FIXING THE SAMPLE MUSIC INDUSTRY: A PROPOSAL FOR A SAMPLE COMPULSORY LICENSE

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INTRODUCTION

"Once music is recorded on tape, it's just pieces of ferrous oxide on plastic, and can therefore be chopped about, switched around, put together in different orders, stretched, compressed, whatever," explained Brian Eno, famous composer credited as the pioneer of ambient music,[1] in a 1977 interview as he discussed the revolutionary benefits of magnetic tape audio recording.[2] The abilities that Eno described are the first means of music sampling.

Music sampling is a technique that has been described as a

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1. Gina Vivinetto, *Reasons to Know Brian Eno*, TAMPA BAY TIMES (July 1, 2004), http://www.sptimes.com/2004/07/01/Floridian/Reasons_to_know_Brian.shtml.

2. Brian Eno (Video West 1977), *available at* http://htmlgiant.com/technology/psychadelic-hoo-haha/.

technological outgrowth of musical eclecticism, a methodology that incorporates compositional concepts of borrowing, quotation, commentary, and collage.[3] Despite providing for new creative works to the public domain, sampling is illegal: it is considered to be an infringement of the exclusive right to prepare derivative works of both the sound recording and musical composition copyrights if the use is not determined to be de minimis or transformative fair use.[4] Musicians who have created new works from sampling famous recordings have endured litigation and paid hefty damages, including statutory damages.[5] Others have given up all of their songwriting royalties to the original song's copyright holders.[6] Because sampling is illegal, sample artists are discouraged from creating new works, which in turn deprives the music industry of revenue and the public domain of new expressive works. To solve these problems, this Article argues that sampling should be permitted, and a compulsory license be imposed upon the copyright holders. This Article also introduces a streamlined system employing a new organization to administer the license and enforce the copyrights for the copyright holders, achieving a balance of interests.

I. WHAT IS SAMPLING?

Sampling is the process of incorporating small portions of sound recordings into a new musical work.[7] In other words, it is a way of writing new compositions by using parts, or samples, of other musicians' songs. Sample artists will typically combine samples with their own original sounds to produce a new recording, but some create their songs completely from samples.[8]

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3. Jeremy Beck, *Music Composition, Sound Recordings and Digital Sampling in the 21st Century: A Legislative and Legal Framework to Balance Competing Interests*, 13 UCLA ENT. L. REV. 1, 22 (2005); BRYAN R. SIMMS, MUSIC OF THE TWENTIETH CENTURY – STYLE AND STRUCTURE 383 (Schirmer Books 1996) (1986).

4. George Howard, *Understanding Sampling, Cover Songs & Derivative Work*, ARTISTS HOUSE MUSIC (Jan. 4, 2011), http://www.artistshousemusic.org/articles/understanding+sampling g+cover+songs+derivative+work; *see* 17 U.S.C. § 101 (2012) (including "any other form in which a work may be recast, transformed, or adapted" in the definition for "derivative work").

5. *See*, *e.g.*, *Westbound Records*, *infra* note 121.

6. Recycled Beatz, *Landmark Case:* Rolling Stones v. The Verve, TUMBLR, http://recycle dbeatz-blog.tumblr.com/post/4783151146/landmark-case-rolling-stones-v-the-verve (last visited Dec. 15, 2015).

7. Rebecca Morris, Note, *When is a CD Factory Not Like a Dance Hall?: The Difficulty of Establishing Third-Party Liability for Infringing Digital Music Samples*, 18 CARDOZO ARTS & ENT. L.J. 257, 262 (2000); *see* Jeffrey R. Houle, *Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just a Bad "Rap"?*, 37 LOY. L. REV. 879, 880–82 (1992).

8. *E.g.*, Paul Tough, *Girl Talk Get Naked. Often*, GQ (Oct. 2009), http://www.gq.com/ story/gregg-gillis-girl-talk-legal-mash-up; *see, e.g.*, Robert M. Vrana, Note, *The Remix Artist's Catch-22: A Proposal for Compulsory Licensing for Transformative, Sampling-Based Music*, 68

Sampling has existed since the 1960s, beginning in the hip-hop and electronic music genres[9] and predating the birth of the sound recording copyright in the United States.[10] In the early days of sampling, sample artists would extract a sample by chopping the magnetic tape that stored the audio data.[11] Since the samples were stored and played on analog equipment, the sample artist was limited to using exact copies of the copyrighted sound recording to perform and record.[12] Sampling became much more of an art form and less of a copy and paste practice with the advent of digital audio processing. Digital audio processors transform the sound wave into binary computer code, which allows the sound to be greatly modified.[13] Modern sample artists can digitally dissect songs, extract a sample, and then adjust audio parameters of the sample such as the pitch, treble and bass gain, and tempo to achieve the sound they want to use in their new composition. Sample artists can affect the sample even more by adding audio effects such as reverb, delay, or damage.[14] Since anyone with a computer can duplicate a digital audio file,[15] sound files are very easy to find, and musicians now have more sounds to work with than ever before. Today, musicians are able to find millions of sounds on the Internet, including songs, to use as building blocks for their new compositions.

There are three categories of musical productions that can be made by incorporating samples: (1) a remix, (2) a distinct composition, and (3) a mix. The term, "remix," has been broadly defined as a new recording that incorporates samples from one or more recordings, regardless of whether the underlying recordings are recognizable.[16] However, a narrower definition is necessary to differentiate it from a second category of products that can be made by sampling, the distinct composition that incorporates unrecognizable samples. A remix is a different version of a

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WASH. & LEE L. REV. 811, 825 (2011) (discussing Girl Talk, a sampling artist who creates songs entirely from of other recordings).

9. *A Brief History of Sampling*, MUSIC RADAR (Aug. 5, 2014), http://www.musicradar.com/tuition/tech/a-brief-history-of-sampling-604868.

10. *See infra* note 32 (Congress created the sound recording copyright in 1971).

11. *See* MARTIN RUSS, SOUND SYNTHESIS AND SAMPLING 186–89 (3d ed. 2008) (explaining the process of recording audio on magnetic tape).

12. *See id.* at 188–89 (stating that tape loops have only one fundamental method of modifying the sound: speed control).

13. *See generally* UDO ZÖLZER, DIGITAL AUDIO SIGNAL PROCESSING (2d ed. 2008).

14. *See, e.g.*, *Live Feature Comparison*, ABLETON, https://www.ableton.com/en/live/feature-comparison/ (last visited Dec. 15, 2015) (describing audio effects that a music producer can use to affect sounds loaded into the audio production software, Ableton Live).

15. *Digital Recording: Here to Stay*, AUDIO TRANSCRIPTION CENTER, http://www.ttctranscriptions.com/digitalvsanalog.html (last visited Dec. 16, 2015) (discussing the differences between digital and analog recording technology and directly supporting the assertion under the "Management of Content" section).

16. Vrana, *supra* note 8, at 822–23 (noting that remix samples may or may not be recognizable).

song that necessarily uses the main elements of the original to give it a different meaning, feel, or genre.[17] To create a remix, the sample artist must incorporate elements of the original in a new way throughout the song so that the new song is different from the original, yet the lay listener is still able to recognize the elements of the original recording. For example, if a sample artist samples lyrics from the chorus of an original recording and combines them with a different melody, then the song is a remix because the original song can be easily recognized through the lyrics and the new melody provides a different context, and thus a different meaning. The major difference between the remix and the distinct composition is that the distinct composition merely samples the original in an unsubstantial way. A distinct composition includes less significant samples from the original, typically a short sound, so that the lay listener cannot easily recognize the sample's origin. The difference between these two categories is important because sample artists will aim to either create a remix, which can be appropriately described as a substantial derivative of the original, or a distinct composition, which merely incorporates unrecognizable elements of the original sound recording and can be described as an unsubstantial derivative. Examples of unrecognizable elements would be a certain kick drum or hi-hat that intrigues the sample artist.

The third category of sampling products is the "mix." A mix is the typical product of the disc jockey (DJ): it is an extended recording that combines multiple original recordings.[18] To create a mix, a DJ will select and play recordings consecutively, transition between them, and add audio effects.[19] Besides its length, the main difference between mixes and other types of sampling products is that mixes necessarily incorporate large portions of the original recording.[20] The sample artist's creative input is difficult to discern in the context of mixing because it is possible for the DJ to play the original recordings consecutively without much effort. However, the DJ usually exercises much more control.[21] Not only does the DJ select and arrange the recordings to play, but he may also use the many audio processes available that allow him to create pleasing transitions between recordings in an attempt to maintain or shift the feeling of the overall mix.[22] Mixes, along with remixes and distinct compositions are the three musical products of audio sampling that

17. *What is a Remix*, RHYTHMIC CANADA, http://www.rhythmic.ca/music-tutorials/tips-and-tricks/what-is-a-remix.html (last visited Dec. 15, 2015).

18. *DJ Mix*, WIKIPEDIA, https://en.wikipedia.org/wiki/DJ_mix (last visited Dec. 15, 2015).

19. *Id.*

20. *Id.*

21. *Id.*

22. *See, e.g.*, *DJM-900SRT*, PIONEER, http://www.pioneerelectronics.com/PUSA/DJ/Mixers/DJM-900SRT (last visited Dec. 15, 2015) (describing the processes available in a professional DJ mixer).

opposers of compulsory sample licensing are most concerned with.

II. HISTORY OF AMERICAN MUSIC COPYRIGHT LAW

A. *American Copyright Legislation*

American Copyright Law began in 1788 when the Framers of the Constitution assigned to 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."[23] Although the phrase "musical works" was included in the Copyright Clause of the Constitution, statutory protection did not exist until Congress passed the Copyright Act of 1831, which amended the copyright statute to include "musical compositions," or the song itself which could be written on paper,[24] to the list of works protected once the author affixes his creation in a tangible medium of expression.[25]

Federal legislation regarding sound recordings, however, took more than a century to catch up with recording technology.[26] In 1908, the Supreme Court held in *White-Smith v. Apollo* that a piano roll was not a "copy" of the musical composition because it could not be read by the naked eye.[27] Thus, anyone could create a piano roll or phono-record from the sheet music and sell it. The following year, Congress passed the 1909 Copyright Act which amended the copyright statute to grant musical composition right holders the exclusive right to create mechanical reproductions of their compositions, such as on piano rolls, and later, vinyl and compact discs.[28] Congress also subjected the mechanical reproduction right to a compulsory license.[29] Once a composer has recorded and distributed his composition, anyone may then obtain a

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23. U.S. CONST. art. I, § 8, cl. 8.

24. *Composition*, THE OXFORD ENGLISH DICTIONARY (2d ed. 1989).

25. The musical composition copyright extends to "musical works, including any accompanying words." 17 U.S.C. § 102(a)(2) (2012); *Copyright Act, Washington D.C. (1831)*, ARTS & HUMANITIES RESEARCH COUNCIL, http://www.copyrighthistory.org/cam/tools/request/showRepresentation.php?id=representation_us_1831&pagenumber=1_1&imagesize=middle (last visited Nov. 4, 2017); *see* Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436 (codified as amended at 17 U.S.C. § 102 (2012)) (adding "musical composition" to the protected list of "book, map, [and] chart" and extending the length of protection offered).

26. *See* Rob Bamberger & Sam Brylawski, *The State of Recorded Sound Preservation in the United States: A National Legacy at Risk in the Digital Age,* COUNCIL ON LIBR. AND INFO. RES. AND THE LIBR. OF CONG. 1, 133 (2010), https://clir.wordpress.clir.org/wp-content/uploads/sites/6/2016/09/pub148.pdf (reporting the first known origins of sound recordings); U.S. Patent No. 200,521.

27. White-Smith Publ'g. Co. v. Apollo Co., 209 U.S. 1 (1908), *superseded by statute*, Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

28. Act of March 4, 1909, ch. 320, § 1(e), 35 Stat. 1075 (effective July 1, 1909).

29. *Id.*

reproduction license to make their own recording of that composition as long as a notice of intention is given to the composer and the proper royalties are paid.[30]

By the seventies, recording technology had become more prevalent. Diminishing record sales due to rampant pirating threatened the music industry since recording artists did not enjoy any federal copyright protection.[31] Congress responded by introducing the sound recording right in the Copyright Act of 1976, which gave record companies the exclusive right to reproduce, distribute, and make derivative works from their sound recordings and allowed them to operate in a market where pirating sound recordings was illegal.[32] The statute defines sound recordings as "works that result from the fixation of a series of musical, spoken or other sounds regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied."[33] In other words, it is the recording of the underlying musical composition. Consequently, recording artists now earn a separate copyright in their recording when they record their version of their own or another's composition.

The sound recording copyright, typically called the "master recording," is subject to a major limitation that distinguishes it from the composition copyright. Section 114(a) of the Copyright Act states the sound recording copyright does not enjoy the exclusive right to performance.[34] Instead, it enjoys a separate, narrower public performance right, which the Act in section 106(6) describes as the right "to perform the copyrighted work publicly by means of a digital audio transmission."[35] Unlike the public performance right afforded to the composition, the sound recording performance right is limited to digital audio transmissions, such as Internet and cable radio.[36] Compositions are subject to a compulsory license for their public performance right, and songwriters deal with a performing rights organization to collect these royalties. Similarly, the sound recording copyright is subject to a compulsory license for digital audio transmissions, which allow companies such as Pandora and Spotify to license the right to play the sound recording on their internet radio services without having to contact the right holders directly.[37]

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30. 17 U.S.C. § 115 (2012).

31. Steve Collins, *Waveform Pirates: Sampling, Piracy and Musical Creativity*, JARP (Nov. 2008), http://arpjournal.com/waveform-pirates-sampling-piracy-and- musical-creativity/.

32. *Id.*; Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (codified as amended at 17 U.S.C. § 102 (2012)).

33. 17 U.S.C. § 101 (2012).

34. 17 U.S.C. § 114(a) (2010).

35. 17 U.S.C. § 106(6) (2011).

36. *Id.*

37. 17 U.S.C. § 114 (2010).

Together, the musical composition and sound recording copyrights comprise the statutory protection afforded to musicians, publishers, recording artists, and record companies for their work. Since both copyrights include the exclusive right to prepare derivative works, the sample artist must negotiate a license with both copyright holders.[38] Section 114(b) of the Copyright Act explicitly includes the remix in the types of products that would infringe the right to prepare derivative works.[39]

B. *Substantive Case Law*

The federal judiciary has held sample artist liable for copyright infringement in the past, awarding compensatory damages and sometimes transferring ownership and awarding punitive damages to the plaintiff. Consequently, these holdings have prevented the infringing work from ever reaching the public.[40] Some defendants have been successful in arguing either the fair use[41] or de minimis use[42] defenses. However, most sampling cases settle before reaching the trial level,[43] and typically involve the defendant paying royalties to the plaintiff and splitting or relinquishing complete ownership of the defendant's work.[44]

The first federal music sampling case was *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, in which the Southern District of New York biblically condemned the act of sampling by beginning its famous opinion with, "thou shalt not steal."[45] In *Grand Upright Music*, Biz Markie, a famous rap artist, sampled a three-word fraction of Raymond Sullivan's composition, "Alone Again (Naturally)," and released his resulting production, titled "Alone Again."[46] Since the defendants admitted to using a sample, the Court focused only on the issue of whether the plaintiffs owned the copyright to the sampled sound

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38. 17 U.S.C. § 106(2) (2011).

39. 17 U.S.C. § 114(b) (2010).

40. *E.g.*, *Westbound Records, infra* note 121.

41. *E.g.*, *Campbell, infra* note 108.

42. *E.g.*, *VMG Salsoul, infra* note 80.

43. Susan J. Latham, Note, *Newton v. Diamond: Measuring the Legitimacy of Unauthorized Compositional Sampling—A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J. 119, 124 (2003); John Schietinger, Note and Comment, *Bridgeport Music, Inc. v. Dimension Films: How The Sixth Circuit Missed A Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 221 (2005).

44. *See, e.g.*, Daniel Nussbaum, *Music Lawsuit Frenzy: Jay-Z Latest to Settle Copyright Claim, Awards 50% Royalties to Swiss Musician*, BREITBART (Mar. 13, 2015), http://www.breitbart.com/big-hollywood/2015/03/13/music-lawsuit-frenzy-jay-z-latest-to-settle-copyright-claim-awards-50-royalties-to-swiss-musician/.

45. Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (quoting *Exodus* 20:15); Schietinger, *supra* note 43, at 221.

46. *See Grand Upright Music*, 780 F. Supp. at 183.

recording and found that they had.[47] Prior to the suit, the plaintiffs refused the defendants' request for a license to use the sample.[48] The defendants decided to sample the song anyway, and the Court held that those actions demonstrated a "callous disregard for the law."[49] As a result, the Court granted the plaintiffs a preliminary injunction and recommended that the defendants be criminally prosecuted.[50]

Grand Upright Music is a hardline foundation to the law of music sampling since the short opinion barely discusses substantive copyright law.[51] The Court gave very little guidance on how to quantitatively or qualitatively analyze the act of sampling. Instead, the opinion suggests that copyright infringement automatically results once the plaintiff proves ownership of the copyright and copying by the defendant.[52]

In 1993, the District of New Jersey decided another important sampling case, *Jarvis v. A&M Records*.[53] In *Jarvis*, defendants Robert Clivilles and David Cole wrote and recorded "Get Dumb! (Free Your Body)" using one-word and short-phrase vocal samples from plaintiff Boyd Jarvis' song, "The Music's Got Me," as well as a distinct keyboard riff.[54] Like the defendants in *Grand Upright Music*,[55] Clivilles and Cole admitted that they sampled the song without authorization,[56] and the Court found that the plaintiffs owned the copyright at issue.[57] The Court in *Jarvis*, however, required an extra element to hold the defendants liable: whether the sample amounted to an "unlawful appropriation" of the plaintiff's copyright.[58] The Court stated that if the samples were quantitatively or qualitatively significant to the plaintiff's work as a whole, then their unlicensed use by the defendants would be unlawful.[59] The Court, therefore, denied the defendants' motion for summary judgment because the question involved further fact-finding.[60]

Jarvis was the first case to require samples to rise to the level of misappropriation in the legal copying context for any copyright infringement to be found. Here, the Court analyzed the question of legal

47. *Id.*
48. *Id.* at 184.
49. *Id.* at 185.
50. *Id.*; *see also* 17 U.S.C. § 506(a) (2012) (imposing criminal liability on certain willful copyright infringers).
51. *See Grand Upright Music*, 780 F. Supp. at 183 (determining that sampling is infringement *per se*).
52. *Id.*
53. Jarvis v. A&M Records, 827 F. Supp. 282 (D.N.J. 1993).
54. *Id.* at 286.
55. *Grand Upright Music*, 780 F. Supp. at 183.
56. *Jarvis*, 827 F. Supp. at 289.
57. *Id.* at 293.
58. *Id.* at 289.
59. *Id.* at 291.
60. *Id.* at 299.

copying with the fragmented literal similarity test, a derivative of the substantial similarity test that is used when the defendant copies a small, but exact part of the plaintiff's work.[61] In such a situation, courts must use the substantial similarity test to determine whether the defendant's use of the plaintiff's work is legal copying, or in other words, amounts to misappropriation.[62] This substantial similarity inquiry in the legal copying context should not be confused with the context in which "substantial similarity" is used to determine whether the defendant actually copied the copyrighted material, once the plaintiff proves the defendant had access to his work.[63] Actual copying is the finding that the plaintiff has copied the defendant's work, whereas legal copying, as the *Jarvis* court demonstrates, is the finding that the actual copying has risen to the level of unlawful misappropriation, as opposed to a de minimis use.[64] Both actual and legal copying must be found for a court to hold a defendant liable for copyright infringement.[65] Therefore, a defendant may successfully argue a de minimis defense to a claim of copyright infringement.[66]

Whether the plaintiff in a sampling lawsuit is the owner of the sound recording or composition copyright is now relevant in the legal copying context, especially if the case is brought in the Sixth Circuit.[67] As mentioned earlier, two separate copyrights exist for a recorded song, one for the composition and one for the sound recording.[68] In *Bridgeport I*, the Sixth Circuit declined to extend the legal copying inquiry to sound recordings.[69] Plaintiff Westbound Records, owner of the sound recording copyright for "Get Off Your Ass and Jam," sued defendant No Limit Films for using "100 Miles and Runnin,'" a song that impermissibly samples the plaintiff's recording, in the defendant's movie soundtrack for *I Got the Hook Up*.[70] The sample was a two-second portion of a guitar solo in the introduction of "Get Off Your Ass and Jam." The defendants

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61. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][1] (2010) [hereinafter NIMMER]; *see also* John S. Pelletier, Sampling the Circuits: The Case for a New Comprehensive Scheme for Determining Copyright Infringement as a Result of Music Sampling, 89 WASH. U. L. REV. 1135, 1176 (2012) (discussing Nimmer and fragmented literal similarity).

62. 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 9:135 (2015).

63. *Id.*

64. *See* PATRY, *supra* note 62, § 9:60 (explaining the difference between a *de minimis* use and a wrongful taking).

65. *Id.*

66. *E.g.*, *Saregama*, *infra* note 80; *Newton*, *infra* note 93. *But see Bridgeport I*, *infra* note 67.

67. *See, e.g.*, Bridgeport Music Inc. v. Dimension Films (*Bridgeport I*), 410 F.3d 792 (6th Cir. 2005).

68. *See* 17 U.S.C. § 102(a)(2), (7) (2006).

69. *Bridgeport I*, 410 F.3d at 798.

70. *Id.* at 795.

altered the pitch of the sample and looped the sample to extend to sixteen beats.[71] The issue was whether the court should uphold the district court's finding that the defendant's use of a small sample of the plaintiff's recording was not substantial enough to amount to misappropriation.[72] In reversing the district court's grant of summary judgment to the defendants, the Sixth Circuit determined that "no substantial similarity or de minimis inquiry should be undertaken at all when the defendant has not disputed that it digitally sampled a copyrighted sound recording."[73] In other words, the Sixth Circuit eviscerated the requirement of legal copying in the digital sampling context for sound recordings. Specifically, the court held, "if you cannot pirate the whole sound recording, [then you cannot] 'lift' or 'sample' something less than the whole."[74] In an attempt to clarify the law for future sample artists, the court established a hardline rule which it engraved with its statement, "get a license or do not sample."[75]

The Sixth Circuit's stance that the de minimis inquiry should not be applied to samples is a serious departure not only from the legislative history of the Copyright Act,[76] but also from substantive copyright law.[77] It is firmly established that for a court to impose copyright infringement liability, the taking must have been a significant portion of the plaintiff's work.[78] The Sixth Circuit's holding in *Bridgeport I* seems to carve out a special exception to this rule for sound recordings, thereby extending greater copyright protection to sound recordings than compositions in the sampling context.[79]

Federal courts not bound by the law of the Sixth Circuit have recently declined to follow its holding in *Bridgeport I*.[80] In *VMG Salsoul*, plaintiff VMG Salsoul was the copyright owner of the recording, "Love Break."[81] Defendant Shep Pettibone produced the composition and recording of

71. *Id.* at 796.
72. *Id.* at 798.
73. *Id.*
74. *Id.* at 800.
75. *Id.* at 801.
76. *See* H.R. REP. No. 94-1476, at 106 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5721; *see also* Schietinger, *supra* note 43, at 232–33 (stating that "a right in a sound recording is infringed whenever all or any substantial portion of the actual sounds that go to make up a copyrighted sound recording are reproduced").
77. Schietinger, *supra* note 43, at 230–34; *see* 2 NIMMER & NIMMER, *supra* note 61, § 8.01[G], at 8–24; *see* Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74–77 (2d. Cir. 1997) (discussing in detail the significance of the *de minimis* concept in copyright law).
78. *See* PATRY, *supra* note 62, § 9:60 (explaining the de minimis use doctrine).
79. Pelletier, *supra* note 61, at 1186–87; *see Bridgeport I*, 410 F.3d at 798 (holding that the de minimis inquiry should not be undertaken when the defendant has admitted to copying a sound recording).
80. *See, e.g.*, VMG Salsoul LLC v. Ciccone, 2013 WL 8600435, at 9 (C.D. Cal. 2013); *see also, e.g.*, Saregama India, Ltd. v. Mosely, 687 F. Supp. 2d 1325, 1338–39 (S.D. Fla. 2009).
81. *Ciccone*, 2013 WL 8600435, at 2.

"Vogue" and included in the production eleven repetitions of a sample of a single chord from the plaintiff's song.[82] The issues were whether the chord merits copyright protection and whether the defendant's use of the chord amounted to misappropriation.[83] In granting summary judgment to the defendants, the federal trial court held that the chord was not original enough to merit copyright protection, and that "even if the alleged appropriation was subject to copyright protection, the Court finds Defendants' use to be de minimis."[84] In reaching its holding, the court rejected the hardline rule developed by the *Bridgeport I* court partly because its federal circuit court, the Ninth Circuit, had not adopted the rule.[85]

Similarly, the court in *Saregama* declined to follow the Sixth Circuit's rejection of the de minimis inquiry in digital sampling cases.[86] In that case, defendant Timothy Mosley admitted to sampling plaintiff Saregama's sound recording of "Bagor Main Bahar Hai" in the defendant's song, "Put You on the Game."[87] The sample was a one-second snippet of a female vocal from the plaintiff's recording.[88] One of the issues in the case was whether the court should follow the Sixth Circuit's hardline rule in *Bridgeport I* and decline to undertake the de minimis analysis in the digital sampling context.[89] The court decided not to follow the Sixth Circuit's de minimis exception for sound recordings,[90] stating that the plaintiff failed to persuade the court that the Eleventh Circuit, which requires proof of substantial similarity, will agree with the Sixth Circuit in the future.[91] Indeed, the court in *Saregama* engaged in a de minimis analysis and determined that the defendant's use of the sample did not rise to the level of misappropriation.[92]

The de minimis defense is not only accepted in the sampling context at the district court level, but also at the federal circuit court level.[93] In *Newton*, the Ninth Circuit was faced with the question of whether to uphold the district court's grant of summary judgment to the defendants on the basis that the plaintiff's sample lacked sufficient originality and

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82. *Id.* at 1–2.
83. *Id.* at 5, 8.
84. *Id.* at 8–9.
85. *Id.* at 9. The Ninth Circuit's stance is discussed *infra*.
86. *Mosely*, 687 F. Supp. 2d at 1338–39.
87. *Id.* at 1326.
88. *Id.*
89. *Id.* at 1338–39.
90. *Id.* at 1341.
91. *Id.* at 1339 ("Saragema also fails to persuade the Court that, in the future, the Eleventh Circuit will depart from the black-letter consensus, which requires proof of substantial similarity, to follow the Sixth Circuit's exception for sound recordings").
92. *Id.* at 1341.
93. *See, e.g.*, Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2004).

the defendants' use of the plaintiff's composition was de minimis.[94] The dispute arose out of the Beastie Boys' use of a three-note sequence from the opening of Newton's composition, "Choir," in their song, "Pass the Mic."[95] The six-second sample that The Beastie Boys used was looped over forty times and used as a background element throughout "Pass the Mic."[96] Prior to using the sample, the Beastie Boys obtained a license from ECM Records to sample Newton's sound recording of "Choir," so only the composition copyright was at issue.[97] The Ninth Circuit affirmed the district court's grant of summary judgment to the defendants, but based its holding only on the finding that the defendants' use was de minimis, and therefore did not amount to an actionable taking.[98] In arriving at its holding, the court relied on the fragmented literal similarity test and determined that the quantitative and qualitative aspects of the sample were insignificant to the plaintiff's work as a whole.[99] The fact that The Beastie Boys used the sample throughout most of their song was irrelevant under the fragmented literal similarity test since that test does not consider how substantial the sample is to the defendant's work.[100] The court also relied on its rule from *Fisher v. Dees*: "a taking is considered de minimis only if it is so meager and fragmentary that the average audience would not recognize the appropriation."[101]

In *Newton*, the Ninth Circuit's determination that the defendants' sampling was de minimis partly depended on the fact that the only copyright at issue was for the composition of "Choir."[102] Newton argued that the sample taken by the defendants was qualitatively significant to the entire composition because he "blows and sings in such a way as to emphasize the upper partials of the flute's complex harmonic tone," and "uses portamento to glide expressively from one pitch to another in the vocal part."[103] However, these were attributes of Newton's performance of his composition in his sound recording, rather than compositional techniques since they did not appear in the score.[104]

Newton exemplifies how difficult it can be for a composition copyright holder to establish that a short piece of his composition is qualitatively significant, even if it is the opening to the song, when

94. *Id.* at 1192.
95. *Id.* at 1191.
96. *Id.* at 1192.
97. *Id.* at 1191.
98. *Id.* at 1196–97.
99. *Id.* at 1195.
100. *Id.*
101. *Id.* at 1193 (quoting Fisher v. Dees, 794 F.2d 432, 434 (9th Cir. 1986)).
102. *Id*. at 1193–94; *see* Latham, *supra* note 43, at 133 (discussing *Newton*).
103. *Id.* at 1194.
104. *Id.*

compared to that of his own sound recording.[105] Unless the composition is embodied in the sound recording,[106] the compositional elements, such as notes and lyrics, must be separated from the emotional performance elements in the sound recording, such as vocal fluctuations and other added musical elements. Composition copyright holders are only able to argue the significance of the limited technical compositional elements of their song, whereas sound recording copyright holders can argue the significance of the production and emotional performance aspects of the recording.[107]

The question of which elements are more likely to support a finding of qualitative significance must be determined on a case-by-case basis. Although, it is far easier for a short sample to be substantial enough to pass de minimis scrutiny for a sound recording than its composition because the composition excludes the acute performance aspects that define the sound recording, which the plaintiff should always raise in a de minimis use challenge. There is simply more to say about a two-second sample of a sound recording than a few notes of its sheet music because the sound recording is a real execution of its composition. Therefore, even if a court ignores the Sixth Circuit's ban on sound recording de minimis scrutiny, the sound recording functionally enjoys stronger copyright protection than the composition in violation of the Copyright Act.

Along with the de minimis defense, sample artists have relied on fair use to justify their craft before the court.[108] In *Campbell*, plaintiff Acuff-Rose Music, Inc. sued defendant Luther Campbell for using a substantial and recognizable guitar riff sample of the plaintiff's song, "Oh, Pretty Woman," in his music group's parody song, "Pretty Woman."[109] Prior to reaching the Supreme Court, the Sixth Circuit found the commercial nature of the defendant's release created a presumption that the defendant's use of the sample was not a fair use.[110] The issue at bar was whether the Sixth Circuit was correct in imposing that presumption.[111] The Supreme Court found that the Sixth Circuit erred because whether the use of the plaintiff's work was commercial was just one factor to

105. *See* Latham, *supra* note 43, at 143 (noting that the district and circuit courts both failed to consider the fact that the sample was from the opening of the plaintiff's composition).

106. *E.g.*, Bridgeport Music, Inc. v. UMG Recordings, Inc., 585 F.3d 267, 276 (6th Cir. 2009) (holding that since the song was recorded and composed simultaneously, the composition was embedded in the sound recording, and thus certain sounds that were not included in the sheet music, such as a dog panting, were protectable elements of the composition copyright).

107. *See Newton*, 388 F.3d at 1193–94 (discussing that the court must filter out licensed elements of the sound recording to properly determine if the unlicensed elements of the composition are qualitatively significant).

108. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

109. *Id.* at 572–73.

110. *Id.* at 574.

111. *Id.*

consider in determining whether the defendant's transformative use was fair.[112] Because 2 Live Crew, Campbell's group, included lyrics that parodied the original song, the Court determined that the defendant's use could be transformative enough to outweigh the song's commercial nature and reversed the Sixth Circuit's decision.[113] *Campbell* currently serves as the only sampling case to reach the Supreme Court.[114]

The de minimis and fair use defenses provide sample artists with some guidance on how to legally sample without a license. However, the threat of a suit from a major record label, publisher, or another type of composition or master recording copyright holder still looms over all sample artists because there is no brightline rule,[115] and like all copyright infringement cases, a judgment against a defendant can be crushing.[116] For example, in *Bridgeport II*, defendant Justin Combs Publishing knowingly released "Ready to Die," a song that sampled the Ohio Players' song, "Singing in the Morning."[117] Plaintiff Bridgeport Music, Inc. owned the copyright to the composition of "Singing in the Morning," and plaintiff Westbound Records, Inc. owned the master recording copyright.[118] The lower court found that the defendants willfully infringed on the plaintiffs' copyrights and awarded $366,939 in compensatory damages, $3.5 million in punitive damages, $150,000 in statutory damages, and an injunction to the plaintiffs.[119] The main issue on appeal was whether the damages violated the defendants' right to due process.[120] The Sixth Circuit held that the 9.5:1 ratio of punitive to compensatory damages were excessive and remanded the issue of punitive damages to the lower court, which subsequently lowered the amount of punitive damages to $688,523, a 2:1 ratio after excluding prejudgment interest from the award.[121] Thus, the defendants ultimately had to pay $688,523 in punitive damages, $344,261.50 in compensatory damages, $150,000 in statutory damages, interest, and were enjoined

112. *Id.* at 584.

113. *Id.* at 594.

114. Pelletier, *supra* note 61, at 1180.

115. *Compare Bridgeport I*, 410 F.3d at 782 (holding that sampling sound recordings is virtually indefensible), *with Saregama*, 687 F. Supp. at 1325 (declining to follow the Sixth Circuit's *per se* infringement treatment of sampling sound recordings).

116. *See, e.g.*, Bridgeport Music, Inc. v. Justin Combs Pub. (*Bridgeport II*), 507 F.3d 470 (6th Cir. 2007) (awarding substantial damages in addition to an injunction to the plaintiff).

117. *Id.* at 475–76.

118. *Id.* at 476.

119. *Id.* at 475; 17 U.S.C. § 504(c)(2) ($150,000 is the maximum amount of statutory damages that a plaintiff can receive in a copyright infringement lawsuit).

120. *Id.* at 476.

121. Westbound Records, Inc. v. Justin Combs Pub., Inc., No. 3:05-0155, 2009 WL 943516, at *3 (M.D. Tenn. Apr. 3, 2009).

from using "Ready to Die" in the future.[122] Although the Sixth Circuit reduced the original award by $2.8 million, the defendants still had to pay over $1 million in damages and forfeit every copy of the album.[123]

III. HOW CURRENT MUSIC COPYRIGHT LAW STIFLES CREATIVITY

To legally use a sample, the sample artist needs to go through an unnecessarily difficult and expensive process to obtain the proper licenses.[124] He must contact the holders of both the composition and sound recording rights, which are usually different entities, and negotiate a license with each of them.[125] If one of them declines, the artist cannot legally use the sample.[126] The harsh double licensing requirement, coupled with the lack of any requirement on the copyright holders to license their samples for creative uses results in very little leverage for sample artists against the copyright holders.[127] In addition, the licensing process requires legal knowledge that the lay musician does not possess. Musicians want to create music, not deal with restrictions to their art form. Artists' managers typically navigate those restrictions and clear samples with the copyright holders. Although full time musicians usually have a manager and the means to pay the expensive licenses, most amateurs do not.

The implication of the current licensing process, therefore, either discourages sample artists from sampling or from participating in the licensing process.[128] Both avenues harm all parties involved: the right holders, the sample artist, and the public. The right holders are not paid the royalties they deserve if the sample artist samples their song

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122. *Id.* (The Court also ordered the defendants to impound all copies of the song and the entire album).

123. Jonathan Bailey, *04/18 On Appeal, Damages for Unauthorized "Ready to Die" Sample Reduced by $2,811,477*, BAD BOY BLOG, http://www.badboyblog.com/item/2009/4/18/on-appeal-damages-for-unauthorized-ready-to-die-sample-reduced-by-2-811-477.html (last visited Dec. 15, 2015) (stating "the album has since then been rereleased with the sample removed").

124. *See* Ryan Lloyd, Note, *Unauthorized Digital Sampling in the Changing Music Landscape*, 22 J. INTELL. PROP. L. 143, 154–55 (2014) (discussing the extreme imbalance of leverage inherent in the process of clearing samples with the copyright holders).

125. Beck, *supra* note 3, at 19.

126. *See id.* at 19–20 (mentioning that the sampling artist must obtain clearance to use two separate copyrights).

127. *See* Lloyd, *supra* note 124 and accompanying text, at 167–68; *see also* Tracy L. Reilly, *Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court's Attempt to Afford "Sound" Copyright Protection to Sound Recordings*, 31 COLUM. J.L. & ARTS 355, 364–65 (2008) (explaining how difficult it can be for the sampling artist to obtain the proper clearance to legally use samples).

128. Lloyd, *supra* note 124, at 169.

illegally,[129] the sample artist either decides not to express his idea or takes a risk of being sued, and the public is deprived of the music that the sample artist would have created, but for the difficult licensing process. It is clear that the process of licensing samples needs to change to facilitate this creative tool for music.

IV. PROPOSAL FOR A CONGRESSIONAL AMENDMENT TO THE COPYRIGHT ACT

A. *The Sample Compulsory License and the Emergence of a Sample License Organization*

The sample compulsory license proposed herein would require composition and sound recording copyright holders to grant a license to sample artists to sample their songs at a rate set by the Copyright Royalty Board. In addition, a sample license organization (SLO) should be formed to centralize and streamline the process of granting licenses and collecting and paying out the royalties to the copyright holders.

The first license to consider, the "license to use," will enable the sample artist to sample one song and use it in one of the three ways discussed in Part III: (1) a remix, (2) a distinct composition, or (3) a mix. The differences in these products should be reflected by distinctive classes of compulsory licenses with different fees and royalties. When the sample artist applies for the license, he would choose which of these three ways he wants to use the sample and notify the copyright holders that he is obtaining a license and how he intends to use it.[130] It will be inexpensive, but it will also be beneficial for the copyright holders if the licensee intends to sell his new song.

Because making a remix involves the use of samples from the original song more so than for a distinct composition, a remix license should allow the artist to use more of the song or a more recognizable portion than a distinct composition license. To make a mix, a DJ typically needs to use a substantially larger portion of a song than for a remix or a distinct composition.[131] Therefore, out of the three ways to use a sample, the mix sample license should grant the right to use the largest portion of the original song. The distinct composition, remix, and mix sample licenses would grant the licensee the ability to use a small, medium, or large portion of the original song, respectively. Accordingly, each license to

129. The rightholders also do not get paid if the sampling artist decides not to sample the song because the licensing process is too difficult.

130. Similar to a § 115 compulsory license, 17 U.S.C. § 115 (2010).

131. *See DJ Mix*, WIKIPEDIA, https://en.wikipedia.org/wiki/DJ_mix (last visited Dec. 15, 2015).

use should have different fees.

The licensee will be able to legally work with the copyrighted content with a license to use. If the artist decides he wants to sell his product, the licensee will pay a percentage royalty of each sale of his new production since part of his profits would be partly attributable to the original copyright holders' works. The royalty fee should be different for each type of sample license because each license allows the licensee to use a different size portion of the original song, and longer portions typically require more work to create. In determining the royalty owed from record sales, the centralized SLO would consistently analyze the use of the sample, unlike the courts have thus far in making a de minimis determination. Although, the SLO should follow the basic analysis from the courts and consider the same tests: the royalty should depend on how much of the original song is sampled, and how significant those samples are to the original song, since the sample artist's work will be more successful if the samples are recognizable.[132] Licensees should also be required to report their earnings quarterly after sending a copy of their final production to the SLO.

An amendment to the Copyright Act should be made to include a section that allows the SLO to deny sample a license in response to a reasonable objection by a copyright holder. Once the sample artist sends his final production to the SLO, the copyright holders of the sampled song should be notified and have the opportunity to file an objection to the use of their samples based on his moral rights. The SLO would then decide if the objection is reasonable enough to deny the license. For example, the SLO may be able to deny a license in response to an objection if the licensee's final production endorses an obscene, religious, political, or immoral message. One purpose of copyright law is to encourage the creation of useful arts,[133] and most of the time the artist is sending a message through his art. An artist may be discouraged from creating art if he knew that his creations could later be used to further offensive messages.

The list of reasonable objections would primarily include those largely founded on legal justifications than moral ones, such as if the sample artist's final production is basically a copy of the original. If two songs are almost identical, but one is made artfully by the original artist and the other is a copy, then the latter is more akin to a "knock-off" than a derivative work and is likely of lesser quality. Allowing "knock-offs" to enter the market would also frustrate the purpose of the Copyright Act

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132. *See* PATRY, *supra* note 62, § 9:64; *see also* Michael L. Baroni, *A Pirate's Palette: The Dilemmas of Digital Sound Sampling and a Proposed Compulsory License Solution*, 11 U. MIAMI ENT. & SPORTS L. REV. 65, 91 (1993) (discussing music industry practices regarding sample licensing deals).

133. U.S. CONST. art. I, § 8, cl. 8.

to encourage the useful arts and confuse listeners if they could not determine who created each version just by listening to them.[134]

B. *Justifications and a Balance of the Interests*

A compulsory license for sampling music would solve many problems of the current system, however, a few concerns must be addressed. Musicians fear that a compulsory license would allow others to violate their moral rights, or artistic integrity, of the original work.[135] Others in the music industry fear that the compulsory license will hamstring their ability to profit from licensing samples. In addition, the Sixth Circuit implied that such a compulsory license would partially legalize piracy.[136] Practically though, a compulsory sample license coupled with the establishment of the SLO will allow sample artists to circumvent the confusing law built by conflicting legislation and case law, allow the music industry to collect smaller royalties from a larger group of people, and expand the public domain.

By amending the Copyright Act to include a compulsory license for samples, Congress would be removing the ability of music copyright holders to negotiate expensive licenses or outright deny others the right to sample their songs. Some critics to compulsory licensing have argued that a compulsory license unreasonably denies the artist the right not to have his work "perverted, distorted, or travestied."[137] Songwriters want to control the way their songs appear to the public.[138] Even though that may be a reasonable expectation, songwriters and recording artists do not have much to fear because sample artists generally respect the original song, i.e. they make a remix to pay tribute to the original rather than criticize or pervert it.[139]

The proposed licensing scheme would also allow licensors to object to the use of the sample on moral grounds, and thereby provide musicians with a means of reasonably denying the license. Furthermore, songwriters are already subjected to a compulsory license that allows other musicians to interpret compositions and perform a cover without having to answer to the composition copyright holder.[140] Sound recording copyright

134. *Id.*

135. Vrana, *supra* note 8, at 858.

136. *See Bridgeport I*, 410 F.3d at 800 (comparing piracy with sampling).

137. AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 683 (3d ed. 2002).

138. *See* Vrana, *supra* note 8, at 858–59 (discussing the original composer's interest in the "artistic integrity" of his creation).

139. *Id.* at 859; *see* Mark Ronson, *Why Would More Than 500 Artists Sample The Same Song?*, TED RADIO HOUR (May 5, 2015), *available at* http://www.npr.org/2014/06/27/322721353/why-would-more-than-500-artists-sample-the-same-song ("I think most people that sample have the utmost reverence for the people who created the music that came before . . . we're all in it because we love music").

140. 17 U.S.C. § 115 (2010); Vrana, *supra* note 8, at 817.

owners should similarly be subjected to a compulsory license that allows second-comers to interpret their works with a derivative of their own, such as a remix.[141]

From a purely economic standpoint, songwriters and record label executives fear they will lose much of the revenue they currently receive from licensing samples if they are forced to license those samples at a cheaper rate.[142] The problem with that argument is that currently the only sample artists who license the right to use samples are professional musicians.[143] Even in the professional realm, some musicians do not license the samples they use.[144] If a convenient licensing system existed that made it cheap and easy for sample artists to use samples legally, amateurs may generally begin participating in licensing and start paying for the right to use samples. A licensing system that amateurs can more readily participate in could bring more revenue into the music industry since more musicians would be encouraged to sample legally. Moreover, it is difficult for copyright holders to detect unauthorized sampling if it is played live,[145] and even if that was not the case, the vast majority of sample artists do not make enough money from their creations to entice the copyright holders to bring suit. Many musicians do not care if someone samples their work, while others even appreciate a sample artist's derivative work. Since the proposed licensing system will encourage compliance with the law, those copyright holders who choose not to sue or are indifferent will finally collect the royalties they deserve. Furthermore, recent technological advances have made it possible to digitally scan music files and determine if they contain fragments of copyrighted songs.[146] This technology could serve as the foundation for enforcing this system since it would be able to find nonparticipating sample artists and notify them and the copyright holders of the violation.

Another concern of the critics concerns is that sampling is merely a type of piracy.[147] As mentioned above, the Sixth Circuit in *Bridgeport I* held, "if you cannot pirate the whole sound recording, [then you cannot] 'lift' or 'sample' something less than the whole."[148] However, that court

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141. *See* Vrana, *supra* note 8, at 813–14 (arguing that there is no explanation for the fact that remix interpretations are off-limits but cover interpretations are allowed via a compulsory license).

142. *See* Baroni, *supra* note 132, at 92–93 (explaining how expensive the clearance process currently is for sampling).

143. *See* Lloyd, *supra* note 124, at 166 (discussing how the negative effects of the current system mainly affects the amateur artist).

144. *See, e.g.*, Vrana, *supra* note 8, at 825–26 (discussing Girl Talk, a successful sampling artist that does not license any of his samples).

145. *See* Baroni, *supra* note 132, at 92 ("Catching sampling can be an unproductive, time-wasting chore").

146. *RightsID Monetize & Protect*, ZEFR, http://zefr.com/ (last visited Dec. 16, 2015).

147. *See Bridgeport I*, 410 F.3d at 800 (comparing piracy with sampling).

148. *Id.* at 800.

inappropriately expanded the meaning of "piracy" to encompass sampling.[149] Piracy is defined by Merriam-Webster as "the unauthorized use of another's production, invention, or conception especially in infringement of a copyright."[150] The unauthorized use of samples can barely be considered piracy because the sample artist only uses a fraction of the song. Most copyright owners are concerned with true piracy, which is the act of widely distributing a recording without permission and without paying royalties.[151] The word, "piracy," really means a total copy, and it is an enormous problem for the music industry because 'pirates' enable others to download entire recordings from the Internet and therefore provide a free, illegal alternative to purchasing the right to listen to the recording.[152]

When a sample artist samples a song, he does not copy the entire original recording.[153] He uses only the portion he needs to achieve the creative result he envisioned, which is by nature only a few seconds long at maximum when creating a remix or a separate composition. Therefore, a song that samples a certain recording is not a realistic alternative to listening to the original. Making a mix, however, is more reasonably compared with piracy since mixes typically require a DJ to use large or full portions of each song in the mix. A DJ can arguably combine many popular songs without creatively transitioning between them or modulating them, and then provide the mix to listeners as a free and satisfactory alternative to paying to listen to the song by itself. To address that concern, the legislature could exclude a mix from the statutory amendment by limiting the amount of a single song that a sample artist can use. Although, the original artist should still have the option to license his song to be used in a mix when he registers with the SLO because the administrative infrastructure would already exist. If a copyright owner wants to make his song available to be licensed for use in a mix, then he could do so by checking a box on a registration form he sends to the SLO.

Along with the practical justifications discussed above, there exist

149. *See* LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 62–79 (2004) (distinguishing Internet music piracy from traditional piracy and arguing that not all forms of Internet copyright violation should be considered true piracy).

150. *Piracy*, MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/piracy (last visited Jan. 31, 2016).

151. *Copyright*, THE FREE DICTIONARY, https://legal-dictionary.thefreedictionary.com/copyright (last visited Jan. 31, 2016).

152. *See* G@M3FR3@K, *RIAA: Online Piracy Has Devastating Impact on Music Business*, MYCE, (Mar. 5, 2004, 12:52 PM), http://www.myce.com/news/RIAA-online-piracy-has-devastating-impact-on-music-business-7875/ (discussing the reasons why online piracy has hurt the music industry).

153. *See* RONALD S. ROSEN, MUSIC AND COPYRIGHT 568 (2008) ("The word 'sample' is used because this practice usually involves a brief snippet from a sound recording that is then used in another recording, usually for an effect desired by the creator of the second recording").

several legal justifications. As mentioned earlier, the Sixth Circuit in *Bridgeport I* outright banned the act of sampling sound recordings without a license by holding that the de minimis analysis should not be undertaken for samples of sound recordings, and thereby extended greater protection to the sound recording copyright in comparison to the composition copyright.[154] In contrast, the Ninth Circuit in *Newton* held that "even where the fact of copying is conceded, no legal consequences will follow from that fact unless the copying is substantial," and accepted the defendants' de minimis defense to violating the plaintiff's composition copyright.[155] Albeit the fact that each case involved a separate copyright, comparing these two cases reveals a virtual circuit split since the Ninth Circuit's opinion suggests that the Court will apply the de minimis analysis in sound recording cases.[156] These competing circuit views cause much confusion in the law;[157] courts not bound by these circuits could follow either one, and music professionals lack the guidance needed to accurately determine their rights and responsibilities when presented with a sampling issue.[158]

In addition to the confusion created by these cases, *Bridgeport I* creates an unintended imbalance in the scope of rights afforded to sound recording and composition copyright owners. Sound recording owners are now afforded more protection than composition owners in states bound by the decision of the Sixth Circuit since that circuit rejected the de minimis defense to sampling a sound recording. Such exceptional protection for sound recordings is contrary to the legislative history of the Copyright Act, which explains that "in approving the creation of a limited copyright in sound recordings it is the intention of the committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17," including those who hold a musical composition copyright.[159] The greater protection afforded

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154. *Bridgeport I*, 410 F.3d at 798.

155. *Newton*, 388 F.3d at 1192–93.

156. Pelletier, *supra* note 61, at 1183–85; *compare id.* ("For an unauthorized use of a copyrighted work to be actionable, the use must be significant enough to constitute infringement."), *with Bridgeport I*, 410 F.3d at 798 (holding that the *de minimis* inquiry should not be undertaken when the defendant sampled a sound recording without authorization).

157. *See* Reilly, *supra* note 127, at 375 ("[T]here is no doubt that the state of sampling law is rife with inconsistency and confusion, even after [*Bridgeport I*]").

158. *See id.* at 366 ("[C]ourts have been reluctant to make precise interpretations of existing law or formulate helpful guidelines by which musicians can determine both their rights and their responsibilities in the sampling process").

159. JOHN MCCLELLAN, CREATION OF A LIMITED RIGHT IN SOUND RECORDINGS, S. REP. NO. 92–72, at 6 (1971) ("In approving the creation of a limited copyright in sound recordings it is the intention of the committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17"); *see* Pelletier, *supra* note 61, at 1187 (discussing the imbalance in rights afforded to the composition and sound recording copyrights in the context of sampling as a result of *Bridgeport I* and *Newton*).

to sound recordings in the context of music sampling is also apparent in the Copyright Act itself.[160] Section 114(b), the section that defines the scope of exclusive rights for sound recordings, expressly includes in the derivative works right the right to remix, rearrange, or "otherwise alter [the sounds] in sequence or quality."[161] In contrast, nothing in the Copyright Act specifically prohibits remixing, rearranging, or otherwise altering a composition.[162]

There are two reasons why this language is problematic. First, in the context of digital sampling, the sound recording copyright operates more resolutely,[163] and less protection is afforded by the composition copyright in litigation because the sound recording derivative works right explicitly grants a right that the composition copyright does not: the right to sample your own recording.[164] The result is another instance of law that contradicts legislative intent. As mentioned earlier, Congress intended not to grant any broader rights to the sound recording copyright holder,[165] but it specifically included this right in the sound recording copyright and not the composition copyright.[166] Granted, the composition cannot be digitally sampled in the technical sense of the term[167] because that copyright refers to the underlying musical structure as denoted by the notes, lyrics and other notations typically written down, and digital sampling requires the sample artist to actually copy the sound.[168] In practice, however, the two copyrights are not different, because the sample artist must still obtain authorization from the composition copyright holder to sample the sound recording.[169] Thus, the second problem is that despite the distinction under the law, there is no distinction in practice.

A compulsory license that establishes a simple licensing system would encourage existing sample artists to sample legally and encourage those who are deterred by the legal consequences to produce more music. The result would be a richer public domain that would include more

160. *See* 17 U.S.C. § 114(b) (2015) ("The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality); *see also* Latham, *supra* note 43, at 126 (noting the legal uncertainty that section 114 places on the composition copyright).

161. 17 U.S.C. § 114(b) (2015).

162. Latham, *supra* note 43, at 126.

163. *Id.*

164. *See supra* note 160 and accompanying text.

165. *See* MCCLELLAN, *supra* note 159 and accompanying text.

166. *See supra* note 160 and accompanying text.

167. Reilly, *supra* note 127, at 377.

168. *Id.* at 363 (explaining what is protected by the composition copyright.)

169. Beck, *supra* note 3, at 19 ("Anyone seeking a license to sample must actually seek two licenses: one from the owner of the copyright in the sound recording and one from the owner of the copyright in the underlying musical composition which is embodied in that recording").

sampling creativity. Because there would be more sampling, musicians would receive more promotional value from others sampling their songs since sample artists typically reach different audiences and the SLO would ensure that proper credit is given to the original artists. If a centralized licensing agency such as the proposed SLO existed, so could a database that would credit musicians, publishers, recording artists, and record labels responsible for creating the sampled song.

C. *Another Proposed Solution*

Another proponent of resolving the legal confusion and injustice that surrounds sampling has suggested a solution that does not involve compulsory licensing. That commentator suggests enacting legislation that standardizes the fair use and de minimis analyses across the federal circuit courts and equalizes sound recordings and compositions under the de minimis use doctrine.[170] The benefits of such legislation are said to not only ensure less variability in the circuits, but also provide sample artists with a framework to analyze their own works and determine if they need a license.[171] This type of legislation would indeed harmonize the courts and perhaps equalize the rights of the sound recording and composition copyrights when it comes to sampling, but unfortunately it would not provide much benefit to the sample artist.

First, the average sample artist would not easily understand the complicated legal analysis that the legislation would involve, and obtaining legal advice from a lawyer would be too costly for each sample. It seems as though the sample artist would have to apply each de minimis and fair use consideration himself, which is a complex analysis at the heart of any copyright litigation and usually involves expert witnesses. Second, even if the sample artist did analyze the fair use and de minimis issues himself, there is still a large risk that the sample artist will get sued and a court will impose liability despite the artist's subjective resolution. Ultimately, this legislation would not reduce uncertainty enough to address the fact that sample artists are discouraged from using samples. The proponent of this legislation argues that since it will reduce uncertainty somewhat, it will give sample artists more leverage and drive down licensing fees.[172] It is true that less uncertainty would help sample artists negotiate more reasonable prices since the prices would more accurately reflect the likelihood of committing copyright infringement, but it does not solve the other problems of having to contact the copyright holders, interest them in your project, and obtain two licenses for each sample, each of which greatly contribute to the imbalance in leverage.

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170. Pelletier, *supra* note 61, at 1194–200.
171. *Id.* at 1198 (discussing the solutions of the author's proposed legislation).
172. *Id.*

CONCLUSION

Sampling is a creative art form that involves musical expression despite its dependence on the use of copyrighted works. A sample artist does not truly pirate sound recordings; he takes small parts and incorporates them into a new composition of his own in an attempt to enrich the listener's experience in a different way or create a new composition entirely.[173] When an artist samples a song, he pays the original artist homage,[174] but does not always give him the proper credit partly because of the risk of litigation.[175] The misconceptions attached to sampling have perhaps invaded the case law, resulting in confusing and inconsistent legal treatment. The Sixth and Ninth Circuits disagree on whether the de minimis defense should be available to sampling defendants,[176] and courts have not preserved Congressional intent.[177] Because the law is confusing and unreliable, amateur musicians are unable to plan a fair or de minimis use of samples and are discouraged from producing new expressive works using this technological art form. One thing is clear: sampling can get the musician into legal trouble, causing him to pay hefty litigation fees,[178] or alternatively forcing him to relinquish the rights to his creations.[179]

The law of sampling needs a drastic overhaul to fix its present issues. With careful planning, a compulsory licensing system with an accompanying organizational structure will not only provide sample artists with simple legal guidelines to follow, but also generate more revenue for copyright holders. The license would also require sample artists to properly credit the original artist and pay royalties without any effort from the copyright holders. Increased compliance with the law among amateur musicians will result from a simpler and cheaper system. Musicians who have never sampled before will be encouraged to dabble with the possibilities. Not only will more copyright holders make money from licensing, but more people will pay for licenses, which may actually increase the total licensing revenue currently flowing into the music industry.

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173. *See* Ronson, *supra* note 139.

174. Vrana, *supra* note 8, at 859.

175. Ronson, *supra* note 139.

176. *Compare Bridgeport I*, 410 F.3d at 798 (holding that no de minimis analysis should be considered in a sampling case in which the copyright at issue is a sound recording), *with Newton*, 388 F.3d at 1192–93 ("For an unauthorized use of a copyrighted work to be actionable, the use must be significant enough to constitute infringement").

177. *See Bridgeport I*, 410 F.3d at 798 (carving out an exception from the de minimis analysis for sound recordings); *see also* MCCLELLAN, *supra* note 159 and accompanying text.

178. *E.g.*, *Westbound Records*, 2009 WL 943516, at 3.

179. *E.g.*, *Landmark Case:* Rolling Stones v. The Verve, RECYCLED BEATZ, http://recycledbeatz.tumblr.com/post/4783151146/landmark-case-rolling-stones-v-the-verve (last visited Dec. 15, 2015).

Congress has amended the Copyright Act in response to technological innovations in the past, particularly in the recording industry.[180] Although, the sampling issue is persistent; despite the fact that musicians generally sample because they love the original song,[181] nothing major has changed since Judge Duffy began his opinion in *Grand Upright Music* with the famous words, "thou shalt not steal."[182] Perhaps it is because a few major record labels and publishers hold many of the copyrights and view such a compulsory license as a chisel in their exclusive right to prepare derivative works. This Article urges the consideration of this type of solution and leaves space for readers to negotiate the license prices and other stipulations with the copyright holders that compose the opposition.

180. *See, e.g.*, Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971), amended by Pub L. No. 93-573, 88 Stat. 1873 (1974) (codified as amended at 17 U.S.C. § 102 (2006)) (enacting a new copyright for sound recordings); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.) (addressing issues regarding copyright and the Internet); *see* Pelletier, *supra* note 61, at 1202 (providing examples of times that Congress has amended the Copyright Act to accommodate new technologies in the recording industry).

181. *See* Ronson, *supra* note 139 ("[A]nd most of the time the producers who make this music are people that are at the heart of it.").

182. Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991); Pelletier, *supra* note 61, at 1201.