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“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

Josh Norek*

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I. INTRODUCTION

Creativity in hip-hop music has been adversely affected by the excessive time and financial costs necessary to clear samples. During hip-hop's early years, the genre's artists appropriated portions of other works to create transformative new works with great frequency. In the minds of many longtime rap fans, the increasing costs involved in clearing samples has led to a dearth of artistically compelling releases in the genre as new acts churn out songs that often lack a distinctive bass line, keyboard melody, rhythm, or most importantly, a "hook."

When used creatively, samples add tremendous musical value to hip-hop. The range and palette of sounds that a producer can work with is greatly expanded when the producer is given access to just three seconds or less of a work. Copyright needs to take into account that the urban feel that the hip-hop genre seeks to convey is often not well-reproduced by traditional instruments and live musicians.

A compulsory sound recording license system for sampling, similar to what already exists for "covers" via compulsory mechanical licenses, is necessary to restore the creative integrity of hip-hop. Such a system would also lower the costs of entry for developing artists and independent labels, while providing a fair and reliable compensation scheme for sampled copyright holders. The proposed license would cover only qualitatively significant sound recording portions of three seconds or less for the music industry.

Currently, the Copyright Act extends a compulsory license for covers, which are new versions of songs recorded by different musicians.¹ Covering a song involves the use of the musical composition, which contains an artist's music in written form. Under the current compulsory license system for covers, an artist desiring to re-record a song that has already been commercially released obtains a mechanical license and pays either eight cents per track sold to the original work's publisher, 1.55 cents per minute of playing time, or a fraction thereof,

¹ 17 U.S.C. § 115 (2000).

whichever is greater.² Sampling differs from a cover in that it incorporates a sound recording, which is the result of a fixation of a performance of instruments or voice.³

The Act should be amended to include sampling. Both covers and samples make use of past works. Therefore, it is inconsistent for Congress to bestow a compulsory license provision for covers while denying it for samples.

One of the Copyright Act's primary purposes is to promote certain uses of existing copyrighted material. The United States Constitution itself states that the purpose of copyright legislation is to promote the progress of science and the useful arts.⁴ As one court has stated, "[a] balance must be struck between protecting an artist's interests and depriving other artists of the building blocks of future works."⁵

Sampling stands to benefit both the sampled and the sampling parties. Sampling in hip-hop increases the recognition of the original work, often leading to significant boosts in album sales and publishing revenue for the original work's copyright holders. The sampler also benefits, as he has access to the unique sound of a successful song or recording artist for the purpose of giving the sampling artist's work a familiar element that listeners will quickly recognize. It is, therefore, not in either party's economic interest to make a sample difficult to clear.

Similar to parody, which receives fair use protection, pastiche is an art form that utilizes the imitation of a unique expression. But pastiche is neutral in that it lacks parody's commentary or critical intentions concerning a work.⁶ It is time that Congress recognizes advances in recording technology, as well as the notion that pastiche is a form of creative expression worthy of protection under copyright law. The denial of fair use protection for non-parodic works that contain sufficient "transformative value," as elaborated in *Campbell v. Acuff-Rose Music*,⁷ runs counter to the Constitution's stated goal of promoting the

² COPYRIGHT ARBITRATION ROYALTY PANEL (hereinafter "CARP"); MECHANICAL ROYALTY RATE (2003), available at <http://www.copyright.gov/carp/> (last modified Aug. 21, 2003).

³ See M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, THIS BUSINESS OF MUSIC 285 (7th ed. 1995).

⁴ U.S. CONST. art. I, § 8, cl. 8.

⁵ *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 842 (M.D. Tenn. 2002), *rev'd on other grounds sub nom. Bridgeport Music, Inc. v. Still N the Water Publ'g*, 327 F.3d 472 (6th Cir. 2003).

⁶ FREDRIC JAMESON, POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM 107 (1991).

⁷ 510 U.S. 569, 579 (1994).

progress of the useful arts.⁸ A transformative use is one in which a new and different result is created from the original. In *Campbell*, the Court stated:

The goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright . . . and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.⁹

The recent *Newton v. Diamond*¹⁰ decision has increased the viability of a compulsory sound recording license system by sweeping away the obligation to clear *de minimis* uses of musical compositions.¹¹ The proposed compulsory sound recording license system would therefore also remove any obligations of samplers to clear the appropriated portion of a sound recording when it is not qualitatively significant.

This Comment will discuss the origins and evolution of sampling, as well as the present sample clearance practice and its various drawbacks. It will then outline a proposed new compulsory license system for sound recordings, and highlight supporting arguments that draw from creative, economic, and fair use theories.

II. HISTORICAL OVERVIEW OF SAMPLING

Sampling occurs when musicians appropriate works digitally by lifting part of a song from a pre-existing master recording and feeding it through a sampler.¹² A sample is "looped" when a short segment of sound recording from a prior work is repeated for extended periods as an accompaniment, often set to rap lyrics.¹³

As early as 1974, South Bronx DJ's pioneered hip-hop by mixing sounds from vinyl albums on multiple turntables. They were joined by vocalists, later known as "rappers," who recited vocals over the combined sounds emanating from the turntables. Even the Beatles' *Revolution 9*¹⁴ included samples from British radio and television

⁸ U.S. CONST. art. I, § 8, cl. 8.

⁹ *Campbell*, 510 U.S. at 579.

¹⁰ 204 F. Supp. 2d 1244 (C.D. Cal. 2002), *aff'd*, 349 F.3d 591 (9th Cir. 2003).

¹¹ *Id.* at 1259. In a discussion of the plaintiff's three-note sequence that appeared once in his composition and was sampled by the Beastie Boys, the court stated, "there is nothing about this sequence making it distinctive, and courts have found misappropriation of similar sequences to be *de minimis* Accordingly, the court concludes that any use by Defendants was *de minimis* and cannot form the basis of a copyright infringement action." *Id.*

¹² *Williams v. Broadus*, No. 99 Civ. 10957(MBA), 2001 U.S. Dist. LEXIS 12894, at *2 (S.D.N.Y. Aug. 27, 2001).

¹³ KRASILOVSKY & SHEMEL, *supra* note 3, at 285.

¹⁴ THE BEATLES, *Revolution 9*, on THE BEATLES (Capitol 1968).

broadcasts, making it one of the earliest widely disseminated works to incorporate samples. The first breakthrough hit making prominent use of samples was the 1979 single *Rapper's Delight*¹⁵ by The Sugar Hill Gang, which appropriated Chic's *Good Times*.¹⁶ More creative and transformative uses of samples followed, including landmark albums such as De La Soul's 1988 record, *Three Feet High & Rising*,¹⁷ and the Beastie Boys' 1989 release, *Paul's Boutique*.¹⁸

To evaluate if the infringement of a copyright is *de minimis*, and therefore not actionable, the alleged infringer must demonstrate that the copying of the protected material is so trivial "as to fall below the qualitative threshold of substantial similarity, which is always a required element of actionable copying."¹⁹ In making a determination of whether the portion was qualitatively significant, courts will find infringement when the portion appropriated was so much of what is pleasing to the ears of lay listeners, or the heart of the work.²⁰

In *Grand Upright Music v. Warner Bros. Records*,²¹ the court held that the artist Biz Markie intentionally violated the plaintiff's rights by using three words from the plaintiff's song and a portion of the master recording.²² In discussing the *Grand Upright* decision, the court in *Jarvis v. A&M Records*²³ noted that the proper question to ask is whether the defendant appropriated, either quantitatively or qualitatively, original constituent elements of the work such that the copying rises to the level of an unlawful appropriation.²⁴ *Grand Upright* represents a significant turning point when rap sampling became regulated and, therefore, more expensive. Until this point, it had been quite common for artists to take the risk of not clearing samples.²⁵

Unfortunately, *Grand Upright* did not discuss in any detail whether a sample could be found sufficiently *de minimis* such that a particular use might not constitute infringement. Hip-hop artists, labels, and publishers alike would have to wait another eleven years

¹⁵ THE SUGAR HILL GANG, *Rapper's Delight*, on RAPPER'S DELIGHT (Sugar Hill Records 1979).

¹⁶ CHIC, *Good Times*, on RISQUE (Atlantic 1979).

¹⁷ (Tommy 1988).

¹⁸ (Capitol 1989).

¹⁹ *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217 (2d Cir. 1998) (citing *Ringgold v. Black Entm't Television*, 126 F.3d 70 (2d Cir. 1997)).

²⁰ *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946).

²¹ 780 F. Supp. 182 (S.D.N.Y. 1991).

²² *Id.* at 183-84.

²³ 827 F. Supp. 282 (D.N.J. 1993).

²⁴ *Id.* at 291.

²⁵ Telephone Interview with Kyle Staggs, Director of Business & Legal Affairs, Bug Music Publishing (Feb. 20, 2003).

before the *Newton* court would pick up the topic again and address it in a meaningful manner.²⁶

Newton set a new precedent, as it formally recognized that when the sampled portion of the original work is *de minimis*, there is no obligation to clear or license the underlying musical composition.²⁷ At issue in the *Newton* case was the plaintiff's three-note sequence of C—D—flat—C with one background note, which was sampled by the Beastie Boys and looped in their song *Pass the Mic*.²⁸ The court went on to hold that such a sequence was not original as a matter of law and that the “Newton technique”—Newton's unique ability to modify the harmonic color in his performance—only appears on the sound recording, not in the musical composition.²⁹ Unfortunately, the *Newton* court did not have the opportunity to discuss whether it would likewise be unnecessary to clear a *de minimis* sound recording, as the Beastie Boys had already licensed the disputed work's respective sound recording from Newton's record label.³⁰

Digital sampling is a new technology that was not originally anticipated by the Copyright Act. In the past, Congress has taken steps to remedy the Act's incompatibility with technological advances. For example, piano rolls, which perform musical compositions mechanically, were not contemplated by the Act prior to 1909.³¹ That year, Congress amended the Act in response to the technological advance in which player pianos could mechanically reproduce a work using paper music rolls. Sampling is also a technological advance, and the *Newton* decision recognized *de minimis* sampling's place as a constitutionally protected useful art.³² *Newton* has opened the door for a compulsory sound recording license system that eliminates the obligation to pay the sound recording license fee when the amount sampled is qualitatively insignificant.

*McDonald v. Multimedia Entertainment, Inc.*³³ further bolsters the notion that it might not be necessary to license musical compositions—and by extension, sound recordings—when the amount of a work sam-

²⁶ See *Newton*, 204 F. Supp. 2d at 1256.

²⁷ See *id.* at 1259.

²⁸ BEASTIE BOYS, *Pass the Mic*, on CHECK YOUR HEAD (Capitol 1992).

²⁹ *Newton*, 204 F. Supp. 2d at 1251.

³⁰ *Id.* at 1245.

³¹ See 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, 272 (1993).

³² See *Newton*, 204 F. Supp. 2d at 1251 (finding the three-note sequence to be *de minimis* as a musical composition, though it still may have qualified as a qualitatively significant sound recording if the performance of the notes was particularly unique).

³³ No. 90 Civ. 6356 (KC), 1991 U.S. Dist. LEXIS 10649 (S.D.N.Y. Jul. 19, 1991).

pled is *de minimis* or qualitatively insignificant. A defendant is not liable for infringement, even if he copies, if the copied material is not protectable.³⁴ *McDonald* found no infringement of a musical composition when the *de minimis* portion at issue was shared by two works, even though the two compositions shared the use of a saxophone as a lead instrument, a similar tempo, a common and unexceptional three-note sequence, and the use of five notes set to the exact same lyric.³⁵

III. THE PRESENT SAMPLE CLEARANCE PRACTICE

The current system for clearing samples is time-consuming, as there are presently two licenses that must be obtained: the sound recording and the musical composition. The record label that released the original work and applies to the performance of the work usually owns the sound recording copyright. The musical composition copyright captures the artist's music in written form and consists of rhythm, harmony, and melody.

Normally, when an artist covers a song, he or she obtains a compulsory mechanical license, under which he or she must pay eight cents (or 1.55 cents per minute) to the original work's publisher for every track sold.³⁶ Permission from the work's publisher need not be obtained to record the cover, so long as the cover does not exceed the limits permitted by the mechanical license in terms of how much freedom the covering artist has to modify and alter the original composition. This differs from samples, for which the licensing fees for both the sound recording and musical composition sample can vary based upon the stature of the artist and record label seeking the license. The general practice in the music industry is that, if a sample is recognizable to the ordinary listener, it must be cleared, regardless of whether it is a *de minimis* use.³⁷

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.³⁸

Upon clearing the sound recording, the sampler must still obtain the musical composition license from the original author's music pub-

³⁴ *Id.* at *14.

³⁵ *Id.* at *13.

³⁶ CARP, *supra* note 2.

³⁷ KRASILOVSKY & SHEL, *supra* note 3, at 287.

³⁸ Telephone Interview with Kami Broyles, Legal Affairs Coordinator, MCA Records (Feb. 18, 2003).

lisher. 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.³⁹

For single use *de minimis* musical composition samples, a major label-sampling act can expect to turn over 15% of the new work's musical composition copyright to the sampled work's author.⁴⁰ When the sampled portion is looped and constitutes a more important part of the new work, that percentage often leaps to 66%.⁴¹ Music publishers that represent the original composition's author usually impose the full eight-cent statutory rate, rather than the six-cent "3/4 rate" that is industry custom for covers.⁴² The figure charged as an advance is then likely based upon a 100,000-unit base, pro-rated by the percentage of copyright ownership held by the original work's author.⁴³ Thus, a new major label act would likely pay a \$4000 advance for the musical composition license if the sampled work's author possessed 50% of the publishing in the new work.⁴⁴

IV. PROBLEMS WITH THE CURRENT SYSTEM OF NEGOTIATED SAMPLE CLEARANCES: TIME & FINANCIAL COST

The cost of clearing samples has become prohibitive, resulting in substantially fewer hip-hop recordings that make use of recognizable samples. The root of this problem is the two competing goals of copyright law: "public access to works of art and protection of copyright owners' rights to profit."⁴⁵ While copyright plays an important role in protecting an author's work, it must also serve the public and create incentives for the creation of new works.⁴⁶

The current industry practice for major label hip-hop acts is to set aside a portion of the recoupable recording budget for sample clearances. For an album that costs \$300,000 to record, a \$60,000 sample budget is commonplace.⁴⁷ However, sample costs very often go over that budget and must be paid for directly out of the artist's own pocket.

Complicating matters for major record labels—which are simultaneously planning national retail marketing campaigns, video shoots,

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Telephone Interview with Kyle Staggs, *supra* note 25.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Kravis, *supra* note 31, at 273.

⁴⁶ See *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

⁴⁷ Telephone Interview with Tom Sarig, Vice President of A & R, MCA Records (Feb. 18, 2003).

and radio promotion while the artist is still in the studio—is the fact that samples sometimes take longer to clear than expected. Furthermore, it is not uncommon for an artist or producer to withhold information about samples from the record label in the hopes of avoiding further clearance costs.⁴⁸ This has resulted in unanticipated situations where labels have literally had to put an album's manufacturing on hold or pull finished copies off record store shelves until the samples are cleared.⁴⁹ The impact of such last-minute actions on a major promotional campaign already underway can be drastic, creating a genuine disincentive for the artist and label alike to utilize samples in the recording process.

The expense of clearing the sound recording and musical composition license is extremely prohibitive for developing acts as well. For an independent artist, the price for clearing a single sample can run more than an entire album's recording budget. With an album or single that sells less than 10,000 units, the cost of clearing the sample is almost never recouped by the album's sales. This creates a barrier to entry for independent or developing acts. Even for major label artists, record companies typically require the artist to bear the cost of licensing samples, and any master use fee and mechanical royalty payments will be deducted from those otherwise payable to the artist.⁵⁰ These expenses, as well as all other recording costs, are then recouped against an artist royalty rate of 13% or more of the album's retail price;⁵¹ this makes it very difficult for a developing hip-hop artist to recoup the costs of producing and creating the album, much less to make a profit.

V. THE FOUR PRIMARY CATEGORIES OF SAMPLES

An understanding of the four primary categories of samples is essential to the implementation of a proposed compulsory sound recording license system because the license fees are based upon the categories' respective distinctions. A key factor in distinguishing the categories is whether the sample has been looped, meaning whether it was repeated as part of a sequence in the new work. A casual listener unfamiliar with copyright law might believe such loops to automatically constitute infringement because a piece of the old work was incorporated as a significant part of the new work. However, the proper analysis for copyright infringement is actually whether the new work made

⁴⁸ Telephone Interview with Kyle Staggs, *supra* note 25.

⁴⁹ Telephone Interview with Tom Sarig, *supra* note 47.

⁵⁰ Dina LaPolt et al., *Sampling, in 8 ENTERTAINMENT INDUSTRY CONTRACTS: NEGOTIATING AND DRAFTING GUIDE* 161-1, 161-11 (Donald C. Farber ed., 2001).

⁵¹ KRASILOVSKY & SHEMEL, *supra* note 3, at 4.

use of a substantial portion of the original;⁵² thus, the focus is not on how much of the new work is made up by the old one, but rather on how much of the original work was appropriated.

A. *Qualitatively Insignificant Sample*

Under this category, a sample is qualitatively insignificant if it cannot easily be identified by someone familiar with the original work. Copyright protection does not extend to exceedingly short phrases of music, particularly when there are only a limited number of ways in which the musical notes or performance may be expressed. A single musical note or drumbeat is not protectable, and the same is probably true for two or three notes or beats. An example of a qualitatively insignificant sample is found in *Bridgeport Music v. Dimension Films*, in which the court found that the appropriated two-second, three-note portion of the chord section was qualitatively insignificant because no reasonable jury, even one familiar with the works of the defendant, would recognize the source of the sample without having been told of its source.⁵³

B. *Qualitatively Significant Sample of Three Seconds or Less Used Only Once*

In this and the preceding categories, a sample is qualitatively significant if it can be easily recognized by someone familiar with the original work. This category consists of a track that samples a qualitatively significant portion of three seconds or less,⁵⁴ but incorporates it only once into the new work. An example of this would be a distinctive James Brown grunt that is sampled and inserted a single time during a

⁵² See *Arnstein*, 154 F.2d at 468.

⁵³ *Bridgeport Music, Inc.*, 230 F. Supp. 2d at 842.

⁵⁴ When listening to numerous hip-hop recordings, three seconds of a qualitatively significant work seems to be the dividing line between a clearly infringing work that requires a license, and a more creative/artistic use better served by the proposed compulsory license system. For examples of clearly infringing hip-hop tracks that appropriated more than three seconds of a qualitatively significant work, see VANILLA ICE, *Ice Ice Baby*, on *TO THE EXTREME* (Capitol 1990) (sampling QUEEN and DAVID BOWIE, *Under Pressure*, on *HOT SPACE* (EMI 1982)); MC HAMMER, *U Can't Touch This*, on *PLEASE HAMMER, DON'T HURT 'EM* (Capitol 1990) (sampling RICK JAMES, *Superfreak*, on *STREET SONGS* (Motown 1981)); A TRIBE CALLED QUEST, *Can I Kick It?*, on *PEOPLE'S INSTINCTIVE TRAVELS AND THE PATHS OF RHYTHM* (Jive 1990) (sampling LOU REED, *Take a Walk on the Wild Side*, on *TRANSFORMER* (RCA 1972)). For an example of a hip-hop track that appropriates less than three seconds of a qualitatively significant work in a creative and transformative manner, see BEASTIE BOYS, *Sounds of Science*, on *PAUL'S BOUTIQUE* (Capitol 1989) (looping a two note guitar riff from THE BEATLES, *The End*, on *ABBEY ROAD* (Apple 1969)).

break in a new rap song as a means to signal the transition between the new work's verse and chorus.

C. *Qualitatively Significant Sample of Three Seconds or Less That Is Looped and Occurs Repeatedly*

This category is marked by a qualitatively significant sample of three seconds or less that is looped and then played at least twice in the new work. A well-known example of this type of use would be Rob Base & DJ Eazy Rock's *It Takes Two*,⁵⁵ which repeatedly loops a small portion of Lyn Collins' vocal performance from *Think (about it)*.⁵⁶

D. *Qualitatively Significant Sample Greater Than Three Seconds*

Well-known songs that sample more than three seconds of a qualitatively significant portion of an original work include Vanilla Ice's use of the bass line and piano parts from Queen and David Bowie's *Under Pressure* and MC Hammer's use of the bass line from Rick James' *Superfreak*. Both of these examples owed a large part of their success to listeners' familiarity with the original works; Vanilla Ice and MC Hammer built new songs upon pre-existing hooks, or the "heart" of the original works.

VI. A SUGGESTED NEW LICENSING SCHEME FOR SOUND RECORDING SAMPLE CLEARANCES

Under the proposed compulsory license system, both qualitatively insignificant samples and single-use qualitatively significant samples that are under three seconds would require no license fees for either the sound recording or the musical composition. Qualitatively significant samples of three seconds or less that are looped would require a payment of two cents per track to the sampled work's sound recording copyright holder. Qualitatively significant uses greater than three seconds would continue to require negotiation and clearance of both the sound recording and the musical composition, as per current music industry practice.

Under Section 115 of the Copyright Act,⁵⁷ a compulsory license is available to make covers once a nondramatic musical work has been distributed to the public.⁵⁸ As with the current system for administering licenses for covers, there would be a presumption that the compul-

⁵⁵ ROB BASE & DJ EAZY ROCK, *It Takes Two*, on IT TAKES TWO (Profile 1988).

⁵⁶ LYN COLLINS, *Think (about it)*, on THINK (ABOUT IT) (People 1972).

⁵⁷ 17 U.S.C. § 115 (2000).

⁵⁸ 17 U.S.C. § 115(a).

sory sound recording license use is proper.⁵⁹ Under the proposed compulsory license for sound recording samples, if a defendant's use is greater than three seconds of qualitatively significant material, a plaintiff is free to take the infringing sampler to court, and the sampler likely would be liable for copyright infringement.

VII. ARGUMENTS FOR A COMPULSORY SOUND RECORDING SAMPLE LICENSE

A. *Enhancement of Creativity in the Hip-Hop Genre*

The sampling of sound recordings furthers a uniquely African-American aesthetic known as the "second sight." This aesthetic borrows sources from the artist's own life experiences and incorporates them to create a novel artistic expression.⁶⁰ Hip-hop is an urban phenomenon created largely by young blacks and Latinos, many of whom lack the resources to obtain and learn to play traditional instruments or to book expensive rehearsal studio time. Unfortunately, a result of the financially costly and time-consuming nature of clearing samples is a reluctance to use samples on new recordings.⁶¹ This reluctance is counter to the very foundation that not just hip-hop, but pop music itself, is built upon. This is because hip-hop, pop, and other "second sight" art forms depend upon an element of familiarity to gain the attention of the listener.⁶² Though artists will sometimes use samples to save money and time, a more common and compelling reason why they sample derives from a desire to use the unique sound of a successful song or recording artist for the express purpose of giving the sampling artist's work a familiar element that listeners will quickly recognize.⁶³ However, the sampling artist will usually also add his or her own ele-

⁵⁹ See *Motola v. EMI Am. Records*, No. 82-6308-PAR (C.D. Cal. 1984) (finding the defendant music group The Stray Cats liable for copyright infringement when the supposed Eddie Cochran cover they included on their album exceeded the limits permitted by a mechanical license in terms of how much freedom they had to modify and alter the original composition).

⁶⁰ Matthew G. Passmore, Note, *A Brief Return to the Digital Sampling Debate*, 20 *HASTINGS COMM. & ENT. L.J.* 833, 843 (1998).

⁶¹ See Robert Christgau, *Adventures in Information Capitalism: Gilbert O'Sullivan Meets Biz Markie*, *VILLAGE VOICE*, Jan. 21, 1992, at 79 (quoting a 1992 interview in which 2 Live Crew's Luther Campbell stated, "A lot of people are getting away from samples now; it's too expensive.").

⁶² See Jon Pareles, *A Zillion-Dollar Question: Who Did What In a Song?*, *N.Y. TIMES*, Apr. 28, 1988, at C21 ("A catchy pop song balances familiarity and novelty, readymades and inspirations; it clings to pre-existing pop like a barnacle on a battleship . . . [I]f a song doesn't have some familiar element in its opening seconds, radio programmers and most record company executives are likely to pass it by.").

⁶³ See AL KOHN & BOB KOHN, *The Digital Sampling Controversy*, in *KOHN ON MUSIC LICENSING* 1479, 1481 (3d ed. 2002).

ments, such as vocals, percussion, bass line, or keyboard flourishes to create a transformative new work.

The use of samples from other musical works can be a very creative practice. From a nearly infinite amount of works to select from, a sampler must decide upon a work which best conveys the theme or statement the artist desires to relate to the listener. For example, a sampler desiring to create a feeling of tension might choose to loop a slowed-down snippet of brass horn section. To stifle developing artists' use of samples just because the artists cannot afford clearance fees runs directly counter to the purpose of copyright legislation as stated in the Constitution: to promote "the progress of science and the useful arts."⁶⁴

It is worth noting that similar to hip-hop, rock and roll has long borrowed from other musical sources.⁶⁵ Since the beginning of Western music, musicians have liberally referenced works by other musicians.⁶⁶ Classical music makes extensive use of other pre-existing works, with artists like Igor Stravinsky making references to older musical pieces in his compositions.⁶⁷ Yet hip-hop has received more scrutiny under copyright law than rock and roll or classical music.⁶⁸

Plaintiffs are making claims with no sound basis in copyright law when they sue samplers who have appropriated a *de minimis*, non-qualitatively significant portion of a musical composition or sound recording. This creates a deterrent for artists to use samples when they may be legally entitled to do so. Individuals now fear using pre-existing works even if they are doing nothing illegal. Payment is currently expected in the music industry for sample uses, so long as a listener can identify the original work, regardless of whether the portion appropriated is *de minimis*.⁶⁹

⁶⁴ U.S. CONST. art. I, § 8, cl. 8.

⁶⁵ For examples of the rock-and-roll tracks that liberally borrow from other sources without giving credit, see BARENAKED LADIES, *Grade Nine*, on GORDON (Warner Brothers 1992) (making use of the guitar riff from RUSH, *Tom Sawyer*, on MOVING PICTURES (Polygram 1990)); RED HOT CHILI PEPPERS, *Punk Rock Classic*, on MOTHER'S MILK (Capitol 1989) (making use of the guitar riff from GUNS N' ROSES, *Sweet Child O' Mine*, on LIES (Geffen Records 1988)), and the SPIN DOCTORS, *Freeway of the Plains/Lady Kerosene*, on UP FOR GRABS . . . LIVE (Sony 1991) (making use of lyrics from JERRY LIVINGSTON AND MACK DAVID, *This Is It (The Bugs Bunny Overture)* (1961)).

⁶⁶ See *Bridgeport Music, Inc.*, 230 F. Supp. 2d at 842.

⁶⁷ See Sherri Carl Hampel, Note, *Are Samplers Getting a Bum Rap?: Copyright Infringement or Technological Creativity?*, 1992 U. ILL. L. REV. 559, 584 (1992).

⁶⁸ See Christgau, *supra* note 61 ("'[B]orrowed' riffs are de rigueur in rock and roll. How many (mostly white) guitarists have inserted a piece of 'Johnny B. Goode' into their own songs? Rappers are expected to clear such usages, even when the notes are reproduced by a live musician rather than taken off a record.")

⁶⁹ KRASILOVSKY & SHEMEL, *supra* note 3, at 287.

Some experts fear that harsh enforcement of copyright laws will lead to a chilling of both creativity and new compositional techniques. If the law does not allow writers, musicians, and other creators to build upon the ideas of their predecessors, it will stifle free speech and creativity.⁷⁰ A balance must be struck between protecting an artist's interests, and depriving other artists of the building blocks of future works.⁷¹ Therefore, it is important to weigh the public's benefit of having creative works against the rights of the original copyright holder.

The benefit of the proposed compulsory sound recording license system is that artists making use of samples will no longer have to spend vast amounts of time and money clearing them, nor will they worry about the threat of a lawsuit if they don't clear the sample sufficiently in advance. Meanwhile, the original copyright holder retains full control of his work when the sampled portion is qualitatively significant and more than three seconds in length. This is a reasonable compromise, as greater creative expression is thus encouraged, while the original works' copyright holders continue to retain a significant degree of artistic control over, as well as receive financial payment for, derivative uses of their work.

B. *Economic Benefits for Both the Sampler & the Original Work Copyright Holder*

Artists that know how to play instruments are now often going into the studio and playing the portion of the would-be-sampled work themselves, so as to avoid having to pay for the sound recording license. When artists alter just a few notes of the original work, they can sometimes get away with not paying for the musical composition license as well. An example of this occurred with Supreme Beings of Leisure, who had a new song that took the opening string section of *You Showed Me*⁷² by Bug Music Publishing's ("Bug's") act "The Turtles." Supreme Beings of Leisure approached Bug for a musical composition clearance. Though Bug sent the license terms to the Supreme Beings of Leisure, the band never contacted Bug again. Bug later learned that the group members just re-played the string parts themselves, so they wouldn't have to pay for the sound recording license from The Turtles' label. The band also changed the musical composi-

⁷⁰ MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.10[B], at 1-75 (1978).

⁷¹ *Bridgeport Music, Inc.*, 230 F. Supp. 2d at 842.

⁷² THE TURTLES, *You Showed Me*, on THE TURTLES PRESENT THE BATTLE OF THE BANDS (White Whale 1968).

tion by a few notes so that copyright infringement would be debatable.⁷³

License evasion tactics lead original work authors and performers to be deprived of financial and artistic credit for a new work that they have helped inspire. This exemplifies how the current sample license clearance scheme can actually harm the interests of the original work's copyright holders, who lose income they would have otherwise received had the authors of the new work not felt discouraged by excessive license fees.⁷⁴

Sampling often stands to benefit both the sampled and the sampling parties. Until Tupac Shakur sampled it in his hit single *All About U*,⁷⁵ the song *Candy*⁷⁶ by Larry Blackmon of Cameo had never been particularly profitable or popular.⁷⁷ The resulting success of the Tupac Shakur song led to Blackmon earning thousands of dollars in royalties.⁷⁸ Sampling increases the recognition of the original work, and, therefore, it is not in the author's economic interest to make a sample difficult to clear.

Perhaps the most prominent and progressive example of how sampling can benefit the sampling and sampled artists alike—as well as their respective labels and publishers—is the rap group US3, which was given permission to make use of and sample the entire Blue Note Records jazz catalog.⁷⁹ The group's resulting 1994 platinum album *Hand on the Torch*⁸⁰ boosted sales of Blue Note's stagnant back catalog as a new generation of listeners heard snippets of the original jazz songs for the first time and later sought out the original works' corresponding albums.

US3's hit single *Cantaloop (Flip Fantasia)*⁸¹ made extensive use of Herbie Hancock's work *Cantaloupe Island*.⁸² Blue Note was quick to

⁷³ Telephone Interview with Kyle Staggs, *supra* note 25 (“It was very shrewd on their part. But this act definitely hurt The Turtles and Bug Music Publishing.”).

⁷⁴ Telephone Interview with Tom Evered, General Manager, Blue Note Records (April 8, 2003) (“I believe that sampling is occurring less frequently today in hip-hop because musicians don't want to pay the license fees. Blue Note is currently generating less in sample licensing revenue for its jazz artists than it was ten years ago.”).

⁷⁵ TUPAC SHAKUR, *All About U*, on ALL EYEZ ON ME (Death Row 1996).

⁷⁶ CAMEO, *Candy*, on WORD UP (Atlanta Artists 1988).

⁷⁷ See LaPolt et al., *supra* note 50, at 161-68.

⁷⁸ *Id.*

⁷⁹ Telephone Interview with Tom Evered, *supra* note 74 (“We asked US3 what the five hardest samples were for them to license, and they told us that all five were on Blue Note. We made them a deal, and the rest is history.”).

⁸⁰ (Blue Note 1994).

⁸¹ US3, *Cantaloop (Flip Fantasia)*, on HAND ON THE TORCH (Blue Note 1994).

⁸² HERBIE HANCOCK, *Cantaloupe Island*, on EMPYREAN ISLES (Blue Note 1964).

capitalize on the newfound interest in its back catalog, and promptly issued a number of compilations from artists sampled by US3, including Hancock and Donald Byrd.⁸³ The 1994 Herbie Hancock best-of compilation *Cantaloupe Island*⁸⁴ went on to sell over 60,000 units in the United States, a remarkable figure considering that the typical Hancock compilation sells only 15,000 copies.⁸⁵ The 300% sales spike was a direct result of interest generated in Hancock's music by US3's samples.

Major music publishers and labels may fear a loss of income due to the proposed sample clearance system's potential abolition of licenses for non-qualitatively significant portions of musical compositions and sound recordings. However, these publishers and labels are worrying prematurely. They should recognize that their losses would very likely be offset because they would now possess a greater share of their own hip-hop artists' copyrights. This silver lining results from the fact that the publishers and labels would no longer have to give up any percentage of their affiliated hip-hop artists' copyrights to the authors or performers of sampled *de minimis* or non-qualitatively significant works.⁸⁶

C. *Pastiche in Hip-Hop Should Be Viewed As a Transformative Use*

Section 107 of Title 17 in the Copyright Act cites criticism and comment as being possible fair uses of another copyright holder's work.⁸⁷ It is illogical for fair use protection to cover parody uses, but not to encompass transformative samples in hip-hop. The court in *Campbell* held that the most important factors in the fair use inquiry are the nature and character of the allegedly infringing use and whether the supposedly infringing use is transformative.⁸⁸ Many uses of samples in hip-hop are indeed transformative because they aid in creating a new work with a different character and message.

⁸³ Telephone Interview with Tom Evered, *supra* note 74 ("The Herbie Hancock and Donald Byrd compilations were done specifically because of the success of US3 with mainstream audiences. The compilations simply would not have existed without US3.").

⁸⁴ (Blue Note 1994).

⁸⁵ Telephone Interview with Tom Evered, *supra* note 74.

⁸⁶ Telephone Interview with Kyle Staggs, *supra* note 25 (stating that a publisher like Warner-Chappell might be able to offset lost musical composition license income under the proposed compulsory sample license system "because they have so many artists from the 1980's and 1990's who were using samples themselves").

⁸⁷ 17 U.S.C. § 107 (2000).

⁸⁸ See *Campbell*, 510 U.S. at 579 (stating that an allegedly infringing work is "transformative" if it "adds something new, with a further purpose or different character, altering the first with new expression, meaning or message; it asks, in other words, whether and to what extent the new work is 'transformative'").

In *Fisher v. Dees*,⁸⁹ the court recognized that a parody is successful only if the audience makes the connection between the original and its comic version.⁹⁰ To conjure up the original work in the audience's mind, the parodist must appropriate a substantial enough portion to evoke recognition.⁹¹ As with parody, art forms like hip-hop also must use a significant enough portion of the original work so as to stir initial recognition within the listener, while still creating a transformative new work.⁹² The only difference between hip-hop and parody is that hip-hop is generally a neutral practice devoid of the mimicry or criticism inherent in parody. The *Campbell* decision's fair use protection for parody⁹³ should be expanded to reflect the now-prominent role of pastiche-based art forms like hip-hop in contemporary culture.

In fair use analysis, courts have traditionally put the greatest emphasis on the effect of the defendant's use of the work upon the potential market for or value of the plaintiff's work.⁹⁴ *Fisher v. Dees* held that infringement only occurs when the new work supplants the original in markets the original is aimed at, or when the original is, or has reasonable potential to become, valuable.⁹⁵ Hip-hop sampling seldom affects the original work's market adversely since the two works are not competing in the same genre. In fact, unlike parody, hip-hop and pastiche uses are actually likely to increase demand for the sampled work; it is quite common for hip-hop listeners to search out and purchase the original tracks that are sampled by their favorite rap songs.⁹⁶

Some may argue that the owners of original works will have their licensing ability adversely affected by a compulsory sound recording license system. However, this is an argument that has little real-life merit, particularly when the copyright holder has not demonstrated any effort to capitalize on the work's derivative uses. In *Jarvis*, the court held that the plaintiff failed to show lost opportunities to release a remix when his work, which was released in 1982, was sampled by the defendant in 1990.⁹⁷

⁸⁹ 794 F.2d 432 (9th Cir. 1986).

⁹⁰ *Id.* at 434.

⁹¹ *Id.* at 434 n.2.

⁹² See Pareles, *supra* note 62.

⁹³ See *Campbell*, 510 U.S. at 579.

⁹⁴ 17 U.S.C. § 107(4) (2000).

⁹⁵ *Fisher*, 794 F.2d at 438. The court commented that it did not believe that consumers desirous of hearing plaintiff's romantic nostalgic ballad would be satisfied to purchase the defendant's parody instead and stated that "[t]he two works do not fulfill the same demand. Consequently, the parody has no cognizable economic effect on the original." *Id.*

⁹⁶ Telephone Interview with Tom Evered, *supra* note 74 ("Hip-hop has definitely shed light onto lesser known jazz titles and helped increase their sales.")

⁹⁷ See *Jarvis*, 827 F. Supp. at 294.

An even more striking example of how a work's value for sample licensing is unlikely to be diminished by another song that makes prior use of the same sample is Jimmy Smith's *Root Down (And Get It)*.⁹⁸ The track was sampled by 3rd Bass in 1990 on their song *Steppin' To the A.M.*,⁹⁹ and by the Beastie Boys in 1994 on their song *Root Down*.¹⁰⁰ Both groups also happened to be the only platinum selling white artists in the hip-hop genre during the early 1990's. Despite the prior use by 3rd Bass, however, the Beastie Boys' album debuted at number one¹⁰¹ and went on to sell three million copies in the United States, spawning a highly successful remix album¹⁰² that featured five additional versions of the *Root Down* single.

Jimmy Smith certainly benefited far more from the later sample license by the Beastie Boys than from the initial use by 3rd Bass. Moreover, the Beastie Boys never would have licensed Smith's work, much less released a track to great commercial success with the qualitatively significant portion of Smith's work as their single, unless there was still a valuable market for Smith's work as a hip-hop sample.

Sampling is unlikely to reduce incentives for authors to create new works; nor is it a reasonable conclusion that a musician would be dissuaded from writing songs for fear that somebody may one day sample a three-second portion of it. Many artists of earlier recordings would actually welcome the recognition and payment resulting from an unauthorized sample.¹⁰³ Furthermore, the *Campbell* court pointed out that original works and new transformative works usually serve different market functions.¹⁰⁴ While *Campbell* distinguished between the original work's market and the secondary parody market,¹⁰⁵ the distinction likewise applies to different musical genres. For example, a sampled jazz loop used in a new hip-hop work is unlikely to adversely affect demand for the jazz original; in fact, the demand is likely to increase.¹⁰⁶

A compulsory license for sound recordings would make unauthorized sampling unnecessary because samplers would be assured use of a song, so long as the amount taken is less than three seconds of qualitatively significant material. It is absurd that copyright law currently punishes samplers with steep license fees when they seek to legally secure a

⁹⁸ JIMMY SMITH, *Root Down (And Get It)*, on *ROOT DOWN* (Verve 1972).

⁹⁹ 3RD BASS, *Steppin' To the A.M.*, on *THE CACTUS REVISITED* (Columbia Records 1990).

¹⁰⁰ BEASTIE BOYS, *Root Down*, on *ILL COMMUNICATION* (Capitol Records 1994).

¹⁰¹ *Top 200 Albums Chart*, BILLBOARD, June 18, 1994.

¹⁰² BEASTIE BOYS, *ROOT DOWN* (Capitol 1995).

¹⁰³ KRASILOVSKY & SHEMEL, *supra* note 3, at 285.

¹⁰⁴ *See Campbell*, 510 U.S. at 591.

¹⁰⁵ *See id.* at 591-92.

¹⁰⁶ Telephone Interview with Tom Evered, *supra* note 74.

license from the original work's owner. Fair use recognition of the transformative function of samples has dual benefits in that it will encourage samplers to seek consent first, while also conveying to the original authors an enforceable royalty rate.¹⁰⁷

VIII. CONCLUSION

The proposed compulsory license would cover only looped, qualitatively significant samples that are less than three seconds in length. Uses of a pre-existing work that exceed three seconds would continue to be negotiated in accordance with the current practices of the music industry. Authors who felt that a sampler had gone beyond the parameters of the system's permitted appropriations would be free to take the sampler to court. A similar industry practice already exists for the compulsory mechanical license, as evidenced by *Motola*, in which the plaintiff sued defendant group, The Stray Cats, for exceeding the boundaries permitted under the Copyright Act to alter an original work when recording a cover song.¹⁰⁸

The proposed system will greatly expedite the time spent in clearing samples, as it will no longer be necessary to obtain a separate clearance for the musical composition, as long as the amount taken is *de minimis* or qualitatively insignificant. The door for such a system has already been opened by *Newton*,¹⁰⁹ in which the defendant licensed the sound recording, but the court held that he did not have to license the musical composition from the plaintiff since the portion sampled was *de minimis*.

In considering the implementation of a compulsory license system for samples, it is important to weigh the public's benefit of having creative works against the rights of the original copyright holder. Because the system would apply only to samples that appropriate a qualitatively significant portion of three seconds or less of the sound recording, copyright holders stand to lose very little. Today's sample clearance process is obsolete and incompatible with the prominent role of pastiche and hip-hop in contemporary culture. Preventing good songs from being released is contrary to the Constitution's stated intent.¹¹⁰ A compulsory sound recording license system will speed up the creative process while still protecting the interests of copyright holders.

¹⁰⁷ See Kravis, *supra* note 31, at 275.

¹⁰⁸ *Motola*, No. 82-6308-PAR (C.D. Cal. 1984).

¹⁰⁹ *Newton*, 204 F. Supp. 2d at 1259.

¹¹⁰ See U.S. CONST. art. I, § 8, cl. 8.

