SAMPLING, LOOPING, AND MASHING … OH MY!:

HOW HIP HOP MUSIC IS SCRATCHING MORE THAN THE SURFACE OF COPYRIGHT LAW

Tonya M. Evans[1]

"The image of the lone author working in her garret is almost wholly obsolete. Today, most writing (indeed, most creativity of all sorts) is collaborative."
– William Fisher[2]

"Intellectual (and artistic) progress is possible only if each author builds on the work of others. No one invents even a tiny fraction of the ideas that make up our cultural heritage."
– Judge Easterbrook in Nash v. CBS, Inc.[3]

I. Introduction

There is nothing new under the sun, or so the saying goes. The process of creating music is no exception. The fruit of this process, an artistic endeavor, is protected by copyright; an intellectual property monopoly created by federal statute to give authors certain exclusive rights in and to their creations for a certain period of time. Congressional power to regulate artistic creations flows from the United States Constitution. The Constitution directs that Congress regulate copyright and patent laws ultimately to serve human values and social ends by

[1] Assistant Professor of Law, Widener University School of Law. B.S. Communication Studies, Northwestern University. J.D., Howard University School of law. The valuable research assistance of Peri Fluger helped in the drafting of this article. Many thanks to Juliet Moringello, John Dernbach, Chris Robinette, andré douglas ponds cummings, Lateef Mtima, and Steven Jamar, for their guidance and support throughout the process of research and writing. The editorial assistance of colleagues at the 2010 IP Scholars Conference at Drake University School of Law, including Peter Yu, and The 2010 IP Scholars Conference at Berkeley Law Center helped in the revising and editing of this article.

[2] William Fisher, *The Growth of Intellectual Property* 16, *available at* http://www.cyber.law.harvard.edu/people/tfisher/iphistory.pdf

[3] Nash v. CBS, Inc. 899 F.2d 1537, 1540 (7th Cir. 1990).

promoting innovation and creativity.[4] However, the law fails currently to meet this constitutional objective.

Copyright law as currently applied to music protects both the performance embodied in a sound recording and the underlying musical composition itself. However, different copyright infringement standards are applied to them in troubling ways. This point is well illustrated in the creation of "hip hop" music.

For decades hip hop producers have relied on the innovative use of existing recordings (most of which are protected by copyright), to create completely new works.[5] Specifically, cuttin'[6] and scratchin',[7] digital sampling,[8] looping[9] and (most recently) mashing[10] are all methods of creating music and are all integral parts of the hip hop music aesthetic. In fact, collectively these creative processes are the hallmark of the type of innovation and creativity born out of the hip hop music tradition.

Copyright infringement cases that involve the underlying musical compositions and cases that involve the performances of those works embodied in master sound recordings are analyzed

[4] *See* U.S. CONST. ART. I, SEC. 8. ADD CITES RE: "human values" and "social ends".

[5] CROSS-REF TO SAMPLING SECTION. Consider URLs for examples.

[6] Cuttin' is similar to scratching, however, the cross fader on the turntable mixer is used to switch back and forth from each of the two turntables.

[7] Scratchin' is moving the vinyl back and forth against the stylus in different patterns and rhythms.

[8] A sample is the portion of pre-existing sound recordings that producers use to create new compositions. With the exponential growth of technology this is method now is commonplace in the hip hop industry. Most notably individuals rely on the Akai MPC or the ASR-10 as their musical instruments. CITE. CROSS-REF TO SAMPLING SECTION.

[9] A loop is a piece of sound that can be played again and again in a coherent sequence. Looping occurs when a "loop" is implemented by the DJ or producer.

[10] The process of mashing combines the music of one song with the lyrics of another. One famous example is The Grey Album. The Grey Album is a "mashed" album that mixed the a cappella tracks from rapper Jay-Z's "The Black Album" with instrumentals created from a wide array of unauthorized samples from The Beatles' The White Album. Another example is DJ Dangermouse's "Girltalk."

differently by the federal circuits in important ways.[11] For example, courts in the Sixth Circuit apply a per se infringement standard when a defendant copies any part of a sound recording. In contrast, courts in the Eleventh Circuit consider substantial similarity and *the de minimis* defense traditionally applied in sound recording infringement cases.[12] These differences, in turn, have lead to unclear judicial definitions, distinctions and interpretations for the role of substantial similarity and what constitutes a *de minimis* use, a fair use, and what constitutes a derivative work. The resulting incongruent decisions reflect an inconsistent application of federal law.

Additionally, current copyright law requires, among other things, that works be created independently (that is, not copied) despite the reality that such a rigid requirement is at odds with the collaborative and cumulative process of creating music, an artistic medium generally permissive of borrowing.[13]

As noted by a number of leading intellectual property scholars, one of the greatest threats to the Constitution's directive to promote science and the useful arts is the stifling effect on innovation by onerous, overly restrictive copyright laws.[14] The *per se* infringement rule recently articulated in a recent hip hop digital sampling case, *Bridgeport v. Dimension Films*, is but one poignant example.[15] That case involved the unauthorized copying and looping of a three-second digital sample from a copyrighted song into a new work. The analysis and holding in *Bridgeport*

[11] This divide has recently deepened in light of the recent district court opinion out of the Eleventh Circuit that sharply criticizes the Sixth Circuit's interpretation of 114(b) of the Copyright Act to function as a *per se* infringement rule. *See* infra ___.

[12] *See, generally,* Leigh v. Warner Bros., Inc. 212 F.3d 1210 (11th Cir. 2000).

[13] *See, generally,* Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop,* 84 N.C. L. REV. 547 (2006).

[14] *See, generally,* Lawrence Lessig, Free Culture: The Nature and Future of Creativity (2004, Penguin Books); William Patry, Moral Panics and the Copyright Wars (2009, Oxford Univ. Press); Pamela Samuelson, _____.

[15] Bridgeport v. Dimension Films, 410 F.3d 792 (6th Cir. 2005).

demonstrate how current copyright law is applied to music, at least in the Sixth Circuit. That Circuit continues to value independent creation at *any* and *all* cost without regard to the role of collaboration and the custom of borrowing in the performance of music. [16]

Additionally, the rule, if adopted by all Circuits or affirmed in a future case by the Supreme Court, may hearken back to the days of the flawed "sweat of the brow" doctrine developed in wayward lower court opinions that attempted to apply the 1909 version of the Copyright Act, which contained ambiguous language regarding the "originality" requirement.[17]

This article examines the deleterious impact of copyright law on music creation. It highlights hip hop music as an example of a genre significantly and negatively impacted by the *per se* infringement rule applied in some cases to sound recordings and traditional notions of independent creation.[18]

Section II chronicles the history of hip hop music beginning with its oral tradition that originates in African and Jamaican culture. Further, Section II highlights hip hop's genesis in the United States in the mid-seventies through its transition into the mainstream. Finally, Section II

[16] *See id. See, generally*, Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L. J. 277 (2006) (asserting "[t]he treatment of musical borrowings under current copyright standards is far too often inequitable) *Id.* at 281. In this article, Professor Arewa examines the artistic and business practices of George Gershwin before his death; namely his appropriation of cultural texts without attribution and the post-mortem business practices of his estate, which exerted significant control of and limitations on similar borrowings of the very work that benefitted from borrowing in the first instance.

[17] On this point, the *Feist* court explained that some lower courts "misunderstood the statute" and "[m]aking matters worse, these courts developed a new theory [the sweat of the brow doctrine] to justify the protection of factual compilations." The Court reasoned further that the sweat of the brow doctrine "had numerous flaws, the most glaring being that it extended copyright protection in a compilation beyond selection and arrangement – the compiler's original contributions – to the facts themselves." *Feist Publications*, 499 U.S. 340, 374 (1991). Therefore, under the sweat of the brow doctrine, "the only defense to infringement was independent creation." *Id*. __

[18] CROSS-REFERENCE TO SECTION II. SPECIFIC EXAMPLES-PF

explores the integral and essential aesthetic value to hip hop music of incorporating and looping digital samples of pre-existing works to create new songs.

Section III outlines the development of copyright protection for music. In particular, Section III focuses on copyright protection for the underlying music and lyrics (the musical composition), which is separate and distinct from protection for the actual performance of that song embodied in the master recording (the sound recording). Generally, the musical composer initially controls the copyright in the musical composition and the recording company controls the sound recording. Two copyrights, one song.[19]

Section III discusses the critical role of a substantial similarity analysis and the *de minimis* use defense generally available to defendants in copyright infringement cases. Although substantial similarity and *de minimis* analyses are considered in all cases involving musical compositions, according to *Bridgeport v. Dimension Films* they are not similarly available when infringement of the sound recording is alleged. Therefore separate infringement standards exist for each copyright composition and performance.

The infringement standard for the underlying musical composition follows a traditional infringement analysis; namely substantial similarity and the affirmative defenses of *de minimis* use and fair use. The infringement standard for the sound recording, at least in some Circuits, focuses only on whether any part of the sound recording was copied, regardless of the amount or substantial similarity to the copied work. Thus a split in the circuits has emerged regarding which defenses are available for sound recording infringement.[20]

[19] CROSS-REF SECTION ON "A TALE OF TWO COPYRIGHTS"

[20] S*ee* Saregama India Ltd. v. Mosley, 687 F.Supp.2d 1325, 1334-41 (S.D. Fla. 2009).

Section IV identifies the negative consequences of applying one infringement standard in music copyright cases for the underlying music composition and another for an artist's actual performance. One such consequence, for example, is the "better safe than sorry" mindset in securing copyright clearances and negotiated licenses.[21] This type of industry practice undermines uses that, in other contexts, may actually be deemed fair or may not even rise to the level of an infringing use. but that no rational distinction seems to exist to warrant differential treatment.[22] Finally, Section IV critiques explores a recent Florida district court's pointed rejection of the *per se* infringement rule that has lead to the aforementioned consequences.[23]

Section V identifies some of the leading proposals in the legal discourse to address the concerns raised in this article. One leading proposal includes the various configurations proffered for a compulsory licensing structure for sound recordings that would mitigate the imbalance in the negotiated licensing environment. A compulsory licensing structure would also be consistent with that already in place to license musical compositions. Such a framework is not only reasonable but a necessary cure to the *per se* infringement rule dilemma.

Finally, Section U urges courts and, ultimately Congress, to consider policies supporting "reverse engineering" in the patent law context to serve as a guidepost for how similar policies could and should be applied in the copyright context.[24] Specifically, this Section explores the policies and concerns that lead Congress to enact the Semi Conductor Chip Protection Act, a law

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[21] *See generally*, Henry Self, *Digital Sampling: A Cultural Perspective*, 9 UCLA ENT. L. REV. 347 (2002).

[22] CITE. *See* Mickey Hess, *Was Foucault a plagiarist? Hip-hop Sampling and Academic Citation*, 23 Computers and Composition 280 (2006) (contrasting prohibited uses of sound recordings with permissible uses of academic works).

[23] Saregama India Ltd. v. Mosley, 687 F.Supp.2d 1325, 1341 (S.D. Fla. 2009).

[24] CROSS-REF to reverse engineering definition.

based on the Copyright Act that is also the only law to recognize expressly a reverse engineering right. Section V posits that acceptance of such policies in sound recording copyright reform would encourage greater latitude in the copyright law landscape for the type of unauthorized, but innovative and aesthetically integral, uses of copyrighted sound recordings for which the hip hop genre has become infamous.

II. Hip Hop Music and Legal Mythologies

A. History of Hip Hop Music

> "People treat hip hop like an isolated phenomenon. They don't treat it as a continuum, a history or legacy. And it really is. And like all mediums or movements, it came out of need."[25] – Mos Def

Mos Def was most *definitely* correct.[26] Hip hop has a rich, dynamic history and a complex legacy born out of a need for collective expression and collective experience by a marginalized community dying to be heard.[27] Similar to other movements throughout history there exists a vast volume of not only cultural, media and pop culture artifacts, but also renowned books, movies and scholarly works that discuss in-depth the history of hip hop culture.[28] The great majority of this history is outside the scope of this article.[29] Instead, in this Section focuses on the music. It explores the history of hip hop music to set the context, and lays the foundation, for analysis of the incongruent and deleterious impact of copyright law on music creation.

1. Hip Hop Culture, Generally

Hip hop is a "style of dress, dialect and language, a way of looking at the world, and an aesthetic that reflects the sensibilities of a large population of youth born between 1965 and

[25] Hip Hop Matters, http://www.allagesmovementproject.org/venues/hip_hop_matters (last visited Aug. 4, 2010).

[26] Mos Def is an American Actor and Emcee.

[27] *See generally* Tricia Rose, *Fear of a Black Planet: Rap Music and Black Cultural Politics in the 1990s*, Journal of Negro Education 60.3, 276-90 (1991). OTHER CITES

[28] EXAMPLES?

[29] It would be impossible to sufficiently honor its depth and breadth herein because to do so would mean necessarily to involve aspects of politics, crime, misogyny, and socioeconomics, civil rights, and police brutality. Although important, those topics are not squarely on point.

1984."[30] Hip hop is grounded on four principal elements: Emceeing, Disc jockeying ("DJing"), break dancing, and graffiti. Emceeing, also called "MCing" or "rapping," is based upon the commonly used phrase "Master of Ceremonies." It is exhibited generally when an individual performs in front of an audience by rhyming, usually to the beat of music.[31] Emceeing is a form of verbal expression whose roots are deeply grounded in "ancient African culture and oral tradition."[32] Despite formal rules of engagement within the hip hop culture, as it were, there was one notable exception: no "biting." That is, MCs were required make up their own verses or note specifically in their rhymes that they were using another's lyrics to either honor or battle them.[33]

DJing is the backbone of hip hop, and represents the the art of cuttin' and scratchin'.[34] Break dancing involves the "acrobatic style of dance that includes head spins, backspins, and gymnastic style flairs."[35] Finally, graffiti is recognized quickly in urban areas by the use of spray paint or markers to illustrate the users "tag" or unique mark or signature. Although all of these together compose the culture of hip hop, as noted above, this section and article will focus specifically on emceeing and DJing (which, together, are the essence of hip hop music).

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[30] Derrick P. Alridge & James B. Stewart, *Introduction: Hip Hop In History: Past, Present, and Future*, 90 J. OF AFRICAN AMERICAN HISTORY 190,190 (2005). Hip hop operates as reflecting the political, economic, social, and cultural realities and conditions individuals go through and is related to them in an understandable context. *Id.*

[31] Hip-Hop*: Beyond the Beats & Rhymes* at 1, *available at* http://www.itvs.org/outreach/hiphop/resources/brief_hiphop.pdf

[32] Thea Stewart, *Exploring the Culture of Hip-Hop* at 11 www.psc.cornell.edu/.../Exploring_Culture_Hip-Hop/.../Exploring_Culture_Hip-Hop.doc (last visited March 13, 2010). Although there is some debate within the hip hop community regarding the terms rap and hip hop, for purposes of this article I use the terms interchangeably.

[33] *Id.* (noting MCs were required "to be original and to rhyme on [time with the beat].").

[34] *Beyond the Beats & Rhymes*, *supra* note __, at 1.

[35] *Id.*

2. The Boogie Down Bronx[36]

The birthplace and time of hip hop music is traced back generally to the Bronx, New York (a/k/a the "Boogie Bown" Bronx) and the early 1970s.[37] However, the oral tradition that underpins hip hop music finds its origins in Africa by way of Jamaica, home to descendants of West Africa.[38] The period of hip hop from 1970 to 1986 is known as "The Roots." Initially, it served as a medium for inner-city youth to gather together at parties in their neighborhoods.[39]

One of the foundational events in hip hop history can be traced back to the Bronx.[40] It is widely accepted within the hip hop community that this was where hip hop was born. On August 11, 1973, a Jamaican DJ known as Kool Herc, was spinning reggae records but not receiving crowd approval ("moving the crowd"). He finally won them over, however, when he isolated a "beat-heavy percussion portion" of a recognizable R&B tune, and rhymed (a/k/a rapped) over the music simultaneously.[41] That defining moment sparked an immediate and irreversible reaction that formulated the essence of rap music.

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[36] The Bronx is the northernmost of the five boroughs of New York City. The Bronx is referred to in hip hop vernacular as "The Boogie Down Bronx" or simply "The Boogie Down" and is revered in hip hop culture as the birthplace of hip hop.

[37] *Id.*

[38] [Afro-Jamaican explanatory note]

[39] Independence: Hip Hop History, http://www.independance.co.uk/hhc_history.htm (last visited Aug. 4, 2010).

[40] History Detectives, Birthplace of Hip Hop, http://www.pbs.org/opb/historydetectives/investigations/611_hiphop.html (last visited Aug. 4, 2010). The time and place specifically is believed to be August 11th, 1973 at 1520 Sedgwick Avenue. *Id*.

[41] *Beyond the Beats & Rhymes*, *supra* note 31, at 3. This served the function to extend the song and increase the energy of the party. *Id.*

Soon thereafter Kool Herc's friend and a recognized pioneer of rap music, DJ Grandmaster Flash, perfected the concept of mixing familiar R&B records. He used classic R&B hits to serve as the background to the expressive foreground in which skillful rappers could demonstrate their lyrical prowess.[42] Afrika Bambaataa, another DJ from the South Bronx who is regarded widely as the founding father of the term hip hop, went beyond American R&B to incorporate sounds from Caribbean, European electro and West African music. [43] Bambaatta is also noted for advancing musical technological innovation and furthering musical creativity by implementing the drum machine and synthesizer.[44]

After Kool Herc's legendary performance, Grandmaster Flash and Afrika Bambaataa began performing shows throughout the Bronx, and the term "hip-hop" began to spread throughout the African-American community.[45] Thus, hip hop music gained its distinctiveness by building on previously recorded songs; that is, by sampling. Much akin to visual collages, sampling is viewed within the hip hop community as a musical tapestry.[46]

In 1975, DJ Grand Wizard accidently discovered the turntable "scratch" that is now the touchstone of DJing.[47] Scratching is a technique understood generally to mean physically

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[42] *Id.*

[43] *Id.* He would in turn lay his vocals over the beat as Kool Herc and Grandmaster Flash did. *Id.* Additionally, Afrika Bambaatta was a leader of a gang known as the Black Spades, who happened to be an extremely violent gang at the time. Once he was able to channel his ability through music he led the transformation of the Black Spades into a unit focused on world peace, subsequently called the Universal Zulu Nation. *Id.* Thus, it is not surprising that Bambaatta is often given credit for greatly reducing gang violence of the New York City region during the 1980s. *Id.*

[44] *Id.*at 4.

[45] *Id.* at 5.

[46] [Chuck D Quote that emphasizes the importance of sampling in hip hop & music]

[47] Billy Jam, Creator of the Scratch: Grand Wizard Theodore, http://www.hiphopslam.com/articles/int_grandwizardtheo.html (last visited Aug. 4, 2010). Apparently, Grand Wizard Theodore discovered "scratching" when his mother was yelling at him to turn down his music and he abruptly moved the vinyl on the turntable platter. *Id.*

manipulating the vinyl or CD back and forth against the stylus in different patterns and rhythms.[48] The following year Afrika Bambaatta engaged in the first "DJ battle" against Disco King Mario, thus starting the legendary "battle scene" among DJs in which DJs competed for best audience response..

Throughout the late 1970s various rap groups began to emerge into mainstream. The first known commercial rap song, *Rappers Delight* by the Sugarhill Gang, was released in 1980 and reached number thirty-six on *Billboards* top 100.[49] After reaching mainstream prominence, the artistry of hip hop began to catch on. DJs, mainly from the Bronx and Harlem, focused primarily on cutting and scratching popular dance records to solidify an entirely new genre of music into the industry's mainstream.[50] During the late 1970s and early 1980s, major record labels, recognizing the public interest in hip hop, began to develop strategies to capitalize on a wealth of new talent and the demand of an underexploited market and created "urban music" departments.[51]

Sub-genres within hip hop began to emerge and became firmly entrenched by the 1990s, when a decidedly violent and harsh sub-genre of hip hop was created, distinctively labeled as "gangster rap."[52] Today, rap can be separated into two distinct spheres of the hip hop culture,

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[48] *See* Infra footnote 7.

[49] *Id.*

[50] Joanna Demers, *Sampling the 1970s in Hip-Hop*, 22 POPULAR MUSIC 41, 41. The records being scratched mainly focused on soul, funk and R&B, such as Isaac Hayes, James Brown, Curtis Mayfield and George Clinton. *Id.*

[51] *Beyond the Beats & Rhymes*, *supra* note 31, at 5. However, in the late 1980s, the music industry consolidated and the distribution of hip hop music decreased rapidly. Therefore, the music industry strictly followed a business model that would only support "the most commercially viable hip-hop acts." *Id. See generally* _____ (discussing a dubious history in the music industry of racializing music).

[52] Reinford Reese, Popular Culture Review (2000) *available at* http://www.csupomona.edu/~rrreese/HIPHOP.HTML. At that point in time, perhaps more than any other, hip hop challenged America with its content, which some perceived as "sexist, misogynistic, and homophobic." *Id.* Gangsta

both of which utilize cutting and scratching techniques and sampling technologies: (1) mainstream and commercial rap; and (2) independent and underground hip hop.[53]

B. Digital Sampling as an Essential and Integral Component to Create Hip Hop Music[54]

*The sampler is a tool and a musical instrument. That's how I always thought about it. … the sampler is an instrument that I **play**.*[55] -- The RZA from Wu Tang

The sampler is more akin to a musical instrument or artistic tool than an instrument or tool of crime. It is essential to the collage-like artistry that sampling creates. This has ingrained aesthetic value to hip hop music and, ultimately, to music creation as a whole.

To understand the importance and pervasive presence of digital sampling in hip hop on a broader scale one need only turn to the Billboard charts of the most prominent albums. In 1989 only 8 of the top 100 albums contained sampling but by 1999 almost a third of the Billboard 100 utilized sampling in some capacity.[56]

In addition to ushering in a new musical genre, the 1980s also ushered in important new technological advancements. Manual scratching was slowly being replaced with digital sampling, which consists of taking a portion of one song and incorporating it "into the sonic

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rap was confrontational and unforgiving, yet still somehow commercially appealing. *Id.* Notwithstanding its controversy, gangsta rap somehow unified widely diverse audiences and solidified hip hop's position as the fastest growing music genre in the world. *Id.*

[53] *Beyond the Beats & Rhymes*, *supra* note 31, at 1.

[54] Self, *supra* note 21 (exploring the cultural motivations and cultural, artistic and legal impact of digital sampling on the music industry).

[55] THE RZA, THE WU TANG MANUAL 190 (2005).

[56] *See* John Lindenbaum, *Music Sampling and Copyright Law*, Princeton University, Center for Arts and Cultural Policy Studies, ____ (1999).

fabric of a new song" by 'playing' the recorded sounds via a keyboard.[57] At the height of the mid-eighties, digital sampling began to advance exponentially Producers sampled any and everything ranging from country to heavy metal.[58] Although the sound of hip hop relied heavily on R&B and jazz influences, the ever-evolving "sound" of hip hop began to diversify substantially.[59]

A sampler is the actual digital audio tool used by music producers to sample. It can be either a stand-alone machine or software. It is similar to a synthesizer but instead of generating sounds like a synthesizer it captures pre-recorded sounds. The sounds are saved and then performed via keyboard like musical notes.[60] Hip hop producers view the sampler as an instrument, an essential tool of the trade. Sampled copyright holders, however, often view the sampler as an illegal weapon that threatens the commercial viability of their intellectual property.[61] Hip hop artists acknowledge this duality; and in many cases even embrace it as the type of counter-culture 'robin hood-ism' that historically has fueled resistance movements of the disenfranchised.[62] I use the Robin Hood metaphor because most hip hop producers detest paying

[57] Demers, *supra* note 49, at 41.

[58] *Id.*

[59] [Discuss artists that used different samples, can be located on Whosampeld.com (i.e. A Tribe Called Quest's "Go Ahead in the Rain sampled Jimi Hendrix.]

[60] *See* http://www.answers.com/topic/sampler-musical-instrument (last visited August 5, 2010).

[61] THE RZA, *supra* note 58, at 191. Even hip hop producers recognize that the sampler can be used either as a tool of an artist or of a sluggard: "A lot of people still don't recognize the sampler as a musical instrument. I can see why. A lot of rap hits over the years used the sampler more like Xerox machine. *Id.*

[62] *See* Andrew Bartlett, *Airshafts, Loudspeakers, and the Hip Hop Sample: Contexts and African American Musical Aesthetics*, AF. AM. REV. Vol. 28, No. 4 639-652 (Winter 1994) (citing Thomas Porcello, _____ "rap musicians have come to use the sampler in an oppositional manner which contests capitalist notions of public and private property by employing previously tabooed modes of citation.).

more money to corporate recording companies than to the composers of the music and/or lyrics.[63]

Sampling is certainly not just a hip hop music phenomenon and is used widely throughout the music industry.[64] But the cultural origins and artistic motivations of sampling within the hip hop music genre that extend to and through New York, Jamaica and Africa, making sampling particularly significant to the genre and culture.[65]

1. Sampler as Musical Instrument

Far from being just an innovative technological tool, the sampler is viewed by hip hop producers as a musical instrument.

Although hip hop music existed long before digital samplers, the process of integrating bits of one record with bits of another was part of the hip hop aesthetic from its dynamic inception in the Bronx.[66] In fact, is it the very act of borrowing bits of existing works in many instances that serves to connect culturally identifiable texts to new ones to further strengthen the community born of collective memory and collective experience.[67] The artistic process of digital

[63] *See* Interview of Schocklee (http://www.ibiblio.org/pub/electronic-publications/stay-free/archives/20/public_enemy.html Last visited July 20, 2010.

[64] *See generally*, John Lindenbaum, Music Sampling and Copyright Law, Princeton University, Center for Arts and Cultural Policy Studies (1999).

[65] [STRONGER AUTHORITY?] *See* Self, *supra* note 52, at 347 (exploring the legal implications of sampling in hip hop within the context of its cultural roots in New York, Jamaica and Africa.).

[66] The Bronx is the northernmost of the five boroughs of New York City. The Bronx is referred to in hip hop vernacular as "The Boogie Down Bronx" or simply "The Boogie Down" and is revered in hip hop culture as the birthplace of hip hop.

[67] *See* Arewa, *Copyright on Catfish Row*, *supra* note 15 at 332 ("Borrowing is often part of what makes cultural texts recognizable to other participants in the cultural context from which such texts emerge. New creations are frequently framed in light of and in relation to past experience.). *See also* William Fisher, *Theories of Intellectual Property*, in New Essays in the Legal and Political Theory of Property 2 (Stephen Munzer ed., 2001), available at http://cyber.law.harvard.edu/people/tfisher/iptheory.pdf (last viewed Aug. 4, 2010) (hereinafter referred to as "*Theories*") ("Today, most writing (indeed, most creativity of all sorts) is collaborative."). *Id.*

sampling, like the resulting music, is rooted in and integrally linked to the African diasporic aesthetic that "carefully selects available media, texts, and contexts for performance use."[68] Part of that diasporic experience rests in Jamaica, birthplace of the DJ who brought the travelling parties of Jamaica to the Bronx.[69]

The RZA describes his use of the sampler as a painter's palette.[70] Chuck D uses it to create a collage.[71] The point of visual art analogies is well made in light of the obvious (and not so obvious, but equally present) distinctions between textual works and performance-based and visual works of art.

Hip hop legend Chuck D of Public Enemy explained that sampling evolved out of a tradition of rappers recording over live bands who were emulating sounds from popular music.[72] So it followed naturally that when synthesizers and samplers were introduced, they built on and enhanced the integral practice of incorporating popular and recognizable sounds so that rappers could still "do their thing over it."[73] Sampling was not used for expediency or to pass off another's creativity as one's own. On the contrary, sampling was another way of arranging and

[68] Bartlett, *supra* note 54, at 639.

[69] *See* Section II herein for a comprehensive discussion of the origins of hip hop music.

[70] Describe RZA and Wutang [Cite to the Wu Tang Manual].

[71] THE RZA, *supra* note 58 at 192. "If you take four whole bars that are identifiable, you're just biting that shit. But I've always been into using the sampler more like a painter's palette than a Xerox. … [O]n every album I tried to make sure that I only have twenty to twenty-five percent sampling. *Id.* Everything else is going to be me putting together a synthesis of sounds. [On one song] it took at least 5-7 different records chopped up to make one two-bar phrase." *Id*.

[72] *Stay Free* Magazine, Issue No. 20, Interview with Public Enemy's Chuck D and Hank Shocklee, http://www.ibiblio.org/pub/electronic-publications/stay-free/archives/20/index.html (last visited Aug. 4, 2010).

[73] Chuck D explained further in his interview with *Stay Free*: "Eventually, you had synthesizers and samplers, which would take sounds that would then get arranged or looped, so rappers can still do their thing over it. The arrangement of sounds taken from recordings came around 1984 to 1989." *Id*.

performing sounds (musical notations) – the 'stock in trade' of music – in the creative process.[74]During the early stages of hip hop music, producers ran wild with the technology without any particular thought for, or concern with, the legal repercussions.[75] Public Enemy emerged and distinguished itself as a "sampling-as-art trailblazer" by incorporating hundreds of samples into their legendary 1988 album, *It Takes a Nation of Millions to Hold Us Back*. In an ingenious fashion, the group combined the samples in a unique way to create a "new, radical sound that changed the way music was created and experienced."[76] Incidentally, due to the vast number of samples used, it would now likely be cost-prohibitive to create *It Takes a Nation* today due to negotiated licensing fees.[77]

Hank Shocklee describes the intricate creative process of sampling as using the beat as rhythmic building blocks or the "skeleton" of a track.[78] The lyrics (a/k/a the rhyme) was added over top of the beat based on how they felt, the direction of the track and "what worked."[79]

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[74] *Id*. (quoting Chuck D as saying, "[w]e thought sampling was just another way of arranging sounds. Just like a musician would take the sounds off of an instrument and arrange them their own particular way.").

[75] *Id*. "In the mid- to late 1980s, hip-hop artists had a very small window of opportunity to run wild with the newly emerging sampling technologies before the record labels and lawyers started paying attention." *Id.* The first sound recording infringement case did not come until _____.

[76] *Id*.

[77] *Id*. Hank Shocklee noted in the interview that although it would not be impossible to create the album at that time, would be very, very costly. The pricing schedule generally included an initial fee with escalations tied to sales numbers. "You could have a buyout--meaning you could purchase the rights to sample a sound--for around $1,500. Then it started creeping up to $3,000, $3,500, $5,000, $7,500. Then they threw in this thing called rollover rates. If your rollover rate is every 100,000 units, then for every 100,000 units you sell, you have to pay an additional $7,500. A record that sells two million copies would kick that cost up twenty times. Now you're looking at one song costing you more than half of what you would make on your album." *Id.*

[78] *Id*.

[79] *Id*. Shocklee described how he and Chuck D used sampling as an integral part of hip hop artistry: "Chuck would start writing and trying different ideas to see what worked. Once he got an idea, we would look at it and see where the track was going. Then we would just start adding on whatever it needed, depending on the lyrics." *Id*.

Hip hop grew in stature in mainstream music and the number of producers who sampled grew accordingly. But at that time, industry practice was to sample first and clear (if ever) after release.[80] The music industry responded in kind to stamp out what it viewed as a hemorrhaging of potential licensing revenue by exploiting a new and viable legal claim to bolster their overall claims of infringing uses. As explained more fully in Section __, their new legal claim was based on a *per se* infringement of the sound recording.

Few prominent artists were as negatively impacted by sound recording infringement claims as Public Enemy. The change in P.E.'s musical style between 1988 and 1991 was discernable, and, arguably not for the better. Their ascension to legendary status was mostly a result of P.E.'s "collage" style of music creation. The group amassed hundreds of independently unrecognizable pre-existing sounds (everything from vocal wails to police sirens) and created with them powerful new musical tracks over which they delivered political commentary about issues of race, racism, economics, violence, police brutality and religion.[81]

Two primary reasons explain why collage-style sampling was so negatively impacted. First, the cost to secure copyright clearances on hundreds of aural fragments quickly became

[80] *Id*.

[81] *Id.* When asked how the threat of litigation impacted the P.E. sound, Chuck D replied: "Public Enemy's music was affected more than anybody's because we were taking thousands of sounds. If you separated the sounds, they wouldn't have been anything--they were unrecognizable. The sounds were all collaged together to make a sonic wall. Public Enemy was affected because it is too expensive to defend against a claim. So we had to change our whole style, the style of *It Takes a Nation* and *Fear of a Black Planet*, by 1991." *Id.* The reason Public Enemy's music sound was negatively impacted is somewhat technical. The composition rates in a sampled sound [DEFINE] are significantly higher and, therefore, of a better quality, than the same sound (an organic sound) created by live in-studio musicians.

exorbitant. Second, samples of pre-existing sounds create a "purer" sound than re-creating the sound in studio with live musicians due to master recording composition rates.[82]

Shocklee provides a somewhat less technical explanation of the difference as being the difference between hitting someone "upside the head" with a pillow versus a piece of wood.[83] The result? Now most producers generally sample and loop only one song so that there is only one or a few copyright holders involved in calling the shots rather than, conceivably, hundreds.[84] So for now it seems the highly artistic and innovative concept of the P.E. style collage created with musical rather than notational composition is dead.[85] The effect of *per se* sound recording infringement and negotiated licenses has, in effect, thwarted the very creativity and artistry the Constitution sought to promote.

2. The Essential Role of Borrowing in Music

The Copyright Act protects only original works of authorship fixed in a tangible medium of expression. However, both traditional and current concepts of copyright are premised on a paradigm that presumes borrowing is generally antithetical to creativity and innovation and creative works worthy of protection are always created independently.[86] This presumption,

[82] This second reason is somewhat technical. The composition rates in a sampled sound [DEFINE] are significantly higher and, therefore, of a better quality, than the same sound (an organic sound) created by live in-studio musicians.

[83] *Id*.

[84] *Id.*

[85] *See* Bartlett, *supra* note 64, at 640 (describing musical composition as opposed to the traditional European practice of notational composition as "the center around which contemporary hip hop constellates.").

[86] Arewa, *supra* note 20, at 585 (explaining that "[c]urrent conceptions of authorship assume a dichotomy between copying and creativity and presume that borrowing is inimical to creativity and innovation. By focusing upon a

beyond being largely unsubstantiated, actually has an onerous impact on musicians who historically have used collaboration and borrowing regularly in the creative process.[87]

This assertion is well illustrated by the real and burgeoning impact copyright creation requirements have had on hip hop music, the producers of which regularly use sampling, looping and mashing as artistic tools to create a novel tapestry of music from existing bits of copyrighted works. From the perspective of the Copyright Act, the sampling artist is expected to license the right to use the copyrighted work (of both the musical composition and the sound recording)[88] and pay licensing fees. But the nature of music in general (hip-hop in particular) as collaborative and generally involving borrowing on the one hand, and the exclusive rights in a copyright holder to, among other things, copy and create adaptations from the original on the other, places this type of artistic innovation at odds with copyright law.

Because of the historical relevance of borrowing which has permeated music throughout history, current copyright laws should be revised to reflect, encourage and protect such uses.[89] Additionally, the policies underlying the existence and development of copyright law in the United States must be realigned with its constitutional underpinnings to focus on more than providing incentives for creation and innovation, but also (and especially) to foster the ideal conditions for creativity.[90] If the fundamental goal of intellectual property laws is truly to

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dichotomy between originality and borrowing, such views of musical authorship fail to recognize that the use of existing works for new creations can be an important source of innovation.")

[87] *Id.*. *See also* _____.

[88] Explain difference.

[89] Arewa, *supra* note 20, at 547 ("The pervasive nature of borrowing in music suggested that more careful consideration needs to be given to the extent to which copying and borrowing have been, and can be, a source of innovation within music.").

[90] Chander & Sunder article at 572 (citing Julie Cohen, "Copyright law … should seek not simply to incentivize more creative goods, but to facilitate the conditions for creativity – including centrally the ability to play.")

promote the progress of science and useful arts than current copyright law lags behind its constitutional call and therefore fails to serve this fundamental goal.[91]

[TO BE COMPLETED]

3. Legal Mythologies in Hip Hop Culture

The relationship between hip hop music producers, the artistic practice of sampling and the legal implications can be summarized as follows:

1. They didn't think it was a problem.

2. Then it became a problem, which was a problem.

3. Then they did it knowing it was a problem.

4. Now they don't do it for fear of a problem.

5. Courts don't agree on how to assess whether the practice is a problem.

6. This is a problem.

[TO BE COMPLETED]

[91] See Leslie A. Kurtz, *Copyright, Creativity, Catalogs: Commentary: Copyright and the Human Condition*, 40 U.C. DAVIS. L. REV.1233, 1244 (2007) ("If copyright is to promote creativity, it will not be well served by rigid control over the ability to access and use cultural goods.").

NOTE: Search "Good Copy Bad Copy," a doc about the failure of copyright law in keeping up with technology and innovation.

III. The Evolution of Music Copyright Culture and the Mythology of Independent Creation

A. Brief History of Copyright Law

Today the United States outpaces other nations as the leading proponent of strengthened intellectual-property rights in America and throughout the world.[92] The U.S. took an undeniably hard-lined approach in its negotiations of TRIPS[93] in the Uruguay Round to adopt its version of copyright and patent revisions.[94] In addition, serious and substantial concerns about wholesale piracy believed to be occurring in China lead the U.S. to respond more aggressively to those infringement concerns than to China's human rights violations.[95]

But the U.S. has not always been so zealous in its protection of intellectual property interests. From the early to mid-nineteenth century the United States offered limited protections of domestic literary works and had little if any regard for piracy claims of foreign copyright holders alleged to occur within the country.[96] But from the mid-twentieth century until today, the confluence of economic, ideological and political factors has compelled Congress to extend

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[93] The World Trade Organization's Agreement on Trade-related aspects of Intellectual Property Rights in Agreement negotiated in the 1986-94 Uruguay Round, introduced intellectual property rules into the multilateral trading system for the first time. *See, generally*, Understanding the WTO: THE AGREEMENTS -- Intellectual property: protection and enforcement, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (last visited Aug. 9, 2010).

[94] *See* William Fisher essay, *The Growth of Intellectual Property: A History of the ownership of Ideas in the United States supra* note 2, at __ (hereinafter referred to as "*The Growth of IP* Fisher Essay ") (citing See Jerome H. Reichman, *Intellectual Property in International Trade and the GATT* in *Exporting our Technology: International Protection and Transfers of Industrial Innovations* (1995).

[95] *Id.* (citing Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 Stanford L. Rev. 1293, 1297-98 (1996)).

[96] *See* Fisher, *supra* note 2, at 2-3 (noting that until the middle of the nineteenth century copyright protection was limited to "verbatim copying of his or her language.") ; *Theories*, *supra* note 74, at 2 (noting Charles Dickens concerns that American publishers were reprinting his works without permission).

and expand the nature, scope and duration of the copyright monopoly far beyond "exclusive rights" to authors and inventors for "limited times."[97] This is clearly evident in the extension of the duration of copyright – now lasting for the life of the author plus seventy years after the author's death. The point is also evident in the expansion of types of works protected by copyright.[98] Additionally the legal discourse has changed the perception of copyright from monopoly to property right.

Article I, Section 8 of the United States Constitution empowers Congress "*To promote the Progress of Science and useful Arts*, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries (emphasis added)."[99] The first national bill to establish copyright law in the United States was passed by Congress in 1790 and signed into law by George Washington on May 31, 1790 "for the encouragement of learning, by securing the copies of maps, Charts, And [sic] books, to the authors and proprietors of such

[97] *Id.* (noting how copyright has been expanded and extended within the last decade: "Legal changes have increased the scope of protection (for example, the Copyright Act of 1976 formally conferred power over derivative works), lengthened its duration (the Sonny Bono Copyright Term Extension Act (CTEA) of 1998 increased it by twenty years), prohibited users from circumventing technical restrictions on using works (for example, the Digital Millennium Copyright Act forbids bypassing access control measures), reduced fair use's scope, increased civil and criminal penalties for infringement, and allowed license agreements to override countervailing rights and defenses such as fair use (for example, court decisions uphold license agreements banning reverse engineering even when it would be fair use) (footnotes omitted)). *See also* Fisher, *supra* note 2 at 10 (noting that no single force lead to the dramatic expansion of intellectual property rights and instead "a host of factors – some of them economic, some ideological, some political, ad some peculiar to the sphere of law – converged to cause the growth.).

[98] *See* Fisher, *supra* note 2, at 3-4 (noting the additions of photographs, sound recordings, software and architectural works).

[99] ARTICLE I, SECTION 8, CL. 8. Interestingly, an earlier draft of this clause empowered Congress: "To secure to literary authors their copy rights for a limited time; To encourage, by proper premiums and provisions, the advancement of useful knowledge and discoveries; To grant patents for useful inventions; To secure to authors exclusive rights for a certain time; and To establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades, and manufactures." Fisher, *supra* note 2 (citing Edward C. Walterscheid, *To Promote The Progress Of Science And Useful Arts: The Background And Origin of The Intellectual Property Clause Of The United States Constitution*, JOURNAL OF INTELLECTUAL PROPERTY LAW 2, 44-45 (1994). Walterscheid opines this language was not passed upon for ideological reasons but because it was too costly to implement. *Id.*

copies, during the times therein mentioned."[100] Its English precursor, The Statute of Anne, took effect in 1710 and is viewed as the first modern copyright statute.[101] It granted "authors or their assigns" the exclusive right to publish books for 14 years from the date of publication.[102] Both focused on written works and wholesale copying.Congress has since made several substantial revisions to the law, including expanding the class of protected works to include sound recordings in 1971.[103]

Copyright exists *automatically* when a work is fixed for the first time in any tangible medium of expression[104] in a copy[105] or phonorecord.[106] By "copies" the Act means material objects – such as books, manuscripts, electronic files, Web sites, e-mail, sheet music, musical scores, film, videotape, or microfilm – from which a work can be read or visually perceived

[100] Copyright Act of 1790, ch. 15, 1, 1 Stat. 124, 124 (repealed 1831).

[101] STATUTE OF ANNE, 8 ANNE C.19.

[102] The term of protection was extended for an additional 14 years if the author were still living upon expiration of the first term. *See id.*

[103] *See infra note* __ at __.

[104] 17 U.S.C. §102(a) (2010).

[105] The Copyright Act defines "copies" as:

> material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

17 U.S.C. § 101.

[106] The Copyright Act defines "phonorecords" as:

> material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

Id.

either directly or with the aid of a machine or device.[107] Phonorecords are material objects – such as cassette tapes, CDs, or LPs, but not motion picture soundtracks on which sounds are recorded and which combine moving images and sound. Thus, for example, a song (the work) can be fixed in sheet music (copies) or in a CD (phonorecord) or both.[108] This distinction is important because sound recordings (an artist's actual performance on the CD) and the underlying musical compositions (the music and lyrics) are considered separate works with separate and distinct copyrights.[109]

In general, the Copyright Act gives a copyright owner the exclusive right to do and to authorize others to reproduce the work (copy),[110] prepare derivative works based on the original (adapt),[111] distribute copies of the work to the public[112] by sale or other transfer of ownership, or by rental, lease, or lending, perform the work publicly,[113] display the work publicly,[114] and in the case of sound recordings, to perform the work publicly by means of a digital audio transmission (DAT).[115] Collectively, these rights are often referred to as a copyright holder's exclusive bundle of rights.[116]

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[107] CITE. See also EVANS, *supra* note 116, at ____.

[108] *Id.*

[109] *See* Bridgeport v. Dimension Films, 410 F.3d 792, 796 (6th Cir. 2005). *See also* Newton v. Diamond, 204 F.Supp. 2d 1244, 1249 (C.D. Cal. 2002).

[110] 17 U.S.C. § 106(1) (2010).

[111] § 106(2).

[112] § 106(3).

[113] § 106(4).

[114] § 106(5).

[115] § 106(6).

[116] For works created on or after January 1, 1978, copyright generally lasts for the life of the author plus seventy years after the author's death.

The exclusive rights in sound recordings are limited to the exclusive rights of reproduction,[117] adaptation,[118] publication,[119] and performance via DAT[120] and do not include any right of public performance.[121] Essentially this means a band can cover a song and pay compulsory royalties to the composer (or her publishing designee).[122]

Accordingly, the protection afforded sound recordings in digital sampling cases only extends to "the recorded sound – the stored electronic data digitally preserved by the composer."[123] Therefore if the exact sounds are re-created independently in another recording (i.e., "covered"), that recording is considered an independent creation. This holds true "even though sounds imitate or simulate those in the copyrighted sound recording."[124] The notion of

[117] § 106(1).

[118] § 106(2).

[119] § 106(3).

[120] § 106(6).

[121] *See* 17 U.S.C. §114(a) (2010). "The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording." *Id.* Additionallly "[t]he exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality." *Id.*

[122] The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 *do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sounds recording*." (emphasis added).

[123] Fharmacy Records v. Saalam Nassar, 248 F.R.D. 507, 527 (E.D. Mich., S. Div. 2008) (finding that artist DMX's incorporation of a portion of ESS Beats in Shot Down (featuring 50 Cent and Styles) did not consitute an infringement of a sound recording because plaintiffs could not establish, and therefore a reasonable jury could not conclude, that defendants actually sampled. *Id.* at 528.

[124] *Id.* at 527 (E.D. Mich., S. Div. 2008) (citing Bridgeport v. Dimension Films, 410 F.3d 792, 799-800).

independent creation has been long established in case law and explored extensively in this legal discourse.[125]

__. *Infringement Analysis: Substantial Similarity*

[TO BE COMPLETED]

__. *Affirmative Defenses in Infringement Cases*

[TO BE COMPLETED]

__. *A Tale of Two Copyrights: The History of Music Copyright*

Copyright law as originally conceived did not contemplate or protect music. The 1909 version of the Copyright Act protected textual works (books, charts and maps) but it also included musical compositions via the "canned music" clause.[126] Until the mid-19th century, copyright holders were only protected against literal copying. As copyright law expanded to include other literary and artistic works,[127] later versions failed to address adequately the differences in how literary and artistic works are created given that performance arts like music have traditionally utilized collaboration (with and without attribution) and borrowing (without and without permission) in the creative process. Such unattributed collaboration and

[125] *See generally* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903) ("Others are free to copy the original. They are not free to copy the copy."). CITES

[126] *See generally, Theories, supra* note 74, at 2 (noting the "work" shielded by the statute was the literal text, nothing more."). Professor Fisher provides a substantive history of the development of copyright law in America as copyright holder entitlement continued to expand and the duration of protection continued to lengthen. Further, he details the confluence of factors that lead to such expansion, not the least of which was a fundamental change to the foundation of the American Economy from agriculture to manufacturing to industry to information technology. *Id.*

[127] Cites.

unauthorized borrowing is contrary to the "independent creation" requirement in copyright law[128] and European notions of the Romantic Author who is seen as creator in isolation by way of inspiration alone.[129]

Copyright law as currently applied to the medium of music, both the performance embodied in a sound recording and the underlying musical composition itself, fails to meet its constitutional goal to encourage innovation and creativity. This point is illustrated clearly in the case of a musical genre like hip hop that from its inception has relied on the innovative use of existing recordings (most of which are protected by copyright), to create completely new works.[130]

In 1971, the Copyright Act was amended to provide copyright protection for sound recordings to prevent piracy of albums.[131] Prior to this amendment, the topic of creating a limited copyright in sound recordings had been considered for several years in connection with the overall revision of the Copyright Act.[132] At that time, only the copyright in underlying musical works was protected from unauthorized and uncompensated duplication but there was no

[128] *See* infra Section ___ and note ___.

[129] *See Theories supra* note 74, at 2. (noting the collaborative nature of most forms of literary and artistic expression, Professor Fisher argues that despite the reality that "the extent to which every creator depends upon and incorporates into her work the creation of her predecessors is becoming ever more obvious … American lawmakers cling stubbornly to the romantic vision."). *See also* Arewa, *supra* note 15, at 333 ("The 'Romantic author" concept, which emphasizes the unique and genius-like contributions of individual creators and inventors, is a primary mechanism by which borrowing and collaboration are denied."); Martha Woodmansee, *On the Author Effect: Recovering Collectivity*" 10 CARDOZO ARTS & ENT. L. J. 227 (1992); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L. J. 279 (1992); Fisher, *surpa* note 2, at 15-16.

[130] CROSS-REFERENCE SECTION II.

[131] *See* The House Report of the Judiciary Committee on the Sound Recording Amendment of 1971, September 22, 1971, 1.

[132] *See id.* at 3.

federal protection of the recordings of those compositions.[133] As a result, sound recordings could be and were duplicated without violating the Copyright Act.

Trade sources estimated the annual volume of wholesale piracy of records at the time to exceed $100 million.[134] Although a statutorily prescribed mechanical royalty scheme already existed to compensate music composers whose music and lyrics were reproduced in copies of albums and tapes, no similar scheme existed to compensate the owners of the master recordings themselves. A minority of states enacted statutes to combat unauthorized duplication of sound recordings. The majority, however, had only unfair competition laws and limited remedies. Further, the jurisdiction of states to regulate in this area was in question due to federal preemption of copyright.[135]

An alarmed record industry lobbied Congress aggressively to protect sound recordings and convinced the legislators to proceed in a piecemeal but expedited fashion to address "recordings piracy" before fleshing out completely the larger revision. Efforts to complete the entire general amendment were stalled due to unresolved issues about cable television. Even the

[133] *See id.* at 2.

[134] *See* House, *supra* note 139, at 2. It had also been estimated that legitimate sales had an annual value of approximately $ 300 million, thus demonstrating that piracy had a substantial impact on potential sales. "The pirating of records and tapes is not only depriving legitimate manufacturers of substantial income, but of equal importance is denying performing artists and musicians of royalties and contributions to pension and welfare funds and Federal and State governments are losing tax revenues." *Id.*

[135] *See id.* at 2-3. "Eight States have enacted statutes intended to suppress record piracy, but in other jurisdictions the only remedy available to the legitimate producers is to seek relief in State courts on the theory of unfair competition. A number of suits have been filed in various States but even when a case is brought to a successful conclusion the remedies available are limited. In addition the jurisdiction of States to adopt legislation specifically aimed at the elimination of record and tape piracy has been challenged on the theory that the copyright clause of the Federal Constitution has preempted the field even if Congress has not granted any copyright protection to sound recordings." *Id.*

Register of Copyrights recommended that the sound recording issue be resolved quickly.[136] Instead of lawmakers drafting the language, they left the precise wording to the interest-holders.[137] The resulting legislation was skewed heavily in favor of those interest-holders (music industry executives) and ultimately not reflective of any public-benefit that justified creating such a copyright monopoly in the first instance.[138]

The Departments of State, Justice and Commerce and the Copyright Office all favored enactment of a limited right in sound recordings.[139] Congress also considered a proposal to create a compulsory licensing scheme for sound recordings. The proposal included statutorily prescribed amounts that users would be required to pay sound recording copyright holders to compensate them for reproductions of their recordings. Initially it was deemed an appropriate and reasonable complement to the compulsory licensing of musical compositions.[140] This proposal was vigorously proffered in Senate Committee hearings and strongly reiterated in hearings before the House Subcommittee. But ultimately it was rejected when the Senate Committee concluded the two situations were not parallel. Specifically the Committee determined that while a compulsory license in the case of musical compositions gave necessary

[136] *See id.* at 10. L Quincy Mumford, Librarian of Congress wrote in written comments to the Chairman of the Judiciary Committee: "[S]ome fundamental problems impeding the progress of general revision of the copyright law, notably the issue of cable television, have not yet been resolved. We agree that the national and international problem of record piracy is too urgent to await comprehensive action on copyright law revision, and that the amendments proposed in S. 646 are badly needed now." *Id*.

[137] Fisher, *supra* note 2, at 19 (noting that instead of drafting the language themselves, "they forced the representatives of organizer interest groups that ha[d] stakes in the content of the statute to negotiate compromises.").

[138] *Id.* at 19.

[139] Interestingly, at least one bill included a provision to add a public performance right so that record companies and performing artists would be compensated when their records were performed for commercial purposes. Ultimately, however, no such right was included.

[140] CITE

access to raw material there was no analogous benefit to grant the same access to the "finished product."[141]

In the final analysis, the House Committee believed the need to protect albums from being pirated was strong but the case for compulsory licensing was weak.[142] In its explanation of sound recordings as the type of "copyrightable subject matter" to constitute a "work," the House Report explained the amendment was intended to apply to wholesale copying of *entire* sound recordings: "Aside from cases in which sounds are fixed *by some purely mechanical means* without originality of any kind, the committee favors copyright protection that would prevent the reproduction and distribution of unauthorized reproductions of sound recordings (emphasis added)."[143] It seems, therefore, it would have been illogical at the time to include compulsory licensing of entire sound recordings, the very issue Congress sought to remedy and avoid. It follows, then, that direct sampling of a portion part was not contemplated and no *per se* rule or departure from traditional infringement analysis was intended.

This distinction is critical in digital sampling infringement cases because, as discussed in Section II herein, the scope of an infringement inquiry is much narrower for sound recordings than for the underlying work. Whereas "substantial similarity" is the primary inquiry in cases involving infringement of the musical composition, the only issue in the case of sound recordings is whether any part or all of the actual sound recording has been used without

[141] [House Report, *supra* note 142, at __. In the view of the Senate Committee, there is "no justification for the granting of a compulsory license to copy the finished product, which has been developed and promoted through the efforts of the record company and the artists." *Id*.

[142] House Report, *supra* note 142, at 4.

[143] *Id.* at 5.

authorization.[144] As a result, substantial similarity in infringement cases involving sound recordings is disregarded and the only question is whether the defendant copied. This reality functions as a *per se* infringement without any consideration for whether a use might be deemed *de minimis* or fair. Anyone who samples a copyrighted work is required to secure a negotiated license in every case to avoid infringement regardless how much (or little) is used. The copyright monopoly – a privilege – was never intended to be absolute.

[144] CITE. *See also* Fharmacy Records v. Saalam Nassar, 248 F.R.D. 507, 527 (E.D. Mich., S. Div. 2008).

IV. Consequences of Incongruent Treatment of Musical Compositions and Sound Recordings

A. *Bridgeport: A Bright-Line Illuminates a Dark Reality*

An example of the stifling effect of copyright law on music is the impact on the practice of sampling of the *per se* infringement rule articulated in *Bridgeport v. Dimension Films* for unauthorized copying of any amount of a sound recording without the copyright holder's permission.[145]

In 2001, plaintiffs Bridgeport Music, Inc., Southfield Music, Inc., Westbound Records, Inc., and Nine Records, Inc. (all related entities), became greatly concerned with what they considered to be rampant infringement of their sound recordings.[146] Accordingly they went on the offensive to challenge the practice of unauthorized digital sampling by filing nearly 500 counts against approximately 800 defendants for copyright infringement.[147] Ultimately, the district court severed the original complaint into 476 individual actions, one of which was the case against No Limit Films.[148]

The relevant controversy arose out of the use of a digital sample of both the Funkadelic musical composition and sound recording of "Get Off Your Ass and Jam" ("Get Off") in N.W.A.'s rap song "100 Miles and Runnin'" ("100 Miles"), which was included in the movie

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[145] *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005) (hereinafter referred to as Bridgeport III).

[146] Bridgeport and Southfield are music publishers and Westbound Records and Nine Records are recording companies.

[147] All of the claims against Miramax Film Corp. and Dimension Films were dismissed with prejudice pursuant to a settlement agreement on June 27, 2002. *See* Bridgeport III, 795 n.1.

[148] *Id.* at 795. Because neither Southfield nor Nine established they had any ownership interest in the copyrights at issue, the district court found them jointly and severally liable for 10% of attorneys' fees and costs. *See id.* at 795-96. Additionally, all of plaintiffs' claims against Miramax Film Corp. and Dimension Films were dismissed with prejudice, pursuant to a settlement agreement dated June 27, 2002. *See id.* at 795 n. 1.

soundtrack for the motion picture "I Got the Hook Up" ("Hook Up") released by No Limit Films in May of 1998.[149]

The sample at issue is an arpeggiated chord, defined as "three notes that, if struck together, comprise a chord but instead are played one at a time in very quick succession."[150] This chord, played on an unaccompanied electric guitar, is repeated several times at the opening of "Get Off."[151] The district court described the resulting sound as "a high-pitched, whirling sound that captures the listener's attention and creates anticipation of what is to follow."[152] The "Get Off" sample consists of a two-second portion of the arpeggiated chord section that was looped 14-16 times in "100 Miles" and appears at five separate points in the song.[153] The district court found that the looped segment lasted approximately seven seconds and therefore made up 40 seconds of the four minute thirty second song.[154]

After sorting through the numerous assertions by Bridgeport in support of its copyright infringement claim of the underlying work,[155] the court focused on the infringement claim that

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[149] *See* Bridgeport Music, Inc., v. Dimension Films LLC, 230 F.Supp. 2d. 830, 833 (M.D. Tennessee 2002) (hereinafter referred to as "Bridgeport I").

[150] *Id.* at 839.

[151] To hear Get Off and 100 Miles visit _____.

[152] *Bridgeport I*, 230 F.Supp. 2d at 839.

[153] *Id.* at 841.

[154] *Id*.

[155] Although 100 Miles was originally owned by four entities, in December 1998 Bridgeport acquired a twenty-five percent interest in the "100 Miles" musical composition as compensation for licensing the right to sample "Get Off" to be used in "100 Miles" that was owned by Bridgeport.[155] Apparently No Limit had acquired from the other co-owners of "100 Miles" various oral and written licenses to use the musical composition in the film and asserted this fact as the basis of its defense. Additionally, in the sample licensing agreement between the original "100 Miles" owners and Bridgeport that granted to Bridgeport the 25% interest in "100 Miles," Bridgeport licensed to the other parties *and their licensees and assigns* the irrevocable right to use the "Get Off" sample in "100 Miles" (emphasis added).[155] Bridgeport challenged the retroactive effectiveness of this benefit to licensees of the parties to the agreement; namely, defendant Dimension Films.

involved the unauthorized use of the "Get Off" sample in "100 Miles." No Limit moved for summary judgment defending its use on two grounds. First, No Limit attacked the chord's originality by arguing that the portion of "Get Off" used "was not original and therefore not protected by copyright law."[156] Alternatively, No Limit asserted a "*de minimis*" use defense arguing the sample was "legally insubstantial and therefore not actionable copying under copyright law."[157] Accordingly, the court assumed – and No Limit did not contest –the sample was in fact digitally copied directly from the sound recording rather than re-created in studio.[158]

In support of No Limit's first "lack of originality" defense, it claimed the arpeggiated chord was a commonly used three-note chord. Westbound countered that the chord was completely unique.[159] Taking into account the limited number of musical notes and chords available, the district court focused not on the originality of the chord but the way it was used and its "aural effect" in the sampled work, especially "where copying of the sound recording is at issue."[160] The district court concluded that a jury could reasonably conclude the way the chord is used in "Get Off" was both original and creative and therefore entitled to copyright protection.[161] Accordingly, on this issue defendant's motion for summary judgment was denied.

As for, No Limit's *de minimis* use argument, the district court navigated its way through a detailed analysis of the law and principles traditionally applied in *de minimis* defense cases to "balance the interests protected by the copyright laws against the stifling effect that overly rigid

[156] *Bridgeport I*, 230 F.Supp. 2d at 838.

[157] *Id.*

[158] *Id.*

[159] *Id.* at 839.

[160] *Id.*

[161] *Id.*

enforcement of these laws may have on the artistic development of new works."[162] The court focused on the question of "substantial similarity" and the various ways courts can assess this element, namely the "qualitative/quantitative" and the "fragmented literal similarity" analyses.[163] It concluded that under either approach, the sample did not amount to a "legally cognizable appropriation."[164] Accordingly, the district court granted defendants' motion for summary judgment and plaintiffs appealed.[165]

However, on appeal the Circuit court pushed aside the district court's effort to apply traditional infringement analyses to the case at hand. Instead it fashioned a *per se* infringement rule triggered whenever someone copies *any* part of a sound recording without any consideration for substantiality similarity or *de minimis* use.[166] The court noted it preferred the "clarity" that bright-line rules provide despite the absence of such an approach in traditional infringement analysis.

The court attempted to justify its ruling by concluding that if one cannot pirate "the whole" one cannot copy less than the whole without permission either.[167] Further, the court read

[162] *Id. at* 840 (citing Warner Bros. Inc. v. American Broadcasting Cos., 720 F.2d 231, 240 (2d Cir. 1983)).

[163] *See id.* at 841 (citing Newton v. Diamond, 204 F. Supp. 2d at 1257; Williams v. Broadus, 60 U.S.P.Q.2d at 1054; NIMMER ON COPYRIGHT §13.03[A][2] at 13-45, n. 92.2.

[164] *See Bridgeport I*. 230 F.Supp. 2d at 841.

[165] The procedural history of this case is somewhat convoluted. The Sixth Circuit issued an initial opinion in Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390 (6th Cir. 2004) (Bridgeport II). Through an Order entered December 20, 2004, the full court denied No Limit Films' petition for rehearing *en banc* but granted a panel rehearing to reassess the issue of digital sampling of a copyrighted sound recording. *See* Bridgeport v. Dimension Films, 410 F.3d 792, 795 (6th Cir. 2005) ("Bridgeport III"). All parties submitted additional briefs and arguments on rehearing.

[166] Bridgeport III, at 798.

[167] *Id*. at 800.

the derivative work right set forth in 114(b) of the Act to mean a sound recording copyright holder has the exclusive right to sample.[168]

In this post-*Bridgeport* era, it seems the traditional defenses to a copyright infringement action of *de minimis* use and uses deemed fair due to the "transformative" nature of the use are not available when the infringement claim is based on alleged copying of the sound recording. However, those defenses remain viable for alleged infringement of the underlying musical composition. Additionally, although a compulsory licensing scheme exists for unauthorized use of musical compositions,[169] no such regime exists for use of sound recordings.

This incongruent treatment of musical compositions and sound recordings has several negative consequences; higher transaction costs, inconsistent application of federal law among the circuits and dramatically reduced creative output. First, this conflict has lead to significantly higher transaction costs to secure licenses to sample sound recordings.[170] This result has lead to a particularly onerous impact on the hip hop genre, which relies heavily on the artistic value of sampling and other innovative uses of technology to create entirely new works.[171]

[TO BE COMPLETED]

A change in the way copyright law is applied to sound recording reproduction is not only needed but inevitable to allow for these types of uses in order to encourage the development of a rich reservoir of cultural benefits from the musical arts and to bring music copyright in line with

[168] *Id*. at 801. [Explore further the court's analysis of 114(a) and (b)]

[169] CITE

[170] CROSS-REF TO SECTION II.

[171] *See supra* note. __ for example of the significantly higher transaction costs of negotiated licenses for sampling if Public Enemy were to re-create *It Takes a Nation of Millions to Hold Us Back*.

the traditions of music creation.[172] At a minimum, the *Bridgeport per se* infringement rule should be overturned and the traditional defenses of *de minimis* and fair use should be applied in all sound recording infringement cases. Such a shift – either by judicial decision or legislative action – would necessarily contemplate and honor the actual complexities in the process of creating music since a musician's or music producer's new work is often (if not always) informed by and built upon the foundation of existing works. Consistent application of copyright law would also provide "clarity" for the music industry without the need for a purportedly clarifying bright-line rule. It would also permit federal courts to engage in the type of balancing of rights and remedies to honor the Constitutional call for intellectual property monopolies.[173]

[172]Scholars and students have been asserting this position since the early-nineties. *See, e.g.*, 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 (2006); David S. Blessing, *Who Speaks Latin Anymore? Translating De Minimis Use for Application to Music Copyright Infringement and Sampling*, 45 WM & MARY L. REV. 2399, 2404 (2004); Neela Kartha, *Digital Sampling and Copyright Law in a Social Context: No More Color-Blindness!!*, 14 U. MIAMI ENT. & SPORTS L. REV. 218, 224 (1996-1997); Susan J. Latham, *Newton v. Diamond: Measuring the Legitimacy of Unauthorized Compositional Sampling--A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J.119, 123 (2003); Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271 (1996); Michael L. Boroni, *A Pirate's Palette: The Dilemnas of Digital Sound Sampling and a Proposed Compulsory License Solution*, 11 U. MIAMI ENT. & SPORTS L. REV. 65 (1993). *See also* Kenneth Achenbach, *Grey Area: How Recent Developments in Digital Music Production Have Necessitated the Reexamination of Compulsory Licensing for Sample-Based Works*, 6 N.C. J. L. & TECH. 187 (2004) (citing Jason S. Rooks, *Note: Constitutionality of Judicially-imposed Compulsory Licenses in Copyright Infringement Cases*, 3 J. INTELL. PROP. L. 255 (1995); Randy S. Kravis, *Comment: Does a Song By Any Other Name Sound As Sweet?: Digital Sampling and Its Copyright Implications*, 43 AM U. L. REV. 231 (1993)). However the issue has now reached a boiling point as even judges have commented on the unsoundness of a *per se* infringement rule for sounds recordings. *See infra* Section __ (discussing Judge Seitz's critique of the *Bridgeport* decision in *Saregama*).

[173] Arewa, *supra* note 15, at 338 ("Copyrights should be granted and enforced in a way that is informed by the context of their operation and consideration of the underlying rationales of copyright and actual uses of copyright.").

B. Saregama: Light at the End of the Per Se Tunnel?[174]

The dispute in *Saregama* arose out of producer Tim Mosley's use of an Indian sound recording titled "Bagor Mein Bahar Hai" ("BMBH") in the song "Put You On the Game" ("PYOG") which appeared on Jayceon Taylor's 2005 album "The Documentary".[175] Saregama asserted that it held a copyright interest in BMBH pursuant to an assignment of rights from its predecessors in interest, Shakti Films and Gramophone Co. of India.[176] After establishing its ownership interest in BMBH and accordingly its right to sue for infringement, Saregama moved for summary judgment because Mosley admitted he used a sample of the BMBH sound recording in PYOG.

The defendants asserted several arguments, two of which are relevant to this article and consistent with the defenses proffered but rejected in *Bridgeport* III. The first argument challenged BMBH's originality and the second was based on lack of substantial similarity. The court noted the sample was a one-second snippet of a G minor chord looped four times in the chorus.[177] The parties cross moved for summary judgment. The question presented was whether

[174] 687 F. Supp. 2d 1325 (S.D. Fla. 2009). This case involves a somewhat convoluted procedural history. Saregama filed its initial complaint in the Southern District of New York (Second Circuit) but the case was moved to the Southern District of Florida on defendants' motion to transfer venue. The court granted defendants' motion to dismiss with leave for Saregama to re-plead, which it did. Mosley, G-Unit and Desperado and remaining defendants Warner Brothers and Universal again filed a motion to dismiss which was granted in part and denied in part, leaving only the Federal copyright claims involving the musical composition and sound recording. Thereafter, Saregama voluntarily dismissed the musical composition claims and the court thereafter focused on the alleged infringement of the sound recording. *Id*. at 1342.

[175] *Id.* at 1331. The other named defendants were G-Unit Records and Desperado, both of which apparently had no involvement in creating, distributing or selling Put You On the Game and were only involved as passive recipients of publishing income pursuant to contract.

[176] *Id.* at 1327.

[177] *Id.* at 1331.

such copying is legally actionable; that is, whether there is sufficient originality to be protectable and substantial similarity between the resulting work and the any protectable elements.

As discussed in Section __, herein, two works are substantially similar if "an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work."[178] The similarity can be either literal (as in the case of direct copying) or non-literal. Even where there is but a small amount of literal similarity (known as fragmented literal similarity), substantial similarity can still be found if the fragmented copy is important to the copied work and of sufficient quantity.[179]

The court analyzed whether a resulting work was substantially similar to the copyrightable aspects of the sampled work. It focused on the songs, "taken as a whole" in its determination whether there was any similarity and, if so, whether the similarity was substantial or merely *de minimis*.[180] The court found that other than the one-second snippet the songs did not bear any similarities and therefore no copyright infringement existed.[181] Taken as a whole the songs deemed completely different, with different lyrical content, tempo, rhythms, and arrangements. The court noted further that it was highly unlikely the average listened could recognize the sampled song in the resulting work.[182]

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[178] *Id.* at 1337.

[179] *Id.* at 1337-38 (favoring the "single-inquiry" approach developed in Oravec v. Sunny Isles Luxury Ventures, L.C., 527 F.3d 1218 (11th Cir. 2008) over the "extrinsic" and "intrinsic" tests developed in prior Eleventh circuit cases). *Id*. at 1338.

[180] *Id.* at 1338.

[181] *Id.*

[182] *Id*.

With the court's decision rendered, Judge Patria Seitz then turned her attention to the *Bridgeport* case because the plaintiff's alternative position was that sound recordings like BMBH should be treated differently than other copyrighted works in light of that case.[183] Judge Seitz made clear that the Eleventh Circuit "imposes a 'substantial similarity' requirement as a constituent element of *all* infringement claims."[184] Judge Seitz questioned the Sixth Circuit's decision to carve out an exception to the substantial similarity test for sound recordings. She expressed confusion as to the basis on which the *Bridgeport* court chose to read section 114(b) so narrowly, especially in light of the fact that 114(b) applies to the scope and protection of derivative works, not original works.[185] Judge Seitz was not persuaded by the plaintiff that the Eleventh Circuit would soon adopt the Sixth Circuit's *per se* rule.[186]

Judge Seitz found no indication in the legislative history or legislative intent consistent with *Bridgeport's* reading of 114(b) that essentially expands – rather than limits – the scope of protection for original works. Specifically, Judge Seitz noted that Bridgeport redefined "derivative work" incorrectly as any work containing *any* sound from the original.[187] If the Bridgeport court's reading of that section is correct, then we must accept that Congress sought to expand the scope of copyright protection for original works "by redefining the term 'derivative work' to include all works containing *any* sound from the *original* sound recording" regardless

[183] *Id* at 1138-39.

[184] *Id.* at 1339 (citing Leigh v. Warner Bros., Inc., 212 F.3d 1210, 1214 (11th Cir. 2000)). Judge Seita noted that although the facts of that case and Bridgeport are similar, that court's decision to disregard a substantial similarity analysis represents a departure from Eleventh Circuit precedent. *Id*.

[185] *Id.* at 1340.

[186] *Id*.

[187] *Id.* at 1339.

whether the works are substantially similar.[188] Like Judge Seitz, I find this reading implausible.[189]

There is a clear and troubling split in the Federal circuits regarding federal copyright protection afforded sound recordings.[190] For this and other reasons set forth in this article, I argue that Congress must revisit this issue to clarify and reconcile the varied approaches to this critical topic and ensure that it fashions a rule that protects copyright holders, preserves traditional defenses to copyright infringement and encourages innovative uses of technology to create new works from existing creative material.

[188] *Id.* at 1340 (explaining that the court's reading of 114(b) in Bridgeport III means it "does not allow the court to conclude that PYOG is a "derivative work" of, and thereby infringes on, BMBH merely because it contains a one-second snippet of BMBH.) *Id*.

[189] *Id*. at 1341 (concluding that "statutory protection for sound recordings extends only to the particular sounds of which the recording consists, and would not prevent a separate recording of another performance in which those sounds are imitated.) Professor Nimmer concurs:

By validating entire sound-alike recordings, the [independent creation provision] contains no implication that partial sound duplications are to be treated any differently from what is required by the traditional standards of copyright law which, for decades prior to adoption of the 1976 Act and unceasingly in the decades since, has included the requirement of substantial similarity. *Id*.

[190] CITES to split in the circuits.

V. Varied Approaches and Alternatives for Allowing Certain Innovative Uses of Technology in Music Creation and Exploitation

"Progress of Science and useful Arts"[191] collectively may be categorized as a type of innovation traditionally referred to as a "public good."[192] A government can respond in myriad ways to strike the balance between recognizing an innovator's right to exploit her creation with the benefit to society of reasonable access to innovation.[193] Copyright law is one such governmental response utilized to enhance and support a civil democratic society.[194] However intellectual property rights regimes have several drawbacks: they are costly to administer, they

[191] NOTE TO SELF: J. Holmes and early cases link copyright with "constitutional support of the "useful arts". However, twenty-first century scholars and cases link "useful arts" to patent law and promotion of "science" to copyright. *See* Eldred v. Ashcroft, 537 U.S. 186, 192 (2003).

[192] William Fisher, *Intellectual Property and Innovation: Theoretical, Empirical, and Historical Perspectives* (May 2, 2001) (an essay prepared for the Programme Seminar on Intellectual Property and Innovation in the Knowledge-based Economy, The Hague, that "examines from various angles the complex relationship between intellectual-property rights and technological innovation.") (hereafter referred to "*IP and Innovation*"). Fisher suggests five strategies a government can employ to encourage innovation: 1) engage in technological innovation themselves; 2) subsidize innovative activities by private sectors; 3) issue post-hoc prizes or rewards to persons and organizations that provide the public socially beneficial innovations; 4) help innovators conceal from the general public information essential to implement their innovations (ex: trade secret law); and 5) confer intellectual property rights upon innovators. The latter, the author argues, allows the innovator to recoup her investment and to profit from the innovation. *Id*. at 2-3.

[193] *See* id. (examines the optimal scope of intellectual property laws based on a cost/benefit analysis and explains the view of intellectual property law proponents that "[o]nly in the rare situations in which transaction costs would prevent such voluntary exchanges should intellectual-property owners be denied absolute control over the uses of their works – either through an outright privilege (such as the fair-use doctrine) or through a compulsory licensing system."). *See also* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (arguing that the Copyright Act is grounded in two objectives: "secur[ing] a fair return for an 'author's' creative labor" and "stimulat[ing] artistic creativity for the general public good"). The notion that a person should own and/or control that which she created is commonly referred to as the labor-desert theory of property generally associated with John Locke. *See* Fisher, *supra* note 2, at 12.

[194] Neil Weinstock Netanel, *Copyright and a Democratic Society*, 106 YALE L.J. 283, 291 (1996) (asserting a "democratic paradigm" as a conceptual framework for copyright law that exists between neoclassisist overprotectionism and minimalism that "views copyright law as a state measure designed to enhance the independent and pluralist character of a civil society." Netanel argues that the "democratic paradigm" relies on copyright protection that is both sufficiently strong and limited "to make room for – and, indeed, to encourage – many transformative and educative uses of existing works." *Id.* at 288.

sometime impede innovation and they can be used offensively to price competitors out of the market with profit maximizing pricing.[195]

An imbalance occurs, when a grant of exclusive rights impedes "cumulative innovations."[196] A related concern is the increased transaction costs that effectively price some innovators out of the market.[197] Accordingly, copyright laws that limit or prohibit access, especially without the benefits of a substantial similarity, fair use or *de minimis use* analysis, should be protected only when their benefits (i.e., increased productivity) outweigh the aforementioned social costs."[198] Stated more succinctly, "the question of how extensive copyright protection should be ... depends on the costs as well as the benefits of protection."[199]

[TO BE COMPLETED]

A. *Sampling Patent to Re-Mix Copyright*[200]

The United States Supreme Court in *Kewanee Oil Co. v. Bicron Corp.*[201] articulated the leading legal definition of "reverse engineering" as "starting with the known product and

[195] *See* William Fisher *IP and Innovation*, *supra* note 94, at 4.

[196] *Id.* (illustrating the point, and, I argue, one of the most pressing concerns in current music copyright law, with the following example: "Suppose Innovator #2 wishes to build upon the work of Innovator #1. The need to secure a license from Innovator #1 will, at a minimum, add to Innovator #2's costs. If, for some reason, Innovator #1 is unable or unwilling to grant the license, the work of Innovator #2 may be frustrated altogether.") *Id.*

[197] *Id.* (noting that "By empowering innovators to charge consumers more than the marginal cost of replicating their innovations, intellectual-property rights have the unfortunate effect of pricing some consumers out of the markets for the goods produced with those innovations.") *Id*.

[198] *Id.* at p. 5. *See also* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEG. STUD. 325, 133 (1989) , http://cyber.law.harvard.edu/IPCoop/89land1.html (acknowledging that all new works are created in the context of and built upon existing works and noting the merits of broader fair use protections and weaker copyright protections to encourage borrowing to create new works).

[199] WILLIAM M. LANDES, COPYRIGHT, IN A HANDBOOK OF CULTURAL ECONOMICS 132, 133 (Ruth Towse ed., 2003).

[200] *See* Tonya M. Evans, *Reverse Engineering Copyright (*July 21, 2010) (unpublished manuscript at __, on file with author) [hereinafter Evans, *Reverse Engineering Copyright*]

working backward to divine the process which aided in its development or manufacture."[202] The fundamental purpose of reverse engineering, posits treatise author James Pooley, is discovery "albeit of a path already taken."[203]

In their noted article *The Law and Economics of Reverse Engineering*, Professors Pamela Samuelson and Suzanne Scotchmer explain reverse engineering generally as "the process of extracting know-how or knowledge from a human-made artifact."[204] The authors further define "human-made artifact as an object that embodies knowledge or know-how previously discovered by other people.[205] Reverse engineering is treated generally by the courts as an important factor in maintaining balance in patent law by allowing innovators to enjoy the exclusive right to exclude for a certain period of time as long as they disclose sufficient information about their invention to the public.[206]

Although the legal right to reverse engineer is well established in patent jurisprudence, no statutory reverse engineering right actually exists.[207] Yet even the Supreme Court characterized reverse engineering in *Bonito Boats v. Thunder Craft Boats, Inc.* as "an essential part of innovation." This article posits that legislators and jurists faced with a fractured music copyright law framework can learn from the policies that protect and indeed encourage reverse engineering

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[201] 416 U.S. 470 (1974).

[202] *Id.* at 476.

[203] *See* James Pooley, TRADE SECRET LAW 5.02, 5-19 (1997).

[204] Samuelson & Scotchmer, supra note 102, at 1577

[205] *Id.* at 1577 fn 1.

[206] *Id.* at 1585. *See also* Evans, *supra* note 205 at __. (again I don't have this)

[207] Samuelson & Scotchmer, *supra* note 102, at 1585.

in the patent context to bring balance back into the equation of a creator's rights with the benefits to society of a richer, more vibrant creative world.[208]

The balance the law should seek to achieve is "to design legal rules that protect information-rich products against market-destructive cloning while providing enough breathing room for reverse engineering to enable new entrants to compete and innovate in a competitively healthy way."[209] Additionally, and as usual, technology continues to outpace the law.[210] So the discussion regarding a substantive revision of music copyright is no longer a matter of if but when, especially given the split in the Circuits.

Professor William Fisher addresses which innovation-enhancing policies have succeeded – and failed – in specific technological contexts.[211] The majority of his essay applies directly to patent rather than copyright law. Nonetheless, his conclusions regarding overly restrictive intellectual property laws that threaten innovation can be generalized and extended to the copyright context.

Ideally, intellectual property should be most narrowly tailored when innovation in the field tends to be highly cumulative.[212] Such is the case in the creation of music, generally, and

[208] *See generally Reverse Engineering Copyright*, *supra* note 205, at ____ (examining the policies underpinning reverse engineering in the patent context that encourages innovation to serve as a guidepost for revision of copyright laws currently applied to unauthorized digital sampling of sound recordings, which is viewed currently as a *per se* infringement of copyright).

[209] Samuelson & Scotchmer, *supra* note 102 at 1580.

[210] *See* Derek E. Bambauer, *Faulty* Math, 59 Ala. L. Rev.345, 354 (asserting that technological advances make uses of existing works "increasingly easy and inexpensive, offering the promise of greater creative output, more interaction by consumers with content, and enhanced diversity of artistic offerings. Legal rules that impede such production, and their underlying rationales, should be scrutinized.").

[211] Fisher, *supra* note 93, at 10.

[212] *See* _____. *See also Reverse Engineering Copyright*, *supra* note 205 at __.

the art of sampling to create hip hop in particular. This is especially valid in light of the essential role of borrowing in the creative process.[213]

Until software was added to the mix of protected works, copyright was not even contemplated in a discussion of the reverse engineering privilege for two reasons. First, artistic and literary works generally do not need to be reverse engineered to be understood.[214] Second, the know-how generally associated with copyright exists on the face of the work.[215] However, Congress enacted the Semiconductor Chip Protection Act ("SCPA") to protect the semiconductor industry from piracy. Semiconductors are information technology products that, like literary and artistic works, bear much of their know-how and value on their face.[216] They are also a "cumulative system technology" that can be analogized to the custom of borrowing in the music creation process. The SCPA was patterned after copyright law but governed by patent law. SCPA contained an express reverse engineering provision and allows copying to study the layout of circuits, incorporates the learned know-how in a new chip, and requires forward engineering.

The semiconductor chip industry, like the music industry, was concerned with innovation and infringement concerns. It was also concerned with the impact of reverse engineering. The legislative history of the SCPA may help to illustrate how Congress could approach music

[213] *See IP and Innovation supra* note 105 at 29.

[214] Samuelson & Scotchmer, *supra* note 102 at ___.

[215] Samuelson & Scotchmer, *supra* note 102 at 1585 (noting "[b]ooks, paintings, and the like bear the know-how they contain on the face of the commercial product sold in the marketplace."). *Id*. The authors noted further that "at least until the admission of computer programs to its domain, copyright law did not protect industrial products of the sort that firms typically reverse-engineer.". *Id*. at 1585.

[216] *Id.* 1595 (noting that this transparency makes semiconductor chips vulnerable to "rapid, cheap, competitive cloning" and impeded the first innovator's ability to recoup her research and development costs necessary to produce the chip.). *Id*.

copyright reform. The SCPA fashioned rules that protect both further innovation and the rights of existing innovators.

Intel Corporation was the first to combat semiconductor piracy concerns with copyright law. First it obtained copyright registrations on the drawings and stencils used in manufacturing chips (aka the masks). Then it registered the chips themselves as derivative works of the drawings.[217] Originally, the industry's goal was to amend copyright law to add semiconductor chips to copyright's subject matter. But because the chips proved so different from the existing covered works, an unlikely alliance formed to oppose adding the chips to the existing copyright structure.[218] Eventually Congress created the SCPA in 1984 to address the unique issues and concerns of the semiconductor industry.[219]

Witnesses testified during Congressional hearings that it was established industry practice to copy competitor masks to analyze the copied chip and design another chip with the same characteristics. Further, witnesses asserted that custom should be captured in a *sui generis* rule patterned on the Copyright Act.[220] Essentially the SCPA recognizes reverse engineering as a beneficial privilege that mirrors existing industry practice and distinguishes between legitimate and illegitimate reverse engineering, the latter being "wholesale appropriation of the work and

[217] *Id*. at 1598. Intel also lobbied Congress unsuccessfully to add "mask works" to the subject matter of copyright. *Id*. at 1599.

[218] *Id.* at 1600. Those who opposed adding semiconductor chips tocopyright's subject matter included the Association of American Publishers and the Associate Register of Copyrights.

[219] SCPA mirrors many of the Copyright Act's provisions: The subject matter is referred to as "mask works," that must be original, rights attach automatically by operation of law, registration is not required but beneficial, the substantial similarity analysis is involved and is based on a "grant of exclusive rights to control reproductions and distributions of products embodying the protected work." *Id*. at 1601.

[220] *Id.* at 1602.

investment in the creation of the first chip."[221] The SCPA sanctions what Professors Samuelson and Scotchmer refer to as "creative copying" – building upon existing works to create something new – known to the industry as reverse engineering. Reverse engineering is generally viewed as a "healthy way for second comers to get access to and discern the know-how embedded in an innovator's product."[222]

Post-SCPA, [briefly discuss what happened? … only a few cases. Could mean it thwarted piracy or that it is unimportant for a number of proffered reasons. Whatever the explanation for the dearth of cases, "the semiconductor chip industry is the only one with a codified reverse engineering provision."[223] TO BE COMPLETED POST-CONFERENCE]

Reverse engineering can be viewed as socially beneficial because "it erodes a first comer's market power and promotes follow-on innovation."[224] Of course, for that very reason, current stakeholders would strongly oppose a similar provision applied in the case of sound recordings.

B. *Compulsory Licensing and Liability-Based Rules for Music Copyright*

Property rights are often described as a bundle of rights. And the most foundational and essential stick in the bundle is the property owner's right to exclude.[225] But this concept does not fit neatly in the intellectual property rubric. The latter, a creature of legislative action, is a

[221] *Id.*

[222] *Id.* at 1649.

[223] *Id.* at 1606.

[224] *Id.* at 1660.

[225] Lempley & Weiser, *Should Property Rules or Liability Rules Govern Information?*, 85 TEXAS L. REV 782, 782 (2007).

privilege-based monopoly granted for limited times. The former is often discussed as having the potential last in perpetuity.

Although traditional property law remedies seek in most circumstances to enjoin behavior antithetical to a property owner's interests, intellectual property owners should theoretically receive remedies only substantial enough to offer protection while maintaining the delicate balance private interest and public good of encouraging further innovation.[226] But in recent years, courts have interpreted copyright law in ways more consistent with a property-rule (I can exclude anyone for any reason) than a liability-based rule (you can use as long as you pay). This shift is referred to as the "propertization" of intellectual property.[227] Essentially, the right to control the use and dissemination of information became forms of property.[228] From the perspective of a legal realist, words matter because they have the power through legal discourse to shape perceptions and can drive outcomes.[229]

A number of alternatives – [from the plausible to the anachronistic] – have been presented in the last two decades to remedy the sampling dilemma. For example, one author identifies certain unauthorized uses that constitute actionable "substantial" copying and suggests a coordination of the *de minimis* doctrine.[230] He makes a credible case for a compulsory sample-

[226] *Id.*

[227] *Theories supra* note 74 at 2 (noting that in the eighteenth century, lawyers and politicians were more apt to refer to copyright and patent as monopolies not property).

[228] *Id.* (noting that in the eighteenth century, lawyers and politicians were more likely to refer to patents and copyrights as 'monopolies' than they were to refer to them as forms of 'property.'" The discourse switched to "one centered on the notion that rights to control the use and dissemination of information are forms of 'property.'"). *Id*.

[229] *See* id. " Specifically, the use of the term 'property' to describe copyrights, patents, trademarks, etc. conveys the impression that they are fundamentally 'like' interests in land or tangible personal property -- and should be protected with the same generous panoply of remedies." *Id.*

[230] Reuven Ashtar, *Theft, Transformation, and the Need of the Immaterial: A Proposal for a Fair Use Digital Sampling Regime*, 19 ALB. L.J. SCI. & TECH. 261, 264 (2008).

licensing scheme complemented by a transformative fair use standard. A key benefit of a liability-based rule is that such frameworks "have the potential to significantly reduce transaction costs in copyright by reducing the extent to which permissions are needed from existing copyright owners."[231]

Professor Arewa offers a "freedom to copy" framework premised on liability rather than property rights that disaggregates compensation and control rights to allow all but unfair uses. [232] This scheme, argues Professor Arewa, best achieves the balance between individual rights and promoting new creativity, especially those based on existing works.[233]

[TO BE COMPLETED]

Another proposal suggests that compulsory licensing schemes help to offset the effects of overly restrictive intellectual property laws.[234] The article examines the pros, cons and alternatives for compulsory licensing and argues the benefits outweigh the associated concerns. Additionally, it outlines an insightful empirical analysis of implementing a compulsory licensing scheme by comparing the effect of compulsory fees to profit-maximizing price in pharmaceutical sales during the term of patent protection.[235]

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[231] _____at 554 (citing Chris Johnstone, *Underground Appeal: A Sample of the Chronic Questions in Copyright Law Pertaining to the Transformative Use of Digital Music in a Civil Society*, 77 S. CAL. L. REV. 397, 424 (2004)). – CITE CHECK

[232] Awera, *Freedom to Copy* at 552.

[233] Arewa, *Freedom to Copy* at 552.

[234] *Id.* (noting compulsory licensing schemes can "mitigate the economic side effects of intellectual-property systems".) *Id*.

[235] William Fisher Intellectual Property & Innovation Essay, in *Industrial Property, Innovation, and the Knowledge-based Economy, Beleidsstudies Technologie Economie,* Vol. 37 (2001)

The fact that so many commentators have suggested and indeed implored Congress to act in this regard, without any corresponding legislative action, suggests that although the issue is reaching a boiling point in legal discourse, the music industry and the courts, Congress has yet to begin even the nascent stages of reform. And to say Congress has been reluctant to sanction such legislation is, without question, an understatement.[236]

Congress must revisit this issue to clarify and reconcile the varied approaches to this critical topic and to ensure that it fashions a rule that protects copyright holders, preserves traditional defenses to copyright infringement and encourages innovative uses of technology to create new works from existing creative material.[237]

[236] *Id.* at 312

[237] *See* Section __ *infra*.

VI. Conclusion

The Constitution empowers Congress "*To promote the Progress of Science and useful Arts*, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries (emphasis added)."[238] It seems clear from over two hundred years of copyright jurisprudence and this constitutional directive that the intention of the founding fathers was to use the *means* of "exclusive rights" to achieve the *ends* of promoting "the progress of science and useful arts" and not, at least not primarily, to reward the labor of authors.[239]

Even at its best, then, copyright law is a tenuous relationship and delicate balance of rights that "assures authors the right to their original expression," but encourages others to build freely upon the ideas and information conveyed by a work.[240] If intellectual property law is to fulfill its utilitarian goal, laws should be narrowly tailored and "should extend no further than necessary to protect incentives to innovate."[241] If left unchecked, intellectual property laws may be stronger than necessary to achieve the stated goals thereby impeding innovation.[242]

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[238] ARTICLE I, SECTION 8, CL. 8. Interestingly, an earlier draft of this clause empowered Congress: "To secure to literary authors their copy rights for a limited time; To encourage, by proper premiums and provisions, the advancement of useful knowledge and discoveries; To grant patents for useful inventions; To secure to authors exclusive rights for a certain time; and To establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades, and manufactures." Fisher, *supra* note 2 (citing Edward C. Walterscheid, *To Promote The Progress Of Science And Useful Arts: The Background And Origin of The Intellectual Property Clause Of The United States Constitution*, JOURNAL OF INTELLECTUAL PROPERTY LAW 2, 44-45 (1994). Walterscheid opines this language was not passed upon for ideological reasons but because it was too costly to implement. *Id.*

[239] Feist Publ'n v. Rural Tel. Serv., 499 U.S. 340, 349 (1991). *See also* Nash v. CBS, Inc., 899 F.2d 1537, 1540 (7th Cir. 1990). (noting that "Copyright law does not protect hard work (divorced from expression), and hard work is not an essential ingredient of copyrightable expression….").

[240] Harper & Row, Pub. Inc. v. Nation Enters., 471 U.S. 539, 556-57 (1985).

[241] Samuelson & Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE.L.J. 1575, 1581 (2002).

[242] *Id*.

In the case of music, the actual business practices of the music industry suggest that the underlying assumptions about intellectual property rights spurring innovation are not in fact being born out as rights.[243] In particular, the right to exclude seems to be used more as weapons than tools of innovation.[244]

This, coupled with the rapid acceleration of technological advancement that allows for even more innovative and creative uses of existing copyrighted works inconceivable both to the early and recent drafters of copyright legislation, is grounds for a compelling argument that copyright law is not only inadequate to honor its goal to promote innovation and creativity but in fact thwarts the very advancement and valuable social benefits of robust creativity and innovation born out of a creative genre like hip hop. Accordingly, Congress should act swiftly to provide clear guidance on how courts and the industry should address concerns raised by sampling and reform music copyright to require all courts to apply traditional analyses of substantial similarity and *de minimis* use.[245]

[TO BE COMPLETED]

[243] *See* Arewa, *Strategic Behaviors and Competition* at ___ (unpublished paper, cited with the permission of the author).

[244] *See* Arewa, *Strategic Behaviors and Competition* at ___ (unpublished paper, cited with the permission of the author).

[245] *See generally* 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 (2006) (arguing that because current copyright law and principles cannot fairly and effectively resolve the complications introduced by the technology of digital sampling, Congress should revise current copyright statutes to address specifically digital sampling and provide clear guidance for the music industry and the courts).

(Oh, oh, oh) Hahaha (Yeah). [Chorus: Pop Smoke & Lil Tjay] Shorty a lil' baddie (She a lil' baddie) Shorty my lil' boo thing (Boo thing) And shorty got the fatty Shorty be catching mood swings Every time I fuck without a rubber I nutted on the covers And I kept it undercover 'Cause I don't kiss and tell (Kiss and tell). [Verse 1: Pop Smoke & Lil Tjay] Every time I fuck, she call me daddy My lil' mama nasty I see the pussy through the panties (Whatever you want) She taste like candy She a queen, like Nefertiti Uh oh, my lil' mama sittin' pretty An Specifically, cuttinâ€™ and scratchinâ€™, digital sampling, looping and (most recently) mashing are all methods of creating music and are all integral parts of the hip hop music aesthetic. Collectively these creative processes are the hallmark of the type of innovation and creativity born out of the hip hop music tradition. And hip hop artists and producers from Chuck D, Queen Latifah, A Tribe Called Quest and M.C. Lyte to The RZA, Missy Elliott, Dangermouse and Jay Z have employed the sampler more as a musical instrument or palette than a tool of expediency or theft. But when done without the per WE areexplorenew document - sampling, looping,and mashing â€¦ oh my!: user manual! documentz-q3.rvine-int.com helps tokeep: Lingerâ€“ searchingrepayment forspecificproductinstructions isat the ready.Â On thislinkyou can read and download sampling, looping,and mashing â€¦ oh my! pdf! AppliedAssessment, environmentalfiguresplate,inaugurationtutorTerreal offers abroadTechnicalDocumentation Library. Researchourintricatecertificatelibraryowingreferencenotes,hamperdiagrams,detailssheets,plotterinformationand more.