

NOTES

UNDERGROUND APPEAL: A SAMPLE OF THE CHRONIC QUESTIONS IN COPYRIGHT LAW PERTAINING TO THE TRANSFORMATIVE USE OF DIGITAL MUSIC IN A CIVIL SOCIETY

CHRIS JOHNSTONE*

*“Our public discourse comprises a rambunctious, effervescent brew of spectacle, prurient appeal, social commentary, and political punditry. It is part entertainment, but as it entertains, it often reveals contested issues and deep fissures within our society, just as it may reinforce widely held beliefs and values.”*¹

I. INTRODUCTION

Throughout the 1970s, the Bronx borough of New York City was perceived as a microcosm of desolate American urban hopelessness.² Within this economically barren wasteland, the city’s culture cultivated a colorful new form of musical art, organically sown from the seeds of the past. What was born as a fringe musical movement has evolved into an American cultural mainstay. Today, hip-hop music experiences tremendous mainstream success, both as a credible art form and as a

* Class of 2004, University of Southern California Law School; B.A. 2001, Duke University. I would like to thank Dan Klerman for his comments.

1. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 350 (1996).

2. See NELSON GEORGE, *HIP HOP AMERICA* 9–10 (1998).

business. Yet the success and proliferation of this genre has largely relied on the use of samples of past funk, rock, and soul compositions.³

Copyright law was established as a mechanism for the promotion of innovation.⁴ In the realm of digital sampling, however, its role remains somewhat unclear. It is obvious that unauthorized copying of original compositions should be unlawful, but the extent of this protection remains a doctrinally elusive concept when applied to small or manipulated fragments of music. Specifically, the issue of digital sampling suffers from a lack of clear judicial guidance.⁵ Although sampling can clearly be translated into standard copyright doctrine, its exact fit has yet to be definitively declared by the judiciary.⁶ District courts have only sporadically tackled the topic, deterring potential litigants who fear the consequences of inconsistent doctrinal application.

This Note will look at the issue of digital sampling through the lens of recent commentary that suggests that copyright law exists, in large part, for the purpose of reinforcing democratic principles such as informed debate, pluralism, and civic participation.⁷ It will attempt to unravel the tangled doctrine regarding digital sampling to demonstrate the pitfalls of the present regime, and will later suggest more appropriate guidelines for the recording industry that will minimize unnecessary fees and eliminate deadweight economic loss.

Part II will discuss the early history of rap music, explain the technological creativity involved in the process of digital sampling, and document the record industry's response to these developments. Part III will consider how this creative process fits into the doctrinal framework of copyright law and will analyze various policy considerations stemming from the current doctrinal approach. Further, it will survey four leading cases to demonstrate the erosion of judicial skepticism and the improved sophistication of copyright application over the past ten years. Part IV will consider the various philosophical justifications for copyright law and will argue that the "democratic approach" is the most appropriate tactic for designing a desirable system for a civil society. Part V will evaluate and

3. *Id.* at 93–96.

4. See William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 2 (Stephen Munzer ed., 2001), available at <http://cyber.law.harvard.edu/people/ffisher/iptheory.pdf>.

5. See Matthew Africa, Comment, *The Misuse of Licensing Evidence in Fair Use Analysis: New Technologies, New Markets, and the Courts*, 88 CAL. L. REV. 1145, 1173–75 (2000).

6. See *id.*

7. See Netanel, *supra* note 1, at 347–52.

reject an opposing proposal of compulsory licensing that relies on an unworkable application of section 105 of the Copyright Act to the practice of digital sampling. Finally, this Note will provide a novel solution that protects the incentives for creation while still allowing for transformative uses that have social impact.

II. THE SOCIAL RELEVANCE OF RAP

Growing from humble roots, hip-hop has transcended its early musical impact and transformed into a marketable cultural influence, providing a vivid perspective of the urban condition largely through postmodern expression. With this success, however, has come unintended legal consequences, resulting in a complex licensing industry.

A. HISTORICAL EVOLUTION AND TECHNOLOGICAL INNOVATION

The infancy of hip-hop music can be traced back to local parties in the parks of Jamaica, where thunderous sound systems played music to a population of people without the financial means to purchase their own records during the 1960s and 1970s.⁸ Owners of these sound systems commissioned local musicians to record instrumental versions of popular American soul hits, and later began to rhyme over these songs as a way to incite the crowd.⁹ These DJs were in fierce competition to garner local acclaim and built their performance reputation by recontextualizing American soul into instrumental Jamaican reggae rhythms.¹⁰ After giving past soul hits a cultural makeover, the DJs would “chat,” or “toast,” over the rhythms in a rhyming fashion, hoping to enliven the masses.¹¹

This improvisational musical style was transplanted to the South Bronx, where DJs began to creatively blend the rhythms of funk and soul by using two turntables to play distinct parts of two songs simultaneously.¹² As the “scratching” and blending of records occurred in the streets, this conceptual approach was paralleled by the use of new sampling machines in production studios. Products such as the E-mu Emulator, introduced in the early 1980s, allowed a producer to store, “manipulate, and play back any sound that had been stored within it.”¹³ This product and its later

8. Henry Self, Comment, *Digital Sampling: A Cultural Perspective*, 9 UCLA ENT. L. REV. 347, 348–49 (2002).

9. *Id.* at 348.

10. *Id.*

11. *Id.*

12. *Id.*

13. GEORGE, *supra* note 2, at 92.

versions quickly lowered production costs for authors¹⁴ and promoted the creation of innovative sounds from the scraps of 1970s funk and soul recordings.¹⁵

Contemporary sampling techniques have retained many of the same attributes of the earlier methods, but have also integrated more sophisticated computers, drum machines, and synthesizers to create seamless musical compositions.¹⁶ Not only have producers been able to reuse past sound recordings, but advanced technology has allowed them to manipulate the pitch, tone, and rhythm of a sample to render it practically unrecognizable.¹⁷ The process of sampling has been defined by musical experts as “the conversion of analog sound waves into a digital code. The digital code that describes the sampled music . . . can then be reused, manipulated or combined with other digitized or recorded sounds using a machine with digital data processing capabilities, such as a . . . computerized synthesizer.”¹⁸ An influential district court opinion has more simply described the process in lay terms as “similar to taping the original composition and reusing it in another context.”¹⁹

However this transformative use is described, “rap music,” also known as “hip-hop,” has continued to rely on the sampling process as a crucial part of its creative identity. For the sake of clarity, the rap music has been defined as a “style of black American popular music consisting of improvised rhymes performed to a rhythmic accompaniment.”²⁰ Rap remains a vital force in its own right, but has also bled into the rhythm and blues (“R&B”) genre to the point where *Billboard*, a weekly magazine covering the music industry, compiles separate weekly charts for rap and R&B/hip-hop singles.²¹ Although recording budgets for rap music have

14. See Christopher D. Abramson, Note, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection*, 74 N.Y.U. L. REV. 1660, 1666 (1999) (arguing that lower production costs have detrimentally affected studio musicians to a point where legislative protection is necessary).

15. See Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271, 277 (1996). But see Abramson, *supra* note 14, at 1668 (stating that “this practice poses the greatest danger to the musical profession because the musician is being replaced with himself”).

16. See GEORGE, *supra* note 2, at 92–94.

17. See *id.* at 91–93.

18. Judith Greenberg Finell, *How a Musicologist Views Digital Sampling Issues*, N.Y. L.J., May 22, 1992, at 5 n.3.

19. *Jarvis v. A&M Records*, 827 F. Supp. 282, 286 (D.N.J. 1993).

20. *Campbell v. Acuff-Rose Music, Inc.*, 50 U.S. 569, 572 n.1 (1994) (quoting THE NORTON/GROVE CONCISE ENCYCLOPEDIA OF MUSIC 613 (Stanley Sadie ed., 1988)).

21. See *Billboard Album Charts*, BILLBOARD, available at http://www.billboard.com/bb/charts/album_index.jsp (last visited Jan. 15, 2004). Although there are separate listings for R&B/hip-hop and

increased over the years, producers still rely on sampling as a traditional part of their creative process, a method that certainly has not diminished hip-hop's marketability.²²

B. COMMERCIAL IMPACT AND WIDESPREAD ACCEPTANCE

Hip-hop music has revolutionized the recording industry and has changed the face of American advertising.²³ Rap regularly dominates the *Billboard* charts²⁴ and accounts for a substantial percentage of total album sales each year,²⁵ with the three top selling albums in 2002 being hip-hop or "rap-inflected."²⁶ Although rap began with primarily underground appeal, it has developed widespread economic significance.²⁷ In many ways, rap has supplanted rock, as the scratch of a record has replaced the drum fill. Even in rock bands, it has become customary for many groups to include a DJ to provide an urban texture to their live ensemble.²⁸

Beyond the music, hip-hop culture has had a profound impact on American business. Blue-chip companies regularly employ rappers as spokespersons in their attempts to tap into youth advertising markets.²⁹ The mere allusion to a certain product in a rap single has caused surprising increases in sales for certain companies.³⁰ Success in the marketing of hip-hop has become so widespread that many artists have started their own diversified corporations, financing everything from film production to clothing lines.³¹ The use of digital samples drives a great portion of the

rap tracks, many songs appear on both listings simultaneously because of the blurring between R&B and rap music.

22. See GEORGE, *supra* note 2, at 95, 98–103.

23. See *id.* at x–xi.

24. See *The Billboard Hot 100*, BILLBOARD, available at <http://www.billboard.com/bb/charts/hot100.jsp> (last visited Jan. 15, 2004).

25. See Lynette Holloway, *Pop's Strong Single Sales*, N.Y. TIMES, Dec. 30, 2002, at C8. See also Ed Christman, *U.S. Music Industry Marks Strong Rebound in Year*, BILLBOARD, Jan. 16, 1999, at 85.

26. John Leland, *Feuding for Profit: Rap's War of Words*, N.Y. TIMES, Nov. 3, 2002, at A1.

27. See Jeff Leeds, *The Great White Rapper Hope: Searching for the Next Eminem*, CHI. TRIB., Nov. 17, 2002, at 14 (noting that record industry surveys have consistently found that approximately seventy-five percent of rap music is purchased by White, Latino, and Asian consumers).

28. See Jennifer Ordonez, *Bands Without Borders Give Music Labels More Mileage: Record Companies Try to Stretch Proven Acts Across Genres*, WALL ST. J., Jan. 2, 2002, at A7.

29. See, e.g., Mary Lisa Gavenas, *Full Court Press for Jay-Z: Hip-Hop Artist to Be Featured in Reebok Ads*, DAILY NEWS REC., Dec. 16, 2002, at 26; Maureen Tkacik, *The Worlds of Extreme Sports and Hip-Hop Are Hangin' Together*, WALL ST. J., Aug. 9, 2001, at B1.

30. See, e.g., Christopher Lawton, *Roc-a-fella Records Invests in Vodka Brand*, WALL ST. J., Dec. 30, 2002, at B4. See also Lynette Holloway, *Hip-Hop Sales Pop: Pass the Courvoisier and Count the Cash*, N.Y. TIMES, Dec. 2, 2002, at C1.

31. See, e.g., Holloway, *supra* note 30.

creative process, and, as a result, its legal availability has direct ramifications on the major financial—not to mention artistic—health of major record companies.³²

C. RISK AVERSION AND ROUTINE LICENSING

In terms of musical production, traditional sampling has remained a steadfast component in the creation of new songs in the hip-hop industry.³³ As producers have become increasingly subtle and sophisticated in their use of samples in producing new works, they have been equally conscious of the legal ramifications of their behavior. Record companies have created entire subdivisions dedicated to making certain that sampled works have been contractually licensed or granted “clearance” from their owner.³⁴ Private firms have also entered the fray, serving as the primary means of negotiating and securing a clearance from a copyright owner.³⁵

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.³⁶ 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.³⁷ With such draconian legal ramifications connected to elusive legal issues, record companies elect to simply pay for licenses.³⁸

Part of the explanation for such defensive and conservative actions lies in the transaction costs associated with litigating a copyright dispute, compounded by the negative publicity associated with this type of controversy. Early cases involving sampling severely damaged the careers

32. See Bob Bahr, *R.I.P. Rap: Is Rap Dead?*, COURIER-J, Nov. 29, 2002, at C1 (noting the “bleeding of rap into rock, pop and R&B—which makes the distinctions increasingly blurry” while suggesting the strength of hip-hop music, despite recent sales decreases, which the author and artists suggest are a result of a poor economy).

33. See GEORGE, *supra* note 2, at 93–96.

34. See *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 184–85 (S.D.N.Y. 1991).

35. Companies such as Music Resources, Inc. represent hundreds of hip-hop artists in pursuing clearances from the catalogs of copyright holders. See Music Resources, Inc., *Sampling Services*, at <http://www.musicresources.com> (last visited Jan. 15, 2004).

36. See, e.g., *Grand Upright Music*, 780 F. Supp. at 185.

37. See also Ronald Gaither, *The Chillin' Effect of Section 506: The Battle over Digital Sampling in Rap Music*, 3 VAND. J. ENT. L. & P. RAC. 195, 201–02 (2001).

38. See Africa, *supra* note 5, at 1174–75.

of a number of artists and received significant coverage in major newspapers.³⁹ Licensing has simply become an accepted cost of doing business in the hip-hop industry, where a popular record can quickly sell millions of copies within weeks. Finally, publishing departments look to avoid disputes among record companies, who are constantly negotiating with each other and would rather avoid constant confrontation with each other.⁴⁰ These deals are eventually made, regardless of whether they are truly necessary, often without the consent of the original artist, who has long since signed away publishing rights.

D. EXPRESSIVE SIGNIFICANCE AND CULTURAL RELEVANCE

The process of sampling within the rap industry can be construed as a sophisticated modern recontextualization of past works.⁴¹ Some commentators characterize the use of past soul and funk records as being in step with the postmodern art movement.⁴² This genre rejects the boundaries between high and low art and eschews divisions between the sacred and profane.⁴³ Hip-hop tends to embrace the postmodern aesthetics of discontinuity, simultaneity, and the diminishing authority of the author, in rhythm with the overt manipulation involved in digital sampling.⁴⁴ Postmodernists also tend to discuss local subjects rather than more global issues.⁴⁵ With an emphasis on clever wordplay and storytelling, hip-hop provides a glimpse into the urban condition without attempting to answer age-old questions. Although the aesthetic and artistic worth of rap music is outside the scope of this Note,⁴⁶ it must be conceded that it provides a unique voice in American discourse, due in part to the transformative use of past creations. In these respects, hip-hop can be seen as an artistic

39. See GEORGE, *supra* note 2, at 95.

40. See Gaither, *supra* note 37, at 204–05.

41. See GEORGE, *supra* note 2, at 91–93.

42. See, e.g., Self, *supra* note 8, at 351–52; Garth Alper, *Making Sense Out of Postmodern Music?*, POPULAR MUSIC & SOC'Y, Winter 2000, at 14.

43. See Mary Klages, *Postmodernism*, University of Colorado at Boulder English Department, at <http://www.colorado.edu/English/ENGL2012Klages/pomo.html> (last modified Apr. 21, 2003).

44. *Id.*

45. *Id.*

46. As Justice Oliver Wendell Holmes once explained:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.

Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (holding that circus posters have copyright protection).

filtration process, recontextualizing past works to create fresh cultural meaning.

Opponents, including many prominent political figures,⁴⁷ have categorically assailed rap music, declaring that it transmits negative messages to society while ignoring the possibility that artists may conversely be *reflecting* society's ills. Although hip-hop is not characterized as being overtly political, politics has bled into the genre.⁴⁸ In fact, many of the wars over censorship have been fought on the battleground of rap music.⁴⁹ Artists in this genre often seem to find themselves national advocates for First Amendment freedoms in judicial disputes and in the court of public opinion because of the publicity generated by their controversial topics.⁵⁰

Regardless of hip-hop's artistic legitimacy or political salience, the fact remains that it is a contributing vendor in the marketplace of ideas. Much of the recent scholarship confronting copyright law focuses on the relevancy of new creation based on transformative use. Interestingly, it should be mentioned that "[m]any creative works have broad political and social implications even if they do not appear or even seek to convey an explicit ideological message."⁵¹ In this sense, "[e]ven what may seem to be abstract, 'pure' artistic expression may challenge accepted modes of thought and belie the efforts of governments or cultural majorities to standardize individual sensitivities and perceptions."⁵² Part V of this Note will demonstrate how copyright law exists to serve the goals of a properly functioning democratic civil society, and how hip-hop producers should be given greater transformative privileges to achieve copyright law's associational goals. As the doctrine presently stands, however, the extent of protection is often based on difficult factual determinations made by members of the bench.

47. See, e.g., Gwen Ifill, *Clinton Stands by Remark on Rapper*, N.Y. TIMES, June 15, 1992, at A1.

48. See Kirk Miller, *Beastie Boys on the Attack: First New Song in Years Slams Bush*, ROLLING STONE, Apr. 3, 2003, at 17.

49. See, e.g., Jonathan Gold, *Ice-T Raps Himself in First Amendment*, L.A. TIMES, Dec. 3, 1989, at 66.

50. See *id.*

51. Netanel, *supra* note 1, at 350.

52. *Id.* See generally Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73 (1996) (emphasizing the need for First Amendment jurisprudence to reflect art's critical role in preserving the balance between the governed and the governing).

III. DOCTRINAL RESPONSES AND ECONOMIC EFFECTS

The Copyright Clause of the U.S. Constitution grants 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.”⁵³ The Copyright Act of 1976 now governs the rights of copyright holders and finds infringement for those who inappropriately copy, reproduce, or prepare derivative works.⁵⁴ In accordance with these rights, courts have not been successful in consistently defining an absolute legal standard for the practice of digital sampling, perhaps due to the factually unique circumstances of each case. To further complicate matters, borrowing from others implicates the rights to both the sound recording (“master use license”)⁵⁵ and the musical composition (“mechanical license”).⁵⁶

To establish infringement, the plaintiff must prove the valid ownership of a copyright and the illegal use of original elements of the work by the alleged infringer.⁵⁷ This latter element requires proving two distinct elements: actual copying and improper appropriation.⁵⁸ Actual copying can be proven by either direct evidence or circumstantial proof that the alleged infringer had access to the original work and that the new work bears a “probative similarity” to the copyrighted work.⁵⁹ In the context of rap music, it is rarely disputed that the copying took place, shifting the brunt of the analysis to the issue of improper appropriation.

The improper appropriation standard is satisfied by demonstrating a “substantial similarity” between the original work and the allegedly infringing work.⁶⁰ This standard is met when “the protected elements of the work would cause an average lay observer to ‘recognize the alleged copy as having been appropriated from the copyrighted work.’”⁶¹ In proving substantial similarity, there are no bright line rules and both qualitative and quantitative determinations are often relevant.⁶² Courts

53. U.S. CONST., art. I, § 8, cl. 8.

54. *See* 17 U.S.C. § 106 (2003).

55. *See* DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 87–88 (4th ed. 2000).

56. *See id.* at 211–14.

57. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

58. *Jean v. Bug Music*, No. 00 Civ. 4022(DC), 2002 WL 287786, at *4 (S.D.N.Y. Feb. 27, 2002).

59. *See Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997).

60. *Jean*, 2002 WL 2877864, at *4.

61. *Id.* (quoting *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 912 (2d Cir. 1980)).

62. *Id.*

routinely discriminate between protectable original expressions in a work and common phrases that do not deserve copyright protection.⁶³ When an alleged infringer's copying is so trivial as to be below the threshold of substantial similarity, it will be considered *de minimis*, and therefore not actionable.⁶⁴ In the case of sampling, this defense has the ability to prove quite useful, considering the short and sometimes unrecognizable uses of past samples.⁶⁵

A. CASE LAW EVOLUTION

Federal copyright law presently addresses the litigation of digital sampling. Yet the subject remains a highly contentious and unpredictable area because of limited judicial guidance and unique factual disputes. This section discusses four major cases to flesh out the various approaches courts have taken to construct a doctrinal framework and to demonstrate the erosion of wholesale judicial dismissal of sampling in exchange for more subtle and sophisticated legal analysis.

1. *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*: First Impression (1991)

In the very first opportunity for judicial guidance on the issue of digital sampling, the District Court for the Southern District of New York provided scant legal analysis. Judge Kevin Thomas Duffy's opinion surprisingly began by quoting the Seventh Commandment as statutory authority, stating, "Thou shalt not steal."⁶⁶ The court concluded that "the only issue" of the case pertained to the authenticity of the original copyright ownership, and it refused to acknowledge the separate distinct elements needed for a copyright infringement claim.⁶⁷ The opinion, if read literally, seemingly holds that any and all sampling of music constitutes automatic copyright infringement.⁶⁸

In the facts of the case, renowned rap artist Biz Markie used three words and a portion of a sound recording from Gilbert O'Sullivan's 1970s ballad *Alone Again (Naturally)* for a performance on his album *I Need a*

63. *Id.* at *5 (citing *Stratchborneo v. ARC Music Corp.*, 357 F. Supp. 1393, 1405 (S.D.N.Y. 1973)).

64. *Id.*

65. *See, e.g.*, *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1256-59 (C.D. Cal. 2002).

66. *See Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

67. *Id.*

68. *See id.* at 183, 185.

Haircut.⁶⁹ He played the same small portion continuously to create a recurring melody in a process known as “looping.”⁷⁰

Judge Duffy declared that Markie showed “callous disregard for the law”⁷¹ and referred the matter to the U.S. Attorney for consideration of criminal prosecution under section 506 of the Copyright Act.⁷² Duffy also granted injunctive relief to the plaintiff, requiring that Markie pull his records from the shelves and remove his works from commerce, despite his various unsuccessful overtures to secure a license.⁷³ By declining to conduct an analysis on the issues of de minimis copying or fair use, the opinion has been severely criticized by commentators.⁷⁴ Unfortunately, the *Grand Upright* analysis simply indicates that even a limited use of a protected musical recording constitutes a per se violation of copyright law. Subsequent cases have considered—and disregarded—*Grand Upright* and have instead conducted a more detailed analysis to uncover infringement.⁷⁵ Naturally, *Grand Upright* had a chilling effect throughout the recording industry, causing increased internal policing of sampling for fear of adverse and inconsistent judicial treatment.⁷⁶

2. *Jarvis v. A&M Records*: Defining the Scope (1993)

In a case involving a classic example of digital sampling, the New Jersey District Court provided a more helpful analysis and began to define the parameters of copyright ownership in the sampling context. At issue was whether the use of a mixture of vocals and instrumentals would constitute unlawful appropriation of the plaintiff’s musical composition.⁷⁷

Defendants Robert Clivilles and David Cole⁷⁸ wrote and recorded a song entitled *Get Dumb! (Free Your Body)* and distributed three separate

69. *Id.* at 183.

70. See Carl A. Falstrom, Note, *Thou Shalt Not Steal: Grand Upright Music Ltd. v. Warner Bros. Records, Inc. and the Future of Digital Sound Sampling in Popular Music*, 45 HASTINGS L.J. 359, 362 (1994).

71. *Grand Upright Music*, 780 F. Supp. at 185.

72. *Id.*

73. See *id.* at 184–85.

74. See Falstrom, *supra* note 70, at 359, 378–79; 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, 266–69 (1993).

75. See, e.g., *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1248–49 (C.D. Cal. 2002); *Jarvis v. A&M Records*, 827 F. Supp. 282, 291 (D.N.J. 1993).

76. See Gaither, *supra* note 37, at 204.

77. See *Jarvis*, 827 F. Supp. at 286.

78. Defendants in this case are professionally known as the C&C Music Factory.

versions of the work commercially.⁷⁹ During the bridge of this song, they used a sample of a song by Boyd Jarvis entitled *The Music's Got Me*.⁸⁰ They conceded that they had used the sound recording, which contained the lyrics "ooh, move, free your body," accompanied by a keyboard riff extracted from the plaintiff's sound recording.⁸¹ This riff functioned as both the rhythm and the melody for the extended bridge in the final minutes of the defendants' composition.⁸²

Judge Harold Ackerman characterized a short sample of the plaintiff's work as an example of "fragmented literal similarity," or the verbatim copying of distinct portions of a sound recording.⁸³ The court focused its analysis on the plaintiff's musical composition claim because the defendants had made a prima facie showing of ownership of the sound recording.⁸⁴ The court stated that once copying has been established, the analysis should center on whether the defendant has appropriated, "either quantitatively or qualitatively, 'constituent elements of the work that are original.'"⁸⁵ The court then denied the defendants' summary judgment claim, stating that there existed a strong possibility that the distinctive keyboard riff and the vocal expressions were original enough to be wrongly appropriated.⁸⁶ It considered the plaintiff's lyrical phrase and keyboard riff "attention-grabbing" and "an expression of an idea that was copyrightable."⁸⁷

In breaking with the approach of *Grand Upright*, *Jarvis* stressed the importance of assessing the originality of a copied portion of the underlying composition in determining the unlawful appropriation of a musical composition. Furthermore, it carved out a factual circumstance that would survive a summary judgment claim. Yet, although the improved detail of analysis was helpful, the extensive damages portion of the opinion⁸⁸ worried members of the recording community because it demonstrated the consequences of not clearing digital samples.

79. *Jarvis*, 827 F. Supp. at 286.

80. *Id.*

81. *Id.* at 289, 291.

82. *Id.* at 291.

83. *Id.* at 289 (citing MELVILLE B. NIMMER & DAVID NIMMER, 4 NIMMER ON COPYRIGHT § 13.03[A][2], at 13-46 (1963)).

84. *See Jarvis*, 827 F. Supp. at 289, 292-93.

85. *Id.* at 291 (citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991)).

86. *Id.* at 292.

87. *Id.*

88. *See id.* at 293-96.

3. *Williams v. Broadus*: An Unlikely Defense (2001)

In the District Court for the Southern District of New York, Judge Michael Mukasey was confronted with another case of fragmented literal similarity and produced an opinion with dicta that hinted toward the prospect of noninfringement in the instance of the limited transformative use of a sample.

In *Williams v. Broadus*, the plaintiff, Marlon Williams, recorded a rap song entitled *The Symphony* that sampled two measures of Otis Redding's *Hard to Handle*.⁸⁹ This copied portion consisted of a five-note ascension and a five-note decline and was replayed, or looped, in 124 of the 140 measures of *The Symphony*.⁹⁰ World-renowned rapper Calvin Broadus, known professionally as Snoop Dogg, then used a portion of Williams's recording in his work entitled *Ghetto Symphony*.⁹¹ Williams sued Broadus, claiming that *Ghetto Symphony* unlawfully appropriated his work.⁹²

As a novel defense to the use of an unlicensed sample, Broadus argued that the plaintiff did not have a valid copyright because statutory law prohibits copyright protection for any part of a derivative or collective work in which preexisting material has been used unlawfully.⁹³ Ironically, a rap artist who had used hundreds of samples in the production of his compositions was arguing for stronger copyright protection for an original work as a way to insulate himself from liability for using an unlicensed sample.

Judge Mukasey denied 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.⁹⁴ The court surprisingly determined that a jury might find that the two works were not "substantially similar," noting that the plaintiff had only copied two of the fifty-four measures of Redding's original composition, and that the substantial similarity test inquires whether the sample is a substantial portion of the preexisting work, not a substantial portion of the infringing work.⁹⁵

89. *Williams v. Broadus*, No. 99 Civ. 10957 MBM, 2001 WL 984714, at *1 (S.D.N.Y. Aug. 27, 2001).

90. *Id.* at *4–5.

91. *Id.* at *1.

92. *Id.*

93. *See id.* *See also* 17 U.S.C. § 103 (2003) (prohibiting copyright protection for derivative work when preexisting material was used unlawfully).

94. *Broadus*, 2001 WL 984714, at *4–5.

95. *See id.* at *4.

The *Broadus* decision has increased the possibility that the recurring use of a small sample could avoid copyright infringement—especially if the sample is qualitatively unimportant to the original composition. Since rap producers often employ looping as a way to create a new melody from segments of past songs, the court’s ruling opens up the possibility for greater access if the sample is a relatively limited part of the original composition.⁹⁶

More importantly, the court made an interesting conceptual distinction, prioritizing the importance of vocalized lyrics over simple background music.⁹⁷ In dicta discussing the pervasiveness of Redding’s five-note sample in *The Symphony*, the court suggested that “a reasonable finder of fact could find that because the lyrics of ‘The Symphony’ do not use the copied portion of ‘Hard to Handle’ and because the lyrics are the most significant portion of ‘The Symphony,’ it follows that ‘Hard to Handle’ does not pervade plaintiffs’ composition.”⁹⁸ Thus, the court conceptualized that a jury could prioritize dominating and distinctive lyrics over less unique background music in its analysis of substantial similarity when determining whether a work is derivative. This discussion is extremely provocative in the context of rap music, where it is arguable that the distinctive lyrics—rather than the manipulated background music—drive the expressive character and aesthetic feeling of a new work. Allowing this type of factual conceptualization of transformative use would constitute a major victory for hip-hop producers.

4. *Newton v. Diamond*: The Importance of Originality (2003)

In the District Court of the Central District of California, Judge Nora Manella seemed to break with the pattern of judicial skepticism toward sampling by granting summary judgment to a rap group that had sampled six seconds from an original composition without securing the rights to the musical composition.⁹⁹ In *Newton v. Diamond*, influential hip-hop artists the Beastie Boys sampled a three-note sequence of a flute composition that had been composed and performed by James Newton,¹⁰⁰ world-renowned

96. *But see* Stephen R. Wilson, *Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense?*, 1 J. HIGH TECH. L. 179, 193–94 (2002) (arguing that case law has actually expanded copyright protection and that looping is an increasingly risky practice).

97. *See Broadus*, 2001 WL 984714, at *5.

98. *Id.*

99. *See Newton v. Diamond*, 204 F. Supp. 2d 1244, 1260 (C.D. Cal. 2002).

100. *Id.* at 1246.

flutist, Guggenheim Fellow, and professor of music.¹⁰¹ The Beastie Boys obtained a license to the sound recording of *Choir* from Newton's record company and used sampling technology to layer the three-note sequence into their hit song, *Pass the Mic*.¹⁰² The segment in question consisted of a vocalization technique described in the notated musical composition that required the performer to finger a higher octave C on the flute while simultaneously singing the same note, ascending a half step to D-flat, and then descending back down to the original C.¹⁰³

The court framed the first issue by determining the scope of protection afforded by the copyright over the musical composition for *Choir*.¹⁰⁴ The plaintiff's expert witness contended that Newton's particular approach to the technique of vocalization included a method of "overblowing" the underlying C note to produce an effect of "multiphonics," a process that modified tone color to produce an effect that was uniquely his own.¹⁰⁵ Newton argued that this "unique" approach rendered the extracted part of his musical composition original, and therefore, protected.¹⁰⁶ The court noted, however, that the musical composition contained only the notation for generic vocalization and that "the copyrighted score of *Choir* does not delineate the techniques necessary to reproduce Plaintiff's 'unique sound.'"¹⁰⁷ More damaging to the plaintiff was the fact that he had included notations to "overblow" in one of his other musical compositions, *Toru*.¹⁰⁸ At trial, the defendants produced numerous recordings by a variety of composers who used the same standard vocalization technique, forcing the plaintiff's own expert to concede that the practice was preestablished and was a "relatively common performance practice in the avant-garde music which grows out of the cultivated Western written music tradition."¹⁰⁹ As a result of this evidence, the court found that the absence of notation for his original style of performance precluded copyright protection for this small part of his musical composition.¹¹⁰

101. Newton has been considered one of the world's best flutists for the past twenty-one years. See Kendra Hamilton, *Cal State Music Professor Sues Rap Group for Copyright Infringement*, BLACK ISSUES HIGHER EDUC., Oct. 10, 2002.

102. *Newton*, 204 F. Supp. 2d at 1246.

103. *Id.*

104. *Id.* at 1249.

105. *Id.* at 1251.

106. *Id.* at 1250-51.

107. *Id.* at 1251.

108. *See id.* at 1252.

109. *Id.* at 1250.

110. *See id.* at 1256.

After the court granted summary judgment for the defendants on the issue of the originality of the extracted part of the musical composition, the question of whether the two works were substantially similar was moot. Yet the court took the opportunity to rule on this issue and explained that infringement is considered *de minimis* when the defendant has proven that the copying of the protected work is so trivial “as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying.”¹¹¹ In these cases involving fragmented literal similarity, the court stated that it is appropriate to consider both quantitative and qualitative factors in reference to whether the defendant utilized a substantial portion of the plaintiff’s work.¹¹²

Judge Manella explained that the defendants had used only approximately two percent of *Choir* and that the plaintiff would have to rely on qualitative factors to prove that the sampling was not *de minimis*.¹¹³ In evaluating the qualitative features of the sampled musical composition, the court determined that “[n]either the two notes in the three-note sequence, the common vocalization technique, nor the combination thereof imparts qualitative importance or distinctiveness to the six-second excerpt,”¹¹⁴ thereby finding in favor of the Beastie Boys that the use of the sample was *de minimis*.¹¹⁵

More importantly, the dispute provided an opportunity for an appellate court to validate the “scholarly” opinion issued by Judge Manella.¹¹⁶ Chief Judge Mary Schroeder of the Ninth Circuit affirmed summary judgment for the defendants, concluding that the use of the sample was *de minimis*.¹¹⁷ The court focused on the work’s compositional elements in assessing infringement, “filtering out” both the licensed sound recording and the expressive qualities omitted from the score.¹¹⁸ In this manner, the court identified the exact locus of protected work by distinguishing the properly licensed sound recording and by excluding Newton’s unwritten expressive technique as “beyond consideration” from its copyright analysis.¹¹⁹

111. See *id.* at 1257 (quoting *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217 (2d Cir. 1998)).

112. *Id.*

113. *Id.* at 1258.

114. *Id.* at 1259.

115. *Id.*

116. *Newton v. Diamond*, No. 02-55983, 2003 WL 22480006, at *1 (9th Cir. 2003).

117. *Id.* at *6.

118. *Id.* at *4.

119. *Id.* at *5.

In assessing whether the notation of *Choir* was protected, the court reiterated appellate approval of the “lay audience test” employed in the leading case on de minimis infringement, *Fisher v. Dees*.¹²⁰ It recited the substantial similarity rule that no legal consequences will result from copying if the average audience would not recognize the appropriation.¹²¹ The court then defended the use of this test in de minimis copying because of the apparent “relationship between the de minimis maxim and the general test for substantial similarity.”¹²²

The court then provided insightful commentary into the appropriate method to assess infringement in cases involving fragmented literal similarity. The practice of digital sampling often involves exact copying, and as a result, “the dispositive question is whether the similarity goes to trivial or substantial elements . . . measured by considering the qualitative and quantitative significance of the copied portion.”¹²³ Weighing these factors, it found that the three-note sequence was quantitatively insignificant because of its brevity and qualitatively insignificant because of its simplicity.¹²⁴ Thus, the court adopted a relatively essentialist framework in the context of digital sampling, which requires a judge to evaluate whether a reasonable jury could recognize appropriation.¹²⁵

The significance of *Newton* on the availability of samples in the marketplace has yet to be determined. Although some may consider *Newton* a victory for samplers, it is unlikely that an artist will omit crucial qualitative elements from a composition that are later worth protecting through litigation. Doctrinally, it appears that the majority’s acceptance of a de minimis defense provides an avenue for samplers to avoid liability. The existence of a split decision, however, underscores the difficulty in having judges unpredictably weigh the persuasiveness of the testimony of paid musical experts.¹²⁶ Finally, the factual background of the dispute demonstrates the existence of a holdout problem when the owner of the original compensation refuses to negotiate a price for transformative privileges because of a difference of opinion about artistic sensibilities.

120. *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir. 1986) (stating that a “taking is considered *de minimis* only if it is so meager and fragmentary that the average audience would not recognize the appropriation”).

121. *Newton*, 2003 WL 22480006, at *3.

122. *Id.*

123. *Id.* at *5.

124. *Id.* at *6.

125. *Id.*

126. *See id.* at *8.

B. MARKET EFFECTS OF THE CURRENT DOCTRINAL FRAMEWORK

The utilitarian justification for intellectual property maintains that property rights are created for the maximization of social welfare.¹²⁷ The present system of ad hoc licensing causes many problems in terms of allocative efficiency. First, major transaction costs are associated with hiring a clearance department and consulting a lawyer during the process of attaining a license. This routine is further complicated by the fact that individuals are forced to seek permission from both the owner of the sound recording and the musical composition, often separate entities.¹²⁸ With no time constraints, property holders can hold out, completely denying access to a work in the secondary market. This behavior serves as an impediment to the maximization of net social wealth.

As mentioned earlier, it remains unclear whether many of the licenses that are secured are indeed necessary. Lawyers are rarely hesitant to send intimidating cease-and-desist letters and can easily threaten dire legal consequences, such as injunctive relief and criminal sanctions. When faced with the prospect of having a publicized album potentially pulled from the shelves and a possible investigation by a U.S. Attorney, it is likely that producers would rather opt to pay a licensing fee. The unequal bargaining power between musicians and record companies further exacerbates the overvaluation of licenses.

The purpose of strong individual property rights can be linked to Coasean theories positing that, absent transaction costs, assets will flow to their highest, most efficient use.¹²⁹ Various economic problems result when these property holders are absolutely unwilling to engage with any buyers. The concept of deadweight loss can be explained as the cost of missed economic opportunities, which results in market inefficiency.¹³⁰ Under the present doctrinal paradigm, there are consumers in the economy who value certain samples more than their marginal cost in the secondary market for transformative use, but do not get to “consume,” or purchase, a license to use them. The number of samples now sold is not where the supply and demand curves meet; rather, the quantity sold is less than optimal, decreasing consumer benefit. The deadweight loss stems from

127. Fisher, *supra* note 4, at 2.

128. See PASSMAN, *supra* note 55, at 306–09.

129. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1–15 (1960).

130. See Charles Moul, *Economic Welfare and the Concept of Deadweight Loss*, Washington University in St. Louis, at <http://wuecon.wustl.edu/~moul/103f02/dwlhandout.pdf> (last visited Jan. 15, 2004).

this underconsumption, especially if this model assumes that the psychic harm suffered by the offended copyright owner is somehow quantifiably less than the value of the sample on the open market. Thus, when the government attaches a strong property right to an original author, the decreased proliferation of transformative uses results in an economic deadweight loss to society.

Accordingly, the true market value of transformative access to a particular work should not be the outcome of an unbalanced bilateral negotiation; rather, the more accurate evaluation of its worth on the open market would be a universal auction, allowing the work to flow to its highest and best use. Assets that are held onto by stubborn property holders are stagnant, and transformative uses are universally hindered. These results suggest that the public consumer surplus is being absorbed by the private creators of original works, a conclusion in step with a great deal of commentary evaluating the overall expansion of the American copyright regime.¹³¹ It is not surprising, therefore, that many dormant works that could be used in the secondary market have been rendered obsolete and useless, diminishing society's net welfare.

C. POLICY CONSIDERATIONS

Inefficiencies in the market for secondary uses suggest that the current regime may not be achieving some of its underlying utilitarian purposes. To determine whether this is true, other policy considerations beyond the market effects that reduce profits for music companies should be addressed. When constructing or perpetuating a doctrinal framework, it is necessary to constantly reassess whether the framework promotes desirable policy outcomes. Under the present system, we could unknowingly be censoring certain speech and quelling creative diversity. When a remedy such as injunctive relief is available to copyright holders, they have the ability to serve as *de facto* gatekeepers, constructively barring access to those with unconventional expressions that may run counter to the copyright holder's beliefs. Consequently, private individuals have a strong say in what types of messages will be expressed in the transformative use of their music in the secondary market.¹³² This level of control is undesirable in a free society, where expressive diversity should be fostered, rather than hindered.

131. See Netanel, *supra* note 1, at 297–306.

132. See Geoff Boucher, *A Musician Writes It, a Rapper Borrows It: A Swap or a Theft?*, L.A. TIMES, Sept. 21, 2002, at F1.

Additionally, the present doctrinal morass provides little guidance to those in the music industry who are unsure whether their use of a digital sample is lawful. Particularly in the application of a *de minimis* defense, judicial doctrine is noticeably circular and unhelpful. Some courts have looked at the distinctiveness and originality of the sample when conducting the qualitative analysis,¹³³ stating that copying is *de minimis* when it is “below the quantitative threshold of substantial similarity.”¹³⁴ The location of this “threshold,” however, is extremely difficult to define considering the potentially infinite factual combinations of musical sounds. Besides these factual ambiguities, the courts have mentioned other methods of determining whether a particular use is trivial. The Ninth Circuit has held that “a taking is considered *de minimis* only if it is so meager and fragmentary that the average audience would not recognize the appropriation.”¹³⁵ This lack of clarity most severely hurts upstart producers with limited resources. Along these lines, the creative use of digital sampling should be permitted to allow novice producers to enter the market, avoid the expense of hiring a room of musicians, and lower their production costs. Without clear guidelines as to what type of behavior is appropriate, these types of individuals are excluded from the creative use of a sample.

It seems apparent from these outcomes that the present statutory scheme does not adequately capture many of the recurring economic and policy goals involved in digital sampling. This requires a reconsideration of the function of copyright law and a reassessment of whether the current regime is achieving these goals.

IV. REASSESSMENT OF THE PURPOSE OF COPYRIGHT

This part will attempt to apply recent scholarship concerning the purpose of copyright law¹³⁶ to the issues involved in the practice of digital sampling. This commentary labels itself the “democratic approach” and contends that the primary purpose of copyright law is to enhance the democratic nature of a civil society.¹³⁷ Conceptually, the Copyright Act provides an impetus for two distinct methods of perpetuating democratic

133. See *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1258–59 (C.D. Cal. 2002).

134. *Id.* at 1256 (quoting *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217 (2d Cir. 1998)).

135. *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir. 1986).

136. This recent scholarship is primarily based on a highly influential article in the *Yale Law Journal* by Neil Weinstock Netanel. See generally Netanel, *supra* note 1.

137. See *id.* at 289–90.

ideals.¹³⁸ First, it serves the *production function* by providing remunerative incentives to authors as a way to spur creative expression.¹³⁹ By producing a higher volume of works, copyright law enhances democracy by proliferating speech, adding to the national debate, and encouraging public participation.¹⁴⁰ Likewise, in its *structural function*, copyright law divorces innovation from state control and elite patronage, leading to more discursive diversity.¹⁴¹ This diversity is crucial for the creation of independent associations and institutions,¹⁴² which are essential components of a successful democracy.¹⁴³

The academic debate concerning the true function of copyright law has grave implications for the current discussion of digital sampling and transformative uses more generally. If this democratic approach is accepted, then the current trend of expanding rights, which has led to the present situation of ad hoc licensing, should be truncated or replaced. This section considers and discards the most conventional approach to copyright law, the “neoclassical approach,” which sees copyright as a mechanism of allocating existing creative works to their highest socially valued uses. It questions this philosophical justification for copyright protection and argues instead that changes should be undertaken to enhance democratic ideals. As a result of this finding, the issue of digital sampling will be considered in a new light that will guide the creation of more appropriate legislation. This Note will demonstrate that hip-hop’s expressive qualities provide a unique perspective on American life, and that the transformative use of digital samples should therefore be encouraged by preemptively assigning liability rules rather than restrictive property rules.

A. NEOCLASSICAL APPROACH TO COPYRIGHT

The present paradigm of an expansive copyright can be linked to economic principles that put faith in the ability of the market to appropriately create incentives for innovation. This conventional approach, labeled as “neoclassicist,” contends that artistic innovation can be seen as a vendible commodity that should be granted fully exchangeable property

138. *Id.* at 288.

139. *See id.* at 288, 347–48.

140. *See id.* at 288, 348–49.

141. *See id.* at 288, 352–63.

142. These public associations include such organizations as newspapers, museums, colleges, and political groups that require the exchange of a rigorous public discourse to exist.

143. *See* Netanel, *supra* note 1, at 341–46.

rights.¹⁴⁴ It contends that these strong property rights are essential to the goal of allocative efficiency.¹⁴⁵ As a result, the system has created distinct boundaries that restrict transformative uses—such as digital sampling—because of a belief that competing consumers in the market for a product will channel new creations to their highest and best uses.¹⁴⁶ It follows that with strong copyright laws backed by property rules, market pricing can guide the allocation of resources in the secondary market for transformative uses in an optimally efficient manner.¹⁴⁷

In the rap industry, an author has the ability to sell the entitlement to his or her song for the highest amount. Neoclassicist theory contends that copyright law should serve to provide transformative privileges to the hip-hop producer who will bid the highest because he or she is best able to transform a sample of that work into a new expression that will satisfy public tastes. Once this has occurred, neoclassicists contend, copyright law has achieved allocative efficiency for society, placing the samples in the right hands to bring them to secondary musical fruition.

Grave problems with this analysis have been uncovered by opposing economic scholarship.¹⁴⁸ First, the economic principles espoused by the neoclassicists require many assumptions about consumer behavior that are not entirely reliable.¹⁴⁹ For example, studies have suggested that consumer preferences are constantly distorted by phenomena such as endowment effects, herd behavior, and taste addiction.¹⁵⁰ Second, the aforementioned model allows for the exploitation of influence, providing intellectual property holders with a great deal of censorship power when a holdout occurs. The possibility of bias against minority viewpoints—both racial and political—in favor of more palatable works impairs the idea of expressive diversity. Thus, the application of property rules in the market system can quell alternative viewpoints in favor of more marketable expression.

Although many authors in the music industry license their work, the holdout problems of uncooperative authors complicate the neoclassical rationale. If an artist, such as James Newton, refuses to allow the Beastie Boys to sample his flute performance, transformative use will simply not

144. *See id.* at 309–14.

145. *Id.* at 314.

146. *See id.*

147. *See id.* at 286–87.

148. *See generally id.*

149. *Id.* at 332–34.

150. *Id.* at 333 n.241.

take place, creating a tax on the volume of artistic expression. If it is indeed true that the courts have frightened record companies into paying for unnecessary licenses, then there exists significant inefficiency and deadweight loss as a result of such robust copyright protection. Additionally, the *Newton* case¹⁵¹ provides an interesting example of how a neoclassicist approach does not serve the “structural function” of copyright law. While Newton is a classically trained flutist without an overtly political message in his instrumental music, the Beastie Boys are part of an alternative rock and rap movement and are constantly using their music to promote political causes of their liking.¹⁵² With property rights subject to the whims of musical artists, individuals can effectively prohibit the transformative use of their work in a secondary market.

B. SUPPORT FOR THE DEMOCRATIC APPROACH AND HIP-HOP’S RELEVANCE

In contrast to this unbridled reliance on market economics to balance the goals of copyright, a series of commentators have instead argued that copyright should serve to create a just and attractive culture that enhances pluralism, improves political competency, and promotes associational diversity.¹⁵³ This “democratic approach” concedes that a sufficiently robust copyright is necessary to incentivize creation, but contends that these inducements can be adequately compensated with a liability rule that allows for the greater transformative use of dormant works. Historical approaches to defining copyright law in the United States demonstrate the centrality of the democratic approach to intellectual property.

Before the enactment of the Statute of Anne of 1710, the British Crown used its discretion in providing printing privileges as a way of asserting censorial control.¹⁵⁴ The historical authority for the advancement of the democratic approach to copyright law derives from the lengths at which the Framers sought to create a public discourse independent of overreaching government control and manipulation. In this sense, the Framers recognized not only copyright’s production function in the generation of expressive works essential to democratic dialogue, but were also exceptionally aware of the structural function of copyright and sought

151. *Newton v. Diamond*, 204 F. Supp. 2d 1244 (C.D. Cal. 2002).

152. The Beastie Boys consistently weigh in on political issues and host the Tibetan Freedom Concert. *See Miller*, *supra* note 48.

153. *See Fisher*, *supra* note 4, at 6–8.

154. *See Netanel*, *supra* note 1, at 354–55.

to detach these expressive works from reliance on state sponsorship or elite control.¹⁵⁵

The early Republic depended on privately funded associations, such as newspapers, to independently evaluate government policy. President George Washington's address to Congress in support of a federal copyright statute stated that the promotion of science and literature were necessary:

[The promotion secures a] free constitution . . . by convincing those who are entrusted with public administration that every valuable end of government is best answered by the enlightened confidence of the public; and by teaching the people themselves to know and value their own rights; to discern and provide against invasions of them; to distinguish between oppression and the necessary exercise of lawful authority.¹⁵⁶

In this manner, it was important that authors could write independent columns and derive revenue from the impact of their ideas rather than through the extent of their political investment. The Supreme Court has echoed this philosophy, stating that "the Framers intended copyright itself to be the engine of free expression."¹⁵⁷

The expansion of the rights of copyright holders has caused a profound philosophical disconnect between the original purpose of copyright and the way it operates in the modern United States.¹⁵⁸ Congress has continually lengthened the duration of copyright protection,¹⁵⁹ and the courts have restricted transformative uses of protected works.¹⁶⁰ Although modern rap music may not have the central importance of the first newspapers of the early United States, it nonetheless has social relevance because changes in popular culture have the ability to either subvert or reinforce social mores. This influences the public consciousness in ways

155. MICHAEL WARNER, *THE LETTERS OF THE REPUBLIC: PUBLICATION AND THE PUBLIC SPHERE IN EIGHTEENTH-CENTURY AMERICA* 124–25 (1990).

156. Netanel, *supra* note 1, at 357 (citing U.S. COPYRIGHT OFFICE, *COPYRIGHT IN CONGRESS 1789–1904*, at 115–16 (T. Solverg ed., 1905) (quoting 1 SEN. J. 125 (1790)). In committee, the Senate also saw the importance of independent political expression, stating that "[l]iterature and [s]cience are essential to the preservation of a free Constitution." BRUCE W. BUGBEE, *GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW* 137 (1967) (quoting 1 SEN. J. 125 (1790); 1 ANNALS OF CONG. 935–36 (Joseph Gales ed., 1790)).

157. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

158. See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1135 (1990) (stating that "[a]lthough copyright often results in suppression of speech, its underlying objectives parallel those of the first amendment").

159. See LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 196–99 (2001); Netanel, *supra* note 1, at 298.

160. See generally Netanel, *supra* note 1 (discussing the efforts of the courts to restrict transformative uses of protected works).

that overt political rhetoric cannot.¹⁶¹ William Fisher has used the term “semiotic democracy” to describe the personal process of making cultural meaning, and explains that copyright law can be interpreted as a way to allow *all* individuals to be active participants in a dynamic discourse, capable of “help[ing] shape the world of ideas and symbols in which they live.”¹⁶²

Furthermore, the transformative use of past works, particularly in hip-hop, allows many marginalized segments of society to make powerful statements to the masses, enhancing participatory opportunities and cultural diversity in the United States.¹⁶³ Although some may criticize rap music for transmitting negative messages or perpetuating racial stereotypes, such judgments of the merits of hip-hop are misplaced because of the music’s undeniable social relevance. In rejecting the proposal that obscene expression should not be eligible for copyright protection, a Fifth Circuit opinion denied that the law should require that “each copyrighted work be shown to promote the useful arts.”¹⁶⁴ It is not the government’s role to define a hierarchy of speech, and courts have held that even potentially obscene materials contain a sufficient social message—whatever that may be—and that the copying of their expressions is forbidden.¹⁶⁵ This Note does not equate hip-hop with obscene materials; it merely seeks to demonstrate that *every* type of work should be supported and that encouragement should include greater privileges to the transformative process of making new meaning.

C. THE PRODUCTION FUNCTION REQUIRES A LIABILITY RULE

In promoting accessibility to copyrighted works, the democratic approach is optimally perpetuated with liability rules, rather than with the property rules that currently provide copyright owners with control that can span over a century.¹⁶⁶ Congress has already determined that such protection is overly expansive in the context of “cover” recordings.¹⁶⁷ In this sense, the legislative branch has already shown that it comports with the view that some transformative works can adequately be protected with

161. *See id.* at 350–51.

162. *See* Fisher, *supra* note 4, at 34.

163. *See* Netanel, *supra* note 1, at 351.

164. *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 860 (5th Cir. 1979).

165. *See id.* at 854–58.

166. *See* 17 U.S.C. § 302(a) (2003) (allowing copyright protection to extend for the life of the author and seventy years after the author’s death).

167. *See id.* § 115.

a liability rule in the form of the compulsory license outlined by section 115 of the Copyright Act.¹⁶⁸

Interestingly, this use of a liability rule achieves many of the goals of neoclassicist philosophy without relying so heavily on the ability of market forces to achieve allocative efficiency. Record studios often compensate the owner of a copyright, whether or not a sample is actually necessary, because of their concern with potential litigation costs. As discussed earlier, the overproduction of copyright holders creates a deadweight loss on net social welfare and a tax on the volume of total expression. By contrast, the attachment of a liability rule allows for greater access for transformative uses, increasing the artistic competitiveness in the market for transformative use.

The production function of copyright law can be only impaired in the event of substitution effects or diminished ex ante incentives. The imposition of liability rules in the context of cover recordings has not been a deterrent to pursuing musical ambitions because the ex ante incentives for becoming an author most likely do not contemplate—much less rely—on the possibility that his or her sound recordings and publishing rights will someday draw a revenue stream. In fact, many of the most sampled artists, such as funk pioneer George Clinton, had no idea that there would ever be such a secondary market for the use of their sound recordings. Thus, the success of compulsory licensing in the use of musical compositions for covers should be useful in indicating an answer to the problem of digital sampling.

This type of theory has been touched on by the Supreme Court in its decision in *Campbell v. Acuff-Rose Music, Inc.*, which dealt with the question of whether the fair use defense was presumptively barred because of a work's commercial nature.¹⁶⁹ The case, coincidentally, dealt with a notorious rap group, 2 Live Crew, who used the musical bass line and some of the lyrics of Roy Orbison's song entitled *Oh, Pretty Woman*.¹⁷⁰ The Court asserted that the first factor in a fair use analysis, the "purpose and character test,"¹⁷¹ exists for the purpose of determining whether the borrowing work merely supersedes the original, "or instead adds something new, with a further purpose or different character, altering the first with

168. *See id.*

169. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 571 (1994).

170. *See id.* An analysis of this case was not included in Part III because the focus on the case dealt less with the doctrinal intricacies of copying and more with the fair use defense in the parody context.

171. *Id.* at 578.

new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’”¹⁷² The Court continued, stating that the goal of advancing expression is “furthered by the creation of transformative works” because “[s]uch works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.”¹⁷³

In its analysis, the Court posed the idea of legislating the attachment of liability rules, instead of property rules, for works that in some way further the objectives of copyright law. To this end, it stated that “the goals of the copyright law . . . are not always best served by automatically granting injunctive relief,”¹⁷⁴ and that “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”¹⁷⁵ Thus, the Court suggested that as a matter of policy, the law should consider compulsory licenses where a copyright owner’s interest may be sufficiently covered by damages.¹⁷⁶ From this dictum, it is evident that the Supreme Court has already shown a willingness to consider the concept of using damages in lieu of injunctions for transformative works as a way of stimulating the “strong public interest in the publication of the secondary work.”¹⁷⁷

V. FRESH FRAMEWORK FOR GREATER ACCESS

To promote the policy objectives of copyright law, lawmakers should replace the existing framework with a compulsory license more tailored to the realities of the practice of digital sampling.

172. *Id.* at 579.

173. *Id.*

174. *Id.* at 578 n.10.

175. *Id.* at 579.

176. The Court stated:

[W]hile in the “vast majority of cases, [an injunctive] remedy is justified because most infringements are simple piracy,” such cases are “worlds apart from many of those raising reasonable contentions of fair use” where “there may be a strong public interest in the publication of the secondary work [and] the copyright owner’s interest may be adequately protected by an award of damages for whatever infringement is found.”

Id. at 578 n.10 (second and third alterations in original) (quoting *Abend v. MCA, Inc.*, 863 F.2d 1465, 1479 (9th Cir. 1988)).

177. *See id.*

A. COMPULSORY LICENSING: LIABILITY RULE VS. PROPERTY RULE

Commentators have suggested that Congress should amend the Copyright Act to include provisions that deal with digital sampling.¹⁷⁸ These scholars suggest that a possible solution lies in creating a compulsory licensing provision, similar to section 115 of the Act.¹⁷⁹ Presently, an individual may record a cover, or an entirely new recording of a protected musical composition, by complying with statutory fee requirements.¹⁸⁰ The licensee must pay the greater of 2.75 cents per sale or 0.5 cents per minute of playing time per sale.¹⁸¹ The original copyright holder, however, has no right of refusal and must allow anyone to cover his or her work, as long as the new version does “not change the basic melody or fundamental character of the work.”¹⁸² Applying an adapted version of this statutory scheme to digital sampling, some have argued, would remove sampling from its doctrinal quagmire and set clear guidelines for hip-hop producers.

This type of statute, if applied to digital sampling, would serve both of the two opposing goals of copyright protection. First, it would continue to compensate the owners of original copyrights, creating further incentives for the creation of original works. With compulsory licenses, the *ex ante* incentives for authorship would not only consist of revenue from the original recording, but would also include income from those who will use the master use license according to payment schedules in the statutory guidelines. To satisfy copyright’s other aims, a system using a liability rule reduces the transaction costs involved in sampling, allowing for streamlined access to original works. A liability rule, in this sense, can further the goals of copyright law by automatically passing works into the public domain in terms of transformative privileges so that they can be manipulated into new works.

178. See generally Note, *A New Spin on Music Sampling: A Case for Fair Pay*, 105 HARV. L. REV. 726, 742–43 (1992); Falstrom, *supra* note 70, at 380; Kravis, *supra* note 74, at 271–75 (discussing possible changes to the Copyright Act to deal with digital sampling).

179. See sources cited *supra* note 178.

180. See 17 U.S.C. § 115(c)(2) (2003).

181. *Id.*

182. *Id.* § 115(a)(2).

B. DRAWBACKS TO A DIRECT TRANSLATION OF SECTION 115 TO DIGITAL SAMPLING

The benefits of simplification afforded by a compulsory scheme along the lines of section 115 are purely illusory. As written, the present mandatory licensing scheme for mechanical licenses cannot be adapted to the process of digital sampling. Using the musical composition requires the payment of a single licensing fee to the owner of the copyright. Yet the construction of hip-hop songs implicates both the rights to the musical composition and sound recording. A regime with a single fee would not be feasible because it would not adequately compensate the owner of the master use license. Further, producers often layer multiple samples with their own composition to create a new song. A translation of section 115 into sampling terms would therefore require a producer to pay the statutory fee of 2.75 cents per sale to each right holder, decreasing the profitability of a songwriting venture of this sort. For many songs, this would create major disincentives to using samples at all, defeating the original purpose of lowering the production costs that hinder transformative use.

Other commentators have argued that the cover license fee could function as the maximum payment for a sample, based on the theory that “the fee to use part of a composition (or recording) should be no greater than the amount one would have to pay to interpret the entire musical composition in a cover.”¹⁸³ Regardless of the logic of this evaluation, this type of payment regime may run into practical problems if producers begin to appropriate more content than a mere sample. If a ceiling is set at a certain value, it opens the door for someone to pirate an entire work, pay the compulsory fee, and still turn a sizeable profit at the expense of major substitution effects working against the owner of the original work. For this reason, there needs to be a useful statutory distinction between piracy and sampling that channels wholesale copying to the current regime and transformative use to a more accommodating set of rules. Abstractly weighing the functional worth of samples compared to cover licenses is not the appropriate method of determining the best system that will promote the goals of copyright. Stepping back, it becomes apparent that the problem at issue is not how much the original author should be paid, but how we can provide fair access to this work to promote the ideals of a democratic civil society.

183. See Note, *supra* note 178, at 740.

C. SOLUTION: GREATER ACCESS THROUGH A LIABILITY RULE

Unrestricted access for samplers must be balanced with equitable compensation for copyright holders. This section will provide a novel solution of taxation and distribution that appropriately aligns the interests and motivations of samplers, copyright holders, and the general public.

1. Sampling vs. Piracy

The first step in creating a viable compulsory licensing scheme involves distinguishing between sampling and piracy. The wholesale copying of an entire work poses challenges to the *ex ante* incentives that are anticipated by authors composing original works. A pirated album can sell for one dollar and turn a profit, causing substitution effects that impair the natural capacity to adequately and fairly compensate the original author, thereby threatening copyright's production function. Instances such as these pose much greater problems than transformative uses and should be treated differently. When an author pirates the work of another, therefore, this behavior should be subject to conventional copyright law and perhaps be subject to even stiffer criminal penalties as a way to protect the robust incentive to create.

Along these lines, a compulsory license should be limited to the transformative use of digital samples. Legislation should define the process of sampling as "*the extent to which the behavior of the alleged infringer is transforming, manipulating, or completely recontextualizing an old work in the process of making an expression with new meaning.*" Distinguishing between instances of wholesale piracy and digital sampling would be simple for hip-hop producers in a practical sense and far easier than the present situation that requires producers to decipher varying standards for a *de minimis* defense. Simplifying the process in this manner removes many of these disputes from litigation, decreasing major transaction costs and curtailing asymmetrical bargaining power between record labels and producers.

Opponents of the use of a compulsory licensing regime argue that this type of system affects the *ex ante* incentives for original creation and worry that multiple taker problems would ensue. Such arguments, however, cannot reasonably contend that there are true problems with substitution effects. Consumers of music never elect to buy a work using a sample in lieu of the original composition. To the contrary, when the use of a sample is actually detected, this awareness often creates a renewed interest in the music of the original work, often reviving the careers of past artists. In the

current paradigm, multiple taker problems already exist because copyright owners are generally comfortable with extensive transformative use, as long as they are paid. Hip-hop producers frequently draw on works such as *Impeach the President* by the Honeydrippers and *Funky Drummer* by James Brown, yet the tone of these works is often manipulated or the timing is often sped up, which leads to the expression of new ideas. Finally, it is obvious that the loss of the right of refusal involved in section 115 has certainly not diminished the ability of original writers to turn a profit.

2. Taxation and Distribution

This Note proposes a system that uses liability rules while avoiding many of the problems associated with a strict translation of section 115 into language that covers digital sampling. As stated earlier, past proposals along the lines of this statute make it prohibitively expensive to sample more than one work in a new song. Conversely, new legislation should abandon the prohibitive expense of paying the entire statutory fee to every right holder for a more prudent alternative. A better solution lies in devising a unique system of compulsory licenses that allows for almost absolute access for transformative use, while still providing adequate compensation to original works that are popular selections by producers in the secondary market.

As stated earlier, any new proposal needs to distinguish between instances of digital sampling and pure piracy. In practical terms, this is not a difficult distinction for lay producers to make, especially when explained in terms of the language proposed in Part IV.C.1.¹⁸⁴ The legislation would impose what can most easily be described as a “tax” 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. These fees would be collected by the copyright office, which would be responsible for compensating the owners of copyrighted works according to the number of times that the particular sample is used by producers in the secondary market. Below are specific rules that would guide such a statute.

Application. At the end of each calendar year, a sampling producer would be required to submit the appropriate paperwork and fees to the copyright office, which would then distribute the revenue according to the

184. The language would evaluate this distinction on “the extent to which the behavior of the alleged infringer is transforming, manipulating, and completely recontextualizing an old work in the process of making an expression with new meaning.” See *supra* Part V.C.1.

provisions below. Only works used in commerce would need to file an application because personal uses would probably fall under the affirmative defense of fair use, or the fees would otherwise be negligible based on a lack of commercial sales.

Fee Costs. These fees would generally equal the statutory guidelines for the use of the musical composition according to section 115, so as not to be prohibitively expensive, while at the same time compensating original authors according to how often secondary producers find their work useful. If an artist uses four samples in a new work, he or she would only be required to pay a flat tax rate on the total number of records sold during the year. In this manner, the amount due to the copyright office is the same if a producer uses one or ten samples on a new track.

Fee Distribution. On a yearly basis, the copyright office would tally the total number of times secondary authors have sampled from a particular work to determine how much payment should be made to the original author. This money would 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. For example, if works by James Brown compose one percent of the total share of samples used, he would be compensated by one percent of the total adjusted gross income collected by the copyright office. In essence, this system provides an appropriate and fair portion to the copyright holder whose works are most often used in the secondary market.

Value. 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. 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. Since an artist may use five different samples on a new song, the compensation for the use of a sample will be somewhat less than the payment for the cover of a musical composition according to section 115.

Timing. This proposed compulsory licensing regime would need to be cognizant of the issue of timing. Although digital sampling often does not cause substitution effects, allowing someone to sample a work directly after the original has been released would pose problems. If a producer could have access to a newly released song, he or she could diminish the originality of that work, affecting its marketability and diminishing its lead time advantages. Thus, the proposed compulsory licensing regime would take this into account, effectively barring sampling under compulsory

licensing for any work for *ten years* after its commercial release. If, however, the original author would like to sell the sampling privileges of the work before then, a contractual agreement would be acceptable as long as it did not provide an exclusive privilege beyond the statutory ten-year period.

Positive Effects. This type of a system instills a compulsory license that allows works to enter the public domain more readily for transformative manipulation. In this manner, privileges are provided to all producers, without holdout problems, deadweight loss, or censorial control. According to Ronald Coase, assets will flow to their highest and best use with the elimination of transaction costs.¹⁸⁵ By simplifying the process and eliminating the threats of litigation, this legislation allows for greater transformative use, while still compensating authors of original works. Further, copyrights owners will still be adequately compensated to maintain incentives, as shown by the effects of section 115, which has not dampened the collective artistic urge to author original works. In its most simple sense, *the proposed compulsory fee serves as a tax on the samplers that is distributed to copyright holders according to the number of separate instances that their particular sample is used.*

Negative Effects. The proposed system does not take into account the relative importance of one sample over another in a particular song. The distribution system to original authors is based on the frequency that an original work is used by society, not the success of a secondary work using parts of that original. Some may argue that this type of compensation skews the apportionment system by not prioritizing significant samples over more trivial ones and by not accurately compensating samples according to their commercial impact. These guidelines, however, allow for more utilized samples to retain a higher cut of the total incoming revenue, somewhat mitigating these problems. In the end, it may actually be desirable to avoid the difficult process of aesthetically judging the merit of one sample over another.

Noncompliance. Enforcing this system would not be difficult, considering the lengths by which record companies presently police themselves and the resources currently expended to ensure that copyright law is not violated. Under the proposed guidelines, the cost of negotiating with record companies would decrease, suggesting a greater likelihood of compliance. In the event that there is a dispute as to whether a work was

185. See Coase, *supra* note 129, at 1–15.

actually sampled, the owner of the copyright could simply seek a declaratory judgment on the matter.

3. Example and Explanation

If *X* composes *Song X* and uses three protected samples (held by owners *A*, *B*, and *C*) in the construction of his secondary work and sells one million copies, he would be “taxed” for the general privilege to sample. Assuming that the compulsory licensing tax is equal to the current fees required in section 115 for the use of musical compositions, and that individually *X* sold one million albums, *X* would be required to pay a flat rate of the total sales of his composition, *Song X*:

$$(\text{Total Sales}) \times (\text{Compulsory Licensing Tax}) = \text{Amount Due to the Copyright Office}$$

$$(1 \text{ million}) \times (\$0.0275) = \$27,500 \text{ Payment Due from } X$$

The total payment from all samplers can be derived in a similar manner. If it is estimated that 100 million copies are sold each year that use digital samples, then the total gross income is calculated as follows:

$$(\text{Total Songs Sold}) \times (\text{Compulsory Licensing Tax}) = \text{Total Revenues to Be Collected}$$

$$(100 \text{ million}) \times (\$0.0275) = \$2,750,000 \text{ Total Payment from All Samplers}$$

In calculating the total amount that *A* will receive for the use of *A*'s original composition, *A*'s portion of the total samples will first need to be calculated, and from this number we can determine *A*'s total payment. If *A*'s samples were used ten times out of 10,000 instances of sampling, then *A* is entitled to that portion of the total gross income according to the number of times *A*'s work was sampled:

$$(\# \text{ Instances } A \text{ Used}) \div (\# \text{ of Total Instances Any Sample Used}) = \text{Portion of Total That Implicates } A\text{'s Rights (} \textit{“}A\text{'s Frequency \%”)}$$

$$10 \div 10,000 = 0.001$$

The payment to *A* is then determined by simply finding what percentage of the total belongs to *A*.

$$(A\text{'s Frequency \%}) \times (\text{Total Revenues}) = \text{Payment to } A$$

$$0.001 \times \$2,750,000 = \$2,750 \text{ Payment to } A$$

These guidelines compensate based on the usefulness of an original work by producers in the secondary market, as opposed to the popularity or impact of a new song using a particular sample.

4. Personhood Considerations

In addition to the conventional utilitarian arguments and recently popular democratic justifications for copyright law, the personhood philosophy should also be considered. Based on the works of Immanuel Kant and G.W.F. Hegel, this theory maintains that intellectual property rights exist for the purpose of satisfying fundamental human needs.¹⁸⁶ It contends that authors should be able to garner respect and admiration for their contributions to society, without the mutilation or misattribution of their works.¹⁸⁷ Based on these philosophical justifications, scholars have reached divergent conclusions on the status of an author's work after he or she has revealed it to the world.¹⁸⁸

The compulsory licensing system brings many of these issues to the forefront, considering the fact that individuals are no longer able to refuse licensing privileges. Copyright owners, such as James Newton, sometimes become furious at their inability to keep other individuals from manipulating the meaning of their artistic expressions.¹⁸⁹ For the most part, however, licensing agreements simply have to do with money. Interestingly, it is rare for an artist to retain publishing rights in his or her particular sound recording. In most instances, it has already been contracted to a recording or publishing company, and the artist is unable to exert his or her influence. Further, while personhood considerations should be evaluated, the proposed compulsory licensing system attempts to mitigate potential problems by allowing for a ten-year lag on access and adequate compensation for the invasion into the author's personhood. As more invasions of this right occur in the secondary market, compensation increases accordingly.

VI. CONCLUSION

As Justice Story once stated:

[I]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must

186. Fisher, *supra* note 4, at 5.

187. *Id.* at 6.

188. *See id.* at 30–31.

189. *See, e.g.,* Teresa Wiltz, *The Flute Case That Fell Apart: Ruling on Sampling Has Composers Rattled*, WASH. POST, Aug. 22, 2002, at C1.

necessarily borrow, and use much which was well known and used before.¹⁹⁰

Critics of this Note may proclaim that greater access to digital samples will lead to *less* creativity in the music industry.¹⁹¹ Yet arguments such as these belie the fact that expanded access to samples will not diminish the amount of original music writing, but will instead provide lower production costs to *increase* the musical catalog available to society. From this standpoint, it is the responsibility of the public to select and prioritize innovative voices in the music industry.

It is undeniable that the transformative use of samples in rap music has changed the face of the cultural icons in the United States and has exposed a generation of suburban Americans to a perspective of the urban condition. Copyright law should seek to encourage the transformative use of digital samples as a way to encourage democratic ideals, while maintaining robust incentives that ensure the continuation of innovative creation. Legislating the existence of a compulsory license will shift power toward those seeking to use dormant works in a positive way, amplifying a unique voice that might otherwise be lost.

190. *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436).

191. *See, e.g.*, Jason S. Rooks, Note, *Constitutionality of Judicially-Imposed Compulsory Licenses in Copyright Infringement Cases*, 3 J. INTEL. PROP. L. 255, 270-71 (1995).