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Unauthorized Digital Sampling in the Changing Music Landscape

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NOTES

UNAUTHORIZED DIGITAL SAMPLING IN THE CHANGING MUSIC LANDSCAPE

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I. INTRODUCTION

The internet age has inspired much debate over the proper legal status of digital music sampling.[1] The role and power of online music media has only skyrocketed since the Ninth Circuit's decision regarding Napster in 2001, and further technological developments in digital music have made the creation and distribution of music online even more effortless than it was at the beginning of the twenty-first century.[2] This progress has fueled a problem few could have foreseen in 2001: the rise of digital sampling in free, self-released music that is not released through any record company or publisher, but is uploaded online by an amateur, unsigned artist.[3]

Historically, especially before the advent of MP3s and file sharing, these free self-released compilations of music were not likely to face legal challenge for the borrowed samples of other pre-established artists used within the tracks. Such music was released non-commercially by a person attempting to gain local clout and prominence, in the hopes that it would eventually lead to public performances and the opportunity to be seen and heard by talent scouts. These compilations sampling different commercially released tracks, or free "mixtapes," were distributed *physically* from street corners, clubs, or other public locations. With this distribution method, there was little chance that any of the tracks would receive massive mainstream attention or draw the ear of those artists being sampled on the tracks.

However, this is no longer the case. Unlike music's past changes in format and medium (i.e., cassette to CD), the MP3 and internet have "exposed consumers to more music than ever before,"[4] and have also provided a method by which an amateur artist can release musical creations to an immediate audience at very little or no cost through such outlets as Bandcamp, Soundcloud, YouTube, and personal websites. Soundcloud, a website in which users can upload and share their tracks online, has become a particularly prominent forum and tool for the amateur artist; as of April 2013, the site has over thirty-eight million users, all of whom have the opportunity to interact,

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[1] Aaron M. Bailey, Note, *A Nation of Felons?: Napster, the Not Act, and the Criminal Prosecution of File Sharing*, 50 AM. U. L. DEV. 473, 475 (2000).

[2] A & M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002); *see also* Neil S. Tyler, Comment, *Music Piracy and Diminishing Revenues: How Compulsory Licenses for Interactive Webcasters Can lead the Recording Industry Back to Prominence*, 161 U. PA. L. REV. 2101, 2110 (2013).

[3] *See infra* discussion Part II.B.

[4] David Goldman, *Music's Lost Decade: Sales Cut in Half*, Feb. 3, 2010, http://money.cnn.com/2010/02/02/news/companies/napster_music_industry/; Sam Gustin, *Digital Music Sales Finally Surpassed Physical Sales in 2011*, Jan. 6, 2012, http://business.time.com/2012/01/06/digital-music-sales-finally-surpassed-physical-sales-in-2011/.

share and provide feedback on any uploaded songs.[5] Though not all of those users upload their musical creations, the number is indicative of a changing musical landscape that is far more populist in nature.[6] Sites such as these represent an overarching, continuing movement in which artists and listeners themselves control the art form.

In addition to increasing the sheer volume of music available to the masses and giving amateur artists a more readily available platform, this new environment also has had a profound effect on the sound and nature of the music that emerged. Though digital sampling was considered an "indispensable element [of] the music industry" even in 1996,[7] the ability to create, share, and listen to music on a computer or laptop has made the digital sample a ubiquitous presence in the industry.[8] The digital music world has encouraged a greater melding of genres and cultures into newly created music, allowing digital sampling in particular to merge diverse sounds into something at once unique and familiar. Sampling a known riff, beat, chorus or hook in a song articulates universal emotions while still creating something wholly new, much like how finding a common ground through a shared language allows a speaker to connect with a greater number of people.[9]

Another essential factor contributing to the increase of digital sampling in music is that sampling better serves new consumer tastes brought on by mobilization. Talking Heads frontman David Byrne argues in his book, *How Music Works*, that the sound of music is influenced significantly by both the venue in which it is heard as well as the technology available at the time.[10] For example, music today is played frequently in cars and in portable MP3 players

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[5] Ryan Mac, *Soundcloud Manages Criticism as it Moves to Become the YouTube of Audio*, FORBES (Apr. 26, 2013, 10:30 AM), http://www.forbes.com/sites/ryanmac/2013/04/26/soundcloud-manages-criticism-as-it-moves-to-become-the-youtube-of-audio/.

[6] Tyler, *supra* note 2, at 2110–11.

[7] Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271, 278 (1996).

[8] Joanna Kao, *Music Shaping Notworks Propagate Mashup Popularity*, USA TODAY COLLEGE (Apr. 1, 2012, 1:05 AM), http://college.usatoday.com/2012/04/01/mustic-sharing-networks-propagate-mashup-popularity.

[9] *See* DAVID BYRNE, HOW MUSIC WORKS 131 (2012) (comparing sampling's use of "hooks and choruses [from other songs] like a knowing reference or quote" to "quot[ing] a familiar refrain to a friend or lover to express your feelings," and concluding that "[s]ong references are like emotional shortcuts and social acronyms").

[10] *Id.* at 13, 139–81 (exploring autobiographically the many ways that recording and playback technology shaped popular music throughout the author's career).

such as the iPod, encouraging more bass-heavy, beat-driven music.[11] The private listening experience in a car or through the iPod and headphones is more conducive to music consisting of "interlocking and layered beats" than the venues and outlets of the past.[12] These new features of music showcase the rising appeal of genres such as hip-hop, the beat-focused orchestrations of which also allow for greater separation between the recorded sound and live musician. Additionally, technology and digital sampling can also mask the deficiencies of the musician, allowing even amateur musicians to not only utilize samples of official tracks, but avoid any sloppiness or egregious errors in the recordings.[13]

Although artists self-releasing these uploads seek hype and popularity over monetary gain, the unsigned artist may incidentally gain profits from uploading and posting their music to Bandcamp, YouTube, or other personally created sites. This can be accomplished by directly charging listeners for a direct download of their music, or through an advertising system in which the artist accrues revenue for each visitor to his site and each time a link or page is clicked. The music industry has even tapped into these online fora to scout potential talent, and multiple recording deals have been garnered from nothing more than a digital upload to one of these sites. Yet the industry's acceptance and utilization of this do-it-yourself, independent culture also effectuates new conflict and issues. Most importantly, it increases the possibility that an unauthorized sample within a particular amateur composition will come to the attention of the rights holder or creator of the sampled original.

Consequently, the number of legal disputes over unauthorized samples has surged since the early '90s.[14] One recent noteworthy conflict involves up-and-coming artist Frank Ocean and the classic rock group The Eagles. Ocean initiated the conflict by utilizing a sample of The Eagles' "Hotel California" as part of a free, downloadable mixtape. The Eagles regarded the sample as

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[11] *See id.* at 127–32 (discussing the rise of sampling and culminating in treatment of hip-hop as a new musical form that has resulted); *id.* at 134–37 (discussing the iPod and Walkman as significant forces in the developments).

[12] *Id.* at 27.

[13] *Id.* at 169 (stating that, with software, "[s]evere or 'amateurish' unsteadiness or poorly played tempo changes can be avoided").

[14] Joe Fassler, *How Copyright Law Hurts Music, From Chuck D to GirlTalk: A Conversation with Kambrew McLeod, co-author of* Creative License: The law and Culture of Digital Sampling, THE ATLANTIC (Apr. 12, 2011, 9:05 AM), http://www.theatlantic.com/entertainment/archive/2011/04/how-copyright-law-hurts-music-from-chuch-d-o-girltalk/236975/ (citing K. McLeod) (asserting that there is now a "litigious sampling culture" and that it will only get worse).

copyright infringement and are considering legal action,[15] even though Ocean released the song at a time when he had made little, if any, profit from his music career, was not signed to any record company, and garnered no profit from the specific song. Cases similar to this one are increasing; however courts have yet to establish a uniform standard to reconcile these new, unique circumstances with copyright law, overall leaving trial courts and parties in the dark as to how to resolve them.

For example, there are two possible ways to resolve this inconsistency and grant better legal certainty to courts and parties wrestling with these recent technology and industry changes. First, digital sampling in music should fall under the doctrine of fair use. Second, if non-commercially released music incidentally garners profits, is eventually released commercially, or is publicly performed for profit, the artist should be subject to a compulsory licensing fee for any previously unauthorized sample within those works, achieved by a Congressional amendment to section 115 of the Copyright Act. With this policy, United States copyright law will both maintain the incentive to create new, original works *and* effectively promote the burgeoning, expansive online music culture and its continued innovation and public enrichment. Altogether, this dual solution will ease enforcement and account for the technological shifts in the music industry by avoiding both speculative remedies and the stifling of current music culture's mixing and sampling.

Part II of this Note will outline the general background of copyright law, as well as the legal history of digital sampling that has led to this litigious state of affairs. Next, Part III will examine the current problems in case law regarding unauthorized digital sampling, and will elaborate on this dual solution that better functions in the present musical and technological environment. Finally, Part IV will reiterate the need for this solution and further emphasize how the amendment will ultimately promote the balance that the Framers sought to achieve with copyright law.

II. BACKGROUND

A. COPYRIGHT LAW AND MUSIC

The foundations of copyright law in the United States trace back to the ratification of the Constitution in 1788. Believing it necessary "to incentivize

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[15] Rob Morkmon, *The Eagles Considering Legal Action Against Frank Ocean*, MTV.COM (Mar. 1, 2012), http://www.mtv.com/news/1680219/eht-eagles-Frank-Ocean-legalaction.

creation and public dissemination of artist works,"[16] the Framers of the Constitution assigned Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[17] As outlined in section 102 of the Copyright Act, copyright protection generally applies to "original works of authorship fixed in any tangible medium of expression,"[18] which essentially requires that a work be an original *expression* of an idea—implying some minimal level of creativity.[19] Copyright protection originates the moment the work is fixed: there is no prerequisite of publication.[20]

Despite the implicit inclusion of "musical works" in the supreme document of the United States,[21] music as it is currently known did not experience comprehensive copyright protection until 1972 when the Copyright Act was amended to extend protection to "sound recordings."[22] This extension was significant to the music industry because the actual *sounds* elicited from the protected musical composition, encapsulated in the original recording of the musical work, were now protected as well. A musical composition "consists of rhythm, harmony, and melody, and it is from these elements that originality is to be determined."[23] It essentially "captures an artist's music in written form," and "protects the generic sound that would necessarily result from any performance of the piece."[24] In contrast, sound recordings are defined as

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16 Armen Boyajian, *The Sound of Money: Securing Copyright, Royalties, and Creative "Progress" in the Digital Music Revolution*, 62 FED. COMM. L.J. 587, 594 (2010) (addressing the Framers' incentive behind the inclusion of the clause).

17 U.S. CONST. art. I, § 8, cl. 8.

18 17 U.S.C. § 102(a) (1990) (listing the specific types of work that copyright both protects and does not protect).

19 Feist Publications, Inc. v. Rural Service Co., 499 U.S. 340, 345 (1991).

20 17 U.S.C. § 104(a) (1998) (clarifying that a work need not be published to obtain copyright protection).

21 *Federal Copyright Protection For Pre-1972 Sound Recordings*, UNITED STATES COPYRIGHT OFFICE, http://www.copyright.gov/docs/sound (last visited Aug. 25, 2014).

22 17 U.S.C. § 114 (1998) (listing exclusive rights of the owner of a copyright in a sound recording); *see also* Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 524 (2006) (stating that sound recordings did not receive copyright protection until 1972 because "Congress did not view them as separate copyrightable works coming within the constitutional parameters of 'writings of an author' ").

23 Newton v. Diamond, 204 F. Supp. 2d 1244, 1249 (holding that rap/alternative rock group the Beastie Boys did not violate the plaintiff's musical composition copyright); *see also* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.05[D] (1992).

24 *Newton*, 204 F. Supp. 2d at 1249; *see also* Dustin Mets, *Did Congress Protect the Recording Industry Into Competition? The Irony of the Digital Performance Right in Sound Recordings Act*, 22 U. DAYTON L. REV. 371, 372–73 (1997).

"works that result from the fixation of a series of musical, spoken, or other sounds . . . regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied."[25] In other words, sound recordings are the "sound[s] produced by the performer's rendition of the musical [composition]."[26] After its codification in 1972, owners of sound recordings were then able to obtain the exclusive rights outlined in § 106,[27] including the right to "prepare derivative works based upon the copyrighted work."[28] This amendment effectively meant that a song or musical work could possess two distinct copyrights—the right to control the use of the composition as well as the *recorded performance* of that composition—and this distinction is of particular importance for digital sampling cases.

However, the Framer's clearly indicated copyright law to balance the competing interests of incentivizing creation and ensuring freedom to information by limiting the term of copyright,[29] thereby "advancing the *public good* through ultimate access to those enriching original works."[30] Legislators, therefore, have limited copyright owners' exclusive rights in provisions throughout copyright law.[31] In addition to the time limitation of copyright protection (life plus seventy years), the law also limits owners' exclusive rights through means such as the fair use, first sale, and merger doctrines, as well as through compulsory licensing.[32]

These limitations were, in many instances, implemented by Congress in an effort to adapt copyright law to changes and technological advancements in the commercial sector.[33] Compulsory licensing, for example, "grew out of a concern in Congress that the music industry was going to develop into a gigantic monopoly."[34] It requires the rights holder to license the work to "anyone else that wants to use it in a phonorecord . . . for a specific payment

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25 17 U.S.C. § 101 (2010) (defining the terms within the Copyright Act).

26 *Newton*, 204 F. Supp. 2d at 1249–50; *see generally* NIMMER & NIMMER, *supra* note 23, § 2.10.

27 17 U.S.C. § 106 (2002) (codifying the exclusive rights of the rights holder).

28 *Id.* § 106(2).

29 U.S. CONST. art. I, § 8, cl. 8; *see supra* note 17 and accompanying text.

30 Boyajian, *supra* note 16, at 593 (emphasis added).

31 *Id.* at 596–97.

32 Though not an exhaustive list of the limitations affecting exclusivity rights of copyright owners, these provisions are of particular applicability and importance in the field of music. *Id.*

33 DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 368, 507 (Rosetta Books LLC ed., Donald Passman 8th ed. 2013) (stating that Congress enacted section 114 of the Copyright Act in 1972 to combat duplication of sound recordings, which was becoming pervasive).

34 *Id.*

established by law."[35] To qualify for compulsory licensing, the individual or entity must fulfill each requirement of section 115 of the Copyright Act.[36] There are three requirements for an original work: (1) the song is a non-dramatic musical work, (2) has been previously recorded, and (3) has been distributed publicly in phonorecords.[37] A non-dramatic musical work is, for all intents and purposes, one which is not written for a musical or opera.[38] By "previously recorded," the statute emphasizes that the artist must have actually recorded the original work before it can fall under compulsory licensing.[39] Thirdly, to be distributed publicly in phonorecords, the song must be an "audio-only recording."[40] In 1995, Congress clarified that compulsory licensing can apply to *digital* phonorecord deliveries (DPD).[41]

Once these requirements for an original recording have been met, the statute then shifts its focus to the licensee, requiring that the new recording does not "change the basic melody or fundamental character of the work" and is only used in phonorecords.[42] This requirement effectively excludes compulsory licensing from encompassing digital samples. In fact, copyright law was largely silent on the legality of the digital sample until the last decade of the twentieth century.[43] With no explicit provision outlining the treatment of digital sampling, the courts characterized a sample as an infringement of the sound recording copyright and illegal without authorization from the rights holder;[44] however, by the time the courts addressed sampling, the practice had already become pervasive in the industry and would not feasibly be discontinued.[45] Consequently, the responsibility for regulating and implementing policies

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[35] 17 U.S.C. § 115 (2002).

[36] *Id.*

[37] *Id.*

[38] PASSMAN, *supra* note 33, at 222.

[39] *Id.*

[40] See 17 U.S.C. § 101, which defines "phonorecords" as any material object "in which sounds . . . are fixed . . . and from which the sounds are perceived . . . or otherwise communicated," but which excludes from this definition such recordings which "accompan[y] a motion picture or other audio visual."

[41] *Id.* § 115.

[42] *Id.* § 115(a)(2).

[43] Fassler, *supra* note 14 ("The suit that really put an end to the 'Wild West' era of sampling was Grand Upright vs Warner Brothers Records, in 1991.").

[44] Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005), *citing* 17 U.S.C. § 114 (giving owner the exclusive rights to the duplication or recapturing of the "actual sounds fixed in a recording").

[45] Fassler, *supra* note 14 ("Record companies . . . didn't pay attention to what these artists were doing.").

pertaining to the digital sample had been left to the music industry for most of the twentieth century.[46]

In regards to legal disputes on digital sampling, two defenses are available to a defendant: fair use or *de minimis* use.[47] Fair use, described in section 107 of the Copyright Act, provides a four-factor test by which the court may determine whether the infringement falls under fair use. These four factors include: (1) the "purpose and character of the use," (2) the "nature of the copyrighted work," (3) the "amount and substantiality of the portion used in relation to the copyrighted work as a whole" and, (4) the "effect of the use upon the potential market for or value of the copyrighted work."[48] Even if a plaintiff proves infringement, the defendant may avoid liability by showing that use of the original work passed this four-factor test. A fair use analysis is governed by principles of equity, and the consideration and weight given to each factor is determined by the circumstances and facts of each case. The court is ultimately seeking to satisfy and maintain the balance between promotion of creative work and an author's exclusive rights. In essence, the fair use defense helps ensure that copyright law does not unreasonably impede express or future innovation. Cases in which the fair use defense prevails usually are ones in which the harm to the owner of the copyright is minimal, but the harm to the other person's work would be substantial.[49]

Though no single factor of the fair use test is necessarily determinative, the "purpose and character of the use" of the infringer's work normally weighs heavy in the judge's decision.[50] If the work at issue is *transformative*, meaning that it "adds something new, with a further purpose or different character, altering the first with new expression, meaning or message," the defendant's work will not be considered infringing.[51] It must change "a plaintiff's copyrighted work or use[] the plaintiff's copyrighted work in a different context" to be considered a "new creation,"[52] and not "merely repackage[] or

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[46] 17 U.S.C. § 115(b)(1) (2010).

[47] John W. Gregory, *A Necessary Global Discussion for Improvements to U.S. Copyright Law on Music Sampling*, 15 GONZ. J. INT'L L. 76 (2011) (asserting that the defendant has the ability to assert these two defenses once the copyright owner proves infringement).

[48] 17 U.S.C. § 107 (1992).

[49] *See, e.g.*, Sony Corp. of America v. Universal Studios, Inc., 464 U.S. 417 (1984) (finding fair use where activity yields social benefits outweighing a particular likelihood of harm to the copyright holder).

[50] Gregory, *supra* note 47, at 89–90 (stating that decision will "often" hinge on whether work is transformative).

[51] *Id.* at 86.

[52] Wall Data, Inc. v. Los Angeles County Sheriff's Dep't, 447 F.3d 769, 778 (9th Cir. 2006).

republish[ ] the original"[53] so that the two are not substantially similar.[54] A caveat to this fair use defense, especially relevant to its application in sampling cases, is that it is only available if the artist has obtained access to the work lawfully, meaning, for example, that the sample could not have stemmed from an illegal MP3 download of the sampled song.[55]

Secondly, a defendant may assert another affirmative defense to infringement, the *de minimis* defense. This defense is applicable when a defendant's copying was so small and trivial that it should be allowed.[56] In regards to digital sampling cases, many courts have opted to analyze the *de minimis* nature of a use through the fragmented literal similarity test, which implements a qualitative and quantitative examination of the portion that was copied.[57] The quantitative portion evaluates the amount that was copied, usually the number of notes or "protectable expression" extracted from the copyrighted work by the defendant.[58] If the amount copied is substantial, the test weighs heavily in favor of the plaintiff, but the court will still consider whether the portion copied is qualitatively significant or distinctive of the original work to the extent that is available in cases involving alleged infringement through digital sampling.[59] The *de minimis* defense will necessarily be strengthened in a case in which the elements of the copied portion are generic, unoriginal, and widely used.[60] Overall, these defenses and legal issues involving digital sampling became widely contested after sampling's "golden age" gave way to a flood of litigation in the early '90s.[61]

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

[54] *Id.* at 1123.

[55] H.R. REP. NO. 105-551, pt. 1, at 18 (1998) (outlining the purposes of the Digital Millennium Copyright Act).

[56] Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 797 (6th Cir. 2005) (holding that a *de minimis* defense was no longer valid in digital sampling cases with unauthorized samples).

[57] *Id.* at 797.

[58] Newton v. Diamond, 204 F. Supp. 2d 1244, 1254 (C.D. Cal. 2002) (concluding that the three-note sequence utilized by the Beastie Boys was neither qualitatively nor quantitatively significant).

[59] *Id.* at 1257. *But see infra* notes 13–113 and accompanying text (discussing the approach by some courts in which no *de minimis* defense is available).

[60] *Newton*, 204 F. Supp. 2d at 1256–57.

[61] Fassler, *supra* note 14 (claiming that sampling had a golden age from 1987–1992).

B. THE RISE OF DIGITAL SAMPLING AFTER THE MP3

The act of sampling "involves incorporating portions of previously recorded works into a new musical composition."[62] This is a form of borrowing that has pervaded music culture since its origin.[63] Until the rise of the MP3 and other technological advances at the turn of the century, however, sampling was a process that required a precise skill set and the presence of either original physical copies or a professional studio.[64] For unsigned amateur artists, this meant relying on "two turntables and a stereo mixer" and sampling only the vinyl records in their possession.[65] Artists had to "create analog cut-ups with razor blades and tape" in order to solidify a recording of the song with the sample.[66] Therefore, due to these restraints, sampling was usually relegated to professionally produced records in the studio or live performances with a DJ.[67]

Digital technology, however, provided an amateur artist not only access to a limitless library of songs (whether legally or through illegal file-sharing services) but also a way to create samples digitally.[68] Devices such as the Musical Instrument Digital Interface (MIDI) made sampling substantially "easier and more affordable" by recording the original sound onto a computer as a digital file from which the amateur artist can extract the sample.[69] The process of sampling continues to become more simplified; for example, a software application dubbed "Noisepad," developed in 2012, further eliminated the resources and steps needed to create a sample, by allowing amateur artists to craft a digital sample with little more than an MP3 and an iPhone or iPad.[70] These significant simplifications of the sampling process have resulted in a flood of sound recordings that include unauthorized samples, many of which have been uploaded online by unsigned artists.

The sampling itself usually takes one of three forms. The first two are similar: artists may use "one segment of a prior song and 'loop[ ]' the segment throughout the new work," or they may take only a "small part of a copyrighted

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[62] Rebecca Morris, *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, 262 (2000).

[63] Note, *Not in Court 'Cause I Stole a Beat: The Digital Music Sampling Debate's Discourse on Race and Culture, and the Need for Test Case Litigation*, 2012 U. ILL. J.L. TECH. & POL'Y 141, 145–46.

[64] *Id.* at 147.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* at 147–48.

[69] *Id.* at 147.

[70] *Noisepad (Music)*, iPads Advisor (Blog) (May 25, 2013), 2013 WLNR 12907374.

song, sometimes altering the sampled music beyond recognition."[71] Far different from these two forms, an artist may also perform a " 'mash up' sampling," which "takes elements of previous songs or other sound recordings and inserts them into new songs."[72] All three forms are now practiced and utilized in almost every genre.[73] This shift to a more populist music environment, however, has produced uncertainty as to the application of copyright law principles to this seismic shift, and its regulations and enforcement mechanisms must be adjusted to account for the massive influx of music creation and publication.[74]

C. COPYRIGHT LAW AND THE DIGITAL SAMPLE

While copyright law fails to directly address the particular issue of digital sampling in any statute,[75] an understood, established process has evolved by which artists can obtain official authorization for the sample and avoid future liability for infringement. Courts elect to adjudicate digital sampling cases through an analysis of both the copyright for the musical score in the original song, as well as the copyright for the sound recording itself.[76] Yet due to the lack of explicit, statutory guidelines, the act of clearing a sample can be a convoluted and expensive process for an artist.[77]

Because no specific provision for samples exists under section 115 of the Copyright Act,[78] rightsholders have no legal obligation to license the rights of the original song to another artist wanting to create a sample.[79] Furthermore,

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[71] Gregory, *supra* note 47, at 79; *see also* David M. Morrison, *Bridgeport Redux: Digital Sampling and Audience Recording*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 75, 90–91 (2008) (categorizing the different types of samples that artists tend to utilize).

[72] Gregory, *supra* note 47, at 79; *see also* Morrison, *supra* note 71, at 90–91.

[73] Gregory, *supra* note 47, at 79 (stating that "[t]oday, artists of all genres implement sampling").

[74] Tracy L. Reilly, *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*, 31 COLUM. J.L. & ARTS 355, 393 (2008) ("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.").

[75] *See* Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 522 (2006) ("Much of copyright law was developed prior to the practice of digital sampling, leaving some doubt as to its applicability to current digital sampling disputes.").

[76] *See id.* at 522–23 ("[C]ourts have considered two distinct forms of ownership, one copyright for the musical score and another copyright for the sound recording.").

[77] PASSMAN, *supra* note 33, at 375–76.

[78] 17 U.S.C. § 115 (2006) (outlining the persons to which rights holders are required to license their works).

[79] PASSMAN, *supra* note 33, at 376.

even if the rightsholder is willing to comply, the sampling artist has to make "whatever deal the rights owners decide to bless [him or her] with."[80] In other words, the rightsholder can dictate the price, the subsequent royalty, and even choose to potentially limit any granted usage by reserving a portion of the copyright.[81] Rather than incentivizing an artist to undergo the proper legal process for clearing a sample, the lack of statutory regulation has exacerbated the "catch me if you can" attitude pertaining to the use of samples in music culture.[82] The unsigned, independent artists may revel in the false sense of security that their unauthorized sample is legally unnoticed due to their anonymity, yet the expansion of the Internet and online music culture has made that reliance increasingly risky and heightened the possibility of litigation.[83]

D. DIGITAL SAMPLING IN CASE LAW

1. Unauthorized Digital Samples as Per Se Infringement. Though legal treatment of unauthorized samples varies, certain courts have established a strict precedent within their jurisdictions. Two cases have effectively established a hard-line legal precedent regarding digital sampling—*Grand Upright Music Limited v. Warner Bros. Records, Inc.* and *Bridgeport Music, Inc. v. Dimension Films*.[84] The first line of the opinion in *Grand Upright Music*, "[t]hou shalt not steal," clarifies that the court's decision sought to end the sampling culture of borrowing without asking.[85] Though the decisions of these two cases were fifteen years apart, the court's basic analysis in each were largely the same in that neither provided for a defense for unauthorized sampling of a sound recording.

In the first of these two cases, *Grand Upright Music*, the court treated the issue of whether the plaintiffs effectively owned the copyright to the sampled song as the sole, determinative question of fact in deciding if the unauthorized sampling was a punishable instance of infringement.[86] As Judge Duffy stated,

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[80] *Id.*

[81] *Id.*

[82] *Id.* at 375; *see also* Note, *supra* note 63, at 154 ("Such a burden upon independent artists of limited resources actually works to encourage illegal sampling rather than compliance.").

[83] *See* JuNelle Harris, *Beyond Fair Use: Expanding Copyright Misuse to Protect Digital Free Speech*, 13 TEX. INTELL. PROP. L.J. 83, 97 (2004) ("Thanks to the ease and visibility of infringement on the Internet, copyright owners are increasingly targeting individual copyright infringers . . . .").

[84] Grand Upright Music Limited v. Warner Bros. Records, Inc., 780 F. Supp. 182, 182 (S.D.N.Y. 1991); Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005). *See also* James A. Johnson, *Thou Shall Not Steal: A Primer on Music Licensing*, 80 JUN. N.Y. ST. B.A. 23, 23–24 (2008).

[85] *Grand Upright Music*, 780 F. Supp. at 182.

[86] *Id.* at 183.

"[t]he only issue . . . seems to be who owns the copyright to the [sampled] song."[87] The most persuasive evidence leading to conclude the court that the plaintiffs properly owned the copyright was a letter from the defendant to the plaintiff requesting consent to use portions of the song for payment.[88] Though Warner Brothers Records, Inc., the defendant, "had a department set up specifically to obtain such clearances," the record company instead chose to "unilaterally release the [artist's] album and single," putting the onus on the artist himself to deal with any ramifications regarding his use of an unauthorized sample.[89] The court found this practice to demonstrate that the defendants only cared about potential profits and exhibited a "callous disregard for the law." Therefore, believing measures beyond a preliminary injunction were justified, the court decorated that any further legal consequences that stemmed from the use of the sample should fall upon the record company itself, rather than the artist.[90] Overall, the defense's arguments, which the court essentially boiled down to "stealing is rampant in the music industry and . . . should be excused," were not only asinine to the court, but violated copyright law and the "Seventh Commandment."[91]

Over a decade after the *Grand Upright* decision, its strict standard was revisited in *Bridgeport Music, Inc. v. Dimension Films*, another case involving an unauthorized use of a digital sample. *Bridgeport* is widely regarded as the landmark case relating to digital sampling (as it pertains to sound recording copyright) for the court's precedent of a "bright-line test" for determining whether a digital sample constitutes a copyright violation.[92] The court analyzed the digital sample present in the rap song "100 Miles and Runnin'," which was the subject of a copyright owned by No Limit Films and was included in the soundtrack of the movie *I Got the Hook Up*.[93] In a holding that ultimately redefined the legal examination of digital samples, the court overturned the district court's grant of summary judgment on the grounds that the "alleged infringement" of the sample was "*de minimis* and therefore not actionable."[94]

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[87] *Id.*

[88] *Id.* at 184 ("[T]he most persuasive evidence . . . comes from the actions and admissions of the defendants.").

[89] *Id.* at 185.

[90] *Id.*

[91] *Id.* at 183 (concluding that the use of an unauthorized sample was inexcusably stealing).

[92] Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005). *Cf.* Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2004) (adjudicating on whether a *musical composition* copyright was infringed in a sample).

[93] *Bridgeport Music, Inc.*, 410 F.3d at 795.

[94] *Id.*

"[One hundred] Miles" utilized a digital sample extracted from the composition and sound recording entitled "Get Off Your Ass and Jam" by George Clinton, Jr. and the Funkadelics.[95] Bridgeport and Westbound each claimed copyright to both the musical composition and sound recording of the sampled song.[96] As stated by one of the expert witnesses in the case, "[one hundred] Miles" took a two-second sample from the original's opening guitar solo, lowered the pitch and " 'looped' and extended [it] to 16 beats."[97] It subsequently appears in "five places" in the sound recording of the rap song, with "each looped segment last[ing] approximately 7 seconds."[98] Based on this evidence the district court concluded that, under a "qualitative/quantitative *de minimis* analysis [also referred to as the] 'fragmented literal similarity' test," the digital sample of the original was utilized in a way that was "original and creative and therefore entitled to copyright protection."[99] A juror "familiar with the works of George Clinton," reasoned the district court, would have difficulty even identifying the source of the sample heard in the sound recording, evidence that the sample was not qualitatively substantial to the original recording.[100] Therefore in consideration of the "small amount of copying involved" (quantitative *de minimis* analysis) and the fact that the two songs did not share sounds qualitatively significant to one another (so as to make them similar in sound or composition), the court granted summary judgment in favor of No Limit Films.[101]

In reversing the district court's ruling, the Sixth Circuit took issue with the applicability of any strain of a substantial similarity test (including fragmented literal similarity), rejecting the assertion that a court should analyze digital sampling cases in the same manner as "infringement of a musical composition copyright."[102] The court then essentially outlined an entirely different approach for applying copyright law to digital sampling. Though it admitted the impossibility of providing a "one size fits all test" to such activity,[103] the Sixth Circuit recognized that digital sampling is an increasingly common practice in the music industry that has caused a "plethora of copyright disputes," creating the need for a concrete legal rule.[104]

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95 *Id.* at 796.
96 *Id.*
97 *Id.*
98 *Id.*
99 *Id.* at 797.
100 *Id.* at 798.
101 *Id.*
102 *Id.*
103 *Id.* (internal quotation marks omitted).
104 *Id.* at 799. *See also* 17 U.S.C. § 114 (2012).

The foundation of the *Bridgeport* court's analysis rested with section 114 of the Copyright Act.[105] In addition to generally reaffirming that the owner of copyright in a sound recording enjoyed the exclusive rights of an author stated in section 106, this section further defines the nature of the "derivative works" protected under the sound recording copyright.[106] The owner of such copyright has exclusive rights not to only the duplication or recapturing of the "actual sounds fixed in the recording," but also to those derivative works "in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality."[107] However, these rights do not extend to derivative sound recordings that "consist[ ] *entirely* of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording."[108]

The court adopted a literal approach to its statutory interpretation of section 114.[109] Because the statute explicitly states that the copyright owner has the exclusive right of any reproduction or duplication of the sound recording, the Sixth Circuit deduced that this encompassed the duplication of any actual, original sound within the recording as well, even if that exact sound was merely a piece or small segment of the recording.[110] Thus, no *de minimis* analysis is needed—even if a "small part of a sound recording is sampled, the part taken is something of value," and "no further proof" is necessary.[111] In other words, no justification, whether it be the seemingly inhibitory cost to obtain the sample or the effort needed to follow through with the process of authorizing the sample, is adequate to sidestep the provisions outlined in section 114.[112] Consequently, the Sixth Circuit held that any unauthorized digital sample is per se infringement.[113]

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105 17 U.S.C. § 114 (2010).

106 *Id.* (outlining the exclusive rights of a copyright owner protected under law, which include the right to reproduce the copyrighted work, prepare derivative works, distribute copies or phonorecords of the work, public perform and display the work, and perform the work by means of a digital audio transmission); *see also id.* § 106.

107 *Id.* § 114(b).

108 *Bridgeport Music, Inc.*, 410 F.3d at 800 (quoting 17 U.S.C. § 114(b)). In its added emphasis of "entirely," the court attempted to show that the work utilizing an unauthorized sample could never fall under protection of the statute, for the sample disqualifies it from being categorized as an entirely independent creation.

109 *Id.* at 805.

110 *Id.* at 800.

111 *Id.* at 802.

112 *Id.* at 801 (citing 17 U.S.C. § 114 as evidence).

113 *Id.* ("Get a license or do not sample.").

The *Bridgeport* court also supported its hardline holding with several practical reasons. First, the court reiterated the far too subjective nature of any type of "substantial similarity" test, which inevitably leads to inconsistent judgments and further obscures whether a given sample constitutes copyright infringement.[114] Though this appears to stifle future creativity and innovation in the music industry, the Sixth Circuit countered that its rule fundamentally favors the artist, for inevitably "today's sampler is tomorrow's samplee."[115] Though the legislative history provided no real guidance as to how digital sampling was intended to be construed under copyright law, the court intimated that it's clear per se infringement standard for unauthorized samples was the most effective approach to providing much-needed stability to the current, chaotic music climate.[116] Any further adaptations or fee adjustments, the court stated, could be worked out by either the music industry or Congress itself.[117]

2. Rejection of Per Se Infringement Pertaining to Unauthorized Digital Sampling. In the years following the *Bridgeport* decision, some courts have declined to utilize the per se infringement rule for unauthorized digital sampling. Instead, they have opted for the less extreme approach of attempting to reconcile the substantial similarity test to the unique characteristics and nature of the digital sample.

For example, in *Saregama India, Ltd. v. Mosley*, a record company brought an action against the defendants for an unauthorized digital sample included in their song "Put You on the Game" (PYOG).[118] This sample borrowed a one-second snippet of "Bagor Mein Bahar Hai" (BMBH), to which the record company owned the rights.[119] Defendants admitted that they lifted the sample directly from the song, yet argued that the sound recordings of the two songs are not substantially similar.[120] The plaintiff, on the other hand, retorted that substantial similarity does not apply because the very nature of the digital sample was an exact, literal copy of the original.[121]

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[114] *Id.* at 802.

[115] *Id.* at 804.

[116] *Id.* at 804–05.

[117] *Id.* at 804 ("Third, the record industry, including the recording artists, has the ability and know-how to work out guidelines, including a fixed schedule of license fees, if they so choose."). *See also* Grand Upright Music Limited v. Warner Bros. Records, Inc., 780 F. Supp. 182, 185 (S.D.N.Y. 1991) (treating as significant that record companies such as Warner Bros. had a department specifically created to obtain licenses for samples).

[118] Saregama India, Ltd. v. Mosley, 687 F. Supp. 2d 1325, 1326 (S.D. Fla. 2009).

[119] *Id.* at 1326–27.

[120] *Id.* at 1326.

[121] *Id.* at 1337.

Although the court conceded that literal copying occurred, it held the plaintiff must prove that there was both factual copying *and* substantial similarity. According to the court, two works are substantially similar if the average person would recognize the original song from the copy and the two songs, taken as a whole, are substantially similar.[122] "Other than the one-second snippet," the court held that the songs "bear no similarities" as a whole and that "no reasonable jury, properly instructed, would mistake PYOG for BMBH or conclude that the two works were substantially similar."[123]

In its rejection of the *Bridgeport* court's per se infringement doctrine, the *Saregama* court specifically took contention with the former's interpretation of § 114 of the Copyright Act.[124] It concluded that the *Bridgeport* court's exception for sound recordings erroneously expanded the definition of derivative works to include a work that contains *any* sound of the original recording, and hence declined to follow.[125] The court also noted that the legislative history of § 114 revealed no evidence that Congress enacted the statute for the purposes of providing a stricter standard for infringement of a copyright for a sound recording through expansion of what constituted a derivative work.[126] Instead, the court remained firm in its conclusion that, in order to be considered a derivative work, the creation must bear substantial similarity to the original as well, and that a court's examination should not cease after discovery of exact copying without license.[127] Thus, the *Saregama* court's rule for determining whether a song containing a digital sample infringes requires not only proof of exact copying of the sound recording, but *also* whether the derivative song reproduces or recaptures the substantial sounds so as to make it highly similar to the original recording.[128]

Other courts, such as the District Court for the Southern District of New York in *TufAmerica, Inc. v. Diamond*, declined to follow the per se infringement standard of *Bridgeport*, yet also attempted to refine the substantial similarity test differently than the district court in *Saregama*.[129] The dispute in *TufAmerica* involved unauthorized digital sampling by the Beastie Boys of numerous songs by musical group Trouble Funk, for which the plaintiff held the copyrights.[130]

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[122] *Id.*
[123] *Id.* at 1338.
[124] *Id.* at 1339.
[125] *Id.* at 1340.
[126] *Id.* at 1341.
[127] *Id.* at 1340–41. This is known as the "Ordinary Observer" test.
[128] *Id.* at 1341.
[129] TufAmerica, Inc. v. Diamond, 968 F. Supp. 2d 588 (S.D.N.Y. 2013).
[130] *Id.* at 592.

In the subsequent analyses of these numerous samples, the Second Circuit, similarly to *Saregama*, focused the bulk of its examination on the substantial similarity between each pair of songs.[131] Although the court's treatment and analysis pertaining to a digital sample largely resembles that of the district court's in *Saregama*, it explicitly asserted that the "fragmented literal similarity" test should be used in cases of digital sampling, an adaption of the *de minimis* standard in which the court analyzes both the quantitative *and* qualitative aspects of the copy.[132] The court held that this test fell under the general substantial similarity standard, but also maintained that it is a separate and specific test.[133] As it is rooted in *de minimis* doctrine, the "fragmented literal similarity" test allows for literal copying of a "small and usually insignificant portion of the pre-existing work,"[134] and thereby examines "whether the copying goes to trivial or substantial elements."[135] To determine if copying is substantial, the court deemed that it was more prudent to look at the "protectable elements" of the original work specifically within the sample, rather than looking more broadly at the "protectable elements of the work as whole."[136] The court achieved this by determining both the quantitative *and* qualitative significance of the sampled portion to the original work as a whole.[137] Therefore, even if the sample may be quantitatively insignificant in that it copies mere seconds of the original work, the sample may still infringe if that portion is significant to the original, as it may decrease the transformative nature of the sampling song.[138] The nature of the test ultimately requires a song-by-song analysis of each sample.[139]

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131 *Id.* at 590.

132 *Id.* at 596; *see also* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 797 (6th Cir. 2005). This was the test utilized by the district court that was subsequently overturned by the Sixth Circuit.

133 *TufAmerica, Inc.*, 968 F. Supp. 2d at 596.

134 *Id.* at 599.

135 *Id.* at 598; *see also* 4-13 NIMMER & NIMMER, *supra* note 23, § 1303[A][2][a] (stating that, in cases in which there is exact copying, one must determine "[a]t what point does such fragmented similarity become substantial so as to constitute the borrowing an infringement").

136 *TufAmerica, Inc.*, 968 F. Supp. 2d at 596, 598.

137 *Id.* at 598.

138 *Id.* at 602 (noting that in order for a portion to be deemed qualitatively significant, it must satisfy the general copyright requirements of being an "original" work, meaning that it must possess "at least some minimal degree of creativity").

139 *Id.* at 599.

In effect, *TufAmerica* disregards one of the customarily used tests for substantial similarity, the Ordinary Observer test,[140] and instead applies the more technical and specific "fragmented literal similarity test" in order to assess the legality of a digital sample.[141] The ordinary observer test determines substantial similarity by inquiring whether an ordinary listener would be able, without purposefully "set[ting] out to dissect the disparities," to recognize and identify the original work that is sampled,[142] and conclude that the two works as a whole were substantially similar. The Second Circuit held that this was an unfair burden for the plaintiff to meet; there is undisputed, exact copying of the original work, yet[143] the sample normally consists of only a couple seconds of the original song and may be distorted or manipulated to fit the new track, making it almost unrecognizable.[144] Due to the ordinarily diminutive nature of a digital sample, the *TufAmerica* court found it more prudent to examine the sample on its own ("the dissected portion") rather than make a judgment based on the "protectable elements of the work as a whole."[145]

Overall, the examples of *Grand Upright*, *Bridgeport*, *Saregama*, and *TufAmerica* demonstrate the general disagreement amongst courts as to the proper legal assessment of an unauthorized, unlicensed digital sample. Some still utilize the "ordinary observer" substantial similarity test, while others refine the substantial similarity *de minimis* analysis in an attempt to reconcile it with the inherent difficulties in analyzing digital samples. Still others such as *Grand Upright* and *Bridgeport* emphasize the unique nature of digital sampling, which does not "involve the mere imitation of sounds, but rather the *actual* use of the copyright owner's original work,"[146] and therefore deem the presence of an unauthorized digital sample as per se infringement.

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[140] Sarogama India, Ltd. v. Mosley, 687 F. Supp. 2d 1325, 1338 (holding that there was no substantial similarity because "no reasonable jury, properly instructed," would mistake the derivative work from the original or conclude that the two works were substantially similar).

[141] *TufAmerica, Inc.*, 968 F. Supp. 2d at 596–97, 602 ("[T]he focus is on the qualitative and quantitative aspects of the allegedly infringed *sample* to the pre-existing work, not to the infringing work." (emphasis added)).

[142] *Id.* at 596.

[143] *Id.* at 597 ("[I]n cases of fragmented literal similarity, there are no blurred lines between what was or was not taken.").

[144] *Id.* at 602 (stating that the "audibility" or discernment of the sample is not the basis of the examination).

[145] *Id.* at 596–97.

[146] Reilly, *supra* note 74, at 366 (emphasis added).

III. ANALYSIS

A. THE DEFICIENCIES OF THE SUBSTANTIAL SIMILARITY TEST, FRAGMENTED LITERAL SIMILARITY TEST, AND PER SE INFRINGEMENT STANDARD FOR DIGITAL SAMPLING

As evidenced by the fact that the federal circuit is starkly split on the issue of digital sampling, the reliance on case law to establish a workable standard of treatment for the practice has proven to be problematic. The lack of cohesive stance on its legality has yielded inconsistent judgments, and this confusion continues to have a negative effect on both the sampling artists and the rightsholders. While a split in the federal circuit is certainly not uncommon or unique to digital sampling, the pervasiveness of the practice in the music industry and the ever-increasing litigation[147] suggests that a more extensive measure—by way of a congressional amendment—needs to be taken.

Each of the varying tests that courts have adopted for digital sampling cases has certain merits and is based firmly on copyright law principles, yet none of these approaches, standing alone, provides a full and adequate solution. In consideration of the current state of the music industry, the complex and varying nature of the digital sample, and the creative balance that copyright law seeks to maintain, each of these tests is insufficient in resolving the issue of unauthorized digital sampling.

The lack of consensus on the legal treatment of digital sampling has induced a flood of litigation, prompting some courts to establish a hard-line rule to efficiently handle such litigation. Though the intent of *Bridgeport* to create a bright-line standard in the interest of organization was legitimate, the Sixth Circuit precariously based its holding on an interpretation of section 114 of the Copyright Act.[148] The construction of section 114 as effectively deeming any unauthorized digital sample to be infringement is to disregard the legislative intent behind the section's inclusion. The very purpose of section 114 was to actually *limit* the exclusive rights of copyright owners outlined in section 106, not expand them.[149] The *Bridgeport* court, nonetheless, employed the statute to effectively expand the rights of the copyright holders rather than to limit them, more or less eliminating any fair use argument or consideration as to promoting creativity and act achieving the balance sought by the framers.[150] In doing so, it discarded the use of any type of substantial similarity test for digital sampling

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147 *See* Fassler, *supra* note 14.
148 *Bridgeport Music, Inc.*, 410 F.3d at 799.
149 4 NIMMER & NIMMER, *supra* note 23, § 13.03[A][2][b].
150 *Id.*

cases, despite the customary use of these tests in both music and sound recording copyright cases.[151] The legislative history surrounding the copyrightability of sound recordings further evidences the incongruent nature of this holding; Congress "explicitly noted . . . that 'infringement takes place whenever all or any *substantial* portion of the actual sounds that go to make up a copyrighted sound recording are reproduced.' "[152] It is evident that *Bridgeport* was, by all accounts, an unprecedented holding unanticipated not only by previous adjudication but also by the Copyright Act itself.

The *Bridgeport* court did, however, clearly acknowledge the abrupt and arbitrary nature of its holding, as evidenced by its deconstruction of the substantial similarity tests and conclusion that these failed to establish true consistency in the law.[153] This assertion, although diverging from the customary analysis used to determine copyright infringement, is not without merit. Whatever its practical value in other areas of copyright law, the general substantial similarity test (the analysis of which rests primarily on the "ordinary observer" test) presents unique difficulties when applied to a legal analysis of a digital sample.

In particular, the general substantial similarity test, which relies on the Ordinary Observer test, errs in that it requires an unreasonably high burden of proof from the copyright holder, and offers too ambiguous a standard by which the sampler must measure his work. Due to the nature of a digital sample, this test must be applied in many cases to a musical excerpt that rarely exceeds three to six seconds.[154] As such, the rightsholder is usually unable to establish that the whole "essence" of the original sound recording was appropriated within such a small extraction. Moreover, this short amount of time also provides a minimal probability that an ordinary observer would be able to discern the original work in the sample. The fact that many samples distort and manipulate the excerpt of the original sound, sometimes even to the point where it is unrecognizable, also provides a loophole by which the sampler can avoid liability for infringement under the ordinary observer test.[155] It therefore seems that the rightsholder would only potentially succeed on this prong of the substantial similarity test when the sample is continuously looped throughout the work and is at once recognizable to the ordinary observer. As the court in *TufAmerica* reasoned, the test guides the court to adopt an overbroad approach in which it views the song

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[151] *Id.*

[152] *Id.* at 13–61 (emphasis in original).

[153] *Bridgeport Music, Inc.*, 410 F.3d at 802.

[154] *See* Morrison, *supra* note 71, at 90–91 (identifying the three typical digital samples utilized by artists).

[155] *Id.* at 91.

as a whole and fails to properly pinpoint the bulk of its examination on the sample at issue. This incorrect focus is highly problematic when the contents of the sample make up less than a few seconds of each song, and is altogether not conducive to the accurate assessment of a digital sample.

While the substantial similarity test may be too general of a test for digital sampling, the fragmented literal similarity test—a derivation of the *de minimis* doctrine—adopted by the Second Circuit in *TufAmerica* is an improvement in that it more accurately and specifically analyzes the finer points and nature of a digital sample. Unlike the substantial similarity test, the fragmented literal similarity approach factors into the examination the fact that the sample *is* an exact copy.[156] This test accounts for the short duration of the sample by focusing not on the two songs as a whole, but instead by inspecting the content of the sample and that snippet's relation to the original work. If the copied portion is not substantial to the original, the copying is considered *de minimis* and not infringement. The two-factor test, in which the court evaluates the sampled portion's quantitative *and* qualitative significance to the original, is a more sound approach for litigating issues of digital sampling, in theory. However, in practice, the subsequent survey of the sample by the court plays out in much the same manner as the general substantial similarity test.

Under the fragmented literal similarity test, the question of whether a sample is deemed *de minimis* copying or infringement will often hinge solely on the qualitative significance of the snippet to the original.[157] Although the test's reliance on the court's own diagnosis and expert testimony is prudent compared to the deference of the ordinary observer test, the standard of proof remains rather vague and unpredictable, as there is no clear definition of "qualitative" or "substantial."[158] The original song's hook would clearly qualify, but anything beyond that is speculative. What is considered infringement and what is regarded as a *de minimis* use is determined on a case-by-case basis, with little to no hard-line rules to follow. The test still allows for legal uncertainty for both the sampler and samplee, especially for the inexperienced amateur artist. As the court in *Bridgeport* accurately stated, the application of this particular substantial similarity test (fragmented literal similarity) in the examination of a digital sample requires extensive "mental, musicological, and technological

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[156] Gregory, *supra* note 47, at 81.

[157] *Id.* at 82 ("In unauthorized sampling, copyright holders do not have a strong remedy available [under fragmented literal similarity test] unless the sample was qualitatively important such as a song's hook. . . .").

[158] *Id.* (citing a song's "hook" as an example of a qualitatively significant portion of the original work).

gymnastics" that can quickly devolve into a subjective and muddled process.[159] Inevitably, this type of exercise, demanding much in the way of time and resources, puts a strain on judicial economy.[160] In consideration of the fact that digital sampling is an integral and pervasive element in the current musical climate, lengthy and slow-moving litigation benefits neither the sampler nor the sampled artist. These drawn-out cases, seemingly contradictory decisions, and inconsistent enforcement will do little to tame the chaos of the populist, online music culture. Yet, *Bridgeport*, while correct in its assertion that a "bright-line" rule was needed in the industry, ultimately settled on one that caused numerous problems of its own.

With neither an explicit provision in the Copyright Act nor a Supreme Court ruling on the issue, legal treatment of the digital sample has been determined by each court's own interpretation and construction of various copyright law provisions. The resulting tests applied to digital sampling have proven to be insufficient, and do not adequately reconcile the nature of the digital sample and changing musical landscape with the intended principles and purposes of copyright law. Consequently, this lack of uniform treatment has had a profound effect on the music industry and especially the amateur artist.

B. THE NEGATIVE EFFECTS OF THE LAW ON THE AMATEUR ARTIST

While the elimination of the substantial similarity test as a uniform standard was arguably a step in the right direction in terms of litigating the use of an unauthorized digital sample, the rule set forth by the *Bridgeport* court ultimately overcorrected the problems associated with substantial similarity. In its pursuit of judicial efficiency, a bright-line rule, and better protection for copyright owners, it subsequently afforded rightsholders a level of exclusion that tipped the balance too heavily in their favor. Similar to the position in which the substantial similarity test formerly placed rightsholders, this rule gives the sampling artist—particularly the amateur, unsigned artist—little chance to prevail in a suit for unauthorized sampling.[161] In essence, under the rule that any unauthorized sample is per se infringement, a sampling artist's only viable option to avoid liability after *Bridgeport* is to examine his or her work for any unauthorized samples and officially obtain any licenses necessary to authorize them. On its face, this may appear fair, but the complexities provide difficult to navigate for the amateur, unsigned artist in the digital age for several reasons.

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[159] *Id.* at 80.

[160] *Id.*

[161] *Id.* at 84 (stating that, under *Bridgeport*, any sampling, "no matter how *de minimis*, and even without any similarity between the two works, constitutes copyright infringement").

First, the per se infringement standard for digital sampling requires a "tedious and subjective analysis" by the artist of his or her created work, one in which a certain level of expertise in the field of music may be more of a necessity than a mere advantage. As one musician put it, the artist, in order to release a song that complies with current law, must break down " 'every single component of every track that [he or she] [makes] and . . . go through every little blip of sound and decide what's significant enough that we need to contact the owner.' "[162] At present, when the creation of recorded music requires a far less intensive process than ever before, and as the allure of quick fame from one upload has never been higher, it is irrational to assume that the majority of amateur, unsigned artists will conduct such an intricate analysis.

Even upon the acknowledgement of a sampled portion, the artist may still inevitably confront difficulties identifying both the original source of the sample, as well as the proper copyright owner of the sound recording.[163] In many instances, it is the record companies rather than the creators or artists themselves that hold both the composition and sound recording copyrights.[164] To further complicate matters, a parent company or label may hold the copyright to a musical composition while a different record label or subsidiary of the record company holds the copyright to a sound recording. Thus, the sampling musician may have to contact two different parties and negotiate for two separate licensing fees in order to implement a digital sample into his or her work.[165]

Additionally, the negotiating process offers no guarantees of the artist's good faith effort to legally obtain the proper licenses for the sample. Because the act of licensing a sample (or an entire song for that matter) to another artist does not fall under compulsory licensing, the copyright owner possesses no legal obligation to license the sample upon negotiation.[166] In effect, this results

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[162] *Id.* at 80 (quoting Mike D., a member of the alternative rock/hip-hop group the Beastie Boys, on the process of vetting a song for any potential legal issues regarding digital samples).

[163] Reilly, *supra* note 74, at 365.

[164] *Id.* at 364 (stating that record companies "typically claim exclusive ownership of sound recordings through recording contracts and assignments of ownership" from the creators).

[165] *Id.* at 365 (outlining a hypothetical in which the sampling artist would have to "contact Sony/ATV Music Publishing and Michael Jackson to obtain rights to use the composition" and would also have to bargain with the subsidiary label (Capitol Records) to obtain a license for the sound recording).

[166] PASSMAN, *supra* note 33, at 376 (noting that, "since there's no compulsory license for samples," the artist has to make "whatever deal the rights owners decide to bless [them] with").

in an unequal bargaining scenario in which the rightsholder firmly controls the petitioning artist, and fees for the sample can subsequently skyrocket.[167]

With the rights holders possessing all the power in the ensuing negotiations, the agreement reached between the rights holders and the sampling artist is not normally a one-time flat fee for use of the sample. Instead, the artist will have to indefinitely forfeit a portion of each future sale as a royalty payment to the holder of the sound recording copyright.[168] Yet, the forfeiture of profits is rarely limited to royalty payments to the rightsholder, for the publisher (or *publishers* in certain instances) will almost always demand both a percentage of the profits, and a partial ownership of the copyright for the song at issue. Depending upon both the royalty rate agreed upon, as well as the amount of publishers involved with the original work, it is even possible that the sampling artist will have to pay out-of-pocket for the song's publication (or upload) into the public sphere.[169] Moreover, terms of the agreement do include shared ownership of the copyright, which means that an artist seeking a license for a song's use in an advertisement or movie would have to obtain the permission of the publisher(s) of the original work in order to do so.[170]

Upon reaching an agreement the artist, under the per se infringement rule put forth by *Bridgeport*, could potentially lose both any profit from the creation, as well as control over its copyright, for an unauthorized *two-second sample within the song*.[171] Undoubtedly, the combination of these factors only further incentivizes an artist to move forward with the sample in the hopes that "the original artist will either not learn of the use or find it too troublesome to sue," or, alternatively, to abandon his creative endeavor altogether.[172]

As it stands, case law does little to provide a disincentive to the masses of unsigned, amateur artists from continuing the culture of "borrow now, ask later" and uploading songs with unauthorized samples. Indeed, this behavior pervades all corners of the internet despite the holdings of *Bridgeport* and *Grand Upright Music*. The seemingly arbitrary nature of legal outcomes confronting even high-profile artists with unauthorized use of their samples creates a

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167 Reilly, *supra* note 74, at 364 ("Sample licenses may be as high as $5,000 in buyout fees for a three-second sample that is 'looped.' ").

168 PASSMAN, *supra* note 33, at 376 (declaring that, for a sample derived from the master recording, the holder "will always want a royalty," usually in the range of three to eight cents per sale).

169 *Id.* (stating that publishers "almost always" demand partial copyright ownership of the track and a percentage of the publishing income).

170 *Id.* ("Even when [the artist] get[s] past all these hurdles, the publishers (and some record companies) will often limit the usage of their sample to [the artist's] records or promo videos.").

171 Reilly, *supra* note 74, at 357.

172 *Id.* at 364.

mindset that the reward outweighs the risk. Similarly, the smaller, unsigned artists proceed thinking they can get away with their "theft."

Altogether, each of these standards regarding unauthorized digital sampling present issues for adequate enforcement and negatively affect amateur artists as a consequence. With such a large pool of amateur, free uploads scattered across the internet on multiple sites[173] (e.g., thirty-eight million users on Soundcloud alone) and no clear standard, third parties bear a difficult burden. Moreover, this type of enforcement mechanism gives third parties (such as websites themselves) too much discretionary power. It requires them to sift through countless tracks (with more inevitably being uploaded each day), recognize the presence of a sample, check whether such sample is authorized, and then notify the pertinent rights holder of the sound recording that was sampled. Consequently, this type of enforcement allows third parties to decide subjectively which songs will remain unless otherwise notified. Given the impracticability of enforcing these requirements, it follows that enforcement against unauthorized digital samples has been inconsistent.

To merely claim that the anemic enforcement of the case law is the sole reason for the rampant unauthorized sampling, however, ignores the important cultural and industry-wide issues that undoubtedly also contribute to the infringement. While the lack of knowledge regarding the process of gaining official authorization may not be the fault of the legal system, the process itself is tailored to an outdated era. No longer can samples only be created in the confines of a professional studio or through well-practiced expertise. To be sure, those signed musicians recording commercially released tracks for record companies still have the resources at hand by which to gain authorization, or at least to be made aware of potential sampling issues.[174] Yet, it is evident from the array of cases regarding digital sampling that record companies either do not allocate enough resources to helping artists avoid potential infringement, or are equally confounded by the legal complexities surrounding the activity.[175] Even these artists—who at the very least possess an awareness of the legal necessity to authorize samples—fall prey to infringement. Hence, the amateur artist who is likely unaware of this process will almost certainly fail to comply with the legal standard for digital sampling.

The cloak of anonymity these unsigned artists once wore as protection from any legal action continues to disappear as the music industry shifts more and

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[173] For example, there are thirty-eight million users on Soundcloud alone. *See* Mac, *supra* note 5.

[174] *See* PASSMAN, *supra* note 33, at 375 ("Record companies won't release a record containing samples without assurances that the samples have been cleared . . . .").

[175] *See* Gregory, *supra* note 47, at 80 ("[A]rtists are forced to determine, often without legal training or counsel, whether a sampled sound recording infringes the copyright-holder's rights.").

more of its presence online. Just as the *Bridgeport* court cited the influx of digital samples at the turn of the century as part of its justification for altering the law,[176] so the court system should respond to this phenomenon of massive digital sampling by amateur artists as reason to further alter the current rules and judicial decisions pertaining to sampling.

Though the *Bridgeport* court arrived at an impractical conclusion, its attempt to establish a bright-line rule in the interest of judicial efficiency and consistency was indeed prudent. Because digital sampling has become so integrated in mainstream commercially released music and is also in millions of amateur compositions across the internet, the law needs stability and organization in its treatment of the practice. Contrary to the implication of the *Bridgeport* ruling, which tends to eviscerate an influential market and culture, in reality and in fact not all acts of unauthorized digital sampling can be treated fairly under one uniform standard due to the highly variant nature of digital samples. Rather, they must be separated and properly categorized according to these variables, so that the law can maintain a fair standard for each category of unauthorized digital samples.

C. THE SOLUTION: FAIR USE AND COMPULSORY LICENSING

As courts seem perpetually split on how to handle the unauthorized sample, it appears that suits involving unauthorized sampling will only increase, for artists will be continually uncertain as to the legality of such conduct. This may eventually deter the artists from crafting what would have been a creative transformative work, subsequently harming the music industry and depriving society of enjoyment of such work, and potential creative inspiration from it. In order to solve this issue in a timely manner, Congress should amend the Copyright Act to include the legality and treatment of digital sampling. Due to the nature of the digital sample, the convenience and ubiquity of sampling in today's music climate, and copyright law concerns pertaining to exclusive rights and the market of the author's work, not even unauthorized sample should be treated identically. As such, digital sampling should be subdivided into the following three categories in the amendment: (1) unauthorized digital sampling in a non-commercially released track; (2) unauthorized digital sampling in a track that garners a profit for an artist/author; and finally (3) unauthorized digital sampling in a commercially released track. Congress should outline a separate, distinct standard for each of these categories, based on the way in which a song is released, as well as any profits garnered from the song.

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[176] Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 798–99 (6th Cir. 2005).

1. Unauthorized Digital Sample in a Noncommercially Released Track. The first and arguably largest category that must be addressed is the unauthorized digital sampling in non-commercially released track. A sizable portion of the music available on sites such as YouTube, illegal-art.net, and Soundcloud are available for free listening and download, and have been created by amateur artists who have neither a record deal nor profits from their artistic endeavors.[177] It can be assumed that any digital sample within the majority of these amateur creations is unauthorized, as it would be both highly difficult and a highly imprudent investment.[178] Proponents of a blanket law prohibiting such unauthorized sampling argue that this is exactly the type of practice from which copyright law protects right holders; it is the copying of another's original work without permission, an act that can diminish the artistic value of the work as well as the artist's control over how it is heard.[179] For an unauthorized digital sample in an amateur's non-commercially released composition, however, infringers can assert a fair use defense.

For this category of unauthorized digital sampling, which is pervasive among large communities and sites across the internet, a standard such as *Bridgeport*'s rule of per se infringement would substantially harm an individual whose work relied upon one or more samples, thus eliminating much of the current music culture because few would be able to obtain the necessary license agreement. Even the slightly more flexible "fragmented literal similarity" test could potentially do the same; the uncertainty as to what is considered infringement increases unease and risk, and it impedes the use of a qualitative, recognizable portion of an original that is regularly used in mash-ups and for creative purposes in other tracks.

The preservation of this culture should be of concern, not only for its sheer size and prevalence, but also due to the fact that, even at its most simplistic use, unauthorized digital samples involve some element of creative expression. Whether the sample is a looped segment, a "collage," or a mash-up, the placement and engagement of the sample by the sampler into a new or different context *transforms* that tune into something apart from the original. As DJ Girl Talk, a highly popular artist of this sampling culture that utilizes the mash-up method, aptly described, his songs are meant to be "something brand new,

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177 Mac, *supra* note 5 (noting that Soundcloud, the audio sharing company, had "seen registered numbers pass the 30 million mark" and was created for the purpose of musicians to share work and "get feedback").

178 *See* Reilly, *supra* note 74, at 364.

179 *Bridgeport Music, Inc.*, 410 F.3d at 792 n.23.

something that transcends [their] source material altogether."[180] Although all artists are not able to achieve such successful or even artistically progressive transformations with their use of unauthorized samples, valuable creative expression is nevertheless present in this "artistic recontextualization or manipulation."[181]

Opponents of this treatment of unauthorized digital sampling argue that such a practice is stealing and diminishes the author's rights to the work, yet this position fails to recognize the nature and benefits of sampling. This practice is not an attempt by the sampler to deem a segment or portion of an original song as his own work, accidentally or deceptively; on the contrary, the sampling arguably acts almost as a promotion and advertisement of the original in some cases. In an empirical study on "the effect that digital sampling has on sales of copyrighted songs," findings demonstrated that (to a 92.5% degree of statistical significance) the songs sampled in Girl Talk's most recent album, at the time of the 2013 study, "sold better in the year after being sampled relative to the year before."[182] Even if such a correlation is difficult to prove with certainty, these are non-commercially released tracks that gain no real profit. Moreover, these songs are not likely to be a market substitute for the original work since they are not released into the commercial market; the artist is not side-stepping the digital sampling market or decreasing the market value of the original work since there no tangible profits. Due to the lack of profits, the artist is also not unfairly avoiding the customary royalty rate for the sample as well. It is of no consequence that not all amateur artists create equally meritorious works; the transformative *nature* of the use, the sheer prevalence of such use, and the lack of negative effect on the value of the sampled work should protect non-commercially released tracks with an unlicensed digital sample from as a legitimate derivative market under fair use doctrine.

2. Unauthorized Digital Sample in a Noncommercially Released Track that Garners Profit for an Amateur Artist. The treatment of unauthorized sampling, however, must be adjusted in the event that the noncommercially released track containing the sample garners a profit. While some argue that fair use should extend even to those tracks that garner an actual profit, to do so would ultimately ignore the increased stakes and interests of the rightsholder with this change in circumstances. Though much of the fair use defense remains the same, the fourth factor in section 107 (market substitution) tips slightly in favor

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[180] Jeffrey Omari, *MIX AND MASH, The Digital Sampling of Music has Stretched the Meaning of the Fair Use Defense*, L.A. LAW., Sept. 2010, at 35.

[181] *Id.*

[182] W. Michael Schuster, *Fair Use, Girl Talk, and Digital Sampling: An Empirical Study of Music Sampling's Effect on the Market for Copyrighted Works*, *available at* http://ssrn.com/abstract=2340235.

of the rightsholder due to the presence of profit.[183] Though a track possessing a digital sample of the original may not act as a market substitute for that original work, there are other issues pertaining to artistic value and fairness that are heightened as a result of the track garnering profits. Although the amateur composition may be transformative in nature, the artist in this case would essentially be sidestepping a market if he or she were allowed to continue without payment and consent for the license. Therefore, the amateur artist in this instance should not be able to merely assert a fair use defense to avoid liability, and will subsequently be subject to the compulsory licensing fee created by the amendment.

3. Unauthorized Digital Sample in a Commercially Released Track. A commercially released track by an official artist that garners profit must clear any samples by obtaining a license agreement with the rightsholder, resulting in a fee and possibly royalty rates. Consequently, to allow an amateur artist to profit from a song that contains a sample without compensating the rightsholders would allow the artist to profit from exploitation without paying the customary price. In addition, the argument that such a track represents a protectable derivative market would be tenuous, for most songs that both contain unauthorized digital samples and profit the artist become the subject of a lawsuit. Overall, the balance of factors weighs more heavily in favor of the rightsholders, thereby rendering fair use an inadequate solution unauthorized digital samples in commercially released tracks.

In order to best resolve the legal issues surrounding those songs which both contain unauthorized samples and garner profits, whether commercially released or otherwise, Congress needs to take action. First, an amateur artist that profits off a song with an unlicensed digital sample should be required to pay a compulsory licensing fee. To accomplish this, Congress must amend section 115 (compulsory licensing for non-dramatic musical works) to include a subsection for digital samples. The subsection would provide that an artist must pay a standard, compulsory licensing fee for an unauthorized sample in a non-commercially released track if (a) the majority of the committee determines that the sample is not *de minimis* use under the "fragmented literal similarity" test and (b) the track ultimately garners the artist a profit or is publicly performed for profit. If the artist does not report the song, sample, and subsequent profits to the Copyright Office within a reasonable time period, the fee should increase. In the event that the Register should decide that the work is not copyrightable, a cease and desist order would be given. Finally, the amendment

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[183] 17 U.S.C. § 107 (2012); *see also supra* text accompanying note 48.

would require the Copyright Office to create a committee of musical experts chosen by the Register to handle sampling disputes and judgments.

In addition, any artist who commercially releases a track found to have an unlicensed digital sample would have to pay a compulsory licensing fee. This fee, however, should be larger in comparison to the one for a non-commercially released track, as it was officially released with the explicit purpose of gaining monetary profit. The rightsholder, upon discovery (or belief) that the original work was sampled without permission, would be required by statute to report this to the Copyright Office. Then the Register would notify the committee of musical experts and, if not deemed *de minimis* use, the Register would issue a standard fee equal to the average licensing fee[184] normally charged by the rightsholder to sample that work. The amendment would also allow for a separate cause of action to be filed by rightsholders who feel that the unauthorized use fails the general substantial similarity test as well. The reasoning for this inclusion is two-part: (1) the argument that the sampling song was a creative and transformative work would be greatly diminished, and (2) allowing such conduct would not promote further creativity and creative works. In order to deter frivolous claims from flooding the federal courts, however, a filing of a separate lawsuit should eliminate the obtainment of the licensing fee. On the other hand, if the court holds that the unauthorized use was indeed intentional, the sampling artist will be liable for damages exceeding the compulsory licensing fee.

In essence, this amendment would opt to subdivide the different instances of unauthorized digital sampling into three identifiable categories, and prescribe different standards for each category. First, for those unauthorized digital samples within non-commercially released songs that elicit no profit, such samples should fall under fair use and the artist should not be liable for the infringement. Second, in the event that a non-commercially released song both garners a profit *and* is not a *de minimis* sample under the fragmented literal similarity test, the artist would be subject to a compulsory licensing fee. This fee would be significantly less than the fair market value for such a sample. Third, the unauthorized sample in a commercial track is given the strictest treatment, although the commercial artist would still benefit from the amendment as well. It would implement a compulsory licensing fee, the value of which would be a set rate equal to the market value of the sample in that

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[184] Alex Mayyaoi, *The Economics of Girl Talk*, PRICEONOMICS BLOG (Oct. 1, 2014, 10:30 AM), http://blog.princeonomics.com/post/47719281228/the-economics-of-girl-talk (advocating that with a fixed rate, "artists would still be compensated if someone samples that music, but it would be automatic, predictable, and (hopefully) affordable").

year. Because of the resources at their disposal and a greater awareness of the legal implications of a digital sample, the amendment holds this commercial artist to a higher standard, and allows for a separate cause of action to be filed by the rights holder if it is argued that such unauthorized sampling fails even the general substantial similarity test. These subdivisions, based on the way in which the song is released and whether any profits were garnered, account for the changes in the music industry and ensure that each instance of unauthorized digital sampling is in accord with the principles of copyright law and the balance that the Framers hoped to achieve.

IV. CONCLUSION

Overall, the inconsistent legal treatment of unauthorized digital sampling, coupled with the ever-expanding market for and use of sampling in music culture, has left artists uncertain of the legal standard; thus, continuous legal disputes continue. The varied judicial approaches have failed to provide a clear, balanced standard that properly accounts for the present state of the music industry. To deem any unauthorized sampling as per se infringement, as the *Bridgeport* court concluded, may ultimately erode what has become a sizable market in the music industry. Even though the *TufAmerica* court's "fragmented literal similarity" test presents a far more flexible standard, it would still eliminate those noncommercial releases that utilize samples comprising a qualitatively significant portion of the original song. While seemingly fair, this test would effectively deter noncommercial mash-up songs because these rely almost exclusively on sampling recognizable, substantial elements of multiple originals and mixing them together in a creative manner to form a new experience for the listener.

Nevertheless, unauthorized digital sampling constitutes copying a portion of another's work without permission, and its prevalence is not a sufficient justification for its legal acceptance. Whereas other common illegal acts in the music market, such as online piracy, fail to provide any significant, meritorious contribution that justifies protection from liability in lieu of favoring rightsholders, unauthorized sampling exhibits a viable transformative quality that *artistically* enhances the music industry and its creative works as a whole. The creative expression in the use of a given sample, authorized or not, can provide enjoyment to listeners, influence the work of other artists, and even potentially increase the market value of the sampled song. With music-making capability ever-increasing along with the development of new technologies, unauthorized digital sampling appears to be an inevitable constant of future music culture. As the market and body of work that utilizes this practice grows

along with the perpetual stream of digital sampling lawsuits, it is in the best interest of the legal system, the artists, and the music industry for copyright law to directly address this issue.

Therefore, Congress should enact the amendment in the interest of maintaining copyright laws applicability to the changing music landscape. By separating the different categories of unauthorized digital sampling based on the type of release and whether the song elicited profits, the amendment would ensure that each is treated in accord with the Framer's purposing in establishing copyright law. Attempting to adopt one uniform standard for all three categories is simply infeasible, as is waiting for the courts to craft a viable solution. In all, the solution offered here, which employs both fair use and compulsory licensing, would continue to protect the artistic and commercial value of original works while also promoting further innovation and growth.