Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*

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"In some cases, you use a sample because its [sic] a really unique sound you want and it would be impossible to get otherwise, like [John] Bonham's kick drum [from the Led Zeppelin album "Houses of The Holy"]. . . . [You] could probably, with a lot of setup and experimentation, get the sound you are after. But it is so much faster to use a sample."—Producer/remixer Freddie Bastone.[†]

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"We're all blatantly stealing from everyone else . . . . That's just the way it's done in the '80's."—Tom Lord-Alge, Grammy award-winning sound engineer when asked about sampling.[††]

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"[The issue is] dirt simple. . . . You can't use somebody else's property without their consent. . . . [Sampling] is a euphemism . . . for what anybody else would call pickpocketing."—Joseph Pope, attorney for Gilbert O'Sullivan.[†††]

[†] Steven Dupler, *Digital Sampling: Is It Theft? Technology Raises Copyright Question*, BILLBOARD, Aug. 2, 1986, at 74.

[††] Michael W. Miller, *High-Tech Alteration of Sights and Sounds Divides the Arts World*, WALL ST. J., Sept. 1, 1987, at 1, col. 1.

[†††] R. Harrington, *The Groove Robbers' Judgment: Order on "Sampling" Songs May Be Rap Landmark*, WASH. POST, Dec. 25, 1991, at D7.

I. INTRODUCTION

This Article explores the legal implications of digital sound sampling, a practice that has revolutionized contemporary music. Many artists use sampling in composition, production, and performance.[1] Digital sampling technology enables artists to record, store, and manipulate any sound, either live or from a previous recording.[2] The sampling of copyrighted musical works poses "excruciatingly difficult legal and moral questions."[3] Because sampling is such a recent phenomenon, no specific legislative criteria govern it. At one extreme, copyright owners and studio musicians argue that digital sampling denies them just compensation for use of their work.[4] At the other extreme, artists who use samples argue that this important new technique will become prohibitively expensive if they must license each use of previously-recorded music.[5] Because almost all disputes involving the sampling of copyrighted works have remained outside the courts, few judicial standards have emerged. As a result, considerable uncertainty exists as to the circumstances under which an artist must license a sample, whether certain kinds of samples are legal, and how much, if anything, an artist should pay for

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[1] A. Dean Johnson, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits*, 21 FLA. ST. U. L. REV. 135, 136 (1993). Typically, these artists only sample very small portions of musical works, which they pick for their quintessence. *Id.* at 137.

[2] Molly McGraw, *Sound Sampling Protection and Infringement in Today's Music Industry*, 4 HIGH TECH. L.J. 147 (1989).

[3] Curt Suplee, *Snapshots of Sound*, WASH. POST, Oct. 25, 1987, at C3.

[4] *See* R. Sugarman & J. Salvo, *Sampling Gives Law A New Mix; Whose Rights?*, NAT'L L.J., Nov. 11, 1991, at 21.

[5] *See* R. Harrington, *The Groove Robbers' Judgment; Order on "Sampling" Songs May Be Rap Landmark*, WASH. POST, Dec. 25, 1991, at D1, D7. However, it should be noted at the outset that rap musicians and other samplers always have the option of hiring studio musicians or making their own sounds. In fact, rapper L.L. Cool J has toured with a band, the Beastie Boys have picked up instruments, and Hammer made his "Too Legit To Quit" album entirely without samples. *See id.* at C18.

a given use.[6] The music industry has responded to these issues by developing an *ad hoc* licensing system based on traditional notions of copyright infringement.[7] This article examines the legal status of *recognizable* samples and concludes that most unauthorized sampling of this type constitutes actionable infringement under the copyright law.

In some cases, sampling involves extensive manipulation of the data sequence of an original work to create an entirely new work. The legal status of such manipulations is unclear. While the ultimate sample is in a sense "derived" from a copyrighted work, it is not infringing as long as it is not substantially similar to the earlier work. Thus, by digitally altering an "intermediate copy," a sampling artist can appropriate the essence of another artist's work without infringing her copyright. Consequently, the author of the sampled work will not be compensated even though a significant portion of her creative effort may be embodied in the digitized manipulation. It is also possible for the creator of such *transformed*[8] samples to undermine demand for the original artist's work by introducing stylistically similar works into the market. As the ability of authors to profit from their creative endeavors diminishes, the incentives for creating new works declines. This article argues that to preserve the incentive mechanism that underlies the copyright system, it may be necessary to view the initial digital reproduction, indeed *any* such intermediate copy, as a potential infringement.[9]

As the foregoing suggests, this article covers a broad spectrum of

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[6] 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).

[7] Nancy L. McCullough, *Making the Case Against Illicit Sampling*, 26 BEVERLY HILLS BAR ASS'N J. 130 (1992).

[8] For purposes of this Article, a "transformed" sample is one that, due to various digital modifications, is no longer recognizable as a copy of its source work. Note that this use of the term describes a somewhat different concept than the notion of a "transformative" use in the fair use context, as discussed in Part V.A.

[9] William S. Coats & David H. Kramer, *Not as Clean as They Wanna Be: Intermediate Copying in* Campbell v. Acuff-Rose, 16 HASTINGS COMM. & ENT. L.J. 607 (1994).

sampling issues. Part II describes the technology used for sampling, provides a history of sampling, describes the different uses of sampling in contemporary music and contextualizes sampling within postmodern artistic practice. Part III describes current practices in the music industry, particularly the kinds of agreements that are used to license musical compositions and sound recordings. Part IV explores the question of whether sampling constitutes copyright infringement, including the issue of whether intermediate copies used to make non-infringing samples are themselves infringing. Part V examines the fair use defense in the context of sampling. Finally, Part VI concludes that most recognizable samples infringe; it also concludes that if intermediate copying is always viewed as infringement, digital technology's vast potential will never be realized.

II. WHAT IS DIGITAL SOUND SAMPLING?

A. *Sampling as a Technological Process*

Digital sampling is "the process of digitally analyzing and recording sound."[10] It also refers to the practice of using "a portion of a previous sound recording in a new recording."[11] The process of sampling consists of three stages: 1) digital recording; 2) computer sound analysis and possible modification; and 3) playback.[12]

In the recording stage, the artist makes a digital recording of a sound that is either "live" or copied from an existing recording.[13]

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[10] E. Scott Johnson, *Protecting Distinctive Sounds: The Challenge of Digital Sampling*, 2 J.L. & TECH. 273 (1987).

[11] Sugarman & Salvo, *supra* note 4, at 1.

[12] Jeffrey S. Newton, *Digital Sampling: The Copyright Considerations of a New Technological Use of Musical Performance*, 11 HASTINGS COMM. & ENT. L.J. 671, 675 (1989).

[13] Erick J. Bohlman, *Squeezing the Square Peg of Digital Sampling into the Round Hole of Copyright Law: Who Will Pay the Piper?*, 5 SOFTWARE L.J. 797 (1992).

The resulting recording, or "sample," is generally short, ranging from less than one second to approximately twenty-five seconds.[14] Although digital sampling is functionally similar to magnetic tape recording in so far as it captures and stores sounds that may be later retrieved, it provides far more control over the captured sound than does traditional analog recording methods.[15] Modern sampling technology enables artists to isolate and record specific aspects, and even particular instruments, within an existing musical recording.[16]

Once the sample is in digital form, the artist can display it on a computer screen and, if she wishes, alter its wave form to change its sonic characteristics.[17] For example, an artist could sample a short "riff" performed by jazz trumpeter Miles Davis and change its pitch, process it using digital delay effects, and "loop"[18] it together to create a continuous and utterly transformed ambient effect as a background element in a new work.[19] Similarly, an artist could sample a single, distinctive drum sound and use it to program an entirely new rhythm.[20] In this way, digital sampling can reduce studio and musician costs, and it can relieve the pressure placed on producers and sound engineers to achieve the "right" sound.[21]

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14 Johnson, *supra* note 10, at 274.

15 *Id.* at 273.

16 Bohlman, *supra* note 12, at 804.

17 Johnson, *supra* note 10, at 274 (citing Tully, *Choosing the Right Sampler*, ELECTRONIC MUSICIAN, Dec. 1986, at 30).

18 "Looping" is the term used to describe the process whereby artists utilize a digital sound sampling device to continually repeat a short musical phrase. *See* Dominic Milano, *E-MU Emulator II Digital Sampling Keyboard*, KEYBOARD, Jan. 3, 1985, at 72. Looping allows an artist to take a central segment of a sound and have it repeat as long as the appropriate key on the triggering device is held down.

19 Johnson, *supra* note 10, at 274.

20 Bohlman, *supra* note 13, at 800. "To the people who record modern music, drum sounds are like vintage wines: ethereal commodities imbued with rich personalities much coveted." Steven Levy, *Push Button Rock*, ROLLING STONE, Nov. 21, 1985, at 108. Perhaps the drum sound which sells the most frequently is that of the late Led Zeppelin drummer, John Bonham. *Id.*

21 Johnson, *supra* note 10, at 275. Economic pressure has propelled the use of samples in recording studios. *Id.* One successful New York jingle producer states: "We can replace 50 instruments with one player and one keyboard."

Ultimately, an artist can play back the recorded sounds and mix them with other sounds by using a triggering device, such as a specialized keyboard or drum machine.[22] In this manner, the artist can cut and paste sampled sounds into a new musical context, either in original or modified form.[23]

B. *The History of Sampling*

Although the wide-spread use of sampling is a fairly recent phenomenon, the technique was first developed in Jamaica during the 1960s by disc jockeys (DJs) who began experimenting with "dub," a musical form that involves mixing disparate sounds into a single work. Using portable sound systems, these DJs manually combined segments from Jamaican and non-Jamaican records, often chanting or scatting vocals over the mix.[24] Jamaican-born DJs like Kool DJ Herc introduced dub in the United States.[25]

Throughout the 1970s, American and Jamaican DJs developed new techniques—such as "scratching," using a beat box to accentuate the pulse of records, and seamlessly fading one record into the next—that have since become common elements in contemporary rap and hip-hop music. However, despite these important technical innovations, the

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Knowles, *Human Beings & High Tech-Find the Best Mix*, BACKSTAGE, Apr. 25, 1986, at 5. Not surprisingly, this attitude makes studio musicians nervous; and, as discussed in Part V.C., it also raises some important questions about preserving creative incentives under copyright law.

[22] Bohlman, *supra* note 13, at 805 (citing Steven Dupler, *Digital Sampling: Is It Theft?*, BILLBOARD, Aug. 2, 1986, at 1, 71).

[23] Bruce J. McGiverin, *Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds*, 87 COLUM. L. REV. 1723, 1725 (1987).

[24] Randy S. Kravis, *Does a Song by Any Other Name Still Sound as Sweet?: Digital Sampling and Its Copyright Implications*, 43 AM. U. L. REV. 231 (citing David Sanjek, *"Don't Have to DJ No More": Sampling and the "Autonomous" Creator*, 10 CARDOZO ARTS & ENT. L.J. 607 (1992)).

[25] *See* Sanjek, *supra* note 24, at 611 (listing Theodore, Afrika Bambaataa, and Grandmaster Flash as deejays who, along with Kool DJ Herc, made dubbing a popular practice in the U.S. during 1970s).

scope of a DJ's artistic expression still remained limited to the extent of his or her own manual dexterity.[26]

Fueled by the success of ground-breaking rap albums that used dub techniques,[27] digital sound sampling emerged in the early 1980s with the advent of the MIDI synthesizer,[28] a device that offered sampling artists unlimited possibilities for experimenting with prerecorded music.[29] Over time, the availability of digital technology transformed sampling from being a performance medium practiced primarily by DJs to a studio recording technique practiced primarily by sound engineers and programmers. Today, digital sampling has become so pervasive that many musicians and engineers now regard it as being "indispensable in the music industry."[30]

C. *Recognizable and Transformed Samples in Contemporary Music*

Although this Article focuses on sampling within the context of rap music, sampling technology has given rise to a wide variety of musical practices; it is thus useful to think of sampling in terms of broad categories of use, which are distinguishable in terms of the amount of sampling used, the context of the sample, and the extent to which the artist has digitally manipulated the sample.

Most rap artists use a combination of familiar and obscure samples

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[26] *Id.* at 611-12.

[27] Two albums, "Rappers' Delight" by the Sugar Hill Gang and the self-titled album "Fatback and their DJ, Big Tim III," revolutionized rap music by being the first to use previously recorded music. *See* David Toop, THE RAP ATTACK: AFRICAN JIVE TO NEW YORK HIP-HOP 15-16 (1984); Jason H. Marcus, Note, *Don't Stop That Funky Beat: The Essentiality of Digital Sampling to Rap Music*, 13 HASTINGS COMM. & ENT. L.J. 767, 770-72 (1991) (explaining that both Sugar Hill Gang and Fatback and their DJ, Big Tim III, borrowed heavily from "Good Times" by the disco group Chic).

[28] The system of electrical equipment needed for sampling is often called a Musical Instrument Digital Interface (MIDI). Sanjek, *supra* note 24, at 612.

[29] Kravis, *supra* note 24, at 239.

[30] Reich, *Send in the Clones, The Brave New Art of Stealing Musical Sounds*, CHI. TRIB., Feb. 15, 1987, § 13 (The Arts Magazine), at 8.

which, despite possible digital modifications, are generally recognizable as copies of their source material. Some works predominantly sample familiar songs and, thereby, ask the listener to consider the samples in a new context. Examples of this category include: Run DMC's "Walk this Way," which incorporates elements from Aerosmith's original recording; and Hammer's "U Can't Touch This," which is structured around a repeated riff from Rick James' "Super Freak."[31] Sometimes even when the source of the sample is unfamiliar, the sample itself has become recognizable because it has been used by other artists.[32] Because the emphasis in most rap recordings is on the rhyme of the lyrics and the beat supporting it, sampling is often sparse in this context. However, some rap artists, like Public Enemy, deliberately crowd their works with an almost oppressive amount of sampled and non-sampled sounds. This sub-genre arguably reflects the "chaos of society by metronometrically replicating the din and collisions of a traumatized civilization."[33]

A newer form of sampling involves digitally manipulating samples to the extent that they are no longer recognizable as copies of their source materials—which may consist of existing copyrighted recordings or new recordings of "found" sounds such as a conversation or the bounce of a basketball. Many contemporary songs consist of nothing more than synthesizer effects and loops of unrecognizable samples overlaid with vocals and occasional "live" instrumentation.[34] Although the boundaries dividing various genres of popular music are rapidly disintegrating, the use of such *transformed* samples is particularly common in the "industrial" music of artists like Nine Inch Nails and Ministry as well as the "techno"

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31 Sanjek, *supra* note 24, at 613.

32 For example, the work of James Brown's drummer, Clyde Stubblefield, on a minor 1971 hit "Funky Drummer" has been sampled by various artists including Sinead O'Connor, Fine Young Cannibals, Big Daddy Kane, the Good Girls, Grace Jones, Mantronix, and Public Enemy. *Id.*

33 *Id.*

34 Note that this suggests a radically different way of composing music. Rather than "jamming" in a rehearsal space with traditional electric and acoustic instruments, this newer generation of composers engage in a form of music making that approximates computer programming.

dance music[35] performed by artists such as Moby.[36]

Sampling can also be used to make alternative versions of existing songs. Today it is common for producers such as Rick Rubin, Jellybean Benitez, and Flood to "remix" popular songs. This process involves reinterpreting original songs through digital manipulation, often by adding new samples.

To summarize, sampling technology can be used in a variety of ways. Sometimes the sample appears in a form that is "substantially similar" to its source. Other times the final version of the sample is no longer recognizable as a copy of its source material. As Part IV illustrates, this distinction becomes important in cases where the owner of the source material seeks to bring a copyright infringement suit against the sampling artist.

D. *Sampling as a Postmodern Art Form*

Cultural critics have employed the proudly ambiguous term "postmodernism" to define a style, a movement, a period, and a condition of contemporary culture.[37] Despite its imprecision, the

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[35] I am here using the term "techno" broadly to encompass other dance forms such as "house," "rave," "acid jazz," "ambient," and so on.

[36] Although traditional rock bands consist of four to six members, industrial "bands" and techno dance DJs typically consist of one or two members who make extensive use of programming and samples, and who hire studio musicians as needed.

[37] In his now classic essay, *Postmodernism and Consumer Society*, Fredric Jameson defines postmodernism as the cultural logic of late capitalism. He argues that the ability of individuals living in the post-war era to form consistent social identities has been seriously undermined by the emergence of new cultural forms that no longer represent stable reference points for individual and collective action. For Jameson, the collapsing of boundaries and the inability of individuals to make distinctions indicates the end of any valid critical position from which to evaluate culture—that is, we have lost the ability to map our position as individual subjects within the great global communication network. Jameson laments the disappearance of a sense of history and the obliteration of "traditions of the kind which all earlier social formations have had in one way or another to preserve." Frederic Jameson, *Postmodernism and Consumer Society*, *in* THE ANTI-AESTHETIC 111-15 (Hal Foster,

ed., 1983).

Jameson characterizes postmodernism in terms of "pastiche" and "schizophrenia." The great modernisms, says Jameson, were predicated on the assumption of an authentic self having the capacity to "generate its own unique vision of the world and to forge its own unique, unmistakable style." Arguing against this position, the post-structuralists assert that the very conception of the unique individual is ideological. "Not only is the bourgeois individual subject a thing of the past, it is also a myth, it never existed in the first place." It was just a mystification. *Id.*

In place of modernist parody, postmodernism relies on "pastiche"—mimicry without satire, "without that still latent feeling that there exists something normal to which what is being imitated is rather comic." Given the decline of the unique self as well as the disintegration of the forms and standards that existed in classical modernism, it is "no longer clear what the artists and writers of the present period are supposed to be doing." No longer, says Jameson, is it possible to invent new styles and worlds—they have already been created. This imprisonment in the past necessarily leads to an imitation of dead styles or "pastiche." The practice of pastiche can be seen in the nostalgia film. Incapable of dealing with time or locating ourselves historically, we are "condemned" to seek our roots in stereotypes and pop images. We have lost genuine contact with the historical past forever. *Id.* at 114-17.

To address the problem of time in postmodernism, Jameson draws from Lacan's theory of schizophrenia as a language disorder. Schizophrenia emerges from the failure of the infant to enter fully into the realm of speech and language. In this way, schizophrenia can be seen as the "breakdown of the relationship between signifiers." For Lacan, the experience of temporality (i.e., past, present and future) is an effect of language (sentences move linearly through time). Since the schizophrenic cannot recognize the time element in language, she cannot experience temporal continuity. Instead the schizophrenic "is condemned to live in a perpetual present with which the various moments of his or her past have little connection and for which there is not conceivable future on the horizon . . . [S]chizophrenic experience is an experience of isolated, disconnected, discontinuous material signifiers which fail to link up in a coherent sequence." As meaning is lost, the literality and materiality of words becomes obsessive. Thus signifiers lose their signifieds and are transformed into images. *Id.* at 118-19.

There are several apparent links between Jameson's description of postmodernism and sampling. First, the samples themselves are often imitations of dead styles—that is, they are bits of "pastiche." Sampling practice actually seems to lend support to Jameson's exaggerated notion that contemporary artists are condemned to recycle pop stereotypes, since everything has already been invented. Second, the intermixing of samples from disparate musical genres and periods produces a "schizophrenic" text in which the relationship between signifiers tends

term suggests a widespread decline in the authority and appeal of modernism and the "emergence of a new sensibility and epistemology breaking with and/or opposed to the modernist paradigm in the whole range of artistic and intellectual endeavor."[38] It remains unclear, however, whether postmodernism represents a decisive break with modernism or is simply a continuation of it.[39] As a result, the concept of collage practice has acquired special significance.

A number of commentators have compared the sampling practices of rap music with modernist collage, particularly the audio collage practices of artists like Kurt Schwitters.[40] However, as Will Straw points out:

> The operations of rock culture over the last decade have been directed less at a disruption or opening up of hegemonic forms—following upon the eclecticism of the 1970s, what would these be?—than at elaborating ceremonial forms of grounding or containment. The importance of this grounding is what distinguishes these texts and cultural forms from the collagist practices of modernism.[41]

The distinction between the modernist collage and the postmodern "grounded" text can be seen when one compares, for example, the modernist "tone poem" (*i.e.*, structureless "noises") with a rap song which recontextualizes sound fragments against a driving, mechanical beat. Sample-laden pop music is unlike modernist collage because it reworks historical styles and imageries across a consistency of rhythm and within formal limits such as traditional verse-chorus structures and

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to break down, undermining traditional musical meaning.

[38] Robert Dunn, *Postmodernism: Populism, Mass Culture, and Avant-Garde*, *in* 8 THEORY, CULTURE & SOCIETY 111 (1991).

[39] *Id.*

[40] *See, e.g.*, Alan Korn, Comment, *Renaming that Tune: Aural Collage, Parody and Fair Use*, 22 GOLDEN GATE U. L. REV. 321 (1992) (Tracing contemporary rap and dance music back to Schwitters and the Musique Concrete movement, Korn asserts, "Widespread use of the digital sampling equipment in the 1980s enabled avant garde collage techniques to enter the musical mainstream.").

[41] W. Straw, *Music Video in its Contexts: Popular Music and Postmodernism in the 1980s*, 7/3 POPULAR MUSIC 256 (1988).

lengths.[42] Without such formal limits, the compositions would cease to be "songs" and would thus lose their commercial viability. For the most part, rap compositions consist of a primary text (*i.e.*, the "song") and sampled texts which are mixed into the primary text.

The postmodern sample artist has a nomadic attitude, treating all genres of music as interchangeable building blocks and advocating "the reversibility of all the languages of the past." He constructs a primary text out of loops and synthesizer effects, and then *writes over* this text with other samples, in effect, puncturing one sign system in the name of another. These multidirectional digressions weave together otherwise irreconcilable references and cultural temperatures. The contiguity of clashing styles that results often bewilders traditional musical meaning.[43] At the same time, the gravitational effect of the underlying disciplinary structure gives continuity to these intertextual clashes, smoothing them out with a hypnotic beat and making the overall decentering effect orgiastic rather than unpleasurable.[44]

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[42] *Id.* Given the fact that collage was powerfully employed within the modernist tradition by the surrealists and others (most notably Picasso), standing alone collage is clearly an inadequate indicator of the difference between modernist and postmodernist artistic practice. Postmodernist techniques often rework and intensify older modernist techniques. The important difference seems to be that while modernist practitioners like Walter Benjamin used collage technique as a means to shake up the dominant culture as a part of a larger utopian social project, postmodernists insist that we can no longer aspire to a unified representation of the world. Thus, collage has become the dominant form of postmodern discourse, not as a strategy in a larger utopian project, but rather as a fragmented reflection of the cultural logic of late capitalism. Schizophrenia has become a cultural norm rather than a catalyst. Avant garde techniques have lost their shock value; today, they are simply entertainment.

[43] This section draws from a discussion of postmodernist painting in FREDERIC JAMESON, POSTMODERNISM OR THE CULTURAL LOGIC OF LATE CAPITALISM 174-75 (1991) (citing ACHILLE BONITO-OLIVA, THE INTERNATIONAL TRANS-AVANTGARDE 6, 18-20, 24, 56-58 (1982)).

[44] *C.f.* Roland Barthes' distinction between pleasure and *jouissance* (perhaps best translated as "sublime physical and mental bliss"). Barthes suggests that we strive to realize the second, more orgasmic effect (note the connection to Jameson's description of schizophrenia) by enacting a creative rather than merely receptive approach toward the otherwise lifeless cultural artifacts that litter our social landscape. Postmodernism, he argues, allows us to deconstruct and move beyond

It might be said that rap artists like the Beastie Boys *reproduce* music whereas frequently-sampled artists like James Brown *produce* music. This is not so much a value judgment as an observation about technique. The same could be said, for example, of a comparison between Manet's technique in producing *Olympia* and Rauschenberg's technique in *re*producing Rubens' *Venus* in *Persimmon*. Although Manet models his seminal modernist work on Titian's *Venus*, he actively breaks away from the style of the original painting by introducing a radical flatness, by applying the paint in a deliberately "material" rather than illusionistic manner and by making his central figure a prostitute rather than a goddess. Rauschenberg, by contrast, simply silkscreens photographic "originals" of numerous themes including the Rubens *Venus* directly onto his canvas. Postmodernists like Rauschenberg dispense with the modernist "aura" of artist.[45] In postmodern works, the fiction of the creating subject gives way to "frank confiscation, quotation, excerption, accumulation and repetition of already existing [texts]."[46]

Whereas the modernist movement sustained a critical position *vis-a-vis* the dominant culture, postmodern art forms, even in their most subversive configurations—punk, for example—are "all taken in

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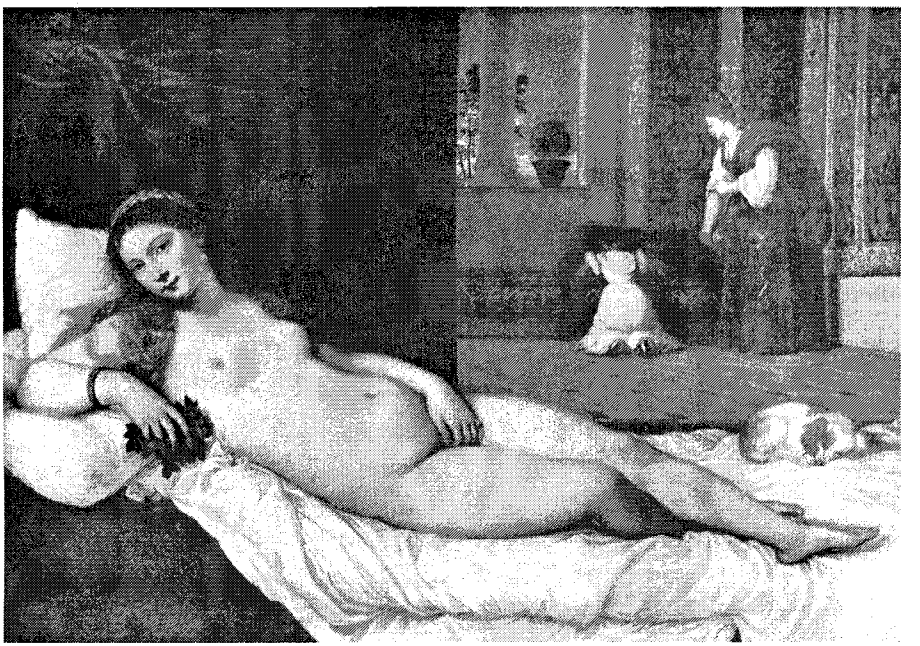
arcane aesthetic distinctions between "high" and "low" art. Andreas Huyssen, however, criticizes Barthes, arguing that his approach to the high-brow/low-brow distinction avoids the whole problem of the potential debasement of modern cultural forms by their assimilation into pop culture through pop art. "The euphoric American appropriation of Barthe's *jouissance* is predicated on ignoring such problems and on enjoying, not unlike the 1984 yuppies, the pleasures of writerly connoisseurism and textual gentrification." DAVID HARVEY, THE CONDITION OF POSTMODERNITY 57-58 (1989).

[45] *I.e.*, the so-called "death of the subject." According to Calvin Tomkins,

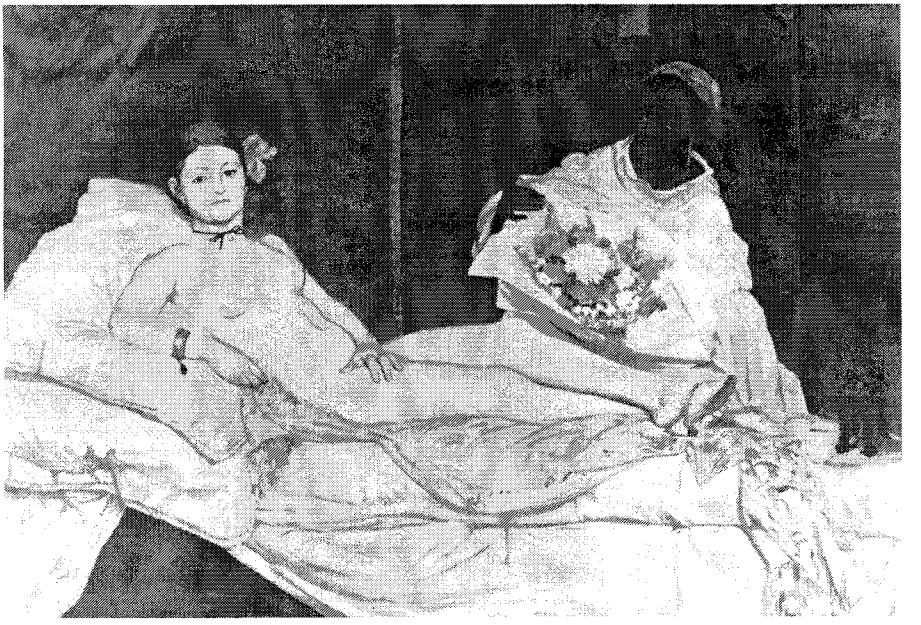
> Rauschenberg . . . wanted the viewer to do much more than sit back and be entertained (or bored) . . . . [He] wanted [the viewer] to participate with his enlivened imagination, to assume responsibility for the creative process along with the artist; if someone was bored, it meant that he was boring himself by refusing to enter into the new spirit.

CALVIN TOMKINS, OFF THE WALL: ROBERT RAUSCHENBERG AND THE ART WORLD OF OUR TIME 239 (1980).

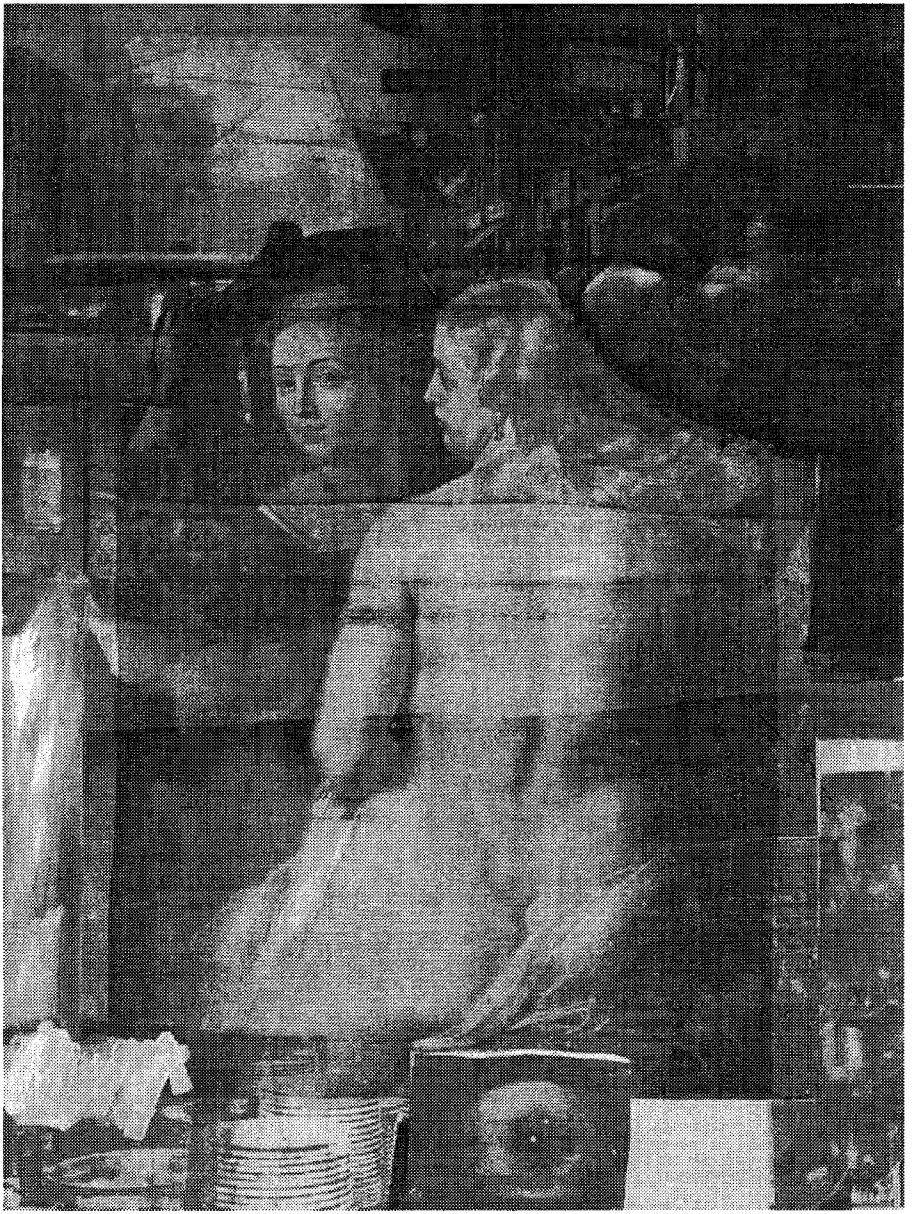
[46] HARVEY, *supra* note 43, at 54-55.



Titian, *The Venus of Urbino,* Uffizi, Florence.



Edouard Manet, *Olympia,* Musee du Louvre, Paris.



Robert Rauschenberg, *Persimmon.*

stride by society" and, unlike so many high modernist works, are commercially successful. Today, fashion and advertising feed off postmodern forms in an unprecedented manner. Thus, rather than embodying a critical or oppositional stance towards mass society, postmodernist art tends to simply reinforce the logic of consumer capitalism.[47]

It might be argued that some "afrocentric" rap artists like Public Enemy strive towards a political practice that, not unlike the modernist avant garde, seeks to shake up mainstream culture. From this perspective, rap music is about *taking* and *reclaiming*. Rather than simply providing a convenient and inexpensive means for music making, sampling enables afrocentric artists to literally take back popular culture, empty it of its mainstream connotations, and use it to convey their own politicized message.[48] The difficulty with this position is that artists like Public Enemy have become heroes, not so much to black militants as to white suburban youth—who have discovered that militant rap music is a particularly effective means for torturing their parents.[49] Postmodern culture has little difficulty in absorbing, sanitizing, and commodifying this kind of "subversive" music.

Sampling is often criticized for making pop music increasingly

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[47] JAMESON, *supra* note 37, at 124-25.

[48] In addition, by sampling historic black artists like Bob Marley, Jimi Hendrix, and George Clinton's Parliament-Funkadelic, some rap artists pay homage to the roots of African-American music. Marcus, *supra* note 27, at 773.

[49] By framing their oppositional stance in racial terms, "afrocentric" rappers seem to have been unprepared for the white audiences they attract. They announce their hatred for the "other man," and then see the children of that "other man" dancing to their music. It seems that many white listeners simply love the beat and screen out the racial themes. *See* MARK COSTELLO & DAVID FOSTER WALLACE, SIGNIFYING RAPPERS: RAP & RACE IN THE URBAN PRESENT 31 (1990).

It is also worth noting that socially-conscious rap artists like Public Enemy and KRS-One are few and far between. Unlike their New York counterparts, "gangsta" rappers from Los Angeles disclaim all ideology except the "primitive accumulation of wealth by any means necessary." MIKE DAVIS, CITY OF QUARTZ 87 (1990). According to Eazy-E, a former member of NWA (Niggers With Attitude), "We're not making records for the fun of it, we're in it to make money." *Id.* Eazy-E has since died of AIDS.

redundant,[50] for putting musicians out of work,[51] and for enabling "no-talents to steal the creative work and sounds of their betters."[52] At the same time sampling has promoted the development of new postmodern musical forms such as rap, techno, and industrial.[53] While it is apparent that the use of sampling is largely driven by economics, it is equally important to recognize that appropriation art signifies in a different manner than prior artistic practice.[54] For example, if Robert Rauschenberg were to paint his interpretation of Rubens' *Venus* rather than appropriating a photographic reproduction

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[50] Baroni, *supra* note 6, at 73.

[51] Ronald Mark Wells, Comment, *You Can't Always Get What You Want But Digital Sampling Can Get You What You Need!*, AKRON L. REV. 691 (Spring 1989). "Many previously sought-after musicians who have created a distinctive sound for themselves are now being undersold by samples of their own work." *Id.* at 700.

[52] J. Takiff, *High Tech and Art*, ST. LOUIS POST DISPATCH, May 5, 1988, at 4F.

[53] It is important to note that subjective opinions as to whether these forms constitute "art" are irrelevant with regard to copyright's aim of promoting artistic endeavor. *See, e.g.*, Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-52 (1903) (holding that copyrightable "authorship" should not be judged by standards of merit).

[54] One commentator describes the significance of appropriation art as follows:

> Appropriation is one of the most pervasive modes of contemporary artistic expression in large part because it is so effective as a form of communication . . . . Appropriation acts as a kind of enhanced language in which the artist makes the audience aware of the significance of otherwise commonplace and increasingly obscured objects. Everyday images such as soup cans, flags, cigarette packages, money, movie stars, comic strips and even shopping bags—the representations of which ordinarily serve as cultural symbols—are transformed into a language through which these artists communicate their message. The modes of representation of these objects and the level of their incorporation varies widely. Yet the creative significance of all forms of appropriation—whether collage or replication—derives from its ability to speak critically of the society in which both the publica and the artist live.

Roxana Badin, *An Appropriate(d) Place in Transformative Value: Appropriation Art's Exclusion from* Campbell v. Acuff-Rose Music, Inc., 60 BROOK. L. REV. 1653, 1656 (1995).

of it, he would be making a very different artistic statement. By the same token, rap artists would communicate a very different message if they were to hire studio musicians instead of looping and juxtaposing samples. If we as a society decide that artists like Rauschenberg should be able to appropriate copyrighted texts, then sampling artists should have the same privilege (after all, even Rauschenberg sells a fair share of mass-produced reproductions). On the other hand, even if we value this kind of artistic production, it does not necessarily follow that artists should be able to appropriate copyrighted works without compensating the original authors.[55] At some point, we must decide whether the need to protect the original author's creative incentives should be subordinated to other social policy goals.

III. THE MUSIC INDUSTRY'S CURRENT APPROACH TO LICENSING SAMPLES

Although it is generally recognized within the music industry that sampled artists are entitled to some legal protection under federal copyright law,[56] efforts to reach an industry-wide agreement on rates

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[55] The courts have not yet ruled on the legality of appropriation. However, several cases have been settled. Robert Rauschenberg reached a settlement with commercial photographer Morton Beebe, whose photograph Rauschenberg incorporated into a print. Larry Rivers settled with photographer Arnold Newman following a suit over Rivers's incorporation of a portion of one of Newman's photographs into a Rivers print. Andy Warhol gave copies of his work to photographers who threatened to sue him over his use of their photos in his work. Patricia Krieg, Note, *Copyright, Free Speech, and the Visual Arts*, 93 YALE L.J. 1565, 1568 n.18 (1984) (citing Gay Morris, *When Artists Use Photographs: Is it Fair Use, Legitimate Transformation or Rip-Off?*, ARTNEWS, Jan. 1981, at 102, 105 (1981)).

[56] McCullough, *supra* note 7, at 130. *See* Part IV for a discussion of sampling and copyright.

and procedures for "clearing" samples have been unsuccessful.[57] Consequently, record companies, music publishers, and artists have developed an *ad hoc* negotiated licensing scheme to address the issue of compensation for sampled artists.

Record companies typically place the legal burden of clearing samples on their artists.[58] This requires an individual artist to keep track of the samples she uses and then, usually by enlisting a "clearing house,"[59] to obtain the necessary licenses for each song: one for the

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[57] There is a question as to whether such an agreement would violate the antitrust laws. Summits and conferences have been convened at the Annual New Music Seminar since 1989. These sessions have been largely unproductive in reaching an industry-wide consensus on sampling, but have served to demonstrate the divergent strategies pursued by the various parties who are involved with the sampling issue. *See* Steven R. Gordon & Charles J. Sanders, *The Rap on Digital Sampling: Theft or Innovation?*, N.Y.L.J., Apr. 28, 1989, at 5, 6. The term "clearing" refers to the process of obtaining a license to use a sample.

[58] In theory, this arrangement should prevent all unauthorized use of recognizable samples by established artists. Warner Brothers Records has a special department to obtain "clearance" for samples. Brown Deposition of 11/19/91 at 30 et seq., cited in Grand Upright Music Ltd. v. Warner Brothers Records, Inc., 780 F. Supp. 182, 185 (S.D.N.Y. 1991). According to Warner Brothers' spokesperson Bob Merlis, while the label will assist artists in obtaining clearance, they have structured their contracts to indemnify the record company in the event that permission is not granted. Melinda Newman & Chris Morris, *Sampling Safeguards Follow Suit; Biz Markie Ruling Prompts Label's Action*, BILLBOARD, May 23, 1992, at 80. PolyGram and Capitol Records also have placed the legal burden of obtaining sampling permission on their artists. *Id.* Rand Hoffman, PolyGram's Senior Vice-President of Business Affairs, reports that his company requires artists to keep a log of each song that they sample so that their legal department can evaluate the use. *Id.* Larry Kenswil, Senior Vice-President of Business and Legal Affairs for MCA music Entertainment Group, says that his company will not release a record before an agreement to use the sample has been arranged. As he told *Billboard* magazine, "If there's a sample on a record that isn't cleared, I can't think of an occasion where we would put the record out." *Id.*

[59] Because clearing houses are not always reliable, some labels have begun to clear the samples in-house. Even when the legal burden to clear samples ultimately rests on the artist or her producer, it is in the record company's interest to keep its artists from getting embroiled in litigation.

musical composition and one for the sound recording.[60] To obtain these licenses, the clearing house or other artist representative negotiates with the owner of the copyrights to the sampled song,[61] which is usually a music publishing company. In negotiating the licensing fees, the respective parties take several factors into account, including the stature of the sampled artist, the stature of the sampling artist, the success of the sampled song, the duration of the sample, the content of the sample (*e.g.*, is it a distinctive "hook" or merely a drum beat?), the context of the sample (*e.g.*, is it essential to the new composition or is it merely atmospheric?), whether the sample will appear in a subsequent promotional video, and so on. Failing to clear a sample can be costly because copyright holders increasingly monitor new releases[62] and demand large settlements when they detect an

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[60] The Copyright Act of 1976 recognizes separate copyright protection in musical compositions and in sound recordings. *See* 17 U.S.C.A. § 102(a) (West 1996).

[61] As a practical matter, a sampler would not use the compulsory mechanical license provision of 17 U.S.C.A. § 115. The sampler's record company would be unwilling to pay the royalty charge for a "cover" for each sample contained within a song. Because a song that uses digital sampling is likely to contain many samples, the cost of numerous compulsory licenses would render sampling prohibitively expensive. *See generally* 17 U.S.C.A. § 115 (West 1996 & Supp. 1996).

[62] Jeffrey H. Brown, Comment, *They Don't Make Music The Way They Used To: The Legal Implications of Sampling in Contemporary Music*, 1992 WIS. L. REV. 1941, 1944 (1992). For example, EMI Music Publishing has a full-time staff of six people who search for unauthorized samples of their copyrighted materials. John Leland, *The Moper vs. the Rapper*, NEWSWEEK, Jan. 6, 1992, at 55. James Brown, who is frequently sampled by rap artists, has retained legal counsel to protect his copyright interests. *I Feel Good*, LEGAL TIMES OF WASH., Dec. 30, 1991, at 3. Salsoul Records, a label whose disco catalog has often been sampled, ran an announcement in *Billboard* magazine stating that it would take legal action against unlicensed samplers. BILLBOARD, May 16, 1992 (Advertisement), at 85. In order to deter samplers, Frank Zappa placed the following warning on one of his albums: "Unauthorized reproduction/sampling is a violation of applicable laws and subject to criminal prosecution." FRANK ZAPPA, JAZZ FROM HELL (Barking Pumpkin 1986).

unauthorized use of their material.[63] Although the music industry's private licensing system is *ad hoc*, it enables the parties to avoid the considerable expense of copyright infringement litigation.[64]

A. *Licensing Musical Compositions*

The music industry has developed three types of license agreements for music compositions. First, the artist may buy out the copyright owner for a flat fee. Second, the parties may negotiate a mechanical license fee whereby the copyright owner receives a payment for each record sold. Third, the parties may enter a co-publishing deal in which the owner of the sampled composition retains a legal and/or financial interest in the new work.[65]

Publishers generally prefer to license samples rather than sell the rights to the underlying composition. This is because licensing samples enables publishers to expand their potential sources of revenue.[66] Accordingly, most publishers seek a co-publishing arrangement that grants them a share of either a percentage of the copyright in the new composition or in the revenue that it generates. Although the publisher's interest in the new composition can range widely, fifty percent splits are common.[67]

The modified compulsory mechanical license—or "income share agreement" as it is sometimes called—is something of a compromise between the flatfee buyout and the co-publishing deal. Under this type of agreement, the copyright holder allows his work to be sampled in exchange for a royalty payment for each unit sold of the

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[63] For example, Gilbert O'Sullivan's lawyer claimed that Biz Markie "dictated the terms of the settlement." Mark Kemp, *The Death of Sampling?*, OPTION, Mar./Apr. 1992, at 17.

[64] McCullough, *supra* note 7, at 131. The expense of litigation and settlements partly explains why so few sampling cases have been filed to date. *Id.*

[65] Brown, *supra* note 62, at 1956.

[66] *Id.* at 1957 (citing Sugarman & Salvo, *supra* note 4, at 21).

[67] *Id.*

new song.[68] This arrangement differs from the co-publishing deal, because the original copyright owner receives a sales-based income stream, but he retains no ownership interest.[69] However, some publishers prefer to receive compensation based on revenues rather than enter into a co-publishing arrangement, because this enables them to profit from the new song's success without exposing themselves to potential infringement suits which may be brought by the owners of the other samples on the record.[70]

B. *Licensing Sound Recordings*

Licenses for sampling sound recordings generally take two forms. The first is a "flat-fee buyout," whereby the rights to the sample are purchased for a single lump sum payment. The second alternative is for the sampler to pay a set royalty for each unit sold.[71]

Owners of the original master recordings typically prefer to license samples for a flat fee.[72] However, on some occasions, the

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[68] *Id.* A publisher would receive a fixed percentage of the statutory rate set by the Librarian of Congress. At a 1991 meeting of the Copyright Society of the South, Don Biederman, Warner/Chappell Music's Senior Vice-President of Legal and Business Affairs, reported that the average fee that his company charged samplers was one-fourth to three-fourths of the statutory rate. E. Morris, *Copyright Society of the South Meet Focuses on New Technology*, BILLBOARD, Feb. 23, 1991, at 79.

[69] Brown, *supra* note 62, at 1957.

[70] *Id.* at 1957 n.85. Records that contain samples often contain many samples. If a publisher becomes a co-publisher of a work that uses sampling, that publisher is exposed to liability for any other musical works that may have been infringed in the creation of the new work. *Id.*

[71] *Id.* at 1957.

[72] Increasingly, such licenses convey only the rights to use the sample in an audio recording. The copyright statute recognizes a distinct property interest in a sound recording. 17 U.S.C.A. § 102(a) (7) (West 1996). This synchronization right allows the copyright owner to integrate a sound recording into a film, television program, or video. If a "sight and sound" license is desired, the sampler will likely have to pay a higher fee. *See* Sandra Bodowitz, *"Sampling;" A Lawyer's Nightmare*, L.A. DAILY J., June 3, 1991, at 21.

parties may instead agree on a royalty payment scheme. This is most likely to occur in cases where the sampled artist believes that the new recording will be successful, and she would like to share in the profits. A royalty arrangement may also be desirable in cases where the artist seeking the sample cannot afford a flat-fee payment. However, in this situation, an advance against royalties may still be required.[73]

The policies of the music industry regarding sampling continue to evolve in light of each new legal challenge and publicized settlement. However, the prohibitive expense of litigation and the industry's strong desire to resolve conflicts internally have prevented most sampling disputes from reaching the courtroom. Record companies that represent sampled artists are reluctant to sue other record labels because they fear that one day they will be sued themselves; they also recognize that their own artists may want to sample the other labels' artists in the future. Thus, record companies have strong economic incentives to avoid engaging in a vicious circle of suits and counter suits.[74]

C. *The Limitations of Enacting a Compulsory Licensing Scheme*

A lack of applicable case law combined with an increased use of digital sampling has led a number of commentators to propose a compulsory licensing scheme for clearing samples.[75] This scheme would be roughly analogous to the one currently used for licensing cover versions of copyrighted songs.[76] The rate for the license would be established by statute and would consist of either a multi-

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[73] *Id.*

[74] Marcus, *supra* note 27, at 781-82.

[75] *See, e.g.*, Note, *A New Spin on Music Sampling: A Case for Fair Pay*, 105 HARV. L. REV. 726 (1992) [hereinafter *New Spin*]; Brown, *supra* note 62, at 1988-89; Baroni, *supra* note 6, at 68, 93-104; Kravis, *supra* note 24, at 273.

[76] *See* 17 U.S.C.A. § 115 (West 1996 & Supp. 1996). Under §115 of the Act, an artist can obtain a compulsory license for any song as long as he does not change the "basic melody or fundamental character" of the original. *Id.*

tiered schedule[77] or a base fee and a per-second charge for each sample used.[78] Such a scheme could be administered by the Librarian of Congress.[79] Proponents argue that this arrangement would lower transaction costs and compensate authors more quickly by setting a uniform rate for samples.[80]

There are a number of difficulties with using a compulsory license scheme for clearing samples. First, most of these proposals fail to take account of the fact that samples vary drastically in terms of their qualitative value. For example, there is a world of difference between sampling a "hook" and sampling a background element. The proposed licensing schemes that do attempt to take account of this distinction usually suggest a multi-tiered payment structure that is at least as administratively cumbersome as current industry practice.[81] In addition, there is no guarantee that the rates set by the Librarian of Congress would be any less "arbitrary"[82] than current rates, because applying a multi-tiered, multi-factor test would inevitably involve making subjective judgments. Finally, while copyright does not distinguish between copying major and minor talents, the industry's current practice places significant emphasis on the stature of the sampled artist and the success of the sampled song. In light of this industry custom, it would make little sense for Congress to enact a compulsory licensing scheme. It would inevitably fail to take into account the difference in market value between a sample of a superstar

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77 *See, e.g.*, *New Spin*, *supra* note 75, at 743-44.

78 *See, e.g.*, Baroni, *supra* note 6.

79 *See* Brown, *supra* note 62, at 1989. Brown refers to the Copyright Royalty Tribunal, but in 1993 Congress abolished that Tribunal. The Librarian of Congress now has the authority to appoint Arbitration Panels and to set royalty rates. *See* 17 U.S.C.A. §§ 801-803 (West 1996 & Supp. 1996).

80 Brown, *supra* note 62, at 1989.

81 *See, e.g.*, *id.* One industry insider has described compulsory licenses as an "accounting nightmare" and added that "this is not an area where government intervention would be desirable." Telephone interview with Susan Genco, Director of Business & Legal Affairs, Arista Records (Apr. 20, 1995).

82 *New Spin*, *supra* note 75, at 742. This commentator justifies a compulsory license scheme because, in the absence of clear judicial standards, the current rates are "arbitrary at best (and inequitable at worst)." *Id.*

and a sample of an unknown. Such distinctions are best left to private negotiation.

The second chief difficulty with most compulsory license proposals is that they fail to adequately address the rights of the author. Although moral rights are scarcely recognized in the United States, § 115 of the Act grants musicians the right to "cover" another artist's song *as long as* they do not change the "basic melody or fundamental character" of the original.[83] By contrast, the whole point of most sampling is to change the fundamental character of the original by dislocating it from its original context. Not surprisingly, many artists resent having their musical works torn into soundbites, and they resent the idea of having their hard-earned signature sounds become commonplace as a result of the continuous sampling of their recordings.[84] While most artists are not fundamentally opposed to sampling, many will object to a particular use of their music, either because they find the new use morally offensive,[85] or because they simply do not like what the sampler has done with their work. Typically publishers provide a demo of the sampler's proposed use to the artist. The artist then has an absolute right to deny the proposed use of her work. Again, given this industry custom, it seems highly unlikely that Congress would propose a licensing scheme that fails to give authors adequate notice and that fails to give them a right of refusal.

Finally, some critics argue that sampling is a fledgling art form and that a compulsory licensing scheme is desirable because it will

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[83] 17 U.S.C.A. § 115. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., — U.S. —, 114 S. Ct. 1164, 1169 n.4 (1994) (parody of Roy Orbison's "Pretty Woman" not a cover entitled to a compulsory license because its arrangement changes the fundamental character of the original).

[84] M. Percifull, *Digital Sampling: Creative or Just Plain "Cheez-oid?,"* 42 CASE. W. L. REV. 1263, 1267-68 (1992). Frank Zappa, for example, has been noted for his distaste of unauthorized sampling. *Id.* at n.1.

[85] For example, many artists refuse to contribute samples to "gangsta" rappers and other musicians who glamorize violence or condone misogyny. Telephone interview with Justin Walker, SONY Music (N.Y.) (Apr. 18, 1995). Mr. Walker speaks of sampling as an "artist's issue," and suggests that a compulsory scheme would create an uproar among artists who would prefer not to be sampled. *Id.*

ensure that samplers can develop their art without fear of being "unfairly dominated by strong players in the industry"[86] or being denied the sample altogether. This reasoning overstates the point. First, because most artists are willing to license samples of their works,[87] there is no shortage of raw material for samplers, nor is there a realistic threat that established artists will prevent a whole generation of newer artists from expressing themselves.[88] While some artists will refuse to license samples, the general availability of samples suggests that the hold-out problem is too insignificant to justify a compulsory scheme at the expense of authors' rights—samplers always have the option of hiring their own musicians.[89] Second, because samplers often sample artists who are signed to the same label, there is little incentive for the publishing division of a record company to exploit one of its other divisions. And even in cases where the artist must license samples from a competing label, opportunistic behavior will be constrained by the fact that the other label will need to license samples from the artist's label in the future.[90] Finally, because sampling negotiations typically involve repeat players in a small bargaining community, a publisher's failure to negotiate reasonably will generate disciplinary feedback in the form of negative reputational effects. Thus, if an overzealous negotiator develops a negative reputation that costs his publishing company business, the company will replace that negotiator.

Ultimately, compulsory licensing schemes are undesirable because they fail to adequately address the complexity of the sampling problem. As one industry insider puts it, sampling "does not lend itself to an automated process . . . . There are just too many

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86 *New Spin*, *supra* note 75, at 743.

87 Walker, *supra* note 85.

88 The very prevalence of sampling in popular music underscores this point.

89 Admittedly, as noted in Part II.D., *appropriating* samples makes a very different artistic statement than using studio musicians. This is true regardless of the fact that the final product would *sound* the same in either case.

90 After years of consolidation, there are only six major record companies left: BMG, CEMA, MCA, Polygram, Sony Music, and WEA. This is a small universe, so "what comes around goes around."

variables at play."[91] Because each instance of sampling presents a unique set of considerations, legislative solutions may be inappropriate, even detrimental in this context. The music industry's private ordering system, while imperfect, is preferable to a compulsory license scheme.

Additionally, while the music industry recognizes that sampled artists are entitled to some kind of federal copyright protection, a lack of case law has prevented clear guidelines from emerging. The next section examines the scope of copyright protection for sampled artists and explores the question of infringement.

IV. FEDERAL COPYRIGHT LAW AND SAMPLING

Pursuant to the copyright clause of the Constitution, Congress has the authority to grant authors exclusive rights to their original works in order to "promote the progress of Science and the Useful Arts."[92] Congress has exercised this authority by enacting the Copyright Act, which endows authors of original works with the exclusive right to reproduce the work in copies;[93] to make derivative works from the original;[94] to distribute copies of the works;[95] to perform the work publicly;[96] and to display the work publicly.[97] Copyright law provides incentives for the production of original works by enabling authors to reap economic benefits from their creations.[98] It also prevents others from becoming unjustly enriched by stealing the author's work.[99]

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91 Telephone interview with Don Passman, partner, Gang, Tyre, Ramer & Brown (Apr. 25, 1995).

92 U.S. CONST. art. I, § 8, cl. 8.

93 17 U.S.C.A. § 106(1) (West 1996 & Supp. 1996).

94 *Id.* § 106(2).

95 *Id.* § 106(3).

96 *Id.* §§ 106(4), 106(6).

97 *Id.* § 106(5).

98 Coats & Kramer, *supra* note 9, at 613.

99 McCullough, *supra* note 7, at 131.

Recorded works of music embody two copyrightable elements: the underlying musical composition (*i.e.*, the "written" version of the lyrics and music) and the sound recording (*i.e.*, the "actual" recorded sounds in a tangible medium). Each of these elements receives a separate copyright. While the copyright owner of a musical composition is entitled to all five of the rights enumerated by the Copyright Act, the owner of the sound recordings only enjoys the exclusive rights to reproduce the sound recording, to prepare derivative works, and to distribute copies. Sampling potentially impacts both copyrights.[100]

A. *Protection of Musical Compositions*

Sampling entails the appropriation of the section of the underlying musical composition that corresponds with the sampled fragment of the sound recording. *Baxter v. MCA*,[101] a Ninth Circuit decision, states that "[to] establish a successful claim for copyright infringement, the plaintiff must prove (1) ownership of the copyright, and (2) 'copying' of protectible expression by the defendant."[102] To establish copying, the plaintiff must demonstrate "defendant's access to the copyrighted work"[103] and "substantial similarity of both general ideas and expression between the copyrighted work and the defendant's work."[104]

The "substantial similarity" prong suggests that misappropriation of *recognizable* samples constitutes an act of infringement. Although "[d]eterminations of substantial similarity of expression are subtle and complex,"[105] the *Baxter* court held that the

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100 *Id.*

101 812 F.2d 421 (9th Cir.), *cert. denied*, Williams v. Baxter, 484 U.S. 954 (1987).

102 *Id.* at 423.

103 *Id.* The "access" prong of the test is presumptively fulfilled in most instances of sampling. By definition, a "sample" is a copied portion of another work.

104 *Baxter*, 812 F.2d at 423.

105 *Id.* at 424.

proper test to be applied is whether "the ordinary lay hearer" comparing the two works could recognize the allegedly infringing sample as coming from the copyrighted work.[106] Many samples meet this standard of similarity, particularly in the context of rap music. Sometimes rap musicians choose a particular sample precisely because it will evoke an association with the sampled work.[107] Jurors may also be able to recognize samples that appropriate short segments of instrumental sounds as coming directly from the sampled work.[108] On the other hand, many samples are digitally manipulated to the point that lay jurors will be unable to recognize a substantial similarity between the prior work and the allegedly infringing one.[109] Consequently, many instances of sampling will not be found to be substantially similar.

Another possible response to the approach suggested by *Baxter* is that even if a sample is recognizable and thus substantially similar, it may represent so trivial a fragment that it should properly be regarded as a *de minimis* use unprotected by copyright.[110] Courts have consistently recognized value approaches, rather than quantitative tests such as the "six-bar rule,"[111] to determine how much copying is required to trigger liability.[112] It is thus quite possible for even a very short sequence of a musical composition to rise to the level of

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[106] *See id.* This test was explicitly adopted in the sampling context by Jarvis v. A&M Records, 27 U.S.P.Q.2d 1812, 1817-18 (D.N.J. 1993), discussed *infra* notes 117-121 and accompanying text.

[107] However, this kind of hit-you-over-the-head sampling is becoming less and less common. While many artists continue to use samples that resemble their source texts, the sources they choose are becoming increasingly obscure. It is unlikely, for example, that a typical Beastie Boys fan will be able to recognize a sample of a two second bass line from a Blue Note record that came out 20 years before she was born. *See* BEASTIE BOYS, ILL COMMUNICATION (Capitol Records 1994).

[108] McCullough, *supra* note 7, at 132.

[109] Brown, *supra* note 62, at 1966.

[110] McCullough, *supra* note 7, at 132 (citing MELVILLE NIMMER, 3 NIMMER ON COPYRIGHT § 13.03[A], at 13-46).

[111] The "six bar rule" is the mistaken belief by some musicians that any phrase less than six bars long can be freely copied. P. GOLDSTEIN, 2 COPYRIGHT § 8.3.1 (1989).

[112] Bohlman, *supra* note 13, at 817.

substantial similarity,[113] or what Nimmer has called "fragmented literal similarity"[114]—that is, verbatim similarity between plaintiff's and defendant's works. As the *Baxter* court stated, "[e]ven if a copied portion [is] relatively small in proportion to the entire work, if [it is] qualitatively important, the finder of fact may properly find substantial similarity."[115] This holding is consistent with other cases involving small segments of a composition.[116] Thus, even a sample of a few notes can be infringing if it is recognizable in a side-by-side comparison and if it embodies an "important" aspect of the earlier work.[117]

In *Grand Upright Music v. Warner Bros. Records*,[118] Judge Duffy of the District Court for the Southern District of New York issued the first federal opinion in which it was held that the non-consensual inclusion of musical samples in a recording violated the federal copyright law.[119] Although the *Grand Upright* decision

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113 McCullough, *supra* note 7, at 132.

114 *See* NIMMER, *supra* note 110, § 13.03 [A][2], at 13-16.

115 *Baxter*, 812 F.2d at 425. When the melody of a prior song is almost wholly appropriated, it is hard to deny that the song's "commercially valuable" aspect has been taken; in such a case, a quantitatively small phrase rises to the level of qualitative importance.

116 *See, e.g.*, Robertson v. Batten, Barton, Durstine & Osborn, Inc., 146 F. Supp. 795, 798 (S.D. Cal. 1956) (finding that commercial songs containing two bars identical to the plaintiff's melody and two bars strikingly similar to the plaintiff's melody constituted infringement); Boosey v. Empire Music Co., 224 F. 646, 647 (S.D.N.Y. 1915) (finding infringement in a five-word phrase and its accompanying music, which were found to be a significant feature of the plaintiff's work).

117 McCullough, *supra* note 7, at 132; Brown, *supra* note 62, at 1964; NIMMER, *supra* note 110, §13.03, at 13-23 to 13-48 ("[E]ven if the [copied] material is quantitatively small, if it is qualitatively important the trier of fact may properly find substantial similarity. In such circumstances the defendant may not claim immunity on the ground that the infringement is 'such a little one.' If however, the similarity is only as to nonessential matters, then a finding of no substantial similarity should result.").

118 780 F. Supp. 182 (S.D.N.Y. 1991).

119 Judge Duffy ruled that rap artist Biz Markie, his record label, producer, and music publishing company had violated the federal copyright law by their unlicensed use of a three-word phrase and its accompanying music from the song "Alone Again (Naturally)," which was written and recorded by Raymond "Gilbert" O'Sullivan.

provides minimal copyright analysis, its holding supports the notion that misappropriation of even a short sample can infringe the copyright of a musical composition.[120]

In *Jarvis v. A & M Records*,[121] a recent and insightful sampling decision, Judge Ackerman explicitly adopted Nimmer's "fragmented literal similarity" test and stated that the proper inquiry with regard to copyright infringement is whether the "value of the original work is substantially diminished" because the part that was copied is of great qualitative significance to the work as a whole.[122] In *Jarvis*, the defendant, without prior authorization, sampled a bridge section and a keyboard riff from Jarvis' "The Music's Got Me" and

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See id. at 183. Judge Duffy found that the defendants were aware that prior clearance was necessary for their use of a sample from O'Sullivan's copyrighted work. *See id.* at 184-85. Further, Judge Duffy ruled that by failing to obtain permission for the O'Sullivan sample contained in Biz Markie's "Alone Again" single before releasing his "I Need A Haircut" album, the defendants showed "callous disregard for the law and for the rights of others." *Id.* at 185. Judge Duffy noted that "the argument suggested by the defendant that they should be excused because others in the 'rap music' business are also engaged in illegal activity is totally specious." *Id.* at 185 n.2. Judge Duffy enjoined further sales of the record and ordered the return of the unsold copies. He also referred the matter to the United States Attorney for the Southern District of New York for possible criminal prosecution. *See id.* at 185.

The *Grand Upright* decision has been widely-criticized in academic writings. *See, e.g.*, Brown, *supra* note 62, at 1987 (The court "erroneously reduced the entire sampling controversy to the single issue of who owned the copyrights"). C. Falstrom, *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 ("The court failed to realize the significance of the issues at hand and, in so doing, missed an opportunity to provide sorely needed legal guidance.").

[120] *See Grand Upright*, 780 F. Supp. at 185. Judge Duffy notes summarily that the defendants' conduct violates "the copyright laws of this country." *Id.* at 183. McCullough, *supra* note 7, at 131.

[121] 27 U.S.P.Q.2d 1812 (D.N.J. 1993).

[122] *Id.* at 1817-18. With regard to the question of whether the copying amounted to unlawful appropriation, Judge Ackerman noted that the copied parts "could not be more similar—they were digitally copied from plaintiff's recording." *Id.* at 1816.

incorporated it into his own work.[123] After acknowledging that "there is no easily codified standard to govern whether plaintiff's material is sufficiently original and/or novel to be copyrightable," the judge stated that if a piece is "sufficiently distinctive, it is copyrightable."[124] Applying these principles, he found that both the bridge section and the keyboard riff were distinctive, "attention-grabbing" and therefore copyrightable. Accordingly, Judge Ackerman denied defendant's motion for summary judgment as to liability on plaintiff's musical composition copyright claim.[125]

B. *Protection of Sound Recordings*

In *Grand Upright*, Judge Duffy held that the defendant's unlicensed use of a three-word sample violated the underlying composition of the O'Sullivan song as well as its "master recording," suggesting that the *de minimis* defense will be of limited utility in the context of sampling sound recordings.[126] However, there remains significant controversy as to whether sampling as little as one or two notes of a work can constitute actionable infringement. Some critics argue that even one isolated sound—be it the trumpet note of a Charlie Parker or the high C of a Pavarotti—can be sufficiently expressive to warrant protection in a sound recording.[127] But to qualify as a

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[123] *Id.* at 1813, 1816. The bridge section contained the words "ooh . . . move . . . free your body;" the distinctive keyboard riff functioned as both a rhythm and a melody. *Id.* at 1816.

[124] *Id.* at 1818.

[125] *Id.* at 1818-19.

[126] *See Grand Upright*, 780 F. Supp. 182. While Judge Duffy does not refute the *de minimis* defense explicitly, his finding of infringement based on a three-word sample appears to do so implicitly. McCullough, *supra* note 7, at 132 n.23. Note that the plaintiff in *Jarvis* did not own the sound recording; his publisher did. Accordingly, there is no useful discussion of the sound recording infringement in that case. *See Jarvis*, 27 U.S.P.Q.2d at 1819.

[127] G. Albright, *Digital Sound Sampling and the Copyright Act of 1976: Are Isolated Sounds Protected?*, 38 COPYRIGHT L. SYMP. (ASCAP) 47, 103 (1992). "Most would agree that Pavarotti's performance of even a single note embodies a sufficient modicum of creativity." *Id.* at 66. It is common for artists to use samples

copyrightable recording under the Copyright Act, the work must "result from the fixation of a *series* of musical, spoken or other sounds . . . ."[128] This implies that copyright protection does not extend to one note, chord, or sound effect—instead, an "aggregation" of sounds must exist.[129]

One of the first cases to address the issue of re-recording as copyright infringement, *United States v. Taxe*,[130] supports the notion

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that contain only one note, particularly in the case of drum samples. A. Johnson, *supra* note 1, at 142.

[128] 17 U.S.C.A. § 101 (West 1996 & Supp. 1996) (emphasis added).

[129] E. Johnson, *supra* note 10, at 281 n.58 (citing H.R. REP. NO. 487, 92d Cong., 1st Sess. 5, *reprinted in* 1971 U.S.C.C.A.N. 1566, 1570 ("The copyrightable work comprises the aggregation of sounds and not the tangible medium of fixation.")); A. Johnson, *supra* note 1, at 141. It could be argued that a sample such as an orchestra "hit" is copyrightable because it qualifies as an aggregate of sounds due to the many instruments sounding at once. The statute and the legislative history, however, do not define what constitutes a series or aggregate of sounds. An orchestra "hit" could be analogized to a chord, a simultaneous sounding of single notes which is, by definition, not copyrightable. For a thorough discussion of digital sampling and distinctive sound copyrights, see E. Johnson, *supra* note 10.

Note that while misappropriation of one isolated sound will probably not support a copyright infringement claim, it might support other causes of action under the right of publicity, unfair competition law and/or § 43(a) of the Lanham Act. For example, while James Brown's trademark shouts make up a very small portion of his recordings, they are "so closely associated with him as to be instantly recognizable." A. Johnson, *supra* note 1, at 152. It is thus conceivable that in addition to suing for infringment, Brown could sue an artist who has misappropriated his distinctive shouts under the right of publicity (his voice has literally been appropriated, which is a violation of many right of publicity statutes, including California's; it also evokes his identity for a commercial purpose), unfair competition (the new song gives the false impression that Brown has endorsed the sample, suggesting a form of passing off), and § 43(a) of the Lanham Act (In Waits v. Frito Lay, Inc., 978 F.2d 1093 (9th Cir. 1992), the Ninth Ciruit upheld a false endorsement claim under the Lanham Act by reasoning that Waits' distinctive voice, not unlike Brown's, is equivalent to an unregistered commercial "trademark." *Id.* at 1106.). These claims would, of course, be stronger in an advertising context. Depending on the status of the federal copyright claims, pre-emption issues may also be an issue.

[130] 380 F. Supp. 1010 (C.D. Cal. 1974), *aff'd in part and vacated in part*, 540 F.2d 961 (9th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977).

that recognizable samples are an actionable form of infringement, even if they have been slightly modified. In *Taxe*, the defendants conspired to re-record popular songs and then distribute the resulting illicit copies. Although the defendants copied entire recordings, they also made certain modifications, such as adding new synthesized sounds, deleting certain frequencies, and altering the speed of the individual tracks.[131] The court found that the jury was properly instructed that re-recording violates the Copyright Act regardless of changes in rhythm or speed, unless the re-recording "is no longer recognizable as the same performance."[132] The court further stated that "[i]f the work is produced by re-recording the original sounds, or 'recapturing' those sounds, the work infringes . . . . [A] 'pirate' is one who simply re-records the original work."[133] In dicta, the *Taxe* court noted that a re-recording of a "trivial" part of a copyrighted song may be "such an insubstantial [one] as to not infringe."[134] But a finding of infringement would still be proper in cases where the defendant's product was "recognizable as the same performance as recorded in the original."[135] Thus, under the *Taxe* court's reasoning, a sampling artist could be held liable for making a recognizable copy, even if he has altered the original sound recording rather than making an exact copy.[136]

The next section addresses the question of whether samples that, due to digital manipulation, are no longer recognizable as copies of their source material can, by way of an intermediate copying analysis, still be regarded as violations of the sampled artist's copyrights.

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131 *See id.* at 1013.

132 *Id.* at 1017

133 *Id.* at 1014.

134 *Id.* at 1014.

135 *Id.* at 1015.

136 *New Spin*, *supra* note 75, at 736.

C. *Transformed Samples & Intermediate Copying*

In many cases, sampling involves extensive manipulation of the data sequence of an original work to create an entirely new work. The legal status of such manipulations is unclear. While the ultimate sample is in a sense "derived" from a copyrighted work,[137] so long as it is not substantially similar to the earlier work, it is not infringing.[138] Thus, by digitally altering an "intermediate copy," a sampling artist can appropriate the essence of another artist's work without infringing her copyright. This means that the author of the sampled work will not be compensated even though a significant portion of her creative effort may be embodied in the digitized manipulation.[139] Moreover, it is possible for the creator of such transformed samples to undermine the market for the original artist's

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[137] A copyright holder possess the exclusive right to make or authorize derivative works from the original. 17 U.S.C.A. §106(2) (West 1996 & Supp. 1996).

[138] Coats & Kramer, *supra* note 9, at 610-11. *See* 17 U.S.C.A. § 106(2) (West 1996); Litchfield v. Spielberg, 736 F.2d 1352, 1357 (9th Cir. 1984) (holding no infringement exists if a new work is merely based on a prior work, unless the new work is substantially similar to the prior work); Kepner-Tregoe, Inc. v. Leadership Software, Inc., 12 F.3d 527 (5th Cir. 1994) (holding an injunction overbroad to the extent it prohibits defendant from altering the infringing work to remove substantially similar portions; no infringement exists if modification eliminates substantial similarity). *See also* Reyher v. Children's Television Workshop, 533 F.2d 87, 90 (2d Cir.) (work must be substantially copied from a prior work before it is considered to be derivative), *cert. denied*, 429 U.S. 980 (1976); Harry Fox Agency, Inc. v. Mills Music, Inc., 543 F. Supp. 844, 849 (S.D.N.Y. 1982) (work is derivative "if it is substantially derived from an underlying work and would . . . constitute an infringement . . . but for the permission granted . . . for its use").

[139] Coats & Kramer provide the following illustration: "[I]f a copyrighted Mondrian painting were digitized, an engineer could rearrange the painting's precise color combinations and shapes to form a work which while evocative of Mondrian, would nevertheless appear dissimilar from any of his work. The resulting manipulation would not merely be Mondrianesque, but rather would utilize the artist's own creative expression embodied in his copyrighted original." Coats & Kramer, *supra* note 9, at 610. The first copyright infringement case involving digital manipulations of photographs was filed recently in the Southern District of New York. FPG Int'l v. Newsday, Inc., 94 Civ. 1036 (S.D.N.Y. Feb. 16, 1994).

work—as well as licensed derivatives—by introducing stylistically similar works at a lower price.[140] As authors are denied the ability to profit from their creative endeavors, the incentives for creating new works will decline.[141]

Outside the context of fair use, it is generally true that any unauthorized reproduction of a copyrighted work constitutes infringement, regardless of the ultimate purpose of the reproduction.[142] Thus, liability depends not on whether a copy is sold, but simply whether it has been made without authorization.[143] Accordingly, in cases where the ultimate use is not infringing either because it is sufficiently dissimilar or because it is a fair use, courts at times have permitted authors of the original work to seek redress for intermediate copying.[144]

In *Walker v. University Books*,[145] the Ninth Circuit, directly addressing the issue of intermediate copying for the first time, upheld the notion that intermediate copying should be treated as an independent use of a copyrighted work. The plaintiff in *Walker* owned the copyright to a set of "I Ching" cards used in Chinese fortune-telling.[146] To make his own set of I Ching cards, the defendant created camera-ready blueprints using the plaintiff's cards.[147] The district court regarded the making of these blueprints as a preliminary step towards the defendant's finished product rather than a "tangible reproduction" of the plaintiff's work, and thus found

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140 Coats & Kramer, *supra* note 9, at 611. For example, imagine that a sample programmer releases a CD-ROM containing modified drum sounds based on, but no longer recognizable as, direct samples of John Bonham's work. Although there is clearly a market for Bonhamesque drum samples, the proposed CD-ROM could effectively usurp the market for licensing both original samples as well as derivative works such as an official CD-ROM of modified drum sounds developed by the copyright holders.

141 *Id.*

142 *See* 17 U.S.C.A. § 107 (West 1996).

143 *See* Walker v. University Books, Inc., 602 F.2d 859, 864 (9th Cir. 1979).

144 Coats & Kramer, *supra* note 9, at 614.

145 602 F.2d 859 (9th Cir. 1979).

146 *Id.* at 861.

147 *Id.*

them non-infringing.[148] The Ninth Circuit rejected the view of the lower court, stating, "[T]he fact that an allegedly infringing copy of a protected work may itself be only an inchoate representation of some final product to be marketed commercially does not in itself negate the possibility of infringement."[149] The court held that the proper inquiry with regard to this kind of copying is not whether the defendant has made a copy as merely an intermediate preparatory step towards a final product, but rather is simply whether or not the defendant has made an unauthorized use of the plaintiff's copyrighted work.[150] Because the plaintiff did not authorize the defendant's use, the Ninth Circuit reversed the lower court, which had granted summary judgment for the defendant based solely on the erroneous premise that the intermediate copying could not, as a matter of law, constitute illegal copying in this case. The court then remanded the factual question of whether the blueprints were substantially similar to, and therefore infringing of, the plaintiff's work.[151]

Stepping back from the position it took in *Walker*, the Ninth Circuit in *See v. Durang*[152] summarily rejected the notion that intermediate copying could infringe an author's copyright. In *See*, the lower court granted summary judgment for the defendants on the ground that no reasonable person could find substantial similarity between the defendants' play and the plaintiff's script.[153] Although the plaintiff responded by requesting discovery of the defendants' earlier drafts of the play on the theory that such drafts could reveal a substantial similarity to her own work, the court denied the request. It held that the earlier drafts sought by the plaintiff could not sustain

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148 *Id.* at 863.

149 *Id.* at 864; *accord* Walt Disney Prods. v. Filmation Assocs. 628 F. Supp. 871, 876-77 (C.D. Cal. 1986) (intermediate copies of Disney characters not yet rendered in final form may still infringe).

150 *Walker*, 602 F.2d at 864. The court noted that the fact that a copy was made in another medium from the original would not, in itself, bar recovery. The fact that the intermediate copy was never itself sold for a profit would also not bar recovery. *Id.*

151 *Id.*

152 711 F.2d 141 (9th Cir. 1983).

153 *Id.* at 142.

an infringement claim where the ultimate work was non-infringing.[154] The court even went so far as to say that intermediate copying of this sort is not really copying at all: "Copying deleted or so disguised as to be unrecognizable is not copying."[155]

In *Sega Enterprises, Ltd. v. Accolade, Inc.*,[156] the Ninth Circuit reaffirmed the position it took in *Walker*. Plaintiff Sega owned the copyrights to computer programs in video game cartridges that were compatible with the Sega Genesis video game console.[157] The programs contained a code that was necessary for the console to recognize the cartridge.[158] Rather than licensing the code from Sega, defendant Accolade, a competitor seeking to design and market Genesis-compatible games, "reverse engineered" Sega cartridges to reveal the compatibility code.[159] In and of itself, the compatibility code in the game programs was merely "functional" and, thus, unprotectable expression which could be readily used by any competitor.[160] After completing the reverse engineering process, Accolade incorporated a description of the Sega game compatibility code into a development manual, which it then used to make its own games.[161] Because the final version of Accolade's game programs used only an unprotectable compatibility code, it did not infringe Sega's copyright.[162] Nevertheless, to reveal the compatibility code through reverse engineering, Accolade had made several intermediate copies of Sega's games.[163]

Sega claimed that the intermediate copies that Accolade made to obtain the compatibility code infringed its copyright.[164] Reciting the holding of *Walker*, the Ninth Circuit stated that the Copyright Act

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154 *Id.*
155 *Id.*
156 977 F.2d 1510 (9th Cir. 1993).
157 *Id.* at 1514.
158 *Id.*
159 *Id.*
160 *Id.* at 1524 n.7.
161 *Id.* at 1515.
162 *Id.* at 1524 n.7.
163 *Id.* at 1514-15.
164 *Id.* at 1516-17.

does not distinguish between unauthorized copies of a copyrighted work based on the particular stage that the alleged unauthorized copies represent.[165] The court noted that the Act, on its face, "unambiguously . . . proscribes intermediate copying"[166] and it summarily distinguished *See*, stating that it and similar cases involving the alleged copying of a literary work did not alter or limit the holding of *Walker*.[167] Treating the issue at bar as one of first impression,[168] the court held that "intermediate copying of computer object code may infringe the exclusive rights granted to the copyright owner . . . regardless of whether the end product of the copying also infringes those rights."[169] In this way, the court acknowledged a preference for the *Walker* approach, which treats intermediate copies as independent and potentially infringing uses.[170]

Although the court determined that an intermediate copy of computer code could potentially infringe the owner's copyright, the court ultimately held that Accolade's reverse engineering and intermediate copying was permissible under the fair use doctrine: "[W]here disassembly is the only way to gain access to the ideas and functional elements embodied in a copyrighted computer program and where there is a legitimate reason for seeking such access, disassembly is a fair use of the copyrighted work, as a matter of law."[171] The court found that Accolade's intermediate copying as part of the reverse engineering process was a fair use because it was a *necessary* step in

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[165] *Id.* at 1518 (citing Walker v. University Books, 602 F.2d 859, 864 (9th Cir. 1979)).

[166] *Id.* at 1518 (citing *Walker*, 602 F.2d at 863-64; Walt Disney Producs. v. Filmation Assocs., 628 F. Supp. 871, 875-876 (C.D. Cal. 1986)) (quoting the language of 17 U.S.C.A. § 106(1)-(2); § 501(a)).

[167] *Id.* at 1518. The court made little attempt to reconcile the *Walker* approach with the seemingly contradictory result of *See*. It is unclear to what extent *See* is still good law.

[168] While the court explicitly acknowledged the relevance of the *Walker* decision, it apparently drew a distinction between an intermediate copy of "I-Ching" cards and an intermediate copy of computer code. Coats & Kramer, *supra* note 9, at 616 n.61.

[169] 917 F.2d at 1519.

[170] *See* Coats & Kramer, *supra* note 9, at 616.

[171] 977 F.2d at 1527-28.

acquiring the unprotected compatibility code, without which Accolade could not enter into the market for producing games compatible with the Sega Genesis game console.[172] Rather than exempting Accolade's intermediate copying because its ultimate use was non-infringing, the court analyzed the intermediate copying as an independent use of a copyrighted work and then determined that under these specific facts the use was fair.[173]

And yet, notwithstanding the apparent gist of the Sega decision, it seems that in many cases the issue of intermediate copying cannot be adequately addressed without taking the ultimate non-infringing use into account. Specifically, a proper fair use analysis includes an examination of the purpose of the copy as well as its impact on the market for the copyrighted work.[174] A court cannot determine the purpose of an intermediate copy without looking at its subsequent use. Indeed, the court found Accolade's use fair largely because it enabled the company to develop games that complemented rather than usurped Sega's other products.[175] Thus, the nature of the ultimate use can significantly impact the intermediate copying analysis.[176] Viewing intermediate copying as an independent use does not resolve the question of whether the use is infringing. However, in cases where the ultimate use is determined to be a fair

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[172] *Id.* at 1518, 1527-28. Note that sampling is not *necessary* for making a transformed sample. First, the sampler can usually license the desired sample for a reasonable fee. Second, the sampler can always obtain his raw material by hiring a studio musician or making the sound himself. Admittedly, as discussed in Part II.D., this second option makes a different artistic statement than literal appropriation.

[173] Coats & Kramer, *supra* note 9, at 616 (citing *Sega*, 977 F.2d at 1527).

[174] 17 U.S.C.A. § 107 (West 1996).

[175] *Sega*, 977 F.2d at 1523-24. While observing that copying that effectively usurped the market for the original work by supplanting that work was not a fair use, the court stated that "the same consequences do not . . . attach to a use which simply enables the copier to enter the market for works of the same type as the copied work." *Id.* at 1523.

[176] *See* Kepner-Tregoe, Inc. v. Leadership Software, Inc., 12 F.3d 527, 538 (5th Cir. 1994) (sweeping injunction against future modifications of defendant's infringing program limited to prohibit only those modifications deriving from an infringement *and* substantially similar to the original).

use, it seems logical to conclude that the prior intermediate use is also fair.[177] The next section examines the fair use defense in detail.

V. FAIR USE DEFENSE

In limited circumstances, courts will subordinate the Copyright Act's goal of generating incentives for creating original works to other social policy goals by invoking the fair use doctrine.[178] Courts apply this equitable doctrine on a case-by-case basis. When a court views a particular use of a copyrighted work as being socially desirable, it will deem the use "fair" and insulate the user from liability to the copyright owner. Such socially desirable fair uses typically involve educational, news reporting, or literary (*e.g.*, parodic or satirical) purposes.[179] To guide determinations of fair use, the Copyright Act specifically authorizes judges to consider four non-exclusive factors.[180] These criteria suggest that the majority of substantially similar samples will not qualify as a fair use of copyrighted compositions and sound recordings. As discussed in subpart B, the legal status of transformed samples and the intermediate copies used to produce them is less clear.

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177 Coats & Kramer, *supra* note 9, at 617.

178 *See* 17 U.S.C.A. §§ 106, 501(a) (West 1996 & Supp. 1996).

179 The statute provides examples of fair uses including use of a work "for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research." *Id.* Case law has privileged uses ranging from parody to private non-commercial videotaping of television programs. *See, e.g.*, Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

180 *See* 17 U.S.C.A § 107 (West 1996).

A. *Substantially Similar Samples*

1. Purpose and Character of the Use

The first factor in the fair use analysis, the purpose and character of the use, examines the alleged infringer's reason for using the copyrighted material. Often when the use is for commercial rather than for non-profit or educational purposes, a court will not recognize fair use. However, this analysis must also examine whether the defendant has added something new to the prior expression or has simply supplanted it.[181]

In *Campbell v. Acuff-Rose Music, Inc.*,[182] the Supreme Court ruled that the Sixth Circuit Court of Appeals had misapplied the fair use doctrine by holding that 2 Live Crew's rap parody "Pretty Woman" infringed Roy Orbison's copyrighted hit song "Oh, Pretty Woman."[183] The Court unanimously held that the Sixth Circuit erred in holding that the parody's commercial nature rendered it a presumptively unfair use.[184] The Court stated that such a presumption was valid only in cases where the commercial use involves verbatim copying rather than a transformation of the original work. Thus, the more *transformative* the new work, the less other factors like commercialism will weigh against a finding of fair use.[185]

While it appears that sampling a particular work to create a parody of that same work would constitute a fair use under *Acuff-Rose*,[186] it is unclear whether a non-parodic commercial use of a

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[181] *See* Campbell v. Acuff-Rose Music, Inc., — U.S. —, 114 S. Ct. 1164 (1994).

[182] *Id.*

[183] *Id.* at 1171-76.

[184] *Id.* at 1177.

[185] *Id.* at 1173.

[186] Admittedly, the Court remanded, leaving the district court sufficient room to find that the song was not a fair use. *Id.* at 1179. However, in light of this decision, it would have been very surprising indeed if the district court did not ultimately find that the use was fair.

recognizable sample could also be sufficiently "transformative" to escape liability.[187] As described in Part II.D., sampling artists juxtapose fragments of recognizable audio texts as a kind of cultural criticism that approximates the work of visual artists like Robert Rauschenberg. Arguably, the whole point of such sampling is to dislocate the sound fragment from its initial context, and thereby to empty the sample of its former meaning by infusing it with a new one.

Most artists who use samples combine disparate works to create new compositions that are unlike their copyrighted source material. Accordingly, courts might examine whether the artist has used the sample as a means to create a new musical statement or whether she has simply appropriated the essence of the source text as the foundation for the new work. For example, the underlying musical theme of Hammer's "U Can't Touch This"[188] incorporates the "hook" of Rick James' "Super Freak,"[189] and therefore probably does not exhibit a sufficiently transformative use of the sample. Courts might also consider the following: 1) What is the *duration* of the sample; 2) What is the *content* of the sample? (Is it a distinctive "hook" or merely a background element?);[190] and 3) What is the *context* of the sample? (Is it essential to the new composition or is it merely atmospheric? Could the new work stand on its own even if the sample were removed?).[191]

In *Acuff-Rose*, the Court did not decide these questions with respect to 2 Live Crew's repeated sample of the characteristic opening bass riff of the Orbison song. Instead, it remanded to the District Court:

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187 The Court stated that transformative value can be determined by examining "whether the new work merely 'supercede[s] the objects' of the original creation . . . or instead adds something new, with a purpose or different character, altering the first with new expression, meaning, or message." *Acuff-Rose*, 114 S. Ct. at 1171.

188 M.C. HAMMER, *U Can't Touch This*, *on* PLEASE HAMMER DON'T HURT 'EM (Capitol Records 1990).

189 RICK JAMES, *Super Freak*, *on* STREET SONGS (Motown Records 1981).

190 This question also arises under the third factor of the fair use inquiry, *infra*.

191 *See generally* A. Johnson, *supra* note 1, 148-49.

> [W]e express no opinion whether repetition of the bass riff is excessive copying, and we remand to permit evaluation of the amount taken, in light of the song's parodic purpose and character, its transformative elements, and considerations of the potential for market substitution . . . .[192]

Thus, if the Court could not even give its unequivocal support to the sampling of an essential riff in the context of a *parody*, it seems unlikely that sampling a recognizable riff in a non-parodic commercial medium would constitute a fair use regardless of the brilliance of its juxtaposition of elements.

Indeed, there is some indication in *Acuff-Rose* that the Court would not view the recontextualization of a recognizable sample as being sufficiently transformative to rise to the level of fair use. For example, in his *Acuff-Rose* concurrence, Justice Kennedy stated:

> Almost any revamped modern version of a familiar composition can be construed as a 'comment on the naiveté of the original' because of the difference in style and because it will be amusing to hear how the old tune sounds in a new genre . . . . If we allow any weak transformation to qualify as parody, however, we weaken the protection of copyright . . . . [This reduces] the financial incentive to create.[193]

Just as he would not support extending fair use to those who "place the characters from a familiar work in novel or eccentric poses,"[194] Justice Kennedy would probably not find the recontextualization of samples sufficiently transformative to warrant fair use protection. Should these issues squarely face the Court, Justice Kennedy's views might gain more support.[195]

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192 *Id.* 1176-77.

193 *Acuff-Rose*, 114 S. Ct. at 1181 (Kennedy, J., concurring) (citation omitted).

194 *Id.*

195 As a collagist practice that recontextualizes sound fragments across musical genres, sampling surely has the potential to offer new insights and understandings of its source works. However, while reasonable people might disagree about whether a particular instance of recognizable sampling is sufficiently transformative

2. Nature of the Copyrighted Work

The second factor, the nature of the copyrighted work, generally weighs against fair use when the nature of the original work is creative rather than purely informational.[196] Because most samples derive from expressive musical works that are creative in nature, this factor tends to weigh against finding that sampling is a fair use.[197] This analysis becomes somewhat more complex when the artist samples a recording of a found sound such as the squeal of a tea kettle.[198] In terms of weighing the equities, it is worth noting that for their part, many sampling artists also exercise a considerable amount of creativity in determining which samples to use, where to put them, and how to modify them.

3. Amount and Substantiality of the Portion Used

The third factor in the fair use analysis is the amount and substantiality of the portion used in relation to the copyrighted work

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to constitute fair use, as a practical matter, it is difficult to imagine a fair use regime that would allow samplers to appropriate samples without paying for them, particularly since most samples can be readily licensed or re-created in the studio, and since the primary objective of most samplers is simply to sell as many records as possible. As discussed generally in Part V.B., a fair use regime would be at odds with music industry custom and the prevailing view among musicians and samplers that unlicensed sampling is a form of stealing. Furthermore, as discussed below in Part V.A.4., fair use protection is probably undesirable in the sampling context because, in the absence of a market mechanism to rationally allocate samples of popular artists, signature sounds could lose their expressive value through overexposure.

196 *See* MCA v. Wilson, 677 F.2d 180, 182 (2d Cir. 1981).

197 McCullough, *supra* note 7, at 133.

198 The rap group Public Enemy used the sound of a tea kettle squeal on a song entitled "Rebel Without a Pause." It is unclear whether the sound was recorded "live" or from a pre-existing recording. *See* Brown, *supra* note 62, at 1955-56.

as a whole. This inquiry requires both a quantitative[199] and qualitative[200] analysis of the defendant's appropriation.[201] However, qualitative factors generally outweigh quantitative factors[202] and, as a result, most courts will be inclined to find that even a very small taking of the plaintiff's work will not be protected under the fair use doctrine where the part taken is "of critical importance to the work as a whole and taken by the infringer in order to save the time and expense incurred by the copyright owner."[203] Thus, in the case of music sampling, fair use would probably not protect an appropriation of the most valuable aspect of plaintiff's work such as the "hook" or chorus, even when the sample is of relatively short duration.[204]

Of course, this third factor relates to the first in so far as the extent of permissible copying varies with the purpose and character of the use. For example, when the case at issue involves a parody, courts typically recognize the parodist's right to use as much of the plaintiff's work as is required to "conjure up" the object of

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199 *See, e.g.*, Consumers Union of U.S., Inc. v. General Signal Corp., 724 F.2d 1044 (2d Cir. 1983) (verbatim copying of 29 words out of a total of 2100 words); Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 310 (2d Cir. 1966). *But see* Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1155 (9th Cir. 1986) (noting that "the copying of an entire work does not preclude fair use per se").

200 *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565-66 (1985) (finding a substantial appropriation because the excerpts taken from the plaintiff's book were the "most interesting and moving" chapter and became the focus of the defendant's work).

201 NIMMER, *supra* note 110, § 13.05[A][3] at 13-186.

202 2 PAUL GOLDSTEIN, COPYRIGHT § 10.2.2.3 at 10:55 (2d Ed. 1996).

203 *Id.* at 10:55-10:56 (quoting Meredith Corp. v. Harper & Row, Publishers, Inc., 378 F. Supp. 686, 690 n.12 (S.D.N.Y.), *aff'd*, 500 F.2d 1221 (2d Cir. 1974)). *See also* Stewart v. Abend, 495 U.S. 207, 238 (1990) (plaintiff's story represented "substantial portion" of defendant's motion picture even if it constituted only 20 percent of the film's script); United Tel. Co. of Mo. v. Johnson Publishing Co., 855 F.2d 604 (8th Cir. 1988); Craft v. Kobler, 667 F. Supp. 120, 128-29 (S.D.N.Y 1987); Salinger v. Random House, Inc., 811 F.2d 90, 98-99 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987).

204 Brown, *supra* note 62, at 1971.

parody.[205] Under this special parody exception, the third factor inquiry becomes a matter of determining whether the defendant has taken *more* than is necessary to conjure up the copyrighted work.[206]

4. Impact of the Use on the Potential Market for the Copyrighted Work and Derivative Works

The fourth factor, the impact of the use on the potential market for the copyrighted work, is the "single most important element of fair use."[207] This factor examines whether the defendant's conduct, if left unchecked, would materially diminish the potential market[208] for, or the value of, plaintiff's copyrighted work.[209] This inquiry must take into account not only harm to the original work but also harm to the market for derivative works.[210]

It can be difficult to measure a negative market impact in cases where the defendant has put the copyrighted work to a use (such as sampling) that the plaintiff has not previously made nor licensed others to make. As a practical matter, most courts base their evaluations upon the concept of "the normal market for the copyrighted

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205 *Id.* at 1971-72.

206 GOLDSTEIN, *supra* note 212, at 10:57. *See* Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 757 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); Berlin v. E.C. Publications, Inc., 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964); DC Comics, Inc. v. Unlimited Monkey Business, Inc. 598 F. Supp. 110, 118 (N.D. Ga. 1984).

207 Harper & Row, Publishers, Inc., v. Nation Enters., 471 U.S. 539, 566 (1985); *accord* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

208 *Acuff-Rose*, 114 S. Ct. at 1178 (citing NIMMER, *supra* note 110, § 13.05[B]). "'[P]otential market' means either an immediate or a delayed market, and includes harm to derivative works." Cable/Home Communication Corp. v. Network Prods., Inc., 902 F.2d 829, 845 (11th Cir. 1990).

209 NIMMER, *supra* note 110, § 13.05[A] at 13-189 (citing *Acuff-Rose*, 114 S. Ct. at 1177); American Geophysical Union v. Texaco, Inc., 802 F. Supp. 1 (S.D.N.Y. 1992), *aff'd* 60 F.3d 913 (2d Cir. 1994); *see Sony*, 464 U.S. at 451 (in order to negate fair use, there must be proof of a "meaningful likelihood" of present or future harm).

210 *Acuff-Rose*, 114 S. Ct. at 1177; *Harper & Row*, 471 U.S. at 568.

work"—that is, those uses that a copyright owner could reasonably be expected to make or license others to make.[211] In *Acuff-Rose*, the Supreme Court drew a broad distinction between the normal market for copies of the original work and the market for transformative copies.[212] "[W]hen a commercial use amounts to mere duplication of the entirety of an original, it clearly 'supersede[s] the objects' of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur."[213] On the other hand, when "the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred."[214] The Court drew an even clearer distinction in the case of parodies, stating that a parody is unlikely to act as a substitute, since the parody and the original typically serve "different market functions."[215]

As previously discussed in Part V.A.1., it is unclear if and when the Court would regard a non-parodic commercial use of a recognizable sample as being sufficiently transformative to warrant fair use protection. Nevertheless, the reasoning of *Acuff-Rose* suggests that because a sample and its source work will inevitably serve "different market functions,"[216] direct market substitution cannot be presumed in the sampling context. On the other hand, while direct

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[211] GOLDSTEIN, *supra* note 212, § 10.2.2.4 at 10:59, 10:62 (noting that this concept was espoused by the 1975 Senate Report, citing S. REP. NO. 473, 94th Cong., 1st Sess 65 (1975)).

[212] *Id.* at 10:63 (citing *Acuff-Rose*, 114 S. Ct. 1164).

[213] *Acuff-Rose*, 114 S. Ct. at 1177 (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901)).

[214] *Id.* at 1177.

[215] *Id.* (citing Julie Bisceglia, *Parody and Copyright Protection: Turning the Balancing Act Into a Judging Act*, 34 COPYRIGHT L. SYMP. 1, 23 (1987)).

[216] Because the sampling artist will typically appropriate a sample from an older genre (such as Motown, disco, or classic rock) and then recontextualize it within a newer musical genre (such as rap, industrial, or techno), the newer work will tend to appeal to a very different market audience than the one targeted by the original work. In other words, rather than simply replicating the indended effect of the source work, the newer appropriationist work will comment on the original using a contemporary musical idiom which will primarily serve a different market than the original song and, not unlike a parody, serve a very "different market function."

market substitution will be unlikely in the sampling context, unauthorized sampling will potentially undermine a copyright holder's normal ability to market and license various *derivative* works, including those that sample his or her original song. Thus, as discussed at length below, fair use protection may be undesirable in the sampling context because, in the absence of a market mechanism to rationally allocate signature sounds, it is likely that the expressive value of popular source works would be frittered away through overexposure.

a. *Impact on the Market for the Original Work*

Direct market substitution for original works will be unlikely in the sampling context since the music made by samplers will rarely, if ever, come into direct competition with its source text.[217] Moreover, it seems highly unlikely that a mere sample could fulfill the market demand for the source work because: 1) most samples only last a few seconds and therefore provide a listening experience that is, at best, a poor substitute for the original song;[218] 2) sampling generally takes place long after a song has reached the height of its popularity and has already reaped most of its sales potential;[219] and 3) the newer work, due to likely differences in its musical genre and its particular historical moment, will typically appeal to a market segment that is largely distinct from the audience that originally made the

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[217] *See* Brown, *supra* note 62, at 1974. Presumably, direct competition could only occur, in a meaningful way, if the sampling artist appropriates the "hook" or essence of a contemporary song and then introduces the new version into the same, or at least overlapping, market demographic, at a time when the original version is still in circulation.

[218] *See supra* text accompanying note 13.

[219] Although the "potential market" for the copyrighted work clearly includes delayed markets, *see supra* note 208, my point here is simply that the negative impact, if any, will become increasingly attenuated as the song drifts into obscurity. It is also worth noting that while some samplers choose sounds for their recognition value, most sampling artists take a revivalist approach, searching for novel uses of uncommon sounds rather than simply recycling prior hits. *See* Brown, *supra* note 62, at 1974.

source text popular.[220] Finally, as one commentator has noted, rather than harming the potential market for the sampled work, sampling often generates a renewed interest in a sampled artist and thereby boosts, rather than undermines, the record sales of that artist.[221]

b. *Impact on the Market for Derivative Works*

Although direct substitution is unlikely in the sampling context, the analysis of the potential market impact on derivative works is much less favorable to samplers. When a sampler revives interest in a sampled artist, that artist will want to capitalize on his renewed popularity not only by reissuing older works, but also by licensing samples to other artists as well. The Isley Brothers, for example, have become extremely popular among samplers. As a result, they command substantial fees for licensing their samples, and they are very particular about how their samples are to be used.[222] From an

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[220] For example, Tone Loc's "Wild Thing," one of the most successful *rap* singles in history, prominently samples the hook of "Jamie's Crying," a song originally recorded by the *heavy metal* band Van Halen, over a decade earlier. *See, e.g.*, Don Snowdon, *Sampling: A Creative Tool or License to Steal? The Controversy*, L.A. TIMES, August 6, 1989, (Calendar) at 61. Given the significant gap in time between the two songs and fact that Tone Loc and Van Halen appeal to very different audiences, it seems improbable that Tone Loc's version diminished demand for the source work; if anything, it generated nostalgia (and thus demand) for the Van Halen original among fans whose musical tastes were broad enough to encompass both genres.

[221] Brown, *supra* note 62, at 1975. For example, James Brown's record label has capitalized on renewed interest in his back catalog and has even released special tracks that feature a collection of his trademark grunts over a funky backing track. *Id.* (citing JAMES BROWN, IN THE JUNGLE GROOVE (Polydor 1986) (reissue)). However, despite the boost to his career, James Brown is against sampling: "Anything they take off my record is mine. Is it all right if I take some paint off your house and put it on mine? Can I take a button off your shirt and put it on mine? Can I take a toenail off your foot—is that all right with you?" Michael W. Miller, *High-Tech Alteration of Sights and Sounds Divides the Arts World*, WALL ST. J., Sept. 1 1987, at 1.

[222] Walker, *supra* note 85.

economic standpoint, one might argue that allowing the Isley Brothers to reap the rewards of sampling is desirable because it prevents a socially valuable asset from being dissipated too quickly. Under a fair use regime nothing could stop all prospective samplers from using the same popular sources at once. The market would become flooded with Isleys and James Browns, and the sounds of these artists would rapidly decline in their expressive values. In the absence of a market mechanism to rationally allocate the samples of popular artists, it is conceivable that these signature sounds would be wasted by a scramble to use them up as quickly as possible.[223] This suggests that, at least with regard to popular source texts, a fair use regime may be undesirable in the context of recognizable samples.

It is also conceivable that samplers could make samples which contain the essence of some source text, but due to various digital manipulations, no longer resemble that source enough to be infringing. This could potentially enable artists to obtain, say, a Zeppelinesque riff, without licensing a sample from Led Zeppelin. In addition, the sampling artist could potentially undermine the demand for officially licensed samples of the original artist's work by introducing less-expensive "knock-off" samples into the market. According to one commentator, the demand for samples of popular musicians and distinctive sounds has become so high that a "black market" has emerged in recording studios.[224] "Sound collecting has become a frenzied sport, with engineers swapping sounds like baseball cards."[225] The next subsection explores fair use in the context of transformed samples and intermediate copying.

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[223] *See generally* Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97 (1994) (making an analogous argument in the right of publicity context).

[224] Baroni, *supra* note 6, at 71.

[225] Tom Moon, *Music Sampling or Stealing: Who Owns the Sounds of Music?*, ST. LOUIS POST DISPATCH, Jan. 24, 1988, at 3e.

B. *Transformed Samples & Intermediate Copying*

Viewing intermediate copying as an independent use does not resolve the question of whether the use is infringing. While the *Sega* decision holds that intermediate copying must receive its own infringement analysis, this independent analysis will often take into account the ultimate purpose of the intermediate copy.[226] In cases where the ultimate use is determined to be a fair use, it seems logical to conclude that the necessary intermediate use is also fair. The fair use exception applies in cases where the need to protect the author's creative incentives must be subordinated to other social policy goals.[227]

The *Acuff-Rose* case illustrates this point nicely. To make its parody version, 2 Live Crew presumably used an intermediate copy of the Orbison original. Nevertheless, to find the intermediate copy infringing would effectively contradict the Court's finding that the parody is a socially beneficial fair use. The threat of liability would deter future parodists from creating similar works. Thus, to preserve incentives for socially beneficial fair uses, it follows logically that the intermediate copying essential to creating those works would also be a fair use. Although intrinsically appealing, this result is far from clear under current interpretations of the fair use doctrine. After all, an intermediate copy does not itself constitute a parody. It is nothing more than a verbatim translation of the original into digital form.[228] Nevertheless, the policies underlying the doctrine support the conclusion that intermediate copying would be a fair use in this context.[229]

A more difficult situation arises in cases where the ultimate work embodies a non-infringing digital manipulation of its source, but there is no apparent policy justification for subordinating the need to

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226 *See Sega*, 977 F.2d at 1527.

227 17 U.S.C.A. § 107; Coats & Kramer, *supra* note 9, at 613.

228 Coats & Kramer, *supra* note 9, at 617-18 (citing Radji v. Khakbaz, 607 F. Supp. 1296, 1303 (D.D.C. 1985) (verbatim translation of article in foreign language is an infringing derivative work)).

229 Coats & Kramer, *supra* note 9, at 618.

preserve the creative incentives of original authors. For example, while Accolade's intermediate copying was a fair use because its reverse engineering was *necessary* for accessing the unprotectable expression in Sega's program,[230] unauthorized sampling is not "necessary" for making a transformed sample—the sampler can license the desired sample or he can simply obtain his raw material by hiring a studio musician or by making the sound himself. While digital manipulations will contribute something to the overall production of creative works, excessive proliferation of such copying would damage creative incentives by denying authors the ability to profit from their original works.[231] Ultimately, this kind of skewing of incentives could produce a shortage of "raw materials" for sampling and other digital manipulations. The reasoning of *Walker* and *Sega* suggests that this kind of intermediate copying would be infringing, and it could not, therefore, be used to produce digital manipulations of original works.[232]

In spite of the analysis just proposed, Professor Weinreb's writing on fair use suggests a somewhat different result. According to Professor Weinreb:

> The reference to fairness in the doctrine of fair use imparts to the copyright scheme a bounded normative element that is desirable in itself. It gives effect to the community's established practices and understanding and allows the location of copyright within the framework of property generally . . . . It is . . . what the Copyright Act prescribes. Fair is fair.[233]

Taking into account the community's customary practice and its prevailing understanding of what constitutes fair conduct under the particular circumstances, a court may use fair use to justify a limited

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230 *Id.* at 1518, 1527-28.

231 Coats & Kramer, *supra* note 9, at 618. *See also* Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1180-82 (1994) (Kennedy, J., concurring).

232 Coats and Kramer, *supra* note 9, at 618.

233 Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1161 (1990).

exception to what would otherwise constitute copyright infringement.[234]

Artists who transform samples of copyrighted works to the point where they are no longer recognizable as copies of their source material generally do not seek licenses for the intermediate copies they use.[235] Of course, as a practical matter, no one will probably catch them. The more important point, however, is that they regard their own creative contribution to the sample as being substantial enough to justify the appropriation.[236] From the perspective of the music industry, such transformative uses do not even constitute "sampling."[237] It appears that no one in the industry feels that these samplers are "stealing," and no one is threatening legal action. Thus, while the *Sega* analysis suggests that the intermediate copies are infringing uses, Weinreb's normative view of the fair use doctrine suggests that sampling copyrighted works for the sake of substantial digital manipulation may be a fair use because no one in the industry regards this behavior as improper or forbidden.

However, a different result might be reached in cases where the resulting sample is still reminiscent of its source. That is, we might want to distinguish between a sample that still sounds "Zeppelinesque" and one that no longer sounds anything like Led

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[234] *Id.* at 1140. Professor Weinreb cites the SONY Betamax case as an illustration of this principle. "The overwhelming fact . . . is that time-shifting had become for the public as well as programmers an ordinary, proper activity. The millions of viewers who taped shows for later viewing had not the least sense that they were doing anything that was forbidden or improper. Indeed, they would have regarded any prohibition as an interference with their property and privacy." *Id.* at 1155. Note that Professor Weinreb seems to vastly overestimate the number of Americans who actually know how to program a VCR!

[235] Here I am particularly thinking of industrial (*e.g.*, Ministry, Nine Inch Nails) and techno dance artists (*e.g.*, Moby).

[236] Interview with Nick Pappas, sound engineer, Harvard Law student, and former member of the industrial group Drive (Apr. 12, 1995). From the perspective of programmers who transform samples, a John Bonham drum sound is no more valuable than a basketball bounce. Both will be changed to the point where they are no longer recognizable as copies of their sources. *Id.*

[237] *Id.*

Zeppelin.[238] As Professor Weinreb suggests, the other difficulty with the normative approach in a world of rapid technological change is that the community's normative standards may lag behind the commercial exploitation of a new medium.[239] For this reason, even within the entertainment industry, there is great uncertainty as to what kinds of digital manipulations are "fair."[240]

C. *Sampling and Creative Incentives*

As a practical matter, it should be acknowledged that failure to compensate authors for the use of samples will not necessarily lead to a significant reduction in the creation of musical works. The incentive rationale of the Copyright Act assumes that without economic incentives, artists would be less likely to create. This rationale has limited force in the context of sampling because most musicians already have adequate incentives to create,[241] and because

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[238] Since most samples used by "industrial" artists sound nothing like their source material, they would probably be deemed a fair use. As a practical matter, however, even in cases where the sample resembles its source, it may be extremely difficult for courts to determine at precisely what point a digitized work is too "reminiscent" of an older work.

[239] Weinreb, *supra* note 233, at 1153.

[240] For example, suppose that a visual artist takes an image from a single frame of a blockbuster movie, and assume that the set design used in the image cost millions to produce. Now imagine that the artist uses digital manipulation to create a whole new image, with new features, but which still has the "feel" of the original image. He then makes a ten-minute video out that image and uses it to create a virtual reality program. Infringement? Fair use? Although this seems to be some kind of taking, I imagine that reasonable people will disagree about the answers to these questions and that we will conceive of the same issues very differently ten years from now, when we are all manipulating copyrighted works for our own entertainment in the privacy of our own homes.

[241] It is doubtful that anyone has ever picked up a guitar in the hope that one day he will be able license a two second sample. Indeed, the vast majority of artists making music today will never be sampled, and most artists who are currently being sampled produced their original recordings before sampling technology even existed. This suggests that sampling has played a fairly insignificant role in encouraging the production of creative works.

licensing fees for samples account for a relatively small proportion of the compensation received[242] by a relatively small number of artists. On the other hand, as described in Part V.A.4, digital sampling does threaten a musician's ability to market derivative works, particularly in cases where another artist can sample the essence of a copyrighted work and then, through digital manipulation, introduce stylistically similar works into the market. Protecting the author's traditional ability to market previously unimagined derivative works is perhaps the strongest rationale for preventing intermediate copying in the sampling context. Admittedly, however, this can amount to more of a windfall than an incentive.

A further issue with regard to incentives is that it is at least conceivable that composing on the computer will gradually replace most other forms of music making. This, in turn, would produce a greater reliance on and demand for samples. One might argue, however, that even with a "fixed" stock of raw materials, computer composers would be able to create an endless supply of new music. So long as all existing musical expression can be accurately sampled, musicians could simply compose on the computer instead of the piano or guitar.

It is also worth noting that sampling can never replace the experience of, and the market for, live musical performances. The incentive to "make it" as a traditional rock 'n roll band remains present, and, in fact, the surge of "alternative" music suggests that people are tired of listening to mechanical music. On the other hand, many bands hate touring and, perhaps, with a clever use of digitized holograms they will be able to "simulate" performances instead. Given the choice of seeing the "real" middle-aged Rolling Stones in an enormous sports arena or having a digital simulation of the Rolling Stones *circa* 1971 playing in your backyard, which would you choose?

Nevertheless, it is quite clear that sampling does threaten studio and performing musicians. It has even been claimed that many previously sought-after musicians who have created a distinct sound for themseleves are now being undersold by samples of their own work. *See supra* note 51.

[242] However, in the unlikely event of being sampled by a superstar like Madonna, the licensing fee can amount to thousands and thousands of dollars, even if the artist was not particularly successful prior to the sampling. Indeed, for older R&B artists who signed unfavorable recording contracts and never saw a dime from record sales, sampling can actually help to right a prior wrong.

But this is probably too optimistic an assessment of what computers can and will be able to do. Arguably, an overreliance on using computers to manipulate existing musical forms could lead to the extinction of entire genres of music. For example, it is doubtful that a composer using a computer would be able to produce an "original" blues composition that would rival the experience of listening to "real" Mississippi Delta blues—it simply would not have the same *human* element. Indeed, it might be said that the primary musical effect of sampling thus far has been to make pop and rap increasingly redundant. As one music critic has commented, "In an era when so many acts employ digital sampling and machine-generated rhythms to make music that sounds as if it were written by an oscilloscope, it's a relief to find a band that uses the traditional line-up [of instruments]."[243]

In addition, the reduction in performing opportunities caused by new technologies will likely result in fewer players at the highest levels. "It takes a thousand journeymen to produce one genius . . . . If we put thousands of journeymen out of work with computers, where will we find the geniuses? Where is the next generation going to get its Dizzy Gillespie?"[244] Thus, the need to stimulate the production of traditional forms will likely increase rather than decrease as the computer comes to dominate music making. Ultimately, the incentive equation as it relates to sampling is highly complex, even contradictory, and it poses a difficult challenge for policy makers.

VI. CONCLUSION

As discussed above, traditional notions of copyright law provide substantial protection against the misappropriation of

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[243] Mark Jenkins, *Guilded Eternity: Time in a Loop*, WASH. POST, Apr. 27, 1990, at N25.

[244] James S. Newton, *A Death Knell Sounds for Musical Jobs*, N.Y. TIMES, Mar. 1, 1987, at F19, col. 1 (quoting New York Musician's Union Local 802 President Robert Glasel).

recognizable samples. While the fair use defense has some appeal, it is unlikely that it will be upheld by courts outside the context of parody. The likely impact of the *Grand Upright* and *Jarvis* decisions will be even more meticulous pre-release licensing, rather than a surge in litigation. Although many commentators have proposed compulsory license schemes to standardize the bargaining process, such proposals fail to adequately take into account the complexity of the sampling problem as well as current industry practice. The legal status of digitally-manipulated samples remains unclear, and it raises important policy concerns.

Case law consistently recognizes that copyright rewards authors not as an end in itself, but rather as a means to stimulate creativity for the public good.[245] In most cases, extending copyright protection to a new technological use of a copyrighted work advances the objective of increasing the number of creative works. However, as the Supreme Court recognized in *Acuff-Rose*, at a certain point expanding copyright protection can actually inhibit the production of new works by preventing others from using existing works as part of their own original expression.[246]

> [T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.[247]

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[245] The Supreme Court has stated: "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (citations omitted).

[246] Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1169 (1994).

[247] *Id.* at 1171 (citation omitted). Elsewhere in the opinion the Court quoted Justice Story's language from a classic opinion making essentially the same point: "Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before." *Id.* at 1169 (quoting Emerson v. Davies, 8 F. Cas. 615, 619 (C.D. Mass. 1845) (No. 4,436)).

Another Supreme Court copyright decision, issued only days before the *Acuff-Rose* opinion, is in accord:

> We have often recognized that the monopoly privileges that Congress has authorized, while "intended to motivate the creative activity of authors and inventors by the provision of a special reward," are limited in nature and must ultimately serve the public good.[248]

To maximize creative production, copyright protection should be established at a level where the "number of works gained from heightened incentives is precisely offset by the number lost when individuals, fearing infringement, are unwilling to produce works drawing upon those already existing."[249]

Digital technology introduces paradoxical issues that copyright law seems ill-equipped to address. On the one hand, digital technology may greatly enrich the creative process by generating countless new, transformative works. On the other hand, if the original works can be freely manipulated, the technology may actually diminish the production of new works by undermining creative incentives. As the Second Circuit noted in *Computer Associates, Inc.*

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[248] Fogerty v. Fantasy, Inc., 114 S. Ct. 1023, 1029 (1994). In Fogerty, the Court ruled that awards of attorney's fees to prevailing parties in copyright actions should be available to defendants under the same standard as applies to plaintiffs. *Id.* at 1033. The court rejected the dual standard which had been used by several circuits, stating that it was equally important to encourage defendants to litigate meritorious defenses and ensure that the limited copyright monopoly is properly demarcated. *Id.* at 1030.

[249] Coats & Kramer, *supra* note 9, at 624. *See generally* William Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989). The entirety of copyright law may be explained under this simple model. Under the fair use doctrine, for example, individuals are permitted to use a copyrighted work in certain socially desirable ways, without incurring liability for infringement. *See* 17 U.S.C.A. § 107 (West 1996). The doctrine permits use of a work "for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research." *Id.* Thus, the doctrine effectively increases the number of new works by reducing the protection which a copyright holder enjoys on his work.

v. Altai, Inc.,[250] applying copyright law to computer code may be like squeezing a round peg into a square hole.[251] The imperfect fit can be harmful to the creative incentives that copyright law seeks to foster. While protecting these incentives may require viewing intermediate copying as infringement in some cases, if intermediate copying is always viewed as infringement, digital technology's limitless potential will never be realized.[252] Therefore, it will often be desirable to permit such copying in cases where the ultimate work is sufficiently different so as not to infringe the original work's copyright.

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250 982 F.2d 693 (2d Cir. 1992).

251 *Id.* at 712.

252 Coats & Kramer, *supra* note 9, at 624.