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"Why Can't We Be Friends?"

How Congress Can Work with the Private Sector to Solve the "Digital Sampling Conundrum"

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ABSTRACT

Recently, technological advancements have provided musicians with unprecedented digital access to the music libraries of the world. Today's musicians are increasingly experimenting with advanced digital equipment, allowing them to easily record, distort, and manipulate any piece of digital music. Specifically, artists have made the practice of "digital sampling" — the process of taking a small portion of a sound recording and digitally manipulating it as part of a new recording — commonplace. However, when it comes to this new form of musical expression, copyright jurisprudence has failed to adapt. Rather than reforming the means by which sampling litigation is conducted, my proposal would remove digital sampling from the courts altogether. Specifically, I propose revising the existing law to allow for a compulsory license for sound recordings and the creation of a sample-based Copyright Management System as a means for providing new revenue streams for the faltering music industry.

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I. INTRODUCTION

For the first time in over a decade, it may be time for the music industry to "start singing a happier tune."[1] Global recorded music revenues in 2012 increased for the first time since 1999, up 0.3%, according to a report by International Federation of the Phonographic Industry.[2] Sales are up, piracy is down, and new revenue streams seem promising for a music industry fighting its way back to economic prosperity. Reflecting on the industry's recent progress, Paul Brindley, chief executive of Music Ally, a consulting firm in London, recently commented: "If there is a lesson to take away, it is probably that the earlier you can embrace new business models and services, the better."[3] Indeed, the music industry has done just that — adapting to the digital age, rather than fighting it, by profiting from legal streaming services, such as Pandora and Spotify, and digital sales from online music distributors, such as Apple's iTunes.[4] However, in a world of ever-changing digital media, it seems the music industry has failed to embrace a fairly new and emerging form of musical expression — digital sampling and music "mash-ups." In fact, as will be

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[1]Victor Luckerson, *Revenue Up, Piracy Down: Has the Music Industry Finally Turned a Corner?*, TIME, (Feb. 28, 2013), http://business.time.com/2013/02/28/revenue-up-piracy-down-has-the-music-industry-finally-turned-a-corner/.

[2] *Id.*

[3]Eric Pfanner, *Music Industry Sales Rise, and Digital Revenue Gets the Credit*, N.Y. TIMES, Feb. 27, 2013, at B3, *available at* http://www.nytimes.com/2013/02/27/technology/music-industry-records-first-revenue-increase-since-1999.html?partner=rss&emc=rss&smid=tw-nytimes&_r=1&.

[4] *Id.*

argued in this Note, reforming the sound recording copyright regime to account for the popularity and widespread use of digital sampling can give rise to a new revenue stream for the resurging music industry.

Congress has successfully responded to new technologies and societal changes by adapting and amending the Copyright Act in order to keep the law clear, current, and relevant.[5] Restructuring the American copyright regime has been imperative for maintaining the purposes of the Constitution's intellectual property clause[6] — to promote creativity by rewarding artists with ownership and control over their works for specific time periods and allowing them to receive revenues through licensing fees or royalty payments. Recently, technological advancements have provided musicians with unprecedented digital access to the music libraries of the world.[7] Today's musicians are increasingly experimenting with advanced digital equipment, allowing them to easily record, distort, and manipulate the pitch, tempo, and

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[5] *See* Robert M. Vrana, Note, *The Remix Artist's Catch-22: A Proposal for Compulsory Licensing for Transformative, Sampling-Based Music*, 68 WASH. & LEE L. REV. 811, 816 (2011); Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831, 1856-59 (2009) (arguing that technological change creates legal uncertainty and legal delay, which, in turn, induce congressional changes to the copyright regime).

[6] U.S. CONST. art. I, § 8, cl. 8 (expressly granting Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries.").

[7] *See* Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 516 (2006).

tone of any piece of digital music. [8] Specifically, artists have made the practice of "digital sampling" —the process of taking a small portion of a sound recording and digitally manipulating it as part of a new recording — commonplace. [9] However, when it comes to this new form of musical expression, copyright jurisprudence has failed to adapt.

In the age of digital formats for music, copyright law suggests it is *illegal* for artists, without authorization, to digitally sample the sound recordings of others. [10] Current copyright infringement analysis regarding sampling is vague, making it difficult for artists to know the boundaries of permissible sampling. Purchasing the appropriate licenses can be overly expensive, involving both administrative and financial costs. Licensing costs essentially amount to a barrier of entry for sampling artists, resulting in a net loss of musical creativity — a consequence that runs contrary to the very purpose of the Copyright Act. By discouraging the growth of sampling, the law[11] seems to interrupt a long tradition of

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[8] *Id.* (citing David S. Blessing, Note, *Who Speaks Latin Anymore? Translating De Minimis Use for Application to Music Copyright Infringement and Sampling*, 45 WM. & MARY L. REV. 2399, 2403-04 (2004)).

[9] *Id.*

[10] *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005) (holding that producers must "[g]et a license or do not sample.").

[11] It is assumed for purposes of this paper that the Sixth Circuit holding in *Bridgeport* is the applicable law. To date, the Sixth Circuit is the only United States Court of Appeals to directly address copyright infringement with respect specifically to sound recording copyrights in the context of digital sampling. All other sampling cases are either (1) district court opinions, (2) only address musical composition copyrights (subject to traditional copyright infringement analysis), or (3) cases in which the court has conflated its analysis of sound recording and musical composition copyrights in a single analysis. *See generally* Newton v. Diamond, 204 F.

musical borrowing that includes "the reworking of songs by contemporaneous artists in American folk music, classical composers' practice of composing variation forms based on existing themes, and quoting from others' tunes in the context of jazz improvisation."[12]

Copyright law is faced with two competing interests. First, the owners of recordings and composition copyrights need to be reasonably compensated when their works are re-used by sampling artists. On the other hand, artists should have a reasonable degree of freedom to rework fragments of existing recordings in order to promote the growth of new genres of music.[13] Supporters of digital sampling claim that sampling musicians are "paying homage to past musical masters,"[14] and simply continuing the artistic practice of

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Supp. 2d 1244, 1260 (C.D. Cal. 2002) (granting summary judgment to a rap group that had sampled six seconds from an original composition without securing the rights to the musical composition); Williams v. Broadus, No. 99 Civ. 10957 MBM, 2001 WL 984714, at *1, 4-5 (S.D.N.Y. Aug. 27, 2001) (denying the defendant's summary judgment claim on the ground that it would not be unreasonable for a jury to find that the plaintiff's work was not an unlawful appropriation of Otis Redding's work); Jarvis v. A & M Records, 827 F. Supp. 282, 292-93 (D.N.J. 1993) (focusing its analysis on the plaintiff's musical composition claim because the defendants had made a prima facie showing of ownership of the sound recording); Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183-85 (S.D.N.Y. 1991) (holding that even a limited use of a protected musical recording constitutes a per se violation of copyright law).

[12] Carlos Ruiz de la Torre, *Digital Music Sampling and Copyright Law: Can the Interests of Copyright Owners and Sampling Artists Be Reconciled?*, 7 VAND J. ENT. L. & PRAC. 401, 402 n.1 (2005).

[13] *See id.* at 401.

[14] *See* Ponte, *supra* note 7, at 516-17 (citing Randy S. Kravis, Comment, *Does a Song by Any Other Name Still Sound As Sweet?: Digital Sampling and Its Copyright Implications*, 43 AM. U. L. REV. 231, 258-59 (1993) (arguing that sampling helps publicize and revive interest in older, often

borrowing traditional "building blocks" to create new musical expressions or ideas through transformative uses of samples.[15] Opponents of this practice assert that digital samplers are "ordinary copyright infringers who unfairly appropriate and exploit the creative efforts and innovations of others to the detriment of modern music."[16]

Despite divergent views, copyright law has failed to adapt to account for the increasing popularity of digital sampling.[17] Over time, the use of sampling has become more and more creative, moving away from the simple appropriation of a single beat to the layered use of several samples in collage-like recordings.[18] In 1989, only eight of the top 100 albums contained samples, but by 1999 almost one-third of the Billboard 100 incorporated samples in some capacity.[19] Today, some artists, such as Girl Talk,[20] have reached unprecedented popularity exclusively as "mash-up" artists.[21]

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forgotten music); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 569-70 (2004) (asserting that sampling may pay tribute or serve free speech interests through social commentary).

[15] Ponte, *supra* note 7, at 517.

[16] *Id.*

[17] *See* Vrana, *supra* note 5, at 828.

[18] *Id.* at 812-13.

[19] *See* John Lindenbaum, Music Sampling and Copyright Law (Apr. 8, 1999) (unpublished B.A. thesis, Princeton University) (on file with Center for Arts and Cultural Policy Studies, Princeton University), *available at* http://www.princeton.edu/~artspol/studentpap/undergrad thesis1 JLind.pdf.

[20] Girl Talk, whose real name is Gregg Gillis, creates "danceable musical collages out of short clips from other people's songs . . ." Vrana, *supra* note 5, at 824 (citing Robert Levine, *Steal This Hook? D.J. Skirts Copyright Law*, N.Y. TIMES, Aug. 7, 2008, at E1).

[21] *See* Paul Tough, *Girl Talk Get Naked. Often*, GQ (Oct. 2009), http://www.gq.com/entertainment/music/200909/gregg-gillis-girl-talk-legal-

Accordingly, 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 not only caused a great deal of legal controversy within the music industry, but has also become the focus of significant legal scholarship.[22] Specifically, legal scholarship has focused on what has become known as the "sampling conundrum."[23] The sampling conundrum denotes the tension between "legal and financial burdens that extant and licensing schemes place on sampling"[24] with the changing landscape of digital media and emerging musical genres.

In this Note, I argue that developments in MP3 technology and online music distribution may allow for the

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mash-up (describing how Girl Talk's live shows have become larger and more frequent, to the point that he now "regularly sells out thousand-seat venues.").

[22] *See generally*, Jonathan D. Evans, *Solving the Sampling Riddle: How the Integrated Clearinghouse Would Benefit the Industry by Promoting Creativity and Creating New Markets While Maintaining Profits for Source Material Owners*, 29 ENT. & SPORTS LAW. 16 (2012); Chris Johnstone, Note, *Underground Appeal: A Sample of the Chronic Questions in Copyright Law Pertaining to the Transformative Use of Digital Music in a Civil Society*, 77. S. CAL. L. REV. 397, 414 (2004); Ponte, *supra* note 7; Anna Shapell, *"Give Me a Beat:" Mixing and Mashing Copyright Law to Encompass Sample-Based Music*, 12 J. HIGH TECH. L. 519, 521 (2012); Vrana, *supra* note 5; Amanda Webber, Note, *Digital Sampling and the Legal Implications of Its Use After Bridgeport*, 22 ST. JOHN'S J. LEGAL COMMENT. 373 (2007); Thomas P. Wolf, *Toward a "New School" Licensing Regime for Digital Sampling: Disclosure, Coding, and Click-Through*, 2011 STAN. TECH. L. REV. 1, 4 (2011).

[23] *See* Wolf, *supra* note 22 (defining the "sampling conundrum" as "[t]he need to balance a sampling artist's interest in appropriating preexisting musical materials (and profiting from that appropriation) with the property rights that the owners of those materials enjoy under the Copyright Act.").

[24] *Id.* at 4.

development of a copyright management system (CMS)[25] for efficient licensing of digital samples. Copyright management systems are "technologies that enable copyright owners to regulate reliably and charge automatically for access to digital works."[26] The CMS is premised on the concept of "trusted systems" or "secure digital envelopes" that protect copyrighted content and allow access and subsequent copying only to the extent authorized by the copyright owner.[27] Also known as automated rights management (ARM), [28] a CMS for digital sampling would enable information providers to enforce standard copyright claims without resort to the threat of litigation — thereby removing costly and convoluted litigation from the judicial system. [29]

The proposed sampling regime is based on full disclosure of source materials used and incorporated into sample-based works, a comprehensive coding system, which tracks the use of source materials through the use of meta-data tagging, and the use of royalty fee schedules similar to those used in other compulsory licensing schemes. [30] As such, my proposal is designed to detect, count, and levy precise charges for uses beyond simply downloading a protected work.

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[25] *See* Julie E. Cohen, *Some Reflections on Copyright Management Systems and Laws Designed to Protect Them*, 12 BERKLEY TECH. L.J. 161, 161 (1997).
[26] *Id.* at 161.
[27] *Id.*
[28] Tom W. Bell, *Fair Use v. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 560 (1998).
[29] *See* Wolf, *supra* note 22, at 31 (arguing that a compulsory licensing scheme would remove responsibility from judges, who have proven unreliable and uncoordinated in the context of digital sampling).
[30] *See id.* at 7.

However, in order for a CMS for digital sampling to function optimally, I also propose the creation of a compulsory license for sound recording copyrights — the creation of which, I argue, is neither radical nor difficult to implement.[31] Altering the current statutory framework to allow for legal sampling would lower transaction costs for sampling artists entering the market while ensuring rights holders are adequately compensated for use of their protected works — both of which promote the dual aims of the Copyright Act. Additionally, in a world of terminally declining profits, the promise of a new revenue stream, in theory, should be appealing to the major players in the music industry.

II. THE "DIGITAL SAMPLING" CONUNDRUM

The current state of copyright law can be summarized as follows: "[i]f one wishes to sample, it can be easy, cheap, or legal: pick two."[32] A producer can use modern software technology easily and cheaply to digitally sample existing musical works.[33] However, artists wishing to profit from musical creation containing digital samples of pre-existing sound recordings must attempt to obtain licenses for each sample used or face the possibility of significant legal

[31] It should be noted that my proposal only seeks to implement a compulsory license for sound recording copyrights. Such a license, for reasons discussed in further detail, *does not* cover licensing for musical composition copyrights. Rather, under my regime, musical composition copyright holders would have an "opt in, opt out" option, whereby rights holders can opt to participate in the CMS or resort to ad hoc licensing and traditional copyright enforcement.

[32] *Id.*

[33] *Id.*

repercussions.[34] Yet, obtaining a license for even one sound recording from the copyright holders can be difficult and costly: an artist wishing to sample must secure licenses from *both* the musical composition copyright holder and the sound recording copyright holder. Additionally, a single "mash-up" can contain numerous samples, increasing transaction costs and compounding liability within a single track.

The "legal" solution — re-recording source materials with studio musicians — is impractical and time-consuming.[35] Even those with the resources to re-record samples may nonetheless find this alternative difficult and creatively undesirable.[36] For the artist, "a sample may contain a unique sound, which would otherwise be impossible to recreate."[37] Ultimately, the source of these tensions can be traced to the dual nature of copyright protection for musical works and the lack of clear judicial standards on the matter.

A. Rights of the Copyright Holder

Before recording technology was widespread, written compositions were the only way musical creations could be copied, and accordingly, composition copyrights were the only protection for musical works.[38] In 1971, Congress extended

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[34] *See* Vrana, *supra* note 5, at 813; Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 810 (6th Cir. 2005) (holding producers must "[g]et a license or do not sample.").

[35] *See* Evans, *supra* note 22, at 16.

[36] *Id.*

[37] Michael Jude Galvin, *Bright Line at Any Cost: The Sixth Circuit Unjustifiably Weakens the Protection for Musical Composition Copyrights in Bridgeport Music v. Dimension Films*, 9 VAND. J. ENT. & TECH. L. 529, 537 (2007).

[38] *See* Vrana, *supra* note 5, at 818.

copyright protection to sound recordings — including recordings of musical compositions.[39] Accordingly, for every embodiment of a musical work in a phonorecord since 1971, there are two copyrights that attach: one protecting the musical composition and another protecting the sound recording.[40] The musical composition copyright protects the underlying arrangement of notes and lyrics that together make up a song.[41] A sound recording copyright, on the other hand, protects the "works that result from the *fixation* of a series of musical, spoken, or other sounds."[42] Once a composition is created, a musician can take the work into the studio and create an infinite number of different sound recordings of the composition — each of which is the subject of a separate copyright.[43]

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[39] Copyright Act of 1971, PUB. L. NO. 92-140, 85 STAT. 391 (codified as amended at 17 U.S.C. § 102 (2006)). Congress initially questioned whether the "purely mechanical" reproduction of sounds involved the necessary originality required for copyrighted works, and whether sound recordings could be viewed separate copyrightable works within the constitutional parameters of "writings of an author." *See* Ponte, *supra* note 7, at 524 (citing H.R. REP. NO. 487, at 2-3 (1971), available at http://www.ipmall.info/hosted_resources/lipa/copyrights/PL 92-140, 85 Stat. 391 %28Oct. 15, 1971%29.pdf (questioning whether sound recordings rise to level of separate copyrightable works)). Despite these concerns, Congress—in an attempt to fight record piracy—recognized sound recordings as a separate copyrightable subject matter, subject to limited federal copyright protection. *Id.*

[40] 17 U.S.C. § 102(2), (7) (2012).

[41] *Id.* at § 102(a)(2).

[42] *Id.* at § 101 (emphasis added).

[43] *See id.* § 102(a)(7). However, in the case of a recording of a musical composition, the imitator would have to clear with the holder of the composition copyright. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 n.8 (6th Cir. 2005).

This distinction is important because the Copyright Act is clear that the two copyrights are separate and are not to be viewed as containing the same set of exclusive rights.[44] While the composition copyright protects the trade of composing music, the copyright for sound recordings protects the recording industry by allowing it to operate without the concern of having to compete with pirated records.[45] Under the current regime, composers and music publishers often maintain ownership of their compositions, while record companies often own the rights to recordings of those compositions.[46] Consequently, musicians and producers who wish to digitally sample a protected work must seek appropriate permission from the copyright owners of *both* the musical composition and the sound recording.[47] However, it is not exactly clear, as elaborated in Part II.B herein what the consequences are for a musician or producer who declines to pay for the requisite licensing fees for use of a digital sample.

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[44] 17 U.S.C. § 102(a)(7) (2012); *see also* 17 U.S.C. § 106 (2012) (definition of "Exclusive Rights in Copyrighted Works"). The Copyright Act explicitly denotes that a musical composition holder enjoys all five exclusive rights (i.e. right to reproduce, prepare derivative works, distribute, publically perform, and publically display the protected work); however, the copyright owner of the sound recording only enjoys the exclusive rights to reproduce the sound recording, to prepare a derivative work of the sound recording, and to distribute copies of the sound recording. This suggests that Congress intended less, and not equal protection for a sound recording copyright holder than for a copyright holder in the underlying composition. *See* Webber, *supra* note 22, at 390.

[45] *See* Vrana, *supra* note 5, at 818 (citing 1 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 22-25 ("The 1971 Sound Recording Act was rooted in concerns over piracy . . .")).

[46] *See* Vrana, *supra* note 5, at 818.

[47] *See* Ponte, *supra* note 7, at 526.

B. Infringement Analysis: What is the Governing Standard?

It is well settled that in order to establish a claim for copyright infringement, a plaintiff must show (1) ownership of a valid copyright, (2) actual copying by the defendant, and (3) that the copying constitutes an "unlawful appropriation."[48] The "substantial similarity" inquiry is used — after the fact of copying has been established — as the threshold for determining whether the degree of similarity between two works suffices to demonstrate unlawful appropriation.[49] If a second work imitates the sounds of an existing copyrighted work such that the second work is "substantially similar" to the original work, the copyright owner has a cause of action for infringement.[50] A finding of unlawful appropriation is required because not all instances of unauthorized copying rise to the level of an actionable appropriation.[51]

In litigation of digital sampling, copying in fact is often not disputed.[52] Whether a defendant copied a sound recording is seldom challenged — "the process of sampling necessarily entails making a direct copy."[53] Rather, the relevant legal inquiry is centered on the amount of "taking" sufficient to

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[48] *See* Castle Rock Entm't, Inc. v. Carol Publ'g Grp. Inc., 150 F.3d 132, 137 (2d Cir. 1998).
[49] *See* Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74-75 (2d Cir. 1997).
[50] *Id.*
[51] *Id.*
[52] Tonya M. Evans, *Sampling, Looping, and Mashing . . . Oh My!: How Hip Hop Music is Scratching More Than the Surface of Copyright Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 843, 875 (2011).
[53] *Id.*

constitute unlawful appropriation of the original work.[54] However, determining when the "unlawful appropriation" threshold is crossed is a problem of line drawing.[55] Such determinations are especially difficult with respect to sound recordings, where a disparity between a one-second sample and a two-second sample can mean the difference between an unidentifiable sample and one that is clearly recognizable.

As a cursory review of landmark sampling cases suggests, courts either have failed to (1) articulate a clear test for determining whether the unlawful appropriation threshold has been surpassed or (2) delineate unambiguous, categorical rules for the application of the substantial similarity inquiry in cases of digital sampling.[56] As Ponte notes, "[c]ourts have handed down inconsistent opinions in digital sampling cases applying different legal standards with findings ranging from per se infringement in some instances to exemptions from copyright infringement under the fair use doctrine and de minimis use in others."[57] Of particular significance is the Sixth

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[54] *Id.*

[55] *See* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A] (Matthew Bender, Rev. Ed. 2014).

[56] *See* Wolf, *supra* note 22, at 24. For example, faced with similar facts — three-note samples that were looped and altered in pitch — courts have applied different standards, with the majority in *Newton* applying a substantial similarity test (resulting in a sample being vindicated) and the *Bridgeport* court rejecting application of substantial similarity for a per se infringement standard. *Id.*

[57] Ponte, *supra* note 7, at 519-20. *See, e.g.*, Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F.Supp. 182, 182 (defendant used a digital sample of music from plaintiff's song in his recording). Assuming that digital sampling was copyright infringement from the onset, the court did not address when a digital sample rises to the level of unlawful appropriation — rendering all unauthorized sampling legally suspect (i.e. per se infringement), with no distinction made between small bites and

Circuit's opinion — the only U.S. Court of Appeals to address sound recording copyright infringement in cases of digital sampling to date — in *Bridgeport Music, Inc. v. Dimension Films.*[58] In a unanimous decision, the Sixth Circuit interpreted § 114(b) of the Copyright Act[59] to preclude application of the substantial similarity test to claims of infringement of sound recording copyrights. [60] The court, in essence, held that the

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large cuts. *Id*. *But cf.* Williams v. Broadus, No. 99 Civ. 10957 MBM, 2001 WL 984714, at *3 (S.D.N.Y. Aug. 27, 2001) (court engaged in a "substantial similarity" inquiry in order to determine whether the digital sampling ("copying") amounted to an unlawful appropriation). It is worth noting that while there is a temporal gap between the two cases (ten years), these two inconsistent approaches to digital sampling cases were handed down by the *same* district court — the Southern District of New York. Additionally, while *Grand Upright* seems to have involved both sound recording and musical composition copyright infringement, the trial judge did not distinguish which copyright he was assessing in his ruling (although it appears to have been addressing primarily the musical composition copyright). *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 802 n.16 (6th Cir. 2005). However, in *Williams*, the judge conceded that it is unclear whether the plaintiffs copied only the composition or the sound recording as well. 2001 WL 984714 at *6 n.4.

[58] 410 F.3d at 792.

[59] 17 U.S.C. § 114(b) (2012) provides: "The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording . . ."

[60] *Bridgeport*, 410 F.3d at 801-02.

unlicensed sampling of a sound recording constitutes per se infringement.[61] Accordingly, in order to produce a *legally defensible* sample, an artist must acquire licenses for each and every sampled fragment included in a finished track.[62]

The implications of *Bridgeport* for sampling are both "manifold and serious."[63] A per se rule creates a judicial standard unable to account for a "class of highly context-specific cases with unique equities and constantly evolving technological considerations."[64] Perhaps most significant, *Bridgeport* appears to contravene the fair use defense contained within the Copyright Act.[65] Section 107 of the Copyright Act delineates that the fair use doctrine explicitly covers sound recording copyrights.[66] Yet, under a per se rule, a defendant seems precluded from waging a fair use defense — a substantial break from existing copyright law.

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[61] *Id.*

[62] Wolf, *supra* note 22, at 21 (citing Kenneth M. Achenbach, Comment, *Grey Area: How Recent Developments in Digital Music Production Have Necessitated the Reexamination of Compulsory Licensing for Sample-Based Works*, 6 N.C. J. L. & TECH. 187, 189 (2004)).

[63] Wolf, *supra* note 22, at 21. The implications of the *Bridgeport* holding on issues such as the de minimis and fair use doctrines have been extensively outlined elsewhere, and accordingly, is not a central focus of this paper.

[64] *Id.* (citing Achenbach, *supra* note 62, at 200).

[65] 17 U.S.C. § 107 (2012); Wolf, *supra* note 22, at 21 (citing YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM, 443-44 (Yale Univ. Press 2006); David M. Morrison, *Bridgeport Redux: Digital Sampling and Audience Recording*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 75, 107-08 (2008).

[66] *See* 17 U.S.C. § 107 (2012) (stating "[n]otwithstanding the provisions of sections 106 and 106A the fair use of a copyrighted work . . . is *not* an infringement of copyright") (emphasis added).

Nevertheless, some commentators argue that the sampling "conundrum" can be solved through revising judicial standards.[67] For example, Morrison has advocated doctrinal revisions that would extend the reach of the de minimis defense[68] and establish the substantial similarity test as the controlling standard of review.[69] Others, such as Ashtar,[70]

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[67] *See* Jeremy Beck, *Music Composition, Sound Recordings and Digital Sampling in the 21st Century: A Legislative and Legal Framework to Balance Competing Interests*, 13 UCLA ENT. L. REV. 1, 3-4 (2005); Jennifer R.R. Mueller, Note, *All Mixed Up:* Bridgeport Music v. Dimension Films *and De Minimis Digital Sampling*, 81 IND. L.J. 435, 459 (2006); Rahmiel David Rothenberg, Note, *Sampling: Musical Authorship Out of Tune with the Purpose of the Copyright Regime*, 20 ST. THOMAS L. REV. 233, 249-53 (2008).

[68] The de minimis doctrine, which is the well-established principle in copyright jurisprudence that trivial uses of a protected work, though unauthorized, will not be deemed an infringing use in every case. *See* Jeremy Scott Sykes, Note, *Copyright—The De Minimis Defense in Copyright Infringement Actions Involving Music Sampling*, 36 U. MEM. L. REV. 749, 761-62 (2006). Given that a digital sample may only capture a few seconds of a protected work, use of small digital samples may be better viewed as a "technical violation of a right so trivial that the law will not impose legal consequences." *See* Ringgold v. Black Entm't Television, 126 F.3d 70, 74 (2d Cir. 1997). However, application of the de minimis defense in cases of digital sampling remains uncertain, since sampled material may be quantitatively small, but qualitatively important. *See* Vrana, *supra* note 5, at 845.

[69] *See* Morrison, *supra* note 65, at 138.

[70] *See* Reuven Ashtar, *Theft, Transformation, and the Need of the Immaterial: A Proposal For a Fair Use Digital Sampling Regime*, 19 ALB. L.J. SCI. & TECH. 261, 283 (2009) (arguing that in the sampling context the appropriate approach is to begin with the de minimis inquiry and then, if the copying is found to exceed it, proceed to the fair use analysis). The fair use defense is particularly applicable to sampling because samples "are merely examples of types of work that quote or otherwise copy from copyrighted works yet constitute fair use because they are complements of . . . rather

have proposed the uniform adoption of the "fair use" defense in cases of digital sampling. Since a digital sample may only constitute a split-second of a recording or only capture one or a few notes in the original composition, it seems extreme to declare that a one-second, single-note sample always amounts to an unlawful appropriation. Yet, given the many ways one may use a digital sample in a new work, it seems that the courts are not well equipped to deal this issue.

C. Doctrinal Reforms Are Not the Answer

Indeed, doctrinal reforms to the existing copyright regime seem to create more problems than answers. As the current doctrinal morass exemplifies, cases of digital sampling have proven difficult for courts to apply existing copyright law in a consistent and predictable fashion. The result, of course, is costly litigation relying almost extensively on the use of experts to weigh the merits of the case — costs that can be eliminated through the adoption of a copyright management system. Instead of continued reliance on judges and juries to shape the boundaries of permissible digital sampling, it seems most practical to remove these determinations from judicial actors altogether.

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than substitutes for the copyrighted original." *See id.* at 309 (quoting Ty, Inc. v. Publ'ns Int'l Ltd., 292 F.3d 512, 517-18, 522 (7th Cir. 2002). However, as a defense in sampling cases, fair use has generally only been successful for new musical works that parody pre-existing recorded works (*see* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)), and likely does not allow for commercial uses of digital samples.

III. THE SOLUTION: A COPYRIGHT MANAGEMENT SYSTEM (CMS) & A COMPULSORY LICENSE FOR SOUND RECORDING COPYRIGHTS

While few remix artists wish to take on the risk of relying exclusively on the fair use defense, they still have the option of obtaining a license for the samples they wish to incorporate into new works.[71] Presently, sample licensing is administered through an ad hoc network of sampling artists, music attorneys, sample clearinghouses (entities that operate outside the formal corporate structure of record labels and that coordinate bargaining between sampling artists and holders of rights in sampled music), and record labels (which have developed departments dedicated to managing their rights in their catalogs).[72] This incomplete and informal network is oriented toward sample-by-sample negotiations for the rights of source materials.[73]

Currently, the practice of ad-hoc licensing poses two primary obstacles to sampling — both of which result in elevated costs to the sampling musician.[74] First, sampling artists face the administrative costs of locating source material owners. Second, once source owners have been located, sampling musicians must then negotiate licenses for their samples.[75] Licensing therefore involves locating multiple rights holders, any one of which possesses unilateral veto power over clearance.[76] Not only do most sampling artists not

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[71] *See* Vrana, *supra* note 5, at 847.
[72] *See* Wolf, *supra* note 22, at 26.
[73] *Id.*
[74] *Id.* at 27.
[75] *Id.* at 28.
[76] *Id.* at 27.

have the financial resources to purchase such licenses, but they also come to the table with significantly less bargaining power — a consideration that weighs against the possibility of reaching a fair and equitable price for the desired sample. The standard sound recording license involves a flat-fee license, which can cost the artists anywhere from one hundred dollars to tens of thousands of dollars.[77] However, for the musical composition license, a typical deal structure involves giving the original copyright holder a percentage ownership in the new work's musical composition copyright, as well as an advance on the expected publishing income.[78] Accordingly, digital sampling currently rests on a business model that loads costs and risk on artists, while transferring potential profits to rights holders and record companies.[79]

It is apparent then, that the current judicial and accompanying licensing regime is stacked against the promotion of musical creativity — a consequence which runs contrary to the underlying principles of copyright law. [80] As this Section will outline in great detail, a CMS for sound

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[77] *See* Josh Norek, Comment, *"You Can't Sing Without the Bling": The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System*, 11 UCLA ENT. L. REV. 83, 89 (2004) (noting that "A sound recording license fee for a three-second sample used only once in a new major label work may cost $1500 as an advance on future royalties from album sales. For a looped sample of three seconds or less, the fee varies from $1500 to $5000, while a looped sample greater than three seconds can run into the tens of thousands of dollars").

[78] *See id.* at 90.

[79] *See* Wolf, *supra* note 22, at 29.

[80] *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (noting that "the primary object in conferring the monopoly . . . lie[s] in the general benefits derived by the public from the labors of authors").

recordings produces a fair, efficient mechanism that benefits all parties. However, in order to function in the most efficient manner possible and to recognize maximum returns on the broad spectrum of uses for digital samples, the CMS would need to be supported by changes to existing copyright law — in the form of a compulsory license for sound recording copyrights. Similar to compulsory licenses for playing recordings on the radio[81] and performing cover songs,[82] compulsory licenses, administered through a CMS, would allow any artist to digitally sample a previously recorded work without having to contact the source material owner. The CMS would pay out appropriate royalties to rights holders depending on the quantity taken and manner of use. Such a scheme would certainly reduce production costs — encouraging both the production of future work by current artists and lowering the economic barrier for entry of new artists who have yet to "fully develop their intellectual, social, and financial capital as experienced actors within the market."[83] Additionally, mechanical enforcement of copyright claims would allow for optimal detection of infringers without the need to resort to the judicial system.

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[81] 17 U.S.C. § 114(d)(2) (2000) (explaining a statutory license for certain types of internet radio).
[82] *Id.* § 115.
[83] *See* Achenbach, *supra* note 62, at 193 (noting that accessibility creates a feedback mechanism; lower costs of production costs enable a greater number of artists to create a greater number of works, which facilitates potentially exponential growth. This, in turn, eventually enables these works to reach the public domain and further lower production costs for artists in the future.).

A. Justifications for a Copyright Management System (CMS)

The utilitarian justification for intellectual property maintains that property rights are for the maximization of social welfare.[84] However, the present system of ad hoc licensing for samples causes many problems in terms of allocative efficacy.[85] The unequal bargaining power between musicians and record companies has exacerbated the overevaluation of licenses, resulting in economic deadweight loss to society.[86] In the context of digital sampling, there are consumers (sampling musicians) in the market who value certain samples more than their marginal cost in the secondary market for transformative works, but who do not have the ability to purchase a license to use them.[87] The quantity of samples sold is less than optimal, thereby decreasing consumer benefit by depriving society of new works.[88]

However, a CMS for sound recordings would provide a centralized point of contact for source owners and sampling musicians. Under the current regime, many infringers go free because of inadequate policing, or because it is not worthwhile for the rights holder to expend resources to obtain "cease and desist" orders and follow up, if necessary, with litigation. In

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[84] *See generally* William Fisher, *Theories of Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168 (Stephen Munzer ed., 2001), *available at* http://cyber.law.Harvard.edu/people/tfisher/iptheory.pdf.
[85] Johnstone, *supra* note 22, at 414.
[86] *See id.* at 414-15. The concept of deadweight loss can be explained as the cost of missed economic opportunities — here, the creation of new musical works — which result in market inefficiency.
[87] *See* Johnstone, *supra* note 22, at 414.
[88] *Id.*

fact, some commentators believe underenforcement by the music industry is a conscious choice — stemming from the industry's fear of losing a suit on the merits, thereby creating favorable precedent for remix artists.[89] Concurrently, popular sampling artists have an incentive to hide samples they cannot otherwise afford to clear in an attempt to avoid liability. Consolidating and coordinating the licensing of sound recordings would therefore allow the music industry to profit from this form of musical creation without monitoring costs. Likewise, sampling artists would avoid the trouble of securing and negotiating licenses and would have an incentive to disclose the use of samples as a means from shielding themselves from liability. Simply put, maximizing the efficiency of a secondary market for digital samples has the potential for net benefits for all parties — sampling musicians, rights holders, and the general public.

i. Benefits for Sampling Musicians

First, the creation of a free and fair sampling market would allow sampling musicians to explore their creative endeavors. The present "doctrinal morass"[90] makes it difficult for those wishing to sample to make accurate ex-ante judgments regarding the need to secure licenses from rights

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[89] *See* Vrana, *supra* note 5, at 826 (citing Levine, *supra* note 20, at E1 ("It may not be in the interests of labels or artists to sue Mr. Gillis, because such a move would risk a precedent-setting judgment in his favor, not to mention incur bad publicity."); David Bollier, *Is Fair Use Regaining Its Mojo?*, ONTHECOMMONS.ORG (Aug. 10, 2008), http://www.onthecommons.org/fair-use-regaining-its-mojo (suggesting that fear of a bad court decision may be keeping copyright owners from challenging fair use claims).

[90] Johnstone, *supra* note 22, at 416.

holders. [91] Making the wrong call can be costly — the penalties for infringement typically include supracompensatory damages and injunctive relief. [92] In combining the doctrinal gray areas surrounding digital sampling and the consequences of risk aversion, the result is a practice of securing licenses even when none is necessary. [93] As Gibson describes, "everyone agrees that it is usually in a user's best interest to secure a license rather than take even a small risk of an adverse judgment; the simple reality is that finding out whether permission is required usually costs more than getting permission."[94] In the context of digital sampling, it is unclear whether the fair use doctrine would protect small appropriations of the existing sound recording. If this were the case, then sampling artists would have no need to secure licenses for small appropriations. However, without certainty, it is conceivable that those producers with the resources to secure licenses may be doing so, despite the fact that the law may not require the acquisition of such licenses.

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[91] *See* James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 884 (2007).

[92] *Id.*; *See also*, Johnstone, *supra* note 22, at 402. Record companies fear severe consequences if they release music that includes samples that have not been licensed. This apprehension has been perpetuated by unsympathetic judicial opinions written in the early 1990s. *See, e.g.*, Grand Upright Music, Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 185 (S.D.N.Y. 1991). An injunction from the bench could require that an album be removed from commerce, causing huge losses in profits. Further, criminal sanctions against those who willfully copy the works of others are suggested under section 506 of the Copyright Act. *See also,* Ronald Gaither, *The Chillin' Effect of Section 506: The Battle Over Digital Sampling in Rap Music*, 3 VAND. J. ENT. L. & PRAC. 195, 201-02 (2001).

[93] *See* Gibson, *supra* note 91, at 884.

[94] *Id.* at 885.

Accordingly, the present ad-hoc system of licensing is almost certainly causing expenditure of unnecessary resources — namely, in the form of monetary costs for securing unnecessary licenses — which is economically undesirable. Furthermore, risk aversion may be causing those wishing to digitally sample to abandon their creative endeavors altogether.[95] In theory, the lack of clarity surrounding the sampling market most severely hurts upstart producers with limited resources.[96] Along these lines, the creative use of digital sampling should be permitted in order to allow novice producers to enter the market, avoid the expense of hiring studio musicians to reproduce samples, and lower administrative costs of locating source material owners.[97]

ii. Benefits for Rights Holders

Automated rights management (ARM) affords source owners with digital defense mechanisms via firewalls, encryption, and passwords against unauthorized uses. [98] As will be discussed in greater detail below, my proposed CMS contains various technological mechanisms that ensure exact and continuous control over proprietary information.[99] In essence, the CMS would imbed mp3 files with metadata that attaches to, and travels with, the protected source material files. For purposes of digital sampling, imbedding metadata tags within mp3 files would provide a mechanism for tracking all samples taken from a given track. The files may also be encrypted to ensure that source material owners maintain

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[95] *Id.* at 933.
[96] Johnstone, *supra* note 22, at 416.
[97] *Id.*
[98] *See* Bell, *supra* note 28, at 564.
[99] *Id.* at 566 (citations omitted).

control over the permissible uses of the files beyond the point of contact. The CMS would therefore provide a mechanism for rights holders to provide context specific licenses (e.g., licensing only certain portions of a sound recording), allow for the mechanical identification of samples in newly created works, and ensure that use of mp3s from the CMS are only licensed for digital sampling purposes.

In theory, a mechanism for tracking digital samples would result in a more efficient sampling market, while also spurring the proliferation of new revenue sources. The music industry, the first media business to be consumed by the digital revolution, has dealt with declining revenues since 1999. [100] For the last decade, the music industry's decline has looked terminal, with the record companies seemingly unable to develop digital business models that could compete with the lure of online piracy.[101] Yet, in 2012, the music industry saw its first rise in global sales, as digital sales and other new sources of revenue grew significantly enough to offset the continuing decline in CD sales.[102] As Edgar Berger, chief executive of the international arm of Sony Music Entertainment proclaimed, "[a]t the beginning of the digital revolution it was common to say that digital was killing music."[103] Now, he added, it could be said "that digital is saving music" [104] because digital revenue comes in a variety of forms. Sales of downloaded singles and albums, from services like Apple's iTunes, continue to grow. More promising to the industry, however, are subscription-based offerings, including

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[100] *See* Pfanner, *supra* note 3.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*

Spotify, Rhapsody, and Muve Music. According to the International Federation of the Phonographic Industry, the number of subscribers to such services grew by forty-four percent last year, to twenty million. [105] The financial and functional success of online music distributors suggests that sampling reform may not be an insurmountable task.

Digital sampling, a prominent practice in emerging musical genres such as Electronic Dance Music ("EDM") and expanding in pre-existing genres such as hip-hop, has only increased in popularity as a means of music production in the digital era.[106] According to its youthful fan-base, EDM is enjoyed "in warehouse raves, DJ sets at not-particularly-upscale clubs, and increasingly at live festivals, where both attendance and excitement has been upending."[107] In fact, the New York Times recently quoted a concert promoter as saying, "If you're 15 to 25 years old now, this is your rock 'n' roll."[108]

This demographic represents a large and emerging consumer base. While many EDM musicians create their own

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[105] *Id.*

[106] *See* Shapell, *supra* note 22, at 521 (noting "[t]he last ten years has seen a proliferation in mash-up popularity, but along with popularity comes the glare of legal scrutiny, which has favored original compositions at the expense of songs created — in part or entirely — from borrowed music"); Jonathan Bogart, *Buy the Hype: Why Electronic Dance Music Really Could Be the New Rock*, THE ATLANTIC (Jul. 10, 2012, 11:12 AM), http://www.theatlantic.com/entertainment/archive/2012/07/buy-the-hype-why-electronic-dance-music-really-could-be-the-new-rock/259597 (describing the recent rise and popularity of electronic dance music).

[107] *Id.*

[108] Ben Sisario, *Electronic Dance Concerts Turn Up Volume, Tempting Investors*, N.Y. TIMES (Apr. 4, 2012), http://www.nytimes.com/2012/04/05/business/media/electronic-dance-genre-tempts-investors.html.

original tracks, many do so through the use of digital sampling and incorporate other popular tracks during their live shows.[109] Some electronic dance artists, such as Girl Talk, play entire music sets by "sampling, blending, looping, recombining, and reconstituting endless samples of popular music from the past fifty years into strange and beautiful new creations."[110] However, artists like Girl Talk are unable to sell their albums without risk of legal repercussions.[111] Licensing reform would not only allow sampling artists to reap the full benefits for their "creations," but would also allow rights holders to tap into these emerging consumer bases and profit from their heavy reliance on digital sampling.

The creation of a CMS for digital sampling would also allow for the proliferation of secondary markets — mainly through "click-through" sales.[112] Sample-based works, unlike traditional forms of music, provide an opportunity for musicians other than the sampling artist to grab the attention of listeners that otherwise may have never inquired into their style of music. While enjoying a remix, mash-up, or other sample-based work, there will inevitably be listeners who may be

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[109] Given the complexities surrounding the right of public performance, I have decided to not address this issue for purposes of this Note. It will be important, however, to consider the impact of a legal sampling regime on rights holders' right to public performance.

[110] Paul Tough, *supra* note 21 (noting that Girl Talk has profited from his album *Feed the Animals* on a "pay what you want" basis. While he has not been sued, Gillis believes the fair use doctrine would protect his works from liability.).

[111] *See* Vrana, *supra* note 5, at 826.

[112] *See generally* Wolf, *supra* note 22 (explaining how a "coding" regime would allow new songs to be "packed" with source materials—allowing listeners to be directed to the source of samples and presumably, leading to sales of the original work).

drawn to a particular sample within the track and wish to inquire as to its source.[113] Imbedding music samples with links to original source materials would provide a listener with the option of finding and purchasing the original source material. Directing a listener to the source material would expose the listener to the original musician, allowing for proper recognition and the potential for further exploration of works by the source material musician. At a minimum, the result is publicity and "buzz" for the source material musician, but more importantly, a potential new customer for the original source material. Additionally, "click-through" links can allow for more effective advertising at virtually no cost.

B. Reforming the Current Copyright Regime is Not "Radical"

As a state-conferred monopoly, copyrights are subject to change — such as changes in duration[114] and scope — in order to adapt to changes in societal norms and advances in technology. For example, prior to 1995, recording artists and recording copyright owners did not have an exclusive right to public performance — unlike musical composition holders — and in turn, did not get paid for the public performance of their works. [115] However, the Digital Performance in Sound

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[113] *Id.* at 69 (defining "diggers" as "obsessive listeners who not only have an active interest in the sources of the samples, but also an awareness of when samples are being employed . . . and [have] a habit of spending money to acquire sampled songs").

[114] *See* Eldred v. Ashcroft, 537 U.S. 186 (2003) (upholding constitutionality of Copyright Term Extension Act of 1998 (CTEA)).

[115] Michael Huppe, *"You Don't Know Me, But I Owe You Money" How SoundExchange is Changing the Game on Digital Royalties*, 28 ENT. & SPORTS LAW. 3, 4 (2010).

Recordings Act of 1995 and the Digital Millennium Copyright Act of 1998 granted a performance right for sound recordings for certain types of digital streaming.[116] These digital performance rights ensure that artists and copyright holders are fairly compensated as music users increasingly switch from buying music to accessing music through Internet, satellite, and cable streaming services.[117] Accordingly, as the digital landscape continues to alter the ways in which listeners "consume" musical works, minor alterations to exclusive rights afforded to sound recording copyright owners should not be viewed as a radical departure from existing copyright jurisprudence.

It is certainly not unprecedented for Congress to respond to market failures through the introduction of compulsory licensing schemes.[118] For example, Section 114(d)(2) of the Copyright Act allows for the transmission of sound recordings over the radio and in other public settings.[119] To avoid unregulated monopolies of musical works,[120] the

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[116] 17 U.S.C. § 106 (2012) (providing sound recording copyright owners the right "to perform the copyrighted work publicly by means of a digital audio transmission").

[117] *Id.*

[118] *See* Joshua Crum, Comment, *The Day the (Digital) Music Died: Bridgeport, Sampling Infringement, and a Proposed Middle Ground*, 2008 BYU L. REV. 943, 965 (2008) (citing ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 6-8, 500-02 (4th ed. 2006) (noting that Congress enacted compulsory licenses in several categories in order to serve content users that were underserved by market forces)).

[119] 17 U.S.C. § 114(d)(2) (2012).

[120] Section 1(e) of 1909 Copyright Act (the "first compulsory licensing system in any copyright or patent statute) was enacted, in part, as a prophylactic response to prevent the Aeolian Company from developing a monopoly in the music industry. *See* Achenbach, *supra* note 62, at 207-08.

Copyright Act also extends a compulsory license for covers — new versions of songs recorded by different musicians.[121] To obtain a license, one need only file notice of intent to use the work with the Copyright Office.[122] If the copyright owner is on record, a statutory royalty rate must be paid.[123] If not, the filing of notice provides a safe harbor.[124] In other words, under a pure compulsory licensing system, there is no need to track down copyright owners and negotiate licensing fees.

However, the compulsory mechanical license provisions of Section 115 do not provide for the compulsory licensing of sound recordings.[125] Nevertheless, just as musicians can obtain compulsory licenses to cover recordings that emulate the basic melody and fundamental character of preexisting songs, so should producers using digital media.[126] As was the case when granting compulsory licensing for musical compositions, digital samples are the very "raw materials" today's musicians seek to use as building blocks for new compositions. Yet, it is unlikely that the recording industry, composed mostly of powerful record companies and

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The Aeolian Company entered into exclusive contracts with numerous national music publishers to mechanically reproduce their works on player piano rolls. Such a monopoly would have been economically disastrous for competitors and would have effectively allowed the Aeolian Company to dictate popular music culture depending upon what it chose to release. The ability of the Aeolian Company to exert disproportionate influence on the market was the situation Congress specifically sought to avoid through use of the mechanical license provision. *See also*, Ponte, *supra* note 7, at 547 n.157.

[121] *See* 17 U.S.C. § 115 (2012).

[122] *See* 17 U.S.C. § 115(b)(1) (2012).

[123] *Id.* § 115(c)(1).

[124] *Id.* § 115(b)(1).

[125] *See id.* § 115(a).

[126] *See* Achenbach, *supra* note 62, at 191, 210-11.

less powerful artists, will voluntarily choose to alter the balance of power for the benefit of the artists.[127] Instead, Congress should exercise its constitutional powers to reform copyright law without relying on the industry to reform itself or for third party clearinghouses to take advantage of the current state of affairs.

In fact, Congress considered adopting a compulsory licensing scheme for sound recordings in 1971[128] — well before sample-based technology allowed for widespread use of sound recordings. The proposal included statutorily prescribed amounts that users would be required to pay sound recording copyright holders to compensate them for reproductions of their recordings.[129] However, at the time the case for compulsory licensing was weak.[130] While a compulsory license in the case of musical compositions gave necessary access to "raw material," there was no analogous benefit to grant the same access to the "finished product."[131] Since piracy was the very issue Congress sought to remedy and prevent through the issuance of sound recording copyrights, it would have been illogical to include compulsory licensing of entire sound recordings.[132]

However, just as Congress did not feel compelled to grant copyright protection to sound recordings until piracy became a pressing issue, improvements in technology, the

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[127] *See* Crum, *supra* note 119, at 967.
[128] *See* The House Report on the Sound Recording Amendment of 1971, H.R. REP. NO. 92-487, at 4 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566.
[129] *See* Ponte, *supra* note 7, at 549.
[130] *Id.*
[131] *Id.*
[132] *Id.*

widespread use of digital formats, and the various foreseeable benefits from small alterations to the existing copyright regime seem to support statutory reform for digital sampling. In promoting accessibility to copyrighted works, Congress has indicated that the Copyright Act is optimally perpetuated with liability rules, rather than with property rules.[133] Congress has previously determined that property rule protection is overly expansive in the context of "cover" recordings.[134] In this sense, Congress has already expressed that it comports with the view that some transformative works can adequately be protected with liability rule protection.[135]

IV. THE PROPOSAL: A COPYRIGHT MANAGEMENT SYSTEM FOR DIGITAL SAMPLES

The most obvious starting point for a compulsory licensing scheme for sound recordings is one closely tailored to the mechanical licensing provisions of section 115 — imposing a flat-rate royalty tied to the number of units sold.[136] The benefits of a flat-rate royalty scheme would accrue most directly and immediately to sampling artists, since it would eliminate the search and negation costs associated with case-by-case licensing and eliminate upfront licensing fees.[137] As Wolf accurately explains, "[w]hile each sample added to the

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[133] *See* Johnstone, *supra* note 22, at 441.
[134] *Id.* (citing 17 U.S.C. § 115 (2012)).
[135] *Id.* at 442.
[136] *See* Wolf, *supra* note 22, at 34. In fact, many commentators have suggested a modified version of § 115 for sampling artists. *See* Michael Baroni, *A Pirate's Palette: The Dilemmas of Digital Sound Sampling and A Proposed Compulsory License Solution*, 11 U. MIAMI ENT. & SPORTS L. REV. 65, 93 (1993); Johnstone, *supra* note 111, at 423; Norek, *supra* note 77, at 94; Vrana, *supra* note 5, at 850.
[137] *See* Wolf, *supra* note 22, at 33.

final, commercially released recording would reduce the sampling artist's share in the revenues from his album's sales, this reduction in revenue would be accompanied by a shifting of the economic risk of sampling from the sampling artist to the original source material owner."[138] Accordingly, one can view the "tax"[139] on the sampling artists' new work as a fee for the shift in economic risk.

However, any scheme that relies on apportioning artist's royalties to pay for samples places a practical limit on the number of samples that a producer can employ in a given song or album. [140] This is especially true given that (1) any sample usually requires at least two licenses, and (2) producers often layer multiple samples with their own composition to create a new song.[141] Assuming a sound recording license is

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[138] *Id.*

[139] In fact, Johnstone proposes a "sampling tax," wherein producers pay a fee to the Copyright Office for the "general privilege to sample," with a constant rate that generates more revenue as the total number of sales of the secondary work increases. Johnstone, *supra* note 22, at 427. Within this system, each copyright holder would not be given the entire statutory fee for each time a sample is used because a producer might use more than one sample on a regenerative track. *Id.* Instead, a copyright holder would be provided a cut of the total collection based on the number of times that his or her sample is used. *Id.* The aggregate of all the sampling taxes paid to the Copyright Office for a given year would then be distributed according to the "number of times the sample is used in relation to the number of total instances of sampling by producers nationwide." *Id.*

[140] *Id.*

[141] *See* Shapell, *supra* note 22, at 541 n.108 (citing Nate Dorr, *Girl Talk: Night Ripper*, POPMATTERS.COM (June 21, 2006), *archived at* http://www.webcitation.org/5tfy6vw40 (noting the extent of song layering on "Night Ripper")). "[T]he samples range from a minute of a rap a capella to a couple seconds of looped guitar, all cobbled together and overlayed [sic] so that as many as four or five familiar components may be audible at any given time." *Id. See also* Blake Hannon, *The Art of Assembly: Mash-Up Specialist Girl Talk Takes Sampling to Lofty Heights*, ST. JOSEPH NEWS-

based on similar pricing schemes found in section 115, a producer would be required to pay the statutory fee of 2.75 cents per sale to each right holder – exponentially decreasing the probability of a new composition comprised of several samples.[142] For music samplers, a flat-fee scheme would therefore create major disincentives for using samples. For instance, those artists who make the most complex compositions would be taxed higher than those who create simple compositions. A flat-fee royalty fee system would therefore reward the wrong kind of sampling at the expense of discouraging the type of musical creation the regime is meant to foster.

Instead, I envision a CMS that ties royalty payouts to the quantity and type of sample used. As this section will further elaborate, the CMS would serve simultaneously as an administrative body, maintaining records of the rights held in each piece of protected music made commercially available in the U.S., setting fees and royalty rates, and distributing revenue generated by the sale of music containing samples. The regime can be easily integrated into current copyright law, is compatible with existing technology, and provides enough flexibility to respond to market forces.

PRESS (Oct. 31, 2008), *available at* 2008 WLNR 20765532 (noting that, while "Feed the Animals" is expressed as fourteen different tracks, "it's actually one 50-minute-plus song that includes more than 300 different samples."); Mary Rice, *Girl Talk All Day Download | The Creative License of Sampling*, PERSONAL MONEY STORE FINANCIAL NEWS BLOG (Nov. 15, 2010), *archived at* http://www.webcitation.org/5uMVGsBey(divulging that new Girl Talk album, "All Day," is comprised of more than 373 samples)).

[142] *See* Johnstone, *supra* note 22, at 425.

A. Statutory Reform

In order to allow for the creation of a digital sampling copyright management system, alterations to Sections 101 ("Definitions") and 114(b) ("Scope of Exclusive Rights in Sound Recordings") are necessary. While my proposal is aimed at defining the boundaries of a sample-based CMS, the exact statutory language underlying the regime would need to be considered in further detail. In essence, I propose the following sections:

> Section 101: A "Digital Sample" is a portion of a preexisting sound recording, which is extracted and embodied in a new master recording.[143]
>
> Section 101: "Digital Sampling" is the process by which a portion of an existing sound recording is used, transformed, manipulated, or completely recontextualized in a new, independent expression with new meaning. [144]
>
> Section 114: A compulsory license provides the privilege of incorporating pre-existing sound recordings, by means of digital sampling, into new, independent expressions. The scope of this section is limited to works created for

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[143] I have adopted a version of the definition set forth by LAPOLT & SAMUEL J. FOX, NEGOTIATING MUSIC SAMPLES, ENTERTAINMENT INDUSTRY CONTRACTS § 161.02[1][a] (2006).

[144] Note, I have endorsed, in essence, Johnstone's definition. *See* Johnstone, *supra* note 22, at 426.

> *commercial* sale, distribution, or any other profit-seeking purpose.

While the aforementioned definitions would need further scrutiny, these working definitions easily distinguish between wholesale piracy and digital sampling by capturing the very nature of digital sampling — the use of a brief snippet from a pre-existing sound recording for a desired use in a secondary work.[145] Indeed, the definition includes the word "portion," which may lead one to believe substantial "portions" of a pre-existing sound recording may be used. However, as the following Section will elaborate, the scope of permissible "portions" is governed by a detailed, hierarchical statutory fee schedule that makes it more costly to pay out the requisite licenses for longer and more identifiable samples. The fee schedule, therefore, makes wholesale appropriation of sound recordings more expensive than simply purchasing the recording — a means for ensuring the regime is not abused as a way for pirating sound recordings below market cost. Last, restricting the scope of licensing to commercial uses ensures that the public is still free to use digital samples for use in parody – and other previously recognized fair uses – without having to pay out royalties for such uses.

In order for the regime to function properly, the Act should consider sample-based works as derivative works.[146] Under current copyright jurisprudence, copyright protection does not extend to any preexisting material used in creating a derivative work. [147] In the context of digital sampling, an artist would gain protection for his new transformative

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[145] *See* Vrana, *supra* note 5, at 820 (citations omitted).
[146] *See* Achenbach, *supra* note 62, at 216.
[147] *Id.*

composition, but not for the pre-existing materials (i.e., the samples themselves). In other words, the sampling artist would obtain only a limited license to use a sample in the derivative work for which he is specifically licensed. As such, the use of a digital sample in a new work would not transfer ownership of the sample, either as compositional elements or excerpts of a recorded performance, from the original rights holder.[148]

Retention of ownership is essential for a sample-based CMS, since, conceivably, the new sample-based work could be sampled by another artist in the future. In other words, the acquisition of a single compulsory license does not mean that the sampling artist can re-use the licensed sample in order to create numerous derivative works. Likewise, a subsequent sample-based artist cannot draw the original sample from a sample-based derivative work without having royalty obligations to the original copyright owner. [149] Without a provision in the Act outlining the copyright holder's remaining interest in any particular sample, the value of a copyright holder's interests in a work used as a source work for sampling would depreciate rapidly.[150]

B. Copyright Management System

Currently, the common practice is for copyright holders to transfer the administration of their copyrights by contractual agreement to music publishing companies like ASCAP, BMI, or SESAC.[151] These companies then have the right to grant

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[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *See* Shereen Daly, *Musical Compositions and Sound Recordings: Who Owns the Music?*, 5 INTELL. PROP. L. BULL. 34, 34 (2000).

licenses and collect income in exchange for rendering benefits (e.g., advances and promotional efforts to the artists).[152] However, these clearinghouses do not collect for owners of sound recordings — they only collect for owners of musical composition copyrights.[153] Rather, the Copyright Royalty Board, the rate-setting entity housed in the U.S. Library of Congress, has entrusted SoundExchange as the sole entity in the United States to collect and distribute digital performance royalties on behalf of all recording artists.[154] As such, SoundExchange — a nonprofit performance rights organization — collects most of the statutory royalties from satellite radio (such as SIRIUS XM), Internet radio (like Pandora), cable TV music channels, and similar platforms for streaming sound recordings.[155]

The statutory license provided for in Sections 112 and 114 of the Copyright Act is a blanket license, which "allows music services and streamers to use any track ever commercially released, without asking permission from the copyright holder of that recording."[156] Accordingly, artists and copyright holders do not have the ability to pull their tracks from circulation or prevent any service from using them.[157] Likewise, instead of each webcaster and satellite radio company having to go to an artist to negotiate licenses for

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[152] *Id.*
[153] *See* David Macias, *Making Dollars: Clearing Up Spotify Payment Confusion*, HYPEBOT.COM (Nov. 26, 2012), http://www.hypebot.com/hypebot/2012/11/clearing-up-spotify-payment-confusion.html.
[154] *See* SoundExchange, http://www.soundexchange.com/advocacy/federal-copyright-protection/regulations/ (last visited June 24, 2014).
[155] *Id.*
[156] Huppe, *supra* note 116, at 5.
[157] *Id.*

every track, any music service can elect to use the statutory license.[158] On the other hand, traditional songwriter-publisher performing rights organizations are only obligated to collect for members who have registered with them directly.[159] If an artist has not signed up to collect royalties through that organization, it does not collect her money, and it does not contact her about it.[160] At SoundExchange, however, the law mandates collection for every track reported by services — making SoundExchange the only entity in the United States performing this function.[161]

Yet, SoundExchange licenses collect royalties for the use of an *entire* song and do not govern the act of sampling.[162] However, if provided with the proper mechanisms, SoundExchange may serve as the perfect platform for implementing a sample-based CMS. This is not only because of its current role in royalty assessment for sound recordings, but also as a function of its novel makeup. The SoundExchange board is "made up of nine recording artists representatives and nine representatives from labels and

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[158] *Id.* The SoundExchange royalties earned for the sound recording are split under U.S. Copyright Law: 50 percent goes to the sound recording copyright holder (whether a record label or an independent artist), 45 percent goes directly to the featured artist (the main performer or performers on a track), and 5 percent goes to a fund that supports backup vocalists and session players. *Id.*

[159] *Id.* at 8.

[160] *Id.*

[161] *Id.*

[162] *See* Shapell, *supra* note 22, at 530 (citing *SoundExchange*, FUTURE OF MUSIC COALITION (May 15, 2008), *archived at* http://www.webcitation.org/5xI6GhLgE (noting that the royalties from the use of sound recordings is administered on a per-performance or per-play basis, indicating that the entire song must be performed or played)).

copyright holders of all sizes."[163] As Huppe notes, "SoundExchange is run by the people it pays, and they've got every interest in keeping the organization as lean and proactive as possible."[164] Similar to the royalty payout system for digital transmission, the compulsory license underlying my CMS for digital samples seeks to function in a similar way — samples are to be tracked by the CMS and royalties paid out automatically by SoundExchange (or another third party entity). Given SoundExchange's expertise in sound recordings in various digital media (such as satellite radio and web-based streaming), the organization seems ripe to take on the role of independent royalty-fee assessor for a digital sampling CMS.

i. Platform

The first step in creating the sample-licensing regime is to create a platform for accessing mp3s. Rather than creating and consolidating a new music library, the registry would be most successful if made compatible with pre-existing, digital music platforms — such as iTunes or "Spotify." Spotify, in particular, is an intriguing model for a digital-sampling CMS based on how the program was able to procure its digital library. In 2008, faced with years of plummeting revenue, major players in the recording industry, such as Universal Music, EMI Group Ltd., Sony Music Entertainment, Warner Music Group and Merlin, all agreed to release their entire catalogs to Spotify Ltd.[165] The big players were not just lured

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[163] *Id.*

[164] Huppe, *supra* note 116, at 5.

[165] *See* Brendan Greeley, *Spotify's Ek Wins Over Music Pirates With Labels' Approval*, BLOOMBERG (Jul. 14, 2011, 10:46 AM), http://www.bloomberg.com/news/2011-07-14/spotify-wins-over-music-pirates-with-labels-approval-correct-.html.

by the promise of increased revenue through web-based streaming; rather, they were particularly intrigued by the advertising revenues that helped fuel the program. Building off of the willingness of major industry players to join the Spotify network merely as a new business model in the digital era, it seems that the creation of a CMS for digital samples — a new revenue stream — would receive little resistance from big players in the music industry. Similar to Spotify and Pandora, the CMS (depending on its makeup) can be formatted for advertising, which would provide another means for profits aside from licensing fees.

Rather than creating an entirely new software platform, the sampling regime could be run as an "app." Apps are user-installed software and allow the primary technology (laptop, phone, notebook) to perform specific tasks that fit the user's individual needs and that were not offered as a feature of the original technology. Users sometimes pay a small fee for the use of an app, which is downloaded directly to their laptop, phone, notebook technology, etc. The CMS digital sampling software or "app" can have its own library function, or, in the alternative, can be designed to be compatible with pre-existing platforms — a possibility that would allow for the quick and efficient adoption of the regime.[166]

ii. Prerequisites

To participate, sampling musicians would need to download the digital-sampling software, or "app" from the Copyright Office. The Copyright Office would have to determine whether to offer the digital sampling "app" for a pre-

[166] In fact, iTunes and Spotify, in particular, already have platforms that allow for the download of, and are compatible with, various "apps."

determined, up-front fee or allow for monthly membership to the sampling community. Proceeds from an initial purchase or subscription fee would cover the administrative costs expended to pay for the creation of the software and would also provide a fund for updating and improving the software.

Ensuring that a fee is paid at the outset would ensure that the regime is adequately financed, but would have the drawback of creating a larger barrier to entry for sampling musicians. A one-time fee would likely involve a greater up-front investment, which in turn, may turn some artists, such as novices, away from the marketplace. Allowing a free download accompanied by a monthly subscription, on the other hand, would lower the barrier to entry for sampling artists. Rather than having to come up with the money upfront, sampling artists would have the freedom to experiment and explore creative endeavors for smaller, monthly fees. With these considerations in mind, I would encourage Congress to invite experts to determine whether a one-time upfront fee or monthly subscription would better further the aims of the new regime.

iii. The Sampling Process

The proposed sampling software, once downloaded, would allow for unrestricted experimentation. Sampling artists would be free to use traditional music sampling programs (e.g., Pro-Tools, Reason, FruityLoops, Ableton) to create new works. Rather than uploading pre-existing music files from her hard drive into traditional sampling programs, the musician would first choose a desired track through the sampling software and upload the track into their preferred sampling software. This step is essential to the functionality of the CMS because the mp3 would need to be embedded with the corresponding metadata tags in order for the software to identify, count, and

distribute royalties in the finished track. Metadata is the data that attaches to a document or mp3 file, sometimes invisibly, and provides information about how, when and by whom it was collected, created, accessed, or modified and how it is formatted (including data demographics such as size, location, storage requirements and media information).[167]

The central function of CMS software is to ensure that the metadata remains "tagged" to a sample taken from the mp3 thereafter — regardless of the size of the sample used. These tags would, in turn, provide the central tracking mechanism for the Copyright Office. In fact, once completed and ready for sale, the multi-page information box that accompanies each song in a listener's library can be encoded to include a listing of the samples contained within a given sample-based work, with direct links to the iTunes store where the source songs could be purchased, or streamed on programs such as Spotify.[168]

The use of metadata tags for online music distribution is not only technologically feasible but is *already* widespread and a central component to the success of online music distribution. Online music distributors, such as iTunes and Spotify, already use metadata tags to provide music labels with something they crave — data.[169] They use the metadata contained in a listener's music library (e.g., play counts, purchase histories, etc.) to identify listener's preferences. Without metadata tracking, record labels only know when a

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[167] *See* Barbara Busharis, *Metadata*, 25 NO. 2 TRIAL ADVOC. Q. 4 (2006).
[168] *See* Wolf, *supra* note 22, at 48. Including links to original source materials would help spur a secondary market for "click-through" sales, by providing new listeners a means for instantly accessing source materials.
[169] *See* Greely, *supra* note 167.

track or album is sold. If a CD is "burned" or "ripped" for a friend or a playlist borrowed for a party, the music labels know nothing about their consumers. However, the use of metadata tracking "gives them a record, by location, age and gender, of every single time a track is played."[170] Tracking listener preferences, therefore, is profitable by allowing music labels to direct their advertising and marketing campaigns towards clearly identifiable demographics and geographical regions. In this sense, appending mp3 files with locked metadata tags can serve a dual function — to track the downloading and sharing of music files, while also providing valuable information about consumer spending habits and "tastes" to record companies.

iv. Fee and Royalty Assessment Process

Once a track is completed, the sampling musician would then upload the new work to the CMS for fee and royalty assessment. For the regime to account for the differences in length and quality of samples used, a two-fold royalty assessment practice is optimal. First, rates would be set by the clearinghouse's board and serve as the de facto rate for sampling. Similar to other royalty-based licenses, the Copyright Royalty Board – or any other organization designated with this task – would set base-line royalties depending on whether the sample taken is purely instrumental, purely vocal, or a mix of instrumentals and vocals. The de facto royalty fee structure is intended to protect those artists who may be apathetic towards participating in the regime or may not possess the resources to create a schedule of samples. The software would count the tags for each sample used in the new work. For each subsequent sale of the work thereafter, the

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[170] *Id.* (explaining how music labels are induced into participating in Spotify for the data the network provides about the tastes of listeners).

software would pay out royalties by multiplying the royalty rate for each sample with the number of sales. In other words, each sample in the track would be identified, multiplied by the amount of sales, and paid out to the source material owners.

A second layer of fee and royalty assessment would exist for those artists who have enjoyed great commercial success. For some artists, a track has become famous for a particular, clearly identifiable musical sequence — such as the bass line from Michael Jackson's "Thriller" or the Allman Brother's guitar riff in "Jessica." Others have reached commercial success through famous and recognizable vocals — such as AC/DC's "You Shook Me All Night Long." In order to compensate for these nuances, musicians would be able to petition the governing body for a specialized royalty schedule. The burden would be on the musicians — or their record company — to produce evidence regarding the popularity of the track (most likely evidenced from past and present record sales, consumer surveys, most pirated tracks, etc.) and a proposed royalty schedule to the governing royalty-setting body. The royalty-assessment organization will then have the option of accepting the proposal, altering the schedule (albeit not as aggressively as suggested by the artist), or rejecting the proposal for the de facto rates. The two-tiered royalty assessment regime would reduce the burden on the governing body by allowing it to set a base-line schedule — thereby eliminating the need to create a schedule for every existing sound recording — while also accommodating artists who have enjoyed great commercial success through the "petition" system.

The royalty assessment process would be based on the following criteria and characterizations[171]:

(a) Purely instrumental samples. These samples would be subject to the smallest royalties, since a musician is free to imitate purely instrumental portions of a song in the studio. In order to protect from "lazy" workmanship (i.e., use of samples because one is uninspired to re-record a sample), the taking allowed for purely instrumental samples should be capped at a fairly small time limit. In other words, only a few seconds of sampled material would be permitted for purely instrumental samples — the exact length of which would be subject to the discretion of the governing royalty board.

(b) Purely vocal samples. Vocal tracks would be subject to a two-tiered fee system —"non-chorus" and "chorus" vocal samples. For non-chorus samples, fees would be assessed according to a base "non-chorus vocal" royalty plus a fractional fee for each word sampled beyond one word.[172] Likewise, samples of chorus vocals would be charged a base "chorus" royalty fee plus a fractional fee for each word sampled beyond one word.[173]

Wolf's proposal, in this regard, hits a particularly fair balance between the interests of rights holders and sampling musicians. Rights holders are assessed an extra royalty for the use of vocals, because vocals are more likely to be recognized and identified with a particular source. Unlike instrumental samples, listeners may associate vocal samples with certain

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[171] Note that, for the most part, I have adopted Wolf's proposed royalty assessment characterizations. *See* Wolf, *supra* note 22, at 59-62.
[172] *See id.* at 60.
[173] *Id.*

artists —regardless of whether they know the original song — since many artists possess a unique voice, tone, or style. On the other hand, sampling musicians are naturally limited in the amount of vocals they can appropriate, since use of significant vocal samples becomes exponentially expensive.

(c) Mixed Samples—Instrumental plus Vocals. Samples containing a mix of instrumental and vocal tracks will be assessed a base "mix" royalty fee plus either the fractional instrumental fee for each second of running time over one second or the fractional voice fee for each word sampled — whichever formulation results in the higher royalty.[174] Since these samples are likely the most recognizable and they copy more material than either a purely instrumental or vocal track, it makes sense that "mixed" samples would require the highest royalties. Higher royalties for "mixed" samples ensures that there is a natural limit on how much a sampling artist can appropriate.

Placing caps on the amount of samples used ensures that sampled music is truly original — thereby satisfying the "originality" requirement for new copyright protection.[175] Since sampling artists will only be able to appropriate as much of the original source material as to remain profitable, they will

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[174] *Id.*

[175] Although unable to obtain a copyright in the samples used, a sampling artist can obtain protection for their new composition. In the context of digital sampling, it is important to think of "[l]oading samples into a computer [a]s similar to blowing wind through a horn, much like producer mashes different keys to add layers and effects, until the result sounds pleasing to the ear." Evans, *supra* note 22, at 16. Accordingly, the act of digital sampling qualifies as an "original work of authorship," as required by 17 U.S.C. § 102, and thereby allows a sampling artist to sell, profit, and protect their new work.

be forced to include their own original arrangement. As such, the cost and length limitations placed on the use samples ensures the transformation and incorporation of the sample into the larger, presumably original work. Perhaps most importantly, this royalty fee structure seeks to address the noted difficulty involved with assessing the value of a given sample by accounting for the length and nature of sounds sampled, the qualitative significance of the sounds sampled, and, through the petitioning system, the prominence of the artist sampled.

v. Coding, Release, and Distribution

Once uploaded to the CMS, the software would read the metadata tags to interpret the appropriate royalty fees for the samples used. The software, by matching the tagged samples to the central royalty schedule, would automatically formulate the total royalties to be paid out by the new work and allow for an itemized list of royalty fees for each particular sample. The itemization of the samples would allow sampling artists to make changes to the track in order to maximize the profitability of their new work. Additionally, an itemized record of the samples contained within a given track provides a basis for rights holders to enforce cases of delinquent payment.

vi. Royalty Distribution

Similar to other compulsory licensing schemes, royalties would not be paid out until consumers purchase copies of the new sound recording. Having a "no-fee-until-profit" system allows for adequate cost-shifting from the sampling artist to the rights holders. Aside from the initial download cost (or subscription fee) for the sampling software, sampling artists would be free to practice their trade and experiment until the "perfect" track is created. The absence of

repercussions for the creation of non-commercially viable tracks would further the purposes of the Copyright Act by promoting unrestricted creativity.

Since the software is intended to be compatible with the major online music distributors, the sampling artist's song could be made available for sale on iTunes, streaming on Spotify, or any other current or future online distribution network. Royalties would be paid out according to units sold, or number of plays on streaming sites, multiplied by each fee assessed to a particular sample. For example, if a track contained fifteen samples, the software would attach the royalty fee for each of the fifteen samples, with each of the fifteen fees multiplied by the number of downloads or streams. Participating online music distributors would simply subtract any owed royalties from the sale of the new track before compensating the sampling artist.

C. How Will Musical Composition Rights Holders be Treated?

However, one must not forget the issue that led to the problem in the first place — the dual nature of music copyrights. For the regime to function, the CMS would need to account for both rights holders, yet the compulsory license for digital sampling only applies to the sound recording copyright holders. Given the limited nature of sound recording copyrights, the administration of the royalty-fee system seems particularly straightforward. The royalty rates would be set by the Copyright Royalty Board (or the designated royalty assessment board) in the following ascending order of cost (i.e., cheapest to most expensive): instrumental rates, non-chorus rates, chorus vocal rates, and mix royalties.

As for musical composition copyrights, the regime would work quite differently. This is because a short sample is likely to be deemed a de minimis use, unless it is particularly "distinctive," "attention grabbing," [176] or the "heart" [177] of the composition. Copyright law holds that trivial uses of a protected work, though unauthorized, will not be deemed an infringing use in every case.[178] Slight or trivial similarities are not substantial and therefore are non-infringing under a standard substantial similarity analysis.[179] Since the majority of digital samples are only several seconds in length, the words or sequence of notes contained therein are likely to be de minimis as a matter of law, and musical composition rights holders have no cause of action for infringement. Regardless, Congress can deem certain sample lengths (e.g. anything under one or two seconds) within a statutory "safe-harbor" – making the use of such samples de minimis as a matter of law.

The consequence of my proposal, of course, is that many digital samples will result in no royalty payments for artists who only hold the musical composition copyright to source materials. However, this is not a radical proposition when considering that a sampling artist often uses digital sampling to capture the exact *sounds* within a particular sound recording, rather than the notes or lyrics contained therein. Since one cannot own a single note or word, it will often be the

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[176] *See* Jarvis v. A & M Records, 827 F. Supp. 282, 292 (D.N.J. 1993).
[177] *See* Elsmere Music, Inc. v. Nat'l Broad. Co., Inc., 482 F. Supp. 741 (S.D.N.Y. 1980).
[178] "[C]opyright does not prevent subsequent users from copying from a prior author's work those constituent elements that are not original-for example . . . facts, or materials in the public domain-as long as such use does not unfairly appropriate the author's original contributions." Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547-48 (1985).
[179] NIMMER, *supra* note 55, at § 13.03[A].

case that the musical composition holder has not been deprived of any benefits afforded by their musical composition copyright. Rather, the individual who produced the unique sound or sang the lyric in a particular way is the one who should benefit from such appropriations (i.e., the sound recording artist).

Since my proposed compulsory license only covers sound recordings, musical composition owners will be afforded an "opt-in/opt-out" option. That is, they can elect to participate in the CMS, with the hopes of obtaining marginal returns and potential "click-through" sales, or can resort to ordinary courses of litigation to enforce their copyrights against unauthorized digital sampling. While this somewhat undermines the effectiveness of the CMS, the compulsory license for the sound recording eliminates one of the major hurdles for sampling artists — contracting with the sound recording copyright holder. Additionally, a CMS for digital samples provides a centralized point of contact for sampling artists to determine whether their use of a particular sample falls within the proposed statutory "safe-harbor" or whether they need to seek out the musical composition rights holder. After all, the CMS is based on full-disclosure, and as such the software can be created to alert the user if a sample taken requires a musical composition license as well. Yet, even the task of seeking out the musical composition holder is more efficient under my proposal, since the CMS would contain a registry of all rights holders for any given track and a sampling artist need only negotiate a license with the musical composition holder.

Nevertheless, participation in the digital-sampling CMS seems attractive for musical composition holders for several reasons. First, writing a "presumption" into the sample-based compulsory license to allow for small takings of musical

compositions may actually benefit, and provide a safeguard for, rights holders. Under the current regime, small, but notable, appropriations of a musical composition may go undetected or unenforced due to the significant resources required to bar the use of a sample. However, since data-tag tracking by the CMS would lead to the creation of a record with the Copyright Office, rights holders would have a simple way of detecting and punishing infringing uses. Accordingly, while composition rights holders — if participating — would have to "give up" the right to win large judgments for infringing uses, the regime would safeguard against the use of presumptively unfair samples —thereby leading to more efficient enforcement. After all, the statutory language underlying the regime could be written to significantly lower the evidentiary burden on source owners, making it easier for composition holders to bring suit for unauthorized uses of their composition.

Additionally, the CMS can be used as a "reward" system for rights holders. That is, once the initial start-up costs of the CMS software are re-paid to the Copyright Office, then additional revenues from user fees and advertising costs can be pooled to create a fund rewarding participating rights holders. Any excess funds could be paid out equally, with any profits accruing equally to all participating artists or could be tied to those samples that prove most valuable — measured by the number of instances a particular track was sampled and contained in a new work during the preceding year.[180]

[180] This idea is similar to Johnstone's "tax" proposal. *See* Johnstone, *supra* note 22, at 427-30.

V. CONTEMPORANEOUS CONCERNS

While my proposed regime seems to capture the nuances and difficulties of digital sampling by offering an effective and practical solution to the sampling conundrum, there are several criticisms and concerns to consider.

A. Practical Considerations

First, there is the possibility that sampling artists may try to bypass the system altogether and publish pirated sample-based music. However, infringing artists would be easy to locate, since any commercially viable track not uploaded through the CMS would be obvious to source holders. After all, if a "mash-up" is dominating the charts, it will be easy for source material holders to recognize that they are not being compensated for any digital samples contained therein. As part of the regime, Congress can write in statutory presumptions to assist rights holders in enforcing their rights against infringing sampling artists.

In order to protect the sampling artists from engaging in any incidental infringement, the sampling software would provide a short "beginner's guide to legal sampling" tutorial upon initial download. This tutorial is particularly important for helping the sampling artist understand that certain samples may be subject to higher fees and that the compulsory license only covers sound recording copyrights. This tutorial will serve as "notice" to all participants of any and all potential liabilities — especially those with respect to the nuances regarding musical composition copyright holders. Once on notice, users will be limited in their defenses for any infringing uses.

Another consideration is how the Copyright Office would actually create the software. After all, it is not likely

that the Copyright Office is the optimal party for producing the most efficient and ideal sampling software. Rather, Congress can allow private contractors to bid for the project. Privately contracting the project would allow experts to create the best possible software, while removing the burden from the government. The initial financing from the project would come from Congress, with any money expended for the creation of the software paid back once the software is launched and initial download (or subscription) fees are paid.

B. Theoretical Considerations

A compulsory license may actually be undesirable for *sampling artists*. Without knowing whether the fair use doctrine adequately protects the act of digital sampling, it is quite possible that a sampling artist will now have to pay out royalties they would not normally be required to pay. As Bell notes, automated rights management, "threatens to reduce radically the scope of the fair use defense to copyright infringement."[181] Specifically, Bell argues that automated rights management will interact with existing legal doctrines to supplant fair use with an analogous but distinctly different doctrine: fared use.[182] While the fair use doctrine "cover[s] certain unauthorized uses of a copyrighted work, such as in commentary or scholarship, that do[es] not displace the copyright owner's potential licensing fees,"[183] "fared use" requires "consumers to pay for the right to access and reuse information, rather than appealing to a statutory fair use exception."[184]

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[181] *See* Bell, *supra* note 28, at 560 n. 9.
[182] *Id.* at 561.
[183] *Id.* at n.10.
[184] *Id.* at n.11.

However, as Bell argues, fared use is not only efficient, but is also equitable.[185] Although sampling musicians might have to pay fees that the fair use defense would otherwise eliminate, they are doing so in return for better access to digital source materials. Not only does a CMS for digital sampling lower transaction costs involved with negotiating licenses, it also lowers any transaction costs related to evaluating whether a particular sample falls within the fair use doctrine — such as consulting with fair use experts. The fair use doctrine necessarily blurs the boundary between valid and invalid copyright claims,[186] and in doing so, pushes any risk adverse musicians out of the market, as their fear of legal repercussions for infringement would outweigh their desire to produce what may amount to a socially beneficial work.[187] Additionally, my proposal would not necessarily cost sampling musicians more because the fair use doctrine imposes considerable hidden costs. For example, Bell notes that such hidden costs include the uncertainty created by the fair use doctrine's uncertain boundaries, the losses passed on to consumers by copyright owners who lose licensing revenue due to fair use, and various other costs. [188] Thus, the net increase in musical works and accompanying revenues would offset the losses of forbearing the fair use defense.

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[185] *Id.* at 561.
[186] *Id.* at 587.
[187] *See* Gibson, *supra* note 91, at 890.
[188] Bell, *supra* note 28, at 561 n.13

VI. CONCLUSION

In the age of digital formats, new ways are constantly arising to access, make, record, collaborate, and share music. While existing statutory, doctrinal, and licensing configurations have severely constrained the freedom of musicians to appropriate and recontextualize the works of past creators, evolutions in the nature of digital technology have created new opportunities for contemporary samplers and source material owners. Indeed, the process of sampling allows musicians to build on the works of former artists in a way that has new meaning — similar to the more traditional methods of musical appropriation that have existed for hundreds of years. However, just as the music industry has adapted to account for increased reliance and access to the digital libraries of the world, it is time for copyright law to do the same. Rather than reforming the means by which sampling litigation is conducted — centered on judicial actors passing aesthetic judgments in order to reach judgments based on outdated law — my proposal would remove digital sampling from the courts all together. Revising the existing law to allow for a compulsory license for sound recordings and the creation of a sample-based CMS can provide new revenue streams for the faltering music industry. Granted, as Michael Huppe notes, "[t]he future also comes with its share of struggles: massive amounts of data, a new regulatory landscape, and a real challenge in spreading even the best of news (like SoundExchange royalties) to the very end of that long tail."[189] Changing and adapting to the new digital culture is not easy, but it is a part of the future — a future that can include revenue, royalties, and new rights that did not exist before.[190]

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[189] Huppe, *supra* note 116, at 8.
[190] *Id.*