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# **MUSIC SAMPLING AND COPYRIGHT LAW**

by

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## INTRODUCTION

*Remember when the music came from wooden boxes strung with silver wire?*  
-Harry Chapin<sup>1</sup>

Copyright law was established in the Constitution to “promote science and the useful arts.” In the age of digital formats for music, copyright law makes it illegal for “bootleggers” to commit audio piracy by copying works of music without paying the artist. However, the advent of digital sampling, which allows a musical artist to appropriate sound from a previously recorded work and incorporate it into a new work, has challenged the existing framework of copyright law. The search for balance between the need to protect artists from audio piracy and the goal of fostering the ability of new artists to draw on previous media has provoked a good deal of legal controversy within the music business. Laws and court decisions have not established what balance between the protection of an original artist and the protection of new appropriative artists would best foster overall musical creativity in the United States.

Digital sampling technology allows an artist to copy a portion of a recorded sound or series of sounds and incorporate the fragment into a new work.<sup>2</sup> While only 8 of the top 100 albums contained sampling 10 years ago, almost a third of the current Billboard

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<sup>1</sup> Harry Chapin, “Remember When the Music (Reprise),” *The Gold Medal Collection* (Electra/Asylum, 1988).

<sup>2</sup> “The process of digital recording changes sound waves into digital information. Sound travels through air in waves. Therefore, a sound must be sent to a transducer, such as a microphone, which converts the sound wave into voltage variations. After the sound waves are converted into voltage variations, the signal is sent to an analog-to-digital converter. The converter changes the analog signal into digital information by first measuring the analog voltage at regular intervals. These regular intervals, known as bits, are then assigned a binary number representing the intensity of the signal at that time. This is the process known as sampling. A computer then stores or processes the sample information. At this point, the sample can be altered by changing or rearranging binary values. When it is time to hear the sample, the process is reversed. A digital-to-analog converter changes the digital information into a voltage signal. This signal passes through a transducer such as an amplifier that converts the voltage variations into sound waves that the ear can hear.” from Paul White *Creative Recording Effects and Processors* (1989) and Craig Anderton, “Digital Audio Basics” in *Synthesizers and Computers* (Milwaukee, WI: H. Leonard Publishing Company, 1985) and Jim Aikin, “Digital Synthesis: Introducing the Technology of Tomorrow,” in *Synthesizers and Computers*.

100 albums use sampling as an artistic tool.<sup>3</sup> Whereas many rock and pop artists have used the technology to save the time and cost needed to hire a live band, hip-hop, dance and experimental artists have chosen the sampler as their primary instrument. For example, Tone Loc's rap hit "Wild Thing" is based on the guitar riff from Van Halen's "Jamie's Crying," and the Beastie Boys' 1989 *Paul's Boutique* is a rap album with beats composed of hundreds of samples including an Isley Brothers guitar solo, the reggae standard "Stop That Train," The Beatles' guitar solo from "The End", Johnny Cash's "Folsom Prison Blues," and radio advertisements.<sup>4</sup> As rap producer Daddy-O says, sampling "is something you put together out of bits and pieces other people have done. Once you have the complete product, you have a completely different picture."<sup>5</sup>

However, because a sample infringes on the underlying composition and sound recording copyrights of the original song, the use of sampling in music involves either licensing the sample from the copyright holders or risking legal action. Interpolation, the process of including part of a song without sampling it, has often resulted in the copyright holder for the original co-owning the new song.<sup>6</sup> White Town's hit "Your Woman" included an interpolation of a 1930s song by Al Bowly, and the three co-writers of the original now receive 50% of the publishing income from the new song.<sup>7</sup> In order to prevent claims from the sampled artists, new artists can use sample CDs with pre-cleared samples on them, make their own samples, or use a song whose copyright has expired, as

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<sup>3</sup> This is due to the increased popularity of rap music, which uses sampling heavily. The charts can be seen at <http://www.billboard.com>.

<sup>4</sup> Wayne Robins, "'Boutique' and the Beasties: Audio Delight," *Newsday*, August 20, 1989.

<sup>5</sup> David Zimmerman, "Rap's crazy quilt of 'sampled' hits," *USA Today*, July 31, 1989.

<sup>6</sup> "The Pirates of Pop," <http://www.futurenet.com/samplenet/tutorials/Pirates/Pirates.html>

<sup>7</sup> "The Pirates of Pop," <http://www.futurenet.com/samplenet/tutorials/Pirates/Pirates.html>.

when Coolio incorporated Pachelbel's Canon into a rap song. For the most part, though, sampling requires paying the copyright holders to re-use the original song.

Unfortunately, the license system that has developed reflects the economic power of the music industry rather than goals of the Constitution or the desires of artists. Only songs that are successful, like the Verve's "Bitter Sweet Symphony," are responded to by lawsuits, prompting the phrase "where there's a hit there's a writ."<sup>8</sup> In some cases, suits develop when a song that was aimed at a limited market suddenly becomes very popular, as when DNA was forced to accept just £4,000 as payment for a remix of Suzanne Vega's "Tom's Diner" that went to the top of the charts in 11 countries. For the most part, sampling artists are at the mercy of large record labels and music publishers when requesting licenses for samples. As drum 'n bass artist Mocean reports, "I tried for nine months to clear the Mahalia Jackson sample. When I finally got a call back, they're like, 'We want six cents a record and \$10,000 in advance.' I said, 'You know, I'm going to sell, like, 2,500 records. You're crazy! My album budget was \$40!'"<sup>9</sup> Because the current system has developed in response to economic pressure from large companies, and because sampling will become an increasingly important aspect of new music, the sample licensing system could benefit from evaluation and possibly change from the judiciary and legislature.

Although the composition and performance of any song is by definition creative, fostering the arts in the United States involves allowing artists to break new ground stylistically, thereby promoting progressive musical evolution. A musical piece does not need to rely on new technology or bizarre styles to be considered creative, but the

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<sup>8</sup> "The Pirates of Pop," <http://www.futurenet.com/samplenet/tutorials/Pirates/Pirates.html>.

<sup>9</sup> Andrew Beaujon, "It's not the beat, it's the Mocean," *CMJ New Music Monthly*, April 1999, p. 25.

American public is better served by new and interesting forms of expression rather than imitation of previous work. Digital sampling technology enhances the ability of artists to break new ground by using samples as cultural, musical, and historical references.

Although distinctions of relative creativity are subjective, for the purposes of this thesis I will assume that copyright law should foster new musical melodies, songs, techniques and styles.

In this thesis, I will examine whether the practice of licensing for samples that is the industry norm is the optimal policy for maximizing creativity. Many complain that the current system of copyright law is based on the ideal of protecting the economic interests of large corporations rather than fostering artistic creativity, while others maintain that protecting the economic interests of creators is essential to maintaining incentives to artists. I will analyze sampling in terms of the benefit to society that intellectual property laws are ideally designed to grant.

First, I will briefly examine the history of musical appropriation in an effort to demonstrate that sampling technology is a stage in the logical progression of musical evolution and should be evaluated as such. Classical music, American folk music, and classic rock have all featured the incorporation of previous melodies, lyrics and styles, and the visual arts have adopted appropriation as an essential tool for cultural critique. I will then chart the legal history of sampling in the United States in order to demonstrate that the laws and courts have not directly addressed nor adequately clarified the issue of music sampling. I will demonstrate the inefficiencies of the current legal framework and the influence of economic resources over disputes about sampling through several case studies of sampling disputes. Since policy proposals for copyright law must account for

the impact of information technology on the music industry, I will discuss the new media's effect on copyright law for sampling. Finally, I will examine possible proposed changes to the current system of copyright law and explain why a compulsory licensing system would best foster artistic creativity while remaining practical for the current music business.

## THE HISTORY OF MUSICAL APPROPRIATION

*I'll bite your mother#\$%ing style just to make it fresher.*

*-Eminem<sup>10</sup>*

*Same as it ever was.*

*-The Talking Heads<sup>11</sup>*

One reason that copyright law is the subject of such contention is that it does not accurately reflect the contemporary tradition of musical creation. In fact, it never has. Most music is as much an amalgamation of previous music as the creation of a new art form. Appropriation from previous musical works actually dates back as far as music itself. The musical practices of parody, mimicry and quotation can be found in classical pieces throughout time.<sup>12</sup> For example, Bach and Handel borrowed from other composers in their 18th Century compositions, and Stravinski referenced older styles and pieces in his neoclassical stage.<sup>13</sup> After WWII, neoclassicism became common, as did the incorporation of other music into musical compositions. Other classical composers have based compositions on folk music, such as Bela Bartok's works based on Hungarian folk music and Dvorak's 1893 Symphony No. 9 *From the New World* which quotes *Swing Low Sweet Chariot*.<sup>14</sup>

Building upon past works is the essence of songwriting, but current copyright law views songwriting as the genesis of a new song with no ties to previous lyrics, melodies,

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<sup>10</sup> Eminem, "Just Don't Give A F#\$%," *The Slim Shady LP* (Aftermath, 1999).

<sup>11</sup> The Talking Heads, "Once In A Lifetime," *Remain in the Light* (Sire, 1980).

<sup>12</sup> Aaron Keyt, "Comment, An Improved Framework for Music Plagiarism Litigation," *76 California Law Review* 421, 423 (1988).

<sup>13</sup> Vivaldi, Reinken and others also borrowed heavily during this period. Paul H. Lang, *George Frideric Handel*, 1966 p. 561 from S. Hampel, "Note: Are Samplers Getting a Bum Rap?: Copyright Infringement of Technological Creativity?" *1992 University of Illinois Law Review* 559 (1992).

<sup>14</sup> E. Schwartz and B. Childs, "Introduction to Bela Bartok: The Influence of Peasant Music on Modern Music," in *Contemporary Composers on Contemporary Music* ed. E. Schwartz and B. Childs, from S.

and types of music. Copyright law cannot restrict sampling on a theoretical basis without also restricting all music, since contemporary music itself is almost entirely stylistic, melodic and lyrical appropriation. In a certain sense, no music is completely original, and therefore claims of absolute authenticity are questionable. An understanding of the musical tradition of appropriation is essential to an evaluative judgment of the optimal copyright law.

### **Folk Music, Classic Rock and Jazz**

American folk music developed without the commodification of musical creation that has fueled the copyright law debate. Songwriters would take a traditional melody, chord pattern or even set of lyrics and alter them slightly according to personal desire. Certain sets of lyrics appear in many folk songs, much like lines such as “on and on till the break of dawn” and “put your hands in the air like you just don’t care” are ubiquitous in hip-hop. Folk, bluegrass, blues, country and western all feature a limited number of lyrical topics and a finite set of chord progressions and melodies. Unlike modern-day sampling, which necessitates the use of the actual sound recorded by the “original” artist, this folk tradition merely involved the appropriation of musical themes and songwriting trends. For example, versions of the folk song “In The Pines,” alternatively known as “Where Did You Sleep Last Night,” have been recorded in 160 different variations by such varied artists as Leadbelly, Joan Baez, Bill Monroe, jazz saxophonist Clifford Jordan, Dolly Parton and most recently, Seattle grunge-rockers Nirvana. The song, which dates back to the 1870s, has been passed on and altered throughout time so that the same

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Hampel, “Note: Are Samplers Getting a Bum Rap?: Copyright Infringement of Technological Creativity?” 1992 *University of Illinois Law Review* 559 (1992).

dark emotion remains but references to pines, trains, infidelity and decapitation differ depending on the version.<sup>15</sup>

This evolution shows that the songwriting tradition of American folk music is based on fluidity and adaptation rather than a notion of absolute authorship.

Much like lyrics in folk music are appropriated and altered to make new songs, rock and jazz songs use standard musical patterns but add “original” melodies and solos. For jazz music, melodies can be copyrighted but chord progressions cannot be. Thus, the melody to a jazz standard such as Gershwin’s “I Got Rhythm” is under copyright, but the I vii ii V chord progression has been used by countless jazz musician without a license.<sup>16</sup> The same appropriation of chord progressions is common in rock music, which almost always uses some variation of the I IV V chord progression. For example, the beginning of Tom Petty’s hit “Mary Jane’s Last Dance” is strikingly similar to Crosby, Stills, Nash and Young’s 1970 song “Almost Cut My Hair.”<sup>17</sup>

*“Almost Cut My Hair”*: Am G D D

*“Mary Jane’s Last Dance”*: Am G D G

These phenomena are not rare in contemporary music; they are the norm. These transgressions are legal, as they are considered to be fundamental to the act of songwriting, but in fact even lyrics and melodies that do fall under copyright are themselves products of musical evolution and tradition rather than drastic innovation. Since so much of music is a composite of previous music, distinctions between chord

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<sup>15</sup> See appendix A for lyrics.

<sup>16</sup> Max Abrams, professional saxophonist, telephone interview, March 30, 1999.

<sup>17</sup> Crosby, Stills, Nash, and Young, “Almost Cut My Hair,” *Deja Vu* (Atlantic: 1970); Tom Petty and the Heartbreakers, “Mary Jane’s Last Dance,” *Greatest Hits* (MCA: 1993).

progressions that cannot be copyrighted and melodies that are subject to intellectual property protection are relatively arbitrary.<sup>18</sup>

Not only has 20th Century music involved the appropriation of lyrics and music, but it also has featured the borrowing of style. The British Invasion rock pioneered by the Beatles, the Rolling Stones, The Who, and the Animals was based almost entirely on American rock and blues written and performed by African-Americans such as Howling Wolf, Muddy Waters, Little Richard and Chuck Berry. Indeed, the early Beatles were less creative masters than an American rock 'n roll cover band. The Second Wave of the British Invasion, which included bands like Led Zeppelin and Cream, was heavily indebted to American bluesmen, as is shown by Led Zeppelin's cover of Robert Johnson's "Traveling Riverside Blues" or Cream's rendition of Willie Dixon's "Spoonful." Although obvious cover songs were attributed to the original artists, the style itself that was used by such British bands was not attributed to its source. Like Elvis before them, the British bands put a new finish on a traditionally African-American music style. In the same way, contemporary rock bands adopt the style of these British bands, as can be seen in the music of the Rolling Stones-esque Black Crowes or the Led Zeppelin-influenced Lenny Kravitz. Even Radiohead's 1997 rock album *OK Computer*, which won the adoration of critics for its quality and originality, contains obvious stylistic references to Pink Floyd and the Beatles. These many examples simply show that the current system of copyright misrepresents the creation of music, considering it a purely original act rather than an event in a cultural tradition.

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<sup>18</sup> U2 singing "it's alright" is no different from the Beatles singing "It's Alright" or the Velvet Underground singing "It Was Alright" or Bob Marley singing "It's Gonna Be Alright" or Free singing "Alright Now," but because the phrase "alright" is ubiquitous in rock music, no copyright or licensing applies. Yet, hip-hop group Naughty By Nature's sample of Bob Marley singing "It's Gonna Be Alright" did require a license.

### Foundsound or Collage Music

The use of externally-produced sound to augment or even create music has its place in several vast cultural movements: it is artistic tradition, not merely stealing someone else's work for personal gain. The art of collage, developed during the cubist movement of 1906-1925, involved combining fragments of images to form a single image. The Dada movement (1916-1924) introduced the photomontage, and Max Ernst created a collage predominantly out of drawings of machinery.<sup>19</sup> The appropriation of pop culture to make an artistic statement fueled the visual art of Warhol, Rauschenberg, Jasper Johns, Claes Oldenburg, and Roy Lichtenstein. Warhol would use visions of daily pop life such as Campbell's soup cans or Marilyn Monroe's face as the palette for his art. The use of pre-existing material is hardly rare in the arts: T.S. Eliot's *The Wasteland* is an amalgamation of cultural and literary references so dense that it requires a series of explanatory notes. Appropriation can be found in the sculpture of Jeff Koons, the paintings of Kenny Scharf, the photography of John Baldessari, the video works of Dana Birnbaum, and the films of Jean Luc Godard, to name just a few.

The Italian Futurist movement in the early 20th Century created sound poetry that was akin to the art of the Dada movement, rejecting the reification of art. These Futurists sought to attune and regulate the noises of everyday life, "the rumble of thunder, the roar of a waterfall, the...white breathing of a nocturnal city, the coming and going of pistons," into an "Art of Noise."<sup>20</sup> After World War II, the French *musique concrete* was made by cutting phonographic discs and later, analog tape. Experimental composers like John

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<sup>19</sup> H.W. Janson and Joseph Kerman, *A History of Art and Music*, p. 195-196. from S. Hampel.

<sup>20</sup> Luigi Russolo, "The Art of Noises," <http://www.unknown.nu/futurism/noises.html>.

Cage and Karlheinz Stockhausen created this music more as an artistic statement than as a money-making product, a trend that continues to this day. In 1961, James Tenney made *Collage 1* by cutting Elvis' rendition of *Blue Suede Shoes* with razor blades and in 1968 the Beatles, bearing the influence of Yoko Ono, created the sound collage "Revolution #9."<sup>21</sup> These collages challenged the awareness of the listener and often made a political point, as when Stockhausen created a satire on nationalism with his 1967 collage "Hymnen."<sup>22</sup> Technological innovation has allowed foundsound artists such as Negativland and John Oswald to splice sounds from the media and create new forms of expression. Many foundsound artists still subscribe to the surrealist/dadaist concept of detournement by appropriating corporate-controlled media transmissions and reorganizing them into self-referential art.<sup>23</sup>

The theoretical basis for contemporary appropriation of music derives from the intellectual movement of postmodernism that developed in the last quarter of this century. The use of audio collage to rebound the bombardment of signs constituted by everyday life reflects what Fredric Jameson calls "the postmodern condition."<sup>24</sup> Postmodern theorist Walter Benjamin argues that reproduction removes a work of art from its aura, or domain of tradition, thus challenging the authority of the original.<sup>25</sup> Artists can take a lyric or a series of notes from a song and create an equally authoritative new song using that segment. Jacques Derrida explains that writing must exist in the

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<sup>21</sup> Alan Korn, "Renaming That Tune: Audio Collage, Parody, and Fair Use," *Fair Use: The Story of the Letter U and the Numeral 2* (Concord, CA: Seeland, 1995), p. 222-223.

<sup>22</sup> Ian MacDonald, "Revolution 9," *Revolution in the Head*, reprinted on the detritus website at <http://detritus.net/rhizome.html#recent>.

<sup>23</sup> Crosley Bendix, "Crosley Bendix on U.S. Copyright," *Negativland Website* <http://www.negativland.com/crosley.html>.

<sup>24</sup> Frederic Jameson, "Postmodernism and Consumer Society," *The Anti-Aesthetic: Essays on Postmodern Culture* ed. Hal Foster (Seattle: Bay Press, 1983), p. 114.

absence of the receiver, so it must be iterable.<sup>26</sup> This means that the context of a piece of music can determine a meaning vastly different from the one intended by the original author. Roland Barthes describes the author as “dead” because whatever he or she has written becomes an independent drifting entity when committed to paper or phonograph.<sup>27</sup> Thus, the understanding of a piece of music and its later use takes place outside the realm of influence of the author. All this can be seen in British rock band Spiritualized’s 1997 song “Cop Shoot Cop,” which uses a line from John Prine’s 1971 song “Sam Stone” and then alters it to make up the lyrics of the rest of the song.<sup>28</sup> The meaning from a song about a Vietnam veteran who has returned home has been altered to fit an apocalyptic vision rebirth and redemption through substance abuse. Benjamin notes that the removal of authority from a work of art challenges the authority of the authentic that is associated with fascism, so musical appropriation can bring about a social change by challenging the culture (system of meaning) that maintains the status quo. In sum, these theorists maintain that since recorded or written music is in a fixed form, it can be appropriated by artists other than the “original author” and infused with new meaning.

Artists have always drawn from the world around them, as when blues lyrics mention towns in the Delta or Pop Art reflects the images of mass consumerism, and contemporary found sound artists are doing the same thing: they are using the pervasive media environment of the postmodern age as the material for collage.<sup>29</sup> These obscure

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<sup>25</sup> Walter Benjamin, “The Work of Art in the Age of Mechanical Reproduction,” *Illuminations* trans. Harry Zohn (New York: Schocken, 1969), p. 220.

<sup>26</sup> Jacques Derrida, “Signature Event Context,” *Limited Inc.* trans. Samuel Welc and Jeffrey Rehlman (Evanston: Northwestern University Press, 1998) p. 8.

<sup>27</sup> Roland Barthes, “The Death of the Author,” *The Rustle of Language* trans. Richard Howard (New York: Hill and Wang, 1986).

<sup>28</sup> See Appendix B for the lyrics.

<sup>29</sup> The Negativland camp writes, *One of the effects of cutting up and reusing media artifacts is making us more aware of the mutable illusions (masquerading as concrete reality) of our media environment by*

experimental sound artists use pieces of other works to create interesting and often moving sound collages. The sampling of recognizable sounds allows these artists to make the collage even more powerful, as when Negativland comments on the ubiquity of soda corporations in the media by using Coke and Pepsi commercials in their collage album *Dispepsi*.<sup>30</sup> This practice is the culmination of a decades-old cultural evolution, and such forms of art should be evaluated as *The Wasteland* would be rather than as low-brow hijinx.

### **Hip-Hop**

*Mail from the courts and jail  
Claim I stole the beats that I rail...  
-Public Enemy<sup>31</sup>*

The technique of sampling has been most popular and controversial in the musical style of rap, or hip-hop. In the late 1970s, a Jamaican-born DJ in the Bronx named Kool DJ Herc began playing the “break” in a rock, soul, funk or even Latin song over and over by switching between phonographs while MCs would “rap” over the beat he created. At parties, dance clubs and parks, rap was performed by DJs spinning records and MCs reciting lyrics composed of street slang. From rap’s inception to the present day, many rap beats contain parts of recognizable songs, ranging from Run DMC’s 1986 hit “Walk This Way,” which borrows a guitar riff, drum beat and chorus from rock band Aerosmith,

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*actively demonstrating that they are indeed illusions. Media collage (or ‘mediage’ as I call it) and the people who do it (‘mediagicians’) cause ‘ripples in the pond,’ as it were, by tearing apart the intricately woven web of subliminal impressions and redefining them in the real of the conscious mind While this is fun and even enlightening for the listener and creator, the corporate media higher-ups who actually OWN the material tend not to like artists screwing around with their carefully and expensively wrought illusions.* Phineas Narco, “Using Found Sound: An Over the Edge Primer,”

<http://www.carhart.com/%7Ephineas/ote-listings/ufs.htm>.

<sup>30</sup> e-mail from detritus mailing list; Negativland, *Dispepsi* (Seeland, 1997).

to Jay-Z's 1998 song "Hard Knock Life," whose chorus is from the musical *Annie*. As music historian Dick Hebdidge writes.

*By doing this they were breaking the law of copyright. But the cut'n'mix attitude was that no one owns a rhythm or a sound. You just borrow it, use it and give it back to the people in a slightly different form. To use the language of Jamaican reggae and dub, you just version it.*<sup>32</sup>

Whereas originally Grand Master Flash had made the beat to his seminal "Adventures of Grandmaster Flash and The Furious Five on the Wheels of Steel" by playing several different record players at a time and cueing or scratching to create a sound collage, the advent of affordable digital samplers in the late 80s allowed DJs to loop pieces of songs and blend them together.<sup>33</sup> Inexpensive drum machines often supplied the basic beat over which such samples and rap lyrics would be melded. David Sanjek, Director of the Broadcast Music Incorporated archives, divides samples into four varieties: quotations that are familiar to the listener, such as the ubiquitous beat from James Brown's "Funky Drummer," the densely-mixed combination of the familiar and the arcane popularized by Public Enemy, the montage style used by Grandmaster Flash that melds a "quilt" from a myriad of sources, and mixes or alternate versions of songs that can often differ greatly from the original.<sup>34</sup>

Whereas rock artists such as Peter Gabriel and Depeche Mode use samples of violins or falling rain in their songs, rap artists almost always use samples culled from previously recorded songs, drawing from the cultural grab-bag of popular music history. Claims made by the original artists sampled in rap songs began after the Beastie Boys

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<sup>31</sup> Public Enemy, "Can We Get A Witness," *It Takes a Nation of Millions to Hold Us Back* (Def Jam/Columbia Records, 1998).

<sup>32</sup> Dick Hebdidge, *Cut 'N' Mix: Culture, Identity and Caribbean Music* (New York: Routledge, 1987) p. 141.

<sup>33</sup> David Toop, *Rap Attack 2* (New York, Serpent's Tail, 1991), p. 191.

heavily sampled Led Zeppelin on the hugely successful *Licensed to Ill*, and De La Soul was sued by the Turtles for \$1.1 million for using a loop from the 1969 song “You Showed Me.”<sup>35</sup> The Beastie Boys were sued for their 1987 use of the words “Yo Leroy” from Jimmy Castor’s “The Return of Leroy (Part One)”.<sup>36</sup> Although De La Soul and their label Tommy Boy settled out of court with the Turtles for a sum rumored to be in ‘the low five figures,’ rap labels began mentioning the original writers of the samples used on album sleeves and eventually paying the original artists for the permission to use such samples.

Rap music, or hip-hop, as it now known, carries with it a large cultural significance: it is not only the voice of urban African-Americans and the only segment of the record industry that is not in decline sales-wise, but also embodies the postmodern notions of collage and pastiche. For example, Ghostface Killah’s album *Ironman* splices quotes from movies such as *Shaft* and *The Usual Suspects* with hip-hop lyrics, samples from such artists as Sam Cooke, and studio-crafted music. Most music critics agree that hip-hop is the genre of popular music that has produced the most innovation and creativity, and its influence on other forms of music (metal, R&B, ska) is unmistakable. Furthermore, hip-hop is part of a long tradition of stylistic evolution that began with American R&B and native Caribbean music and includes ska, rocksteady, reggae, dub, and dancehall.<sup>37</sup> Rap is African-American folk music and depends on appropriation and building on previous music just like traditional American folk and blues. Questions of copyright for hip-hop developed not when the form originated, but only when rap sales

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<sup>34</sup> D. Sanjek, “‘Don’t Have to DJ No More’: Sampling and the ‘Autonomous’ Creator,” *Cardozo Arts and Entertainment Law Journal* Volume 10, Number 2 (1992), at 612-615.

<sup>35</sup> David Toop, p. 191-193.

<sup>36</sup> David Zimmerman, “Rap’s Crazy Quilt of ‘Sampled’ Hits,” *USA Today*, July 31, 1989.

had become strong enough to make legal action profitable. Evaluating the optimal level of copyright law to promote creativity necessitates the realization of the artistic and cultural merit of hip-hop that is just as legitimate as Mozart or James Brown.

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<sup>37</sup> Hebdidge.

## HISTORY OF MUSIC COPYRIGHT IN THE UNITED STATES

*If you know your history, then you would know where you're coming from.*  
-Bob Marley<sup>38</sup>

The debate over copyright law for the sampling of music is a conflict in interpretation of the Constitution, legislation, and court decisions. A brief analysis of the legislation and court decisions regarding music sampling, as well as an examination of the current legal practice for music sampling, is essential to fully understanding the issue. The legal history of music copyright shows that the issue of music sampling has not been decisively limited by either statutes or court decisions, so policymakers have free reign to enact whatever policy will in fact promote creativity.<sup>39</sup>

### U.S. Copyright Legislation for Music

U.S. copyright law has its origin in Article I Section 8 of the Constitution:

*The Congress shall have the power...to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their writings and discoveries.*<sup>40</sup>

The Supreme Court has added that “the economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public

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<sup>38</sup> Bob Marley, “Buffalo Soldier,” *Legend* (TuffGong: 1984).

<sup>39</sup> The arguments used by all sides in debates over intellectual property refer to their position in idealistic rather than pecuniary terms, so regardless of the actual motivations behind such legislation I will evaluate all arguments from a theoretical rather than economic basis. Even if intellectual property laws were written to protect the earnings of large corporations, I will maintain focus on the original and explicit goal of the law: to promote the useful arts. I interpret the promotion of these arts, in this case, to mean the promotion of artistic creativity rather than the economic well-being of the artists themselves. Of course, the economic viability of the arts, in this case music, factors in even at the theoretical level, since if artists cannot survive on an artist’s wage then the useful arts cannot be promoted.

<sup>40</sup> U.S. Constitution, Article I Section 8.

welfare through the talents of authors and inventors” and that “rewarding the creators of artistic works is therefore only a ‘secondary consideration.’”<sup>41</sup> Still, rewarding the artists is made possible by the protection of intellectual property established in the Constitution.

The 1910 U.S. Copyright Law was a manifestation of Congress’ power to promote the useful arts by providing authors with exclusive rights. Although it did not sufficiently anticipate technological inventions like the jukebox, this early law did allow the copyright owner of a nondramatic musical composition to demand fees from others who wish to perform it publicly.<sup>42</sup> The Copyright Act of 1976, a rewriting of the original Act, was written to promote “the broad public availability of literature, music, and the other arts.”<sup>43</sup> The 1976 Act defined two copyrightable elements of any musical recording: the musical composition (the written lyrics and musical arrangement), and the sound recording (the sounds on the cassette, CD, or album). The Copyright Act of 1976 gave holders of musical composition copyrights the exclusive right to reproduce the music, make a derivative work based on the copyrighted music, distribute the work publicly, perform the music publicly and display the work publicly.<sup>44</sup> Holders of the sound recording copyright are given only the first three of these rights. A derivative work is one in which the fixed sounds are “rearranged, remixed, or otherwise altered in sequence or quality.”<sup>45</sup> Section 115 of the Copyright Act requires holders of composition copyrights to allow other artists to “cover” the song at a set rate of royalty payments as long as the

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<sup>41</sup> *Mazer v. Stein* 347 U.S. 201, 219 (1954).

<sup>42</sup> William H. O’Dowd, “Note: The Need For a Public Performance Right in Sound Recordings,” 31 *Harvard Journal on Legislation* 249.

<sup>43</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). from S. Hampel, “Note: Are Samplers Getting a Bum Rap?: Copyright Infringement of Technological Creativity?” 1992 *University of Illinois Law Review* 559 (1992).

<sup>44</sup> Tit. 17 U.S.C. 106 (1988) in David Richards, “The Copyright Law and the Musician: A Guide to the 1976 Copyright Act,” [gopher://wiretap.spies.com/00/Library/Article/Rights/copyrigh.mus](http://gopher://wiretap.spies.com/00/Library/Article/Rights/copyrigh.mus).

<sup>45</sup> Tit. 17 U.S.C. Sec. 114(b) (1988).

second artist does not “change the basic melody or fundamental character of the work.”<sup>46</sup> For example, the Fugees did not need the permission of the holder of the songwriting copyright for Roberta Flack’s “Killing Me Softly,” but they did have to pay royalties according to a rate set by the Copyright Royalty Tribunal.

The 1971 Sound Recording Amendment (later incorporated into the 1976 Act) was designed to prevent bootlegging by record and tape pirates.<sup>47</sup> The 1976 Act provided copyright owners with the opportunity to impound the violating works, obtain statutory damages and legal costs, and inflict criminal penalties, so copyright holders have much to gain by seeking legal recourse in a copyright dispute.<sup>48</sup> The development of sampling technology and the use of a recorded sound in a new work was not widely available in 1976. Although the question of whether bootlegging is a detriment to the promotion of musical creativity is fairly clear, appropriation through sampling has a less determinate influence on the music community.

In 1989, the U.S. joined the Berne Convention for the Protection of Literary and Artistic Works, which allowed works to be legally copyrighted without explicit notice on each copy.<sup>49</sup> In 1998, the WIPO Treaty Implementation Act extended copyright law to the digital domain, but maintained the same definition of Fair Use. This law is more relevant to copyright law for new media, which will be discussed later in this thesis.

### Recent Court Decisions

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<sup>46</sup> Tit. 17 U.S.C. 115 (a)(2) (1998).

<sup>47</sup> Alan Korn, “Renaming That Tune: Audio Collage, Parody, and Fair Use,” *Fair Use: The Story of the Letter U and the Numeral 2* (Concord, CA: Seeland, 1995), p. 226.

<sup>48</sup> *Ibid.*, p. 226.

<sup>49</sup> Richards.

Despite the obvious role of the federal legislature in determining how to promote the arts, most of the legal battles involving music appropriation have taken place in the courts rather than on the floor of Congress. The 1976 Act was written before sampling technology was widespread, and therefore current practice regarding copyright is based more on cases such as *Campbell v. Acuff-Rose*. Moreover, many of the key cases in sampling litigation have been settled out of court, thus not constituting rules of law, so the applicability of copyright law to sampling is under constant dispute.

In *United States v. Taxe*, the court ruled that re-recording an entire song while changing some frequencies and tones violates copyright.<sup>50</sup> This decision did not deal with the fragmentary appropriation of a song, and did not answer whether changing the original song into an unrecognizable version would constitute infringement.<sup>51</sup> However, the court did find that infringement occurs even if the re-recorder changes the original music as long as the original work can be recognized in the final performance.<sup>52</sup> The implication from *Taxe* is that any act of sampling is automatically infringement.

In 1987, The Ninth Circuit court ruled in *Baxter v. MCA* that “[to] establish a successful claim for copyright infringement, the plaintiff must prove (1) ownership of the copyright, and (2) ‘copying’ of protectable expression by the defendant.”<sup>53</sup> The first stipulation is elementary, and the second can be established by proving the defendant had access to the original work and that there is ‘substantial similarity’ between the two works. *Baxter* established that even a small sample, such as a James Brown yelp, could be considered substantially similar if the small sound segment is *qualitatively*

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<sup>50</sup> *United States v. Taxe*, 380 F. Supp. 1010 (C.D. Ca. 1974) *aff’d in part and vacated in part*, 540 F.2d 961 (9th Cir. 1976) *cert. denied*, 429 U.S. 1040 (1977).

<sup>51</sup> S. Hampel.

<sup>52</sup> D. Samjek, p. 620.

*important*.<sup>54</sup> Still, no court has found against a *de minimis* defense claiming that a small portion of sound does not infringe on copyright.

In 1991, the United States District Court for the Southern District of New York decided in *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.* that rapper Biz Markie had violated the copyright of Raymond “Gilbert” O’Sullivan’s “Alone Again (Naturally),” which Markie had sampled in his song “Alone Again” on his album *I Need A Haircut*.<sup>55</sup> Markie had looped ten seconds of the original song to form the background of a rap song and had used the title as a chorus. Markie’s attorney had forwarded a copy of the Markie version to Gilbert’s representative, but Warner Bros. released the album before hearing back. The court accepted all of the plaintiff’s arguments, concluding that sampling was essentially the same as theft.<sup>56</sup> Warner Bros. reportedly settled with O’Sullivan for a large sum of cash and removed the song in question from further pressings of the album.<sup>57</sup> This decision began a slew of similar cases against sampling artists and pressured record labels to clear all samples before releasing a record.<sup>58</sup> Furthermore, the decision discouraged sampling artists from sending letters of request to the original artists, since that suggests infringement.<sup>59</sup>

The threat of such legal action is often enough to produce a substantial settlement for copyright holders. For example, Vanilla Ice’s 1990 hit “Ice Ice Baby consisted of the

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<sup>53</sup> *Baxter v. MCA*, 812 F.2d 421 (9th Cir.) *Williams v. Baxter*, 484 U.S. 954 (1987).

<sup>54</sup> “Note: A New Spin on Music Sampling: A Case for Fair Pay,” 105 *Harvard Law Review* 726 (1992).

<sup>55</sup> Biz Markie, “Alone Again,” *I Need A Haircut* (Cold Chillin’: 1991). This song has not been included on the audio CD because it has been removed from Markie’s album and is not available in MP3 form on the internet. *Grand Upright Music Ltd. v. Warner Bros. Records Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991).

<sup>56</sup> The first line of the decision was “Thou shalt not steal,” 780 F. Supp. 182 (S.D.N.Y. 1991).

<sup>57</sup> Chuck Philips, “Songwriter wins large settlement in rap suit,” *L.A. Times* January 1, 1992.

<sup>58</sup> Jellybean Benitez, Tuff City Records, Bridgeport Music and Parliament-Funkadelic all filed suit just before or just after the verdict. This and a full analysis of the *Grand Upright Music* case can be found in C. Falstrom, “Thou Shalt Not Steal: *Grand Upright Music Limited v. Warner Bros, Inc.* and the Future of Digital Sound Sampling in Popular Music,” 45 *Hastings Law Journal* 359 (1994).

rapper reciting lyrics over the bassline and chords that start Queen and David Bowie's 1982 song "Under Pressure." The seven note bassline that starts both songs is the most distinctive part of both songs. The original artists, their record company, and the publishing company all threatened to sue for recoupment of royalties and eventually settled out of court.<sup>60</sup>

### Possible Legal Defenses for Sampling Artists

In order to counter claims of copyright infringement, a sampling artist who is being confronted by the legitimate copyright holder can claim the sample is an independent fixation of music, that it is small enough to be *de minimis*, that the original artist does not "own" the sampled section, that the digital sampling constitutes a Fair Use of the original, or that the digital sampling was done in parody and therefore is a Fair Use.<sup>61</sup> These defenses are important indicators that sampling is not specifically prohibited nor embraced in the Constitution, Copyright Act and court decisions, but rather could be allowed or restricted with full legal legitimacy depending on whether it is found to be consistent with the underlying purposes of the Constitutional clause and the implementing legislation.

The Copyright Act does not give copyright protection to a sound recording made of "an independent fixation of other sounds," regardless of whether the new sounds imitate those on an older recording.<sup>62</sup> A salient example of an independent fixation of

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<sup>59</sup> A. Johnson.

<sup>60</sup> "Note: A New Spin on Music Sampling: A Case for Fair Pay," 105 *Harvard Law Review* 726 (1992).

<sup>61</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). from S. Hampel, "Note: Are Samplers Getting a Bum Rap?: Copyright Infringement of Technological Creativity?" 1992 *University of Illinois Law Review* 559 (1992).

<sup>62</sup> Tit. 17 U.S.C. Sec. 114(b) (1988).

sounds would be a cover song, which involves an artist making a new but similar version of a previously written and recorded song. It could be argued that the sampling process involves an independent fixation of sounds rather than actual copying, since the technology converts the sound into digital information and then back into sound waves.<sup>63</sup> If a sampler was considered a musical instrument rather than a copying device, then the use of a sample would be more similar to “covering” the sound than duplicating it. In this case, a sample would constitute covering a small segment of a song and therefore would be subject to compulsory royalty rates. However, even though samplers are used as instruments in bands such as Soul Coughing and Sublime, the courts do not generally consider them to be musical instruments. Still, it should be noted that Adolphe Sax received similar skepticism about his saxophone being a musical instrument.<sup>64</sup>

The defendant in a copyright case can also claim that the sample used is *de minimis*, meaning that the portion appropriated is so small that the average audience would not recognize it.<sup>65</sup> Contrary to popular belief, there is no number of notes or beats that constitutes the boundary of *de minimis*.<sup>66</sup> Rather, the smallest sample that could be recognized by someone familiar with the original is the limit as to what could be protected by a *de minimis* defense.

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<sup>63</sup> S. Hampel.

<sup>64</sup> Matthew Smith, “The Sounds of Science: Stretching the Definition of the Term ‘Musical Instrument,’” *L.A. Times*, June 28, 1987, Magazine p. 24.

<sup>65</sup> *Fisher v. Dees*, 794 F. 2d 432 n. 2 (9th Cir. 1986) in S. Hampel.

<sup>66</sup> Two early cases did imply that the size of the borrowed portion could determine whether or not infringement occurred. In 1915, *Boosey v. Empire Music Co.* [224 F. 646 (S.D.N.Y. 1915)] ruled that six similar notes or more constitutes infringement, while the 1952 *Northern Music Corp. v. King Record Distribution Co.* [105 F. Supp. 393, 397 (S.D.N.Y. 1952)] indicated that the use of more than four bars constitutes infringement. However, these findings were not supported in the decision in *Taxe*.

A third defense could be that the sample used is so small that the owner of the copyrighted work does not actually own the segment.<sup>67</sup> The basis for this is the line of the Copyright Act that demands a copyrightable work must “result from a series of...sounds,” implying that a single sound cannot be copyrighted.<sup>68</sup> For example, a drumbeat or single guitar note cannot be copyrighted, so the sampling artist could claim that his or her appropriation does not violate copyright. De La Soul’s *Change in Speech* samples a James Brown grunt, and it could be argued that this grunt was not actually owned by James Brown. Still, even a very small portion of a song could be recognizable and even essential to the original song (Michael Jackson’s “hooooo” in Billy Jean, for example) and therefore could be considered to be copyrightable.

The bulk of contemporary copyright disputes over music samples do not revolve around whether the sample is small or recognizable or an important part of the song, but instead question whether an instance of music appropriation is or is not “Fair Use.”<sup>69</sup>

Section 107 of the Copyright Act limits the exclusive rights of copyright holders:

*The Fair Use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a Fair Use the factors to be considered shall include-*

- (1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;*
- (2) the nature of the copyrighted work*
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*

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<sup>67</sup> S. Hampel.

<sup>68</sup> Tit. 17 U.S.C. 101.

<sup>69</sup> Libraries, publishers and academics have been embroiled in a similar dispute over whether academic texts can be reproduced without licensing fees.

*(4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of Fair Use if such finding is made upon consideration of all the above factors.*<sup>70</sup>

Even if substantial similarity is proven between the original work and that of the defendant, a court can disregard the copyright clause if it is stifling rather than fostering creativity.<sup>71</sup> However, all four of the criteria have been found unfavorable to sampling artists in the courts.

A sample would generally not be considered “Fair Use” under the first criterion because samples are almost always used in songs aimed at commercial sale and profitmaking purposes are considered unfair use.<sup>72</sup> The second is also unfavorable, since appropriation for inclusion in informational catalogs and indexes is considered more fair than creative works.<sup>73</sup> The third is less damning, since a sample is generally in a small amount and of variable substantiality. A sample such as Hammer’s use in “Can’t Touch This” of Rick James’ bassline and music for “Super Freak” would fall outside the bounds of Fair Use since the sample was neither in small amount nor insubstantial.<sup>74</sup> Also, the Beastie Boys’ use of a line from Bob Dylan’s “Just Like Tom Thumb’s Blues” in “Finger Lickin’ Good” would be of questionable Fair Use since although the sample is small, the line is qualitatively important to both songs. On the other hand, one of the squeaks or sirens or shouts that make up the background for a Public Enemy track would fare better, since the sample would be small and insubstantial. This third distinction demands an

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<sup>70</sup> Tit. 17 U.S.C. 107 (Copyright Act of 1976).

<sup>71</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). from S. Hampel, “Note: Are Samplers Getting a Bum Rap?: Copyright Infringement of Technological Creativity?” 1992 *University of Illinois Law Review* 559 (1992).

<sup>72</sup> *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984).

<sup>73</sup> *MCA v. Wilson*, 677 F. 2d 180, 182 (2d Cir. 1981).

<sup>74</sup> MC Hammer did not hesitate to set up a licensing deal with James. The publishing royalties between the two parties were split evenly. A similar deal was worked out for 2 Live Crew’s use of Bruce Springsteen’s

arbitrary measure of the quantity of sampling, and for that reason is mostly used by courts to validate their decision rather than as a determining factor.<sup>75</sup>

The fourth criterion depends not only on whether the song containing the sample would pose an economic threat to the original version but also whether the new song would be detrimental to the success of later derivative uses of the original song.<sup>76</sup> For example, by using the drum beat from Led Zeppelin's "When the Levee Breaks," the Beastie Boys' "Rhymin' and Stealin'" did not take sales away from Led Zeppelin's untitled fourth album, but it may have taken sales away from Dr. Dre's song *High Powered* that uses the same sample. However, some samples have revived the career of sampled artists such as James Brown and Parliament-Funkadelic, so it is often unclear whether the fourth criterion applies for a given sample. This fourth criterion has further significance, though, because it has been interpreted to require a judgment of whether the challenged use would be harmful if it were widespread.<sup>77</sup> In the case of sampling, a court would be deciding not only whether the particular use of sampling hurt the sampled artist but whether widespread sampling without licensing would hurt the music industry overall. For this reason, the fourth criterion is generally considered detrimental to the argument of Fair Use.

The Fair Use clause also allows for factors not discussed above to influence a court's decision in determining whether a use is fair. Although the courts have often depended on the four listed criteria in justifying their decisions, the law was designed to account for developments in technology like sampling that had not yet occurred. In short,

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"Born in the U.S.A." for their "Banned in the U.S.A." in which Springsteen received 5.5 cents per sale. Jeffrey Resner, "Sampling Amok?" in *Rolling Stone*, June 14, 1990, p. 105.

<sup>75</sup> A. Johnson.

<sup>76</sup> *Harper & Row v. Nation Enters.*, 471 U.S. 539, 568 (1985).

if a court determined that allowing free sampling would benefit society more than deeming sampling unfair use, it could legitimize its decision by referring to the line “the factors to be considered shall *include...*” Other relevant criteria might be the importance of the sampled material to the original and new song, the frequency of the sample in the new song, the popularity of the original, the degree of alteration of the original segment, attempts by the sampling artist to negotiate licensing, and acknowledgment of the original artist by the sampling artist.<sup>78</sup>

Works of parody are more likely to be considered Fair Use because they criticize as well as entertain and the ability to levy criticism has its basis in the 1st Amendment as well as the Copyright Act. If a parody “has neither the intent nor the effect of fulfilling the demand for the original” and does not appropriate a greater amount of the original work than is necessary to “‘recall or conjure up’ the object of [the] satire,” then the work will be considered Fair Use.<sup>79</sup> Because most artists would not give permission to be parodied, the consent of the original artist for a parody is not necessary, unlike a cover song or a non-parody sample. The parody defense gained legitimacy with the 1993 Supreme Court decision in *Acuff-Rose Music, Inc. v. Campbell*, in which rap group 2 Live Crew’s use of Roy Orbison’s “Oh, Pretty Woman” in their song “Pretty Woman” was ruled not to be infringement.<sup>80</sup> Although this decision does not directly involve sampling, since the lyrics were changed and only a re-recording of the bass riff was incorporated into the version by 2 Live Crew, the case was a landmark decision in

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<sup>77</sup> *Sony Corp. of Amer. v. Universal City Studios, Inc.* 464 U.S. 417, 451 (1984), in A. Johnson.

<sup>78</sup> A. Johnson.

<sup>79</sup> *Fisher v. Dees* 794 F. 2d 432, 436-37 (9th Circuit 1986) held that the Saturday Night Live song “When Sonny Sniffs Glue” did not infringe on the copyright of “When Sunny Gets Blue” in S. Hampel.

<sup>80</sup> G. Yonover, “Artistic Parody: The Precarious Balance: Moral Rights, Parody, and Fair Use,” 14 *Cardozo Arts and Entertainment Law Journal* 79 (1996).

support of appropriative rights. Justice Souter's comment stated that the market impact of a parody should not be the only criterion in determining whether infringement has taken place.<sup>81</sup>

The Copyright law does not explain how to determine the value of a sample. Also, it is unclear whether the stipulations for "Fair Use" accurately represent the goal of fostering creativity or whether they are too constrictive. Moreover, legal scholars agree that the court cases thus far have not made a definitive statement as to whether sampling infringes on a copyright.

### **The Current System of Licensing for Samples**

Under the current system of copyright law, any phonorecord is subject to both a copyright for the sound recording and a copyright for the written song itself. For the use of an entire musical composition, there is a compulsory licensing system that features a statutory royalty rate. The mechanical licensing for entire songs, which involves paying the composition copyright owners for the right to re-record a song, is mostly handled by the Harry Fox Agency in the United States and the Canadian Mechanical Rights Reproduction Agency (CMRRA) in Canada.<sup>82</sup> As of January 1998, the U.S. statutory rate was 7.1 cents or 1.35 cents per minute, whichever is greater, per record distributed. The Harry Fox Agency keeps a small percentage and distributes the rest to the music publishers, who pay about half of their receipts to the songwriters.<sup>83</sup> There is no

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<sup>81</sup> M. Marquis, "Comment: Fair Use of the First Amendment: Parody and Its Protections," 8 *Seton Hall Constitutional Law Journal* 123 (1997).

<sup>82</sup> Donald S. Passman, *All You Need to Know About the Music Business*, (New York: Simon And Schuster, 1997), p. 220.

<sup>83</sup> Bob Kohn, "Bittersweet Symphony: A Primer on the Law of Webcasting and Digital Music Delivery," *MP3 Website*, <http://www.mp3.com/news/073.html>, p. 5, also in *Entertainment Law Reporter*, August, 1988.

compulsory system for sound recordings and no universal system for licensing the composition copyright for a song that is sampled.

In addition to mechanical licensing for covers, a song also has a public-performance right that derives from the section of copyright that applies to performing a composition in public.<sup>84</sup> ASCAP, BMI and SESAC, the performance rights societies in the U.S., collect fees from all the radio stations, television stations and nightclubs that play the song and divide the sum among the artists.<sup>85</sup> Again, only the underlying composition copyright holders receive income from performance rights societies.

Most artists who use a noticeable sample license the sample by paying either a flat fee or a royalty calculation based on the number of copies sold of the new work.<sup>86</sup>

Licenses for samples are needed from both the owners of the sound recording copyright and the owner of the copyright for the underlying musical work.<sup>87</sup> A more popular song or artist demands a higher licensing fee, as when Puff Daddy sampled the Police's "Every Breath You Take" for his "I'll Be Missing You." Fear of litigation substantiated by the case history above makes this practice a necessity for most sampling artists. The artists shoulder almost all of the cost of this system, since record labels pass the cost of licensing on to the artist. This is peculiar because in effect, the record company is making the sampling artist pay to protect the record company from being sued. Furthermore, because the record company of the original artist almost always has the copyright, the

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<sup>84</sup> Donald S. Passman, *All You Need To Know About The Music Business* (New York: Simon and Schuster, 1997), p. 231.

<sup>85</sup> In 1998, The Supreme Court decided that the Kingsmen should receive the royalties from their 1963 recording of the song "Louie Louie" that Gusto Records and GML had been withholding. These were not royalties for the written song, but rather the accumulation performance royalties garnered from radio airplay and the use of the Kingsmen version in movies and commercials. Paul Farhi, "'Louie, Louie': Kingsmen Awarded Royalties," *Washington Post*, November 10, 1998.

<sup>86</sup> "Sample Licensing in the Music Industry," *Chaos Webpage*, <http://www.cmm.com.au/legal/sample.htm>.

original artist does not receive most of the licensing fee.<sup>88</sup> A buy-out fee can cost between \$250 and \$10,000, but most range between \$1000 and \$2000.<sup>89</sup> A payment of a percentage of the mechanical royalty rate can range from .5 cents to 3 cents per record manufactured.<sup>90</sup> A copyright owner generally receives between 10% and 50% of the statutory rate established by the Copyright Arbitration Royalty Panel, with the average of cases settling upon 30%.<sup>91</sup> To make a record that is heavily dependent on sampling, license fees can inflate the price to between 30 and 40 thousand dollars.<sup>92</sup> Most record contracts include clauses that make the artist pay for damages of violating copyright so that the record company and distributor are free from liability.<sup>93</sup> If the sampling is especially heavy, or the owner of the composition copyright of the original is especially resourceful, the copyright owner will demand partial or complete ownership of the new song. For the use of an entire melody the copyright owner can demand 50% of the new song.<sup>94</sup>

The Copyright Act and the case history discussed above have not left a clear determination of whether samples in hip-hop songs or foundsound collages constitute infringement of copyright.<sup>95</sup> More importantly, it is unclear whether the legal history of

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<sup>87</sup> Michael McCready, "The Law Regarding Sampling," *Ohio State University Website*, <http://www.demouniverse.com/osu/papers/sampling.htm>.

<sup>88</sup> *Chaos*.

<sup>89</sup> McCready.

<sup>90</sup> *Ibid*.

<sup>91</sup> Al Kohn and Bob Kohn, *Kohn on Copyright* (Englewood Cliffs, NJ: Aspen Law and Business, 1996), p. 1305.

<sup>92</sup> John Rieger, "Art and Music Sampling: The Death of Creativity," KPFA Radio Program #5-93, December 1, 1993. Available at <http://www.geocities.com/SunsetStrip/Studio/1830/sampling.txt>.

<sup>93</sup> *Ibid*.

<sup>94</sup> Passman, p. 297. See the case study on "Bitter Sweet Symphony."

<sup>95</sup> In the 1993 case *Jarvis v. A&M Records*, a district court implied that improper appropriation takes place when fragmented samples substantially diminish the value of the original. In *Jarvis*, the defendant had sampled his own song, and was sued by the owner of the sound recording copyright of the original. This finding suggests that in cases of sampling, the portions used would never cause confusion in a lay person and therefore should not be evaluated using the traditional method for determining illegal appropriation.

sampling is consistent with the goal of fostering creativity. I will examine several case studies to demonstrate how the current system has performed under various circumstances and whether the outcome was optimal for musical creativity.

## CASE STUDIES

Several recent disputes demonstrate the failings of the current system for the licensing of sampling. In all of these cases, artistic development was limited or would have been limited by restrictive copyright practices. If copyright law is designed to promote the arts, these examples question how well it has achieved its goal.

### *Paul's Boutique* and Creativity in Rap Sampling

*Make another record 'cause the people they want more of this.*  
-Beastie Boys<sup>96</sup>

In 1989, the Beastie Boys followed up their smash rap album *Licensed to Ill*, with *Paul's Boutique*, a commercial flop. The album was produced and co-written by the Dust Brothers, who backed the rappers with a rich musical texture fashioned from hundreds of samples. The appropriated music includes an Isley Brothers guitar solo, the reggae standard "Stop That Train," the Beatles' guitar solo from "The End", and radio advertisements for New York shops. Much like the music, the raps themselves are composed of pop culture references, naming celebrities such as Geraldo Rivera, J.D. Salinger, and Fred Flinstone. The inventiveness of the album influenced all hip-hop records that followed, in part because it used sampling and cultural immersion to add meaning to the music.

The samples are not used to avoid the cost and effort of producing original music. Rather, the noticeable samples add layers of meaning to the music. The cultural reference made possible by a snippet of an old song makes the listener think "Now where did I hear that," and associate the new song with the meaning they attribute to the old. Since 1987,

the Beastie Boys have established themselves as cultural connoisseurs and tastemakers, even publishing a magazine covering what they consider to be culturally interesting. Their early use of samples performs a similar function, demonstrating for the listener that the Beasties draw their influences from a long tradition of rock and funk music as well as contemporary hip-hop. In their later albums, after extensive use of sampling was made prohibitively expensive, the Beasties played rock music themselves to signify their musical roots. On *Paul's Boutique* the samples make the reference.

For example, the Beastie Boys rap “I shot a man in Brooklyn,” and follow with a sample of Johnny Cash singing “Just to watch him die.”<sup>97</sup> This is a reference to Johnny Cash’s classic song “Folsom Prison Blues,” which is best known for the line “I shot a man in Reno just to watch him die.”<sup>98</sup> This use of Cash’s song is not only aurally interesting, but also suggests the importance of Johnny Cash’s influence on contemporary music, particularly since the hopelessness and ubiquity of mindless violence is an important theme in both old country music and hip-hop. It also places the classic theme of the remorseless criminal in the setting of New York rather than the wild west, implying that the carefree attitude of New Yorkers is akin to the lawlessness of the frontier.<sup>99</sup>

The artistic point made by *Paul's Boutique* is similar to that made by T.S. Eliot in *The Waste Land*. Eliot bemoans the decline of Western culture and art by compiling dozens of obscure historical and literary references that require a set of notes to fully understand. The Beastie Boys demonstrate the importance of the Beatles, reggae, Sly

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<sup>96</sup> Beastie Boys, “Shake Your Rump,” *Paul's Boutique* (Capitol: 1989).

<sup>97</sup> Beastie Boys, “B-Boy Bouillabaisse: e) Hello Brooklyn,” *Paul's Boutique* (Capitol, 1989).

<sup>98</sup> Johnny Cash, “Folsom Prison Blues,” *Classic Cash: Hall of Fame Series* (Mercury, 1988).

Stone and bluegrass music by placing themselves amid a dense series of cultural references. Like poetry, music is subject to interpretation, and any listener can interpret a number of meanings from the use of samples. However, without using previously recorded music, the Beastie Boys and other musicians would be unable to attempt to build upon older music while paying homage to their roots. All musicians have influences that can be heard in their music, but the Beastie Boys simply played the influence itself rather than incorporating stylistic nuances into their own songs.

Hip-hop is the music of contemporary urban culture, and the use of name-dropping and sampling makes such cultural evolution possible. However, although *Paul's Boutique* had a profound influence on hip-hop acts and rock musicians such as Sublime and Beck, it could not be created today because of prohibitive licensing fees. Even millionaire artists such as the Beastie Boys might be discouraged by having to pay each of the hundreds of sampled artists for the use of their material. *Paul's Boutique* shows that sampling can be used to make a cultural statement, and that often more than a few samples are necessary to complete the artistic vision of the musician. The current system makes the realization of this vision extremely expensive.

### **The Negativland Debacle**

*Now kings will rule and the poor will toil, they tear their hands as they tear the soil, but a time will come in this dawning age when an honest man sees an honest wage.*  
-U2<sup>100</sup>

By parodying one of the world's most popular bands, Negativland became the most famous sound collage artists and an example of how appropriative artists can suffer

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<sup>99</sup> A similar effect can be found in the Fugees cover of Bob Marley's "No Woman No Cry," in which the New York rappers adapt the lyrics about Bob Marley's native Jamaica to Brooklyn.

at the hands of large corporations. The fate of Negativland shows how far the practice of copyright in the music industry differs from the original intent of the Constitution. Negativland claims that appropriation has been essential to the making of music for centuries, and that the statements their music makes about the media environment are protected under the Fair Use clause. However, the dispute over one of their singles shows that economic factors are more powerful than legal or artistic ones in determining the outcome of a copyright disagreement.

In 1991, Negativland released the single “U2” on SST records.<sup>101</sup> The single included two songs which involved an extensive parody of Irish rock band U2’s “I Still Haven’t Found What I’m Looking For” and explicative-ridden out-takes from Casey Kasem’s Top 40. One of the two versions contained a sample of the original U2 song, and the other featured a Negativland rendition of the song. The cover featured a picture of the U2 spyplane and at first glance appeared to be a single by the band U2.<sup>102</sup> Although the cover might have constituted a slight economic threat to U2, Negativland was never asked to change it by the sampled parties. Instead, U2’s record label and publishing company, Island Records and Warner-Chapell Music, sued SST records in 1991, who settled for \$45,000 in costs and damages. Even though the Negativland single had only sold 7000 copies, Island spent \$75,000 to suppress the record and to obtain the copyright for it. Threatened with annihilation, SST and Negativland had to agree to pay Island and Warner-Chapell, stop distributing the single, and give up the rights to the song.<sup>103</sup> U2

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<sup>100</sup> U2, “Van Diemen’s Land,” *Rattle and Hum* (Island, 1988).

<sup>101</sup> Negativland, “U2,” (SST, 1991). SEE AUDIO.

<sup>102</sup> No discussion of this issue can be complete without reading Negativland’s book *Fair Use: The Story of The Letter U and the Numeral 2* (San Francisco: Seeland, 1995).

<sup>103</sup> The *Campbell* decision would have made Island’s original suit far less threatening, since the Fair Use of appropriation for parody was validated by the Court.

pressured Island to give the song back to Negativland, but Island would not give over the rights without Kasem's permission, and Kasem refused.

SST then sued Negativland for the \$90,000 in legal costs that the small label had spent, claiming that Negativland's contract demanded that the band be legally responsible for such a suit. In 1993, Negativland was sued by SST records for releasing a book called *The Letter U and the Numeral 2*. After a long dispute, SST and Negativland settled out of court, in effect allowing SST to keep the \$30,000 in Negativland royalties it had been withholding since the beginning of the dispute.<sup>104</sup>

In both cases, the threat of financial destruction made a small band unable to pursue legal redress in the courts.<sup>105</sup> Although the law is subject to court interpretation, and therefore could be used to protect artistic freedom or limit musical appropriation, the Negativland dispute demonstrates that a small band and a small label cannot risk their livelihood on the opinion of the court. Under the current system, small artists do not have the financial resources to battle large publishing companies or record companies in the courts, so almost all disputes are settled out of court. Only major label artists with industry clout can afford to challenge claims of infringement; in most cases a costly legal battle would be impossible. Also, this case exemplifies the problems of having to clear sampling use with all the sampled parties. Even when U2 agreed to have their song sampled and pressured their label and publishing company to relinquish the right to the Negativland version, Kasem's obstinence prevented the song from ever seeing the light of day. Third, the dispute between Negativland and SST hints at a far more widespread

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<sup>104</sup> Ibid. 166.

<sup>105</sup> A similar fate befell Canadian foundsound recording artist John Oswald, whose album *Plunderphonics*, a collage of pop songs, was destroyed (literally) after a settlement with the Canadian Recording Industry

practice: more often than not, labels hold the individual artists responsible for copyright violations so the label is exempt from any legal repercussions. This forces artists, most of whom could not personally finance a legal battle, to shy away from sampling in order to avoid bankruptcy.<sup>106</sup>

### ***Campbell v. Rose-Acuff Music and the Supreme Court's Defense of Parody***

In 1989, Luther Campbell and his rap group 2 Live Crew recorded a song called "Pretty Woman," which borrowed musical elements from Roy Orbison's 1964 classic "Oh, Pretty Woman." Acuff-Rose refused to grant 2 Live Crew permission to pay for the use of the original, but 2 Live Crew released the song on *As Clean As They Wanna Be* anyway.<sup>107</sup> In 1994, the Supreme Court determined that 2 Live Crew and its record company, Luke Skywalker Records, were not perpetrators of copyright infringement. The Court examined each of the factors mentioned in the Fair Use clause: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use upon the potential market value of the original. The Court rightly deemed the second factor irrelevant since

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Association. "Taking Sampling Fifty Times beyond the Expected (Musicworks Magazine Interview with John Oswald, 1990) in *Fair Use*, p. 219.

<sup>106</sup> However, in March of 1994, the Supreme Court ruled that John Fogerty, who had been sued and exonerated for copying from his own previous material, should have his legal fees paid by the plaintiffs. Fogerty had been accused of copying from his 1970 Creedence Clearwater Revival song "Run Through the Jungle" to make his 1985 solo song "Old Man Down the Road" by CCR's old record label, Fantasy Records. This ruling encourages defendants not to settle out of court if they believe their use of previously recorded material is fair, because even their legal fees can be repaid. *Fogerty v. Fantasy, Inc.*, U.S. Supreme Court (Case No. 92-1750), decided March 1, 1994, in Negativland, "Copyright, Fair Use and the Law."

<sup>107</sup> Moral right, the right of a creator to control the future use of his or her creation, is emphasized much more in France than in the United States. The European conception implies that an artist cannot be separated from his or her work, and therefore has a right to protect their own artistic integrity by controlling use of the creations. Geri J. Yonover, "Artistic Parody: The Precarious Balance: Moral Rights, Parody, and Fair Use," 14 *Cardozo Arts and Entertainment Law Journal* 79 (1996). Ironically, France is also the

parodies almost always involve the appropriation of segments of famous expressive works. For the other three, the decision clarified how the court would interpret the criteria in a case involving not only parody, but also sampling.

Maintaining that the goal of copyright is furthered by transformative works, the Court found that the 2 Live Crew song significantly added to the original. The Court found that parody is a form of criticism protected by the Fair Use clause, so a sufficiently transformative parody would be considered Fair Use.<sup>108</sup> The Court demanded that a parody criticize the work it is imitating, not society in general. Because the 2 Live Crew song could be perceived to be criticizing the original by juxtaposing the original's romantic yearnings with images of grotesque promiscuity and unattractiveness, it was considered a parody that is fair under the first criterion.<sup>109</sup> It can be assumed that a use of sampling that also had a transformative and parodic effect, such as Negativland's use of Michael Jackson's Pepsi commercial in its anti-cola *Dispepsi*, would be more likely to be considered fair.<sup>110</sup> On the other hand, N.W.A.'s less transformative send-up of George Clinton's "Automobile" would be less likely to be considered Fair Use because the rappers do not change the melody or the music, just the lyrics.<sup>111</sup> This distinction is consistent with promoting artistic creativity, since N.W.A.'s replacement of moderately

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birthplace of the postmodern theory of the death of the author, in which a creator is permanently separated from his or her text.

<sup>108</sup> The social value of parody involves First Amendment issues of free speech and its import to society. However, The Supreme Court did not discuss the First Amendment, nor the idea/expression dichotomy that allows copying of an idea but not its expression, in the decision for *Campbell*. Some argue that the First Amendment should be included as the fifth criterion for determining Fair Use. Mel Marquis, "Comment: Fair Use of the First Amendment: Parody and its Protections," 8 *Seton Hall Constitutional Law Journal* 123 (Fall, 1997).

<sup>109</sup> The lower courts had interpreted the lyrics to be ridiculing the banal and overly simplistic lyrics of the original. See Appendices C and D for the complete lyrics to both songs. The audio disk contains the recorded versions of both songs.

<sup>110</sup> Negativland, "Why Is This Commercial?" *Dispepsi* (Seeland, 1997).

<sup>111</sup> N.W.A., "Automobile," *Niggaz4Life* (Priority, 1991).

misogynistic lyrics with offensively misogynistic ones is far less creative than 2 Live Crew's elaborate parody.

The third factor, the extent of the copying, is of central concern to sampling artists and parodists. Parody necessitates conjuring up the original work in order to make the difference between the two salient.<sup>112</sup> The Court found that although 2 Live Crew had copied the first riff and first line of the Orbison song, parody would have been impossible with less.<sup>113</sup> Therefore, it found that the parody did not copy too much of the original. This finding suggests that parodists must strive to copy enough of the original to invoke it in the mind of one listening to the parody, but no more than that. This also questions the legality of potential parodies such as that of Negativland. A court would probably rule that Negativland's controversial song "U2" contains more of U2's song "I Still Haven't Found What I'm Looking For" than is necessary to conjure up the original in the mind of the listener. Similarly, Weird Al Yankovic's parodies, which involve the complete music and melody of the original with changed lyrics, would necessitate licensing.<sup>114</sup>

The fourth factor questions whether the new song would either harm the market performance of the original or effect the potential future market for the original. The court states that a parody infringes if it usurps demand for the original (if Roy Orbison fans bought the 2 Live Crew version and decided that they did not also need to buy the original), but not if it suppresses such demand (if those that heard the parody agreed that the original lyrics were childish and chose not to purchase it). It was obvious to the Court

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<sup>112</sup> *Elsmere Music, Inc. v. NBC* 623 F. 2d 252, 253 n.1 (2d Cir. 1980) found that Saturday Night Live's "I love Sodom" was a Fair Use parody of "I Love New York." The necessity of a parody to conjure up the original has also been elaborated on in several other cases.

<sup>113</sup> The Court determined that the lyrical copying was fair and sent the question of whether the repeated appropriation of the bassline was excessive back to the District Court. *Campbell* at 1176-77. in Nels Jacobson, "Note: Faith, Hope and Parody: *Campbell v. Acuff Rose*, "Oh, Pretty Woman," and Parodists' Rights," 31 *Houston Law Review* 955 (Fall, 1994).

that the markets for the two songs is entirely different. Furthermore, there was no evidence that another hip-hop group who licensed the bassline would sell fewer versions of their derivative song because many listeners had already heard and enjoyed the bassline in the 2 Live Crew version. Therefore, the Court decided that the parody would not impinge on the future market for a derivative work.

The decision, based on the four criteria mentioned in the Copyright Act, shifted the emphasis from determining the commercial nature of a secondary work to examining the transformative value of the new work, allowing commercial parodies to be Fair Use.<sup>115</sup> This finding was in contrast to two previous Supreme Court cases, *Sony Corp. of America v. Universal Studios, Inc.* and *Harper & Row v. Nation Enterprises*, which had emphasized the market and economic aspects of a secondary work when determining infringement.<sup>116</sup> These previous decisions had influenced lower courts to examine only the commercial nature of a secondary work when evaluating Fair Use.<sup>117</sup> In *Campbell*, the Court sought to determine whether the new work, through transformation and creativity, added to the old work or merely superseded the original.<sup>118</sup>

The Court decision expanded the legal conception of Fair Use in part because 2 Live Crew's song was of such limited artistic value. As a parody, the song constituted at best a mild criticism of the original, with the lyrical content bordering on juvenile. Still,

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<sup>114</sup> Weird Al Yankovic does receive licenses for all of his parodies.

<sup>115</sup> Roxana Badin, "Comment: An Appropriate(d) Place in Transformative Value: Appropriative Art's Exclusion from *Campbell v. Acuff-Rose Music, Inc.*," 60 *Brooklyn Law Review* 1653 (1995).

<sup>116</sup> 464 U.S. 417 (1984) and 471 U.S. 539 (1985), in Badin. In *Sony*, the court found that the use of betamax recordings of TV programs for home viewing constituted unfair Use, implying that any parody that could have commercial bearing on the original would be unfair Use. In *Harper & Row*, the Court found *The Nation* to have infringed by publishing a segment of Gerald Ford's manuscript before publication, concluding that the secondary user that stands to gain from commercial exploitation of copyrighted material is violating the tenants of Fair Use.

<sup>117</sup> Badin.

the court was right to side with Campbell because the right to parody is essential to the traditional American values of free expression and free speech. Furthermore, since the 2 Live Crew song constituted no market challenge to the original and was substantially different, the use was indeed fair. The decision suggests that almost any other parodic appropriation of a song would also be found not to infringe.

However, the *Campbell* decision is not necessarily a boon to musical creativity. While the Supreme Court decision is favorable to sampling because it implies that almost any song that references the original could be considered a parody, it does not necessarily increase the chance of a non-parodic use being found fair.<sup>119</sup> Justice Souter writes, “it is uncontested here that 2 Live Crew’s song would be an infringement of Acuff-Rose’s rights in “Oh, Pretty Woman,” under the Copyright Act of 1976...but for a finding of Fair Use through parody.”<sup>120</sup> Kennedy’s concurring opinion insists that “the parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole.”<sup>121</sup> This conflicts directly with the needs of artists to use previous music as an artistic palate rather than just the subject for parody. If a rock band had used the same sample of Orbison’s song to enhance a genuine love song rather than a send-up, the use would be considered unfair. Similarly, an appropriative use by an experimental artists such as John Oswald would be considered unfair if the new work criticized society

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<sup>118</sup> The notion of transforming a primary text into something creatively new is a component of Negativland’s proposal and has its origins as far back as John Milton.

<sup>119</sup> In 1992, a Second Circuit Court ruling in *Rogers v. Koons* found that Jeff Koons’ sculpture String of Puppies was not an obvious transformative parody of an art Rogers photograph. *Rogers v. Koons*, 960 F.2d 301 (2d Cir.), cert. denied, 113 S. CT. 365 (1992). Badin argues that *Acuff-Rose* allows for the dismissal of the artistic merit of appropriative works if the parodic and transformative value is not obvious.

<sup>120</sup> *Campbell v. Rose-Acuff Music, Inc.*, U.S. Supreme Court, (Case No. 92-1292) decided March 7, 1994.

<sup>121</sup> Justice Kennedy, Concurring Opinion, *Campbell v. Rose-Acuff Music, Inc.*, U.S. Supreme Court, (Case No. 92-1292) decided March 7, 1994.

in general rather than the original song.<sup>122</sup> Any work that does not meet the Court's definition of parody would still be subject to the *Sony* standard of Fair Use and would therefore probably be found to infringe. The Wu-Tang Clan's "Can It All Be So Simple," which expands on Marvin Gaye's laments about loss of innocence with raps about urban street life, would be considered to infringe because it is not parodying the original, regardless of artistic merit.<sup>123</sup> The finding suggests that artists using extensive excerpts are better suited to claim to have appropriated a song for parody than for musical creativity.

Promoting the creative arts, one would assume, should involve protecting purely creative artists as well as parodists, and the previous analysis of Fair Use demonstrates that the law could be interpreted to defend non-parodic use. The Fair Use section of the Copyright Act allows a use to be fair for reasons other than the four that are stated, and this would include allowing uses that are necessary to promote the creative arts. In *Stewart v. Abend*, the Supreme Court wrote, "The Fair Use doctrine thus permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."<sup>124</sup> Souter himself notes that the Fair Use guidelines are meant to be "illustrative and not limitative."<sup>125</sup> However, the *Campbell* ruling suggests that the Court, even when siding with potential infringers, is unwilling to defend nonparodic uses of sampling, even if the use differs substantially from the original and has artistic merit. For this reason, appropriative artists cannot risk legal battles over their work and will be discouraged from breaking new artistic ground, a

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<sup>122</sup> One of the fundamental tenants of appropriation art is an attack on "traditional notions of originality and authorship in art," embracing popular symbols to criticize society. Badin.

<sup>123</sup> Wu-Tang Clan, "Can It All Be So Simple," *Enter the Wu-Tang: 36 Chambers* (Loud, 1993).

<sup>124</sup> *Stewart v. Abend* 495 U.S. 207, 236 (1990). This opinion was quoted in the opinion for the *Campbell* case.

<sup>125</sup> *Campbell* 114 Supreme Court at 1170.

clear contradiction of the goals of copyright. Furthermore, by refraining from establishing absolute Fair Use guidelines and thus demanding that Fair Use cases be determined on a case by case basis, the Court dooms appropriative artists to speculation as to how their particular case will be interpreted by the Court. A clearer copyright law, while still allowing for conceptions of copyright to evolve over time, would give both artists and publishers more of an idea of where their work stands in the law.

### ***Bitter Sweet Symphony and the Dangers of Unlicensed Sampling***

*It's a bitter sweet symphony, this life  
Try to make ends meet, you're a slave to the money, then you die*<sup>126</sup>  
-The Verve

*There's a reason they call this the music business.*<sup>127</sup>  
-Richard Ashcroft, lead singer of the Verve

Veteran British rockers The Verve scored their first major hit with “Bitter Sweet Symphony” in the summer of 1997. 1.8 million copies of the Verve album *Urban Hymns* were eventually sold in the UK alone, and the success of the song on MTV and modern rock radio made the Verve one of the premier rock bands in England and the U.S. However, the song featured an extensive sample of an orchestral version of the Rolling Stones’ “The Last Time” that was originally recorded by the Andrew Loog Oldham Orchestra in the early 1960s.

Allen Klein, the manager of the Rolling Stones who owns the publishing copyright to “The Last Time,” turned down the Verve’s request for a license because he hates sampling. Eventually, Verve manager Jazz Summer convinced Klein to allow the Verve to use the sample, but on the condition that Mick Jagger and Keith Richards

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<sup>126</sup> The Verve, “Bitter Sweet Symphony,” *Urban Hymns* (Virgin, 1997). SEE AUDIO.

receive the songwriting credit for the song. This gave the composition copyright to Klein. Klein then agreed to have the song used in the Nike “I Can” commercial that premiered during Super Bowl XXXII. The Verve eventually agreed to let Nike use the band’s version rather than re-record it with another band. For idealistic reasons, the Verve gave their \$175,000 profit from the commercial to charity.

Ironically enough, Nike’s use of *Bitter Sweet Symphony* in its commercials boosted the Verve’s sales from mediocre to outstanding. *Urban Hymns* had only sold 470,000 copies in the U.S. over 14 weeks and had peaked at just #63 on the U.S. charts. After the commercials were aired, *Urban Hymns* went on to sell millions in the U.S. and *Bitter Sweet Symphony* became a Top 20 single.<sup>128</sup> Future singles such as “The Drugs Don’t Work” and “Lucky Man” established the Verve as more than a one-hit wonder, but it is undeniable that the success of *Bitter Sweet Symphony* made the success of the Verve possible.

In 1999, Oldham, who claimed to own the copyright for the recording of the orchestral version, sued the Verve for using the sound recording of the original orchestral song. The Verve and their label Virgin had always admitted to have used the sample and had even paid a royalty to Decca Records, the Rolling Stones’ original label.<sup>129</sup> Claiming that he held the sound recording copyright that the Verve had licensed from Decca, Oldham demanded a million pounds in royalties.<sup>130</sup> The outcome of this latest dispute is

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<sup>127</sup> Robert Hilburn, “The Bittersweet Smell of Success,” *Los Angeles Times*, March 29, 1998.

<sup>128</sup> Alice Rawsthorn, “Nike deal sweetens US prospects of British band: TV commercial has sent The Verve up the charts and doubled album sales,” *Financial Times*, April 6, 1998.

<sup>129</sup> John Willcock, “Who’s Suing Whom: Bitter Symphony as The Verve is sued by Oldham,” *The Independent*, January 11, 1999.

<sup>130</sup> Chris Ayers, “Verve Sued Again Over Pop Tune,” *The Times*, January 9, 1999.

still unknown, but a band less successful than the Verve would be bankrupt at this point due to legal fees.

This recent and rather bizarre example demonstrates the pitfalls of the current copyright system for sampling. First, a song that was widely considered one of the best singles of 1997 was almost not released because Allen Klein refused to allow the Verve to pay for a sample that, although essential to the song, was built upon extensively. The Verve version of *Bitter Sweet Symphony* uses Ashcroft's lyrics and a full rock band accompaniment to the orchestral loop and sounds nothing at all like the Rolling Stones' version of "The Last Time." Creativity certainly would have been limited if the Verve had been forced to drop their best song from their album. Second, the deal that was worked out gave The Verve no ownership of a song they themselves wrote, crediting only Ashcroft for the lyrics. The result of this was the possible use of the Verve song, performed by other musicians, in any commercial that Allen Klein chose to license it to. The Verve was fortunate to have their song used in one of the best commercials of the year, as it could have been advertising anything at all, even products that the band themselves find morally repugnant. Although the success of The Verve after the Nike ad has made more bands willing to have their songs used in high-exposure television advertisements, musicians such as Neil Young, Pearl Jam and the Verve themselves feel that the meaning and message of their music is cheapened by use in advertising.<sup>131</sup> Third, since both the owners of the composition copyright and the sound recording copyright can demand royalties for the use of a sample, fledgling bands can be faced with prohibitive licensing costs. If the Verve had not had success after *Bitter Sweet Symphony*,

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<sup>131</sup> Robert Hilburn and Jerry Cowe, "National Exposure, For a Song;" *Los Angeles Times*, March 17, 1998.

for which they received no profit, they would have been in severe financial straits. None of these developments can be considered good for overall creative growth.

### **What Goes Around Comes Around: *Deconstructing Beck***

*I've been drifting along in the same stale shoes.*  
-Beck<sup>132</sup>

The Dust Brothers' most critically acclaimed project is Beck's *Odelay*, widely considered the best rock album of 1996. *Odelay* features a barrage of musical samples, studio instrumentation, sung vocals, and bizarre sampled quotations. As a result of previous law suits, many of the samples are credited to the original artists on the album sleeve and the copyright holders were paid for the use of the songs. One of the songs, entitled "Jack-Ass," involves sung lyrics, a bass part and an acoustic guitar playing over the accompaniment to Them's version of Bob Dylan's "It's All Over Now, Baby Blue." It can be assumed that the use of this sample, which plays throughout most of the song, would have been found to infringe on the sound recording copyright, but not on Dylan's composition copyright. The current system of licensing allowed Beck, an established recording artist, to buy the use of the original music, but a new artist with fewer resources would not have been able to create the brilliant album that resulted. Furthermore, any of the thirteen copyright holders credited on the album or the creators of the hundreds of other random noises could have objected to Beck's project and made *Odelay* impossible. Even if *Odelay* is not considered a commentary on postmodern media society and a parody of American culture, it still constitutes progress in the creative arts and should be made possible under copyright law.

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<sup>132</sup> Beck, "Jack-Ass," *Odelay* (Geffen: 1996). SEE AUDIO.

Because Beck is a famous rock musician whose career has been based on the use of samples, a group of more obscure, more experimental sound collage artists used his music to create *Deconstructing Beck*, a mostly unlistenable barrage of sound art. *Deconstructing Beck* is a compilation of songs by obscure foundsound artists who used computer software to mix and splice material from Beck's albums into song-length pieces. One of the thirteen songs consists of a cut-up version of "Jack-Ass" that is noticeably derived from the Beck song but has spaces of silence between each second of music.<sup>133</sup> In part because *Deconstructing Beck* is an artistic statement about the use of media in art and in part because it would be financially impossible, the Beck samples were not cleared nor licensed from the original copyright holders. The organization known as @tmark released the album on a tiny label called Illegal Art and sold it over the internet for six dollars. The founder of the label, a Dartmouth graduate student who goes by the pseudonym Philo T. Farnsworth, has said that "part of the motivation in choosing Beck was that we'd be sampling his sampling and in a way it would be a parody of what he's doing...We were aiming for a gray area because we wanted to stretch the boundaries of Fair Use."<sup>134</sup> Farnsworth claims that the album is a protest against corporate greed and the commodification of art, demanding the right to use corporate products in art as a reaction to a pervasive media environment.<sup>135</sup> The only repercussions were cease and desist letters from Beck's lawyer and his song publisher, though it is rumored that Beck himself was not bothered by the project. The limited legal action is probably a function of the limited sales of a sound art project not sold in stores. It is obvious that as long as

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<sup>133</sup> Jane Dowe, "Puzzles and Pagans," *Deconstructing Beck* (Illegal Art, 1998). SEE AUDIO.

<sup>134</sup> Neil Strauss, "The Pop Life; Tweaking Beck with Piracy," *The New York Times*, May 6, 1998.

<sup>135</sup> Colin Berry, "Fables of the Deconstruction: Sound Pirates Hijack Beck's Booty," *CMJ New Music Report*, July, 1998.

purchasers are aware the album is not a new Beck release, *Deconstructing Beck* could not possibly threaten Beck's sales. Also, since its sales are so limited, the profit garnered from Beck claiming royalties would barely be worth the legal cost and hassle.

From an artistic perspective, *Deconstructing Beck* is fascinating. However, in the realm of popular music, the album would be considered terrible. It is difficult to listen to in its entirety and has no discernible melody or rhythm in any of the songs. It truly is sound art, a compilation of sound images that makes a statement. It is unclear whether the courts would find that *Deconstructing Beck* constitutes Fair Use for parody or not, but even the remote possibility of legal intervention makes the current system imperfect. The ability to make intelligent criticism about mass culture certainly falls under the domain of the creative arts, and copyright law should incorporate the protection of such expression into its language. Many in the foundsound community wish that *Deconstructing Beck* would have gone to court, since a victorious landmark case would allow foundsound artists much more freedom of expression.<sup>136</sup> Without such a ruling, and without a copyright law that clearly protects sampling, obscure political sound artists will still be operating on the fringe of legality, the gray area that Farnsworth wants to expand.

In the Supreme Court's decision in *Campbell v. Acuff-Rose, Inc.* Justice Souter states that determination of Fair Use "calls for a case-by-case analysis."<sup>137</sup> However, many artists cannot afford litigation, and the risk of being found to have infringed discourages artists from using appropriation creatively. These case studies show that a clear law or legal precedent for the sampling of music is necessary to promote the

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<sup>136</sup> Steev Hise, e-mail on [rumori@detritus.net](mailto:rumori@detritus.net) mailing list, February 16, 1999.

<sup>137</sup> *Campbell v. Acuff-Rose Music, Inc.*

creative arts fully. They also demonstrate that the outcomes of copyright disputes are more dependent on economics than on legal precedent or the ideals of the Framers. Although the current copyright law would allow for legitimate Court defense of non-parodic fragmentary sampling, the events discussed above prove that such an eventuality is unlikely. In the following section I will examine several proposals for establishing a clear law for the sampling of copyrighted music.

## NEW MEDIA

*It's been a long time comin', but a change is gonna come.*  
-Sam Cooke<sup>138</sup>

*Things done changed.*  
-The Notorious B.I.G.<sup>139</sup>

Any analysis of copyright law for music cannot overlook the transformative effect that new information technology will have on the marketplace. In the near future, music will be sold primarily in electronic form over the internet rather than in a physical medium such as compact discs. Also, the very notions of authorship and ownership have been challenged by new media. Recent developments in the expansion of evolution of information technology shed light on where the music industry is going and how any revised copyright law should incorporate the changes.

### **MP3 Technology and the Democratization of Distribution**

MP3 (short for MPEG-1, layer 3) technology can reduce digital audio to one twelfth of its original size with little reduction in sound quality, so a single song of 60 megabytes can be reduced to just 5. This enables the song to be transferred along internet connections from any computer to any other, where the sounds can be downloaded onto the desktop or burned onto a compact disk. Both legal MP3s and pirate MP3s, which are under copyright and cannot be distributed legally, are available on the web. Search engines such as the ones at Lycos.com, mp3.com, and www.oth.net have enabled consumers to easily locate a particular song. Companies such as GoodNoise have begun to sell MP3s for a low price, even though each MP3 can be copied and distributed

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<sup>138</sup> Sam Cooke, "Change Is Gonna Come," *Golden Age* (RCA, 1976).

<sup>139</sup> Notorious B.I.G., "Things Done Changed," *Ready to Die* (Arista, 1994).

indefinitely. The new Diamond Rio player acts like a digital walkman, allowing the user to download songs from the computer desktop onto the device, which is portable.<sup>140</sup>

Many anticipate that as soon as most Americans have access to the high-speed internet connections necessary to download the songs in a reasonable amount of time, music will be obtained completely on-line and CD stores will become obsolete.<sup>141</sup>

Although the use of high-speed internet connections is currently limited predominantly to computer junkies and college students, the record industry has recognized the transformative potential of the new technology. On-line booksellers amazon.com and Barnes and Nobles have already established the internet as a lucrative market. In response, internet companies such as CDNow and Music Boulevard sell compact discs on-line and ship them to the buyer, acting as an extremely efficient record store. Major labels are examining ways to advertise and distribute their albums on-line.

Meanwhile, the new system of distribution constitutes a significant threat to the market share of major record labels. Even before the transition to web-based sales, the dominance of the “Big Five” record labels over the marketplace has been diminishing. Although the “Big 6” (before the merger of Universal and Polygram) controlled 91 percent of domestic sales in 1991, that figure had sunk to 80.9 percent by 1998.<sup>142</sup> More American consumers have been buying albums from independent music labels such as

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<sup>140</sup> Abe Crystal and John Lindenbaum, “Power to the People: MP3’s put music in the hands of the masses,” *Nassau Weekly*, February 18, 1999.

<sup>141</sup> Internet radio webcasts have also caused a significant amount of controversy. ASCAP and BMI, the organizations that collect royalties for mechanical licenses, have insisted that webcasters should pay to play prerecorded music as radio stations must. The RIAA has insisted that internet music stations are violating the copyright of the sound recordings of the songs that are being played. For a full analysis of the issue, see Bob Kohn, “When does a radio station need permission from record companies to broadcast sound recordings over the internet?” *MP3.com News&Info*.

<sup>142</sup> David Sanjek, “Popular Music and the Synergy of Corporate Culture,” *Mapping the Beat: Popular Music and Contemporary Theory* ed. Thomas Swiss, John Sloop, and Andrew Herman (Malden, MA: Blackwell, 1998), p. 175.

No Limit Records, Sub-Pop, Kill Rock Stars, Matador, Thrill Jockey and Drag City.

These independent labels, as well as individuals, will be able to sell their music to a much wider audience over the internet, since obscure or less commercial styles of music can also find an audience on the web.

Audio piracy also threatens the profit of major labels. Pirate MP3 sites have made songs available for download that normally would only be found on a \$16.99 compact disc. In 1996, two songs from U2's album "Pop" were posted on websites in several countries for free downloading before the album had even been released.<sup>143</sup> Copies of Pearl Jam's hit album *Yield* were also available for free download on the internet before the album reached stores. Because there is currently no license or royalty system in place for the distribution of music on the internet, these transactions take place without benefiting the labels and artists. The major labels argue that an environment of free music hurts the artists by stealing their deserved sales. The major labels, represented by the Recording Industry Association of America (RIAA), have fought audio piracy in the courts and the legislature. In 1997, the RIAA sued three sites that were offering MP3s of copyrighted works and succeeded in closing the sites.<sup>144</sup> At the end of 1997, the software and entertainment industry succeeded in having a law passed through Congress and signed by President Clinton that levies harsh punishments on copyright violators. Not only could first offenders face three years of incarceration and fines of \$250,000, but even not-for-profit distribution of copyrighted works is considered "for financial gain."<sup>145</sup>

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<sup>143</sup> Don E. Tomlinson and Timothy Nielander, "Unchained Melody: Music Licensing in the Digital Age," 6 *Texas Intellectual Property Law Journal* 277 (Spring, 1998).

<sup>144</sup> A federal court ruled that the site operators owed the RIAA \$100,000 per infringement, but the RIAA waved the damages. Chris Nelson, "News Flash: Record Biz Rep Wins War Against Net Music Sites," *Addicted to Noise*, Jan 21, 1998.

<sup>145</sup> "Tough New Copyright Law Covers The Net," *CNN/Time All Politics*, December 17, 1997, at <http://detritus.net/rhizome.html#recent>.

In 1998, the RIAA sued Diamond Multimedia Systems in a failed effort to prevent the production of the Rio player.<sup>146</sup> Later that year, the RIAA announced their Secure Digital Music Initiative, an attempt to prevent internet piracy. The RIAA wants to eliminate the unauthorized copying of song files, a type of piracy that MP3 technology cannot prevent. An industry standard for file encryption could prevent consumers from making unlimited copies of a song or album.

However, there is no evidence that having pirate sound files available on the internet has hurt the record industry, just as the introduction of cassette tape dubbing did not hurt the music industry.<sup>147</sup> Also, exposure produced by free files on the internet might actually increase sales by enhancing interest in an artist. Furthermore, hackers will always be able to circumvent anti-piracy measures.<sup>148</sup> Many industry insiders argue that the record industry would be better off harnessing the power of the new media rather than trying to maintain oligopoly power in stores.

At the end of 1998, Clinton responded to RIAA and other intellectual property industry group demands and signed the Digital Millennium Copyright Act. While the worldwide adoption of the World Intellectual Property Organization treaties depends on ratification from many other countries, the act applies U.S. copyright law to the internet, and extends copyright protection for music from the life of the author plus 50 years to the

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<sup>146</sup> Matt Richtel, "Music Industry Loses a Bid to Stop Internet Recording," *New York Times*, October 28, 1998. The RIAA claimed that the Rio violates the 1992 Audio Home Recording Act because it does not include the surcharge that recorders must pay to labels, publishers, songwriters, and publishers. Diamond argued that the surcharge does not apply to computer program-based media. Doug Reece, "RIAA Files Suit Over MP3 Player," *Billboard*, October 24, 1998. Computer hackers later wrote software that enables the Rio to transfer data back into a PC, which would make it a recording device rather than a playback device. Diamond claims that using the Rio to transfer music when the internet is faster and more convenient makes commonplace data sharing via Rio improbable. Joe Nickell, "Mighty Rio Now A Two-Way Street," *Wired News*, [http://www.wired.com/news/print\\_version/culture/mpthree/story/17529.html?wnpg=all](http://www.wired.com/news/print_version/culture/mpthree/story/17529.html?wnpg=all).

<sup>147</sup> The analogy is not completely accurate because digital copies have the same quality as the original, whereas analog cassette copies do not.

life of the author plus 70 years.<sup>149</sup> The Act also makes devices that circumvent copyright-protection systems illegal and institutes a statutory license system for webcasting that gives record labels royalty income and guarantees webcasters access to music.<sup>150</sup> Instead of licensing sound recordings with each record company, webcasters can pay a statutory rate that is agreed upon by the webcaster and the labels.<sup>151</sup> The Act absolves the RIAA of anti-trust charges so that it could act as a representative for the labels in licensing to webcasters.<sup>152</sup> The passage of the Digital Millennium Act also demonstrates the influence of industry representatives like the RIAA in Congress. Any change in the copyright law that opposes record industry interests would be exceedingly hard to pass through Congress.

Many artists have touted the internet as a means to escape “slavery” to major record labels and distribute music independently. In the record industry as it currently operates, major labels ship records to distributors, who then sell the records wholesale to stores. Meanwhile, some independent labels distribute records to stores, whereas others hire independent distributors to issue the records to stores. After the stores, the distributor, the record label and taxes have taken a chunk of profits, relatively little royalties are left for the artist.<sup>153</sup> Rap group Public Enemy claims that internet distribution will allow artists to receive more profits from their work. Public Enemy

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<sup>148</sup> Neil Strauss, “The Industry Vs. Web Pirates,” *The New York Times*, December 17, 1998.

<sup>149</sup> “WIPO Bill Is Now Law,” *Billboard*, November 2, 1998.

<sup>150</sup> The Digital Millennium Copyright Act also extended Fair Use for libraries and Universities to cover digital documents and limited the liability of on-line service providers such as America On-line. Bill Holland, “WIPO Treaties Act Awaits Clinton OK,” *Billboard*, October 24, 1998.

<sup>151</sup> If the various parties cannot agree on a license rate, the U.S. Copyright Office will set it.

<sup>152</sup> The RIAA does not currently collect the webcasting license fees, as the system is still being established. John Collatta, attorney for media licensing, BMI, phone interview, 3/24/99.

<sup>153</sup> Donald Passman, *Everything You Needed To Know About the Music Business*, p. 83. The share of sales taken by the various parties must pay for manufacturing, promotion, production, advertisements, overhead, salaries and dozens of other costs.

established a net radio site, with a focus on underground and independent hip-hop, and released the new single “Swindler’s Lust” in MP4 format.<sup>154</sup> The rap group plans on releasing future songs and albums over the internet rather than using a major record label. Elsewhere, the ex-CEO of MCA records has established an on-line record label called Atomic Pop that will offer songs and videos from its artists. The owners of the site claim that it will allow the artists to keep more of the profits than traditional labels, and will earn revenue from record sales and merchandising on the site.<sup>155</sup> Obscure artists who could not gain commercial radio airplay have begun to distribute their songs for free on the internet as well, hoping that the exposure will result in enhanced record sales. MP3 technology will completely eliminate distribution costs, since after the web address license and host fee have been covered, each additional transmission of a song costs the distributor nothing. This allows artists and labels without the financial capital necessary to promote and distribute an album in the traditional marketplace to overcome the economies of scale that give the major labels such an advantage.

Media theorist W. Russell Neuman posits that the new communications media will be a democratizing force, allowing a plurality of ideas to replace a homogenous mass culture.<sup>156</sup> This development can be seen to take place in the music industry as well as in public affairs. Because a web page can distribute information for free, anyone with a computer can distribute information to anyone else, bypassing the traditional conduits of information flow. Consumers can not only purchase music from a greater variety of

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<sup>154</sup> MP4 is a media delivery technology that competes with MP3, Liquid Audio and other forms of digital audio transfer. Despite Public Enemy’s support for MP4, it is more in tune of record industry preference than MP3 because MP4 files cannot be “burned” onto CD or combined into a customized playlist. Jim Hu, “MP4 hits the music download scene,” *Cnet news.com*, January 15, 1999.

<sup>155</sup> Lesley Anderson, “New music site drops a bomb on major labels,” *CNN Interactive*, February 19, 1999.

<sup>156</sup> W. Russell Neuman, *The Future of the Mass Audience* (Cambridge: Cambridge University Press, 1991).

outlets, but they also can be exposed to forms of music that would have been excluded by homogenous corporate radio and MTV. This allows a greater diversity of musical styles, since fringe bands can now reach a wider audience and transmit music without prohibitive distribution costs.

The opportunity for new information technology-based media to democratize the contemporary system of ownership and property conception should not be underestimated. Just as Walter Ong has argued that print technology and literacy allowed thoughts to be independently owned, and therefore copyrighted, the new media might eliminate notions of absolute individuality and ownership, since the internet itself is an amalgamation of electronic pastiche.<sup>157</sup> Because information on the internet is impermanent and easily accessible, it can be borrowed and changed by any reader or listener. As the internet becomes more interactive, authorship of texts will become muddled and difficult to express in concrete terms. Already, the possibility of owning a creative work is becoming outdated. In the literary realm, recent revelations that Raymond Carver's short stories were heavily influenced by his editor have questioned the legitimacy of any work having a single author.<sup>158</sup> In music, songwriting royalties force the artists to estimate what portion of a song was written by each collaborator, a practice that most find ridiculous.<sup>159</sup> Lauryn Hill recently underwent a legal battle with a group of Newark producers who claim that they co-wrote her award winning album "The Miseducation of Lauryn Hill." As music slips out of corporate control, some theorize that

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<sup>157</sup> John Sloop and Andrew Herman, "Negativland, Out-law Judgments, and the Politics of Cyberspace," *Mapping the Beat: Popular Music and Contemporary Theory* ed. Thomas Swiss, John Sloop, and Andrew Herman (Malden, MA: Blackwell, 1998), p. 304.

<sup>158</sup> D.T. Max, "The Carver Chronicles," *New York Times Magazine*, August 9, 1998, p. 34.

<sup>159</sup> Courtney Love and her band Hole had to face allegations that their 1998 album *Celebrity Skin* contained more contributions from Smashing Pumpkins leader Billy Corgan than he was credited for.

notions of authorship will more accurately reflect the actual songwriting process, which involves using previous styles and songs to forge a new form of expression. Of course, endangering protection of individual authorship, if taken to an extreme, could eliminate the incentive to create music in the first place. However, a theory of ownership that credits collaborators and influences could replace the current corporate possession of culture with a paradigm that accurately reflects the creative process.

As Neuman would claim, the web-based challenge to the oligopolistic music distribution system in the U.S. allows for greater diversity and creativity in music. One instance of the corporate limitation on creativity is the major label practice of marking albums with Parental Advisory stickers that signify violent, adult or offensive content. This labeling system, which is legally voluntary, has prompted K-Mart and Walmart, which sell 20-25% of all records in the U.S., to not carry any labeled albums.<sup>160</sup> The labeling often has racial undertones, targeting black rap artists more than any other group.<sup>161</sup> While the internet provides an opportunity for children to obtain inappropriate material, it also prevents arbitrary industry practices to limit the distribution of music. The decision of K-Mart and Walmart to not stock any “offensive” records and the tendency of record stores to have many copies of a few popular releases and very little stylistic diversity will become irrelevant.

Despite its revolutionary potential, most experts insist that MP3 technology will not doom the record industry. Only the major labels can spend substantial monies to

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<sup>160</sup> Edna Gunderson, “Most in harmony with music warnings,” *USA Today*, March 16, 1998.

<sup>161</sup> Almost any rap album with violent or sexually explicit language will be labeled, whereas a Grateful Dead album including the line “I’m gonna scare you up and shoot you,” or a Johnny Cash album including the line “First time I shot her, I shot her in the side, hard to watch her suffer but with the second shot she died,” is not. Grateful Dead, “Mr. Charlie,” *Europe ‘72* (Warner Bros., 1972). Johnny Cash, “Delia’s Gone,” *American Recordings* (American Recordings, 1994).

promote an artist and can supply the advances that constitutes a primary form of income for many musicians. Also, most established artists are tied to the major labels in contract. Indeed, Public Enemy's attempts to distribute an old album on-line were thwarted because Polygram held the right to distribute it. Most consumers would rather have their tastes dictated by radio and MTV than sift through the thousands of bands that will make their songs available electronically, and only a major label can ensure airplay for an artist.<sup>162</sup> Even Chuck D, Public Enemy's leader and an outspoken proponent of on-line distribution, admits that the new media will not replace the current structure, only offer an alternative to it.<sup>163</sup> Also, encryption technology in MP3s and compact discs will eliminate most audio piracy, so only dedicated hackers will be able to download copyrighted songs for free.

It is probable that after MP3 technology (or its successor) has become widespread, the major labels will profit from selling encrypted music files on-line, and will continue to sell albums in stores. Today's big name artists will continue to be distributed by the major labels, and the size of the "Big Five" will give them a competitive advantage in promotions and advertising that will prevent small upstart distributors from capturing too much of the record industry pie. Still, an artist such as Public Enemy who already has a large popular following will be able to break away from the major labels and sell their music on-line independently by charging money via credit card for each download. Furthermore, smaller artists will be able to reach a larger audience and save the distribution costs that plague the small labels that do not benefit from economies of scale. However, it should be noted that most of America does not yet

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<sup>162</sup> Jon Pareles, "With a Click, A New Era of Music Dawns," *New York Times*, November 15, 1998.

<sup>163</sup> David Kushner, "Chuck D: MP3 Won't Kill Labels," *Wired* February 24, 1999.

have access to the internet and probably will not for the next twenty years. The level of technological sophistry seen in college “hackers” and new media buffs is not representative of the American consumer at large, and record stores will continue to be the primary source of music for those who cannot afford a computer or who choose not to invest the time in understanding the new media technology. Still, any new copyright law must anticipate the eventual transition from the sale of a physical medium (cassettes, compact disks, digital audio tape, DVD) to the sale of digital data.

### **The On-Line Guitar Archive**

The legal controversy that has surrounded the on-line guitar archive demonstrates how issues of internet copyright may be handled in the future. OLGA, one of the greatest boons for amateur musicians that accompanied the advent of the internet, contained 15,000 files of guitar tablature, chords, and lyrics. All of the files were amateur’s interpretations of relatively well-known songs. Of course, OLGA and many sites like it constitute a very real economic threat to the publishers of guitar tab books, who charge guitar players twenty dollars for a more elaborate and dependable version of what can be found on OLGA. In 1996, EMI Music Publishing pressured the University of Nevada at Las Vegas to eliminate the site, which it had been hosting. It claimed that the electronic publication of certain songs constituted unlicensed usage of songs whose copyright belonged to EMI Publishing.<sup>164</sup> Duplicate versions of OLGA, known as mirror sites, also closed due to EMI Publishing’s legal threat. Defenders of OLGA claim that it constituted Fair Use, arguing that the use of the files was only for private study. Indeed, the

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<sup>164</sup> Matthew Mirapaul, “Tablature Erasa: Guitar Archive Closed by Lawyers,” *New York Times* June 6, 1996 web version.

difference between OLGA and a library is negligible. Although America On-Line also stopped hosting a copy of OLGA, the archive of now 22,000 files can still be accessed at a number of sites.

The apparent perpetuity of OLGA demonstrates that new information technology makes restricting copyright violation extremely difficult. Even if all American mirror sites were shut down, other countries could still host sites that could be accessed by Americans.<sup>165</sup> It is for precisely this reason that WIPO established worldwide intellectual property rights. The pertinacity of the guitar archive also shows that hackers and other net experts will always be a few steps ahead of the authorities, devising new ways to transmit information that may violate copyright. As with MP3s, publishers must hope that the majority of consumers will be too lazy or technically ignorant to access the violating files.

### **New Media and Music Copyright**

The coming metamorphosis demands that copyright law be examined in terms of the operation of the music industry in ten years rather than its condition now. First, sampling will be even easier because music will be available in mass quantities on the internet. This constitutes quite a challenge for labels and publishers hoping to catch all

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<sup>165</sup> In January of 1999, the Harry Fox Agency, which is also the licensing wing of the National Music Publishing Association, filed a criminal complaint that led to a police raid in Switzerland and the elimination of a lyrics site that held the words to over 600,000 songs. Joe Nickell, "We Can Work It Out," *Wired News* January 25, 1999. The operators of the site and the National Music Publisher's Association have considered making the site an authorized outlet for the lyrics that is sanctioned by the NMPA. Under this proposal, any revenues from advertising on the site would go to the Harry Fox Agency. Matthew Mirapaul, "Lyrics Site in Copyright Dispute May Go Commercial," *New York Times* (Web Version), January 30, 1999.

uses of the work they own under copyright.<sup>166</sup> There will be more music available, which in turn implies that each artist will command a smaller share of the market. Just as independent artists have challenged the market dominance of major-label artists, niche bands and commercial-sounding independent bands will be able to lure consumers away from the few dominant performers. Compulsory licensing for sampling will also be made difficult, since there will be more releases and more points of distribution to monitor.

Also, the number of parties that are legally responsible will be greatly reduced. In 1998, the RIAA warned pressing plants that they would be held liable for producing an album that contained unauthorized copying. After the RIAA won \$4 million from Quixote Corporation for duplicating unauthorized compact discs, Negativland could not find a pressing plant willing to manufacture its latest CD, *Over the Edge: The Weatherman's Dumb Stupid Come-Out Line*, because the album contained an unlicensed sample from Pink Floyd's *Dark Side of the Moon*.<sup>167</sup> In the future, a band like Negativland will still be held legally accountable for sampling, but will not have to interact with a record label, a distribution company, or a pressing plant, which vastly reduces the number of obstacles to putting out a controversial album. Furthermore, the plurality of the music market of the future might equalize sales so that instead of a small band like Negativland going up against the market interests of a supergroup like U2, the bands would be on even territory and would have similar legal resources.

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<sup>166</sup> The employees of record labels and publishing companies that scan new releases for copyright violation could never listen to all the music being distributed over the internet.

<sup>167</sup> Joe Nickell, "Samples Silence Negativland," *Wired*, September 1, 1998. Negativland draws an important distinction between the Quixote case, which involved bootlegging or pirating, and their own music, which they claim is protected by the Fair Use clause. Eventually, the RIAA incorporated an explanation of Fair Use into their guidelines to pressing plants and Negativland found a plant willing to press the album.

Whatever the extent of the change in distribution, it is clear that the music industry will be significantly different in the future, and any change in the copyright law for sampling must anticipate such a change.

## **PROPOSALS**

The previous sections have demonstrated the essential aspects of any new copyright law. First and foremost, it should promote creativity in music, thus according with the goals stated in the Constitution. However, it must also be palatable to the record industry, which exerts considerable power in Congress and would be directly affected by the new law. It must establish legal guidelines for sampling that minimize the range of decision that could take place in the courts, since legal battles often result in settlements out of court that favor the wealthier party. It must also account for the change in the record industry that will accompany the transition to an internet-based marketplace: more songs will be released and consumers will buy music from a myriad of distribution outlets. Similarly, it must account for the globalization of the marketplace that the new media will make possible, so that the internet sale of music from other countries falls under the jurisdiction of the law. In addition to these stipulations, the effect these proposals would have on moral rights, parodies, and commercials are also of consequence.

### **Moral Rights**

In Europe, artists are accorded moral rights, or their rights to control future use of their creations regardless of copyright. One form is the “paternity right,” the right to be credited for a sample. Another form of moral rights is the “integrity right,” the right to prevent one’s work from being altered or distorted in a form that is not to one’s liking, as when Marc Cohn prevented dance group Shut Up and Dance from distributing their use

of his melody of “Walking in Memphis.”<sup>168</sup> Indeed, Congress established a compulsory system for composition copyrights that only applies to versions similar to the original in order to prevent works from being “perverted, distorted, or travestied.”<sup>169</sup> However, since many authors do not own the copyright to their previous work, equating moral rights with copyright is fallacious. Even if artists could control how their works are used, it is unclear how the limit on the moral rights of an author would in any way harm their creative output. Although Gilbert O’Sullivan did not want Biz Markie to sample his song “Alone Again, Naturally,” he certainly would not have stopped making music out of fear of such an appropriation. Musicians want to be musicians, and except for the few megastars that have made millions, most cannot afford to stop making music on ethical grounds.

Indeed, whereas crediting samples enhances the public knowledge of musical history and adds meaning to the new work, and is widely practiced from licensing artists such as Beck to outlaws like Negativland, preventing sampling artists from re-using their work based on personal whim only limits creativity. Artists with more resources and industry clout, such as U2 and George Michael, who recently prevented a mix of his work from being distributed, can ensure that any use of their work is according to their taste, allowing such established stars to further their oligopoly of a cultural form. If one considers authorship in its true historical context, in which styles, lyrics and melodies are personalized amalgamations of what has come before, then the moral rights of an author to determine all future use of a personal creation seem less essential. Although it may seem distasteful for Puff Daddy to use the Police’s “Every Breath You Take” as the

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<sup>168</sup> David Robinson, “Sampling: how not to get caught out!” *Samplenet*, [http://www.futurenet.com/samplenet/tutorias/SAMPLES\\_LAW/sample.html](http://www.futurenet.com/samplenet/tutorias/SAMPLES_LAW/sample.html).

<sup>169</sup> House Report of the Copyright Act of 1976, No. 94-1476, at page 109 (September 3, 1976), in Kohn, p. 1300.

majority of a new song without the consent of Police, it is equally unfair that such a use does not credit the reggae bands and the pop bands who influenced the Police song, not to mention the innovators of rap who influenced Puff Daddy. Since notions of authorship are not clear cut, the law should only concern itself with promoting creativity, not upholding the moral rights of the author. Criticism, parody, and artistic appropriation would not be possible under a system of strict moral rights, so any proposal should sacrifice moral rights for the benefit to society that is constituted by re-use.

### **Parody**

The Court's decision in *Campbell* established a sufficient defense of Fair Use for parody, so I will assume the copyright law for parody should not be changed. Although the *Campbell* decision did require parodies to only appropriate enough to conjure up the original, the ruling did establish the Court's desire to protect parodies under the Fair Use doctrine. Although parodists such as Weird Al Yankovic, who do much more than merely conjure up the original, must still pay license fees, few have argued that such a practice constitutes real detriment to artistic creativity. If an artist did refuse to license an original to a parodist or if a parodist could not afford the necessary license fees, *Campbell* establishes a strong enough legal defense for the parodist that the sampling artist would have a strong case. However, if future cases infringe on the ability of parodists to claim Fair Use, or if evolution of the music industry in any way limits the ability to legally parody, the issue should be reexamined.

### **Advertising**

The use of sampling in advertising differs fundamentally from sampling in artistic musical works because the re-use of a sampled work for commercial purposes does not promote the useful arts. Copyright laws were established to benefit society by allowing the arts to flourish, but were not designed to allow advertisers to use music to sell products. However, although the distinction between art and business maintains the integrity of the rock and roll ethos of music as art and culture rather than a product, sampling artists are also trying to sell something. One could argue that there is little difference between Nike trying to sell shoes by sampling the Verve and Puff Daddy trying to sell Puff Daddy albums, T-shirts, concert tickets, home videos, and wall posters by sampling the Police. Complaints that the use of songs in commercials limits creativity are entirely unfounded, as the Verve example shows. Artists including the Verve, Fatboy Slim, the Beatles, Spiritualized and Stereolab have received exposure in commercials that led to sales, which in turn allowed the artists to make more music. Still, the copyright law was established to promote the arts, not Volkswagen sales, so bands like Negativland are right in claiming Fair Use should not extend to commercials. Indeed, one of the 1976 Copyright Act Fair Use guidelines suggests against finding Fair Use when the use is for a commercial purpose. Furthermore, advertisers have certainly not been limited by the requirement of licensing samples, whereas artists have. It is justifiable, then, to mandate licensing for advertisements, since that will funnel more revenue to the artists without infringing on creative impulses.

Few have argued that the system should be otherwise, although a few artists claim that even though their copyrights have been sold, they should still retain the right to prevent their works from being used to sell products. Although the use of Beatles songs

to sell footwear or Rolling Stones classics to promote soft drinks is distasteful to many music enthusiasts, the majority of artists, record industry executives and advertising interests are content with the present system of sample licensing for advertising. The danger of a band losing the rights to a song because of sampling and then having the song appear on a commercial, as was the case with “Bitter Sweet Symphony,” should merely indicate the importance of clarifying the law for using samples in musical pieces.

With these stipulations in mind, I will examine a few possible copyright systems for samples: the current system, the elimination of copyright, free fragmentary appropriation, a system of rigid Fair Use guidelines, more liberal Fair Use criteria, and a compulsory license system.<sup>170</sup> A new copyright law must be both clear and in accordance with the aims of the Constitution.

### A. The Current System

Despite the gap between the intent of the copyright law as propounded in the Constitution and the practice of copyright in the world of popular music, the current system has succeeded reasonably well at promoting artistic creativity. Sample-heavy albums such as *Odelay* and *Paul’s Boutique*, Puff Daddy’s *No Way Out* and Sublime’s *40 Ounces of Freedom* have been made. While it is true that artists without the financial resources to clear their samples cannot use them, it is equally true that record labels and publishing companies have relatively little interest in suing obscure and low-selling

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<sup>170</sup> Some lawyers and academics argue that the duration of copyright protection should be reduced and the short-term compensation increased. Don E. Tomlinson and Timothy Nielander, “Unchained Melody: Music Licensing in the Media Age,” 6 *Texas Intellectual Property Law Journal* 277 (1998). However, a change in the length of copyright is unlikely to take place in the near future. As the law currently stands after the Sonny Bono Copyright Term Extension Act, copyright protection lasts for the life of the author plus 70 years, a twenty year extension from the older time span. RIAA website <http://www.riaa.com/musicleg/mlfed.html>. Although argue that technological change has developed at such a rate that extremely long copyright lifetimes are no longer logical, anything short of a drastic change in

artists. For example, my friends and I recently recorded a rap song that uses samples from Pink Floyd's "Atom Heart Mother Suite" and Traffic's "Low Spark of High Heeled Boys," but the owners of the respective composition and sound recording copyrights of the two songs will not care because our song has sold zero copies.<sup>171</sup> If the song suddenly became successful, then we could conceivably be sued, but since much of record industry success depends on major label promotion and distribution, independent artists usually know whether or not their album will fly under the "industry radar." Music industry backers claim that very few sampling artists are dissuaded from sampling, as most resign themselves to clear the samples or are content in obscurity. Only mid-size bands like Negativland bear the brunt of the disadvantage, since they are well enough known enough to attract the interest of labels and publishers but do not have the resources to clear all their samples.

The primary flaws with the current system are theoretical rather than practical. Although few sampling artists blame the copyright system for preventing them from making their art, many note that the current practice of the law is inconsistent with the goals of the Constitution and the tradition of collage and appropriation in artistic forms. By allowing wealthy corporations to charge sampling artists for the re-use of old songs, a select few have established a cultural oligopoly.

Meanwhile, the record industry is thriving. Most telling, rap music is the highest-selling genre, surpassing country music in 1998 for the first time ever. However, sales do not necessarily reflect a thriving artistic community. More experimental and inventive musicians rarely can make a living from their music. Many obscure artists blame the

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copyright duration would fail to have any distinct effect on sampling, since the recognizability of a sample depends on it having been recorded during the lifetime of the listener.

copyright law for creating a bland and commercialized music scene. Very few styles of music are heard on commercial radio or MTV, and many successful acts sound disturbingly similar. A common trend is for a band to become successful (Nirvana, Sublime) and then for scores of imitation bands to crop up in an attempt to appeal to a similar market (Bush, Seven Mary Three, Silverchair for Nirvana, Sugar Ray, No Doubt for Sublime). Many complain that in all forms of music, even hip-hop, creativity has stagnated and old sounds and themes are merely being recycled. A glaring example of this is the success of No Limit Records, produced by New Orleans entrepreneur Master P. The dozens of albums released on Master P's independent label consist of predictable statements of street prowess, record industry success, and allegiance to No Limit Records along with the recitation of catch phrases such as "Holler if you hear me," "Gold and platinum tank," and most ridiculous, "Ungghhhhh." Despite the lack of any discernible artistic merit, these albums sell extremely well, in part because of Master P's revolutionary marketing strategy. Although it is questionable whether copyright law can be completely to blame for this phenomenon, it is true that the current trends in music have not reflected a significant promotion of the arts. Furthermore, the production of mass culture is in the hands of the major media companies, so now a few huge corporations create a cultural product that is immune to feedback from the audience.<sup>172</sup> It is impossible to tell how responsible the copyright system for sampling is for the current state of affairs, but the case studies in previous sections do show that the accepted interpretation of the law is theoretically unsound and potentially stifling.

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<sup>171</sup> The Cohesive Nonsense Unit, "Rhymes Are Furry."

<sup>172</sup> Don Joyce, personal e-mail, March 13, 1999.

## B. Information Wants To Be Free

The most extreme proposal is that copyright law itself is fallacious and should be eliminated. Opponents of intellectual property law claim that individuals and corporations should not be able to own ideas or their expression, and intellectual material should be uncopyrightable like language.<sup>173</sup> Opponents of intellectual property for music argue that intellectual products should not be owned by individuals, companies, organizations, or the government, and should be allowed to flow freely through society like ideas.<sup>174</sup> Proponents of the “free music philosophy” claim that any abridgment of the copying of music impedes the progress of the arts. They also argue that limits on copying and use impinge on the Constitutional freedoms of speech and expression.<sup>175</sup> These radicals argue that compensation and attribution can still exist outside of the monopoly model of copyright, citing the success of free software companies and pre-copyright musicians as examples. Although free music enthusiasts defend an artist’s right to charge for tapes and CDs, they defend the right of others to copy, distribute, and modify the music.<sup>176</sup> For example, the Copyright Violation Squad conceptualizes recorded music as organized thought and sound and claims it should be a free public resource of public expression. The Copyright Violation Squad provides anyone who asks with cassette

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<sup>173</sup> Brian Martin, “Against Intellectual Property,” reprinted at [http://www.eff.org/pub/Intellectualproperty/against\\_ip.article](http://www.eff.org/pub/Intellectualproperty/against_ip.article), p. 7.

<sup>174</sup> Brian Martin, “Against Intellectual Property,” [http://www.eff.org/pub/Intellectual\\_property/against\\_ip.article](http://www.eff.org/pub/Intellectual_property/against_ip.article).

<sup>175</sup> “A Primer on the Ethics of ‘Intellectual Property,’” [http://www.ram.org/ramblings/philosophy/fmp/copying\\_primer.html](http://www.ram.org/ramblings/philosophy/fmp/copying_primer.html).

<sup>176</sup> “The Free Music Philosophy,” <http://www.ram.org/ramblings/philosophy/fmp.html>.

copies of controversial works such as Negativland's "U2."<sup>177</sup> Individuals could copy any music, but not sell the new copy. The emphasis of this proposal is on benefiting society through liberal copyright laws, rather than promoting individual wealth.

If copying were made legal and free, sampling would no longer require licensing or clearance fees. This would be consistent with the conception of the collective process of creative works, since all music is indebted to the stylistic, melodic and lyrical influence of collaborators and previous music. This would create an environment in which sampling would be completely legal, and an artist could borrow as much of a previous work and alter or copy it to whatever extent he or she pleased.<sup>178</sup>

The primary problem with this system is that it would remove the incentive for much music-making today: money. Supporters of free music claim that musicians would continue to make money from merchandise, concert tickets, performance royalties, and even record sales to consumers who buy albums for the liner notes, lyrics sheets, and packaging. Also, free music enthusiasts claim that sending donations directly to the artists could become an accepted social practice like tipping.<sup>179</sup> This argument is deeply flawed. Very few consumers would send "donations" for copied works, and even fewer would buy a CD they already owned just for lyrics and liner notes that would be readily available on the internet for free. Although the elimination of copyright law would allow any creative appropriation, the primary result would be scores of bootlegs of artists, and the record industry would lose billions in revenue.

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<sup>177</sup> John Sloop and Andrew Herman, "Negativland, Out-law Judgments, and the Politics of Cyberspace," *Mapping the Beat: Popular Music and Contemporary Theory* ed. Thomas Swiss, John Sloop, and Andrew Herman (Malden, MA: Blackwell, 1998), p. 291-292.

<sup>178</sup> The GNUmusic project seeks to offer free sound files and software resources on a web site to create an Internet-based community of experimental musicians. See <http://www.gnumusic.net>. Akihiro Kubota, personal e-mail, March 7, 1999.

<sup>179</sup> "The Free Music Philosophy."

A more convincing argument made for opponents of copying restrictions is that very few musicians ever become wealthy through their craft anyway. Opponents of strict intellectual property law cite the law of diminishing returns, claiming that extending copyright ceases to promote progress and merely allows a fortunate few to profit from intellectual property protection. They claim that the current copyright law hurts society more than it benefits artists by offering slight incentives to creating music.<sup>180</sup> Again, however, a practical defense of an ideological statement fails to hold water. Although few musicians do make millions, almost all want to. As rapper Ol' Dirty Bastard explains, "who the f@#\$ wanna be an MC if you can't get paid to be a f#\$%in' MC?"<sup>181</sup> Although many collage artists also have paying jobs as computer programmers or professors, the majority of contemporary musicians rely on the proceeds of their work, and would not be able to dedicate their lives to their art without this financial remuneration. This is most true for hip-hop, which is one of the few ways poor African-Americans can transcend the system of poverty that has developed in the inner cities.<sup>182</sup>

This raises the larger question: how elastic is the supply of new music? Will artists continue to make music if they make less money, or if their music no longer belongs to them? No statistic can accurately measure the behavioral tendencies of popular musicians, but the thousands of struggling bands in America alone suggests that most musicians would dedicate at least a few years to music even if financial rewards were unlikely. Brad Parker, a professional songwriter, claims that although he has lost huge profits to piracy and unfair industry practices, he still wants to write songs

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<sup>180</sup> Richard Stallman, "Copywrong," [http://www.eff.org/pub/Intellectual\\_property/copywrong.paper](http://www.eff.org/pub/Intellectual_property/copywrong.paper).

<sup>181</sup> Ol' Dirty Bastard, "Rawhide," *Return to the 36 Chambers-The Dirty Version (Elektra, 1995)*.

professionally.<sup>183</sup> Further profits from sampling does not influence any musician's career decision, so the loss of sampling license revenue would not have a profound effect on any career. Labels and publishers could both argue that the proceeds from licensing samples allow them to hire more bands and give their roster larger advances, but once again this is ignoring the actual situation in the music industry. The supply of music vastly outpaces the demand of record labels for bands, so the labels give the bands only as much money as is necessary to sign them and keep them away from another label. New artists would not find another career because they are afraid that in twenty years a rap group will use their chorus. Still, some level of potential financial reward is necessary as an incentive to musicians.<sup>184</sup>

The third and most convincing argument for the free copying of music is that a music industry that bases creativity on a reward system limits the creativity of output and hurts society even while it benefits the individual artist. Some argue that paying artists on a piecework basis through royalties actually reduces the quality of work rather than stimulating creative genius.<sup>185</sup> They hold that most musicians act according to creative impulses, and the elimination of a record industry would produce more creative and self-indulgent forms of music, since commercial concerns would become irrelevant. A brief examination of the money-making acts in America today would demonstrate that sticking to an accepted formula (angst-filled rocker, sexy diva, street-smart rapper) is the easiest path to commercial success. The only artists that can truly afford to be creative are the

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<sup>182</sup> "If I wasn't in the rap game, I'd probably have a Ki knee deep in the crack game, because the streets is a short stop, you either slinging crack rock or you got a wicked jump shot," Notorious B.I.G., "Things Done Changed," *Ready To Die* (Arista, 1994).

<sup>183</sup> Brad Parker, phone interview, 2/25/99.

<sup>184</sup> Kevin McManus at SESAC makes an analogy to golf: as soon as golf began attracting sponsors and provided the potential for significant earnings, many more people began playing golf. Phone interview, 3/24/99.

few that have the financial cushion of years of success (Neil Young, REM, David Byrne) or those who rely on income from other sources (most foundsound collage artists).

Psychological studies have shown that performing an activity with the goal of a reward reduces creativity.<sup>186</sup> The argument follows that if all artists were forced to work two jobs to support themselves and viewed music as a hobby, true musical evolution would be facilitated.

Although the commercial nature of the music industry has undoubtedly impeded the amount of truly creative music that the average consumer is exposed to, the opportunity currently exists for artists to make marginal forms of music as a hobby. The many found sound artists mentioned in this paper fall into this category, as do the thousands of musicians across America who do not become rock stars. Permitting piracy would not make life easier for these musicians, it would simply eliminate most of Michael Jackson's profits. As profoundly dehumanizing as the record industry is, the profits from huge megastars like Michael Jackson, Madonna, and even U2 allow the labels and publishers to give record deals to fledgling bands just in case the new acts turn out to be the "next big thing." Eliminating copying restrictions for whole works would only have relevance for the few musicians, such as recent college graduates, who are deciding whether to try a career in music or seek another form of employment. No one would decide to spend *more* time making music if the record industry were made less dominant, so it is unclear how society on the whole would benefit from "free music," except of course by paying less for CDs.

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<sup>185</sup> Martin, p. 8.

<sup>186</sup> Alfie Kohn, "Studies Find Reward Often No Motivator: creativity and intrinsic interest diminish if task is done for gain," *Boston Globe*, January 19, 1987.

Making one's music free is a good tactic for fledgling bands hoping to gain exposure to wider audiences or simply increase public access to their work. I personally was in a band that distributed its albums for free because a wider audience was deemed more important than financial gain. Within a year, copies of our poorly recorded music had surfaced in Washington D.C., Colorado and Alaska.<sup>187</sup> The internet allows bands that wish to distribute music for free to reach a wider audience and, in some cases, spread an obscure musical style to thousands whereas tape copying could only reach a few friends.

However, allowing free copying of their music, as when songs are distributed in MP3 format without the consent of the artist, allows consumers not to pay for the album because the songs are available for free. If copyright law were entirely eliminated, consumers could purchase the latest Smashing Pumpkins album and either distribute it for free or charge customers to make a personal profit. The new media technology has made obtaining free music much easier. Although the elimination of copying restrictions would free up sampling artists to pursue their creative endeavors, its implications for the record industry and artists make it politically unfeasible. Even if paternity rights were maintained so that sampling or bootlegging continued to credit the original artist without payment, the record industry and probably most artists would use all lobbying power to prevent its enactment into law. This plan, quite simply, is impossible.

### C. Free Fragmentary Appropriation

*We think it's about time that the obvious aesthetic validity of appropriation begins to be raised in opposition to the assumed preeminence of copyright laws prohibiting the free reuse of cultural material. Has it occurred to anyone that the private ownership of mass culture is a bit of a contradiction in terms?*<sup>188</sup>

<sup>187</sup> Muffcake, *Have A Slice, The Chronic, and We Shot Tupac*.

<sup>188</sup> Negativland, "Fair Use," *Fair Use*, p. 195.

-Negativland

*free The fragmentary reuse of anything for any reason should be free of charge and of charges, period.*<sup>189</sup>

-Don Joyce, member of Negativland

The Negativland camp and other sound collage artists argue that any fragmentary sampling of a musical work should be legal because such re-use is a legitimate creative technique.<sup>190</sup> Negativland maintains that, “as artists, the economic prohibition of clearance fees and the operational prohibition of not being able to obtain permission when our new context is unflattering to our samples should not diminish our ability to reference and reflect the media world around us.”<sup>191</sup> Negativland agrees with the intent of copyright law, and opposes piracy or bootlegging. For this reason, they support the right of copyright owners to demand payment for the complete usage of a song, as when a band covers a song written by someone else. However, Negativland argues that copyright ownership should not prevent the creative reuse of a work, while maintaining that the original artist should be credited in the liner notes of the new work.<sup>192</sup>

Negativland and their allies do not demand any change in the existing copyright law, insisting that the law itself allows for the system that they prefer. An expansion of Fair Use in the courts could protect all partial uses of an older work for which the whole is greater than the some of its parts. John Oswald, another foundsound artist, cites Milton’s maxim that piracy or plagiarism occurs when the old work is not bettered by the

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<sup>189</sup> Don Joyce, personal e-mail, March 4, 1999.

<sup>190</sup> Negativland, p. 48.

<sup>191</sup> Negativland, “Negativland’s Tenets of Free Appropriation,” *Negativland website*, <http://negativland.com/riaa/tenets.html>.

<sup>192</sup> The packaging for the Negativland CD *Dispepsi* credits the seventeen sources from which the sound samples found on the album were culled.

borrower.<sup>193</sup> Legal precedent established by the courts' interpretation of statute could allow the Fair Use Doctrine to override copyright restrictions on creativity. Just as the Biz Markie case mandated sample clearance and the 2 Live Crew case established protection for parody, a court case that expanded the legal conception of Fair Use would prompt creative artists to use uncleared samples and would discourage labels and publishing companies from filing suit against them. In the *Campbell* decision, the court investigated whether the new work was transformative, adding new expression of meaning or message to the original.<sup>194</sup> The criterion of a new work superseding the original by adding something new could also be the determining factor in whether a sample is fragmentary: if the original does not add anything, whether in sound or meaning, to the original, then a court could find that the sampling artist had infringed. Because Congress is so susceptible to the lobbying of the RIAA and NMPA, a law that allowed free sampling could never be passed.<sup>195</sup> For that reason, a court precedent is the only way this system could ever be implemented.

The first flaw with the Negativland proposal is that the guidelines are overly vague. The obvious question must be answered: what constitutes fragmentary appropriation? Is it all but five seconds of a five minute song, or does the fragment have to be substantially smaller than the new song? While some make a distinction between a song that uses a sample as a component and the re-use of an older tune that adds little artistic development to the original, it is often unclear whether or not a use has been

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<sup>193</sup> John Oswald, "Plunderphonics, or Audio Piracy as a Compositional Prerogative," <http://www.interlog.com/%7Evacuvox/xplunder.html>.

<sup>194</sup> Kohn, p. 1372.

<sup>195</sup> Don Joyce, personal e-mail, March 14, 1999.

transformative.<sup>196</sup> Some uses of fragmentary appropriation are clearly transformative in terms of both music and meaning, as when Naughty By Nature's "Ghetto Bastard" uses the sped-up bassline from Bob Marley's "No Woman No Cry" and retains the coda of voices singing "everything's gonna be all right," but features rap verses about life in the American ghetto. Both the meaning, the story of growing up poor in Newark, and the music itself, a rap song, differ from the original, so Naughty By Nature's use would be considered fair. However, the distinctions are not always as clear cut. The Fugees' remake of Bob Marley's "No Woman No Cry" is considered by most to be a cover, since none of the Marley sound recording is used, but does adding a hip-hop beat and changing the word "Kingstown" to "Brooklyn" constitute transformation?<sup>197</sup> Transformation can be very minute and the line between a cover and an original song can often be confused.

In another instance of subtle transformation, many dance remixes involve putting a different beat under a popular rock song, making it viable for a club setting. For example, the single release of Cornershop's "Brimful of Asha" includes a remix by big beat producer Fatboy Slim that features a heavier beat and various sound effects that fit in with the original song.<sup>198</sup> This practice is so untransformative that the song is generally released under the original artist's name, so that the song would be attributed to Cornershop and called "Brimful of Asha (Norman Cook Remix Single Version)." Having free fragmentary sampling would allow producers and DJs to change only the beat of a song and appropriate an entire song with licensing. It is possible that the release of an

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<sup>196</sup> Neil Strauss, "Sampling is (a) Creative of (b) Theft?" *New York Times*, September 14, 1997.

<sup>197</sup> Legal dispute between the Fugees and Marley camps is unlikely since Fugees vocalist Lauryn Hill is engaged to Marley's son. Naughty By Nature, "Ghetto Bastard," *Naughty By Nature* (Tommy Boy: 1991); Fugees, "No Woman No Cry," *The Score* (Sony: 1996); Bob Marley, "No Woman No Cry," *Legend* (TuffGong, 1984).

<sup>198</sup> Cornershop, "Brimful of Asha," (Wijja: 1998).

older song with a revamped beat would in fact infringe on the market of the original, as only a truly dedicated fan would want the original and remixed versions of Cornershop's "Brimful of Asha."

A third example demonstrates the arbitrary nature of transforming or bettering the original. The Evolution Control Committee, a group of sampling artists that agree with Negativland's proposal, created "Rebel Without A Pause (Whipped Cream Mix) by splicing the vocal track from the Public Enemy rap song "Rebel Without A Pause" onto an instrumental track by Herb Alpert and the Tijuana Brass.<sup>199</sup> While the Evolution Control Committee insists that a song "should rely on its own merits, rather than riding the coattails of success of another song," the samples are in fact complete songs by the original artists, only fragmentary in that the background music of the Public Enemy song had been removed.<sup>200</sup> Found sound artists would demand that the Evolution Control Committee song be protected under Fair Use, but that same protection would imply that playing two complete songs back to back and calling the creation a new song would also be protected. If using the entire vocal track from a rap song does not constitute "riding the coattails of success of another song," then any creative form of bootlegging (one that in any way differs from the version of the song previously available) would be legal.

Without a clear distinction between piracy and fragmentary appropriation, the Negativland proposal would not prevent the same legal threats that stifle creativity under the current system. The legal distinction of what constitutes "the whole being greater than the sum of its parts" would necessarily involve legal battles that are inefficient, costly,

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<sup>199</sup> The ECC did not clear the license with Public Enemy or Herb Alpert because to sample the Public Enemy master alone would have cost \$2,500, which is more than the ECC spent on the entire project. Mark Gunderson, "Copyright...For Poorer or Richer," <http://www.icomm.ca/macros/copyrite.txt>

<sup>200</sup> Mark Gunderson, "Copyright...For Poorer or Richer," <http://www.icomm.ca/macros/copyrite.txt>.

and usually threatening enough so that independent artists and labels would be forced to settle out of court. In sum, fragmentary appropriation would allow near-piracy as well as dense sound collage. Just as current Fair Use terminology such as “conjure up the original,” “transformative” or “de minimis” constitutes the ridiculous collision of legal restrictions and musical styles, “fragmentary” applies a legalistic term to a phenomenon that cannot be easily classified.

Negativland argues that because art is subjective, it cannot be simplified into concrete boundaries that would eliminate dispute and possible legal action. They compare having an objective limit on how much sampling can constitute Fair Use to a mandate of how much blue can be used in a painting.<sup>201</sup> Art and the law, they argue, are not compatible, so any strict legal restriction will necessarily limit artistic potential. Still, when confronted with the ambiguity that such a system could present in the courts, Negativland intellectual property expert Don Joyce suggested the following guidelines for courts to determine Fair Use. A “no” answer to one guideline could be overshadowed by a yes in the other two, with three “no” answers resulting in a finding of infringement and three “yes” answers producing an automatic finding of Fair Use.

- 1. Does the contested work contain less than the whole of the original work used?*
- 2. Does the contested work significantly transform the work used?*
- 3. Does the contested work as a whole produce an effect that is significantly new and different from the work used within it. Is the whole “more than the sum of its parts?”*

Joyce claims that 99% of all cases of sampling would be easy to distinguish from bootlegging according to this system. Although the decision would be subjective, necessitating some court battles, the guidelines give the benefit of the doubt to artistic

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<sup>201</sup> Don Joyce, personal e-mail, March 14, 1999.

creativity rather than private ownership by holding the right of society to benefit from artistic creativity and the right of the individual to free expression higher than an artist's right to all-inclusive intellectual property. For the cases examined in this paper, these criteria would simplify any legal dispute over Fair Use, and protect almost all uses of sampling under the Fair Use doctrine.<sup>202</sup>

The argument for the Negativland proposal is certainly compelling. Free fragmentary appropriation eliminates corporate ownership of the environment that artists live in, and expands the scope of legal creativity. It also is consistent with the tradition of folk art, folk tales and folk music that until recently constituted the basis of artistic creation, allowing appropriation through sampling to bear the same legal ramifications as the other types of appropriation that have always been a part of music. The appropriation of the media is a viable artistic technique and one that fits into a long history of appropriative art. Having to pay for the many samples that make up a sound collage piece prohibits bands outside the corporate structure to legally create their art. It is true that sampling like that of Negativland does not hurt the market for the original, and in many cases enhances interest in the original. For example, hip-hop has spawned a revival of 70s funk bands who are touring again and releasing new albums.<sup>203</sup> Also, as stated previously, the fear of being sampled would not discourage any artists from creating music. Even if it did, the flattery and criticism that sampling allows is fundamental to the notion of free speech.

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<sup>202</sup> For a brief song-by-song analysis of how Joyce's proposal would effect the case studies, see Appendix E.

<sup>203</sup> Bands such as George Clinton and the P-Funk Allstars, the Ohio Players, Kool & The Gang, Earth, Wind and Fire, and War credit being sampled in hip-hop to their revival. Vernon Gobbs, "Funk Revival On Road, in Studio," *Billboard*, July 27, 1996.

Most importantly, the framers of this proposal claim that its implementation is necessary to further the creative arts. In terms of artistic structure, “everything new that we could possibly do has now already been done,” so artistic creativity now involves recombining the styles, structures, melodies, lyrics and timbres that have come before into new hybrids.<sup>204</sup> From a pop music perspective, the success of Sublime’s mix of hip-hop, dub, punk, and folk, Wyclef Jean’s combination of hip-hop and folk, and Prodigy’s combination of rock, rap and electronic dance music suggest that hybridization is the future of music. Negativland view their sound collage as one of the few ways to still exercise creativity following a music history in which both pure silence (John Cage) and raw noise have been considered musically viable.

Despite industry claims, free fragmentary appropriation would not have a negative effect on creative output. As explained earlier, no artists would stop making music because their work could be appropriated and added to another work. Furthermore, the dip in industry profits from the removal of license fees would not necessarily harm creativity, since most artists see relatively little of the license revenue. Furthermore, studies have shown that creativity is best fostered in a non-reward setting, so the removal of license revenue could even spur overall creativity.<sup>205</sup> Free fragmentary appropriation would cut down on the legal threat to sampling artists, which would not only allow grass roots (as opposed to corporate-backed) musical art to get off the ground, but would also prevent all parties from wasting legal fees. This model’s repression of moral rights allows true musical evolution and facilitates the free expression of parody guaranteed in the

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<sup>204</sup> Don Joyce, personal e-mail, March 14, 1999.

<sup>205</sup> Alfie Kohn, “Studies Find Reward Often No Motivator: Creativity and intrinsic interest diminish if task is done for gain,” *Boston Globe*, January 19, 1987.

Constitution. The law would benefit the public rather than private artists, companies, or corporations.

However, the damning problem with this proposal is that its success is dependent upon approval, even if begrudging, from publishers and labels. This system would not be acceptable to the RIAA or the National Music Publishers Association, since although the fear of being remixed would not discourage any artist from making music, the labels and publishers would lose money they currently earn from licensing out samples. For the catalogs of 70's funk artists, for example, it is likely that licensing to hip-hop artists produces more revenue than licensing the songs for TV, movies, radio airplay, and cover songs. Because artists like Negativland fear financial ruin from such a suit, it is unlikely that any such case could make it to court. If a court ever did decide in the favor of a sound collage artist or even a hip-hop sampling artist, the decision would be appealed and future cases would be brought by the large corporations that have too much to lose from a drastic change in the licensing system. Joyce himself admits that the court would never hand down such a revolutionary decision, and if it did, Congress would succumb to industry pressure and pass a law contradicting the court decision.<sup>206</sup> He writes, "these categories of consideration...are assuming free expression is more important to society than ownership. So right there, you know this could never happen because this society does not believe that for a moment." Although the Negativland proposal is the best from an ideological perspective, a more pragmatic solution is needed.

#### **D. Rigid Guidelines For Fair Use**

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<sup>206</sup> Don Joyce, personal e-mail, March 14, 1999.

There is a common myth in music circles that four seconds of a song or four notes of a song can be used without violating copyright. Although this concept, based on outdated legal decisions, has no bearing on the current practice of copyright law, it could provide a method to avoiding legal action and protecting fledgling artists from corporate influence. If the law stated that the appropriation of another song through sampling for the purpose of parody or for a use that lasts no longer than four seconds, not including looping, falls under Fair Use and does not require permission from the copyright-holding interests, there would never be any dispute over whether a use is fair. For non-parodic works, any use that involves a fragment longer than 4 seconds would necessitate a license from the copyright owner. This would allow a musical artist to use a segment of an old song to make a reference to the older work or to augment the musical make-up of the new work, but would prevent a new artist from “ripping off” an old work and in doing so discouraging artists from creating music. The sampling artists could loop the 4 second sample to create the background for a song, but could not create a facsimile of the original without licensing.

The most significant problem with this system is that it sets rigid bounds to a sampling artist’s creativity. If an artist needs more than four seconds of a work to complete his or her artistic vision, the use would require a significant fee paid to the original artist. This dissuades any artist from using a longer sample, since a short sample would be free and legal. As Negativland would claim, attempting to set a strict legal limit on what art is permissible contradicts all the tenets of creative art. Although such a system might be tolerable for collage artists that use many samples in a single work or

groups such as Public Enemy that use mixtures of many samples in rap songs, most appropriative artists would continue to be limited by a set limit on how much use is fair.

In one sense, this system finds a compromise between the need of sampling artists to use older music and the desire of record companies and publishers to defend the market for the original. However, this system actually satisfies neither requisite.

Negativland would claim that their sonic collages often require more than four seconds of a sample to complete their artistic vision, and the labels would complain that four seconds of a song looped for several minutes could cause some consumers not to buy the original. Unfortunately, even a system that eliminates the incredible inefficiency that plagues sampling disputes will not be widely accepted as long as the record companies and publishers benefit from an arbitrary and imprecise system.<sup>207</sup> More importantly, strict guidelines would not preserve the artistic tradition of appropriation or the societal need for creative growth that might extend beyond the use of a four second sample. Several of the case studies mentioned earlier in this paper would still require licensing under this system, but if the time limit were extended, the record industry would cry theft.

### **E. Revising Fair Use Criteria**

Because sampling did not exist at the time of the copyright law's creation, some feel that Fair Use for sampling could be clarified by a revision of section 107 of the U.S. Code. These proposals seek to maintain the system in place, but establish a different balance between artists' rights and samplers' rights. Providing guidelines for determining Fair Use for music could aid in an artist's decision whether or not to sample. For example:

- (a) Notwithstanding the provisions of 17 U.S.C. §106-106A, the sampling of a copyrighted work for artistic purposes is not an infringement of copyright.*
- (b) For purposes in this section, “sampling” is defined as using a machine to convert analog sound waves into a digital code, in order to:*
- (1) incorporate the resulting code into an original musical composition*
  - (2) combine resulting codes taken from one or multiple sources to create original musical composition; or*
  - (3) manipulate the resulting code for the purposes of (1) and (2)*
- (c) In determining whether the use made of a work in any particular case is a sample, factors to be considered shall include the following:*
- (1) the purpose and character of the use, including whether such use is for purely commercial purposes or for artistic purposes*
  - (2) the amount of substantiality of the portion used in relation to the copyrighted work as a whole; and*
  - (3) the effect of the use upon the potential market for or value of the copyrighted work<sup>208</sup>*

This proposal, which need not be limited to music, makes an important distinction between sampling for the purposes of bootlegging strictly for commercial gain and sampling that is done for artistic purposes. It also protects artists from losing sales by being co-opted by a new work that uses their song. However, these guidelines are so vague and arbitrary that it is unclear whether or not most cases of sampling would be protected. Even if sampling is seen as a potentially legitimate art form by the Court, these guidelines leave a wide spectrum as to the extent of sampling that may or may not be Fair Use. This fails to alleviate the problems with the current system, especially license fees paid to large corporations based on the threat of legal action, a lack of congruence between the copyright clause of the Constitution and the Copyright Law, and the ability of original artists or their associates to prevent sampling and limit artistic expression due to personal whim. Although such a legal revision would be a slight improvement over the current law, several court cases would be needed to define the court’s position on where

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<sup>207</sup> “A New Spin on Music Sampling.”

the cut-off for Fair Use exists on the spectrum, and such a cut-off could very well be more limiting than the current system.

### **F. Compulsory Licensing System for Samples**

The reason few legal disputes have arisen over covering songs is that a compulsory system is in place, overseen by the Harry Fox Agency, that leaves no room for argument about the cost of licensing an entire song. A similar system could be developed for sampling, so that the copyright holder for the original song would be paid royalties based on the performance of the new song. A neutral non-profit clearinghouse could determine the portion of a song that is constituted by the sample, and ownership of the composition and sound copyright could be divided based on that proportion. For the purposes of royalties, the copyright would be treated as if the song were co-owned, with the performance and mechanical royalties for each song being split according to the proportion decided on by the clearinghouse. The Harry Fox Agency could collect mechanical royalties from album sales and divide according to the proportions decided on by the clearinghouse, and the performance rights societies (ASCAP, BMI, SESAC) could distribute performance royalties similarly. Decisions about whether to use the song in movies, commercials, and television shows would be left up to the artist or corporation with the largest proportion of composition ownership, but proceeds from such secondary uses would again be divided according to the proportions decided upon by the clearinghouse.<sup>209</sup>

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<sup>208</sup> Carl A. Falstrom, "Thou Shalt Not Steal: *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.* and the Future of Digital Sampling in Popular Music," 45 *Hastings Law Journal* 359 (January, 1994).

<sup>209</sup> The decision to use the new work in commercials or other forms of media should be left to the majority composition copyright owner rather than the majority sound recording copyright owner because a re-make

Paying license fees via royalties is the fairest method for both the sampled artist and the sampling artist because speculation as to the future success of the new song and power relations between the two parties cannot effect the license fee. The current licensing alternatives, aside from doing nothing and refusing to grant a license, include granting a license for a one-time flat fee, granting a license in exchange for royalties from the sales of the new song, granting a license in exchange for royalty and performance royalties garnered by the new work, seeking co-ownership of the new composition, or seeking an assignment of the copyright of the new work.<sup>210</sup> A flat fee licensing system would be unwieldy, since newer artists and labels with fewer resources would be less able to pay but would also distribute fewer albums. Granting the original artist full ownership reduces the incentive for new artists to sample. Dividing up the royalties for sales and performance based on the extent of the sampling could prove to be a more efficient method of maintaining intellectual property rights while fostering creativity.

An easy way to establish the royalty rate would be to base it upon the rate determined by the Copyright Arbitration Royalty Panel.<sup>211</sup> The clearinghouse could determine the value of the sample to the original and the new work, so that the royalty percentage could shift from 5% of the statutory rate for a trivial series of notes to 100% of the statutory rate for a song that uses the sample as its basis. The number of times a sample is used in the new work and the duration of the sample would be weighed in determining the percentage, but the success of the old song would not be considered.

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of the underlying musical composition could be used in such formats but the sound recording cannot exist without the underlying song.

<sup>210</sup> Al Kohn and Bob Kohn, *Kohn on Music Licensing* (Englewood Cliffs, NJ: Aspen Law and Business), p. 1300-1301.

<sup>211</sup> The National Association of Songwriters claims that the current statutory rate of 7.1 cents is far too low. In the 1920s the rate was 2 cents, so the statutory rate for mechanical licensing has risen far slower than

However, every sample involves a sound recording copyright as well as the composition copyright. Although some sounds, such as a shout or two drum beats, are not subject to composition copyright, most samples appropriate a substantial amount from the underlying musical composition and the sound recording of that composition.

Consequently, in addition to the holder of the composition copyright, most samples need to be cleared with the owner of the sound recording licenses, who are typically record labels. Although sampling artists now have to license samples from both copyright holders, no court decisions have discussed sound recording copyright. Since most samples are used because they are recognizable, arguments of *de minimis* or unrecognizability are largely irrelevant.<sup>212</sup> Furthermore, the Digital Millennium Copyright Act ensures the rights of sound recording copyright holders on the internet, so mechanical royalties will have to be paid to all copyright holders when a song is sold over the internet. The current royalty rates for sound recordings range from .5 cents to 5 cents per unit, which is considerably less than the rates for composition.<sup>213</sup> Because most labels have sampling artists on their roster, they are typically more accommodating of those requesting licensing. A possible solution would be to set a maximum ceiling for sound recording royalties owed of 50% of the current statutory rate. This could leave a sampling artist with a combined royalty fee of 150% of the statutory rate, but only in extreme cases. Even on an album such as *Paul's Boutique*, the amount of new lyrics would make such an eventuality unlikely.

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inflation. Increasing the rate would benefit older songwriters who would be sampled, and hurt new artists who would be paying for the samples.

<sup>212</sup> Alan Korn, "More On Sampling," *The Fine Print: Legal Issues That Concern Musicians*, <http://mail.musicuniverse.com/fineprint11.html>.

<sup>213</sup> Kohn, p. 1309.

A compulsory system would eliminate most court cases, allow noncommercial bands to “fly under the industry radar” or avoid clearing all samples, protect parody and free expression by eliminating moral rights, prevent sampling artists from paying exorbitant license fees, and allow parody to flourish. Because the license fees are in the form of royalties, a small artist need not have a substantial sum ahead of time and cannot be stuck with significant fees unless the new album makes enough money to pay them. Furthermore, it allows a sampling artist to profit even though an album may be sample-heavy. The owners of copyright benefit because they will not need to hire lawyers and listen to every new album to obtain license revenue. One could argue that judgments of how essential the sample is to the original or the new song are arbitrary, and therefore make an automatic system impossible. However, it is doubtful that the fear of having the royalty rate determination in third party hands would scare off any musician from making music. Furthermore, the elimination of a legal threat would more than make up for the lost ability of a small artist to sell a record without clearing the sample.

Unfortunately, such a compulsory license system suffers from both theoretical and logistical difficulties. From a theoretical perspective, almost everyone in the music industry objects to a compulsory system as a matter of course. Publishers and record labels would lose the ability to charge high royalty fees or exorbitant flat fees for samples, and would complain that any compulsory system erodes the incentive system that compels artists to create music. Labels and publishing companies would not want to surrender decisions about royalty rates to a third party. To a minor extent, the adverse effect such a system would have on the industry might also harm individual artists. Since mechanical royalties are often divided equally by the publisher and the artist, a drop in

licensing revenue could hurt artists.<sup>214</sup> However, it is unclear whether a compulsory system would actually reduce licensing revenue. While publishers could no longer charge exorbitant fees for samples, more use would take place and more sampling artists would be forced to pay a license fee, so that an artist might actually receive increased income.

The major problem is that many in the music industry still view extensive sampling as theft. A music lawyer makes the analogy of someone taking a car to run an important errand that might benefit many people.<sup>215</sup> The person should not be able to take the car without the owner's permission, the lawyer argues, except in special situations like medical emergencies or law enforcement. This analogy does not hold: personal property rights were established to protect the rights of the individual, whereas copyrights were established to benefit society as a whole. Therefore, taking the car to benefit many people could be more in the benefit of society than maintaining the car owner's property rights. Even though the record industry may be theoretically adverse to any weakening of the property rights that have allowed it to make billions of dollars, it is unclear whether the industry would lose profits from the system. Also, a compromise must be made between providing incentive for artists and allowing society to further the arts by appropriation, and as previously discussed, a strict conception of a composition or sound recording as "property" is too limiting of society's potential to re-use.

However, many in the music industry also find compulsion repugnant because it eliminates the moral rights of the author, which still survive (just barely) with the current system.<sup>216</sup> For example, in the *Campbell* case, Warner-Chapell did not want to file suit

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<sup>214</sup> Contracts with record labels are far less equitable, so the artist would not see a significant loss of revenue even if sound recording licensing profits did fall.

<sup>215</sup> Fred Koenigsberg, counsel at White and Case, phone interview, March 16, 1999.

<sup>216</sup> Kohn, p. 1301.

against 2 Live Crew, but Roy Orbison's widow used a clause in her contract with the publishing company to force it to object to the obscenity of the 2 Live Crew song.<sup>217</sup> Nevertheless, as stated above, the moral rights of an author based on a conception of authorship that is questionable to begin with should not be held as a paramount concern in cases of sampling.

Collage artists, in turn, would complain that any license system continues the marriage of art and commerce that compromises artistic principles, disapproving of any system that allows the ownership of mass culture. It is true that mandating licensing for samples contradicts the folk tradition of appropriation in music and the visual arts, in which appropriation is considered an essential technique. Although the compulsory license system would allow almost any appropriative use, many musical artists would still refuse to pay original artists for what the new artists perceive as a cultural environment that should be commented on freely.

From a logistical standpoint, the system would require the establishment of a clearinghouse by private interests. Enforcement of the payment schemes, especially on the internet, would require the full cooperation of record labels, performance rights societies, publishers and artists. The sheer number of new releases each week, especially when the internet becomes a viable mode of distribution, would require a large staff and technology able to quickly access all new releases.

Although it pleases none of the contesting parties, a compulsory system may be the best alternative. A theoretical common ground between opponents of corporate ownership of art and the record industry that depends on strict property laws to reap profits is impossible. The best alternative is to implement a system that allows the record

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<sup>217</sup> Fred Koenigsberg, counsel at White and Case, phone interview, March 16, 1999.

industry to continue to flourish, so that it can provide artists with the income necessary to allow them to make music full-time, while at the same time allowing new artists to re-use the cultural heritage of music in new artistic forms. This proposal accomplishes these pragmatic goals, and does not harm any of the concerned parties enough to eliminate its support in the courts.

## MY PROPOSAL

*You ain't a beauty but hey, you're all right, and that's all right with me.*  
-Bruce Springsteen<sup>218</sup>

*If this was the only way to get a better solution, I guess I would grudgingly accept it.*  
-Bob Boster, sound collage artist<sup>219</sup>

A compulsory licensing system for samples is by no means perfect. It does not replace the current copyright law with one that correctly reflects the creative process. It also would not foster the greatest amount of sampling creativity, since sampling would cost a new artist money. It could eliminate some revenue from sample licensing, which would risk hurting the music industry and perhaps artists. However, given the current structure of the music industry and the direction that new media will take the music marketplace, my suggestion for a change in the copyright law would provide the greatest impetus for musical creativity while maintaining political feasibility. In the next section, I will elaborate on how a compulsory system would operate.

The cornerstone of my proposal is a not-for-profit private clearinghouse that would determine the proportion of ownership of the composition and sound recording of songs involving samples. The clearinghouse could either be established voluntarily, like the Harry Fox Agency, or could be mandated by Congress. The sampling clearinghouse would be sent every new release that contains a sample. The samples would be clearly delineated to facilitate the computation of ownership share. Avoiding the system, of course, would be voluntary, but if a sampling artist were to release a song containing a sample without sending it to the clearinghouse and without clearing the sample with the copyright owners privately, the copyright owners could sue the sampling artist for

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<sup>218</sup> Bruce Springsteen, "Thunder Road," *Born to Run* (CBS: 1975).

<sup>219</sup> Bob Boster, personal e-mail, March 10, 1999.

violation of copyright. The clearinghouse would then determine the proportion of ownership belonging to the various composition copyright holders and sound recording copyright holders. Whereas ASCAP, BMI and SESAC have managed to establish various models of licensing for all the mediums that play music, the sample clearinghouse would be much simpler. All the new CDs (and soon digital music files) would be sent to the clearinghouse, which would simply determine the proportion of authorship and make such information public.

Several such licensing clearinghouses have been set up in response to legislative suggestion in the past, and have all been relatively successful at upholding their respective licensing systems. In 1978, The Copyright Clearance Center was established to oversee the licensing of photocopy reproduction rights. In managing rights for 1.75 million print works and representing thousands of publishers and writers, the CCC has licensed over 9,000 users of photocopied print, including companies and universities.<sup>220</sup> The CCC makes the use of copyrighted printed materials more efficient by distributing the royalties from the licenses to the individual publishers and writers while acting as a single point of contact for users of copyrighted works. Internationally, the CCC formulates agreements with reproduction rights organizations overseas so that the foreign organizations pay the CCC for American works copied abroad and the CCC pays its foreign counterparts for foreign works copied in the United States.

Although the CCC does not handle music, it proves to be a useful model on which to base a sampling clearinghouse, since it handles 1 million licensing transactions a year

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<sup>220</sup> Copyright Clearance Center, *CCC website*, <http://www.copyright.com/About/default.html>.

while operating as a non-profit organization.<sup>221</sup> Just as the CCC funds its operation by taking a small percentage of the licensing revenues it collects, a sampling clearinghouse could charge each artist that sends a new album a few cents per album to pay for the review process. This would still save artists money, since finding the original artists and haggling over proportions privately would involve considerable legal costs. Of course, new artists would retain the right to bypass the clearinghouse and negotiate directly with the original copyright holders, but the original copyright holders would have to respect the decision made by the clearinghouse. Since artists would prefer to use samples administered by the clearinghouse, since these samples would not require legal haggling and exorbitant licensing fees, all labels, publishers and artists would be encouraged to join the compulsory system. Either Congress could make paying the royalty determined by the clearinghouse a legal alternative to negotiating with the copyright holder, or the labels and publishers would sign an agreement with the clearinghouse which would waive claims on sampling artists paying by the compulsory system.

Just as the CCC's Board of Directors contains representatives from academia, publishers, authors, government and other concerned parties, the sample clearinghouse could be administered by a combination of artists, copyright lawyers, and representatives from the RIAA, NMPA, ASCAP, BMI, SESAC, The National Academy of Songwriters, and media outlets such as MP3.com and goodnoise.com. Industry experts warn that because publishers and record labels have so much to gain from copyright-friendly percentage findings, corruption of the evaluation process would be a significant threat to

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<sup>221</sup> For the sake of clarity, I have used the CCC as a rough model rather than the licensing clearinghouses of the Harry Fox Agency or the performance societies because they are described later as performing other tasks within the new system.

such a system.<sup>222</sup> Because it is essential that the clearinghouse not fall under the influence of the music industry and give either new or older artists unfair favor when determining the proportion of ownership, it is essential that direction of the clearinghouse be a cooperative venture based on pre-set guidelines.

The current statutory royalty rate for complete compositions is 7.1 cents per song. Using this 1998 royalty rate, a trivial series of notes used once that was assigned a 5% rating would produce a licensing royalty for the composition copyright owner of .355 cents per unit sold. This may seem minuscule, but a million selling album would give the original artist \$3550. This is substantial considering that under the current system, the sample would probably not be licensed at all. A sample given the 75% rating, on the other hand, would generate 4.97 cents per unit sold for a composition copyright owner. A million selling album in this case would produce \$53,250 in royalties for that party. Although a new artist only makes about a dollar in royalties from the sale of a CD, an album that samples heavily would still only pay about half of that to the various original artists, and the sampling artist would save the thousands of dollars that a flat-fee license would cost.<sup>223</sup> Since the record labels generally pay for the clearance fees for samples, record deals could stipulate that the record label would pay the sampling royalties and an artist would continue to receive a dollar per album in artist royalties.

With the statutory fee accepted as the maximum royalty rate that can be charged for the use of a sample, guidelines are necessary to allow the clearinghouse to assign the correct proportion of ownership to the sampling artist and the original artists.<sup>224</sup>

Suggested factors include the popularity of the prior work as a whole, the importance of

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<sup>222</sup> Kevin McManus, SESAC, phone interview, March 24, 1999.

<sup>223</sup> The \$1.00 estimate is from Donald Passman, *All You Need to Know About the Music Business*, p. 172.

the sample in the original work, the duration of the sample, and the importance of the sample to the new work. The first factor, the success of the original work, takes an overly commercial perspective of the law, rewarding successful original artists because recognizable samples from successful songs tend to create more successful sampled works. This phenomenon is already accounted for by the royalty system, since successful songs involving samples send more money to the original artists than flops. On the other hand, the other three factors do indicate criteria that the clearinghouse should use when determining the proportions of ownership. The melody, chorus, vocals, or opening of a song should be valued more highly because these are the key elements of the original work.<sup>225</sup> For example, The Beastie Boys use the main riffs from Led Zeppelin's "The Ocean" and Black Sabbath's "Sweet Leaf" on their first album *License To Ill*, which should result in a higher proportion of ownership going to the original artists than the background music from Them that Beck samples on "Jack-ass." The duration of the sample also measures the significance of the sampled material, but should be measured against the second criterion so that a long sample of background music is given less weight than a shorter sample from a melody or chorus.<sup>226</sup> Accordingly, Vanilla Ice would cede much of his songwriting share to Queen and David Bowie for looping the intro to their collaboration "Under Pressure" on his rap song "Ice Ice Baby," whereas Public Enemy would give up far less for a klaxon horn that is meshed with dozens of other sounds. The fourth factor, the importance of the sample to the new work, gives more weight to a sample that makes up the chorus of a new song than one which appears in a minor form. Thus, the notorious sampler Puff Daddy would lose much more of his

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<sup>224</sup> "Note: A New Spin on Music Sampling: A Case for Fair Pay," 105 *Harvard Law Review* 726 (1992).

<sup>225</sup> "A New Spin on Music Sampling."

copyright share for one of his sample-dependent rap songs, whereas a three note riff used only once would not deserve a large share.

Example Guidelines for the Determination of Sampling Royalty Percentages

Nature of Sample in Original Song

Does the sample include the riff, chorus, vocals, melody of the original?

Does the sample include the “hook,” or most memorable segment, of the original?

Is the sampled fragment in the background or foreground of the original?

Duration of Sample

How long (in seconds) is the sampled fragment?

How many times is the sample looped in the new song?

How long is the total playing time of the section involving the sample in the new song?

Does the sample include the underlying composition or just the sound recording?

Nature of Sample in New Song

Is the sample altered, sped up, sped down?

Is it the only sample or one of several?

Is it used as the chorus or hook of the new song?

How much does the new song resemble the old?

How much of the new song does not involve the sample?

Is the sample used in the background or foreground of the new song?

Although multiple samples confuse proportional allotment somewhat, each additional sample reduces the importance of the others so that their sum would continue to add up to a maximum of the statutory rate for a cover song. If the panel found the sampling percentages for song composition to exceed 100%, it would have to reevaluate, since it is impossible for a new song to contain more foreign material than a cover song, which is completely written by other parties and receives the standard royalty rate. In Appendix E, I will explain how this system would apply to some other songs from the case studies.

For example, the two second drum break from Mountain's "Mississippi Queen," which connotes a musical reference only to the most seasoned of classic rock listeners, would receive a sound recording royalty rating of 5% for its sampling in *Paul's Boutique* song "Looking Down the Barrel of a Gun." Since the four drum hits are not part of the underlying musical composition, the composition copyright holder for the Mountain song would receive no royalties for the re-use. The single bell that is heard repeatedly would also receive a sound recording rating of 5% and again could not be considered part of any musical composition. On the other hand, the drum loop that plays throughout most of the song would be deemed 30% of the sound recording and 30% of the composition, since it is not as essential to the original or the Beastie Boys song as a melody or chorus but is still easily recognizable. The guitar riff, also recognizable and looped extensively, would receive a rating of 30% for both copyrights. Accounting for all the sound recording values being divided by two, the Beastie Boys would end up owing a combined 95% of the statutory royalty rate, or 6.745 cents per unit, to the various artists they sampled.<sup>227</sup> For a song that apart from the lyrics is composed entirely of samples, a rating of 95% out of 150% is not too steep. A rating of 150% would imply that the entire composition and sound recording were sampled directly from another source with no changes by the new artists. Of course, if the entire sound recording and composition existed in unchanged form, the clearinghouse would find the sampling artist to be guilty of piracy, so the 150% is a limit that could never actually be realized without legal violation.

Clearly, this system places the emphasis on protecting the rights of new sampling artists rather than maintaining a strict definition of Fair Use. However, it manages to account for the many arguments against allowing sampling by ensuring that if the new

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<sup>227</sup> Beastie Boys, "Looking Down the Barrel of a Gun," *Paul's Boutique* (Capitol, 1989). SEE AUDIO.

song began selling at high volumes, and thus constituted a threat to the original works and an indirect challenge to the incentives promoting original art, the original artist would be remunerated through royalties. If the new song were only purchased by a handful of consumers, then the re-use would in no way threaten the original work and little repayment to the original artists would be necessary to maintain a healthy atmosphere of creativity.

The infrastructure for collecting the sampling royalties after the clearinghouse determines the proportions of ownership is already in place. In 1927, the National Music Publisher's Association established the Harry Fox Agency to act as a clearinghouse and monitoring service for licensing musical composition copyrights. 20,000 American publishers pay the Agency a small percentage to monitor records, tapes, CDs, and now the internet, as well as movies, television, and radio programs, and license the use of the publishers' songs to the users for the statutory rate.<sup>228</sup> The Harry Fox Agency keeps 4.5% of all mechanical royalties recovered as a commission, and takes a similar commission for synchronization licensing for films, broadcast TV, and radio shows.<sup>229</sup> The Harry Fox Agency, or competitors, could collect the mechanical royalties from the sales of music and distribute them according the composition proportions determined by the clearinghouse.

For performance royalties, BMI, ASCAP and SESAC, while keeping only operating expenses as a commission, could continue to collect for composition copyright holders. The RIAA, citing the Digital Performance Right in Sound Recordings Act that went into effect in 1996, claims that the record companies should be paid license fees for

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<sup>228</sup> The Harry Fox Agency, "About HFA," *HFA website*, <http://www.nmpa.org/hfa.html>.

webcasters, and has established itself as a clearinghouse for webcasters to cover sound recording copyrights.<sup>230</sup> Like ASCAP and BMI, the RIAA would collect a percentage of the license fees for the service of collecting royalties. Although the RIAA's legal right to demand licenses for nonsubscription web broadcasts is still under dispute, and the global nature of the internet makes license enforcement before the complete implementation of WIPO difficult, the infrastructure for a clearinghouse for sound recording copyrights is in place. For albums sold in stores, the RIAA could apply its internet model to normal distribution in order to obtain the royalties owed to sound recording copyright owners.

The globalization of markets necessitates that any effective licensing system be recognized worldwide rather than just within the borders of the United States. Although the U.S. certainly dominates the world trade for compact discs, sampling artists could bypass a U.S.-only compulsory system by releasing an album overseas. Just as ASCAP and BMI have to seek out and acquire royalties from foreign performances of compositions and the Harry Fox Agency must acquire mechanical royalties for albums sold overseas, the sample clearinghouse would need to monitor songs sold overseas for their sample content. While it would be difficult to convince a Czech rap band to submit an album to the U.S. sample clearinghouse and share royalties with a band in the U.S. from sales in Czech Republic, the establishment of sample clearinghouses in other countries could augment the scope of the U.S. sampling system just as the foreign performance rights societies interact with BMI and ASCAP.

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<sup>229</sup> The Harry Fox Agency, "Engaging HFA As Your Agent," *HFA website*, <http://www.nmpa.org/hfa/services.html>.

<sup>230</sup> Beth Lipton, "Music firms mull Net copyright claim," *CNET News.com* <http://www.news.com/News/Item/0,4,23170.00.html?st.ne.1.head>

For new releases by American artists, the current infrastructure is equipped to collect the royalties worldwide, since all the problems of internationalization and internet that would effect a sample clearance system would also effect the traditional mechanical, performance, and sound recording licensing structures. Currently ASCAP (for example) has agreements with 55 foreign performance rights societies to collect royalties from public broadcast overseas. It collects over \$130 million a year, almost a fourth of its total revenue from international royalties.<sup>231</sup> If an American artist released an album that was deemed to contain samples and thus be co-owned by the original artists, the agencies would collect and distribute as they would for all other releases.

Music sales over the internet will be easier for the rights societies to monitor than sales and broadcasts in foreign countries. Once the proportions of ownership have been established by the clearinghouse, performance and mechanical royalties would be distributed to the various parties in the traditional way. ASCAP, BMI, and SESAC would receive license fees from radio stations, webcasters, and music venues, and then divide the sum a song is allocated proportionally between the composition copyright holders. ASCAP, BMI and SESAC have recently expanded their number of licensing models to cover the licensing of performance on the internet. For mechanical royalties, the Harry Fox Agency would collect royalties for albums sold in stores or over the internet and again divide them proportionally among the composition copyright holders. The RIAA, which has already established itself as the collecting agent for sound recording royalties in webcasts, could also collect the sound recording royalties for the record labels. BMI has already developed a “robot” that scans the internet for the performance of a song, and

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<sup>231</sup> ASCAP, “Collecting International Royalties,” <http://www.ascap.com/membership/international.html>.

a similar program could be developed to keep track of sales.<sup>232</sup> The record labels are currently developing technology that would watermark all music to prevent the unauthorized copying and transmission of digital files.<sup>233</sup> Such technology will be necessary for the record industry to curtail piracy, but it would also facilitate the computation of sampling royalties.

The few court decisions that have pertained to copyright infringement in sampling would deter most potential pirates from bypassing the system. The same legal threats that have supported the current system of licensing would compel sampling artists to either clear a sample through the clearinghouse or negotiate privately with the copyright holders. Disputes over whether a song involving sampling should be submitted to the clearinghouse would fall under the jurisdiction of the courts, since not paying royalties for a song's samples constitutes copyright infringement. Such an eventuality would be rare because the legal risk of avoiding the system would outweigh the modest costs of submitting an album to the clearinghouse.

However, if a sampling artist or the original song copyright holders dispute the proportions decided upon by the clearinghouse, they could refer to the appeals board of the clearinghouse and ask for a reevaluation (for a fee). A randomly selected group of reviewers would again determine the proportions of ownership, and if the second evaluation differs by more than 10% of the original percentage, the appeals board would submit the songs in question to a third team of reviewers and average the three results. This would not occur frequently because after a few months the clearinghouse would develop a fairly rigid method of following the guidelines. Also, the slight differences in

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<sup>232</sup> Kevin McManus, SESAC, phone interview, March 24, 1999.

<sup>233</sup> Brad Parker, National Academy of Songwriters, phone interview, March 25, 1999.

royalty revenue that would be caused by a change from 30% of the statutory rate to 35% would rarely make the appeal fee an efficient use of resources. This dispute resolution system would keep as many cases as possible out of the courts. Because the overburdened courts would favor the implementation of a compulsory system that removed the mechanics of the music industry from the legal sphere, they would probably rule in favor of the compulsory system if any parties sued the clearinghouse or a sampling artist who used the clearinghouse.

Although such a system does not understand sampling to be the evolutionary conclusion of a history of popular music that has involved appropriating past works of music, capitalism necessitates the ownership of any marketable good. This system does, however, clearly define the legal guidelines of sampling copyright, so legal argument rather than the threat of legal action can control disputes over sampling copyright. A clearer law also prevents major record labels and publishing companies from wielding an unfair advantage when negotiating license fees or disputes. Because payment for samples would be in the form of per-unit royalties rather than flat licensing fees, prohibitive licensing fees would not prevent any sampling artists from realizing their creative vision. Although a subtle pressure to use fewer samples and thus own more of the copyright might influence some artists to shy away from extensive sampling, any artist who felt sampling essential could easily complete any project. Therefore, the copyright law and its interpretation in the courts more accurately reflects the Constitutional goal of promoting the creative arts.

## CONCLUSION

*The darkest hour is always just before the dawn.*  
-Crosby, Stills and Nash<sup>234</sup>

Questions of public policy rely on real-world context, and clarifying copyright law for the licensing of music samples is no exception. Although the history of sampling and art itself suggests that the creativity alluded to in the Constitution would best be attained by extending Fair Use to all uses of sampling, the need to appease industry lobbyists and maintain a system of incentive for musical artists demands that such radical changes not be implemented. The compulsory license system I have described may not accord with Warhol's vision or the American folk music ethic, but it would make artistic creative growth in music possible.

Unfortunately, even a compulsory system that could benefit all the parties involved in sample licensing is unlikely to be implemented. Because labels and publishers do not want to lose control of royalties, they would not voluntarily allow a neutral clearinghouse to determine the royalty rates that sampling artists would pay. Industry experts insist that Congress would never implement a mandatory system that required labels and publishers to surrender the ability to charge exorbitant rates for licenses.<sup>235</sup> Since the record industry, as well as the motion picture industry and most major forms of media, is owned predominantly by large corporations such as Time-Warner, any significant threat to the profits of record labels and publishers could influence the campaign funds that are currently supplied to Congress by industry

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<sup>234</sup> Crosby, Stills, and Nash, "Long Time Gone," *Crosby, Stills and Nash* (Atlantic: 1969).

<sup>235</sup> Kevin McManus, SESAC, phone interview, March 24, 1999.

lobbyists.<sup>236</sup> Not until the music industry changes drastically will an alternative to the present system be politically viable.

However, such an eventuality may not be too far off. The history of sampling shows that publishing companies and record labels only began to care about sampling when the acts using the technique began to make money. If profit is the primary force behind licensing enforcement, it is possible that a change in the industry structure might change the restrictions on sampling.

Although sampling is revolutionizing popular music in the United States, most music industry representatives do not consider the current sample license system to be the most serious challenge facing the music industry.<sup>237</sup> Piracy of both compact discs and sound files on the internet threatens industry profits more than compliance with a compulsory license system for sampling. Since the advent of MP3s, for example, the RIAA has concentrated its efforts on eliminating internet bootlegging rather than infringement in cases of re-use. An increase in the number of media outlets such as DVD, webcasting, MP3s, and interactive works will decrease the legal attention that is paid to sampling. When all music is sold in electronic form over the internet, the record industry will be struggling to prevent new types of bootlegging and may choose to abandon its prohibition of alternatives to the current system.

Furthermore, the record industry needs to maintain profits, which may involve fostering new forms of music such as those by Beck and Nine Inch Nails that involve

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<sup>236</sup> Brad Parker, phone interview, March 25, 1999.

<sup>237</sup> Artists, too, do not consider sampling to be their primary policy concern. Whatever revenue artists lose from unlicensed sampling or licensing fees pales in comparison to the profits lost through other accepted industry practices. For example, the National Academy of Songwriters notes that record deals, mechanical royalties and performance royalties all pay the artist at unfairly low rates. Furthermore, industry practices like paying song copyright owners modest flat fees instead of per-screening royalties for songs used in movies deprive artists of far more money than any sampling fees. Brad Parker.

samples. Although the obvious samples in songs by Beck still need to be cleared, the small ones may not incite a law suit because the legal hassle is not worth it and such artists are essential to the future success of the music business.<sup>238</sup> Especially since many new sub-genres of music that involve sampling have become successful, the record industry may choose to ignore minor copyright infringement. The major labels will be seeking to maintain market dominance by tapping into new styles of music to sign the next Nirvana or Master P. Because the music of the future will be even more referential to the past, and since the sampler has come to rival the guitar as the rock instrument of choice, the entire industry may come to welcome sampling not as a means to reap licensing revenue but as a way to generate much needed new sales. When such a paradigm shift takes place, a compulsory license system will allow the music industry to stay healthy while artists face fewer obstacles to using sampling as an artistic form.

Even with the current structure of corporate dominance, an evaluation of copyright systems for music samples is not a purely academic exercise. Only through the examination of alternatives to the current system of copyright can the emphasis of public discourse shift to promoting musical creativity. Most industry executives subscribe to the paradigm of absolute intellectual property and personal property rights rather than benefit to society and the musical community at large. When the coming transformation of the music industry takes place, it will benefit policymakers to remember the Constitutional goal of promoting the useful arts when establishing copyright laws that pertain to sampling.

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<sup>238</sup> Bob Boster, personal e-mail, March 8, 1999.

## Appendix A

Various Lyrics for “In the Pines/Where Did You Sleep Last Night?”

*Black Girl black girl, don't lie to me  
Where did you sleep last night  
I stayed in the pines where the sun never shines  
And shivered when the cold wind blows.  
-Lizzie Abner, 1917*

*The longest train I ever saw  
Went down that Georgia line  
The engine passed at 6 o'clock  
The cab passed by at 9*

*In the pines, in the pines, where the sun never shines  
And we shiver when the cold wind blows*

*I asked my captain for the time of day  
He said he threw his watch away  
A long steel rail and a short crosstie  
I'm on my way back home*

*Little girl, little girl what have I done  
That makes you treat me so?  
You caused me to weep, you caused me to moan  
You caused me to leave my home  
-Bill Monroe, 1952*

*My girl, my girl, don't lie to me  
Tell me, where did you sleep last night?  
In the pines, in the pines, where the sun don't ever shine  
I would shiver the whole night through*

*Her husband was a hard working man  
Just about a mile from here  
His head was found in the driver's wheel  
But his body never was found*

*My girl, my girl, where will you go?  
I'm going where the cold wind blows  
In the pines in the pines where the sun don't ever shine  
I would shiver the whole night through  
-Nirvana, 1993<sup>239</sup>*

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<sup>239</sup> The entire analysis of “In the Pines” comes from Eric Weisbard, “Pop Music; A Simple Song That Lives Beyond Time,” *New York Times*, November 13, 1994.

## Appendix B

### “Sam Stone” by John Prine

*There's a hole in daddy's arm where all the money goes  
And Jesus Christ died for nothing I suppose  
Little pitchers have big ears, don't stop to count the years  
Sweet songs never last too long on broken radios<sup>240</sup>*

### “Cop Shoot Cop” by Spiritualized

*Hey man there's a hole in my arm where all the money goes  
Jesus Christ died for nothing I suppose  
Cop shoot cop I believe I believe that I have been reborn  
Cop shoot cop I haven't got the time no more*

*Hey man there's a hole in my head where information goes  
And all my friends died for nothing I suppose  
Cop shoot cop I believe I believe that I have been reborn  
Cop shoot cop I haven't got the time no more*

*Hey man there's a hole in my reason that I gotta close  
'Cause all my love died for nothing I suppose  
Cop shoot cop I believe I believe that I have been reborn  
Cop shoot cop I haven't got the time no more*

*The desert is any place without you  
And all my love, I'm pretty sure you can feel that too  
The loneliness, you know it hits me and lasts for days  
'Cause you're so sweet, you make me feel like a child my babe*

*The desert is where I find myself when I get blown  
'Cause you're so sweet and I can't seem to find my way back home  
If this is heaven, well you know that I'm not happy here  
'Cause heaven ain't any place where you're not near*

*The desert is any place without you my friend  
And I will love you even if I'm in it 'till the end  
'Cause you're so sweet I'm always wishing babe that you were here  
The desert is any place without you my dear*

*And I will love you, I will love you<sup>241</sup>*

<sup>240</sup> John Prine, “Sam Stone,” *John Prine* (Atlantic, 1971).

<sup>241</sup> Spiritualized, “Cop Shoot Cop,” *Ladies and Gentleman We Are Floating in Space* (Dedicated/Arista, 1997).

**Appendix C**

“Oh, Pretty Woman” by Roy Orbison and William Dees

*Pretty Woman walking down the street  
Pretty Woman, the kind I'd like to meet  
Pretty Woman, I don't believe you, you're not the truth  
No one could look as good as you, Mercy*

*Pretty Woman, won't you pardon me  
Pretty Woman, I couldn't help but see  
Pretty Woman, that you look as lovely as can be  
Are you lonely just like me?*

*Pretty Woman stop a while  
Pretty Woman, talk a while  
Pretty Woman give your smile to me  
Pretty Woman yeah yeah yeah  
Pretty Woman look my way  
Pretty Woman say you'll stay with me  
'Cause I need you, I'll treat you right  
Come to me baby, be mine tonight*

*Pretty Woman, don't walk on by  
Pretty Woman don't make me cry  
Pretty Woman don't walk away  
Hey O.K.  
If that's the way it must be, O.K.  
I guess I'll go home, it's late  
There'll be tomorrow night, but wait!  
What do I see?  
Is she walking back to me?  
Yeah, she's walking back to me!  
Oh, Pretty Woman.*

**Appendix D**

“Pretty Woman” as recorded by 2 Live Crew

*Pretty woman walkin' down the street  
Pretty woman girl you look so sweet  
Pretty woman you bring me down to that knee  
Pretty woman you make me wanna beg please  
Oh, pretty woman*

*Big hairy woman, you need to shave that stuff  
Big hairy woman you know I bet it's tough  
Big hairy woman all that hair it ain't legit  
'Cause you look like Cousin It  
Big hairy woman*

*Bald headed woman girl your hair won't grow  
Bald headed woman you got a teeny weeny afro  
Bald headed woman you know your hair could look nice  
Bald headed woman first you got to roll it with rice  
Bald headed woman, let me get this hunk of biz for ya  
Ya know what I'm saying you look better than rice a roni  
Oh bald headed woman*

*Big hairy woman come on in  
And don't forget your bald headed friend  
Hey pretty woman let the boys jump in*

*Two timin' woman girl you know you ain't right  
Two timin' woman you's out with my boy last night  
Two timin' woman that takes a load off my mind  
Two timin' woman now I know the baby ain't mine  
Oh, two timin' woman  
Oh pretty woman*

### **Appendix E: Fair Use Findings Using Don Joyce's Criteria**

- 1. Does the contested work contain less than the whole of the original work used?*
- 2. Does the contested work significantly transform the work used?*
- 3. Does the contested work as a whole produce an effect that is significantly new and different from the work used within it. Is the whole "more than the sum of its parts?"*

The Verve's "Bitter Sweet Symphony" contains only a few seconds of the original work, transforms the work, and produces an effect significantly different from the orchestral version of "The Last Time," so the court would rule for Fair Use.

2 Live Crew's "Pretty Woman" does not contain the entire Roy Orbison song, transforms the lyrics and sound of the original and replaces a heartfelt romantic effect with a raunchy satirical one. Thus, the Court would find Fair Use.

Beck's "Jack-ass" only uses the first few seconds of the Them song, transforms the work by adding new lyrics, melody, and guitar chords (and a completely different coda), and produces an effect different from the original due to the profound difference in song structure, lyrics, and tone. Again, Fair Use.

*Deconstructing Beck* does not use entire Beck songs, transforms any song fragment and creates an entirely different effect from the original. The Court would rule for Fair Use.

Negativland's "U2" does feature use of U2's "I Still Haven't Found What I'm Looking For," but the many other samples and parodic rendition of the original transform it and

produce a humorous effect rather than the questing romantic sentiment of the original.  
Fair Use.

*Paul's Boutique* does not contain any samples of entire songs. Also, all the uses of samples are extremely transformative, since the samples are used as a background for rapping and are spliced with other, unrelated samples. Furthermore, the effect produced by *Paul's Boutique* differs greatly from a Beatles, Johnny Cash, Sly Stone, or bluegrass song. Therefore, the Court would rule for Fair Use.

Fatboy Slim's remix of Cornershop's *Brimful of Asha* features the entire original song with a vastly different drumbeat and several other effects added. The sound is transformative, since the remix does not sound at all like the original despite the obvious melodic and lyrical similarity. Most importantly, the big beat dance remix creates a completely different effect from the leisurely original, so the Court would find for Fair Use. Dance remixes like this would prove to be the most difficult cases for a court weighing Joyce's criteria, but for the most part they would all pass the test. Fatboy Slim's extended remix of the same song would produce a much easier finding of Fair Use, because it adds new material to the song and splices the original into a new order.

Bootleg MP3s constitute a use of the entire song that is by no means transformative and creates the exact same effect as the original. Obviously, the Court would rule that the sale of MP3 of copyrighted material would constitute piracy.

In *U.S. v. Taxe*, an artist re-released versions of hit songs with the tones and frequencies changed. The entire songs were used, the minute changes did not produce a significant transformation, and the effects of the songs were the same as the originals. Therefore, the Court would find copyright infringement. However, foundsound artist John Oswald attempted a similar technique with a Dolly Parton song that would have a different legal result. By slowing down the Parton song until she sounded like a man and by adding other beeps and effects, Oswald created enough transformation of song and effect to outweigh this use of the entire song and lead to a finding of Fair Use. Here, the court's position would protect sampling for creative commentary but not for commercial piracy, even though the techniques are similar.

### Appendix F: Compulsory Sample Royalty Computations

The Verve's "Bittersweet Symphony" uses a looped sample of the orchestral version of "The Last Time," but add a new melody, new lyrics and new instrumentation. This use would receive a 40% rating for both the sound recording and composition copyrights.

The Verve would owe Allen Klein 2.84 cents per copy sold and Andrew Loog Oldham 1.42 cents per copy sold.

2 Live Crew's "Pretty Woman" was ruled by the courts to be parody, and therefore would not owe any royalties to Rose-Acuff Publishing.

As explained earlier, the Beastie Boys' "Looking Down the Barrel of a Gun" would owe 6.745 cents per unit to various copyright holders. Since the whole album uses only sampling and no original instrumentation, a rating of 95% out of 150% could be expected for the whole album.

Negativland's "U2" would have been filed as a parody and because it makes direct reference to the original "I Still Haven't Found What I'm Looking For," in a humorous and critical nature. Negativland would not owe any royalties to U2 or Casey Kasem.

"Puzzles and Pagans" on *Deconstructing Beck* is made entirely of sounds made by Beck but no songs written by Beck. Although all the sounds were in fact created by Beck, the splicing and effects were not his work. Beck and his publisher would not be owed any

royalties for the underlying composition. The sound recording copyright owner would receive a 75% rating, which amounts to 2.665 cents per copy sold.

Beck's "Jack-Ass" uses the Them sample heavily, but adds a new melody, new lyrics, and a completely different Coda. Because the overall song does not resemble the original Dylan song at all, only the sound copyright owner should be paid. The sample from Them is looped continuously but Beck's chords, lyrics, vocals and coda could stand on their own so the sound recording copyright would receive a rating of 35%. This amounts to a royalty of 1.2425 per unit sold.

Fatboy Slim's remix of Cornershop's "Brimful of Asha" adds a drumbeat and a few sound effects but for the most part, the remix resembles the original. Both for the composition and the sound recording, the remix would receive a rating of 80%. Thus Fatboy Slim would owe 8.52 cents per unit sold.

The Evolution Control Committee's "Rebel Without A Pause (Whipped Cream Mix) would receive a composition copyright rating of 60%, which would be divided equally between Public Enemy and Herb Alpert. The sound recording rating would be 80%, again split between the two original artists. The total owed would be 7.1 cents per unit sold, the same as for a cover song.

The re-use of hit songs in the *Taxe* case would be given a rating of 95% for the sound recording and composition, yielding a 10.1175 cent/unit royalty payment. The 95% rating

is so high that the original artists may want to sue the sampling artist for copyright infringement, citing piracy. The extent of the changes levied on the original songs would determine the court's decision on such as dispute.

**Appendix G: Contents of Audio Disc**

1. The Beastie Boys, "Looking Down the Barrel of a Gun," *Paul's Boutique* (Capitol, 1989).
2. Roy Orbison, "Oh, Pretty Woman," *Monumental Hits* (Monument, 1975).
3. The 2 Live Crew, "Pretty Woman," *As Clean As They Wanna Be* (Atlantic: 1989).
4. Negativland, "U2 (1991 A Capella Mix)," downloaded from Negativland website <http://www.negativland.com/audio.html>, originally (SST: 1991).
5. The Verve, "Bitter Sweet Symphony," *Urban Hymns* (Virgin, 1997).
6. Beck, "Jack-Ass," *Odelay* (Geffen: 1996).
7. Jane Dowe, "Puzzles and Pagans," *Deconstructing Beck* (Illegal Art, 1998).
8. The Evolution Control Committee, "Rebel Without A Pause (Whipped Cream Mix)," downloaded from Detritus website, <http://www.detritus.net/ecc/gunderphonic/>.
9. Cornershop, "Brimful of Asha," (Wiija: 1998).
10. Cornershop, "Brimful of Asha (Norman Cook Remix)," (Wiija: 1998).

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This thesis represents my own work in accordance with University Regulations.

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