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Kenneth M. Achenbach

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Kenneth M. Achenbach[1]

I. Introduction: "The Grey Album"

Last winter, a young, Los Angeles-based hip-hop producer, working out of an improvised studio in his bedroom,[2] created what could quite possibly be the most important album of the past year, if not the past decade. After sending out "a few CDRs . . . to friends,"[3] he discovered that the album had somehow made its way into local record stores.[4] In response to the rapidly-developing buzz around the album, he decided to offer downloadable copies online. At one point, 150 websites were offering the album for download, and some estimates of the total number of downloads

[1] J.D. Candidate, University of North Carolina School of Law, 2006.

[2] Corey Moss, *Grey Album Producer Danger Mouse Explains How He Did It, at* http://www.mtv.com/news/articles/1485693/20040311/jay_z.jhtml?headlines=true (Mar. 11, 2004) (on file with the North Carolina Journal of Law & Technology).

[3] Michael Paoletta, *Danger Mouse Speaks out on 'Grey Album,' at* http://www.billboard.com/bb/icopyright_display.jsp?vnu_content_id=1000455930 (Mar. 8, 2004) (on file with the North Carolina Journal of Law & Technology). "CDR" or "CD-R" stands for CD-recordable, and describes "blank" compact discs that have been treated with a special photo sensitive dye. When this dye is activated by a laser in the course of "writing" information onto the disc, it mimics the microscopic pitting that is used on commercially produced audio CDs, allowing such a "burned," or written upon, CD-R to be read by most standard CD audio devices.

[4] *Id.* There are some inconsistencies between sources as to how the initial small distribution of the album took place, with other sources reporting that "[Mr. Burton] sent about 3,000 promo copies out." Illegal Art, *The Grey Album Story So Far, at* http://www.illegal-art.org/audio/grey.html (last visited Sept. 7, 2004) (on file with the North Carolina Journal of Law & Technology). However, it is possible that both sources are accurate, describing events at different points in the initial offering process.

for songs from the album exceed one million copies.[5] The album has received numerous favorable reviews from reputable sources.[6]

However, Brian Burton, who produces under the name Danger Mouse, will not receive any gold or platinum records in recognition of the popularity of his album, nor is he likely to receive any mainstream awards for his work. Despite the absence of accolades, the record industry is all too aware of Mr. Burton's latest album. Unfortunately for Mr. Burton, rather than viewing the album as a hallmark of an emerging revolution in music production that could be harnessed for substantial profit, the record industry has focused on the materials that were used in the making of the album.

Like the majority of hip-hop producers, Mr. Burton creates his works primarily through the process of sampling. Sampling has been used in hip-hop, dance, and other genres of music for well over a quarter of a century. The exact process has changed with the development of more sophisticated hardware and software technology, but the term generally refers to the appropriation of sounds from an existing sound recording for transformative use in a new work.[7] In his album, Mr. Burton used samples from the Beatles eponymous 1968 release, commonly referred to as "The White Album," and vocal tracks from the *a cappella* version of the Jay-Z release, "The Black Album,"[8] to create his work. The result

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[5] Paoletta, *supra* note 3.

[6] *See, e.g.*, Renee Graham, *Jay-Z, the Beatles Meet in 'Grey' Area*, BOSTON GLOBE, Feb. 10, 2004, at E1. *See also* Lauren Gitlin, *DJ Makes Jay-Z Meet Beatles*, *at* http://www.rollingstone.com/news/story/_/id/5937152 (Feb. 5, 2004) (on file with the North Carolina Journal of Law & Technology) (calling "The Grey Album" "an ingenious hip-hop record that sounds oddly ahead of its time").

[7] See discussion *infra* Part IV for a more through description of sampling processes.

[8] Artists commonly release *a cappella* versions of rap albums for the specific purpose of "remixing" by DJs in live club performances or on "remix" albums. Typically, in the case of albums, the artist and DJ make arrangements for the use of the remix. Such remixes allow the general public to gain greater access to the original artist's work. For example, the lyrics of a more "downtempo" rap song can be remixed by a DJ in a performance with a dance-oriented instrumental track. This allows new audiences to experience the artist's work and simultaneously provides greater publicity for the original artist and his work in a

was logically entitled "The Grey Album." The album did not receive a conventional release but instead found its distribution through other means, as Mr. Burton "knew [he] could never release the album commercially,"[9] due to copyright concerns. Even with free distribution, EMI Group ("EMI"), the holders of the rights to the sound recording of "The White Album," served Mr. Burton with a cease-and-desist letter.[10] However, in response to the actions of EMI, a large number of websites staged a "virtual protest" by simultaneously offering all tracks of "The Grey Album" for free download over a twenty-four hour period.[11] This protest received substantial attention from downloaders, and "bootleg" copies of the album were later sold on eBay for as much as $80 each.[12] Clearly, the general public had developed persistent and significant interest in the album.

Although there is something of a legal cease-fire at the moment,[13] it is quite possible that litigation by EMI or other

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market outside of her target demographic. Additionally, the virtuosity with which this remixing is done, combined with the recognizability of the original vocal track, serves to build the reputation, career, and subsequent economic impact of the DJ. Ideally, both parties benefit in the process. Such practice is very similar to the "talkovers" of early Jamaican DJs from which rap music grew. *See* Chris Johnstone, *Underground Appeal: A Sample of the Chronic Questions in Copyright Law Pertaining to the Transformative Use of Digital Music in a Civil Society*, 77 S. CAL. L. REV. 397 (2004).

[9] Paoletta, *supra* note 3. *See* discussion *infra* Part II for more on why such a conventional release is viewed as impossible.

[10] *See* Paoletta, *supra* note 3.

[11] Bill Werde, *Defiant Downloads Rise From Underground*, N.Y. TIMES, Feb. 25, 2004, at E3 (noting that the protestors billed the event as "Grey Tuesday").

[12] Web masters of the approximately 150 participating sites reported serving between 85 and 1,000 copies of the *entire album* each. *Id.*

[13] As of March 5, 2004, the actions have been limited to cease-and-desist letters from EMI and at least one Digital Millennium Copyright Act ("DMCA") "takedown" notice from Sony Music/ATV Publishing, the owners of the rights to the musical compositions, issued to an Internet service provider ("ISP"). *See* Electronic Frontier Foundation, *Grey Tuesday: A Quick Overview of the Legal Terrain*, *at* http://www.eff.org/IP/grey_tuesday.php (last visited Sept. 7, 2004) (on file with the North Carolina Journal of Law & Technology).

interested parties may follow the coming months.[14] Regardless of whether EMI resorts to such litigation, the story of "The Grey Album" is representative of the current four-way tension between contemporary music production, the development of the musical arts, copyright holders in established works, and the law. The tension in copyright law as it applies to issues of sampling is nearing a point of critical mass. The current structure of the Copyright Act[15] has failed to create a fair market system that is an effective vehicle for ensuring the progress of the arts.[16] Federal District Courts have adopted inconsistent approaches to sampling law, precluding a legal consensus on business practices in a national music industry.[17] Digital sound editing and compositional technology is developing at an unprecedented rate. This development continually provides accessible creative tools to independent, enterprising producers such as Mr. Burton at lower costs. Meanwhile, sample-based music and the marketing associated with it continue to carve out an increasingly significant niche in the national economy. These factors, when combined with the salience that a popular work such as Mr. Burton's lends to sampling issues, create a unique environment that requires and facilitates resolution.

The time is right for Congress to revisit the Copyright Act.[18] This Comment examines the current situation in sampling law from constitutional, judicial, and economic perspectives. It

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[14] *See id.* (providing a tentative listing of the potential parties with interests in the compositions and/or sound recordings used on "The Grey Album," including EMI and Sony Music/ATV Publishing).

[15] 17 U.S.C. §§ 101–1332 (2001).

[16] The promotion of the progress of Science and Art is the ostensible original justification of all copyright law, as stated in U.S. CONST. art. I, § 8, cl. 8.

[17] *See infra* Part III.

[18] Modification of the Copyright Act, be it textually or in how it is interpreted judicially, has been suggested before, particularly in the early-to-mid-1990s, as the first sampling cases began to be litigated. *See, e.g.*, Jason S. Rooks, *Note: Constitutionality of Judicially-imposed Compulsory Licenses in Copyright Infringement Cases*, 3 J. INTELL. PROP. L. 255 (1995). *See also* Randy S. Kravis, *Comment: Does a Song By Any Other Name Sound As Sweet?: Digital Sampling and Its Copyright Implications*, 43 AM. U. L. REV. 231 (1993). Since that time the issue has not been as widely discussed. For reasons outlined in the body of this Comment, the time has come for taking up such discussion again.

argues that Congress should take the opportunity provided by the nexus of legal dissonance and public salience to modify the Copyright Act in a way that accommodates transformative, sample-based, musical productions. In the interest of progress, this action must facilitate the broadest use of recordings in order to further creative expression. It must also continue to protect the financial interests of artists in their works. This Comment proposes that the most effective way to ensure a proper balance of these issues is to modify the mechanical licensing provision of the Copyright Act[19] and include a compulsory licensing system for the use of samples in transformative works.

II. Copyright Law and Its Failure in Music Sampling

Copyright law finds its origin in the Constitution. Article 1, Section 8, Clause 8 reads: "[The Congress shall have the power to] promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[20] The location of this clause in the section enumerating Congressional powers[21] suggests that the exclusive rights of an artist or inventor to his or her work is not, in and of itself, a Constitutional right, but rather is within the power of Congress to secure,[22] so long as that security is granted pursuant to the original aim of promoting "Progress."[23]

In theory, artists will be increasingly encouraged to produce works when they are likely to reap the benefits of those works, particularly when the benefits are potentially lucrative. In essence, "Congress has . . . 'dangled a carrot,' called a copyright, in front of the nose of those creative individuals among us to stimulate them into producing . . . works which will benefit

[19] 17 U.S.C. § 115 (2001).
[20] U.S. CONST. art. I, § 8, cl. 8.
[21] *See* U.S. CONST. art. I, § 8.
[22] Michael L. Baroni, *A Pirate's Palette: The Dilemmas of Digital Sound Sampling and a Proposed Compulsory License Solution*, 11 U. MIAMI ENT. & SPORTS L. REV. 65, 74 (1993).
[23] U.S. CONST. art. I, § 8, cl. 8.

society at large."[24] Over time, however, the assumption that granting extensive and exclusive rights to authors is necessarily *the* means of promoting progress has become nearly universal. References to exclusive interests as "the ultimate public interest that the Constitution and its drafters were thinking about"[25] have vocalized this assumption.

This assumption confuses means and ends. The Constitution's ultimate goal in this area is the promotion of "Science and the useful Arts,"[26] not simply the protection of a proprietary interest of an author in his work. Monopolies often have undesirable effects on the efficiency of any market[27] and can be especially damaging to progress in markets that depend upon the exchange of ideas for development.[28] Sanctioning a monopolistic protection should occur only when there is substantial certainty that the particular monopoly sanctioned is truly the most effective way to promote a specific policy.

Copyright should not be viewed as an exclusive, proprietary interest akin to the rights associated with real property ownership.[29] The Framers of the Constitution may have realized this concern. Although they granted broad-reaching power to Congress to secure exclusivity in the rights to a work, the Framers specifically proscribed such an interest from extending in

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[24] *Copyright Law Revision: Hearings Before the House Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. of the Judiciary on H.R. 2223*, 94 Cong. 475 (June 5, 1975) [hereinafter *Hearings*] (testimony of Donald D. Merry, President, Sicom Electronics Corp.).

[25] *Hearings*, *supra* note 24, at 1865 (testimony of Barbara Ringer, Register of Copyrights).

[26] U.S. CONST. art. I, § 8, cl. 8.

[27] RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW, 271–320 (4th ed 1992).

[28] Appropriation of new techniques and styles has been a hallmark of artistic development throughout the ages. Without the ability to build upon the work of both predecessors and contemporaries via imitation and incorporation, the rate of progress in art would be limited to the developments of individual artists over their isolated lifetimes. To paraphrase Pablo Picasso: "Good artists borrow, great artists steal."

[29] *See* POSNER, *supra* note 27, at 41 (providing that the "tragedy of the commons" associated with unowned land does not apply to real property, as externalities do not apply in the same ways).

perpetuity, permitting such security only "for limited Times."[30] Moreover, the concerns about inefficiency attached to unowned real property are inapplicable to intellectual property, as use by one individual does not increase the costs of use to any other individuals.[31]

This limitation creates a Constitutional provision for the existence of a public domain in some form. The advantages of a temporal limitation on the reach of Congressional copyright protection align themselves with an economic model of copyright as well.[32] By limiting both the number of rights that are granted and the duration of those rights, the production costs incurred by other artists in the making future works will be reduced.[33] Reduced production costs will both encourage production of future works by current artists and lower the economic barrier for entry of new artists who have yet to fully develop their intellectual, social, and financial capital as experienced actors within the market.[34]

Although these two factors, the encouraging of individual artists to produce by granting them market leverage through temporary monopoly[35] and the lowering of production costs to future artists as a way to facilitate entry into this market,[36] are not necessarily in strict adversarial tension with one another, there is a certain balance which must be struck. Unless new artists are enabled to enter the market, the encouraging of artists currently in

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[30] U.S. CONST. art. I, § 8, cl. 8.

[31] *See* POSNER, *supra* note 27.

[32] *Id.*

[33] *Id.* at 41–42.

[34] Accessibility creates a feedback mechanism; lower costs of production enable a greater number of artists to create a greater number of works, which facilitates potentially exponential growth. This phenomenon eventually enables these works to reach the public domain and even further lower production costs for artists in the future.

[35] This function will be referred to as the "encouraging" function throughout the remainder of this Comment.

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the market will be of less long-term significance in terms of promoting innovation.[37]

The potential for future earnings is the substantial element of the encouraging function of copyright. However, potential earnings remain an effective encouragement to new production only until those potential earnings begin to be realized. Once an artist receives income from works he has already produced, it is possible that he will be less encouraged to produce new works.[38] Further, the benefit he receives is for a past action and the benefit continues despite current inaction.[39] When potential income is realized on a level of significant substantiality to provide the artist with a comfortable income, the encouraging function could be diminished completely. At this point, the costs required to produce new works,[40] when balanced against a proportionally insignificant increase in gross income possibly generated by these new works,[41] provide little or no real incentive to produce new works. This is particularly problematic because those artists who have the greatest potential to make significant *future* contributions will not feel encouraged to create new works as they are receiving significant income from *past* works, despite *current* inaction.[42] Receiving compensation for past works may encourage some

[37] Established artists may continue to receive income from works that have lost any of their *avant garde*, progressive value. Essentially, artists may rest on their creative laurels and continue to be well compensated for their inaction.

[38] It is also possible that the realization of potential income could create a positive feedback mechanism. For instance, an artist who continues to receive more income may be commensurably encouraged to produce new works.

[39] This situation is complex, and the unique market factors interacting with each individual actor create a nearly infinite universe of behavioral outcomes. However, the significant danger that a situation as described above *could* reasonably occur on a significant level, when viewed with the potential negative effects of monopoly on a market, is illustrative of the need for a closer examination of copyright policy.

[40] If a band with a deceased member is involved, such production costs could be prohibitive.

[41] The production costs would also have to be balanced against the possibility, however unlikely for established "hit" artists, that their new work would not be profitable.

[42] This evaluation of potential is based on the premise that an artist who has made significant contributions in the past, as evidenced by hit songs, will likely have the skills to do so on a commensurate level in the future.

artists to diversify their interests through royalty-sponsored entrepreneurship in other markets,[43] but it nevertheless fails to encourage new work *in the arts* by these artists. However, over-emphasizing enabled entry into the market, such as by the wholesale elimination of the possibility of such future income by radically limiting the term or scope of copyright ownership, is not a desirable outcome. This situation provides little incentive for an artist to produce works that require a great degree of investment.

Beyond these concerns, there is also another issue to address. Artists do not operate in a vacuum. Instead, artists require an audience for relevance.[44] Accordingly, there is an inherent public interest in "dissemination for the benefit of the public . . . on an equal plane with the protection of the authors and inventors."[45] Regardless of concerns as to how copyright regulation works to encourage the production of new, innovative works, such regulation must simultaneously facilitate dissemination. Regulation which prevents distribution of an "illegal" work will make the illegal work, and any accompanying innovation, irrelevant.[46] When applied too broadly, such regulation can greatly limit the total universe of artistic expression.

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[43] *See, e.g.*, Susan Berfield, *The CEO of Hip Hop*, BUS. WK., Oct. 27, 2003, at 90 (describing the diverse interests of hip-hop pioneer Russell Simmons). *See also* discussion *infra* Part V.

[44] Sometimes an audience is not found until years after the work is produced. But even in this situation, what impact would such a delay have on the artist himself and his productivity? For example, Van Gogh's current relevance is exclusively a product of his "discovery" and placement within the expressionist school some time following his death. This relevance is exclusively a current one; he was not particularly relevant on any large scale during his life. This does nothing to diminish his current relevance, but it could have had an impact on his productivity and contribution to the art world while he was alive and, subsequently, to the art world today. This brings up a relatively serious issue as to exactly how effective the economic encouragement function is as the preeminent motivation for creative persons.

[45] *Hearings*, *supra* note 24, at 117.

[46] The methodology itself is stifled by the removal of economic incentive to continue to produce works. It is also stifled through the imposition of fines for the production of those works.

This limitation can be incalculably far reaching in its effects. The banning of any one work not only affects that particular work but also limits potential works that could have built upon the banned work. Moreover, future works that would have built upon the banned work in a legal manner would be proscribed in the same way as new works that would have illegally built upon the banned work. Therefore, such overbroad regulation could unduly subvert progress by preventing the legitimate development of legitimate works conceptually built upon a legitimate facet of a work that has been banned for a wholly unrelated reason. Such a subversion of progress is inconsistent with the original Constitutional purposes of copyright.[47] Although limited by the letter of the law they must work within, courts dealing with such issues should nonetheless recognize this danger of an overbroad reading of copyright, particularly as it applies to the unique situation of sampling. However, courts generally have chosen not to follow this course. Moreover, in contrast to the national nature of the music industry and the benefit such a national industry would derive from legal uniformity, the various district courts have been inconsistent in their development of sampling jurisprudence.

III. Sampling Law Today

Although the technique of sampling[48] has been used in music

[47] *See* U.S. CONST. art. I, § 8, cl. 8.

[48] Musical sampling has received considerable scholarly attention over the relatively brief time that it has been an issue before the courts. Numerous articles highlight the historical development of sampling law; however, that issue is not the primary focus of this Comment. For a more thorough treatment, *see, e.g.*, David S. Blessing, *Who Speaks Latin Anymore? Translating De Minimus Use for Application to Music Copyright Infringement and Sampling*, 45 WM. & MARY L. REV. 2399 (2004) (providing an examination of the applicability of the de minimis use exception to infringement where copying has occurred at such a minimal level as to fall below the standard of substantial similarity necessary for infringement); Susan B. Latham, Newton v. Diamond: *Measuring the Legitimacy of Unauthorized Compositional Sampling—A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J. 119 (2003) (providing an analysis of the concept of de minimis use); Stan Soocher, *Judicial*

production for three decades,[49] the issue emerged on the judicial radar slightly more than ten years ago.[50] The usual issue in unlicensed sampling suits is whether the use of samples in the new work is an infringement of the original recording. Because sampling uses the recorded performance of a song as its source material, these suits may involve not only the rights to the recorded performance that provided the raw audio source used by the sampling musician but also the rights in the underlying composition upon which the recorded performance was based.[51] Courts sometimes employ the "substantial similarity" test for infringement in sampling cases.[52] This test originated in the Second Circuit's examination of infringement in visual works.[53] This substantial similarity test is necessary even when the factual matter of copying is uncontested.[54] The Ninth Circuit recently applied this test in *Newton v. Diamond.*[55]

In *Newton*, the court held that the use of the sample in question did not infringe upon the rights of the original composer.[56] The court noted that "the contribution of the performer . . . provides as much musical content as the composer."[57] The court alluded to a cause of action for infringement in a sound recording based upon the distinctiveness of a musician's interpretation of a composition. However, the defendants in *Newton* had obtained a license for the use of the

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Guidelines Mature for Sampling Copyright Issues, 18 ENT. L. & FIN. 1 (2003) (providing a quick and to-the-point synopsis of copyright precedent).

[49] *See* Molly McGraw, *Sound Sampling Protection and Infringement in Today's Music Industry*, 4 HIGH TECH. L.J. 147, 148 (1989), *referenced in* Baroni, *supra* note 22.

[50] *See* Grand Upright Music Ltd. v. Warner Bros. Records Inc., 780 F. Supp. 182 (S.D.N.Y. 1991).

[51] Newton v. Diamond, 349 F.3d 591 (9th Cir. 2003).

[52] *Id.* at 595.

[53] Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 75 (2d Cir. 1997).

[54] *Id.*

[55] 349 F.3d 591 (2003).

[56] *Id.* (noting that a three-note sample drawn from the original work and sequenced so as to appear some forty times as part of the new composition was de minimis in relation to the original composition).

[57] *Id.* at 595 (quoting Dr. Christopher Dobrian, an expert witness called by the plaintiff).

sound recording, and issues of distinctiveness were irrelevant to the decision. The only concern was the similarity of the use of the sampled three-note progression as a portion of the new composition as compared to the use of that same three-note progression in the context of the whole of the original composition.[58] The court held that there was insufficient similarity between the use of the three-note sequence in the new composition and the use of the three-note sequence in the old composition to constitute infringement.[59]

While leaving a window open for liability in instances where longer, more compositionally significant samples were used, the court's decision in *Newton* would generally insulate sample based musicians from liability to the composers of the underlying works from which they sampled. Although this decision does not ensure the fair operation of the licensing market, it does allow artists to navigate that market relatively easily. Generally, a sampling artist could identify the party to whom she may be liable from the label of the source material's recording. Although the *Newton* paradigm fell short of establishing a bright-line, universal rule, the pragmatism and common sense of the decision provided a rubric that could be easily applied to other fact patterns. Exactly what sort of use would constitute liability to the composer of the underlying work would have to be given substance by subsequent decisions, but the language of the Ninth Circuit clearly states that the sampling of a brief, relatively simple progression similar to the one used by the defendants in *Newton* did not rise to the level of liability.[60] The system under the *Newton* paradigm was far from perfect, but it neither increased the difficulty of legal sampling nor contradicted contemporary sampling jurisprudence. *Newton* provided a tenable position from which the creators of sample-based works who possessed sufficient market capital could continue to create, although this palette was limited to those sound recordings for which sample-based artists had successfully negotiated licenses.

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[58] *Newton*, 349 F.3d at 595.
[59] *Id.* at 598.
[60] *Id.* at 598.

However, in the recently decided *Bridgeport Music v. Dimension Films*,[61] the Sixth Circuit rejected the *Newton* paradigm. Relying largely on law review articles as justification for the decision,[62] and admittedly following "no existing judicial precedent,"[63] the court explicitly rejected the substantial similarity approach.[64] Instead, the court found that sampling from a sound recording *necessarily* infringes upon the rights of the owners of both the sound recording itself and the underlying composition. Adopting a paternalistic tone reminiscent of the decision in *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*,[65] the court advised the defendants to "[g]et a license or do not sample,"[66] although, in all likelihood, several licenses would be required to avoid infringement under the Sixth Circuit model.

The logic used by the Sixth Circuit failed to take into account the uneven bargaining power between parties in a sampling negotiation. Instead, the court used the frequency of pre-trial settlements in sampling suits and use of licensing by some sampling musicians as prima facie evidence of the necessary fair nature of the sampling market within the record industry.[67] However, this assumption failed to consider the possible costs associated with the operation of the licensing market. By assuming that because the licensing system works in some instances it is necessarily effective—without considering either the frequency with which it fails, or the impact of such failure—the court made its decision on an incomplete and fundamentally biased set of facts.[68] Potentially prohibitive costs associated with the bargaining process for obtaining a license and the potential collateral costs to culture as a whole must be considered to

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[61] 383 F.3d 390 (6th Cir. 2004), *reh'g denied*, 2004 U.S. App. LEXIS 21701 (6th Cir. 2004).

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

[63] *Bridgeport Music*, 383 F.3d at 400.

[64] *See id.*

[65] 780 F. Supp. 182 (S.D.N.Y. 1991).

[66] *Bridgeport*, 383 F.3d at 398.

[67] *See id.*

[68] *See id.*

accurately evaluate the licensing market. The consideration of cost is particularly important when making a decision that could dramatically increase such costs. Under the Sixth Circuit's holding, any artist will be required to conduct two or more separate negotiations for the rights to use each sample, the failure of any one of which would proscribe him from using that sample under law. Success in obtaining licenses from other interested parties would be made irrelevant.[69] As such, the potential for a single party with a diverse portfolio of copyrights to exert disproportionate influence on the entire market is enormous.[70]

While setting out the "principled bright-line rule" the Sixth Circuit claims is needed for sampling cases,[71] the court subverts an emerging judicial test. While a bright line rule can be convenient at times, it is not the most appropriate approach to sampling cases. Sampling jurisprudence incorporates cases involving both widely ranging fact patterns and a continually evolving technological landscape. There is variation both in the individual forms of the works in question as well as the processes by which those forms were created. Equitable results in such cases are dependent upon a judicial standard with the flexibility to deal with such variation. Additionally, because it applies to a national industry, a consistent judicial paradigm would enable the development of a standardized industry practice.

Had it chosen to adopt the Ninth Circuit's *Newton* paradigm, the Sixth Circuit could have moved sampling law one step closer to such a uniform standard, while still possibly ruling for the plaintiff based upon the significance of the sample used and the specific fact situation. However, the Sixth Circuit's decision is

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[69] This enables one owner of rights to prevent the exercise of a *different set* of rights by another owner absent proof that such exercise will result in any calculable damage to the first owner.

[70] For instance, an individual or entity holding a substantial number of sound recordings and rights to the underlying compositions of *different* recordings could prevent artists from sampling *any* of those works. The centralized market control that this could potentially create is reminiscent of the near-monopoly acquired by the Aeolian company prior to the adoption of the 1909 Copyright Act, a situation that was circumscribed by the adoption of the initial mechanical license. *See* discussion *infra* Part VI.

[71] *Bridgeport*, 383 F.3d at 399.

a step in the opposite direction. The potential differences between infringement decisions in the Ninth Circuit and the Sixth Circuit are of particular significance for creators of sample-based works using sound recordings made prior to February 15, 1972, which may be unprotected by the Copyright Act.[72] In the Ninth Circuit, such use could incur no liability so long as the sample was found not to represent a significantly substantial portion of the underlying composition. In the Sixth Circuit, this same use would necessarily infringe upon the rights of the owner of the composition. The development of a stable, uniform industry practice is not possible when the outcome of the case is essentially dependent upon the chosen jurisdiction. The dissonance among the circuit courts suggests that only through a Supreme Court decision or congressional modification of the Copyright Act may a consensus be reached.[73] However, the former course may be impractical given the current rate at which sample-based songs are being produced and the amount of time required by the Supreme Court to reach its opinions.

IV. New Technology and Its Implications: The Art of Sampling

In both *Newton v. Diamond*[74] and *Bridgeport Music v. Westbound Records*,[75] the defendants employed a technique of sampling known as "looping," a technique that has been used in sample-based production for many years. Looping involves using a particular "riff" from the original song consisting of several notes. The riff is sampled by conversion to a digital data file,[76] which is then sequenced in a repetitive manner to create a rhythm

[72] *See* 17 U.S.C. § 301 (2001) (providing that enactment of the 1976 Copyright Act does not preempt common law or state interests in recorded performances fixed before February 15, 1972, until 2067, although these works would not receive federal copyright protection under the terms of the Act).

[73] 17 U.S.C. §§ 101–1332 (2001).

[74] 349 F.3d 591 (9th Cir. 2003).

[75] 383 F.3d 390 (6th Cir. 2004).

[76] In both cases, the sample used was a three-note progression, played on flute in the former instance and on solo guitar in the latter. *See Newton*, 349 F.3d at 593.

track. This new track is then used throughout the new work. The tempo or pitch of this riff can be adjusted slightly in order for it to match the tempo or key of the new composition.[77] The loop can also be treated with an almost limitless number of effects prior to its inclusion in the new work. This re-contextualization of such a riff can have a dramatic transformative effect on the way the listener perceives the riff.

Despite the fact that looping has existed for years, modern software samplers allow this method to be pushed to new levels.[78] Many producers not only use looped samples in the traditional manner but also cut out smaller and smaller snippets of sound, essentially deconstructing a recording to a catalogue of source sounds. A producer can then re-sequence these sounds in an entirely novel key or tempo. Producers are able to digitally import the sound of a kick drum or guitar chord, recorded perhaps half a century ago, in a composition similar to the way classical composers use a particular section of the orchestra, playing a particular note.[79] Sampling allows the composer to avoid the transactional costs associated with using studio musicians in the recording process. Composers are able to consider the entire catalogue of sounds ever recorded, as well as any combination of these sounds, as potential source sounds for their final composition.[80] In addition to the broadening of the creative palette

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[77] A technique DJs call "beat matching" refers to creating a smooth transition between two songs during a live performance. This technique has been used for decades, even before the use of digital sampling. Prior to the use of digital technology, this effect was accomplished by slightly varying the speed at which a record was played on a turntable.

[78] For example, programs exist that allow a sample to be "sliced" into separate parts in the course of converting the sample into a novel file type. The "slices" can then be independently manipulated in the subsequent arrangement, allowing for tempo to be altered independently from pitch, a major obstacle for earlier samplers, and enabling the re-arrangement of the slices of that sample.

[79] Producers can insert the sound of a specific instrument into a composition at a specific point or use samples of the same instrument playing different notes for all of the notes used in a particular composition. Essentially, such technology enables the composer to transform every violin into a Stradivarius.

[80] Artists would not be limited only to the use of previously created sounds. The artist could create a novel sound if there is nothing available that matches the artist's preference.

available to the composer, commercially available sampling and sequencing software increases the accessibility of this technique to new artists.

Whereas older, hardware-based samplers were often prohibitively expensive for the aspiring producer,[81] modern software samplers have become quite affordable.[82] The increasing availability of pre-digitized music today allows nearly anyone with the proper hardware and software to produce professional, CD-quality, sample-based works. Given the length of most federal court dockets,[83] potential infringement suits resulting from the works of such "bedroom producers" could overwhelm the ability of the judiciary to address infringement suits in a timely manner.[84] Additionally, considering the fact that federal courts have yet to come to a consensus on how to treat the sampling techniques of the mid-1990s, it is unlikely that the judiciary is the most efficient and effective means of answering the sampling question under the current version of the Copyright Act.

V. The Economic Impact of Sampled Music

A casual glance at the Billboard Record charts will give an initial indication of the prominent place that rap, hip-hop, and other digitized and sample-based music occupies in the music industry.[85]

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[81] *See* Baroni, *supra* note 22 at 71 (describing the high costs of some early hardware samplers).

[82] For example, Acid Pro, the software program used by Mr. Burton in the creation of "The Grey Album," currently retails for "about $400." Moss, *supra* note 2.

[83] The *Bridgeport Music* action was originally filed May 4, 2001; however, the Sixth Circuit opinion was not decided until September 7, 2004.

[84] As it is, the vast majority of sampling cases are settled prior to trial. *See*, Soocher, *supra* note 48, at 1. Nevertheless, the mere possibility that such a vast number of cases *could* go to trial is cause for concern.

[85] At the time of this writing, two of the top five albums in the country are hip-hop albums. *See* Billboard.com, *The Billboard 200, at* http://www.billboard.com/bb/charts/bb200.jsp (Oct. 29, 2004) (on file with the North Carolina Journal of Law & Technology). Also, *all* of the top five singles in the country are either hip-hop or contemporary R&B songs, with only two of the top ten singles for the same time period from categories other than hip-hop or contemporary R&B. *See* Billboard.com, *The Billboard Hot 100, at*

As of 2002, hip-hop music was the second best-selling genre in the country, generating nearly $2 billion in sales.[86] Despite the fact that the music industry has suffered a recent slump in sales, hip-hop music has consistently been one genre generating significant sales for record labels, and in several instances, key hip-hop artists have ensured that some record labels remained profitable.[87]

Above and beyond the direct market impact of record sales, hip-hop also has a dramatic influence on related markets,[88] such as fashion[89] and other cultural industries.[90] Industry monitors have openly recognized that despite a recession, hip-hop's cultural

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http://www.billboard.com/bb/charts/hot100.jsp (Oct. 29, 2004) (on file with the North Carolina Journal of Law & Technology).

[86] Shawn E. Rhea, *Music Masters*, BLACK ENTERPRISE, Aug. 2002, at 87.

[87] *See* Jeff Leeds, *Media: 2002 and Beyond*, L.A. TIMES, Dec. 29, 2002. Artists such as Eminem are driving Universal Music Group to a dominant market position. But the heavy reliance on catalogued works by labels such as BMG illustrates the tension that can exists between major record labels when the protection of established works and use by sample-based artists becomes an issue. *Id.*

[88] Recently, the use of popular melodies as ringtones for cellular phones has exploded as such an intimately-tied related market. As a result, Billboard has recently announced that beginning in its November 6, 2004, issue it will begin publishing charts of the "Top 20" polyphonic ringtone sales for each week. It is likely that hip-hop will constitute a significant portion of what has been estimated to be a $3.5 billion annual industry (based upon 2003 figures). REUTERS, *Billboard Rolls Out Cell Phone Ringtone Chart*, Oct. 26, 2004, *at* http://story.news.yahoo.com/news?tmpl=story&cid=769&ncid=762&e=7&u=/nm/20041026/music_nm/media_ringtones_dc (last visited Oct. 29, 2004) (on file with the North Carolina Journal of Law & Technology).

[89] PBS.org, *Hip-Hop Style: What is Cool? at* http//www.pbs.org/newshour/infocus/fashion/hiphop.html (Sept. 27, 2004) (on file with North Carolina Journal of Law & Technology). The very fact that PBS is running a story on what began as an underground urban cultural phenomenon is noteworthy.

[90] *See, e.g.*, Azell Murphy Cavaan, *Movies; Hip-hop Hurray; Films with Urban Flava Cross Over and Take Box Office by Storm*, BOSTON HERALD, Apr. 17, 2003, at 57 (describing how movies about urban culture or starring hip-hop artists consistently produced sales worth hundreds of millions of dollars throughout 2002 and 2003). *See generally* Paul Butler, *Much Respect: Towards a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 56 (2004) (describing hip-hop's influence on the marketplace, the academy, and politics; advocating the incorporation of hip-hop cultural norms into the American criminal justice system).

influence has bolstered the sales of some luxury items preferred by successful hip-hop artists.[91] As of 2003, "[m]arketing experts estimate[d] that one-quarter of all discretionary spending in America . . . is influenced by hip-hop."[92] Hip-hop music and its influence upon popular culture has had a dramatic effect on national and international markets, specifically the Japanese market.[93] This increasing popularity highlights the potential expansion of the largely American-driven hip-hop-based marketing machine on a global scale.

Additionally, minority entrepreneurship originating in the cultural markets, particularly hip-hop related businesses, is a major component of minority-owned businesses in this country.[94] However, requiring a new artist to subjugate herself to a major record label to acquire the necessary capital to enter the market can ultimately hinder this type of entrepreneurship.[95] A government which is truly interested in supporting entrepreneurs, and minority entrepreneurs in particular, should have a compelling interest in facilitating market entry for these small businessmen and start-ups.

As the popularity and crossover market appeal of hip-hop grows, these small businesses will also grow, once they are capable of expanding beyond their initial incubatory stage. For example,

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[91] *See Spirits Are Young at Heart; 2004 State of the Industry Report*, BEVERAGE INDUSTRY, July 1, 2004, at 28 (pointing to sharp increases in sales of Courvoisier and other cognacs following the release of Busta Rhymes' hip-hop song "Pass the Courvoisier," as well as the licensing of Armadale brand vodka by William Grant and Sons to Roc-A-Fella records, home to hip-hop artist Jay-Z).

[92] Susan Berfield, *The CEO of Hip Hop*, BUS. WK., Oct. 27, 2003, at 90.

[93] *See* Yo Takatsuki, *Japan Grows Its Own Hip-Hop*, BBC News, *at* http://news.bbc./co.uk/go/pr/fr/-/2/hi/asia-pacific/3324409.stm (Dec. 17, 2003) (on file with the North Carolina Journal of Law & Technology) (describing the explosion of hip-hop culture in Tokyo, Japan).

[94] *See* Dipannita Basu & Pnina Werbner, *Bootstrap Capitalism and the Culture Industries: A Critique of Individuous Comparisons in the Study of Ethnic Entrepreneurship*, 24 ETHNIC & RACIAL STUDIES 236 (2001).

[95] Such subjugation will also likely short-circuit the encouraging function of copyright. That is, the label will often require transfer of the rights to the sound recordings produced, thereby at least halving the potential income of the artist himself.

Russell Simmons, the founder and CEO of Phat Fashions[96] and co-founder of Def Jam Records, began his business career as an undergraduate student at City College of New York in the mid-1970s when he became the manager of the seminal hip-hop group Run-DMC.[97] Without the capital he drew from sample-based music, Mr. Simmons could not have established himself in the music industry and built his multi-million dollar business empire. This type of entrepreneurship is the archetype of the American dream as it exists at the dawn of the 21st century, and deserves support for economic and philosophical reasons, alike. In the absence of a uniform judicial standard regarding sample-based music, Congress should revise the copyright statutes. Congressional action in this area would secure the interest of both sample-based and conventional artists and assist hip-hop based entrepreneurs.

VI. Ripe for Change: § 115

Minimal alterations to the "mechanical licensing" provision set forth in § 115 of the Copyright Act[98] could easily address the current dissonance surrounding sample-based music. Sampling is not covered by the current structure of § 115. In the mid-1970s, Congress adopted the current form of § 115 during an overhaul of the Copyright Act.[99] However, the underlying concept of a mechanical license provision can be traced to the 1909 Copyright

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[96] Phat Fashions owns the popular label, Phat Farm, an urban fashion manufacturer that boasts approximately $300 million annual revenues. *See* Lydia Martin, *Music Tycoon's Life is Full of Shining Moments, at* http://www.ohio.com/mld/ohio/entertainment/gossip/7059776.htm?1c (last visited Nov. 19, 2004) (on file with the North Carolina Journal of Law & Technology).

[97] Berfield, *supra* note 92. Run-DMC, a hip-hop act managed by Simmons, was one of the first of such groups to achieve significant mainstream success, in large part due to their originally unlicensed incorporation of an Aerosmith sample into one of their songs. Instead of seeking legal remedy for such use, Aerosmith entered into a collaborative relationship with Run-DMC, bolstering the careers of both bands in the process.

[98] 17 U.S.C. § 115 (2001).

[99] Section 115 in its current form was adopted as part of the 1976 Copyright Act. 17 U.S.C. §§ 101–1332 (1976).

Act.[100] Although the issue of sampling is removed from the section's original purpose,[101] the mechanical license provision reflects a tradition of pragmatic and functional flexibility. Slight modifications to this provision would provide a simple solution to the current conflict between the rights of copyright holders and the interest in artistic expression and progress.

As "the 'great-granddaddy' of all compulsory licensing provisions,"[102] § 1(e) of the 1909 Copyright Act represents the "first compulsory licensing system in any copyright or patent statute, in any intellectual or industrial property statute, or, as far as anyone seems to know, in any statute in the world."[103] This section was the result of two objectives: protection of the rights of a composer against others recording his compositions and prophylactic response to prevent the Aeolian Company from developing monopoly in the music industry.[104] The statute enabled any individual to perform a composition for the purposes of making an additional "phonorecord." When enacted, the provision was a necessary response to technology that was being used to make these recordings on Edison wax cylinders or paper rolls for player pianos. Although such recordings could be reproduced, the production rates did not even approximate "modern" reproduction

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[100] The 1909 Copyright Act, § 1(e) (1909).

[101] Section 115 currently serves a function that is as far removed from its original purpose as sampling would be.

[102] *Hearings*, *supra* note 24, at 1865 (testimony of Barbara Ringer, Register of Copyrights).

[103] *Id.*

[104] *Id.* at 1867. By purchasing the sound recording rights and rights to musical compositions for a vast number of works, Aeolian Co. speculated on a change in the copyright law resulting from the 1909 Act as it was being discussed. Such a monopoly would be disastrous not only for potential economic reasons but also because it would effectively allow the Aeolian Co. to dictate popular music culture depending upon what it chose to release. The ability of the Aeolian Co. to exert disproportionate influence on the market was the situation Congress specifically sought to avoid through use of the mechanical license provision. However, an overbroad interpretation of current copyright law creates the possibility of such disproportionate market influence by speculative holding companies today. *Id.* *See supra* note 72.

rates.[105] Additionally, early methods of reproduction destroyed the original recording, and the sound quality with each subsequent copy degraded significantly.[106] The original compulsory license system ensured that the recordings of compositions were distributed fairly. Additionally, the provision allowed a different artist to make multiple recordings of a given composition. In an era where the ability to reproduce any one performance was limited, the provision allowed the production of multiple sources of original sound that distributers could use to make additional recordings. The ability to create recordings of a composition using different musicians allowed for competitive phonorecord pricing and facilitated the free exchange of ideas and development of musical innovation. More people could have access to recorded versions of compositions, while the holders of the rights in the composition received fair compensation from compulsory licenses.

The development of new recording techniques rendered § 1(e) irrelevant in terms of its original purpose. Mass production of records became possible, particularly following the invention of the vinyl long-play album in 1948.[107] It was now possible to manufacture an infinite number of records from a single performance, which, if performed by the composer himself, would exist as a perfect aural representation of that original composition.[108] There was no longer a need to outsource to hired musicians.

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[105] NationMaster.com Encyclopedia, *Sound Recording*, *at* http://www.nationmaster.com/encyclopedia/Sound-recording (last updated Sept. 28, 2004) (on file with North Carolina Journal of Law & Technology).

[106] *Id.*

[107] *Hearings*, *supra* note 24, at 1399 (testimony of Stanley R. Gortikov, President, Recording Industry Ass'n of America, Inc.). Mr. Gortikov's testimony stated that in 1975, the RIAA's member companies made and marketed eighty-five percent of the recorded music sold in the U.S. He also argued that a one-cent increase in the mechanical royalty paid to composers would cripple the recording industry—of which his company presumably had an eighty-five percent market share.

[108] The representation would be perfect in the sense that as the composer performed, the song could be converted directly from composer's idea into music, without the need for intermediate transcription into musical notation. In the case of a transcribed score, composition would have to be filtered through the perceptions and interpretations of another musician reading that notation, so

Although the mechanical license provision of the Act was no longer needed strictly to serve its intended purpose, the statute was not repealed. In the meantime, as recording technology developed, the record industry evolved, and new industry practices emerged in response to the verbage of the mechanical license provision. These practices moved the record industry to lobby to ensure that the mechanical license provision would survive future modifications of the Copyright Act.[109] The most popular practice was the recording of "cover" songs. Often, a different artist will record a new version of an old song. This new version is commonly called a "cover song." In a sense, cover songs are the same as the secondary recordings that the mechanical licensing provision addresses, distinguished by the opportunity for a new artist to interpret an existing work with her own style.[110]

As technology changed the production practices of the record industry, it also altered the distribution practices of the industry. The advent of radio and television dramatically changed the way the public listened to music. Overlapping radio reception areas and the development of national radio networks created a music market that transcended regional distribution patterns. Improvements in mass production processes and the national infrastructure worked with these advances to introduce music to new audiences.[111] The increased speed of dissemination enabled record companies to know when they had found a "hit" song.

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some nuances of the composition as an idea would be lost to the eventual recorded performance by a hired musician. The original recorded performance by a composer/musician would exist as the true expression of the composer's ideas. This situation casts doubts upon the severability of ownership rights between composition and recorded performance as it applies to composer/musicians. However, the current entrenchment of severability in copyright law makes this argument little more than an intellectual and philosophical exercise.

[109] *Hearings*, *supra* note 24, at 1399 (testimony of Stanley R. Gortikov, President, Recording Industry Ass'n of America, Inc., that the mechanical license provision should remain in place but the royalty rate should not be increased).

[110] *See* 17 U.S.C. § 115 (2001).

[111] Improvements, such as the construction of the national interstate highway system, would have massive ramifications on the shipping and distribution practices of *any* national industry.

Such commercially successful works were also useful for new, lesser known artists. The artists could capitalize on the popularity of the song by performing the song in order to attract an audience's attention. Furthermore the original composer would benefit from a renewed national awareness of his work, potentially in new markets,[112] and royalty derived from each recording of the cover song. Covering songs became a particularly popular form of musical expression, and the symbiotic publicity relationship can be seen to this day among a number of artists.[113] However, without the obsolete mechanical license provision, it is quite possible that such a practice would not have taken root. Artists could have refused to license a "hit" composition to a perceived "competitor" in the national music market,[114] similar to the refusal by some artists to license samples today. It is impossible to say what the state of music would be today without artists who used established hits to fuel their entry into the music industry.[115]

The protected activities of "covering" share a structural and methodological similarity to the process of sampling. Under the old model, a composer would produce a work as a written composition, and then hire musicians, or employ himself as a musician, to play. This performance was then recorded on a phonorecord for distribution. Section 115 enabled another individual to hire his own musicians to play the song from the original written composition for a second independent rendering. Originally, the new recording would seek to emulate the sound of the original recording, including all of the performance nuances, as

[112] By this time, the markets may have been waning somewhat.

[113] Some examples of artistic symbiosis through cover include Joe Cocker's cover of the Beatles' "A Little Help From My Friends" and Tina Turner's cover of John Fogerty and Creedence Clearwater Revival's "Proud Mary." A more recent and vivid illustration of potential symbiosis through cover are Johnny Cash's covers of Depeche Mode's "Personal Jesus" and Trent Reznor's (Nine Inch Nails) "Hurt." As a result, Mr. Cash won an MTV music award and earned the respect and admiration of listeners who could hardly be considered members of his core demographic.

[114] Portraying the music market as a zero-sum game is particularly tenuous in light of the size of the music market and the diversity of listener tastes.

[115] For example, the entire world of "jazz standards," the foundation for much of the American musical landscape, might not exist in its present form had composers refused to allow other musicians to interpret their works.

closely as possible. The entrepreneur who could set up such a session would likely staff it with musicians able to create comparable sounds, in an attempt to reproduce the subtleties in the original recording.

Sampling works in much the same way, except technology enables a producer to use the original recording to divine the composition. Moreover, the composition produced by this divination is, in reality, a closer approximation of the composition than any score could be.[116] After the producer reaches this point, technology again enables him to reinterpret the work[117] without having to filter his reinterpretation through another set of musicians. This process facilitates the clearest expression of the producer's ideas.[118] Also, as specific sounds from the original

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[116] *See supra* note 108.

[117] This reinterpretation is similar to that done in the modern recording of cover songs, although the reinterpretation possible with sampling can be both more extensive and more precise.

[118] Some writers have expressed concern about this particular phase of the process. *See*, Christopher D. Abramson, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection*, 74 N.Y.U. L. REV. 1660, 1668 (1999) ("This practice poses the greatest danger to the recording profession because the musician is being replaced by himself."). While the concern is well founded, it is not entirely accurate. First, one must examine the extent to which replacement occurs, namely, whether a session musician replaces the composer. If the musician had performed for hire in the original recording, she retains no rights to her performance. As such, the composer's incentive to produce in this capacity is unaffected by this use because there was no potential benefit to the musician from *any* future use of the album. Additionally, many studio musicians have taken advantage of the emerging market for unique single-note or note-sequence sounds among the digital music community by releasing their own royalty-free sample compilations of decontextualized samples. This development enables producers to use the samples once they pay the initial purchase fee. Producers are pragmatists and will use whatever sounds best express their ideas. If these sounds come from royalty free discs, the entire sampling quagmire can be avoided. However, in the case of Mr. Burton, a compilation would have been an unrealistic alternative for the particular expression he was seeking.

It is rare that artists keep the rights to their recorded performances unless they record the works completely independently or have ownership interests in the publishing company. However, there is the potential loss of income that may occur if the producer must re-hire artists to re-enact their own compositions on a new recording. Additionally, overcoming logistical

recording can be preserved, the potential exists for the new work to make culturally relevant comment based upon the work the producer chooses to sample. Such commentary could address the sampled work itself,[119] the culture or time period from which the work was drawn, or the contrast between cultural environment surrounding the original recording and the contemporary cultural environment into which the sample is re-injected.[120]

In light of the history of the application of the mechanical licensing provision and the similarity between sampling and recording practices protected by § 115, modification of § 115 of the Copyright Act appears to be the best way to resolve some of the current conflict surrounding sampling. Section 115 is the direct descendant of the 1909 mechanical license provision, conceived as a pragmatic, and at the time revolutionary, solution to a very specific problem that could have dramatically hindered free progress and innovation in the musical arts. In that tradition, § 115 should now be modified by Congress to address a situation no less threatening to free artistic development.

VII. Modifying § 115

Congress intended copyright law to encourage progress in the arts by creating an economic market for artistic works.[121] This market would require some degree of proprietary interest in works

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difficulties may make this activity cost-prohibitive. Owner/artists would nonetheless receive compulsory royalties both from their interests in the composition and the recordings.

[119] Parody is one example of commentary on another work that is deemed a permissible fair use under current copyright law. *See*, Campbell v. Acuff-Rose Music, 510 U.S. 569, 586–93 (1993) (holding that sampling for parody purposes constitutes fair use).

[120] For example, Mr. Burton used samples drawn from recordings by the Beatles, who created the framework for modern sequencing and sampling by introducing eight-track recording and the use of sampled sound effects on their "Sgt. Peppers Lonely Hearts' Club Band" album recorded in 1966 and 1967. Jay-Z, as a rap artist, employs sampling extensively in his own work. All of these factors combine in a record that pays homage to past, present, and future innovations in popular music, all while bringing these issues to the popular forum.

[121] *See supra* Part II.

to function properly. However, the creation and protection of this market does not automatically create a nurturing environment for progressive artists.

Great artists have always reached their creative heights by building upon the works of their predecessors. Nearly all modern artistic expression draws so heavily on prior innovation and techniques that the referential nature of such techniques is hardly recognized anymore.[122] Emulation and incorporation of elements of another artist's signature techniques, aside from being one of the highest forms of flattery, is one of most effective ways of encouraging progress. This technical dialogue between artists eventually finds its way into "movements" and "genres."

Music is more prominent in contemporary American culture than ever before. It is used as ambient sound in department stores, as entertainment, and as a part of marketing schemes for products. Individuals often associate music with numerous other stimuli,[123] and songs trigger specific emotional responses in a listener.[124] Advertisers often attempt to elicit an emotional response from a listener by playing a song alongside images of their product. Presumably, the advertisers seek to encourage consumers to associate those emotions with their product. Similarly, a sample-based musician can use samples from "hit" songs to compose not only with musical notes, but also with the psychological and emotional connotations of those notes. This allows the composer to express his idea in a radically new way. However, a composer may encounter difficulty when attempting to use these samples: The works that have the strongest associations with the largest number of people may be among the most difficult

[122] Examples of widely-appropriated referential techniques include the use of musical improvisation as part of a composition, two-point perspective, contemporary color theory, and the "golden thirds" compositional technique.

[123] For instance, an automobile manufacturer uses a Led Zeppelin song in its current advertising campaign. The song has little to do with the product other than the fact that it is included in television commercials.

[124] The development of this association is a product of simple operant behavioral association, one of the basic theoretical foundations of behavioral psychology. *See, e.g.*, B.F. SKINNER, ABOUT BEHAVIORISM 51–79 (1976).

songs to license under conventional free-market licensing practices.[125]

The economic and artistic value of sampled music should make its preservation an issue of concern to the government. Section 115 provides the most ready vehicle for such preservation. Due to its appropriation and wide use by the music industry for regulating the making of cover songs, the logistical mechanisms for collection and intra-industry enforcement are already largely in place.[126] Only several slight modifications would be required to the existing text of § 115 to allow for sample-based music.

A. Limit Acceptable Sample Lengths

Congress should substitute limiting parameters on acceptable sample lengths in place of the proscription on "duplicating a sound recording fixed by another" outlined in § 115(a)(1)(ii), for works fixed after February 15, 1972. Section 115(a)(1)(ii) is the most overt obstacle to sampling falling within the current provisions of § 115. This clause is the logical place to insert a possible restriction on the arrangement and duration of any sample drawn from an original work. Such a restriction would protect sampling of the sort seen in cases such as *Newton*[127] and *Bridgeport Music*,[128] while preventing wholesale copying of the source work.[129] Insertion at this point in § 115 would maintain the applicability of the proscription on copying a recorded performance set forth at the end of § 115(a)(1). The only change in applicability would be to carve out an exception for samples of

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[125] *See* Paoletta, *supra* note 3 (quoting Mr. Burton: "I knew I could never release this album commercially.").

[126] Organizations such as ASCAP and BMI have proven themselves to be effective royalty collection vehicles.

[127] Newton v. Diamond, 349 F.3d 591 (9th Cir. 2003).

[128] Bridgeport Music v. Dimension Films, 383 F.3d 390 (6th Cir. 2004), *reh'g denied*, 2004 U.S. App. LEXIS 21701 (6th Cir. 2004).

[129] Record company executives repeatedly mentioned this sort of "piracy" as a concern in their testimony prior to the adoption of the Copyright Act of 1976. *See, e.g.*, *Hearings*, *supra* note 24, at 1397 (testimony of Stanley R. Gortikov, President, Recording Industry Ass'n of America, Inc.).

an acceptable length and allow their use in a sample-based, compulsorily licensed work.

B. Allow the Use of a "Basic Melody" in § 115(a)(2)

Congress should remove the constraints on the use of a "basic melody or fundamental character of the work" as enumerated by § 115(a)(2).[130] The constraints in § 115(a)(2) greatly limit the use of many production techniques used by sampling artists. Additionally, the re-contextualization of a sample changes its fundamental character. Section 115(a)(2) currently concerns only the interests of the composer vis-à-vis an artist seeking to record the cover song. Given the lack of judicial consensus on the rights of composers in relation to the use of samples,[131] this provision would be a good place to address these issues as well.

C. Explicitly Declare Dual Liability and Create Compulsory Licensing

The Act should make clear that use of a work as a source for a sample subjects the sample-based artist to liability to the owner of the rights to the recorded performance,[132] as well as to the owner of the rights in the underlying composition, as outlined by §115(c). Certain riffs are more significant to their underlying works than other riffs. The dissonance among the federal courts in interpreting the significance of a particular riff to its source work can result in decidedly different liability exposure between jurisdictions.[133] Modifying § 115 to acknowledge the potential liability a sample-based artist may encounter will help clarify some potential litigation issues surrounding sampling. Therefore, the impact on the rights composers must be clearly addressed. This modification is most easily achieved by directly creating or dispelling liability to composers as a matter of statutory law in all

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[130] 17 U.S.C. § 115(a)(2) (2001).
[131] *See supra* Part III.
[132] Royalty provisions will be outlined in a new provision, tentatively § 115(e).
[133] *See supra* Part III.

sampling cases. As some samples could be substantial enough to create liability to the composer even under the Ninth Circuit test, composers should receive some compensation for the use of the samples. As such, all composers should receive royalties when a artist takes samples from their work. Because the licenses are compulsory, individual actors will be unable to exert overly-restrictive pressure on the market, as they would in a free-market licensing system.

Requiring dual licensing in the compulsory system may place a slightly greater burden on the sampling artist, but this burden is more than offset by the dramatic lowering of transaction costs pursuant to the compulsory licensing of the sound recording. Additionally, this nominal hurdle will simply encourage artists to use only those samples they deem absolutely necessary, such as those with high connotative-associative value for their audiences.[134] At the same time, the compulsory licensing system will ensure that a sample-based artist can gain access to those critical samples.

D. Categorize Sample-Based Works as Derivative Works

Sample-based works should be considered derivative works of their source works for copyright purposes. The ownership of copyright in the entirety of these derivative works can be held exclusively by the artist that creates them. However, the use of samples in a work would not transfer any ownership of these samples, either as compositional elements or excerpts of a recorded performance, from their original owners. The sampling artist would obtain only a limited license to use these elements in the derivative work for which he specifically licenses them. Re-use of source material in a subsequent work, either by the original or a subsequent sampling artist, would require a contemporaneous

[134] Artists may choose to use samples drawn from royalty-free compilations or create their own sounds for shorter or unrecognizable samples. Additionally, studio musicians who produce these sound compilations can draw compensation from the licensing fees when sampling artists use their work.

license from the original owners of the interests in the composition and recorded performance.

This provision could be substituted for the current proscription against copyright in a derivative work under the mechanically licensed system.[135] Revised § 115 must strike a balance between the rights of the sampling artist in his newly created work and rights of copyright holders in the source works. Conceivably, the new, sample-based work could be sampled by another artist in the future. The acquisition of a single compulsory license does not mean that the sampling artist can re-use the licensed sample for numerous derivative works. Likewise, a subsequent sample-based artist could not draw the original sample from the derivative work without having royalty obligations to the original copyright owner. Without this provision, the value of a copyright holder's interests in a work used as a source work for sampling would depreciate rapidly. The new statutory provision should facilitate the practice of sampling while having as narrow as possible an effect on the value of existing works. Additionally, the requirement of drawing a single sample from the original source work will both encourage the continued production of more "traditional" music, as well as the exploration of catalogued sound recordings. This arrangement is analogous to the symbiotic publicity relationship that currently exists in the context of cover songs.[136]

E. Royalty Provisions

The notice provision of § 115 would be followed, as written,[137] to cover compulsory licenses for sampling issues as well. The above modifications make § 115 applicable to sampling. The only details remaining are the specifics of the royalty provision. The existing royalty provisions are by far the most specific and textually voluminous provisions in the current version

[135] 17 U.S.C. § 115(a)(2) (2001) ("except with the express consent of the copyright owner").
[136] *See supra* Part VI.
[137] 17 U.S.C. § 115(b) (2001).

of § 115.[138] Additionally, a significant amount of the testimony at the Congressional Hearings prior to the 1976 revision of the Copyright Act focused on these issues.[139] The appropriate royalty rate for samples will require new discussion. However, the general framework already established and engrained in the practices of the record industry could form the basis of sample-based royalty procedure going forward. Additionally, a large portion of the substantive material could be taken directly from the existing royalty provisions.[140] Some of the general themes that should be applied to the sample royalty calculation practices include:

1. Flat Rates

A flat rate should be charged for any sample used. Calculating rates in any other manner would add unnecessary complexity to the licensing process. Certain provisions set forth earlier in the modified § 115 would also prevent inequities that could stem from a flat royalty rate. First, limiting the duration of a sample would prevent any gross inconsistencies in the cost per second of a particular sample, as it would work itself out in fact. An artist's choice to use a sample that is significantly shorter than the statutory maximum would reflect the heightened value the artist places on that particular sound,[141] and the cost per second discrepancy would be immaterial.

Furthermore, the modified licensing system would achieve the superior goal of promoting progress. The "hit" works that have proven their economic value would see their relative market value depreciate if a compulsory license system is adopted. Such a

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[138] *Compare*, 17 U.S.C. § 115(c) (2001), *with* 17 U.S.C. §§ 115 (a), (b), (d) (2001).

[139] *See, e.g.*, *Hearings*, *supra* note 24, at 1399 (testimony of Stanley R. Gortikov, President, Recording Industry Ass'n of America, Inc.) (stating the mechanical license provision should remain in place but the royalty rate should not be increased). *See generally* S. Rep. No. 93–983 at 146 (1974) (Report of Mr. McClellan, Committee on the Judiciary, together with Additional and Minority Views, to accompany S. 1361).

[140] 17 U.S.C. § 115(c) (2001).

[141] In the alternative, a producer would likely create a similar sound herself, or obtain the sound from a royalty-free compilation. *See supra* note 124.

depreciation, though contrary to the current free-market licensing paradigm, is necessary to maximize the expressive potential, and subsequent cultural value, of sample-based works. Source works with higher value in the marketplace may carry greater expressive value for the sampling artist, making access to samples a compelling public interest.[142]

The tension created between underlying public interest and the economic benefit to the original creator is akin to the whole of copyright law. However, the existence of the economic benefit system is based upon the assumption that it is *the* appropriate manner to secure the public benefit. While a song may be worth millions of dollars to the owner of its rights, the song's worth is both derived from and bound to the work's contribution to the cultural environment. Why should a composer whose work has become an established part of the cultural environment be permitted to limit the use of the work as an expressive tool to evoke or critique that environment? Hit songs have become iconic. When a sample-based artist appropriates the samples of a hit song in a recognizable way, he composes not only with those sounds, but also with the subjective connotations of those sounds in his audience. These connotations would be inaccessible in any way other than the direct use of the source recording. The more successful the hit song is, the greater its potential expressive value. The public interest value in the accessibility of a recording roughly correlates to that recording's popularity. To say that this correlation results in a perfect offsetting of interests is a gross oversimplification. However, the relationship between public interest value and popularity illustrates the equitable nature of the flat-rate system, particularly in light of the complexity of valuation in the music industry that makes devising an accurately equitable gradated system impractical.[143]

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[142] *See supra* text accompanying notes 127–28.

[143] This complexity is even more apparent when one considers that market value of a song is heavily dependant on timing. An obscure song today could be a hit in four months. Calculating future value in this situation is difficult, at best. Additionally, including a determination of market value at a particular time over the course of the licensing relationship in the findings of fact may further complicate litigation.

The flat rate would be charged per sample used, not per source song used. Use of two distinct samples from one source work should create royalty liability for two samples, not one. A sample is a sample. It would stand to reason that a work incorporating samples from two different source recordings would create royalty liability to the owners of both works. The use of two samples from one work in no way diminishes the value of either one of those samples, simply because they originate in one work as opposed to two. As such, the sampling artist should have to pay for each sample used, not for each source work drawn from.

The number of times a sample appears in a derivative work should not be relevant in determining the royalty. Assessing royalty liability based upon the number of times a sample appears in the derivative work would effectively eliminate the process of looping.[144] Because looping is a well-established practice among sample-based artists, this somewhat obvious provision must be explicitly enumerated in the revised statute. Without this security, a potential misinterpretation of a revised § 115 which did not contain this provision could still endanger the practice of looping.

2. Royalties Should Be Relatively Small

The flat rate should, like the flat rate for cover songs under § 115(c) today, be a relatively small sum collected per album pressed, rather than a larger standard fee regardless of the number of albums pressed. This method would ease entry into the field of music production for entrepreneurial sampling musicians. An artist could produce a small number of sample-based works, based on his budget, for limited distribution, without having to worry about disproportionate overhead from a standardized fee applied without regard to the number of albums pressed. Subsequent wider release could be financed with proceeds from the original

[144] Bridgeport Music v. Dimension Films, 383 F.3d 390 (6th Cir. 2004), *reh'g denied*, 2004 U.S. App. LEXIS 21701 (6th Cir. 2004) (stating that through the process of looping, the two-second sample appeared, in whole or in part, at least eighteen times in the derivative work). *See* Newton v. Diamond, 349 F.3d 591, 593 (9th Cir. 2003) (stating the sample in question appeared over forty times in the derivative work).

small release, and the owners of the source would receive additional compensation as more copies of the sample-based work are pressed. Additionally, this compensation scheme could be more lucrative for the owners of a source work if the derivative, sample-based work is a commercial success. Recovery by the owner of the source work would not be capped by a set fee, but rather would continue to grow as additional copies of the derivative work are manufactured.

Essentially, these new provisions could create a situation very similar to that which exists under the current provisions of § 115 for cover songs. It ensures that musicians will "play nice" by forcing them to allow their works to be used in the creation of new works. Artists may be reluctant to allow the sampling of their works for any number of reasons, not all of them rational. However, this proposal for a revised § 115 attempts to create a mutually beneficial situation for both the original artist and the sample-based artist. Further, the public benefits from the production of new, sample-based works. The record industry has been traditionally resilient and adaptive. Use of the mechanical license provision for profit through the production of cover songs is illustrative of such a capacity for innovation.[145] Despite potential testimony by executives to the contrary,[146] the record industry will find a way to adapt to the practice of sampling and the revision of the compulsory license provision of § 115.

VIII. Conclusion

While it is quite possible that we will see no more litigation out of the *Grey Album* case specifically, the work remains significant from a political standpoint. It may be in the best

[145] The record industry has begun to embrace online digital distribution, and as a result record sales have experienced a recent recovery. This development is a testimony to such resilience and adaptability. *See, e.g.*, Phil Hardy, *U.S. Recorded Music Market Maintains Its Recovery; Online Costs Achieve Sales of 35m Downloads in 2004*, MUSIC & COPYRIGHT, May 26, 2004.

[146] *Hearings*, *supra* note 24, at 1399 (testimony of Stanley R. Gortikov, President, Recording Industry Ass'n of America, Inc.) (stating proposed changes in the royalty rates under the existing compulsory license provision would bring about the demise of the record industry).

interests of EMI and other potential plaintiffs not to sue an artist who is such an embodiment of the positive potential of sampling as Mr. Burton. He did not opt for an "illegal" release simply to maximize his own profits. It is unlikely that he will receive payment at all commensurate with the popularity of his album. "The Grey Album" was not intended to disrespect the artists Mr. Burton sampled.[147] Mr. Burton knew he would be unable to produce his work by operating within the accepted framework of the law.[148] However, should further litigation follow, hopefully the courts will decide the case narrowly so as to allow the practice of sampling, and the music industry as a whole, to further evolve.

Congress should take the opportunity given to them by the publicity surrounding "The Grey Album" and resolve the current sampling dilemma through statutory modification. Any modifications to § 115 should attempt to maximize the potential distribution and relevance of the new work while maintaining the balance between the encouraging/enabling dichotomy of the Copyright Act. A free market licensing system for samples, while theoretically adequate for such purposes, nevertheless falls far short of this goal in practice.

Sample-based artists with insufficient capital resources to secure licenses, or who wish to use samples from artists who refuse to license any of their works, are limited in their artistic choices. This limitation is not based on the form of the work itself, but rather on the failure of the market system to facilitate production of sample-based works. Works capable of making meaningful contributions to culture are lost, unless, like Mr. Burton's album, they are released as an "illegal" work. The very release of such illegal work is evidence of the failure of the mechanisms of the current system. However, until Congress amends the Copyright Act, illegal releases will become an increasingly common feature of the musical landscape, and owners of interests in the underlying works will go completely uncompensated.

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[147] Gitlin, *supra* note 6 (quoting Mr. Burton, who stated that if he discovered Jay-Z did not like his work, he would recall the distributed copies).

[148] *See*, Paoletta, *supra* note 3 (quoting Mr. Burton, who stated: "I knew I could never release this album commercially.").