately copyrightable.⁴⁴

Although copyright rights—like real property rights—are fully assignable and licensable, it is well-accepted that nothing in the law affirmatively requires the copyright owner of either the sound recording or the composition to license their works to other musicians for digital sampling purposes.⁴⁵ Therefore, a musician who intends to sample material from an original copyrighted work legally faces two potential licensing fees.⁴⁶ To complicate matters even more, the composition copyright is usually held by a music publishing company or, less commonly, by the artist himself, while the sound recording copyright is typically held by a record company that bargains for the right upon the signing of new musicians.⁴⁷ Most

41. *A New Spin*, *supra* note 34, at 731-32.

42. 17 U.S.C. § 102(a)(2). In order to bring a claim supported by federal copyright protection for a musical composition, the owner must file a form “PA” (Performing Arts) to register the song with the U.S. Copyright Office. PA works are intended to be performed directly to an audience or indirectly by means of a device or process. Performing Art Works Registration, U.S. Copyright Office, <http://www.copyright.gov/register/performing.html> (last visited Mar. 26, 2008).

43. 17 U.S.C. § 102(a)(7). To bring a claim supported by federal copyright for each recorded version of a musical copyright, the owner would not file a PA form in the Copyright Office, but instead would secure a SR (“Sound Recording”) form. SR works are those resulting “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.” 17 U.S.C. § 101 (defining “sound recordings”); *see also* Sound Recording Registration, U.S. Copyright Office, <http://www.copyright.gov/register/sound.html> (last visited on Mar. 26, 2008).

44. These examples are purely hypothetical and used by the author solely to demonstrate the difference between securing copyright in a composition and subsequent copyrights in a sound recording.

45. *See* 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).

46. *Id.* The sampling musician is thus also faced with threats of lawsuits from several potential sources. EMI Music Publishing has a staff of employees whose only job is to listen to newly released records for unauthorized sampling of its copyrighted songs for the purpose of dissuading musicians from sampling original material without a license. *See* Falstrom, *supra* note 4, at 361 n.7. For an informative discussion of how overlapping rights in music copyrights makes music licensing an extremely complicated matter that has “wreaked havoc among music industry players,” *see* W. Jonathan Cardi, *Über-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835, 852 (2007).

47. *A New Spin*, *supra* note 34, at 727 n.7.

music sound recordings are owned by the major record labels—Universal Music Group, Sony-BMG Music Entertainment, Warner Brothers Music, and EMI Group—who typically claim exclusive ownership of sound recordings through recording contracts and assignments of ownership from the musicians, producers and technicians who actually create the recordings in the studio.⁴⁸

Sample licenses may be as high as \$5,000 in buyout fees for a three-second sample that is “looped.”⁴⁹ Fees can be similarly high if the original artist and/or the sampled song is well-known.⁵⁰ If the sampling artist cannot afford such fees, he will often gamble by using the sample without obtaining a license in hope that the original artist will either not learn of the use or find it too troublesome to sue.⁵¹ If the sampling musician is not the gambling type, yet still cannot afford high licensing fees, he may abandon altogether his mission to use the sample.⁵² Since a major purpose of the Copyright Act is to encourage artistic productivity for the “public good,”⁵³ many believe that such a phenomenon thwarts the general policy objectives of copyright law.

48. Cardi, *supra* note 46, at 848. For an interesting debate about whether the “big five” record companies’ standard contracts are disproportionately unfair to signing musicians, see Phillip W. Hall, Jr., *Smells Like Slavery: Unconscionability in Recording Industry Contracts*, 25 HASTINGS COMM. & ENT. L.J. 189, 190 (2002) (stating that the recording industry’s use of standard recording contracts “has forced artists into a position that some have said amounts to professional slavery”). But see *Brungard v. Caprice Records, Inc.*, 608 S.W.2d 585, 587 (Tenn. Ct. App. 1980) (observing the economic reality that it is the record company—not the signing musician who is usually an unknown artist when entering into the recording contract—who bears the entire risk of loss from all the costs of producing and distributing the record, which may never ultimately succeed in the marketplace). For an informative treatment of the process of rescinding an allegedly unconscionable recording contract, including several examples of lawsuits filed by musicians against their record companies and noting attempts by artists to get relief from their contracts by filing bankruptcy, see Todd M. Murphy, *Crossroads: Modern Contract Dissatisfaction As Applied to Songwriter and Recording Agreements*, 35 J. MARSHALL L. REV. 795, 806-817 (2002). For examples of specific provisions contained in standard recording contracts that address the consequences of musicians’ use of sampled material, see *infra*, Section III.C and accompanying notes.

49. See Garnett, *supra* note 12, at 519. Once recorded from the original song, a sample can be “looped,” or played back continuously throughout the sampler’s new song. While drums and other percussion instruments are commonly looped, many types of other samples can also be looped. In fact, special software that specializes in creating loops can be obtained by today’s samplers. See <http://www.comvan.com/2008/03/29/fruityloops-studio-80/> (last visited on April 3, 2008).

50. See *A New Spin*, *supra* note 34, at 729. Many rap musicians who frequently incorporate samples claim to pay a disproportionately high license fee since they are commonly not represented by attorneys and have little bargaining power over the chieftains of the music industry. See *id.* at 729 n.13.

51. Falstrom, *supra* note 4, at 361 n.7 (noting that experts have estimated that sampling musicians utilize the practice of “sneaking” samples in nearly fifty-percent of cases). Occasionally the sampling musician will go to great lengths to clear samples. For example, when the Beastie Boys wanted to use 400 samples in a new recording, their attorney Ken Anderson personally contacted each of the sampled artists and got clearance for all of them with hardly any cost. This, however, is unfortunately “the exception and not the rule.” Marcus, *supra* note 4, at 768.

52. Falstrom, *supra* note 4, at 375 (stating that the reason why rap musicians often abandon their mission is because they cannot achieve their intended effect of referring to a prior work “note-for-note” if they cannot directly sample that prior work).

53. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (noting that the general intent of the Copyright Act is not merely to reward authors of creative works, but to ensure the benefits enjoyed by the general public from the labors of authors).

Additionally, the sampling musician who intends to secure licenses for the use of original material may often find it difficult to find the original source and the copyright ownership of some samples.⁵⁴ For example, an artist who wanted to use a sample from the original recorded version of "Eight Days a Week" in his song may be surprised to learn that the creators and performers of that song—the Beatles—have absolutely nothing to do with licensing that use today. The artist would have to contact Sony/ATV Music Publishing and Michael Jackson to obtain rights to use the composition and, furthermore, would also have to separately bargain with Capitol Records (a subsidiary of EMI) to obtain a license to use the sound recording from which he would take the sample.⁵⁵

Because the original musician is likely not the named holder of the sound recording copyright in his work, he is also denied the direct use of the enforcement mechanisms as provided in the Copyright Act. The Act, as written, denies the original musician direct control over the subsequent use of his material and the ability to bring an action for copyright infringement once he has relinquished copyright ownership of his song. Even if the original musician does hold the copyright to all of his music, it will be shown that he cannot rely with absolute confidence on the Act (or other intellectual property-related laws) to provide him with a cause of action against the musician who samples his copyrighted material.⁵⁶

The second problem with the Copyright Act in the area of digital sampling is that its statutory language does not expressly address how courts are to determine whether the use of a sample is an infringement of one or more of the exclusive rights secured by artists in their recorded material.⁵⁷ Because digital samples did not exist prior to 1976, the technological process used to create them was simply not conceived of by Congress nor addressed in the 1976 Copyright Act.⁵⁸ Whereas

54. Aiken, *supra* note 32, at 68. Using a sample CD is not always fail-safe either, as the manufacturers of sample CDs can grant permission only to use material on the CDs that they created and it is not always the case that all the material on a sample CD was originally created by the manufacturer. *Id.*

55. See Krysten Crawford, *Michael Jackson to Lose Beatles' Catalog?*, CNN MONEY.COM (May 5, 2005), available at http://money.cnn.com/2005/05/05/news/newsmakers/jackson_loan/index.htm (last visited on April 3, 2008). In an interesting twist of fate, Jackson and Sony/ATV have jointly owned the composition copyrights to most of the songs in the Beatles' catalog since 1995. Noah Balch, *The Grey Note*, 24 REV. LITIG. 581, 585-86 (2006). This is a perfect example of how copyright rights can come to be owned and controlled by persons and/or entities that are seemingly unrelated to the original artists who are known to the public to be most associated with the songs.

56. See *infra* Section III.B-C and accompanying notes.

57. See Julie D. Cromer, *Harry Potter and the Three-Second Crime: Are We Vanishing the De Minimis Defense From Copyright Law?*, 36 N.M. L. REV. 261, 268 (2006) (noting that "the Act gives little guidance regarding the elements of infringement"). But see Marsha A. Willis, Comment, *Unauthorized Digital Sound Sampling, the Taking of a Constitutional Right*, 17 S.U. L. REV. 309 (1990) (critically examining unauthorized sampling in the area of copyright law and stating that solutions to the problems associated with sampling can be found in existing law).

58. E. Scott Johnson, Note, *Protecting Distinctive Sounds: The Challenge of Digital Sampling*, 2 J.L. & TECH. 273, 280 (1987). In an attempt to argue that Congress was aware of the practice of digital sampling during the period in which it was gathering information for amending the Copyright Act in the 1970s, one author has claimed that the *Bridgeport Music* court's statement that "digital sampling wasn't being done in 1971" is "factually incorrect." See Jennifer R.R. Mueller, *All Mixed Up: Bridgeport Music v. Dimension Films and De Minimis Digital Sampling*, 81 IND. L.J. 435, 448 n.108 (2006).

copyright used to be a "fairly simple thing" in the area of music, the extent to which the modern technological process of sampling amounts to infringement of a copyrighted work is unclear.⁵⁹ Historically, Congress has been slow in enacting amendments to current legislation in response to rapidly emerging areas of technology.⁶⁰

Because the Copyright Act does not provide direct assistance in addressing the issue of infringement in the area of digital sampling, courts have been reluctant to make precise interpretations of existing law or formulate helpful guidelines by which musicians can determine both their rights and their responsibilities in the sampling process.⁶¹ The traditional notion of copyright protection that has emerged in the courts is that if a second work imitates the sounds of an existing copyrighted work to the point where the second work is "substantially similar" to the original work, the copyright owner has a cause of action for infringement.⁶² However, sampling "transcends the scope of the 'substantial similarity' test as it was originally conceived" by Congress since it does not involve the mere imitation of sounds, but rather the actual use of the copyright owner's original work.⁶³

Mueller attests that the first electronic samplers were introduced in the 1950's "and, although analog rather than digital, were capable of sampling any recorded sound in the same way that digital sampling programs do today." *Id.* She also maintains that the first digital samplers were introduced in 1975. *Id.* To the contrary, however, most authors generally agree that, prior to the late 1970's and early 1980's, existing technology merely replaced generic musical expressions, whereas a digital sample "does not merely replace a type of digital sound, as do Mellotrons and synthesizers; it replaces a particular instrument as played by a particular player in a particular setting, engineered by a particular engineer under the direction of a particular producer." Johnson, note 58, at 274-75. See also Garnett, *supra* note 12, at 510-11 (claiming that the first digital sampler was commercially introduced in 1979 and noting that the 1980's marked the advent of sampling technologies); David Small, *To Catch a Thief—Unauthorized Digital Sampling of Copyrighted Musical Works*, 17 T. MARSHALL L. REV. 83, 85 (1991) (noting that when sampling became available in the early 1980's, it was "quite a breakthrough in recording technology in that creative musicians and record producers were no longer limited to the sounds created by common musical instruments and analog synthesizers."); and Courtney Bartlett, *Bridgeport Music's Two-Second Sample Rule Puts the Big Chill on the Music Industry*, 15 DEPAUL-LCA J. ART & ENT. L. 301, 304 (2005) (acknowledging that analog equipment used prior to the 1980's "limited musicians to 'scratching' vinyl records and 'cutting' back and forth between different sound recordings."). Interestingly, the official Fairlight website lists the year 1979 as a "milestone" year in which the Fairlight CMI, the pioneering digital sampling technology, was created. http://www.fairlightau.com/default_content.html (last visited Mar. 26, 2008).

59. See Reneau, *supra* note 31, at 36.

60. *A New Spin*, *supra* note 34, at 744. For an example of Congress' lack of response to technological change in legislation until desperately needed, see 1 MELVILLE NIMMER, NIMMER ON COPYRIGHT, §2.10 at 2-173 (2007) (explaining that sound recordings did not receive protection under the Copyright Act until 1971, after years of record piracy that plagued the music industry).

61. Falstrom, *supra* note 4, at 362.

62. For a thorough explanation of the origins and development of the substantial similarity test, including an exhaustive discussion of the *de minimis* doctrine, see Cromer, *supra* note 57, at 267-274.

63. See Randy S. Kravis, Comment, *Does A Song By Any Other Name Still Sound As Sweet?: Digital Sampling And Its Copyright Implications*, 43 AM. U. L. REV. 231, 234-35 (1993). Because advanced sampling machines can sample at a rate of 100,000 times per second, there is no loss of fidelity "and no aural distinction between the original sound and the sample; the human ear hears the identical music." Baroni, *supra* note 17, at 69. For these reasons, many commentators argue that sampling is direct copying in violation of the exclusive right to reproduction afforded to the copyright holder in §106(1) of the Copyright Act.

Many early lawsuits alleging copyright infringement in the use of samples were either dismissed or settled⁶⁴ due to the high cost of litigation⁶⁵ and the amount of time involved; therefore, courts did not often have to decide the delicate issues involved.⁶⁶ The first case on digital sampling⁶⁷ went through a complete trial in 1991 when Raymond "Gilbert" O'Sullivan sued rap artist Biz Markie for sampled use of his copyrighted material in the rapper's album entitled, "I Need a Haircut."⁶⁸ The ten-second sample containing the first eight bars of O'Sullivan's song, "Alone Again (Naturally)," was looped into Markie's new song over and over throughout the entire song while Markie "rapped" over the sampled music.⁶⁹ The District Court for the Southern District of New York not only enjoined the production of Markie's album, but also referred the case to the U.S. District Attorney for possible criminal penalties.⁷⁰

The first phrase in the court's opinion, "Thou shalt not steal," signaled the attitude of the court that sampling amounted to theft.⁷¹ Once Markie admitted that he used the sample, the only remaining issue for the court was whether O'Sullivan's claim to ownership of the copyright was valid.⁷² Since the court did

64. For example, Jimmy Castor's suit against the Beastie Boys for using drum beats and words from his hit recording "The Return of Leroy (Part I)" was settled despite heated publicity. See Sanjek, *supra* note 8, at 618. Mark Volman's \$1.7 million suit against De La Soul, discussed *infra* at note 162, was settled for an undisclosed amount almost immediately after it was filed. See Marcus, *supra* note 4, at 782.

65. Filing a lawsuit for copyright infringement can prove to be an expensive venture. Even in the early days of sampling, entertainment law attorneys with experience in music law charged from \$100 to \$400 per hour. Court costs for one party in a major copyright trial averaged \$150,000 and a judgment finding a single willful infringement was as high as \$100,000. The losing party in the case may also have to pay attorney's fees to the opposing side. See Gregory T. Victoroff, *Music Sampling: Legal Overview, Practical Guidelines*, 26 BEVERLY HILLS B.A.J. 134, 135 (1992). See also Rebecca Morris, Note, *When Is a CD Factory Not Like a Dance Hall?: The Difficulty Of Establishing Third-Party Liability For Infringing Digital Music Samples*, 18 CARDOZO ARTS & ENT. L.J. 257, 274 (2000) (noting that "even in close cases," it is usually more cost-effective for the sampler to pay the cost of the sampling license than to take his chance at finding himself at an expensive sampling trial, "the outcome of which... is nearly impossible to predict with any degree of certainty").

66. Cf. Kravis, *supra* note 63, at 236. For specific examples of cases that were settled or dismissed, see *A New Spin*, *supra* note 34, at 728 n.11.

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

68. Falstrom, *supra* note 4, at 361.

69. *Id.* at 362.

70. *Grand Upright Music*, 780 F. Supp. at 185; see also Kravis, *supra* note 63, at 236 (predicting the substantial impact on copyright law the case had because the Southern District of New York handles a large percentage of the nation's copyright cases).

71. *Grand Upright Music*, 780 F. Supp. at 183; Falstrom, *supra* note 4, at 364. Warner Brothers released Markie's album after asking for O'Sullivan's permission to use the sample but before getting any reply. Other factors that may have influenced the decision included the unprofessional actions of Markie's attorney in the discovery process and the fact that he relied on erroneous interpretations of Markie's attorney in the discovery process and the fact that he relied on erroneous interpretations of existing law. See *id.* at 366-67 (stating that the court may have been more lenient on Markie, or at least more uncertain of the equities involved in the case, had Markie simply not have dealt at all with O'Sullivan). But cf. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 583, 585 n.18 (1994) (stating that defendant's effort to obtain permission to use a work should not be held against it when determining copyright infringement). For a discussion of the case that is directed to musicians, see Negitvland, *[Copyright] Fair Use & the Law*, KEYBOARD, June, 1994, at 89.

72. Falstrom, *supra* note 4, at 364.

not make a distinction between sampling small bites and large cuts of material or take into consideration whether the sampled material was instantly recognizable or a mere "banality," critics have argued that the overly broad decision has "made sampling a hazardous occupation."⁷³

Four months later, a second sampling case went to trial in *Jarvis v. A & M Records*.⁷⁴ Defendants Robert Clivilles and David Cole had used samples of plaintiff's recording in their song, "Get Dumb! (Free Your Body)." In ruling against defendants' motion for summary judgment, the district court of New Jersey held that a triable issue existed as to whether the defendant appropriated, either quantitatively or qualitatively, elements of the prior work that were original to the extent that the appropriation rose to a level that was unlawful.⁷⁵ The court noted that an original work may be substantially diminished even if only a small part of it is sampled, if that small part has a sufficient qualitative importance to the work as a whole.⁷⁶

In apparent recognition that the legal tide was turning with respect to unlicensed sampling, the Beastie Boys sought permission from ECM Records for a fee of \$1,000 to use a three-note sample from flautist James Newton's recording of "Choir" for use in their 1992 song entitled "Pass the Mic."⁷⁷ Newton, an acclaimed jazz and classical musician and university professor, filed a copyright claim against the Beastie Boys claiming that, although the band had obtained a license from the record company for the sound recording of "Choir," his separate rights in the underlying composition had not been licensed by him and, therefore, were infringed by the Beastie Boys' use.⁷⁸ After a discussion of the history and

73. *Id.* at 368-69 (anticipating the demise of sampling as an art form as a result of the case, as more rappers are now choosing to hire live musicians rather than sample).

74. 827 F. Supp. 282 (D.N.J. 1993).

75. *Id.* at 292; see also Falstrom, *supra* note 4, at 369 n.65.

76. *Jarvis*, 827 F. Supp. at 292; Falstrom, *supra* note 4, at 370 n.5. This was not the first copyright case to recognize that appropriation of even a small amount of copyrighted material can amount to infringement if that amount is substantially qualitative. In *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), *Time* magazine had obtained the exclusive right to publish former President Gerald Ford's memoirs on the Watergate affair. Before the scheduled release of *Time's* article, defendant magazine published a condensed article containing several quotes, paraphrases and facts drawn from the *Time* article. *Id.* at 543. Finding copyright infringement, the Supreme Court held that even though defendant copied only a small quantity of plaintiff's work, the portions that were taken constituted the "heart of the book." *Id.* at 565. Similarly, in *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 855 F. Supp. 905, 911 (E.D. Mich. 1994), the court held that photocopying of plaintiff's copyrighted anthologies for sale by a commercial copying service for university students without consent or remuneration was not fair use of the materials. The court stressed that, even though some portions copied amounted only to five percent of the original work, they were "not insubstantial or incidental references." *Id.* at 910.

77. See *Newton v. Diamond*, 388 F.3d 1189, 1191 (9th Cir. 2004), *cert. denied*, 545 U.S. 1114 (2005). The excerpt of the composition taken "consists of three notes, C-D flat-C, sung over a background C note played on the flute." *Newton*, 388 F.3d at 1191. The resulting sample was six seconds long, and was looped within defendants' song "so that it appears over forty times in various renditions of the song." *Id.* at 1192.

78. *Beastie Boys Win Sampling Battle*, BBC NEWS, Nov. 10, 2004, <http://news.bbc.co.uk/1/hi/entertainment/music/3998905.stm>.

application of the *de minimis*⁷⁹ exception to copyright infringement, the Ninth Circuit held that because “no reasonable juror could find the sampled portion of the composition to be a quantitatively or qualitatively significant portion of the composition as a whole,” the use by defendants of “a brief segment of [plaintiff’s] composition, consisting of three notes separated by a half-step over a background C note, is not sufficient to sustain a claim for infringement of Newton’s copyright in the composition ‘Choir’.”⁸⁰

In that same year, plaintiffs in the Sixth Circuit brought copyright infringement claims in *Bridgeport Music, Inc. v. Dimension Films* against No Limit Films LLC and related entities for using portions of the sound recording “Get Off Your Ass and Jam” (“Get Off”) by George Clinton, Jr. and the Funkadelics without permission.⁸¹ It was undisputed that: (i) No Limit Films featured “100 Miles and Runnin” (“100 Miles”), a rap song, in the soundtrack for the movie *I Got the Hook Up*; and (ii) “100 Miles” included a sample from the sound recording of “Get Off.”⁸²

“100 Miles” contained a sample of the three-note guitar solo opening of “Get Off” that was four seconds in length.⁸³ Using sampling technology, defendants lifted this guitar music from the original recording, extended it to 16 beats, lowered the pitch and looped it into resulting seven-second intervals that appeared in “100 Miles” in five different spots.⁸⁴ Although the district court expounded on the artists’ method in recording the arpeggiated chord in a “quick succession” on an unaccompanied electric guitar, which was played in a rapid manner to produce a “high-pitched whirling sound” and found that a jury could reasonably conclude that “the recording method was original and entitled to protection under Copyright law,”⁸⁵ it granted summary judgment in favor of No Limit Films. The court found that the sampled segments in the recording of “100 Miles” did not “rise to the level of legally cognizable proportion” under the *de minimis* analysis or under the “fragmented literal similarity test.”⁸⁶

The Sixth Circuit Court of Appeals reversed the district court and developed a bright-line test (“Get a license or do not sample”) to be used in sound recording copyright infringement claims.⁸⁷ The court engaged in a literal reading approach of Section 114(b) of the Act, and held that any unlicensed use of an original

79. The phrase, *de minimis non curat lex*, or “the law does not concern itself with trifles,” was embraced by the Ninth Circuit in *Fisher v. Dees*, 794 F.2d 432, 435 n.2 (9th Cir. 1986) in which the court held that a taking of material from someone else’s copyrighted composition is *de minimis* “only if it is so meager and fragmentary that the average audience would not recognize the appropriation.” For an informative summary of the history of the *de minimis* principle, particularly as applied to the law of digital sampling, see generally *Cromer*, *supra* note 57.

80. *Newton*, 388 F.3d at 1195-96.

81. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 795 (6th Cir. 2005).

82. *Id.* at 796.

83. *Id.*

84. *Id.*

85. *Id.* at 796-97. The court described the sampled material as a “riff” recorded with a technique that “captures the listener’s attention and creates anticipation of what is to follow.” *Id.*

86. *Id.* at 797.

87. *Id.* at 801.

musician's copyrighted sound recording is an infringement.⁸⁸ Specifically noting that the "strong protection implied by [Section 114(b)] could be mitigated by a judicially applied standard which permits some degree of *de minimis* copying," the court nonetheless announced its "bright line" rule, which it determined to be "specifically mandated by Congress."⁸⁹

Some opine that the holdings in *Newton* and *Bridgeport Music* represent a split in the circuits on the issue of sampling and copyright infringement.⁹⁰ The *Newton* court, however, specifically held that because the defendants had secured rights to use the sound recording, its opinion was confined to an analysis of the defendants' use of the *composition* only.⁹¹ Similarly, the *Bridgeport Music* decision made it abundantly clear that it was limiting its ruling to *sound recording* copyrights⁹² and essentially agreed with the *Newton* court's analysis when it acknowledged that deciding whether an unlicensed use of a sample infringes a musical composition "may require a full substantial similarity analysis."⁹³

Many also believe that these cases are victories for musicians whose works are rampantly sampled without permission;⁹⁴ however, relying on lower court cases in the absence of specific statutory guidance or a Supreme Court interpretation still does not give either the sampled musician or the sampling musician certainty,⁹⁵ particularly in light of the fact that there is such a divide over the interpretation of the Copyright Act with respect to the controversial act of sampling. As such, the

88. *Id.* at 803 n.18. Section 114(b) sets forth limitations to the sound recording copyright owner, as follows:

The exclusive rights of the owner of copyright in a sound recording . . . do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.

See 17 U.S.C. § 114(b) (2006). The *Bridgeport Music* court noted that Congress' use of the word "entirely" evidences intent that a recording created that contains *any* sounds fixed in a previous recording amounts to infringement. See *Bridgeport Music*, 410 F.3d at 803 n.18.

89. *Bridgeport Music*, 410 F.3d at 803 n.18. The court pointed to various reasons why the bright line test is beneficial and reasonable. First, the test will be easy to enforce. Second, the market will keep the negotiable license price within a reasonable limit. And third, sampling is a physical, purposeful taking. When a sampler takes something from a creator, it does not matter if the sample is small, it still holds value. Therefore, in order to take a piece of a sound recording, the sampler must first obtain a license. The court then went on to say that if Congress intended something different, it was up to the recording industry to return to Congress for clarification or change in the law. *Id.* at 801-805.

90. See, e.g., Mueller, *supra* note 58, at 436; William Y. Durbin, *Recognizing the Grey: Toward a New View of the Law Governing Digital Music Sampling Informed by the First Amendment*, 15 WM. & MARY BILL RTS. J. 1021, 1035 (2007).

91. *Newton*, 388 F.3d at 1193-94.

92. *Bridgeport Music*, 410 F.3d at 796 n.3. The court held that the "analysis that is appropriate for determining infringement of a musical composition copyright is not the analysis that is to be applied to determine infringement of a sound recording." *Id.* at 798.

93. *Id.* at 804.

94. The music industry considered the Grand Upright judgment to be hostile to the practice of sampling, as evidenced by an increase of new litigation in sampling cases. See Falstrom, *supra* note 4, at 367-68 (citing specific examples of recent copyright infringement cases that have been filed).

95. See Lionel Bentley & Brad Sherman, *Cultures of Copying: Digital Sampling and Copyright Law*, 3 ENT. L. REV. 158, 158-59 (1992) (discussing why the *Grand Upright* case is of slight direct relevance to the law of copyright in the area of digital sampling).

sampled musician has historically looked to sources other than the Copyright Act to protect himself from unauthorized acts of sampling.

B. OTHER LAWS AND DOCTRINES

Particularly before *Bridgeport Music*, sampled musicians have turned to other laws and doctrines aside from federal copyright law in the fight for protection of their original material, including state misappropriation and right of publicity laws.⁹⁶ The major problems in relying on such doctrines are that they can substantially vary from state to state, and that they can definitively be preempted by federal laws such as copyright.⁹⁷

In the past few decades, cases relying on state common law doctrines have increasingly recognized the rights of an author to his name, image, likeness and even his distinctive voice sound and quality.⁹⁸ Since these cases demonstrate that U.S. courts have been increasingly willing to protect the sounds and likenesses of individual performers, some commentators have believed that original musicians were gaining meaningful legal recognition in their fight against unauthorized sampling, even before *Bridgeport Music*.⁹⁹ While vocalists may have right of publicity precedent in their favor, instrumentalists "may have a more difficult task if the unauthorized sampling merely involves the isolated sound of his instrument."¹⁰⁰

In addition to employing common law doctrines of misappropriation and the right of publicity, some states have offered more extensive protection by enacting legislation that recognizes the artists' "moral rights".¹⁰¹ These rights are designed

96. See *A New Spin*, *supra* note 34, at 730 n.16. These doctrines emphasize the commercial value of the artist's "identity," which includes intangible aspects outside the realm of copyright protection, such as the artist's name and likeness. Misappropriation gives a cause of action for the use of a performer's identity for the commercial gain of a third party. The right of publicity protects against unwanted or commercially destructive use of an artist's name or likeness. For an exhaustive treatment of these doctrines, see CHISUM & JACOBS, *supra* note 36, § 6F at 6-47 and § 6G at 6-66.

97. See *A New Spin*, *supra* note 34, at 730 n.16.

98. See, e.g., *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (holding that Ford Motor's television advertisement using a Bette Midler sound-alike to re-create her 1970s hit, "Do You Want to Dance," was sufficient to support Midler's right of action); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1098 (9th Cir. 1992) (affirming a violation of California's right of publicity statute when defendant imitated singer's voice in a radio commercial).

99. See, e.g., Philippe Logie, *The Dechavanne Case: Unauthorised Sound Sampling of a Distinctive Voice*, 4 ENT. L. REV. 121, 123 (1993) (comparing judicial treatment of the "right of publicity" in the United States, the United Kingdom and France).

100. See *Small*, *supra* note 58, at 110 (proclaiming that it is more difficult to establish the identity of a musical instrument than the human voice for purposes of asserting a right of publicity cause of action).

101. As of 2006, the following eleven states had enacted "moral rights" statutes for authors: California, Connecticut, Louisiana, Maine, Massachusetts, Nevada, New Jersey, New Mexico, New York, Pennsylvania and Rhode Island. Additionally, Georgia, Illinois, Montana, South Dakota, Utah, and Wisconsin have enacted provisions acknowledging attribution or integrity for works of fine arts commissioned by the state or acquired by art dealers. See Cyril P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 405 n.36 (2006). For a full discussion of the scope moral rights protections afforded to authors for their works, see Edward J. Damich, *A Comparison of State and*

to give authors direct control by extending their right to receive credit as the author of their work (the right of "attribution") and the right to prevent objectionable use of their work by others (the right of "integrity").¹⁰² Since moral rights exist apart from economic rights, where moral rights are protected an author still retains some control of the work he creates even if he grants economic interest of the work to another.¹⁰³

The Convention for the Protection of Literary and Artistic Works, signed in 1886 in Berne, Switzerland, created a uniform international body of law regarding the non-economic rights of authors in the works that they create.¹⁰⁴ The Berne Convention Treaty specifically states that "dramatico-musical works" and "musical compositions with or without words" are protected works of art in the area of moral rights.¹⁰⁵

Because copyright law in the United States is primarily concerned with protecting the pecuniary interests of copyright *owners* rather than the moral rights of *author-creators*, until recently there was no express federal protection for rights of attribution or integrity in the Copyright Act; therefore, any attempt to protect such rights "as deriving from copyright law's application was merely fortuitous."¹⁰⁶ When the Berne Treaty was first executed by other countries, the United States had no interest in participation; however, Congress eventually realized that Berne membership would allow American participation in the formulation of international copyright policy.¹⁰⁷ President Reagan subsequently signed the Berne Convention Implementation Act on October 31, 1988.¹⁰⁸ While, arguably, U.S. law conformed to the requirements of joining the Berne Convention, it specifically resisted further expansion of moral rights in the United States beyond the realm of existing state doctrine.¹⁰⁹

Nonetheless, Congress eventually decided to recognize moral rights in the

Federal Moral Rights Protection: Are Artists Better Off After VARA?, 15 HASTINGS COMM. & ENT. L. J. 953 (1993).

102. Patrick G. Zabatta, Note, *Moral Rights and Musical Works: Are Composers Getting Berned?*, 43 SYRACUSE L. REV. 1095, 1096 (1992). In order to understand the concepts of "attribution" and "integrity," one must consider moral rights from a "continental cultural perspective." France is considered the birthplace of the moral rights doctrine. The French doctrine of *le droit moral* recognizes that the artist has a "natural right to the fruits of her creativity which cannot be conveyed away through licensing or transfer of the economic interest." *Id.* at 1104.

103. *Id.* at 1096-97. See also Melville B. Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499, 524 (1967) (explaining how moral rights differ from economic rights of intellectual property).

104. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2583.

105. *Id.*

106. Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(A)*, 77 WASH. L. REV. 989, 995 (2002) (noting that Section 106 of the Copyright Act, while providing the author of copyright various exclusive rights, e.g., to reproduce, distribute, publicly perform and make a derivative work of the original work, does not include the author's ability to compel recognition for her work by third parties).

107. Zabatta, *supra* note 102, at 1105-06.

108. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2583, codified as amended in scattered sections of 17 U.S.C.

109. See Zabatta, *supra* note 102, at 1109-10 (discussing the motivations of Congress in implementing the Act).

United States for limited categories of copyrighted works when it amended the Copyright Act in 1990 by enacting the Visual Artists Rights Act ("VARA").¹¹⁰ Protected works of "visual art" under VARA include a single painting, a print, a sculpture, a drawing, a signed still photographic image produced for exhibition, and limited editions of these works that total two-hundred or fewer, which are signed and consecutively numbered.¹¹¹ Since VARA does not afford songwriters any new protection, they still must rely on the "patchwork of pseudo-moral rights protection" of state common law doctrines.¹¹²

While VARA protects only a limited subset of copyrighted works, the few state moral rights statutes that have been enacted cover expanded categories of protected works.¹¹³ Additionally, while VARA expressly limits moral rights to extend only for the life of the author, five states expressly recognize "life-plus-fifty" terms for moral rights protection.¹¹⁴ Additionally, even though state moral rights statutes offer extended protection to artists, a state court can easily determine that VARA preempts the state statute if it finds that it covers the same subject matter as VARA.¹¹⁵ Moreover, a musician from one of the majority of states that have not enacted moral rights legislation can find himself with no protection other than the limited provisions of VARA.

Some commentators have argued that Congress should extend moral rights to all authors, specifically including musicians whose works are being sampled without their consent.¹¹⁶ But since there is an inherent conflict between moral rights and the economic interests of intellectual property in the United States,¹¹⁷ it is highly

110. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5128, codified as amended in scattered sections of 17 U.S.C.; see in particular § 106A..

111. 17 U.S.C. § 101 (2006).

112. Zabatta, *supra* note 102, at 1101.

113. States' definitions of protected works under the moral rights doctrine are typically much more broadly defined than under VARA. For example, the Connecticut moral rights statute includes protection for works of calligraphy, works of mixed media, and craft works in clay. See Damich, *supra* note 101, at 954-55.

114. *Id.* at 962.

115. *Id.*

116. See, e.g., Zabatta, *supra* note 102, at 1130-35. The rationale for extending moral rights to musicians is that they are especially vulnerable to infringement of their moral rights, since their music is widely disseminated. Due to the "technological methods of appropriation through sampling and the adaptability of music into potentially objectionable contexts," musicians have a strong argument for requiring more extensive protection of their moral rights. See Zabatta, *supra* note 102, at 1130.

117. Intellectual property is big business in the United States. "Users" of creative works, or those who exploit intellectual property rights of composers of musical compositions fear that extending moral rights would disrupt contractual agreements regarding the user's economic interests and expectations in acquiring the intellectual property rights. By protecting the pecuniary rights of a copyright owner, the Copyright Act reflects the Anglo-Saxon view that considers ownership of property in absolute terms. See *id.* at 1107-08. See also Robert Gorman, *Federal Moral Rights Legislation: The Need for Caution*, 14 NOVA. L. REV. 421, 423-24 (1990) (addressing the concern that recognition of moral rights is not consistent with U.S. copyright jurisprudence with a discussion of how investments in the arts and entertainment industries would be chilled if the ability of producers to disseminate works was limited by the expansion of the moral rights doctrine, thus leading to fewer works ultimately distributed to the public). Kris Parker of *Boogie Down Productions* states that the debate over the extension of protection for sampled artists is "about money and more money." See Jeffrey Ressler, *Sampling Amok?*, ROLLING STONE, June 14, 1990, at 105. Cf. *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 24 (2d

unlikely that Congress will comply with such requests in the near future. Thus, while the tide may be turning in favor of non-musical artists' rights in state doctrines and federal law, there is still an insufficient amount of precedent to rely on in the direct and unique area of digital sampling.¹¹⁸

C. MUSIC INDUSTRY REGULATIONS

Because digital sampling implicates so many unresolved legal problems, the music industry itself has attempted to alleviate the controversy in several ways. Most record labels have created special departments to clear the samples included in their catalogs.¹¹⁹ Independent companies that specialize solely in hunting down clearances for samples have even been formed in the wake of the rising debate over the sampling process.¹²⁰

Other record companies deal with the problem of sampling more directly. Many recording contracts contain language that gives the recording company the right to reject artists' recordings that are deemed "unsatisfactory"; when a recording then contains unauthorized samples, the recording company asserts such use as "unsatisfactory," relying on the contract to reject the recording.¹²¹ Similar contract provisions may even require the artist to obtain clearances for all samples, or to deliver unsampled recordings as substitutes for the original recording containing the samples.¹²² Failure to comply with the contract provisions would result in a

Cir. 1976) ("the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law. . . cannot be reconciled with the inability of artists to obtain relief from mutilation or misrepresentation of their work to the public on which the artists are financially dependent").

118. It is not even clear in countries that already have a strong moral rights doctrine whether moral rights can protect artists from unauthorized digital sampling. In 1989, a French musician was sued after he recorded sampled words and phrases taken from a famous talk show; the musician mixed the words so that the talk show host seemed to be insulting himself. On March 15, 1990, The Tribunal of Grande Instance of Lille held in an unpublished opinion that the musician was guilty of copyright infringement. "Quite regrettably, the decision does not refer to any breach of moral rights whereas it was blatant in this case." Logie, *supra* note 99, at 121-22.

119. Reneau, *supra* note 31, at 37. Many record label executives state that they will generally tolerate a "four bar limit" of appropriation of music contained in their catalog without permission; however, other publishers will not tolerate even that much. Jobete Music, publisher of the vast Motown catalog, is considered the toughest publisher in the business when it comes to sample clearances. See Ressenner, *supra* note 117, at 105.

120. Reneau, *supra* note 31, at 37. Record companies have a legitimate reason for being concerned over their artist's use of uncleared samples. After the *Grand Upright* court enjoined Biz Markie's album, Warner Brothers Music was forced to place an advertisement in *Billboard* magazine requesting that retailers return copies of the album that had not been sold. See Falstrom, *supra* note 4, at 366.

121. Victoroff, *supra* note 65, at 136.

122. *Id.* For example, the following provision is found today in many standard record company contracts with musicians:

It is understood and agreed that Artist shall be responsible for licensing and obtaining authorization to include any portion(s) of third party master recordings and/or compositions (hereinafter, "samples") within Masters to be embodied on phonographic records hereunder. It is further understood and agreed that Artist shall be responsible for and shall pay any and all costs, fees and expenses in connection with such licensing and authorization, and that all such sums

breach of contract claim by the recording company and repayment of the money advance that many recording companies grant artists to record a master.¹²³

Another common provision contained in recording contracts is a warranty that the musical material delivered does not infringe the copyright or other intellectual property rights of other musicians or artists.¹²⁴ A lawsuit for illegal sampling could then result in several breach of warranty suits between each entity selling the sampled product, "creating a duty of indemnification for each person along the [marketing] chain that ends with final legal responsibility placed on the musician."¹²⁵

As the above discussion demonstrates, if either the sampled or sampling musician relies on existing federal and state law or music industry regulation of sampling, he will often find a complete lack of uniformity and certainty as to whether the use of the sample is appropriate. Since the law in the area of sampling has historically demonstrated such a lack of predictability, neither the rights of the sampled musician nor the responsibilities of the sampling musician have ever been certain. Even though *Bridgeport Music* has helped achieve a level of clarity regarding the viable proprietary interest in sound recordings that are sampled without license, the court's ruling has been met with such disdain in the legal community that it is unlikely that other circuits will follow suit anytime soon.

III. SHATTERING THE TOP THREE MYTHS SURROUNDING THE PRACTICE OF DIGITAL SAMPLING

As discussed in Part II, there is no doubt that the state of sampling law is rife with inconsistency and confusion, even after *Bridgeport Music*. As maintained below, part of the reason *why* it has been so difficult for courts to unite in an understanding of the legal ramifications of sampling, and why there has not developed a cohesive and mature body of sampling law, is due to several assumptions that have been promulgated within the legal community and the music industry regarding the art form of sampling. Upon being dispossessed of such

(including royalties), to the extent not paid by Artist, shall be recoupable by Company from any and all monies otherwise becoming due under this agreement, including but not limited to advances otherwise payable hereunder. Company shall have the right, prior to Artist's entering into any such license or agreement, to approve the terms and conditions of each proposed license or agreement pertaining to samples which Artist proposes to embody on a Master, and no such license or agreement shall be consummated prior to Company's approval of such terms and conditions. Company shall have the right to withhold such approval in its unrestricted discretion. Upon the decision by Artist or any other applicable third parties that one or more samples are to be embodied on a Master hereunder, Artist shall notify Company as to the identity, duration and character of the proposed sample(s), and shall provide Company with one or more (as Company shall specify) cassette tapes of the Master containing the sample(s).

Interview with Alan S. Bergman of Gottlieb, Schiff, Bergman & Sendroff P.C., in New York, N.Y. (December 18, 1995).

123. *Id.*

124. *Id.*

125. *Id.* For example, the contract provision would require the distributor to pay the record store's attorney fees and damages; the recording company would then be required to pay the fees and damages of the distributor; and the musician is technically liable for *all* fees and damages. *See id.*

myths, one will have a better appreciation of the Sixth Circuit's rationale in holding in *Bridgeport Music* that copyright owners cannot be deprived of the value of their sound recordings taken unlawfully by secondary users.

A. MYTH NUMBER ONE: SAMPLING IS ANALOGOUS TO BORROWING, QUOTING OR IMITATING PRIOR WORKS

The most prevalent misconception regarding the act of sampling is that it is the legal equivalent of borrowing, quoting or otherwise imitating the original works of prior musicians. To the contrary, there is a significant difference between the phenomenon of borrowing or being influenced by another's musical style and digitally replicating a recorded portion of a musician's original work verbatim and placing it into one's own piece.¹²⁶ Utilizing the hypothetical example set forth in the introduction of this article, it is the difference between being mentored by our fictional lawyer and learning the techniques of drafting one's own bullet-proof legal brief on the one hand (regardless of whether it is reminiscent, or even imitative, of the former) and altering and adding to *his* actual legal brief and identifying it as one's own, on the other hand.

Yet a common premise set forth by champions of "free" digital sampling¹²⁷—and one that seems never to be questioned or fully examined—is that the practice of sampling without paying is not a new phenomenon.¹²⁸ In defense of this assertion, authors routinely claim that, as early as the nineteenth century, classical musicians such as Brahms and Rachmaninoff "borrowed" material from previous authors for use in their own musical compositions.¹²⁹ So many authors have espoused the proposition that "just as rap artists borrow samples of sound recordings from past artists, composers throughout history have borrowed themes, musical phrases, and ideas from their ancestors,"¹³⁰ that the belief that imitating and sampling are essentially the same practice is taken as a common truth in much legal commentary on the subject.¹³¹ In fact, it is generally accepted that sampling

126. David S. Bloch, "Give the Drummer Some!" *On the Need for Enhanced Protection of Drum Beats*, 14 U. MIAMI ENT. & SPORTS L. REV. 187, 196 (1997) (commenting that "imitation is not appropriation" because even when a musician plays a song highly inspired by another musician, he is practically guaranteed to add his own "artistic" expression).

127. The term "free" digital sampling refers to the phenomenon of sampling another's original sound recording without their knowledge, consent or remuneration based on an underlying conviction that the sampler is more entitled to such use of the raw material to create his song in the name of "promoting the arts" than the sampled musician is entitled to exclusive rights to his proprietary, original creation.

128. See Victoroff, *supra* note 65, at 134.

129. *Id.* (quoting a telephone interview with Irwin Coster, Ph.D., musicologist, in Los Angeles, CA, May 26, 1992).

130. Lauren Fontein Brandes, *From Mozart to Hip-Hop: The Impact of Bridgeport v. Dimension Films on Musical Creativity*, 14 UCLA ENT. L. REV. 93, 100 (2007).

131. See, e.g., Mueller, *supra* note 58, at 436 (stating that "sampling has been with us throughout history—the only difference is the advanced computer software and equipment that make the process easier and more direct"); Jeremy Beck, *Music Composition, Sound Recordings and Digital Sampling in the 21st Century: A Legislative and Legal Framework to Balance Competing Interests*, 13 UCLA ENT. L. REV. 1, 30 (2005) (claiming that the underlying concepts and aesthetics of sampling have long been a

is a process with a “distinct history, a developed aesthetic, and a set of auteurs who have defined the parameters of its use.”¹³²

To state premises such as “[j]ust as Bach, Handel, Mozart, Bartok, and countless others *quoted* extensively from their predecessors to pay homage to the past and to create innovative musical *styles*, rap artists use sampling to archive past *styles* and as a form of creative musical composition”¹³³ or “sampling can be likened to ‘quoting’ the *idea* contained within the few notes borrowed from the original whole”¹³⁴ is contradictory to the following facts previously discussed in this article: (a) the very equipment that makes digital sampling possible was not even in existence until the late 1970s, so the acts of composers from prior centuries cannot be likened to those of digital sampling artists;¹³⁵ and (b) musical compositions, by their very nature, are created by different processes than sound recordings and, unlike sound recordings, clearly cannot be digitally sampled.¹³⁶ Moreover, because the Act expressly mandates that copyright protection never be extended to ideas and concepts, but only to original expressions of such ideas and concepts,¹³⁷ the suggestion that sampling a copyrightable sound recording and imitating a non-copyrightable musical idea or style are analogous activities is contrary to the very basics of copyright law.

Therefore, the musical authorship of classical composers from past centuries who were inspired by, borrowed from, quoted or even downright plagiarized their predecessors’ works when creating their *compositions* (and who did not even have the equipment to sample) cannot be so readily compared to the acts of modern samplers who physically take portions of their predecessors’ actual *sound recordings*. In fact, it is even semantically disingenuous to state that classical composers (or anyone from any century who plagiarizes or “takes” substantial portions of others’ copyrighted compositions or sound recordings) is engaged in the

part of the art form of Western music composition); Steven D. Kim, *Taking De Minimis Out of the Mix: The Sixth Circuit Threatens to Pull the Plug on Digital Sampling in Bridgeport Music, Inc. v. Dimension Films*, 13 VILL. SPORTS & ENT. L.J. 103, 103 (2006) (professing that digital sampling is only the “latest method” through which artists and composers steal ideas from their contemporaries and predecessors); and Gerry Belanger, *Plunderphonic: Who Owns the Music?*, OPTION, Jul./Aug. 1990, at 13 (quoting a musician who states that sampling does not take or steal from an original work, but merely “refers to” it).

132. Sanjek, *supra* note 8, at 610.

133. Brandes, *supra* note 130, at 103 (emphasis added).

134. Mueller, *supra* note 58, at 436 (emphasis added).

135. See *supra* notes 7-23 and accompanying text.

136. See *supra* notes 41-43 and accompanying text. A musician can infringe an underlying composition when sampling a sound recording made from that composition; however, he cannot ever sample a composition that has not been tangibly reduced into a sound recording.

137. 17 U.S.C. § 102(a)-(b) (2006). The landmark case interpreting Section 102(b) on what has been coined the “idea/expression dichotomy”—now a fundamental precept in copyright law—is the Supreme Court holding in *Baker v. Selden*, 101 U.S. 99, 101 (1879), stating that where the “methods of an art are the common property of the whole world, any author has the right to express the one, or explain and use the other, in his own way.” See also *Arnstein v. Edward B. Marks Music Corp.*, 82 F.2d 275, 277 (2d Cir. 1936) (in a suit to enjoin the infringement of a copyrighted musical composition, the court noted that, while it may be true that musical *themes* may “catch the popular fancy” and sell the song, the *theme* is “not where musical genius lies, as is apparent in the work of all the great masters”) (emphasis added).

act of "borrowing," which indicates a legal, consensual act on the part of the person who owns the borrowed material with some form of anticipated return of such material.¹³⁸ If any such act is in violation of the Copyright Act, it is nothing other than copyright infringement, whether you are Beethoven or the Beastie Boys.¹³⁹ Yet, authors routinely go to great lengths in order to re-create the definition of sampling in various ways in order to justify their argument that free sampling is an act supported by the Constitution, specifically and American copyright jurisprudence, generally.¹⁴⁰ In addition to run-of-the-mill comparisons of sampling to quoting, borrowing and being influenced by musical ideas, which have already been demystified above, one author has gone as far as to state:

The artist sampling a given work does not literally 'take' the sound out of the original recording, as sampling uses the same basic process familiar to many computer users who transfer music from compact discs onto the hard drives of their computers. If this transfer was a physical taking, after ripping tracks from a compact disc, the disc would come out of the computer's CD-ROM drive blank.¹⁴¹

Note that the author does not cite any authority for this assertion, yet it is in direct contravention of the basic workings of digital technology (*i.e.*, one does not have to deplete the original recording or the original computer program in order to steal or take a digital copy). It is an attempt to divert the reader from the non-debatable fact that "samples are verbatim copies of the expression embodied in the appropriated sound recording."¹⁴²

A related proposition stated by free sampling adherents is that because musicians have a history of relying on past works, the legal community and the public should view sampling as merely another form of reliance.¹⁴³ The argument suggests that long before the ability to sample, musicians have "fabricated musical

138. The definition of "borrowing" is to "take and use (something belonging to someone else) with the intention of returning it," whereas the definition of "taking" is to "capture or gain possession of by force" or to "acquire or assume." See THE OXFORD COMPACT ENGLISH DICTIONARY, 117 & 1172 (2d ed. 2003).

139. One author who subscribes to the common belief that "[t]he classical music canon offers numerous examples of musical borrowing, which has not led critics or commentators to question the ability or artistry of master composers such as Mozart, Haydn, Bach, Beethoven and others," nonetheless also concedes in the same article that "Handel used others' works extensively in his musical compositions, which by the early nineteenth century had engendered significant discussion as to whether Handel should be considered a plagiarist." See Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 601-07 (2006).

140. See *id.* at 581-82. Arewa laments that defining sampling as theft or misappropriation immediately infers that an illegal activity has occurred, whereas "borrowing has a much more neutral definition and does not by itself indicate anything illegitimate, illegal or undesirable." According to Arewa, then, as long as the practice of sampling is defined as something it is not, *i.e.*, borrowing, it can somehow be turned into a legitimate practice.

141. See Mueller, *supra* note 58, at 450. Mueller also claims that, while we should recognize the modern technology that makes sampling "different from other forms of copying," we should nonetheless note that sampling is "not a physical appropriation" of the sampled material. *Id.* at 459. How sampling, then, is different if it is not such a taking, is not discussed.

142. Small, *supra* note 58, at 100.

143. See Kravis, *supra* note 63, at 256.

acts that copied from other acts."¹⁴⁴ For example, the 1950s witnessed a vast number of "crooners" in the music industry who imitated the "style" of Frank Sinatra; similarly, the widespread success of the rock band KISS in the 1970s provoked other rock bands to imitate their unique use of distinctive facial make-up and extravagant onstage costumes (including high-heeled boots).¹⁴⁵ It is therefore largely by "creative imitation" of older musicians that contemporary musicians can be inspired to compose new works.¹⁴⁶

Although entirely factual, such a position again fails to consider the reality that sampling is a unique *technological* use of prior music, so that copying prior styles and copying prior recorded material are two separate procedures with differing resultant consequences. When a contemporary musician emulates the "style" of an older musician, he adds at least some of his own original style, personality and musicianship to the prior act so that the new act cannot be considered an exact reproduction of the older act.

When a member of KISS watches a newer band imitating KISS' "style," he can rest assured knowing that none of KISS' original material has been appropriated exactly by that band to gain success. It is an entirely different phenomenon, however, if that same band lifts original KISS material note-for-note in a permanent recording of the band's new music. In the former example, the KISS member would not say, "hey, that's me!" But in the latter example, such a comment would be exactly descriptive.¹⁴⁷

Champions of free sampling also defend the practice by noting that "throughout history, every new development in music has been greeted with suspicion by the music establishment of the day."¹⁴⁸ They argue that today's concerns about sampling are similar to yesterday's concerns over the birth of synthesizers and drum machines.¹⁴⁹ Musicians who began to use these instruments in the recording studio and onstage were admonished by critics who believed that the instruments easily enabled musicians to create sounds that previously took talent and creativity to compose on conventional instruments such as the organ or drums.

Free sampling supporters state that just as many drummers in the 1980s who learned to work with drum machines found that they were in the best position to be hired to use them, "so will musicians who find creative ways to use sample libraries have an edge in the years to come."¹⁵⁰ Free sampling critics would respond that

144. *Id.* at 256 n.154.

145. *Id.* Later in the 1970s, guitar players would be inspired to copy the popular style of Eddie Van Halen. *See id.*

146. *Id.* (quoting HAROLD O. WHITE, PLAGIARISM AND IMITATION DURING THE ENGLISH RENAISSANCE 202 (1965)).

147. For example, when the rock band Mötley Crüe hit the scene in the early 1980's, they were criticized as being largely imitative of KISS due to their similar make-up, costuming, hair styles and onstage tactics. Notwithstanding, the band created its own distinctive and unique music and did not digitally snatch any of KISS' recorded material in order to achieve fame. This is the type of creative imitation and use of prior works that the Copyright Act intends to protect.

148. For example, polyphony (the ability to play harmonies) was considered "demonic" in medieval times, and was punished by burning at the stake. *See* Victoroff, *supra* note 65, at 137.

149. Randall, *supra* note 17, at 56.

150. *Id.*

such a comparison between drum machine and synthesizer technology, on one hand, and sampling technology on the other, is yet another false analogy that allies of sampling make when defending the practice. Unlike synthesizers and drum machines that are primarily used to generate their own sounds, the sampling equipment can only store and then subsequently manipulate previously generated sounds that are put into it.¹⁵¹ Whereas the user of the drum machine still composes original sounds on the instrument, the sounds that are stored into sampling equipment are technically not "created" by the user of digital sampling technology; rather, they are created by a combination of creative efforts of many talented players in the studio.

The *Bridgeport Music* court was able to see through the myth that compositional borrowing and being influenced by past styles and sounds is not akin to sampling or using the actual recorded sounds themselves when it held that sampling such sounds "is a physical taking rather than an intellectual one."¹⁵² The court further explained that only when appreciating the difference between the copyright protection afforded to a musical composition and that afforded to a sound recording, one could understand how a second comer may be able to take three notes from an original composition without infringing, whereas taking the same three notes from a subsequent sound recording made of that composition would, in fact, infringe the sound recording copyright.¹⁵³ In the legal sense, taking an exact digital copy of a previous recording can by no means be so readily compared to being influenced, consciously or subconsciously, by such original work.

B. MYTH NUMBER TWO: BECAUSE SAMPLING IS A LEGITIMATE ART FORM, SAMPLERS SHOULD BE ENTITLED TO FREELY USE OTHER MUSICIANS' ORIGINAL COPYRIGHTED MATERIAL

Building further on the false premise that sampling is equivalent to imitating, many commentators on the subject of digital sampling and copyright infringement suggest that sampling should receive more legal protection and respect throughout the music industry as one of the several creative processes by which musicians "compose."¹⁵⁴ Those who defend free digital sampling maintain that sampling

151. Logie, *supra* note 99, at 121 n.4.

152. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 802 (6th Cir. 2005).

153. *Id.* at 801-02.

154. See, e.g., 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, 164 (1993) (maintaining that most sampling should not be viewed as copyright infringement); Mueller, *supra* note 58, at 450, 463 (arguing that, because samplers do not literally "take" sounds out of original artists' recordings, the process of sampling "merely allows" samplers "to stand on the shoulders of other artists, furthering creative expression"); Brandes, *supra* note 130, at 124 (professing that the *de minimis* defense should be available to those who sample sound recordings, lest the exclusive control that the owners of sound recordings have will allow them a "significant bargaining advantage over potential samplers"). But see Baroni, *supra* note 17, at 73 (criticizing sampled music as "sound-alike" music, and predicting that increased use of samples will cause pop and rap music to become "increasingly redundant"); Jeffrey S. Newton, Note, *Digital Sampling: The Copyright Considerations of a New Technological Use of Musical Performance*, 11 HASTINGS COMM. & ENT. L. J. 671, 705 (1989) (stating that all unauthorized

musicians often create new and valuable music by "incorporating hundreds of samples from wildly diverse sources, creating a virtual aural collage."¹⁵⁵ Therefore, the argument continues, the technique cannot be considered "piracy" of older works; while the "pirate" duplicates an entire work and mass-produces direct copies of it, the sampling artist copies only small pieces of older works in order to create a "new cohesive whole" by adding something new to make the second song distinct from the original.¹⁵⁶ The opinion that digital sampling is an art form proceeds from a belief that the sampling musician utilizes the sampled recording itself as an actual instrument to develop and create original sounds in ways similar to use of a piano or guitar to produce those sounds.¹⁵⁷

Others have noted that the disc jockeys who were the pioneers of sampling "viewed themselves as musicians and their turntables as musical instruments," due to the fact that the looping and mixing techniques from one turntable to the next "involved prodigious manual dexterity."¹⁵⁸ The argument that sampling enables the creation of a new piece of art is enhanced by an assertion that sampled material can sound different depending on the individual talents of the sampling musician; since a sampling musician needs extensive knowledge of the sampled instrument in order to get the sound "right," the sampled material sounds better when produced by a "great" player.¹⁵⁹

While it is true that several recording artists and producers in the music industry praise as original and innovative the act of using sampled material to create a new song, "conventional musicians"¹⁶⁰ often argue that there is nothing inherently creative in the process of sampling itself, so that learning how to sample a sound by pressing a computer key could not by any stretch of the imagination be compared to the true "art" of learning how to play a piano or a guitar.¹⁶¹ In fact, several

digital sampling amounts to copyright infringement).

155. Falstrom, *supra* note 4, at 368 n.62.

156. *Id.* at 370-71.

157. Musicians and others who state that the use of a sampled recording itself is the use of an actual musical instrument strongly believe in the "innovative potentialities of technology." See Sanjek, *supra* note 8, at 610. Since the sampling musician manipulates the previous work to such an extent before incorporating it into the new song, the new song is an original work of art. See Kravis, *supra* note 63, at 235.

158. Garnett, *supra* note 12, at 511.

159. Randall, *supra* note 17, at 51 (claiming that today even the general public can distinguish between a real seventy-piece orchestra and a sampled one, and that it can also tell whether a musician is making creative use of sampled material).

160. The term "conventional musician" shall refer to a musician who is trained in and primarily uses actual musical instruments to create music, as opposed to a "sampling musician," who has little or no training on musical instruments and who primarily uses modern sampling technology to create music.

161. "Art" is defined as "the disposition or modification of things by human skill" and "the special skill required by those who practice one of the fine arts...[as] distinguished from the sciences." See WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 105 (2d ed. 1983). It is therefore easy to distinguish the "art" of learning to perform on a musical instrument from the "science" of learning to operate technological sampling equipment. Skilled conventional musicians such as composer Kurt Boesinger, would generally agree to such a distinction. Mr. Boesinger states that while sampling could be considered an art in theory, the problem is that sampling is very often not used artistically in practice. In many cases, samplers loop one source that has gained popular recognition and do not do anything creative with it. Mr. Boesinger concedes that creative sampling does occur in many cases. For example,

critics of sampling would argue that there is nothing creative or original in an electronic process that directly copies another artist's prior composition.¹⁶² One author states that sampling is largely a fascination with a form of technology, and that any "honest" sampler will readily admit to her "lack of instrumental expertise."¹⁶³ Another commentator states that sampling has created the "modern musician" who relies "more on visual presentation and less on musical talent."¹⁶⁴ And there are others who go so far as to state their belief that "theft" is a more appropriate term to characterize the process of digital sampling.¹⁶⁵

It has also been asserted that the opinion of many people who do not consider sampling to be an art form is racially driven because African American rap artists use the technique more than any other group.¹⁶⁶ Some believe that because rap is "black art,"¹⁶⁷ white people look for any loophole they can in order to harm the

"Foley Artists," are known for their creative use of samples in the film industry. The dinosaur roars that are heard in the movie *Jurassic Park* were created when Foley Artists sampled together the sounds of various animals recorded at zoos. The resulting sound bite was a unique collage of these sounds that, when combined, had never been heard before. "That," Mr. Boesinger states, "is creative sampling." Telephone Interview with Kurt Boesinger, Professional Audio Technician, *Electronic Innovations*, in Detroit, Mich. (Oct. 21, 1995).

162. Mark Volman, vocalist from the 1960s band, the Turtles, was "infuriated" upon hearing the familiar organ and violin sounds from his 1969 top ten hit, "You Showed Me," looped into DeLa Soul's, "Transmitting Live From Mars" for more than one minute. Claiming that DeLa Soul violated the California record piracy statute by sampling his material without authorization, Volman sued the musicians for \$1.7 million. Volman stated, "When we created music in the Sixties, we didn't do it by taking other people's music and using it as part of ours. . . . I just don't understand the creative implications of using another group's music." Ressler, *supra* note 117, at 103. Others critical of sampling as an art form point to evidence that many rap artists have been known to abandon sampling in favor of hiring live musicians for their songs. Since the creativity of rap music continues to flourish without using samples, they argue that sampling was never an original art form, but merely an excuse to cut the costs of production. See Kravis, *supra* note 64, at 254-55 n.150 (providing specific examples of hit rap songs that do not utilize samples).

163. Sanjek, *supra* note 8, at 615-16. Other critics react even more vehemently when asked whether they consider sampling as art. Music publisher Lester Still has remarked, "I don't recognize [sampling] as an art form. Bullshit! Art form? Goddamit, it's plagiarism!" See Ressler, *supra* note 117, at 105.

164. Several artists who used sampling early on, such as New Kids on the Block, were not even able to play an instrument; others, such as Milli Vanilli, could not even sing. See Baroni, *supra* note 17, at 73. The modern sampler's lack of "true talent" shows that sampling is actually deceitful because:

[...C]onsumers hearing the Beastie Boys' song, "She's Crafty," will think they are fantastic guitarists, when in reality the guitar riff is a sample taken from Jimmy Page off the Led Zeppelin song, "The Ocean." Imagine their surprise when they attend their first Beastie Boys' concert and learn that all the music is pre-recorded and none of the Beastie Boys are musicians.

Id. at 99-100.

165. See Falstrom, *supra* note 4, at 364.

166. Havelock Nelson, *Dissed by Pirates, Dogged by "Sample Hell," a Maturing Art Form Fights for Respect*, BILLBOARD, Nov. 28, 1992, at R-3 (stating that an "atmosphere of conservatism" has caused the admonishment of several rap artists by the music industry). For example, due to local obscenity laws, music retailers are still reluctant to stock some rap music even though previous titles by certain "explicit" rappers sold well. *Id.*

167. Rap music has been defined as "an urban, often urbane, melange of politics, rock-n-roll, rhythm and blues, African vocal traditions, and modern technology" whose lyrics "reflect the outlook of a generation of black youth." See Jeffrey B. Kahan, Note, *Bach, Beethoven and the Home Boys: Censoring Violent Rap in America*, 66 S. CAL. L. REV. 2583, 2583 (1993). Rap music was

black genre of music.¹⁶⁸ It has been stated that "the mature lyrics of contemporary rap reflect the outlook of a generation of black youth, lyrics often intimidating to white listeners, who at times threaten to suppress what they do not understand."¹⁶⁹ In defense of rap music as an art form, one author has described the genre of music as a medium used by African American artists to "pay homage to the strong roots of black American music."¹⁷⁰

While it is true that sampling is most associated with rap and hip hop, it is actually a common practice in the recording of all forms of music.¹⁷¹ While African American rap artists have been taking most of the heat for unauthorized sampling, artists of other races and musical genres have also "done their share" of sampling other artist's original material.¹⁷² In his 1988 pop hit, "Tall Cool One," British musician Robert Plant even used samples from his own 1970s band, Led Zeppelin, years after the group disbanded.¹⁷³ In fact, as rap music has become more sophisticated, "original rap rhythms are themselves pirated by mainstream musicians and other rappers."¹⁷⁴ Since musicians crossing all types and genres

"revolutionized" in 1979 when Chic remixed a recognizable disco hit, "Good Times." The remix was considered "actual usurpation of previously recorded material" whereas before the rap was only mixed live at "informal gatherings" and the underlying music was not altered in any way. As soon as the Chic record and other similar rap records were released, questions on copyright violation arose. See Marcus, *supra* note 4, at 770-71. Many believe that the "fragmentation" in sampling and subsequent "reassembly" in hip hop songs reflects the African American cultural experience and vernacular traditions that are essential to African American art. See Arewa, *supra* note 139, at 624.

168. Ressler, *supra* note 117, at 105.

169. Kahan, *supra* note 167, at 2583.

170. Marcus, *supra* note 4, at 773. Rappers take music from prior black artists such as Jimi Hendrix and Bob Marley, and "affirm and carry on the historical sounds of those artists by weaving them into new arrangements," thus "harking back to a richer, more soulful era" in order to cope with existing "racial embattlement" in today's society. *Id.* Another author notes the fact that the Grammy Awards have their own category for rap music. See Falstrom, *supra* note 4, at 372 n.76.

171. Sanjek, *supra* note 8, at 610. See also Bartlett, *supra* note 58, at 301 (recognizing that "U2, Peter Gabriel, and Iggy Pop have something in common with L.L. Cool J, Public Enemy and Tone-LoC" in that they have all sampled sounds from older songs to make their music).

172. Don Snowden, *Sampling: A Creative Tool or License to Steal?*, L.A. TIMES, Aug. 6, 1989, Calendar at 61. Chuck Berry is listed as co-writer of the Beach Boys' song, "Surfing USA," since the song was so obviously patterned after Berry's, "Sweet Little Sixteen." David Byrne and Brian Eno's 1981 album, "My Life in the Brush of Ghosts," utilizes samples of sounds of preachers and radio programs. *Id.* In 1998, a Taiwanese aboriginal couple sued German pop music group Enigma for illegal use of a sample that contained the couple's singing and chanting on "Return to Innocence," an Enigma song that was the theme for the 1996 Atlanta Olympics. See Melissa Hahn, *Digital Music Sampling and Copyright Policy--A Bittersweet Symphony? Assessing the Continued Legality of Music Sampling in the United Kingdom, the Netherlands, and the United States*, 34 GA. J. INT'L & COMP. L. 713, 715 (2006). The British group, Art of Noise, founded by Trevor Horn in the 1980's, was known for taking samples and using them "in a musical collage setting." See Mary B. Percifull, Note, *Digital Sampling: Creative or Just Plain "Cheez-oid?"*, 42 CASE W. RES. L. REV. 1263, 1266-67 (1992). Horn has also used a famous "big band" brass chord samples of popular rock group, Yes, taken from their song, "Owner of a Lonely Heart." Johnson, *supra* note 58, at 276, n.22. White rap artist, Vanilla Ice, got into trouble after sampling a portion of Queen's recording of the David Bowie song, "Under Pressure" and using it in his 1990 song, "Ice, Ice, Baby." Percifull, note 172, at 1266.

173. J.D. Considine, *Larcenous Art?*, ROLLING STONE, June 14, 1990, at 107.

174. Bloch, *supra* note 126, at 197 (citing the example of Lenny Kravitz lifting a drum beat from a popular Public Enemy song and taking full credit for the song Kravitz ultimately created using the

seem to be utilizing sampling technology,¹⁷⁵ the argument that sampling critics are isolating only rap and hip hop music as a target for "indirect censorship"¹⁷⁶ is unfounded.

Additionally, both the rap and hip hop genres of music have become so popular worldwide that their listening audiences have widened to include people of all walks of life.¹⁷⁷ In 2003, it was reported that seventy-percent of hip hop music was purchased by Anglo Americans and that "rap music is now embraced across the radio dial and across the nation by a diverse, multi-racial fan base."¹⁷⁸ Moreover, the rap and hip hop artist base has also expanded and crossed cultures, as several Anglo American musicians such as Eminem have enjoyed fame and popularity in selling rap records.¹⁷⁹ In addition to music and fashion, hip hop words such as "dis," "yo," and "chill," have been introduced into mainstream American English; the music genre is "now also mixed in all types of music, including rock, reggae, jazz, and electronica."¹⁸⁰ Notwithstanding evidence that the rap and hip hop genres have been widely embraced by many facets of culture on a global scale and have ascended in popularity and overall economic success in the last decade, the argument that the musical genres are suffering from racist-driven censorship continues to flourish.

Despite the divide that exists among musicians and commentators over the subjective and, thus, legally immeasurable artistic legitimacy of the sampling process, this Article demonstrates that such a debate regarding the artistic merits of

appropriated beat).

175. *Id.*

176. See Marcus, *supra* note 4, at 772.

177. Rashaun Hall, *Hip-Hop, Inc.: How Rap Reached Wall Street—From Clothing Companies to Energy Drinks*, ESSENCE (June 2005) (noting that hip-hop has become a multi-billion dollar industry that has crossed over to Seventh Avenue with lines such as musical artist Jay-Z's signature S. Carter athletic-shoe collection, and claiming that "today's hip-hoppers are as eager to dress you as they are to keep you dancing"). See also Arewa, *supra* note 141, at 559-561 (stating that hip hop is the second best selling musical genre in the United States, with domestic sales increasing in the last decade from 6.7% of total record sales in 1995 to 12.1% in 2004). Note, however, that in the last few years while the entire music industry has reported current across-the-board drops in CD sales, rap sales were noticeably down 21% from 2005 to 2006 and for the first time in 12 years no rap album was within the top 10 best sellers in 2007. *Sales of Rap Albums Take Stunning Nosedive*, FoxNews.Com (March 1, 2007) available at <http://www.foxnews.com/story/0,2933,255606,00.html> (last visited April 3, 2008).

178. Joan Anderman, *Hip-Hop Setting the Beat in First, Black Artists Hold Billboard's Top 10*, THE BOSTON GLOBE Oct. 4, 2003, available at <http://hsan.org/content/main.aspx?pageid=21> (reporting that in the last half decade, rap has crossed from largely urban-format radio stations to Top 40 stations, "a shift that reflects the listening tastes of the broadest swath of young, active music consumers," according to Geoff Mayfield, director of charts and senior analyst at Billboard magazine).

179. In 2002, for example, Eminem's album "The Eminem Show" was the top R&B/Hip-Hop Album of the Year. See *Top R&B/Hip-Hop Albums 2002*, BILLBOARD.COM, available at http://www.billboard.com/bbcom/charts/yearend_chart_display.jsp?f=Top+R%26B%2FHip-Hop+Albums&g=Year-end+Albums&year=2002.

180. Arewa, *supra* note 139, at 560-61. For example, southern white rocker Kid Rock is famous for his musical style melding rock-n-roll, rap, country and hip hop genres. Kid Rock's 2001 album, *Cocky*, was described as a "mélange of styles, from rap to country, utilizing organ, pedal steel, and harp as well as metallic guitar solos" with contributors including pop artist Sheryl Crow and rapper Snoop Dogg. See Editorial Review of Katherine Turman, Amazon.com, <http://www.amazon.com/Cocky-Kid-Rock/dp/B00005R2IN#moreAboutThisProduct>.

any type of musical ability or creation has no place within the framework of a proper discussion about the *legality* of sampling original material that is incorporated into music of *any* genre as created by persons of *any* race, gender or background.¹⁸¹ Many authors have spent a considerable amount of time obdurately defending the act of sampling by arguing that the form, type, or genre of music in which sampled material appears is an artistically legitimate type, genre, or form of music, and offer no analysis on the legality of the process of sampling removed from such artistic analysis. In so doing, these authors effectively mask the true legal issue—scrutinizing the *act* of sampling by anyone who is a sampler regardless of the resultant form of music in which the sampled material ultimately appears.

An example is warranted to make this point clear. Imagine that I take a copy of the poem my best friend wrote and, without her knowledge or consent, I enter it into a poetry contest. After the poem wins first prize, my acts of deceit and fraud are discovered, and the prize is repudiated. Absent factual proof to the contrary, I would be loathe to argue that the reason my prize was taken away was because the judges of the poetry contest disliked the subject matter of the poem or because they were indirectly attempting to censor the poem (*i.e.*, because I am Catholic, a woman, a lawyer, or for whatever impermissible reason unrelated to my fraud). It would be obvious that the reason my prize was taken away was because I did not comply with the rules of the poetry contest (*i.e.*, I entered a poem that I did write and that did not legally belong to me).

Because it is well settled that the ability to copyright any particular genre of art should not be scrutinized by the subjective tastes of individuals, thus providing protection to all original works of authorship as long as the slightest modicum of creativity is established, it is disingenuous for legal commentators to decry judicial opinions based on unfounded beliefs that the court is commenting on the artistic merit of defendant's work.¹⁸² When courts determine that other forms of art have infringed on the copyright of an original owner, commentators do not engage in unfounded analyses of whether the judge in the case was "commenting" on the

181. See Justice Holmes' famous opinion in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) positing that works of art cannot be judged as worthy by persons trained only in the law, thus denying the rights of the public who may have differing opinions regarding the merits of a certain work.

182. See *e.g.*, Arewa, *supra* note 139, at 580-81. The author claims that the discussions of hip hop in various sampling cases "reveal a disdainful, if not contemptuous, view by judges for the type of musical borrowing involved in hip hop as a genre" which "essentially represents an evaluation of the aesthetic merit of hip hop works...." Other than pointing to the *Grand Upright* court's statement, "Thou Shalt Not Steal," a commentary by the court on the *act* of sampling, the author cites no support for the assertion that judges in hip hop cases are making their decisions based on disdain for an entire genre of music. Moreover, the author fails to point out certain facts that influenced the *Grand Upright* court's decision, particularly the fact that the defendant attempted to license plaintiff's work for use in his song, but plaintiff refused consent based on a belief that defendant's use failed to maintain the integrity of the original song. Despite plaintiff's refusal, defendant proceeded to pilfer plaintiff's work anyway. See Brandes, *supra* note 130, at 118-19. See also *supra* note 71 for additional facts that influenced the court's decision. If anything, courts have gone out of their way in order to make clear that criticisms of the artistic viability of a work of art have no place in a courtroom. See Bartlett, *supra* note 58, at 317-18 (discussing that in the analysis of whether a work of art is defensible under the fair use analysis as a parody, "it is not important whether the parody is in good or bad taste").

viability of the defendant's art form.¹⁸³ Why, then, does the legal community allow such a red-herring analysis to occur unchecked in the field of sampling?

As such, all commentary on sampling should be predicated by an acknowledgement that the final recording produced by sampling may properly and legally be described as a "creative collage"—and this should be taken as an absolute truth regardless of one's subjective and personal taste for any music in which original sampled material ultimately appears. Whether one likes or dislikes music created by samples has no place in a legal discussion of the act of sampling. As more fully developed herein, the legality of sampling is simply not dependent upon the form, type or genre in which the music appears, just as it is not dependent upon the age, race, background, political beliefs, or any other qualifying characteristic of either the artist who samples or the artist who is sampled. Any suggestion that the sampling analysis proceeds from these subjective polemics is a myth which should be disregarded, or at the very least, debated in a different social milieu.

If anything, the *Bridgeport Music* decision, whether intentionally or unintentionally, has resulted in a casting aside of all the issues of genre typecasting, underlying racism, and attempts to censor in sampling cases. The only inquiry that is asked in a sampling case in the Sixth Circuit moving forward is "did the defendant use a sample of the sound recording or didn't he?" Even if the types of racial profiling that judges in sampling cases are accused of is actually occurring, there is essentially no way for such aesthetic judging of rap and hip hop to occur under the *Bridgeport Music* analysis.

C. MYTH NUMBER THREE: IN ORDER TO ACHIEVE THE PROPER BALANCE OF COPYRIGHT PROTECTION, WE MUST ERR ON THE SIDE OF GIVING MORE PROTECTION TO SAMPLERS THAN SAMPLED MUSICIANS

Another argument often advanced in favor of free digital sampling is the familiar assertion that when dealing with the protection of intellectual property, it is wiser to err on the side of encouraging the production of more creative works (*i.e.*, songs created by means of free sampling) than to overprotect existing works (*i.e.*, original songs that are sampled).¹⁸⁴ The landmark Supreme Court opinion in *Campbell v. Acuff-Rose Music, Inc.*,¹⁸⁵ a case dealing with the rights of artists to create parodies of prior works, states that there is a point where extending copyright protection to prior works of art stifles the production of new works by stopping artists from drawing upon original works to create new compositions.¹⁸⁶

183. See, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930); *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706 (S.D.N.Y. 1987).

184. See, e.g., *Bartlett*, *supra* note 58, at 320-27. For an extensive discussion of why the overprotection of intellectual property is unwise because it harms the creative process that it attempts to protect, see *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512 (9th Cir. 1993) (Kozinski, J., dissenting).

185. 510 U.S. 583 (1994).

186. *Id.* at 1169. For an interesting graphic illustration of this phenomenon, see William S. Coats & David H. Kramer, *Not As Clean As They Wanna Be: Intermediate Copying in Campbell v. Acuff-Rose*, 16 HASTINGS COMM. & ENT. L.J. 607, 623-25 (1994).

While it is wise not to stifle the creation of newer works and to encourage wide dissemination of a variety of different musical genres, it is equally important to encourage the creation of original material by assuring some protection against appropriation and misuse.¹⁸⁷ While critics of free sampling do not intend to “wipe out” the use of sampling to create new material entirely, it is their contention that in cases where the sampling musician uses a certain amount and/or a certain kind of original material, the sampled musician has just as many rights to have his work protected as the sampling musician has rights to create a fresh work. As Section III of this article has noted, striking a legal balance between the equally important rights of the original musician and the sampling musician has been a difficult, if not impossible, task to accomplish.

There are three variants of the reasoning behind the myth that the law should provide more protection to samplers than to the original musicians who are sampled: (i) because music has “limited tones,” laws regulating uncompensated sampling will necessarily stifle creativity; (ii) because musicians create works primarily for non-economic reasons, they “don’t mind” unlicensed sampling of their works by others; and (iii) existing licensing schemes for sampling third-party music do not work. Once these myths are exposed and debunked, the legal community will have a better appreciation for the rationale employed by the *Bridgeport Music* court’s analysis in its attempt to protect sound recording copyrights from being sampled without consent.

1. Because Music Has “Limited Tones,” Laws Regulating Sampling Will Necessarily Stifle Creativity

Contrary to the provisions in Section 106 of the Copyright Act granting the copyright owner the exclusive rights to copy, reproduce, and create derivative works of his material, law reviews are replete with articles arguing that the sampling artist has a “right” to reproduce certain portions of a prior artist’s work without consent or compensation. Many believe that the *Bridgeport Music* court’s holding that even when a small part of a sound recording is sampled, “the part taken is something of value”¹⁸⁸ is erroneous because “music is a limited language,” and so creating minute combinations of notes that are similar to the notes that appear in other songs is “naturally unavoidable.”¹⁸⁹ The argument is based on the

187. Coats & Kramer. *supra* note 186. at 612.

188. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 802 (6th Cir. 2005).

189. Mueller. *supra* note 58. at 446-47. For support of this assertion, which fundamentally suggests that musicians who sample sound recordings somehow cannot be legally responsible for their actions, the author cites to *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988). The rationale used by the court in that case, however, is readily distinguishable from an analysis of the act of the musician who samples recordings. In *Gaste*, the court was called to determine whether the singer, composer, and publisher of the popular song “Feelings” infringed an earlier, less popular song written by another composer. The court noted that in determining copyright infringement of popular songs, it had to recognize that the substantial similarity analysis “must extend beyond *themes* that could have been derived from a common source or *themes* that are so trite as to be likely to reappear in many *compositions*” and that “we are mindful of the limited number of notes and chords available to *composers* and the resulting fact that common *themes* frequently reappear in various *compositions*,

assumption that protecting small parts of sound recordings would have the same negative effect on creativity as would allowing copyright protection for each letter in the alphabet.¹⁹⁰ Proponents of such reasoning claim that the *Bridgeport Music* court's literal reading of the Copyright Act to determine that substantial similarity is not required in analyzing infringement of sound recordings is "the equivalent of allowing the author of a novel copyright protection for every letter of the alphabet he uses."¹⁹¹

While such assertions may be true of a musical *composition*, as duly noted by the court in *Newton v. Diamond*,¹⁹² applying the same rationale to sound recordings fails to take into consideration the unique differences between the composition and the sound recording as discussed in Section II.A of this article.¹⁹³ Essentially, it would be akin to stating that giving the producer of the movie *Gone With the Wind* copyright protection for the film is equivalent to bestowing him with copyright protection in the written script; it essentially ignores the reality that there are several layers of copyright ownership and protection in the creation of most intellectual property, not just music.¹⁹⁴ In fact, it can be said that creating a sound recording from a musical composition is conceptually equivalent to creating a feature film from a movie script.

If a law professor wanted to supplement her job with a foray in making movies, she certainly would be able to write and produce her own Civil War era love story. However, would she be able to argue that she can take actual famous footage from *Gone With the Wind* and insert portions here and there into her production just

especially in popular music." *Id.* at 1068-69 (emphasis added). Unlike the *Bridgeport Music* court, the *Gaste* court was not faced with a musician who sampled a sound recording verbatim. Yet authors continue to apply the reasoning used to determine substantial similarity in cases of infringement of sound recordings as they do for cases of infringement of compositions. See, e.g., Arewa, *supra* note 139, at 557 & 576 (predicting that hip hop artists will be "significantly impeded" by the holding in *Bridgeport Music* infused with a discussion of the "restricted nature of the musical scale" and claiming that "inherent limitations exist to developing concepts of transformative uses in a system based on only twelve notes," but never distinguishing the different types of analysis required for determining infringement of compositions versus infringement of recordings) (emphasis added.).

190. Mueller, *supra* note 58, at 457.

191. *Id.* at 448.

192. The court made it abundantly clear that even though the compositional elements of the three-note sampled segment are "simple, minimal and insignificant" (quoting defendant's expert), there are certain "unique performance elements found only in the sound recording." *Newton*, 388 F.3d at 1194-96. *But see id.*, at 1198 (Graber, J., dissenting) (arguing "that an average and reasonable listener would recognize Beastie Boys' appropriation of the composition of the sampled material); Bloch, *supra* note 126, at 203 (also asserting an opinion contrary to the majority in *Newton* that even though all Western melodies consist of variations of twelve tones, that does not necessitate a conclusion that there are too few of these combinations to allow them copyright protection).

193. Whereas creating an individual sound could never be considered a work of authorship for a composer, "digital samples evidence that an individual sound may be the work of authorship for the producer of a sound recording." See Johnson, *supra* note 58, at 283 (emphasis added).

194. For example, the 1939 film adaptation of Margaret Mitchell's best-selling novel, *Gone With the Wind*, is often considered the most beloved and popular film of all time. Sidney Howard wrote the movie script and producer David O. Selznick subsequently acquired the film rights to Mitchell's novel in 1936. The famous film, shot in three-strip Technicolor, is the greatest epic film depicting the Civil War in the South and boasting a classic tale of romance. Filmsite.org. *Gone With The Wind*, <http://www.filmsite.org/gone.html> (last visited on Mar. 28, 2008).

because she is too poor to afford to produce her own war scene footage, or because it is too difficult to reproduce the famous sunset at the end of the movie in the studio? Since the movie industry does not tolerate such appropriation of original works, why should the music industry do so? Indeed, just as the law professor would have to either: (a) recreate her own Civil War footage and Southern sunset on film; or (b) negotiate a license from the owner of the *Gone With the Wind* motion picture to use the actual footage filmed in that movie, so should samplers have to legally act to obtain the fodder and raw materials they use to create a song that contains samples of prior recorded material.¹⁹⁵

While many free sampling devotees attempt to expound on the claim that the law should err in favor of sampling artists by arguing that defendants who sample sound recordings are artistically restricted in their acts of sampling due to the limited nature of the musical scale, the fact of the matter is that there are a limitless number of ways to create sound recordings from a composition.¹⁹⁶ This phenomenon is evidenced by the fact that in some works, like the "Choir" recording sampled in *Newton*, "the producer's contribution may be fully expressed in a . . . few note recording"¹⁹⁷ In fact, the value of the sound recording lies in the manner in and method by which the sounds are fixed by a combination of efforts of the musicians' performance and capture thereof by the producer and engineer, *not* in the notes or chords, the protection of which is reserved for the composition copyright.

In order to appreciate not only the variety of ways that producers can create unique recorded variants of a composition, but also the economic value of the consequent sound recording as separate and apart from the underlying composition, an example is in order. Led Zeppelin's fourth untitled album, commonly referred to as *Led Zeppelin IV*, includes a cover version of a 1929 blues song entitled, "When the Levee Breaks." When released in November 1971, the album peaked on the charts at No. 2, remained on the charts for 234 weeks, and was certified a gold album by the end of 1971.¹⁹⁸ *Rolling Stone* magazine has reported continuous and steady sales of the popular record, with a reported total of 22 million sold as of 2003.¹⁹⁹ In fact, as of June 2007, Amazon.com had given *Led Zeppelin IV* a sales

195. But, as free sampling proponents may argue, why should we require such a wasteful expenditure of resources when a second comer can easily recreate the sounds or film images with modern technology? Isn't such a result unfair to struggling musicians and filmmakers who have neither the money to recreate the sounds or images by hiring musicians or taking a film crew to a cotton field in the South nor the bargaining power to negotiate a reasonable license fee from the owner of the film or sound recording?

196. Bloch, *supra* note 126, at 203 (shattering the misconception that just because Western melodies are made of a combination of twelve tones, there are necessarily too few combinations of those tones to permit copyright protection, and noting that even standard drum rhythms should be protected because there are so many ways to create them).

197. Before the advent of digital sampling, a one-note recording did not have commercial value, but today few-note and even single-note sound recordings do have value. *Id.*

198. Super Seventies Rock Site. Led Zeppelin. <http://www.superseventies.com/ledzeppelin1.html> (last visited on Mar. 28, 2008).

199. *The RS 500 Greatest Albums of All Time*. ROLLING STONE, November 2003 available at http://www.rollingstone.com/news/story/6598004/66_led_zeppelin_iv (last visited on Mar. 28, 2008).

rank of 142 in the "Bestsellers in Music" category and had noted that the album was in the Rock-n-Roll Hall of Fame's "Definitive 200" category,²⁰⁰ further indicating the continued popularity and economic viability of the album decades after it was first released.

Music experts agree that part of the reason why *Led Zeppelin IV* remains an enduring album and why "When the Levee Breaks" has been sampled over and over again has to do with the ingenuity, creativity, and technique shown by a combination of efforts and talents of the producers, engineers, and artists themselves when they decided to record the album at Headley Grange, an old mansion in Headley, East Hampshire, England. One author gives an account of the combination of techniques used in the recording of the album, and particularly of "When the Levee Breaks":

The story of the recording of the track in Headley Grange is well-known, with the [drum] kit set up on the stone floor at the foot of the massive stairwell, and just a stereo pair of microphones placed on the second landing. [Led Zeppelin's guitarist and drummer] knew exactly what they were after, and fully deserve the acclaim the experiment has brought them.

[The drummer's] kit is of course tuned exactly for the occasion and the beat is wide open and laidback, allowing maximum space to savour the resonance of the environment. The cymbals explode in a way they simply never do when recorded in a controlled, damped room.²⁰¹

Another author remarks of the acclaimed recording:

The famous drum performance was recorded by engineer Andy Johns placing [the drummer] and a new drumkit at the bottom of a stairwell. . . and recording it using two Beyerdynamic M160 microphones at the top, giving the distinctive resonant but slightly muffled sound. . . [The guitarist] recorded [the] harmonica part using the backward echo technique, putting the echo ahead of the sound when mixing, creating a unique effect. Because this song was heavily produced in the studio, it was difficult to recreate live. The band only played this song a few times in the early stages of their 1975 U.S. Tour.²⁰²

As such, it is easy to see why so many drummers have attempted, to no avail, to reproduce the unique sounds of the drum beat of "When the Levee Breaks."²⁰³

200. The National Association of Recording Merchandisers and the Rock & Roll Hall of Fame have formulated a list of 200 albums that "should be in every music collection" because they are "albums that have consistently excited record buyers over the years and those that have the potential for continued success based on enduring popularity." Amazon.com, Rock and Roll Hall of Fame Presents Definitive 200, <http://www.amazon.com/gp/feature.html?ie=UTF8&docId=1000062961> (last visited on Mar. 28, 2008).

201. CHRIS WELCH AND GEOFF NICHOLLS, JOHN BONHAM: A THUNDER OF DRUMS 157 (2001).

202. Wikipedia.org, When the Levee Breaks, http://en.wikipedia.org/wiki/When_the_Levee_Breaks (last visited on Mar. 28, 2008) (citing DAVE LEWIS, THE COMPLETE GUIDE TO THE MUSIC OF LED ZEPPELIN (1994); CHRIS WELCH, LED ZEPPELIN: DAZED AND CONFUSED - THE STORIES BEHIND EVERY SONG 70, 72 (1998); DAVE LEWIS, LED ZEPPELIN: THE COMPLETE GUIDE TO THEIR MUSIC 33 (2004)).

203. Welsh and Nicholls, *supra* note 201, at 98.

When an imitating drummer's attempts to recreate the sound on his own fails today, he can achieve the *exact* sound that Led Zeppelin and its producers, engineers, mixers, and recorders worked so hard to achieve originally with the press of a button or a click of a mouse. In fact, the single-bar pattern of "When the Levee Breaks" "found its way on to every breakbeat collection in the late 1980's."²⁰⁴

Not only are the drum sounds unique, but they are also highly distinctive and associated with Led Zeppelin by fans worldwide. All it takes is hearing about two notes and two seconds of the drum intro to "When the Levee Breaks" for a fan familiar with the band's repertoire to obtain an immediate recognition of the song. While the act of a different drummer copying the compositional components of the simple, underlying drum pattern on his own kit may be determined *de minimis*, the *Bridgeport Music* court evidenced its understanding of the unique nature of a sound recording as distinct from a composition by observing that Congress' intent in drafting section 114(b) of the Copyright Act was to strike a balance by giving sound recording copyright holders the exclusive right to duplicate the sounds in their own recordings.²⁰⁵ The court appropriately noted that "the world at large is free to imitate or simulate the creative work fixed in the recording so long as an actual copy of the sound recording itself is not made."²⁰⁶ In other words, any band may perform research on how Led Zeppelin created the unique drum sounds in "When the Levee Breaks"; they may then expend the money, resources and energy in renting Headley Grange and attempting to make their own similar drum sounds; they may even go so far as hiring the original musicians and engineers to aid them in this quest.²⁰⁷ What they cannot do, per the explicit terms of section 114(b), is to "duplicate the sound recording in the form of phonorecords, or of copies. . . , that directly or indirectly recapture the actual sounds fixed in the recording."²⁰⁸

When one fully appreciates the distinction between the nature of a composition (which is created by using limited note and chord combinations) and subsequent sound recordings (the tones and sounds of which can be created in a boundless number of ways), one can understand why affording copyright protection to such sound recordings will not stunt the growth of new music, as many proponents of sampling have attempted to argue. The *Bridgeport Music* court was aware of such a distinction when it held that "[f]or the sound recording copyright holder, it is not the 'song' but the sounds that are fixed in the medium of his choice. When those sounds are sampled they are taken directly from that fixed medium."²⁰⁹ As the court correctly noted, all musicians are free to imitate the creative work that is fixed in the sound recording, provided that they do not make an actual copy of such

204. *Id.* at 157 (stating that the simple beat of the bass drum – syncopated on the last sixteenth of the beat and isolated at the beginning of the track – is a "bedrock for the loping hip-hop grooves of the sampling generation" and can easily achieve "clean" sampling).

205. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800 (6th Cir. 2005).

206. *Id.*

207. Except drummer John Bonham, who died in 1980.

208. 17 U.S.C. § 114(b) (2006).

209. *Bridgeport Music*, 410 F.3d at 802.

sound recording.²¹⁰ Because samplers can imitate the composition—which is made up of limited notes—by employing the collective creative talents of various musicians, engineers, and even studio acoustics to create their own sound recordings, their artistic sampling endeavors will not be thwarted by the rule set forth in *Bridgeport Music*.

2. Because Musicians Create Works Primarily for Non-Economic Reasons, They “Don’t Mind” Unlicensed Sampling of Their Works by Others

The second part of the myth that sampling musicians deserve more copyright protection than sampled musicians is the fallacy that musicians create primarily for reasons other than gaining pecuniary benefit from their creations and, therefore, the incentives that the Copyright Act attempts to provide via the exclusive rights of section 106 are unnecessary.²¹¹ While painting with such a broad philosophical brush on musical creation may be easy for copyright scholars and music critics, in fact, many musicians do not condone unlicensed sampling and rightly wish to control the economic viability of the music they create.²¹² Other authors more accurately observe that, in a free market economy, there must be some mechanism for artists to obtain the benefit of their intellectual investments due to the reality that when “faced with the choice between creating and copying, it makes more sense to copy.”²¹³ In fact, many would argue from a philosophical standpoint that

210. *Id.* at 800.

211. At the apex of such a tenet is Creative Commons (“CC”), a non-profit organization chaired by Lawrence Lessig, which “seeks to use private rights to create public goods” by ensuring that songs from which anyone may sample freely are available on the Internet. Arewa, *supra* note 139, at 643-44. CC seeks to facilitate the “open licensing” of creative works by offering free licenses and encouraging large-scale sharing of authors’ copyrighted works. Zachary Katz, *Pitfalls of Open Licensing: An Analysis of Creative Commons Licensing*, 46 IDEA 391, 391 (2006). But, as Katz has observed, even within the charitable environment of Creative Commons, licensors can impose various restrictions on their works, such as “BY” (requiring attribution or credit to the original author), “NC” (prohibiting any use “primarily intended for or directed toward commercial advantage or private monetary compensation”) and “ND” (no right to create derivative works from the original material). *Id.* at 395-96. Such restrictions inherently result in a “central tension in the open source and free culture movement” because authors want to share their work and promote open access, yet they still also desire to maintain “some control over their work,” which “may ultimately lead to the closing off of creative works to uses that may be perceived as beneficial by the initial licensors.” *Id.* at 409-10. When certain works with restrictions cannot be combined with other works, the very purpose of Creative Commons is thwarted. For example, ND is a popular restriction that is included in one-third of all CC licenses; however, works created under this restriction “constitute an infertile species that will never self-populate. . . or breed with other content types.” *Id.* at 401.

212. For example, several musical groups such as Pink Floyd and the Beatles have a strict “no sampling policy”; they will not provide a license to *anyone* to sample any of their musical repertoire. Brandes, *supra* note 130, 124-25. Signifying “a new awareness of the pervasiveness of the [sampling] problem” and reflecting “a deliberate effort by one artist to protect himself” is Frank Zappa’s “no sampling” warning that he has placed on his albums. Johnson, *supra* note 58, at 305. See also Percifull, *supra* note 172, at 1267 (noting that rampant sampling practices “disturb” many musicians who “resent having spent years developing a personal style, only to have it become commonplace as a result of continuous sampling of their recordings”).

213. Matthew J. Sag, *Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency*, 81 TUL. L. REV. 187, 193-94 (2006) (noting that, while it may be true that artists

to assign the "gain" from a creative work to someone who had nothing to do with its creation shortchanges the original creator and impermissibly develops a "desert" theory in which others believe they are entitled to the proprietary fruits (real or intellectual) of the labors to which they have contributed "nothing of any sort."²¹⁴

Other overlooked economic observations include the fact that free sampling enables its users to compose easily and receive credit and royalties for works that prior musicians have spent time, money, and emotion in composing as their own.²¹⁵ Since anyone is a potential musician, the gap between the performer and his audience has been bridged to the extent that much of the "mythology" associated with the creation of music has eroded.²¹⁶ Critics muse that the infatuation with modern equipment has caused musicians to disregard the art of composing and performing music of true quality.²¹⁷ Some even go so far as to state that the

create for a variety of non-economic reasons, this fact "should not obscure the point that the author's hope of commercial success is often what keeps them chained to the typewriter and keeps their publisher paying the rent").

214. Richard A. Epstein, *Liberty Versus Property? Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. REV. 1, 7-8 (2005). For an interesting philosophical and moral perspective on the principles of proprietary rights that can be applied to licensing of intellectual property, see Ayn Rand, *Capitalism: The Unknown Ideal* 258 (1946). Rand states that "[t]here can be no such thing as the right to an unrestricted freedom of . . . action on someone else's property" and:

In any undertaking or establishment involving more than one man, it is the owner or owners who set the rules and terms of appropriate conduct; the rest of the participants are free to go elsewhere and seek different terms, if they do not agree. There can be no such thing as the right to act on whim, to be exercised by some participants at the expense of others.

Id. (Emphasis in original).

215. Since sampling technology has elevated all consumers to "potential creators," the talented composer or musician is thereby denied an "aura of autonomy and authenticity," and "[i]nstrumental dexterity is no longer a prerequisite for creation." Sanjek, *supra* note 8, at 609. Proponents of free sampling may argue that the Supreme Court decision in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991), specifically denies copyright protection for the amount of time and money expended by an author to create a work. In *Feist*, the plaintiff expended effort and money to compile names and telephone numbers in order to publish a white and yellow page directory covering a particular geographic area. *Id.* at 343-44. The plaintiff sued for copyright infringement when the defendant identically reproduced 1,309 of the plaintiff's 46,878 listings for publication in its own directory. *Id.* at 344. The Court rejected the "sweat of the brow" theory used in earlier cases to offer copyright protection for the amount of time and labor expended to create a compilation. *Id.* at 352. Concluding that the plaintiff's white pages were not sufficiently creative to "satisfy the minimum constitutional standards for copyright protection," the Court held that:

[Plaintiff] publishes the most basic information—name, town, and telephone number—about each person who applies to it for telephone service. This is "selection" of a sort, but it lacks the modicum of creativity necessary to transform mere selection into copyrightable expression...[therefore] there is nothing remotely creative about arranging names alphabetically in a white pages directory..

Id. at 362-63. The Court instructed that "the principal focus should be on whether the selection, coordination, and arrangement are sufficiently original to merit protection." *Id.* at 358. While expending time and money to compile facts will no longer pass muster under the "sweat of the brow" theory to merit copyright protection, compositions of original music will still be considered copyrightable expressions even under the more stringent originality requirement imposed in *Feist*.

216. See John Leland, *Singles*, SPIN, Aug. 1988, at 80. One author has described the effect of extensive use of sampling as an enlargement or "democratization" of the "ranks of potential creators." Sanjek, *supra* note 8, at 609.

217. Les Hooper, *Composing With MIDI*, ELECTRONIC MUSIC EDUCATOR, Winter, 1990, at 3

production of music through sampling is the "greatest threat facing instrumental musicians today" because a sample, unlike a phonograph, allows a musician's performance to be reused in a "completely different piece of music."²¹⁸

Proponents of free sampling refute these claims with several counter-arguments. First, free sampling advocates argue that since new material created by sampling does not cut into the original musician's market, he sustains no loss of profit by the use.²¹⁹ It, therefore, would not be plausible to argue that purchasers of the new work bought it in place of the original work.²²⁰ To the contrary, the sampling musician actually broadens the audience of the original musician by introducing his song to an audience who probably never would have heard it, and possibly would not care to hear it.²²¹

This argument views profits from the limited perspective of the "effect on the market" test utilized in a legal determination of copyright infringement.²²² It fails to recognize the fact that original artists who are sampled are typically denied financial compensation and attribution for their work.²²³ Since sampling does not involve the mere imitation of sounds, but instead incorporates the actual use of the sampled musician's original work,²²⁴ critics of free sampling argue that the sampled musician should be entitled to some form of compensation for such use of his work.²²⁵

The argument that sampling does not cut into the original musician's market also fails to consider the possibility that the increased use of sampling in the music industry has decreased employment for session musicians and traditional performance musicians.²²⁶ Even as far back as the mid-1980s, when sampling was just beginning to emerge as a popular art form, the New York Musician's Union Local 802 reported a "precipitous" drop in employment of session musicians, which it attributed to perfection of the technological reproduction of synthesized

(stating a fear that new generations of musicians who implement modern music technology will not be inclined to dig back into the historic roots of music as an art form).

218. Christopher D. Abramson, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection*, 74 N.Y.U. L. REV. 1660, 1661-62 (1999) (comparing the "plight" of the modern-day musician to that of a factory worker who is replaced by machines except that, unlike the factory worker, the musician actually created the product that is replacing him).

219. Falstrom, *supra* note 4, at 371 n. 70.

220. *Id.*

221. *Id.*

222. The "effect on the market" test is a statutory fair use defense in a copyright infringement cause of action. It can be found at 17 U.S.C. § 107(4). For a complete definition of the "effect on the market" test in conjunction with fair use, see CHISUM & JACOBS, *supra* note 36, at § 4F[3][b][iv] 4-197.

223. See Johnson, *supra* note 58, at 288.

224. Kravis, *supra* note 63, at 235.

225. Rap artist M.C. Hammer has stated that the reason he obtains clearances for samples of other musician's work is because if he uses their material in his new composition, they have the right to be compensated. Ressler, *supra* note 117, at 105.

226. J.C. Thom, Comment, *Digital Sampling: Old-Fashioned Piracy Dressed up in Sleek New Technology*, 8 LOY. ENT. L.J. 297, 332 (1988). A musician can gain access to an entire orchestra without having to invest in hiring musicians simply by using a sampling library. See Percifull, *supra* note 172, at 1268.

music.²²⁷ While free sampling proponents may argue that such fears are overblown, dismal statistics evidence that recording jobs for the acoustic performer decreased by approximately thirty-five percent between the years of 1983 and 1986 alone.²²⁸

Even if sampling does not cut into the original musician's market, some artists state that if a musician uses a sample of their material, he should at the very least obtain their consent because: (i) they are really "still playing" in the second work; and (ii) the second work may be something with which the original musician would not want to be associated.²²⁹ For instance, imagine that an original blues singer becomes famous for her signature sound of vocalizing in unusually low pitched tones. Her voice alone is then sampled by a rap musician and used in a totally different context that she deems both vulgar and offensive.²³⁰ She then has a legitimate fear that when fans recognize her signature sound in the second work, they will associate her with the music or believe that she had an active part in creating it.²³¹

227. See Johnson, *supra* note 58, at 275 (arguing that statutory protection for digital samples should be afforded to producers, thereby encouraging the creation of new works in the studio).

228. Newton, *supra* note 154, at 674 n.14; see also James S. Newton, *A Death Knell Sounds for Musical Jobs*, N.Y. TIMES, Mar. 1, 1987, at F19. When session musicians are hired to perform in the studio on a new work, they face additional problems if that material is subsequently appropriated by sampling musicians. Since the session musician is not the recording artist named on the label of the new work, he has no rights that would enable him to directly sue the sampling musician for using his material. For example, when jazz musician Johnny Hammond recorded his 1974 album, *Higher Ground*, he hired session musician Ron Carter to perform a bass solo for the intro to his song "Big Sur Suite." More than ten years later, rapper Dr. Dre sampled Carter's solo and looped it throughout his song "A Nigga Widda Gun." The song was contained in Dr. Dre's 1992 release entitled *The Chronicle*, which sold approximately 3.5 million copies. When Carter approached his attorney Alan S. Bergman, Bergman informed Carter that as a sideman he had no rights to sue Dr. Dre. Luckily, Bergman was able to contact Hammond, who held the copyright to *Higher Ground*. Working with Hammond, Bergman was able to claim 3.1 cents on behalf of Carter for each copy of Dr. Dre's album that was sold. However, most session musicians are not as fortunate as Carter in pursuing their rights to their original material in these situations. Interview with Alan S. Bergman of Gottlieb, Schiff, Bergman & Sendroff, P.C., in New York, N.Y. (December 18, 1995). For a further discussion of the case see *infra* note 287.

229. Randall, *supra* note 17, at 56.

230. It is not unrealistic that some musicians would find offense in the content of contemporary rap music. Since the birth of rap music in black dance clubs in New York in the 1970s, the lyrics of the genre have "grown acutely political, and at times graphically violent." Kahan, *supra* note 167, at 2583. In such rap songs as "Let a Ho Be a Ho" and "Mind of a Lunatic," the performer depicts an "unrelenting blast of rage" largely aimed at women. In the latter, one finds the lyrics, "Her body's beautiful so I'm thinkin' rape / Shouldn't have had her curtains open so that's her fate." Greg Kot, *No Sale: Citing Explicit Lyrics, Distributor Backs Away from Geto Boys Album*, CHI. TRIB., Sept. 13, 1990, at Tempo 9. Rap music continues to be a source of controversy. Referring to vulgar rap lyrics, one author has described the rap "attitude" as "bombastic, self-aggrandizing and yet as scary as sudden footsteps in the dark." Jerry Adler, Jennifer Foote & Ray Sawhill, *The Rap Attitude*, NEWSWEEK, Mar. 19, 1990, at 57. For a full treatment of the controversy surrounding the lyrical content of rap music and other music, see generally Anne L. Clark, Note, "As Nasty As They Wanna Be": *Popular Music on Trial*, 65 N.Y.U. L. REV. 1481 (1990); James R. McDonald, *Censoring Rock Lyrics: A Historical Analysis of the Debate*, 19 YOUTH & SOC'Y 294 (1988).

231. Some states offer more legal protection for the rights of an author to prevent objectionable uses of his name by recognizing the doctrine of "truthful attribution." For example, in *Williams v. Weisser*, 273 Cal.App.2d 726 (Cal. Ct. App. 1969), the defendant paid a U.C.L.A. student to take

Proponents of free sampling commonly rebut that in the vast majority of situations, the sampling artist does not "lift" material that is so associated with the prior musician's signature sound that the listening audience would identify the second work as an original extension of the prior artist's composition.²³² Since the sampling musician often manipulates the sound electronically to the point that it is no longer recognizable or to where the recognizable sound is *de minimis*,²³³ sampling proponents maintain that the fear of becoming identified with the second work is overblown and unrealistic.

It is interesting to observe, however, that even some advocates of free sampling admit that some secondary works are so reminiscent of the prior works they sample that they cease to be mere samples and become virtual "clones."²³⁴ While it is true that many sampled sounds are used minimally in a second work, oftentimes signature sounds of sampled musicians are used significantly and recognizably in second works with which the original musician had no connection.²³⁵ Though rap artist Biz Markie looped only ten seconds worth of sampled material from Gilbert O'Sullivan's song "Alone Again (Naturally)" in his album "I Need a Haircut,"²³⁶ the sample was easily recognizable, and not just a "mere drum beat."²³⁷

extensive notes on lectures given by the plaintiff. The defendant copyrighted the notes under his name and sold them to students. The California Court of Appeal held that:

An author who owns the common law copyright to his work can determine whether he wants to publish it and, if so, under what circumstances. Plaintiff had prepared his notes for a specific purpose—as an outline to lectures to be delivered to a class of students. Though he apparently considered them adequate for that purpose, he did not desire a commercial distribution with which his name was associated. Right or wrong, he felt that his professional standing could be jeopardized...Any person...could reasonably believe that plaintiff had assisted in the final product.

Id. at 742. *But see* Shostakovich v. Twentieth Century-Fox Film Corp., 80 N.Y.S.2d 575 (N.Y. Sup. Ct. 1948) (holding that the mere fact that a composer dislikes the context in which one of her musical works in the *public domain* is presented is insufficient to stop another from using her work and attributing it to her). For a complete discussion of differing state doctrines that attempt to protect the rights of artists that are beyond the scope of the Copyright Act, *see supra* notes 95-116 and accompanying text.

232. For example, sampled drumbeats, which are usually very brief, have never been considered either a "definite" or distinct part of a song. Sheila Rule, *Record Companies are Challenging 'Sampling' in Rap*, N.Y. TIMES Apr. 21, 1992, at C13.

233. Marcus, *supra* note 4, at 777. When sampling prior recordings, some artists try to reduce their chances of being sued for copyright infringement by processing the work beyond the point of recognition. Victoroff, *supra* note 65, at 135.

234. *See* Falstrom, *supra* note 4, at 379.

235. Dupler, *supra* note 13, at 74 (noting that Phil Collins' widely popular snare drum sound from "In the Air Tonight" has been used on dozens of recordings with which he had no association). Conga player David Earl Johnson has had his congas and unique eighty-year-old African drums sampled, the sounds of which are "way up front" in musician Jan Hammer's popular theme song to the *Miami Vice* television show. Johnson states that Hammer has "got [him] and [his] best sounds for life" without permission or compensation. *Id.* *See also* Johnson, *supra* note 58, at 295 (lamenting that when artists such as Johnson enter the studio and store their sounds into digital memory, they face the risk that they will "leave behind" their distinctive sounds and, thus, their future employment opportunities may be diminished).

236. *See* Falstrom, *supra* note 4, at 361. For a further discussion of the ensuing legal battle between Markie and O'Sullivan, *see supra* text accompanying notes 67-73.

237. *Id.* at 369. For an informative perspective on the particular vulnerability of drums to illicit sampling due to a common belief that drum rhythms are essentially all the same and that the drums are

Another argument used in defense of protecting the sampler more than the sampled musician is that free sampling can actually "resurrect" older music that the conglomerates who are in charge of record companies have "allowed to languish in their back catalog."²³⁸ When sounds from songs that have been out of print for a number of years are sampled by a musician with fresh ideas and are incorporated into the musician's new song, the older material can be heard by audiences who may never have had an opportunity to experience it otherwise.²³⁹ On the other hand, when the original musician is not even credited for the sample, there is little reason to believe that his back catalog will "experience a sudden surge of interest."²⁴⁰ Some opine that it is practically impossible to determine whether the use of samples from an artist's previous works help or hurt the future marketability of such works.²⁴¹

Several lesser-known musicians praise the technique of digital sampling for various other reasons, including that use of the sample library acts as an advertisement of their talents.²⁴² Other musicians actually attribute their success in the music industry to having their unknown songs sampled by popular musicians, and subsequently "discovered" by curious producers or audiences of the popular sampling musician.²⁴³ While it may seem odd that a producer who has spent hundreds of dollars on sample libraries would hire the actual musician to reproduce the same sounds live, some library publishers state that it is a common occurrence.²⁴⁴

Others have intuitively observed that, when having to choose between samplers and original musicians, "it is not unreasonable to side with the party that has engaged in unquestionably creative, non-infringing behavior" or, in other words, the original musician.²⁴⁵ Laws that permit free sampling practices without compensating the original artist who is sampled actually reduce the incentive to

important only to help the other musicians keep time when playing a song. *see generally* Bloch, *supra* note 126.

238. Sanjek, *supra* note 8, at 616. Bobby Byrd, a rhythm and blues performer from the 1960s, actually attributes his rejuvenated career to popular rap artists who have sampled his older works. Snowden, *supra* note 174, at 61.

239. *See generally* Marcus, *supra* note 4.

240. Bloch, *supra* note 126, at 208.

241. *Id.*

242. For example, Michael Bland, drummer for the artist Prince, put together a CD-ROM containing samples of his own material for the admitted purpose of advertising his services to the music industry. He rationalizes this act by claiming that as a "sideman," he does not get a chance to show the kind of work that he can do on his own. He also states the reality that musicians performing behind a popular artist can never be certain how long their gig will last. *See* Randall, *supra* note 17, at 50.

243. Ofra Haza, an Israeli pop musician who recorded a folk song album, was sampled when London disc jockeys mixed her "haunting voice" into popular rap songs. Haza has since enjoyed both an international reputation and a major recording contract. *See* Snowden, *supra* note 172, at 61. Session percussionist Bashiri Johnson was featured on a Spectrasonics disc set entitled *Supreme Beats*. When the producer of the set heard the musician's work, he "immediately hired the real thing." *See* Randall, *supra* note 17, at 50.

244. Doug Morton of *Q Up Arts* claims that the people who use sampled material in place of the real musicians are the ones who either financially or logistically are not able to hire the real player. *See id.*

245. Bloch, *supra* note 126, at 214.

create and increase the incentive to sample; as a society, we get “fewer performers and fewer performances—a result that hurts samplers (who have fewer sources to sample from) and musicians alike.”²⁴⁶ It is important, therefore, to understand that any rule favoring samplers over uncompensated original musicians is a “self-destructive rule” because, eventually, artists will be less inclined to produce original music that serves as the raw material for rap, hip hop, and other “mechanically based music forms.”²⁴⁷

Musicians may have a number of motivations for producing the works, such as making them freely available by posting them on the Creative Commons; however, that decision should be within the exclusive control of the artist. The Copyright Act, as written from its inception, allows the musician the initial exclusive control of such economic decisions with respect to his work. While one may rightly argue that the duration of such an exclusive period of control is excessive and, therefore, contravenes the Constitutional mandate of a balance between the rights of the public and the rights of the copyright owner,²⁴⁸ granting anything less than exclusive control of the owner’s sound recording would cause an impermissible shift in the balance of such rights in favor of potential sampling musicians.

3. Existing Licensing Schemes For Sampling Third-Party Music Do Not Work

Particularly after the *Bridgeport Music* ruling, many authors have expressed solicitude that the court’s decision will stifle creativity exercised in the context of an entire genre of music (*i.e.*, rap and hip hop).²⁴⁹ The only evidence commonly set forth to back up such claims, however, is mere conjecture that because musicians will not have enough money to purchase licenses legally and hire competent counsel to negotiate such licenses on their behalf, they will stop making music altogether.²⁵⁰ To the contrary, as previously discussed, rap and hip hop sales are steadily on the rise and hip hop is the second most popular genre of music.²⁵¹ Is it possible that sampling musicians could simply legally obtain licenses to create the works that bring them such fame and success or that they could create entirely

246. *Id.* at 200.

247. *Id.* See also Ryan C. Grelecki, *Can Law and Economics Bring the Funk...or Efficiency?: A Law and Economics Analysis of Digital Sampling*, 33 FLA. ST. U. L. REV. 297, 316 (2005).

248. There are differing opinions as to whether a long duration of copyright rights thwarts or inspires creativity. One argument is that the public domain is reduced by extending the length of copyrights because there will be fewer raw materials “to stimulate artists.” However, a countervailing argument is that “the one thing that may be responsible for keeping a starving artist from abandoning his or her art is the opportunity to make it big.” Jennifer S. Green, *Copyrights in Perpetuity: Peter Pan May Never Grow Up*, 24 PENN. ST. INT’L L. REV. 841, 859 (2006). See also Sag, *supra* note 213, at 188.

249. See, e.g., Bartlett, *supra* note 58, at 324-26; and Gary Young, *6th Circuit Clamps Down on ‘Sampling’*, www.Law.com, Sept. 30, 2004, <http://www.law.com/jsp/article.jsp?id=1096473910640>.

250. Brooke Shultz, *Sound Recordings: “Get a License or Do Not Sample”*, 7 TUL. J. TECH & INTELL. PROP. 327, 335 (2005). “To require an artist to stop the creative process, consult a lawyer, and go through the process of obtaining a license . . . is disruptive and ineffective.” Bartlett, *supra* note 58, at 320.

251. See *supra* notes 177-80 and accompanying text.

original works of art? Instead of focusing so one-sidedly on the effects of sampling regulations on the sampling artists, the legal community should spend some time considering the effects of sampling on the original musicians who are being sampled.

Regardless of the absence of proof that sampling licenses deaden musical creativity and the ability to make music, there exists a growing contingent that believes that allowing copyright owners to negotiate in arms-length transactions with samplers simply does not work. Many state that the uncertainty and expense of sampling licenses in certain circumstances is justification enough to thwart the exclusive rights of copyright owners.²⁵² One author takes such reasoning to an extreme when presenting an argument in defense of known free sampling artist Brian Burton, arguing that a major obstacle to licensing "is the lack of certainty for licensing fees."²⁵³ When Burton created his *Grey Album* by sampling substantial portions of the Beatles' *White Album* and rapper Jay-Z's *Black Album* without permission, he received a cease-and-desist letter from EMI Records, the company that controls the Beatles' sound recording copyrights.²⁵⁴ The author admits that Burton sampled actual sounds owned by EMI without first contacting the company to negotiate a license for use of its intellectual property; however, "even if he had, it is highly doubtful that he would have been able to afford the large sums of money required to license songs from *The White Album*."²⁵⁵

Other scholars similarly point to the prohibitive costs and difficulties of obtaining sampling licenses as a means to exculpate the illegal acts of using another's sound recording without permission.²⁵⁶ They claim that the cost of clearing samples is so prohibitive that it entirely prevents artists from "realizing their creative vision legally."²⁵⁷ Taken to its logical conclusion, this line of reasoning could apply to *all* arms-length licenses of intellectual property and other commodities or, for that matter, to all properties. For example, if I am a local potato chip manufacturer who recently entered into the snack food business and want to use the famous "Frito Lay" trademark on my own flavor of chips, I can go ahead and use it without obtaining permission from Frito-Lay North America, Inc., the owner of the mark. I will be entitled to full absolution for my extralegal behavior because I predict that the owner will: (a) charge too much for the license; or (b) not be willing to license the mark at all. The snack industry would not allow such behavior. Why should the music industry tolerate it in the form of free digital sampling?

In this entitlement-theory malaise, others have gone so far as to contend that the First Amendment should be read as demanding "freedom of imagination" for derivative works such as songs that utilize samples.²⁵⁸ Because such works

252. Balch, *supra* note 55, at 588.

253. *Id.* at 587.

254. *Id.* at 581-83.

255. *Id.* at 588.

256. See, e.g., Brandes, *supra* note 130, at 95; Mueller, *supra* note 58, at 456.

257. Durbin, *supra* note 90, at 1045.

258. Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1,

"always bring with them a new injection of imagination,"²⁵⁹ they should be distinguished from mere reproductions and the creator of such works should not be punished for "imagining or for communicating what he imagines."²⁶⁰ Well, I am closing my eyes right now and imagining how the prequel to *Gone With the Wind* would read or what it would sound like if I played the *White Album* backwards and added vulgar and Satanic lyrics. Under Rubinfeld's imagination theory, I have mostly free reign to pursue such endeavors, as well as a Constitutionally mandated luxury of usurping the artistic efforts and economic successes of those who created before me.²⁶¹

Others take it even a step further by proposing a system where there would be no rights given to authors of copyrighted works. Under one such proposal, the State would contract with authors to sell their works in exchange for "adequate reward" (using "general tax revenue") and for the purpose of incentivizing future productions.²⁶² Under yet another theory, intellectual products would not be owned by anybody; instead, they would be free "to be used by anyone who wants to" and would be treated as "everyday language."²⁶³ The author of this theory justifies removing ownership from creators of intellectual works because "the value of intellectual work is affected by things not controlled by the worker, including luck and natural talent," and even advocates "mass civil disobedience to intellectual property laws."²⁶⁴

A related tactic used by commentators who protect free samplers and excuse their non-compliance with licensing schemas is to vilify the "big bad" record companies who control most of the popular sound recordings that are used by samplers.²⁶⁵ This stratagem fails to consider that the reason many musicians transfer the rights in their recordings in the first place is to use the resources and experience of the record companies who provide them with a studio in which to

4 (2002). Rubinfeld claims that current copyright law is unconstitutional to the extent that it allows courts to issue injunctions and grant damages in cases of derivative works, such as songs using sampled material. With respect to such derivative works, "copyrights act as prior restraints" and "create a private power over public speech that is unacceptable and tantamount to censorship" because "they penalize the exercise of the imagination." *Id.* at 58-59.

259. *Id.* at 53.

260. *Id.* at 4.

261. Even Rubinfeld concedes that not *all* remedies can be taken away from the original copyright owner; he advocates that "special remedy rules"—or an apportionment of profits—be used for copyright holders' derivative works rights. Under this scheme, the exclusive right to make derivative works would no longer exist. Anyone could make a prequel or sequel of *Gone With the Wind*, which would only be subject to an action for profit allocation. *Id.* at 58. Such a solution is akin to affording a compulsory license for derivative works, which will be discussed at length in *infra* Section IV.A and accompanying notes.

262. See Lior Zemer, *Rethinking Copyright Alternatives*, 14 INT'L J.L. & INFO. TECH. 137, 138 (2006) (noting the suggestions of authors such as JW Harris, RC Guell, M. Fischbaum and BG Damstedt, but proposing his own solution of an indefinitely renewable copyright with a *quid pro quo* promise by the author to abide by a list of "fair dealing" exceptions).

263. Brian Martin, *Against Intellectual Property*, ELECTRONIC JOURNAL OF INTELLECTUAL PROPERTY RIGHTS, Sept. 1996, <http://www.uow.edu.au/arts/sts/bmartin/pubs/95psa.html>.

264. *Id.* at 7, 15.

265. *Id.*

record and professionals who press, package, promote, and distribute their music “in a magnitude that the artist individually could never match.”²⁶⁶ In fact, even the author who would excuse Burton’s sampling behavior on the *Grey Album* admits that, “when dealing with licensing issues, it is advantageous to have a professional corporation, such as Sony, grant and collect royalties for the music licenses.”²⁶⁷ The author goes on to explain that the Beatles initially decided to transfer the rights in their recordings so as to avoid tax implications from the massive earnings received from the popular songs—transferring the recordings to a public company allowed the artists to avoid paying capital gains.²⁶⁸ Success in the music business is not achieved in a vacuum; it is achieved by means of the very economic model by which its biggest critics have, ironically, profited the most.

While arguing against arms-length sampling transactions, free sampling proponents readily admit that what samplers are taking from original recordings is something of value.²⁶⁹ Most samplers themselves will not deny that they sample for three main reasons: (i) they do not want to, or are unable to, recreate the sounds in the original sampled recording;²⁷⁰ (ii) in order to “conjure up” a past work that has proven economic success and public recognition;²⁷¹ or (iii) simply because it saves time and production costs.²⁷² In all three scenarios, samplers are taking something of recognizable value, and should “pay the piper” who created the work of value.

A major critique of the *Bridgeport Music* court’s holding is that the opinion will impinge on creative works because it mandates sample clearance. But the *Bridgeport Music* court did not outlaw sampling. Rather, it merely iterated a common economic theme that, like it or not, has applied to American jurisprudence since the inception of our Constitution: if you want to “borrow” or, more accurately, *take* something of value that belongs to somebody else, you had better obtain their permission and negotiate a fee for such use.²⁷³ If samplers openly admit that: (i) what they are using to create their songs is valuable fodder; and (ii) such material is owned by third parties who, by law, have exclusive control of such material, then why should samplers not be willing to pay the market price for such material without claiming that the results of such a practice “could signal a

266. Grelecki, *supra* note 247, at 313-14.

267. Balch, *supra* note 55, at 585.

268. *Id.*

269. See, e.g., Durbin, *supra* note 90, at 1044 (stating that the *Bridgeport Music* court’s proposal that artists are free to independently recreate sounds of others ignores “the artistic value of incorporating the original recording itself”).

270. See Kim, *supra* note 131, at 126 (noting that “the unique nature of the original recorded sounds and the creative choices that were made in the actual fixation of the composition” is what is of value to the sampling musician, not the ability to recreate such sounds on his own); Brandes, *supra* note 130, at 122 (stating that rap artists are not necessarily able to recreate the unique sounds of a popular drum kick or bass line).

271. Brandes, *supra* note 130, at 118 (admitting that “[b]y using familiar samples, rap artists benefit from listeners’ familiarity with and affinity towards the sampled works”).

272. Johnson, *supra* note 58, at 299.

273. *Id.* at 295-96.

disastrous result"?²⁷⁴ If I choose to be a painter, can I argue that I should get free paint or free palates, without with which I would be unable to create? The art industry would not tolerate such handouts, so why should the music industry condone the third-party use of valuable samples for nothing?

The *Bridgeport Music* court accurately noted that mandating sampling licenses would not stifle creativity by pointing to the fact that, since the boom of sampling technology and in response to the earlier sampling lawsuits, "many artists and record companies have sought licenses as a matter of course."²⁷⁵ Other courts should follow such sound reasoning and recognize that, in order to protect the further creative efforts of future musicians, the Copyright Act should be read to provide protection to the owners of sound recordings by requiring licenses for their use in subsequent recordings.

IV. THE SOLUTION: CONTINUED REGULATION OF SAMPLING WITHIN THE MUSIC INDUSTRY

Because the existing laws and procedures regarding the proper use of sampled material rest on unclear, non-uniform and ad hoc decision-making processes, it is clear that, until other courts follow the lead of the *Bridgeport Music* court's reasoning, enacting a new or reformulated system of sampling regulation is necessary to protect the rights of all musicians involved. Several commentators have proposed solutions in order to clarify the rights of original and sampling musicians.

A. THE COMPULSORY LICENSE

Some authors have proposed a compulsory license for the use of digital samples that would be similar to the mechanical compulsory license enacted in the Copyright Act of 1909.²⁷⁶ One author suggests a compulsory license that would give any person the right to sample "everything from a peep to an entire, single instrumental track" from any sound recording publicly distributed in the United States.²⁷⁷ The fee for the license would be determined by the Copyright Royalty Tribunal and would consist of a base fee and a charge by the second for each sample used.²⁷⁸

Aside from the general philosophical arguments against a compulsory licensing

274. Kim, *supra* note 131, at 130.

275. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 804 (6th Cir. 2005).

276. See, e.g., Baroni, *supra* note 17, at 93; Kenneth M. Achenbach, *Grey Area: How Recent Developments in Digital Music Production Have Necessitated the Reexamination of Compulsory Licensing for Sample-Based Works*, 6 N.C. J.L. & TECH. 187, 206-21 (2004); and Durbin, *supra* note 90, at 1046-47. The compulsory license system for digital recordings can be found at 17 U.S.C. § 115 (2006).

277. The maximum allowable taking, however, would be one sample from each artist who is sampled for each sampling artist's album. Baroni, *supra* note 17, at 94-95.

278. *Id.* at 96-97. But see Bloch, *supra* note 126, at 216 (stating that the royalty could alternatively be set by the market once the protections of a compulsory licensing scheme are in place).

scheme,²⁷⁹ there are specific practical reasons why it is not the most appropriate solution in the realm of digital music sampling. The compulsory license scheme would eliminate several of the problems surrounding the use of digital sampling, such as having to determine fees and find the original musician in order to obtain clearance; however, the sampled musician would be even more vulnerable to having his work associated with a new work that he finds morally objectionable.²⁸⁰ The author of this proposal admits that this is a legitimate concern, but states that since most pornographic and violent music gains limited exposure, there would rarely be any real harm done to the original musician.²⁸¹ Since rap and hip hop music often contain lyrics that some may deem morally objectionable and because the music has increased in popularity in the last few decades, a complete dismissal of the moral rights concern is problematic.²⁸²

279. There are three main philosophical camps of thought regarding compulsory licensing schemes, as follows: (i) the fundamental nature of copyright is to balance the interests of copyright owners and users of copyrighted works, and compulsory licensing should be regularly used as an administrative tool to achieve that balance; (ii) the fundamental nature of copyright is exclusive ownership by the author of the copyrighted work, but in certain well-supported instances, compulsory licensing should be considered, as long as it is in conjunction with a fair market rate; and (iii) the fundamental nature of copyright is that of a personal right akin to real property ownership, and compulsory licensing should never be considered because it is a non-consensual taking of property. Robert Cassler, *Copyright Compulsory Licenses—Are They Coming or Going?*, 37 J. OF COPYR. SOC'Y 231, 253-54 (1990).

280. Bloch, *supra* note 126, at 216 (claiming that "a compulsory license does violence to the concept of moral rights").

281. *Id.* at 101-102.

282. Anyone familiar with music industry trends can witness the increase in general popularity and public recognition of rap music in recent years. 2 Live Crew's rap album, *As Nasty As They Wanna Be*, was released in 1989. In one year, sales of the album totaled 1.7 million copies. See Jim McCormick, *Protecting Children From Music Lyrics: Sound Recordings and "Harmful to Minors" Statutes*, 23 GOLDEN GATE U. L. REV. 679, 687 n.58 (1993). Critics accuse rap artist Ice-T for glorifying crime, homophobia, sexism, and violence in his lyrics. His popular 1992 song "Cop Killer" sings, "I'm 'bout to bust some shots off I'm bout to dust some cops off." His 1989 album *The Iceberg Freedom of Speech* was No. 1 on the college campus charts. See Sally B. Donnelly, *The Fire Around the Ice*, TIME, June 22, 1992, at 66. One concerned author writes:

Unfortunately, the messages embodied in today's Hip-Hop music overwhelm a healthy mainstream survival ethic in the eyes of many youth and as a result, society now runs the risk of fostering a generation of youth who will inevitably, tragically and perpetually engage the criminal justice system. Impressionable young people who are heavily exposed to the negative and criminal-related images in Hip-Hop music and videos, instead of developing realistic and criminal-related images in Hip-Hop music and videos, instead of developing realistic measures of societal norms of right and wrong, develop a criminal-minded value system that praises confrontation, aggressiveness and crime and shuns humility, kindness and legality. Hip-Hop culture is the paradigm used by many young people to order their lives.

Christian D. Rutherford, "Gangsta" Culture in a Policed State: *The Crisis in Legal Ethics Formation Amongst Hip-Hop Youth*, 18 NAT'L BLACK L.J. 305, 306 (2004-2005). The author decries fact that despite the "dangerous dynamic" of hip-hop influence the African-American community, which is affected most negatively by this phenomenon, yet remains reluctant to critique it. *Id.* at 307. More recently, the late rapper Tupac Shakur was reported as having album sales with a total of more than 18 million units in the U.S., with a career total of 24.4 million. See Margo Whitmire, *Tupac's 'Game' Haunts Album Chart at No. 1*, Billboard (Dec. 22, 2004), available at http://www.billboard.com/bbcom/news/article_display.jsp?vnu_content_id=1000741125 (last visited April 3, 2008). His 2004 album "Loyal to the Game," which is his third U.S. chart-topping posthumous album since his death contains the following lyrics: "Pass the clip, I think I see him comin now. Fuck the bullshit, posse deep

Another difficulty with the proposed compulsory license system is that it would treat samples of basic underlying instruments as having the same value as samples of a musician's "signature sound." The author of this proposal makes the familiar argument that when "hook" samples are incorporated into secondary works, a new market for original artists is opened.²⁸³ It is highly improbable, however, in many situations, that audiences of the new work would be able to associate the sample with the original artist.²⁸⁴ The author himself readily admits that "it is doubtful . . . that consumers are able to identify most samples with the original performer's recording."²⁸⁵

The author's solution to the identification problem is to require a label credit on the new recording that would refer to the album, song, and artist from which the sample was derived.²⁸⁶ It is true that such a requirement would solve the identification problem; however, the sampled musician still would not be able to control the association of his work with the new work. The resulting phenomenon is that the overall integrity and value of his work is still harmed.²⁸⁷ Since many highly successful "older" musicians have already reaped millions of dollars on past works, they may be interested only in preserving the integrity and value of those works. The flat monetary fees of the compulsory license would be inconsequential for these musicians.

A final problem with the compulsory license proposal is that session musicians would be harmed even more than they are under the existing system.²⁸⁸ The author of the compulsory licensing proposal denies such a claim by predicting that under a compulsory license scheme, many musicians would opt to hire live musicians "rather than face the specifications of the compulsory license. . . ."²⁸⁹ This statement not only negates the author's proposition that a compulsory licensing

and let's run him down. Gots to be the first one to hit ya when we meet. Comin quickly up the streets, is the punk ass police. The first one jumped out and said, "Freeze!" I popped him in his knees and shot him, punk, please. . . Cause cops should mind they business, when we rush. Now you're pleadin like a bitch, cause you don't know how to hush." See also Lola Ogunnaike, *Tupac Shakur: Dead Man Talking*, New York Times (Nov. 9, 2003), available at <http://query.nytimes.com/gst/fullpage.html?res=9900E2D61F30F93AA35752C1A9659C8B63> (last visited April 3, 2008) (noting that even seven years after the rapper was killed in a drive-by shooting in Las Vegas, "one can confidently say that he has never been more popular.").

283. Baroni, *supra* note 17, at 101.

284. For example, imagine a twelve-year-old fan of the Beastie Boys listening to their song "She's Crafty" and thinking, "Hey, that's actually Jimmy Page playing those guitars on Led Zeppelin's 1973 hit song "The Ocean." It is even more unlikely that the fan would then, as a consequence, purchase the Led Zeppelin recording.

285. Baroni, *supra* note 17, at 101.

286. *Id.* at 99.

287. Some sampling musicians have voluntarily added credits on their new recordings to the original musicians whose works they sample. On occasion, however, the sampling musician does not even bother to make sure the credit is accurate. For example, in 1992, rapper Dr. Dre sampled jazz musician Ron Carter's original material from a 1974 song entitled "Big Sur Suite." The credit to Carter on Dr. Dre's album mistitled the original song as "Big Sir Sweet." Interview with Alan S. Bergman of Gottlieb, Schiff, Bergman & Sendroff, P.C., in New York, N.Y. (Dec. 18, 1995). For a further discussion of the case, see *supra* note 228.

288. See *supra* notes 227-30 and accompanying text.

289. Baroni, *supra* note 17, at 103-104.

system would be efficient,²⁹⁰ but also denies the fact that sampling an existing unique sound is undoubtedly less time consuming (and probably cheaper) than hiring a session musician to attempt to reproduce that sound exactly. Knowing that he can obtain unlimited exact sounds from any original recording, the copying musician has even less incentive to hire live musicians.

B. THE VOLUNTARY LICENSE SYSTEM

Another author has proposed that the music industry adopt a voluntary and cooperative licensing scheme in order to deal with the intricacies involved in digital sampling.²⁹¹ The following discussion will explain why such a scheme would be an effective way of dealing with the dilemmas that sampling technology pose. The proposed licensing scheme would not be compulsory, but full industry-wide cooperation would be needed to ensure the goals of protecting both the sampler's need for "artistic expression at a fair cost" and the sampled musician's need for "compensation and recognition of . . . original creativity."²⁹²

The artist sampling previous material would make a list of all samples he intends to use, contact the prospective sampled artists for clearance, and negotiate a payment schedule that would be appropriate in determining the individual situation. Factors that would be taken into consideration for the amount of money to be paid to the sampled artist would include the amount taken from the original work and the realistic expectations of the sampled artist's right to compensation.²⁹³ Factors used to determine the cost of the sample would include the number of original components used in the sample (*i.e.*, a single track or an entire album), how important the sample is to the new work, the number of repetitions of the sample in the new work, and whether the use of the sampled material is offensive to the original artist.²⁹⁴

An alternative standard for determining the cost may be even more efficient. Because the majority of uses of sampled material is mere reproduction of conventional instruments for the purposes of convenience and low cost creation of underlying sounds (such as a drumbeat or bass line), a flat fee could be imposed on the sampler who intends to emulate such basic sampled material. Alternatively, the sampling artist in this situation would only be required to give recognition to the sampled musician in the same way that a writer would recognize that he borrowed material from a previous author by giving that author credit for a phrase in a footnote to the new work. A separate test for determining fees would be necessary if the sampling musician is using an "inherently distinctive" sample from an original work (such as a voice or a recognizable guitar riff or drum beat), however

290. The author states that the compulsory licensing system would create a "clear" and "practical" system that would both "simplify" and "facilitate" existing methods of sampling. *Id.* at 102-103.

291. See Marcus, *supra* note 4, at 785-790.

292. *Id.* at 786-87.

293. The entire process requires good faith, fair dealing, and respect for the integrity of both sampled and sampling artists. *Id.* at 788.

294. *Id.* at 789.

slight the use may be. In the latter example, the determination would have to be made using an ad hoc analysis. If the original musician finds the second work objectionable, he would have the right to flatly refuse incorporation of her "inherently distinctive" sample into the second work. The sampling musician would simply have to come up with another plan.

Some advantages of the voluntary licensing scheme would be fair compensation and recognition to sampled musicians, as well as the avoidance of litigation when "washed up" artists are allowed to extract large amounts of money from current, profitable musicians who work in more contemporary music genres.²⁹⁵ Additionally, if the entire music industry should agree to such a system, individual recording contracts would not contain the sort of non-uniform and often unfair provisions imposing requirements and penalties that are often imposed upon musicians who intend to sample.²⁹⁶ Thirdly, determinations of licensing fees would be imposed by individuals within the recording industry who have a greater understanding of the creative and technological implications involved in the process of digital sampling than any court hearing a copyright infringement case could ever have.

Lastly, and most importantly, both sampled and sampling musicians would be subject to a uniform standard to determine their respective rights and obligations involved in the sampling process. The sampling musician would be well-informed about the specific allowable uses of original material before he engages in the practice of sampling that original material, thus lessening his motivation and ability to "steal" that material without clearance. Since the use of samples would occur before the recording of the new work, the sampled musician would neither have to police his prior work nor initiate expensive litigation for the use of un-cleared samples that have already been recorded.

While the proposed voluntary licensing scheme has many advantages, it leaves several questions unanswered. For example, what specific entity in the music industry would implement the scheme? How will industry-wide compliance be achieved when so many differing opinions exist regarding the use of samples? And, most importantly, how will "voluntary" compliance be assured?

There are some answers to these questions. A standard clause could be imposed in all new recording contracts stating that before a musician samples prior material, he must submit a proposal to a music industry Arbitration Board that would determine whether clearance for the sample is necessary and how much it will cost the musician. To assure fair determination of these questions, the Arbitration Board would be composed of persons representing all types of music genres.²⁹⁷ The sampling musician (and any sampled musician) would agree to have all disputes determined by the Arbitration Board instead of a court.

295. *Id.*

296. See *supra* notes 121-25 and accompanying text.

297. Because much of the controversy over sampling exists between musicians from "older" genres of music (such as blues and rock-n-roll) who tend not to favor sampling and "newer" genres (such as rap and hip hop) who embrace the practice, composition of the Arbitration Board should reflect equal representation of all types of music.

Admittedly, even these additional propositions may further beg the question of who will appoint the board members, and how equal representation will be achieved between the rights of sampled and sampling musicians. Additionally, if complete industry-wide compliance with the system is not achieved, uniformity and predictability will be jeopardized. Nonetheless, it is this author's belief that some form of industry-wide compliance seems to be a better method for the regulation of unauthorized sampling than a compulsory licensing scheme. As digital sampling continues to increase, the music industry will eventually realize that it is in the best interests of all musicians to adopt its own uniform system of sampling regulation. Even the *Bridgeport Music* court expressed its faith in the "ability" and "know-how" of the record industry "to work out guidelines, including a fixed schedule of license fees, if they so choose."²⁹⁸

V. CONCLUSION

Whether one enjoys listening to eighteenth century classical music on a turntable or tuning into a satellite music station to catch the latest classical, heavy metal, or rap hit, it cannot be denied that music is and always has been an important part of our cultural experience. Increased technology has made access to recorded material more readily available to millions of people who derive great pleasure from listening both to the old and new compositions of their favorite musicians.²⁹⁹

While most of this modern technology has been beneficial both to artists and fans of music, a heated debate has arisen over whether some of the technology will actually harm the creative music process. Regardless of one's position on whether the technological advancement of digital sampling is a blessing or a curse for the music industry, one must recognize that additional measures are necessary either to strengthen existing laws and music industry practices in the realm of sampling, or to formulate a new system of clear standards for the controversial practice.

Because the legal community has a history of struggling with adapting existing laws to technological advances, it is unlikely that either an amendment to the Copyright Act or the federal recognition of moral rights in the area of sampling will occur in the near future, if ever. For similar and other obvious reasons, including the fact that there have been so many myths surrounding the elusive technological development of digital sampling within its relatively short life, it is also implausible to rely on the development of a complete and uniform body of state common law development for musicians' rights.

It is, therefore, proposed that the music industry itself take charge of the sampling dilemma by uniting all of its producers, recording companies and

298. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 804 (6th Cir. 2005).

299. When rock-n-roll was first introduced in earlier decades, radios were bulky and basically stationary; however, recent innovations have miniaturized transmission equipment into high-quality and portable units that have made it more possible for persons to "envelop themselves constantly" in music. See Elizabeth F. Brown & William R. Hendee, *Adolescents and Their Music: Insights Into the Health of Adolescents*, 262 J.A.M.A. 1659, 1659 (1989). See also, McDonald, *supra* note 230, at 296 (noting that statistics reported an increase in record sales from \$224 million in 1947 to \$600 million in the 1950s alone).

musicians under a comprehensive, voluntary licensing scheme. If such an agreement can be reached, not only would both sampled and sampling musicians be protected until Congress or the Supreme Court steps in to provide a clear-cut law on sampling, but the millions of fans who enjoy listening to a wide variety of music would also be ensured a steady quantity of new songs as created by these musicians.