SAMPLING AS A SECONDARY ORALITY PRACTICE AND COPYRIGHT'S TECHNOLOGICAL BIASES

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I. Introduction

Sampling – the practice of taking small pieces from an existing recording of musical works or other sounds, adjusting their tempo and pitch, and remixing them – first appeared in the 1960s as part of DJs' innovative and skilled ways of using analog technologies.[1] In the 1980s, with the introduction of digital samplers, sampling gained more popularity as a method of music production.[2] Using sampling as a technique, musicians build on existing sounds, reinterpret them, engage in a conversation with fellow musicians of various generations, and develop motifs that can be very different from any of the originals they sample.[3]

Although sampling requires much imagination and skilled execution, it has often been dismissed as an act of stealing, or a sign of low originality.[4] For a long time, the only Grammy Awards category allowing songs with prominent samples was the "best rap song."[5] But sampling has become such a common method in music

[1] *See* VMG Salsoul v. Ciccone, 824 F.3d 871, 875 (9th Cir. 2016) (defining sampling "as the actual physical copying of sounds from an existing recording for use in a new recording, even if accomplished with slight modifications such as changes to pitch or tempo"); Newton v. Diamond, 388 F.3d 1189, 1192 (9th Cir. 2003) (explaining the concept of sampling as incorporating pieces of sound recordings into new recordings); DICK HEBDIGE, CUT 'N' MIX: CULTURE, IDENTITY AND CARIBBEAN MUSIC 93-94 (1987) (noting new DJs of London dance scene in 1960's).

[2] *See Newton*, 388 F.3d at 1192 (explaining that sampling has become a common practice in many types of popular music); *see also* Justin Williams, *Music & Letters*, 94 OXFORD U. 554, 556 (2013) (reviewing SOPHY SMITH, HIP-HOP TURNTABLISM, CREATIVITY AND COLLABORATION (2013) & MARK KATZ, GROOVE MUSIC: THE ART AND CULTURE OF THE HIP-HOP DJ (2012)) (explaining the change in technology that began in the 1980s and consequentially changed the music industry).

[3] *See Newton*, 388 F.3d at 1192 (illustrating the process of sampling in order to manipulate and combine sounds and the origin of the process); *see also* Jane McGrath, *How Music Sampling Works*, HOW STUFF WORKS ENTERTAINMENT (last visited Oct. 8, 2016), *archived at* https://perma.cc/AQC2-BSAJ (portraying how music sampling has evolved and been used in popular culture).

[4] *See* Grand Upright Music, Ltd. v. Warner Bros. Records, 780 F.Supp. 182, 183 (S.D.N.Y. 1991) (demonstrating the belief that stealing is common industry practice).

[5] *See Grammy Awards Change Rules, Allow Samples in Songwriting Categories*, FACT (June 12, 2014), *archived at* https://perma.cc/6A8H-LPQT (articulating the songwriting rule change at the Grammy Awards). The best songs categories are awarded to the songwriter(s) and sampling was considered as specific to "the

production and composition that recently the Recording Academy changed this rule.[6] Starting in 2015, songs with prominent samples can compete in other categories, including "Song of the Year."[7] Using sampling as a method of songwriting is finally no longer a reason to be refused the highest honor in the industry.[8] Bill Freimuth, vice president of the Recording Academy, when explaining this transition, commented that sampling is an old and common practice, and the rules should reflect the current music landscape.[9] Freimuth suggested that even great composers such as Bach and Bartok "sampled" Vivaldi and Hungarian folk music: "[U]sing samples was just part of the craft, it wasn't really cheating in any way, and it wasn't a lesser form of songwriting."[10]

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unique craft of writing rap songs." *Id.*

[6] *Compare 52nd OEP Category Description Guide*, GRAMMYS (last visited Oct. 18, 2016), *archived at* https://perma.cc/28C9-6W6J (displaying requirements and rules for specific awards before the rule change), *with* Mike Roe & Bianca Ramirez, *New Grammys rules include allowing samples in Song Of The Year*, WITHOUT A NET (June 12, 2014), *archived at* https://perma.cc/MV85-5EH9 (explaining new Grammy rules as of 2015, allowing for sampling in Song of the Year).

[7] *See* Roe & Ramirez, *supra* note 6 (announcing why sampling can now be used in Song of the Year awards and stating the reason that Freimuth used the term "sample" in a broad sense to include "borrowing," since technical devices that allow musicians to splice, lift, manipulate and loop existing sounds have only been around for a few decades).

[8] *See* Roe & Ramirez, *supra* note 6 (showing why these rules allow more opportunities for artists to win prominent awards and asserting that this rule change more likely means that songs using some samples will not become immediately disqualified for the prize – "to eliminate a lot of the head-scratching" why some very popular songs are not nominated); *see also* Alex Cosentini, *Allowing Samples in Grammy Songwriting Categories is a Terrible Decision*, COSENTINI ENTERTAINMENT BLOG, (June 12, 2014), *archived at* https://perma.cc/45DD-4YTG (warning of potential pushback against new artists from the industry). There is likely to be pushback for a rap song or a song with heavy samples to be competing for the song of the year, as sampling is still often considered as "lack[ing] of originality and creativity," and not as valuable or precious an activity as songwriting. *Id.*

[9] *See* Roe & Ramirez, *supra* note 6 (discussing the history of sampling by classical musicians).

[10] *See* Roe & Ramirez, *supra* note 6 (quoting Freimuth defending the sampling practice of musicians). It should be clear that Freimuth did not mean sound recordings or digital samplers existed at the time of Bach or Bartok, but that borrowing was a common practice in music composition and that sampling is one contemporary form of borrowing. *See also infra* notes 353, 354, and accompanying text.

Nevertheless, the U.S. courts have not been very receptive to sampling.[11] In 2005, the Sixth Circuit ruled that while musicians may use a *de minimis* defense for sampling a musical composition, there is no *de minimis* defense available for sampling sound recordings.[12] In 2009, the Sixth Circuit ruled that paying homage by sampling is not a fair use.[13] In both cases, the disputed samples were works of George Clinton.[14] He has disapproved the copyright holder of his recordings, Bridgeport Music Inc., for going after sampling musicians aggressively, commenting: "The DNA of hip hop has been hijacked, leaving many artists across generations in needless hardship."[15]

Following Tricia Rose, professor of Africana Studies and a cultural critic, this article sees sampling as a practice in secondary orality – orality mediated by technologies that allow one to store, retrieve and distribute sound.[16] "Secondary orality" comes from

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[11] *See* Stephen R. Wilson, *Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense?*, 1 J. HIGH TECH. L. 179, 180 (2002) (showing a lack of case law as to sampling and unlawful appropriation); *see also* Mark R. Carter, *Applying the Fragmented Literal Similarity Test to Musical-Work and Sound-Recording Infringement: Correcting the Bridgeport Music, Inc. v. Dimension Films Legacy*, 14 MINN. J. L. SCI. & TECH. 669, 686-87 (2013) (commenting on the *de minimis* effect); Susan J. Latham, *Newton v. Diamond: Measuring the Legitimacy of Unauthorized Compositional Sampling – A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J. 119, 125 n.35 (2003) (discussing *de minimis* sampling).

[12] *See* Bridgeport v. Dimension Films, 410 F.3d 792, 797-98 (6th Cir. 2005) [hereinafter *Bridgeport I*] (inferring that the *de minimis* defense is not available for sampling a musical composition, it should thus be allowed); *see also* Bridgeport Music, Inc. v. Dimension Films, 230 F. Supp. 2d 830, 842 (M.D. Tenn. 2002) (discussing the importance of different sounds in sampling).

[13] *See* Bridgeport v. Universal Music Group, 585 F.3d 267, 278 (6th Cir. 2009) [hereinafter *Bridgeport II*] (affirming the district court's holding that the homage is "not necessarily fair use").

[14] *See Bridgeport II*, 585 F.3d at 272 (indicating the origins of the digital sample was George Clinton's *Atomic Dog*); *Bridgeport I,* 410 F.3d at 796 (indicating the origin of the digital sample was *Get Off Your Ass and Jam* by George Clinton, Jr. and the Funkadelics).

[15] *See* Mike Masnick, *George Clinton Takes on Sample Troll Bridgeport Music Again: The DNA of Hip Hop Has Been Hijacked*, TECHDIRT (June 13, 2011), *archived at* https://perma.cc/X2H7-AWV6 (illustrating Clinton's complete and utter disgust with Bridgeport's lawsuits surrounding his samples).

[16] *See* TRICIA ROSE, BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA 86 (George Lipsitz, et.al eds., 1994) (providing an example of rap music as in part an expression of post-literate orality). Tricia Rose

Walter J. Ong, a philosopher and cultural historian, who analyzed the "technologizing of word" – the transition from a primary oral society to a chirographic/typographic society – and its effects on our human consciousness and modes of thought, including how we relate ourselves to our expressed ideas, the concept of authorship and ownership over these expressions.[17] Copyright law, as a product of the chirographic/typographic society,[18] used to protect only "writings of an author."[19] In the late nineteenth century, the technologizing of sounds raised questions about the ownership of both literal and non-literal expressions.[20] Although copyright law now uses the abstract term "original works" to include a variety of activities and their expressive results, its interpretation can be affected by judges' pre-occupied perceptions of cultural productions that are more closely associated with the technology of writing.[21] The technological biases against non-literal forms of expressions in copyright earlier prevented the courts from understanding sound recording copyright and later from making room for sampling as a secondary orality practice.[22]

Part II of this article first discusses Ong's thesis about how the technologizing of words – including orality, literary and secondary orality – affect the sense of ownership of expressions, and then gives an overview of the exclusion and inclusion of recorded sound in copyright in the United States.[23] Part II then moves on to look at the mechanical reproduction of sounds, which began in the last quarter of

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also uses the term "post-literate" orality. *Id.*

[17] *See* WALTER ONG, ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD 132 (Routledge Taylor & Francis Group, 2nd ed. 1982) (opining on the societal transition with the advent of technology).

[18] *See id.* at 128-29 (providing the history of the beginning and evolution of copyright law).

[19] *See* Copyright Act of 1909, § 4, *repealed by* The Copyright Act of 1976, 90 Stat. 2541 (stating that only an author's writings are covered by the statute).

[20] *See Copyright Basics*, UNITED STATES COPYRIGHT OFFICE (May 2012), *archived at* https://perma.cc/37B2-2F8A (establishing the scope of protection under U.S. copyright law for literal and non-literal expressions).

[21] *See id.* (outlining what constitutes an "original work of authorship" under the 1976 Copyright Act).

[22] *See* W.H. Baird Garrett, *Toward a Restrictive View of Copyright Protection for Nonliteral Elements of Computer Programs: Recent Developments in the Federal Courts*, 79 VA. L. REV. 2091, 2091 (1993) (explaining the court's struggle to define non-literal elements).

[23] *See* ONG, *supra* note 17, at 79 (analyzing how technologizing words has affected the ability to critique the changes technology has on those words); *see also* discussion *infra* Part II. Copyright, and the Technologization of Word.

the nineteenth century, as the technologizing of "sound."[24] After the phonograph was invented in 1877, it took exactly a century for phonorecords to become a full-flung copyright subject matter in the 1976 U.S. Copyright Act.[25] Nevertheless, the courts may still have a technological bias against non-literal forms of expression until this day.[26] Part III explains why Rose considers sampling a secondary orality practice, how the practice of sampling has affected the process of music production, aesthetics, and authorship, and why this article chooses to tackles the issue of sampling from the angle of copyright's technological biases.[27] Part IV reviews major cases involving hip hop and sampling, and provides some suggestions on how copyright law can better accommodate sampling as a secondary orality practice.[28] Part V concludes the article by noting how sampling has been conceived positively in hip hop in the U.S. but cautions that the politics can be very different in another context, e.g. in the sampling of indigenous sounds in world beat and ethnic pop.[29]

[24] *See* ONG, *supra* note 17, at 82 (articulating how mechanical contrivance affects how sound is produced); *see also* discussion *infra* Part II. Mechanical Reproduction and the Technologizing of the Sound.

[25] *See* Paul S. Rosenlund, Note, *Compulsory Licensing of Musical Compositions for Phonorecords Under the Copyright Act of 1976*, 30 HASTINGS L. J. 683, 683 (1979) (discussing how the 1976 Acts provided new requirements for music publishers due to the introduction of compulsory licensing).

[26] *See* Garrett, *supra* note 22, at 2126-27 (reaffirming the courts restrictive approach on non-literal copyrights).

[27] *See* ROSE, *supra* note 16, at 64 (explaining how rap music's use of sampling has affected the culture of the music industry); *see also* discussion *infra* Part III. Sampling, Secondary Orality and Copyright

[28] *See, e.g.*, VMG Salsoul v. Ciccone, 824 F.3d 871, 874 (9th Cir. 2016), *Bridgeport I*, 410 F.3d 792, 795 (6th Cir. 2005), Newton v. Diamond, 388 F.3d 1189, 1190 (9th Cir. 2003), Grand Upright Music, Ltd. v. Warner Bros. Records, 780 F. Supp. 182, 183 (S.D.N.Y. 1991); *see also infra* Part IV. Sampling on Trial

[29] *See* Megan M. Carpenter, *Intellectual Property Law and Indigenous Peoples: Adapting Copyright Law to the Needs of a Global Community*, 7 YALE HUM. RTS. AND DEV. L. J. 51, 58 (2004) (proposing the need for intellectual property law to acknowledge cultural variances).

II. The Exclusion and Inclusion of Sound Reproduction in US Copyright Law

A. Copyright, and the Technologization of Word

The birth of copyright law was closely related to printing technologies and book trade in the sixteenth and seventeenth century.[30] Unsurprisingly, the scope of copyright law initially was rather limited, covering only the printed books and maps, and only later expanded to cover subject matter enabled by newer technologies, such as sound recordings and motion pictures.[31]

Although Walter J. Ong did not directly address the origin of copyright, he discussed how the technologization of word in literary society changed human consciousness, and introduced a sense of ownership of written symbols.[32] Unlike primary oral traditions,[33] in which words are potent, power-driven by the speaker in the living present, people in chirographic or typographic society see words as "things," which are alienated from the speaker and objectified in visual space,[34] and thus can be exploited for the management of knowledge.[35]

According to Ong, the technologization of words also affects our understanding of "originality," "creativity," and the ownership of an expression.[36] In primary orality, using formulaic patterns was economic because it made recalling easier.[37] While persons in the primary oral culture could "entertain some sense of proprietary rights

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[30] *See* LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 4 (1968) (tracing the development of copyright law through creation of the printing press and book trade).

[31] *See* Shun-Ling Chen, *Exposing Professionalism in United States Copyright Law: The Disenfranchised Lay Public in a Semiotic Democracy*, 49 U.S.F. L. REV. 57, 57-59 (2015) (discussing the expansion of copyright was not without political struggles and policy debates).

[32] *See* ONG, *supra* note 17, at 173-75 (noting the shift in types of literacy and its effect on human consciousness).

[33] *See* ONG, *supra* note 17, at 133-34 (distinguishing primary and secondary orality).

[34] *See* ONG, *supra* note 17, at 32 (characterizing how words affect communication).

[35] *See* ONG, *supra* note 17, at 129 (encouraging interior consciousness instead of exploitation of visual space for the management of knowledge).

[36] *See* ONG, *supra* note 17, at 132 (explaining how technology impacts the human view of creativity and expression).

[37] *See* ONG, *supra* note 17, at 84-85 (evaluating economic efficiencies of incentivizing early record keeping).

to a poem," such sense is rare and weak due to the shared lore, formulaic patterns and themes.[38] In a typographic culture, Ong argued that a printed book is seen as an object that "contains" information, with title page as its label,[39] and "created a new sense of private ownership of word."[40] Furthermore, print "encouraged a sense of closure"[41] – a work is "set off from other words" and the artificial boundary gave the impression that the work is "a unit in itself."[42] Thus, print culture "gave birth to the romantic notion of 'originality' and 'creativity,' … seeing [the work's] origins and meanings as independent of outside influence, at least ideally."[43]

Printing, and later computerization, continued and reinforced this particular transformation initiated by writing.[44] Electronic devices, such as telephone, radio and television, marked a larger shift, introducing what Ong coins as "secondary orality": a technology-mediated orality which largely relies on the writing and printing culture.[45] Ong did not discuss much whether the deployment of electronic devices and the resurrected orality may affect how we relate ourselves with expressed ideas, including the concept of authorship and ownership over stored words and sounds.[46] Nevertheless, he noted generally that those who practice the art of secondary orality are not devoid of the mindset of literary people.[47] The new form of orality is "more deliberate and self-conscious," and even the spontaneity in secondary orality is carefully planned.[48] This

[38] *See* ONG, *supra* note 17, at 128 (comparing weak common attributes of old themes against rare proprietary rights).
[39] *See* ONG, *supra* note 17, at 123-24 (alleging a book is a vehicle for providing information).
[40] *See* ONG, *supra* note 17, at 128 (proclaiming that print influenced individual's ability to feel a sense of ownership over words).
[41] *See* ONG, *supra* note 17, at 129 (illustrating how printed works evoke a sense of isolation and finality).
[42] *See* ONG, *supra* note 17, at 131 (creating a different medium of expression).
[43] *See* ONG, *supra* note 17, at 131 (detailing the way that print gave works the ability to stand alone).
[44] *See* ONG, *supra* note 17, at 132 (examining the stages and transformation of orality with technology, specifically printed works).
[45] *See* ONG, *supra* note 17, at 133 (classifying the concept of 'secondary orality').
[46] *See* ONG, *supra* note 17, at 10-11 (observing technological impact on orality without delving into impact on forms of human expression).
[47] *See* ONG, *supra* note 17, at 11 (noting that present day orality is based on a written literary foundation).
[48] *See* ONG, *supra* note 17, at 133 (explaining the differences between the new and old oralities).

article does not attempt to develop a full discussion of how the transition to secondary orality affects the human psyche – picking up what Ong left off is too daunting a project for it to achieve.[49] Rather, this article borrows concepts from Ong to discuss how the copyright system responded to the objectification and materiality of "sounds," resulting in the many misfits between the copyright system and orality, and the recurring failures to understand sampling as a secondary orality practice.[50]

B. Mechanical Reproduction and the Technologizing of the Sound

The pronounced purpose of copyright law in the United States is to promote the advances of science and useful arts by encouraging the production and the dissemination of information.[51] Hence, one important issue about copyright ability is whether an expression can be stored and retrieved by certain forms of technology.[52] As mentioned earlier, the first U.S. Copyright Act of 1790 only covered books, charts and maps.[53] Music copyright, in the form of sheet music, only came to exist in 1831,[54] and would remain the only form

[49] *See* ONG, *supra* note 17, at 82 (outlining the impact of technology on human enlightenment and understanding).
[50] *See* ONG, *supra* note 17, at 31 (explaining the utility of orality and sound to derive meaning).
[51] *See* U.S. CONST. art. I, § 8, cl. 8 (referencing constitutional basis for copyright law). "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*
[52] *See Copyright Basics*, *supra* note 20, at 3 (establishing that an inquiry into whether a work is fixed is necessary for copyright protection).
[53] *See* Copyright Act of 1790, 1 Stat. 124 (1790) (current version at 17 U.S.C. § 101 (1976)) (identifying original legislative embodiment of copyright law in the United States). "An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned." *Id.*
[54] *See* Copyright Act of 1831, 4 Stat. 436 (1831) (current version at 17 U.S.C. § 102 (1976)) (observing the introduction of music as copyrightable subject matter). The Copyright Act of 1831 states:

> [A]ny person or persons, being a citizen or citizens of the United States, or resident therein, who shall be the author or authors of any book or books, map, chart, or musical composition, which may be now made or composed, and not printed and published, or shall hereafter be made or composed, or who shall invent, design, etch,

of music covered by the US Copyright Act until the 1970s.[55] Sound was ephemeral until Thomas Edison invented the first phonograph in the 1877, and the technology took a few more years to mature.[56]

Thomas Edison had envisioned that phonograph could faithfully record not only the words but also the quality and mood of the voice.[57] Sound quality, intonation, pitch, instrument technique that used to slip through the symbols could now be reproduced.[58] As Ong's secondary orality deals with technology-facilitated human verbal communication, this paper takes a look at not only phonograph but also player pianos, successful commercial devices that mechanically reproduce music and were legally important in the beginning of the twentieth century, to discuss the technologizing of sound further. [59]

1. White-Smith v. Apollo – are piano rolls violating the copyright of musical composition?

In 1908, the Supreme Court ruled on *White-Smith*, to decide whether piano rolls, which are perforated sheets of paper used in a musical instrument playing automatically, are "copies" of sheet music under copyright law, and their production thus must obtain

> engrave, work, or cause to be engraved, etched, or worked from his own design, any print or engraving, and the executors, administrators, or legal assigns of such person or persons, shall have the sole right and liberty of printing, reprinting, publishing, and vending such book or books, map, chart, musical composition, print, cut, or engraving, in whole or in part, for the term of twenty-eight years from the time of recording the title thereof, in the manner hereinafter directed.

Id.

[55] *See* Copyright Act of 1976, 17 U.S.C. § 101 (1976) (recognizing evolution of copyright law to incorporate protection of sound concepts).

[56] *See The Phonograph*, SCIENTIFIC AMERICAN, July 25, 1896, at 65 (describing the impact of Edison's first phonograph as foundational to what would become a storage unit for songs and speeches alike).

[57] *See id.* (highlighting the belief that recorded words could be passed down to future generations). "He contended that it would be a faithful stenographer, reproducing not only the words of the speaker, but the quality and inflections of his voice; and that letters, instead of being written, would be talked." *Id.*

[58] *See id.* (providing information on how a phonograph reproduces sound).

[59] *See* White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 9 (1908) (describing importance of pianos for producing music). "The record discloses that in the year 1902 from seventy to seventyfive thousand [sic] of such instruments were in use in the United States and that from one million to one million and a half of such perforated musical rolls . . . " *Id.*

permission from the copyright holder.[60] Appellant argued that music is intended for the ear and that copyright should prevent the multiplication of "every means" of reproducing the music, sheet music and perforated rolls alike.[61] Appellee claimed that copyright only covered the "tangible results of mental conception" protected by the statute, which is sheet music, and should not extend to the perforated piano rolls.[62]

The interpretation of statutory language was complicated by the introduction of new technologies unforeseen by the legislature.[63] The majority cited earlier American and English cases regarding both player pianos and phonographs as part of their deliberation.[64] The major debates in the Supreme Court centered around the following questions: 1. is a perforated roll a "copy" of the sheet music from which it is adapted; 2. what are perforated rolls if they do not count as copies of sheet music; 3. what is the purpose of copyright protecting sheet music.[65]

The majority handed down a decision in favor of the manufacturers of perforated rolls, and reckoned that: 1. a sheet music is written or printed notation that expresses the musical composition, musical sounds and perforated rolls are not "copies" of the sheet music in the sense of copyright;[66] 2. the perforated rolls are part of the machine, and can only be used as part of the machine;[67] and 3. the

[60] *See id.* at 18 (explaining Supreme Court's ruling that piano rolls cannot be copies within meaning of copyright act).
[61] *See id.* at 11 (arguing music should be protected under copyright act).
[62] *See id.* (offering appellee's argument that piano rolls are not covered under copyright act).
[63] *See* Copyright Act of 1976, 17 U.S.C. § 101 (1976) (illustrating that Congress considered future developments in technology when amending the Copyright statute).
[64] *See White-Smith Publ'g Co.*, 209 U.S. at 13 (using prior cases as support for not finding copyright protection); *see also* Stern v. Rosey, 17 App. D.C. 562, 564-65 (1901) (referencing phonograph, wax cylinder); Kennedy v. McTammany, 33 F. 584, 584-85 (D. Mass. 1888) (referencing player piano, perforated roll).
[65] *See White-Smith Publ'g Co.*, 209 U.S. at 12 (discussing decisions prior to this case have held perforated rolls operated in connection with mechanical devices are not subject to copyright).
[66] *See Kennedy*, 33 F. at 584-85 (ruling that perforated strips do not qualify as paper copies of sheet music); *Stern*, 17 App. D.C. at 564-65 (noting the limitations on the application of the term "copying").
[67] *See Kennedy*, 33 F. at 584-85 (noting how the perforated strips are an extension of the machine that created them); *Stern*, 17 App. D.C. at 564 (denying plaintiff's assertion that the wax cylinders were copyrighted sheets).

perforated rolls are no copies of sheet music because they do not contain intelligible notation – bars, notes, words and signs, hence they are incomprehensible even to experienced musicians.[68]

The majority characterized the composer as a romantic author, one who has the "intellectual creation" in his mind.[69] Although the composer could perform what was in his head without first presenting it in written form, the majority opined that copyright could only protect things in a form which one can "read" or "see," and then copy.[70] This is a literal and formalist interpretation of the statute, which reflects the Ongian literary mentality.[71] Alienated from the composer, the sheet music is a tangible object that contains the results of the composer's intellectual efforts.[72] By arguing a sheet music should at least convey the information of the melody to those with trained skills to read the inscriptions,[73] the majority implicitly suggested that the purpose of granting copyright to musical works is not merely to encourage the performance of music for the entertainment of the public's ears.[74] Rather, only in the form of sheet music can a musical work inform those (few) who are musically

[68] *See Kennedy*, 33 F. at 584 (explaining why the presence of clef or bars or lines would be determinative of sheet music); *Stern*, 17 App. D.C. at 565 (stressing the importance for sheet music to follow notation standards).
[69] *See White-Smith Music Publ'g Co.*, 209 U.S. at 17 (explaining that "[a] musical composition is an intellectual creation which first exists in the mind of the composer").
[70] *See id.* (discussing the definitions of a "copy").
[71] *See* Copyright Act of 1831, ch. 16, § 4, 4 Stat. 436, 437 (1831) (current version at 17 U.S.C. § 407 (1976)) (referencing the background of the 1831 Copyright Act was to protect works existed in a tangible media).
[72] *See White-Smith Publ'g Co.*, 209 U.S. at 17 (stating that the overall intent of the statute was to protect the composer).
[73] *See id.* at 18 (noting the difficulty of reading the scrolls experienced by those familiar with the craft). The court noted:

> [E]ven those skilled in the making of these rolls are unable to read them as musical compositions . . . They are not intended to be read as an ordinary piece of sheet music, which, to those skilled in the art, conveys, by reading, in playing or singing, definite impressions of the melody.

Id.
[74] *See id.* at 17 (holding the statute was not intended to prohibit music composers from sharing their work with the public).

literate, to facilitate learning and subsequent innovations and to fulfill the copyright's constitutional mandate.[75]

In his concurring opinion, Justice Holmes further abstracted the information contained in the perforated roll, the tangible object.[76] Holmes noted that a piece of music can be represented in different forms, and the collocated musical sounds performed according to such notation are the essential meaning and worth of the musical composition.[77] Holmes reckoned that a paper roll is a copy of the music composition, and hence, manufacturing a paper roll perforated to perform these sounds should also be exclusive to the copyright holder.[78]

2. 1909 Copyright Act – Congressional Deliberation Over the Mechanical Reproduction of Sound

While the Supreme Court agonized over *White-Smith*, a congressional deliberation over the general revision of copyright law was also underway.[79] The proposed bill included a clause to broaden

[75] *See id.* at 10-11 (discussing the process by which a person skilled in the art of sheet music reproduces what the author intended); Data Cash Sys., Inc. v. JS&A Group, Inc., 480 F. Supp. 1063, 1069 (N.D. Ill. 1979) (holding that the object phase of a computer program was not a copy based on the Copyright Act or common law definitions); J. Diane Brinson, *Copyrighted Software: Separating the Protected Expression from Unprotected Ideas, A Starting Point*, 29 B.C.L. Rev. 803, 803 (1988) (describing the purpose of the note as suggesting a separation between a computer program's unprotected ideas from protected expression); *Record Companies Must Embrace Changing Digital Landscape*, BILLBOARD BIZ (Feb. 23, 2004), *archived at* https://perma.cc/L99E-XDX2 (explaining that copyright law has allowed an unprecedented level of privacy).

[76] *See White-Smith Publ'g Co.* 209 U.S. at 19 (opining that the notion of tangible property in is far more abstract in copyright law).

[77] *See id.* (expounding on musical composition as a smorgasbord of sounds reduced to a tangible expression). Holmes further notes that this musical composition can be reproduced with or without continuous human input. *Id.*

[78] *See id.* at 20 (contending that any object that reproduces the musical composition should be protected like the original copy).

[79] *See Arguments before the Committees on Patents of the State and House of Representatives, Conjointly: on the B. §6330 and H.R. 19853, to Amend and Consolidate the Acts Respecting Copyright*, 59th Cong. (1906) [hereinafter *Arguments*] (statement of Charles W. Ames, representing United Typothetae of America, et. al.) (indicating that the Congressional deliberations to amend and consolidate the acts respecting copyright occurred June 6-9, 1906).

the forms of "copies,"[80] which would include phonorecords and piano rolls.[81]

Composers and publishers supported the bill, and championed broadening the interpretation of the term "writing" in the Constitution.[82] Citing *Burrow-Giles Lithographic Co. v. Sarony*,[83] composers and publishers noted that it was the opinion of the Supreme Court that "writing" can be broadly construed to include "all forms of writing, printing, engraving, etching, by which the ideas in the mind of author are given visible expression," including photographs, the technology of which did not exist earlier.[84] It was seen as unfair that the phonorecord producers pay the session performers but not the composers for using their music.[85] It was argued that these manufacturers – of phonograph and player piano alike – were "parasitic," exploiting the composers without stimulating original works.[86]

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[80] *See id.* at 26 (statement of Horace Pettit, representing Victor Talking Machine Company) (suggesting that Sec. 3 of the bill include a clause to broaden the forms of copies protected under it).

> That the copyright provided by this act shall extend to and protect all the copyrightable component parts of the work copyrighted, any and all reproductions or copies thereof, in whatever form, style, or size, and all matter reproduced therein in which copyright is already subsisting, but without extending the duration of such copyright.

Id.

[81] *See* Michael Landau, "*Publication," Musical Compositions, and Copyright Act 1909: Still Crazy After All These Years*, 2 VAND. J. ENT. L. & PRAC. 29, 30 (2000) (explaining later that musicians and singers did not have a role in the player piano cases, and did not begin claiming copyright of their recorded performances until some decades later).

[82] *See Arguments*, *supra* note 79, at 99 (statement of G. Howlett Davis, representing inventors) (tracing the original interpretation of the term "writing" in the Constitution and opining on the Copyright League's desire to expand its traditional meaning).

[83] *See* 111 U.S. 53 (1884).

[84] *See id.* at 58 (explaining what writings meant in the context of the clause of the Constitution).

[85] *See Arguments*, *supra* note 79, at 197 (statement of Charles S. Burton) (showing how former copyright law did not equally protect session performers and composers).

[86] *See Arguments*, *supra* note 79, at 223 (statement of Nathan Burkan) (arguing phonorecord manufacturers exploited the real artists). "This industry devoted to

Most manufactures of phonographs and player pianos banded together in the opposition of the bill,[87] arguing that the Constitution protects only authors and their "writings."[88] Reiterating the majority opinion in *White-Smith*, they believed the interpretation of the term "writing" should be narrow, copyright should protect only expressions perceptible to the eye,[89] and arguing that cylinders and perforated rolls were mere part of a machinery mechanism.[90]

In the end, Congress overturned *White-Smith*, expanding the music copyright to cover the exclusive right to prepare mechanical reproduction of the music.[91] Some congressional testimonies did point out that various skills and contributions are needed in manufacturing player pianos and phonographs beyond music composition.[92] For example, the production of piano rolls involved mathematicians and technicians, and phonorecords could not do without singers and musicians who had adapted their performance to the function of the phonograph.[93] Nevertheless, at this time Congress

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the manufacture of perforated rolls and phonograph records is essentially parasitic. It thrives by exploiting the productions of American composers, their names, and reputations. It exercises no productive effort in the art which it exploits. It does not stimulate original work." *Id.*

[87] *See Arguments*, *supra* note 79, at 155-56 (statement of Paul H. Cromelin) (indicating how he opposed the portions of the copyright law which would include reproductions under the term "writings"); *see also Arguments*, *supra* note 79, at 381 (memorandum of objections to the bill by Philip Mauro, counsel American Gramophone Company) (discussing how composers and publishers have not contributed to the changed conditions).

[88] *See* U.S. CONST. art. I, § 8, cl. 8 (declaring that Congress has the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

[89] *See Arguments*, *supra* note 79, at 381 (memorandum of objections to the bill by Philip Mauro, counsel American Gramophone Company) (opining that the provision in question is unconstitutional because it expands the definition of "writings" and what should be protected).

[90] *See Arguments*, *supra* note 79, at 380 (memorandum of objections to the bill by Philip Mauro, counsel American Gramophone Company) (stressing that cylinders and perforated rolls are part of the machinery mechanism because it is made by machines operating similarly to printing machines).

[91] *See* An Act to Amend and Consolidate the Acts Respecting Copyright Act of 1909, Pub. L. 60-349, § 1(e), 35 Stat. 1075 (1909) (detailing the new changes to copyright protection in the United States).

[92] *See Arguments*, *supra* note 79, at 102 (statement of Horace Pettit) (discussing the impact different parties have on the sound of the musical instruments).

[93] *See Arguments*, *supra* note 79, at 102 (statement of Horace Pettit) (describing the

did not consider piano rolls or phonorecords as a new category of subject matter, nor did it consider contributors with these other skills as potential "authors" of musical works.[94] Rather, Congress limited its understanding of copyright as an exclusive right to literary expressions and endowed the music composers with the power to control not merely the reproduction of the notated music, but also its animation forms, either via perforated paper and a mechanical mechanism, or via performance captured by phonorecords.[95]

C. Sound Recording as "Writing"? - Copyright's Technological Biases

1. The Failed Attempt in the 1909 Act

Although phonographs and player pianos technologize music differently, the 1909 Act did not clearly distinguish between these two, because both composers and publishers of sheet music saw their copyright weakened by the innovative technologies in similar ways.[96]

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ability of inventors to reproduce performances for the general public). The perforated paper rolls needs input from mathematicians, musicians and technicians; restricted by technical constraints of phonograph, only those musicians and singers who were able to adapt their performance to the functions of the machine would be able to contribute to phonorecords. *Id.* at 99.

[94] *See Arguments*, *supra* note 79, at 230 (statement of J.L. Tindale) (discussing the role of piano rolls in pieces of music).

[95] *See* 17 U.S.C. § 114 (2010) (outlining extent of protections provided to owners of copyright of sound recordings provided by statute). Nevertheless, Congress made a compromise by establishing a compulsory license system for mechanical reproduction. *Id.* The current law includes the same exception from the Copyright Act of 1909. *Id. See also* Copyright Act of 1909 §1(e) (1909) (defining the rights surrounding copyright law).

> [A]s a condition of extending the copyright control to such mechanical reproductions, That whenever the owner of a musical copyright has used or permitted knowingly acquiesced in the use of the copyrighted work upon the parts of instrument serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor a royalty of two cents on each such part manufactured, to be paid by the manufacturer thereof.

Id.

[96] *See* David Suisman, *Sound, Knowledge, and the "Immanence Of Human*

While the 1909 Act recognized that a musical work can be copied in "any form," copyright still only protected "*writings* of an author" (emphasis added),[97] or at least works that are perceptible to the eyes.[98]

Player piano rolls and phonorecords are certainly tangible media with retrievable information, and their manufacturing requires skills and knowledge a composer often do not possess.[99] If, according to Ong, the defined boundary of tangible media allowed the imagination of ownership and control to permeate throughout society, piano rolls and phonorecords should have stood as strong candidates as new subject matter of copyright. [100] At the congressional hearing, some manufacturers of piano rolls and phonorecords did hold the position that they should also be granted copyright for their products.[101] The representative of the Victor

Failure": Rethinking Musical Mechanization through the Phonograph, the Player-Piano, and the Piano, 28 SOCIAL TEXT 13, 14 (2010) (detailing the congressional history dealing with changes in the music industry as a result of advancing technologies at the beginning of the 20th century). Historian David Suisman observed that the two technologies of musical mechanization – player pianos and phonograph – were discussed on "relatively equal terms" in the congressional debates which led to the 1909 Act, and the final solution – mechanical rights – took both technologies into account. *Id.*

[97] *See* Copyright Act of 1909 §1 (e) (providing protection to only to written works, but also allowing for reproduction after royalties are paid).

[98] *See id.* (listing the following subject matters: books, periodicals, lectures prepared for oral delivery, dramatic compositions, musical compositions, maps, works of art, drawings of a scientific or technical character, photographs, prints and pictorial illustrations); *see also* Chen, *supra* note 31, at 67 (illustrating the lithographers objection to the inclusion of artistic works). In fact, the inclusion of pictorial works in the 1909 Act also went through a heated debate over the interpretation of "writings." *Id.*

[99] *See Arguments*, *supra* note 79, at 197 (statement of Charles Burton, representing manufacturers of automatic musical instruments and perforated-roll controllers) (explaining that the perforated paper rolls need input from mathematicians, musicians and technicians; restricted by technical constraints of phonograph, only those musicians and singers who were able to adapt their performance to the functions of the machine would be able to contribute to phonorecords); *see also Arguments*, *supra* note 79, at 27-28 (statement of Horace Pettit) (discussing the skills and expertise behind the creation and performance of the instruments).

[100] *See* Suisman, *supra* note 96, at 23 (citing theorist Theodor Ardono, "Music, previously conveyed by writing, suddenly turns itself into writing.").

[101] *See Arguments, supra* note 79, at 253-54 (statement of Mr. Charles Burton, representative of manufacturing companies) (documenting the representative of piano roll controller, Mr. Burton, asserting that piano rolls should be copyrightable); *Arguments*, *supra* note 79, at 27-28 (statement of Horace Pettit,

Talking Machine Company brought attention to the new technologizing of human and instrumental sound in phonorecords, and how it can achieve similar functions as chirography/typography/photography – technologies that were already given space in the copyright system.[102] He purported that the bill should cover phonorecords, because:

> the talking machine is a *writing* upon a record tablet … Here we have a *true writing of the voice*, recording uttered sounds, … the special particular expression and characteristic method of speech . . . the exact voice, with all its individuality recorded, to be reproduced through the medium of the reproducing device employing a stylus operating in the groove.[103]

Making an analogy to *Sarony*, he argued that phonorecords contain "the individuality and personality of the rendition by the performer . . . it is the *picture* of the voice or of the instrumentation . . . as copyrighted photograph is a picture of a person and a thing."[104]

Nevertheless, the 1909 Act did not see piano rolls and phonorecords as new copyright subject matter, even though their manufacturing required skills and knowledge, which a composer often do not possesses, and such production involved many other practitioners.[105] For a copyright law system that was still largely based on chirography/typography, and only recently opened door to other visually perceptible works, it was difficult to include the sound

representative of Victor Talking Machine Company) (asserting that the copyright statute should be extended to "talking machine records").

[102] *See Arguments*, *supra* note 79, at 28 (statement of Mr. Horace Pettit, representative of Victor Talking Machine Company) (comparing phonorecords and chirography, typography, and photography as the basis for the argument that piano rolls fall within copyrightable subject matter).

[103] *See Arguments*, *supra* note 79, at 29 (statement of Mr. Horace Pettit, representative of Victor Talking Machine Company) (reasoning that the bill should cover phonorecords because they are similar to other instrumental arts).

[104] *See Arguments*, *supra* note 79, at 29 (statement of Mr. Horace Pettit, representative of Victor Talking Machine Company) (analogizing *Sarony's* argument that a picture is similar to voice).

[105] *See* Landau, *supra* note 81, at 30 (stating that the Copyright Act of 1909 did not include phonorecords and piano rolls).

inscriptions due to the inability to convey comprehensible information to human eyes.[106]

For the manufacturers of piano rolls and phonorecords, the concerns of unauthorized copying were not fabricated.[107] Around the time when Congress enacted the 1909 Act, the Victor Talking Machine Company and Fonotipia sued a competitor and were granted injunction based on equity.[108] In 1912, AEolian sued a competitor for copying its perforated rolls.[109] The court admitted that this is not "strictly matters of copyright," but granted preliminary injunction based on equity and on its interpretation of the statutory language, allowing a licensee to be "an aggrieved party."[110] The *Fonotipia* court further reckoned that sound recordings could be copyrighted under the 1909 Act,[111] yet this dictum was criticized and was not upheld by later courts.[112] During that time the Copyright Office also consistently refused to register copyright for phonograph records.[113] Player pianos gradually went out of fashion, but the copyright debates over sound recording continued in courts as well as the

[106] *See* Landau, *supra* note 81, at 35 (stating patent law protects devices that re-create musical sounds, but not musical works).
[107] *See* Landau, *supra* note 81, at 35 (describing the manufacture's argument for changes to the act).
[108] *See* Fonotipia Ltd. v. Bradley, 171 F. 951, 964 (C.C.E.D.N.Y 1909) (stating that injunctive relief was granted to Fonotipia and Victor Talking Machine).
[109] *See* AEolian Co. v. Royal Music Roll Co., 196 F. 926, 927 (W.D.N.Y. 1912) (indicating AEolian brought action against a competitor for duplicating perforated rolls).
[110] *See id.* at 927-28 (holding that Congress gave an owner of copyrighted work the right to maintain this action).
[111] *See Fonotipia*, 171 F. at 963 (stating that the copyright statute as amended grants property rights to recordings).
[112] *See* John E. Mason Jr., *Performers Right and Copyright: The Protection of Sound Recordings from Modern Pirate*s, 59 CAL. L. REV. 548, 551 (1971) (noting that *Fonotipia* was condemned for its dictum); *see also* Stuart Banner, *Owning Sound: Property Rights in Recorded Music, 1880-1950* UCLA SCHOOL OF LAW 14(on file with the University of British Columbia Department of History) (last visited Oct. 25, 2016), *archived at* https://perma.cc/G9GL-4EYV (acknowledging that subsequent courts began to find unfair competition without the element of passing off).
[113] *See* BARBARA A. RINGER, SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE S. COMM. ON THE JUDICIARY, 86TH CONG., THE UNAUTHORIZED DUPLICATION OF SOUND RECORDINGS 1 (Comm. Print 1961) (citing the difficulty in early copyrighting).

legislature.[114] Also, for our discussion of secondary orality, the phonograph is more relevant a technology than player pianos, as it involves performers as an emerging category of authors.[115] Phonorecords capture the power of voice or instrumental techniques and allow their reproduction in front of audience nearby and faraway, now and later.[116]

2. Lawsuits and Lobbying Between the Two General Copyright Revisions

Musicians and singers did appear in the 1909 congressional debates, but were represented by the Victor Talking Machine Company, which did it for its own corporate interests.[117] It was not until three decades later that performers began to assert their authorial contribution and claim ownership of their recorded performance.[118] In *Waring v. WDAS Broadcasting Station*,[119] Fred Waring, a popular musician and bandleader, sued a radio station for broadcasting a recording of his band, which was not licensed for such purpose.[120] The Supreme Court of Pennsylvania ruled that a performer has a right of property to his recorded music, which does not overlap with or duplicate the author's right in musical composition.[121] The

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[114] *See* MARYBETH PETERS, SUBCOMM. ON COURTS AND INTELLECTUAL PROPERTY H.R. COMM. ON THE JUDICIARY, 106TH CONG., SOUND RECORDINGS AS WORKS MADE FOR HIRE 79 (Comm. Print 2000) (indicating the status of sound recordings as protectable under the 1909 Copyright Act was the subject of debate).

[115] *See* Jason Toynbee, Article, *Copyright, the Work and Phonographic Orality in Music*, 15 SOC. & LEGAL STUD. 77, 78 (2006), (discussing how the rise of the recording created a new kind of musical culture where the author/performer distinction was blurred).

[116] *See U.S. Copyright Office Definitions*, COPYRIGHT (last visited Oct. 25, 2016), *archived at* https://perma.cc/RD5K-WTMP (providing a definition for the term "phonorecord").

[117] *See Arguments, supra* note 79, at 26 (discussing representation of Victor Talking Machine Company and their interests in amending the Copyright Act).

[118] *See* Ashley Griffith, *Copyright Law as it relates to Performance Rights*, MUSIC BUS. J. (Mar. 2008), *archived at* https://perma.cc/ATS4-LW7Q (illustrating the lack of copyright protection for sound recordings in the early 20th century and the fact that it did not formally exist until 1972).

[119] *See* 194 A. 631 (Pa. 1937) (reasoning Fred Waring sued WDAS Broadcasting because they played his music without authorization).

[120] *See id.* at 632-33 (stating the facts of the case and outlining the reason for the suit).

[121] *See id.* at 634-35 (explaining the circumstances under which a performer's

justification was similar to the congressional statement of the Victor Talking Machine Company, recognizing performers' "unique genius" in their interpretations – *the distinctive and creative nature of their creative performance*.[122] In 1939, a district court of North Carolina also affirmed Waring's property right in his performance, which is of a "distinctive style" that is "his."[123] While, similar to Ong's suggestion that printed books gave rise to the idea of ownership over words, the bounded tangible medium containing the distinctive rendition did give rise to the idea of ownership of recorded music to some judges, there was still no consensus on this issue.[124] In 1940, another band leader, Paul Whiteman, lost his case in the Second Circuit,[125] because Judge Learned Hand remained skeptical of performers' property right in a recorded performance.[126]

Legislative bills which proposed to include phonograph recordings as a subject matter began as early as 1925,[127] but it was not until the Daly bill in 1936 that performers were finally characterized as "authors," and performances or renditions as "works."[128] Many professional organizations of performers and musicians supported the bill but the record companies opposed, arguing that phonorecord copyright should be vested in the

interpretation of a musical composition would afford him a property right in said composition).

[122] *See id.* at 635 (stating that "the large compensation frequently paid to such artists is testimony in itself of the distinctive and creative nature of their performances").

[123] *See* Waring v. Dunlea, 26 F. Supp. 338, 339 (E.D.N.C. 1939) (explaining that the complainant has enough interest in his "unique rendition" to afford him a property right).

[124] *See* ONG, *supra* note 17, at 128 (stating that print has "created a new sense of the private ownership of words").

[125] *See* RCA Mfg. Co. v. Whiteman, 114 F.2d 86 (2d Cir. 1940).

[126] *See id*. at 88 (stressing the difficulty of seeing how a producer or maker of records could maintain a property interest in their work).

[127] *See* COPYRIGHT OFFICE OF THE LIBRARY OF CONGRESS, SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE S. COMM. ON THE JUDICIARY, 86TH CONG., PROTECTION OF WORKS OF FOREIGN ORIGIN 7 (Comm. Print 1961) (discussing the first bill, the Perkins Bill of 1925, regarding recording copyrightable works).

[128] *See* Stanislava N. Staykova, Sound Record Producers' Rights and the Problem of Sound Recording Piracy 23 (Aug. 2004) (unpublished LLM Thesis, University of Georgia Law School) (on file with the University of Georgia Law School in the LLM Theses and Essay Digital Commons) (describing the expansion of copyright protection for performances and sound recordings).

manufacturers.[129] Hence, the issue is not only about whether a recent technologizing of music and the storage medium could lead to new subject matter of copyright, but who can claim authorship, and thus ownership, in copyright law.

3. Sound Recording Became Copyrightable in the 1970s

Performers and record companies fought over this particular issue in the next four decades, in addition to the renewed debates of whether a copyright subject matter should convey intellectual conceptions visually,[130] and how broad the term "writing" should be.[131] With the development of cassette players, their electro-magnetic technology made it even harder to claim that they contain writing/inscription that is perceptible to the eyes.[132] Nevertheless, due to the statutory language, proponents for phonorecord copyright continued to argue that sound recordings have values similar to "writings," especially in cultural forms that are delivered predominantly orally, i.e. folk songs.[133] In these cases, the sound recording can serve as "written transcription," and may preserve more expressive subtlety than notations.[134]

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[129] *See id*. at 23-24 (characterizing other stakeholders, including music publishers, broadcasters, jukebox manufacturers and motion picture producers that were against extending copyright to sound recordings).

[130] *See* COPYRIGHT OFFICE OF THE LIBRARY OF CONGRESS, SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE S. COMM. ON THE JUDICIARY, 86TH CONG., THE MEANING OF "WRITINGS" IN THE COPYRIGHT CLAUSE OF THE CONSTITUTION 75 (Comm. Print 1960) (arguing record like objects may not fit since they demonstrate intellectual conceptions visually).

[131] *See id.* (discussing the extension of the scope of the term "writing").

[132] *See* GERARD O'REGAN, PILLARS OF COMPUTING: A COMPENDIUM OF SELECT, PIVOTAL TECHNOLOGY FIRMS 172 (2015) (detailing the invention of the audio cassette player).

[133] *See* COPYRIGHT OFFICE OF THE LIBRARY OF CONGRESS, SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE S. COMM. ON THE JUDICIARY, 86TH CONG., THE MEANING OF "WRITINGS" IN THE COPYRIGHT CLAUSE OF THE CONSTITUTION 79-80 (Comm. Print 1960) (alleging the term "writings" can be applied to multiple formats).

[134] *See* H. COMM. ON THE JUDICIARY, 88TH CONG., 2ND SESS. COPYRIGHT LAW REVISION, PART 3: PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT 73 (1964) (statement of William Lichtenwanger, Library of Congress) (discussing the value of including a sound recording as a writing). "[I]n addition to its value as a performance, a sound

Sound recordings finally received limited copyright in 1972,[135] and later the full extent of copyright in 1976.[136] However, that sound recordings became a new category of subject matter was not a spontaneous response to the technological developments and the increase in unauthorized duplications.[137] Rather, its inclusion into copyright law was the result of a prolonged campaign led by performing artists and recording producers, as well as the persistent support from the Copyright Office, which was behind this general revision of copyright law.[138]

In the light of the development of new technologies,[139] copyright law introduced the term "fixation" to broadly cover expressions that can be stored in a tangible form and can be reproduced.[140] Section 102 of the 1976 Act adopted the language: "[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[141] "No particular form of fixation is required as long as

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recording has value as a writing, under the constitutional meaning. In the case of folk songs, for instance, it may be the only writing that exists." *Id.*

[135] *See* H.R. REP. NO. 92-487, at 1 (1971) (approving the creation of a limited sound copyright in sound recording on October 15, 1971).

[136] *See* H.R. REP. NO. 94-1476, at 15-16 (1976) (delineating the scope of exclusive rights in sound recordings).

[137] *See* Chen, *supra* note 31, at 70-71 (indicating that technological developments gave rise to the 1976 Copyright Act).

[138] *See* Chen, *supra* note 31, at 71 (clarifying how performing artists and recording engineers became authors).

[139] *See* Trotter Hardy, *Copyright Law's Concept of Employment – What Congress Really Intended*, 35 J. COPYRIGHT SOC'Y U.S.A. 210, 229 (1988) (explaining the addition of the term "fixation" into the Copyright Act).

[140] *See* H. COMM. ON THE JUDICIARY, 88TH CONG., 2ND SESS., COPYRIGHT LAW REVISION, PART 3: PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT 73, 47 (Comm. Print 1964) (statement of John Schulman) (suggesting that copyright ability is essentially the ability to reproduce the work, "when a work is fixed, not necessarily in 'tangible' form"). "'[T]angible' indicates something material – but in a form from which it can be reproduced, we have the essential of a copyrightable work." *Id.* Schulman also suggested that, in light of future technological developments, the definition should be broader. *Id*. at 47.

[141] *See* 17 U.S.C. § 102 (1976) (stating what the U.S. Copyright Act protects in general); *see also* H. COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., SUPPLEMENTARY REGISTER'S REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (Comm. Print 1965) (stating that "[a]lthough unfixed works such

the work is capable of being [retrieved]."[142] Since then, the copyright has become more technologically neutral and offered the protection not only to written notations of music and but also to music/sounds that are technologized by mechanical reproduction.[143]

4. Biases Unsolved/Reinforced by the 1976 Act

By replacing the term "writings" with "original works of authorship," the 1976 Act seemed to cure a persisting inability to accommodate new eras of information storage and retrieval brought by media technology advancements.[144] As sound recording became a new category of subject matter, copyright law nevertheless reinforced the conceptual distinction between the sound recording and the underlying musical composition, and separated composers and performers/producers into two categories of authors.[145] The legal distinction between different subject matter and the pigeon-holing of practitioners caused new problems involving the technologization of music.[146]

The restrictions regarding notation system is one of the causes of the problem; for example, certain musical elements may end up having only copyright in sound recording but not in composition.[147] Sociomusicologist Simon Frith has noted that

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as improvisations and unrecorded performances would not be subject to statutory protection, they would continue to be protected at common law, a point to be discussed further in connection with section 301").

[142] *See* H. COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., SUPPLEMENTARY REGISTER'S REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (indicating that as long as there is a physical form of the composition, work may be copyrighted).

[143] *See* John F. Banzhaf, III, *Copyright Protection for Computer Programs*, 64 COLUM. L. REV. 1274, 1279 n.28 (1964) (providing for limited protection against mechanical reproduction of copyrighted musical compositions).

[144] *See* 17 U.S.C. § 103 (1976) (asserting that a compilation of preexisting materials are arranged in a way that results in an original work).

[145] *See* Jon M. Garon, *Copyright Basics for Musicians*, GALLAGHER, CALLAHAN & GARTRELL PC (Mar. 2009), *archived at* https://perma.cc/KA9X-84QQ (stating that composers and records fall into different categories regarding copyright laws).

[146] *See id.* (noting that recording and composing music are two distinct categories in which musicians are grouped).

[147] *See* UNITED STATES COPYRIGHT OFFICE, COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUND RECORDINGS 1, 1 (2012) (outlining that the author of a music composition is the composer, and the author of a recording is the

harmony, melody and lyric remained the object of legal protection, even though timbre (quality of a sound) and rhythm have become more and more important in pop music.[148] Legal scholar Anne Barron also observed that copyright law adopts a narrow conception of music and tends to protect what can be notated in the score.[149] Even though unintended, such technological bias in copyright law ends up privileging certain musical elements , such as melody and harmony, and depreciates other elements that are also significant in popular music, especially rhythm.[150]

Also, in contemporary popular music, music is often made collaboratively through a jamming process in the recording studio.[151] In *BTE v. Bonnecaze,*[152] Bonnecaze the drummer of the band *Better than Ezra (BTE)* asserted joint authorship of the song for his contribution in the jamming session.[153] While the court reckoned that Bonnecaze may have been a joint author in the music recording as a performer, the court decided against Bonnecaze for his failure in providing independently copyrightable contribution in the music composition.[154] The court does not seem to realize that there may not be clear separation between music composition and music recording

producer). For copyright purposes, recording and composition are entirely different. *Id.*

[148] *See* Philip Anthony Rose, Which One's Pink? Towards an Analysis of the Concept Albums of Roger Waters and Pink Floyd (Apr. 1995) (unpublished Ph.D. dissertation, McMaster University) (on file with author) (noting that Frith's observation failed to consider the underdeveloped academic work in pop culture, specifically analysis of popular music).

[149] *See* Anne Barron, *Introduction: Harmony or Dissonance? Copyright Concepts and Musical Practice*, 15 SOC. & LEGAL STUD. 25, 26 (2006) (indicating that copyright law protects music, which can be easily notated).

[150] *See id.* (emphasizing that practices such as digital sampling and re-use of sonic materials are fundamental to modern musical creativity); *see also* Kembrew McLeod & Benjamin Franzen, *Copyright Criminal: The Funky Drummer Edition*, YOUTUBE (Aug. 6, 2011), *archived at* https://perma.cc/2CKA-A9GP (illustrating how James Brown's drummer Clyde Stubblefield was the most sampled musician, but the copyright royalties went to Brown, if any, not him); Chen, *supra* note 31, at 98 (explaining how some courts are biased towards professionals, with the assumption that non-professionals own no property interest).

[151] *See* Gabriel J. Fleet, Note, *What's in a Song? Copyright's Unfair Treatment of Record Producers and Side Musicians*, 61 VAND. L. REV. 1235, 1251 (2008) (commenting on current music composition techniques).

[152] 43 F. Supp. 2d 619 (E.D.La., 1999).

[153] *See id*. at 620 (outlining the basis of the cause of action).

[154] *See id.* at 622 (summarizing the reasoning against Bonnecaze's claim of joint ownership).

for many contemporary musicians in their actual music production.[155] Or, the court intentionally chooses to insist that only those making contributions in literal forms can be credited as composers, regardless that such bias may lead to unfair treatment to musicians and performers.[156]

III. Sampling, Secondary Orality and Copyright

As the sound recording became a heated copyright debate in Congress in the 1960s, sampling as a new way to experiment with sound has already sprouted in the Caribbean.[157] Sampling began as DJs' innovative use of analog technologies, which allowed them to manipulate the recorded sound, take small pieces of it and edit them into their own performances.[158] Sampling often uses only small segments of a recording, which are frequently not part of the hook of a song, not immediately recognizable, intended for a different mood/expression/sentiment, and hence their use is more likely to be transformative.[159] In the 1970s, when Congress came to recognize sound recording as a new category under copyright protection, this new musical practice has found its way into the ghettos of New York and soon flourished as a popular musical practice.[160] Nevertheless, the congressional debates surrounding the control over the reproduction and the public performance of sound recordings were largely unaltered, shedding little light on the forthcoming challenges of copyright brought by sampling.[161]

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[155] *See id.* at 625 (distinguishing the legal separation between musical composition and sound recordings because of their distinct copyright qualities).

[156] *See* Chen, *supra* note 31, at 98 (noting the bias of some courts to favor the professional author in copyright disputes).

[157] *See* David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233, 1246-47 (2004) (discussing the momentum of copyright legislation in the 1960s); Henry Self, Comment, *Digital Sampling: A Cultural Perspective*, 9 UCLA ENT. L. REV. 347, 354 (2002) (exploring the global origins of sampling music).

[158] *See* Self, *supra* note 157, at 350 (describing the evolution of technology adopted by DJs).

[159] *See* Self, *supra* note 157, at 350 (explaining early sampling methods by isolating, manipulating, and combining other recorded portions).

[160] *See* Copyright Act of 1976, 90 Stat. 2541 (codified as amended at 17 U.S.C. § 101) (introducing the concept of sound recording to copyright law); Self, *supra* note 157, at 350 (highlighting the development of hip hop in the Bronx in the 1970s through instrumental sampling techniques).

[161] *See* Nimmer, *supra* note 157 at 1335 (recognizing that public performances were mostly unchanged through copyright laws of the 1970s).

A. Sampling as a Secondary Orality Practice

Before digitized music came into being, sampling musicians commonly used several manual techniques: emphasizing particular rhythmic break passages of records by extending the beat, scratching vinyl records, using two turntables as a set of music instruments,[162] switching seamlessly from one record to another, and strengthening pulses with an electronic beat box.[163] A prominent use of sampling is the break beat, looping drums and bass guitar as the rhythmic basis.[164] By singling out the rhythm section of their choice, sampling musicians prioritize elements that used to be the background and bring them to the forefront.[165]

These manual techniques relied on the expertise of individual DJs.[166] The introduction of digital samplers into the market turned sampling into a common practice in the production of music,[167] deployed in a variety of genres.[168] Some regard sampling as "thievery,"

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[162] *See* MARK KATZ, GROOVE MUSIC: THE ART AND CULTURE OF THE HIP HOP DJ, 127 (2012) (arguing the "-ism" in turntablism is not merely a "simple suffix" but that it "lent a sense of seriousness and cohesion to the art and even suggested something of a philosophy."). The term "turntablism" refers to the art of some DJs. *Id.* at 127. Turntablists are DJs who use the turntable as a music instrument – as a pianist is a person who plays music with a piano and a drummer is a person who produces percussion with drums. *Id.* at 127. Mark Katz notes that most people are unable to conceive turntables as music instruments because turntables are machines originally designed to play recorded music. *Id.* at 61. But instead of using turntables in their designated way, DJs use them to manipulate the records, rearranged prerecorded sounds and beats to produce new pieces of music. *Id.* at 61-62.

[163] *See* David Sanjek, "*Don't Have to DJ No More": Sampling and the "Autonomous" Creator*, 10 CARDOZO ARTS & ENT. L. J. 607, 612 (1992) (illustrating one of the earlier methods of digital audio conversion).

[164] *See* ROSE, *supra* note 16, at 77-78 (illustrating the different uses of sampling).

[165] *See* ROSE, *supra* note 16, at 73-74 (explaining how the rhythm section is prioritized and the underlying rhythms are brought to center stage).

[166] *See* Sanjek, *supra* note 163, at 612 (discussing the evolution of DJing technology).

[167] *See* Sanjek, *supra* note 163, at 612 (describing music production through use of samplers); John S. Pelletier, S*ampling the Circuits: The Case for a New Comprehensive Scheme for Determining Copyright Infringement as a Result of Music Sampling*, 89 WASH. U. L. REV. 1161, 1165 (2012) (explaining how the creation of digital samplers provided DJs with a more sophisticated way of producing music).

[168] *See* Sanjek, *supra* note 163, at 613 (listing examples of different genres of music that use digital samplers).

or laziness, a mere "shortcut,"[169] yet sampling is usually not simply copying.[170] Finding the right beat is like mining, digging out precious yet hidden minerals and polishing them to make them heard.[171] Sampling musicians often use multiple tracks simultaneously, layering one sample on top of another for a dense effect.[172] Because the process of getting the desired sound and effect could take a lot of time and effort, involving many decisions, sampling might be quite the opposite of taking a shortcut.[173]

Tricia Rose calls sampling a secondary orality practice, enabled by technologies and the access to an abundant collection of recorded music.[174] Referring to Ong's study of oral traditions, Rose noted that the idea of "originality" in orality is different from literary society.[175] Bards do not make up completely new stories, instead, they tailor already-told stories to a specific audience and situation.[176] "Formula and themes are reshuffled rather than supplanted with new materials."[177] As a post-literate oral practices, sampling musicians have characteristics from both primary oral society and literary

[169] *See* ROSE, *supra* note 16, at 79 (stating that commentators have described sampling as thievery).
[170] *See* ROSE, *supra* note 16, at 79 (suggesting that sampling is not merely a shortcut to copy a musical passage).
[171] *See* Stetsasonic, *Talkin' All That Jazz*, GENIUS (last visited Feb 14, 2017), *archived at* https://perma.cc/FW7R-EC8K (quoting "[I]n fact it's only of importance when I make it a priority"); *see also* Public Enemy, *Caught, Can We Get a Witness*, AZLYRICS (last visited Feb. 14, 2017), *archived at* https://perma.cc/3QSV-8XTX (quoting "I found this mineral that I call a beat").
[172] *See* ROSE, *supra* note 16, at 79 (illustrating how numerous tracks are placed on top of one another to create a multi-layer effect).
[173] *See* ROSE, *supra* note 16, at 79 (describing sampling as a time consuming practice).
[174] *See* ROSE, *supra* note 16, at 89 (suggesting that sampling has had significant effects on the recording industry).
[175] *See* ROSE, *supra* note 16, at 86 (noting that "Rap is in part an expression of what Walter Ong has referred to as 'post literate orality.'" (citing WALTER ONG, ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD, 156 (Routledge, 2nd ed. 1982))).
[176] *See* ROSE, *supra* note 16, at 86 (explaining how Bards do not make up new stories but tailor their message to specific audiences).
[177] *See* ROSE, *supra* note 16, at 86 (referencing Ong's theory of storytelling (citing WALTER ONG, ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD, 79 (Routledge, 2nd ed. 1982))).

society.[178] The "musical instruments" they use – samplers – allow them to lodge their narrative originality in reshuffling cultural formulas and themes in the form of recorded sound.[179] Nevertheless, sampling musicians are also used to the idea of "composing," "writing" music in a way in which "millions of sounds, rhythms, and melodies" are accessed and reworked, added to the memory file as musical ideas develop.[180] The selection and sequencing in sampling, as well as the use of lyrics, can be thoughtfully constructed.[181]

B. Sampling, Authorship and Aesthetic in the Remix Culture

Musicologist Paul Théberge's examines "sound" as a contemporary concept that exists only in an era with mechanical or electronic means of sound reproduction.[182] Th*é*berge argues that the use of sampling technologies transformed musical production by inserting a form of consumer practices – "the process of selecting the 'right' pre-fabricated sounds and effects for a given musical context has become as important as 'making' music in the first place. (emphasis original)."[183] Sampling is one of the practices which later constituted part of the "remix culture," referring to "any reworking of already existing cultural work(s).[184] New media theorist Lev Manovich notes that music is one of the few existing fields in which sampling and remixing are done openly.[185] According to Manovich,

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[178] *See* ROSE, *supra* note 16, at 86 (reiterating the idea that sampling has traits of both primary oral society and literary society (citing WALTER ONG, ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD, 79 (Routledge, 2nd ed. 1982))).
[179] *See* ROSE, *supra* note 16, at 86 (explaining the concept of oral and literary traditions influencing modern culture).
[180] *See* Rose, *supra* note 16, at 87 (outlining how lyrics are written down first, memorized, and then later recited orally).
[181] *See* Rose, *supra* note 16, at 87 (noting that "Rap fuses literate concepts of authorship with orally based constructions of thought and expression.").
[182] *See* PAUL THÉBERGE, ANY SOUND, ANY SOUND YOU CAN IMAGINE: MAKING MUSIC/CONSUMING TECHNOLOGY 191 (George Lipsitz et al. eds., 1997) (defining sound to be an integral part of music in an era which uses mechanical and electronic reproduction).
[183] *See id.* at 200 (noting the trend of musical production becoming a consumer-focused practice).
[184] *See* Lev Manovich, *What Comes After Remix?*, REMIX THEORY (Apr. 24, 2007), *archived at* https://perma.cc/WCR4-8FB2 (describing how remixing has become more broad over time).
[185] *See* Lev Manovich, Remixability and Modularity 3 (Nov. 2005) (on file with author) (drawing a distinction between industries that sample and remix openly as

remixing is different from "appropriation" (often used in non-music areas) and "quoting" (used across media), as it denotes a more systematically rearranging of existing material.[186] Remixing represents new practices of authorship, and sampling has come to mean a technologically-enabled liberty to "uninhibited[ly] use [] digital sound recording as a central element of composition."[187]

By purchasing hardware (e.g. digital synthesizers, samplers, and drum machines), software, and soundware,[188] musicians are able to integrate sampling into part of their music production.[189] Sampling as a secondary orality practice allows musicians to incorporate inter-textuality, which fragmentizes sounds or even takes them out of their original contexts, as part of its musical expression.[190] Thus, as Théberge argues, sampling transformed the process of music making, which has become simultaneously production and consumption.[191]

With this new way to technologize sounds, musicians have developed an aesthetic for sound which opens up the "autonomy" of the author, who is technologically empowered to weave cultural references into original patterns.[192] They "demand[] that all sounds

opposed to those where sampling is not openly acknowledged).

[186] *See* Manovich, *supra* note 184 (favoring "remixing" to "appropriation" because it suggests a systematic re-working of the source).

[187] *See* Manovich, *supra* note 184 (quoting music critic Andrew Goodwin who states that sampling appears to give an individual a right to use digital sound recordings to create a type of collage or montage); *see also* THÉBERGE, *supra* note 182, at 204 (stating that a characteristic of the post-modern era is to use sampling in music production).

[188] *See* Paul Théberge, *Ethnic Sounds: The Economy and Discourse of World Music Sampling*, *in* MUSIC AND TECHNOCULTURE 97 (Rene T. A. Lysloff et al. eds., 2013) (recognizing hardware manufactures took up the task to supply sets of pre-recorded sounds, or "soundware," which are readily usable by their customers as a marketing strategy). In the early 2000s, an audio CD for sampling cost between $69-$129, but the ones with samples edited, looped and programmed for a particular hardware could cost $199 for a single disc and $750 for a multiple-disc set. *Id.* Later on, a small cottage industry with better expertise to keep up with the changes in styles and genres of popular music emerged to supply soundware. *Id.*

[189] *See* Andrew Blake Sorkin, *A Brief Introduction to Sampling Audio*, TOM'S HARDWARE (Oct. 23, 2005), *archived at* https://perma.cc/6VW7-K254 (describing the shift from hardware samplers to software).

[190] *See Digital Music Sampling: Creative or Criminality?*, NPR (Jan. 28, 2011), *archived at* https://perma.cc/9KDT-F7WC (defining current understanding of sampling in digital music).

[191] *See* THÉBERGE, *supra* note 182, at 213 (reminding readers that sound sampling is controversial).

[192] *See* THÉBERGE, *supra* note 182, at 206 (commenting that technology has

(and sequences of sounds) . . . be made available for musical purposes."[193] Some musicians rely on hardware manufacturers and third parties to provide new and interesting sounds.[194] Others prefer finding their own samples to using soundware.[195] In either case, a large collection of music recordings increases one's chance to find the right sound.[196]

Because many early sampling musicians might not have been formally trained to compose or to play "real" musical instruments, and because their aesthetic priority was on strong bass and rhythm, instead of melody, their musical works were accused of being nothing but noise.[197] Nevertheless, some may still take the lack of formal music training as an advantage rather than disadvantage.[198] Shocklee of Public Enemy believes that such musical training can be a constraint for new musical possibilities, and hence should be abandoned, or interrogated and revised.[199] Without a pre-set understanding of "correct and proper sound construction,"[200] one is freer to employ musical strategies from Black musical traditions, which may have different cultural priorities.[201] Shocklee's attitude reflects the commonality Richard Schur found between Critical Race Theory tactics and hip hop aesthetics, "freedom can only be found by resisting

changed the music industry).

[193] *See* THÉBERGE, *supra* note 182, at 213 (quoting Théberge on the accessibility of music production being essential).

[194] *See* THÉBERGE, *supra* note 182, at 243 (describing sources for manufacturing production of musical sampling).

[195] *See* David Sanjek, *Fairly Used: Negativland's U2 and the Precarious Practice of Acoustic Appropriation*, *in* MUSIC AND TECHNOCULTURE 358-78, 364 (Rene T. A. Lystoff, et al. eds., 2003) (quoting DJ Shadow asserting that "beat *shopping* is a culture").

[196] *See Welcome to an Oasis of Musical Inspiration*, ZERO-G (last visited Feb. 15, 2017), *archived at* https://perma.cc/5R8T-R62G (depicting the benefits for clients to a large library of sound clips).

[197] *See* ROSE, *supra* note 16, at 74 (asserting early sampling techniques merely used sounds).

[198] *See* ROSE, *supra* note 16, at 81 (citing inexperience as beneficial rather than a hindrance); *see also* THÉBERGE, *supra* note 182, at 198 (describing how a composer can focus on structure by composing music based on sound rather than melody).

[199] *See* ROSE, *supra* note 16, at 83 (alluding to nontraditional training is an alternative form of training because formal training can bar identification with cultural history).

[200] *See* ROSE, *supra* note 16, at 81 (describing the differences between "proper" and "improper" sound construction in the rap music genre).

[201] *See* ROSE, *supra* note 16, at 82 (illustrating different tactics and influences available to create music).

social convention."[202] In fact, a recent empirical study shows that hip hop led one of the most significant stylistic revolutions in popular music in the US since the 1960s.[203]

Along this vein, sampling can be used to offer a critique of mainstream musical styles and genres.[204] Sampling musicians tend to disobey rules that sound engineers normally would have followed.[205] They may deliberately distort a sound,[206] *detune* a sampler to produce a very low frequency of sound they desire.[207] Using turntables or samplers as musical instruments, sampling musicians can extend the rhythmical elements they find most compelling and push them to the foreground.[208] Their musical practices can also reflect a cultural identity – some musicians may avoid certain models that that sounds too "white," i.e. have technological parameters that "adhere most stringently to the Western classical legacy of restricted rhythm in composition."[209]

While sampling has expanded our sonic experiences and the pop music genres[210] it has also tested the copyright system's boundary, which since the 1970s expanded to cover sound recordings.[211] Literary criticisms and law have attempted to

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[202] *See* RICHARD SCHUR, PARODIES OF OWNERSHIP: HIP-HOP AESTHETICS AND INTELLECTUAL PROPERTY LAW 104 (2009) (articulating that American culture is a breeding ground for social individuality).

[203] *See* Matthias Mauch et al., *The Evolution of Popular Music: USA 1960-2010,* ROYAL SOC'Y. OPEN SCI. 1, 1 (2015), *archived at* https://perma.cc/MRR9-SV4S (quantifying the rise of rap and other related musical genres as one of three revolutionary music events since 1964).

[204] *See* Paul Harkins, *Microsampling: From Afuken's Microhouse to Todd Edwards and the Sound of UK Garage, in* MUSICAL RHYTHM IN THE AGE OF DIGITAL REPRODUCTION 177, 178 (Anne Danielsen ed., 2010) (exploring how sampling pushes the shape of music and how it is judged).

[205] *See id.* (inferring that sampling musicians differ from sound engineers).

[206] *See* ROSE, *supra* note 16, at 85-86 (quoting Harry Allen from the *Village Voice,* "hip hop humanizes technology and makes it tactile. In hip hop, you make the technology do stuff that it isn't supposed to do.").

[207] *See* ROSE, *supra* note 16, at 75 (quoting Kurtis Blow, "[t]hat's what we try to do as rap producers – break car speakers and house speakers and boom boxes. And the 808 does it. It's African music!")

[208] *See* ROSE, *supra* note 16, at 74 (describing how rap producers innovate the use of sampling and turntables beyond their traditional use).

[209] *See* ROSE, *supra* note 16, at 77 (highlighting the preferences of samplers and their desire to establish their own identity in music).

[210] *See* Mauch, *supra* note 203, at 1 (summarizing the evolution of the pop music genres over approximately thirty years).

[211] *See* 17 U.S.C. § 101 (2016) (referencing the definition of "sound recording" in

"demythify" the image of the romantic genius ingrained in Western culture that influenced the formation of copyright law.[212] Nevertheless, such image of "romantic author" remains dominant in the popular imagination.[213] The courts thus tend to permit copyright holders to control the meaning of the works, whether in whole or in

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the existing Copyright statute). The 1976 Act fully recognized sound recordings as a subject matter, with their authors receiving the full arrange of exclusive rights granted by copyright law. *Id. See also* H.R. REP. NO. 487, 92ND CONG., 1ST SESS., at 1 (1971) (noting that the 1972 revision gave sounds recordings certain rights).

[212] *See, e.g.*, JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS 54 (James Boyle ed., 1996) (explaining how through the romantic period, inspiration came to be known as "original genius"); MICHEL DE CERTEAU, THE PRACTICE OF EVERYDAY LIFE 101-02 (Steven Rendall trans., 1984) (articulating the practice of storytelling and its effects on daily social practices); ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES 211 (1998) (stating author Neil Bissoondath's stance on Romantic individualism: ". . . I reject anything that limits the imagination. No one has the right to tell me who I should or should not write about. . . "); MARK ROSE, AUTHORS AND OWNERS 1 (1993) (arguing the distinguishing characteristic of the modern author is proprietorship: the author is the original creator and therefore the owner of a unique commodity, his or her work); JACK STILLINGER, MULTIPLE AUTHORSHIP AND THE MYTH OF SOLITARY GENIUS 183 (1991) (describing the universality of the romantic notion of single authorship and its place in biography and literary history); MARTHA WOODMANSEE & PETER JASZI, THE CONSTRUCTION OF AUTHORSHIP 29 (1994) (discussing the modern idea of authorship through its past and imagining its future); LIOR ZEMER, THE IDEA OF AUTHORSHIP IN COPYRIGHT 227 (2007) (arguing the public's contribution has a decisive role in the expression of any idea, which "should guarantee the public a stake in copyright works contemporaneous with any private claims"); Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1299 (1996) (elaborating on original authorship's role in the hardening of intellectual property rights as it encouraged the production and wider circulation of the ideas contained in literary works); Peter Jaszi, *Toward a Theory of Copyright: Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 470 (1991) (discussing the romantic idea of authorship as individual control over the created environment and its role in the era of pre-industrial capitalism); Jessica Silbey, *The Mythical Beginnings of Intellectual Property*, 15 GEO. MASON L. REV. 319, 342 (2008) (describing the author of a copyrighted work as a "creative genius" and that the cult of the romantic author runs deep into the history of United States copyright law); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author"*, 17 EIGHTEENTH-CENTURY STUDIES 425, 426 (1984) (stating an author is solely responsible and therefore exclusively deserving of credit for the production of a unique work).

[213] *See* BRONWYN T. WILLIAMS & AMY A. ZENGER, POPULAR CULTURE AND REPRESENTATION OF LITERACY 129 (2007) (showing how the image of the author is consistently romanticized in popular culture).

pieces.[214] Richard Schur has noted the tension between sampling as a music production technique and the traditional notion of copyright.[215] In particular, Schur points out that the idea/expression dichotomy assumes that a particular expression denotes one distinct idea.[216] The doctrine is to balance public and private interests by allowing the author to own a particular articulation of the concept but not the concept itself.[217] Yet, sampling, and the various ways of deploying samples reveal the ambiguity behind texts, images and sounds – a particular articulation may be a subset of a concept, but it can also have multiple meanings.[218] Schur argues that hip hop's overarching message is irony – by reinterpreting samples, musicians reassign meanings to words and sounds to highlight a different identity, cultural experiences, and to reshape discourses.[219] Hence, sampling raises questions regarding not only statutory interpretations of copyright law, but also the underlying cultural assumptions about

[214] *See* HARV. OFFICE OF THE GENERAL COUNSEL, COPYRIGHT AND FAIR USE: A GUIDE FOR THE HARVARD COMMUNITY 1 (2016) (stating that generally speaking, a copyrighted work cannot be duplicated without the creator's permission).
[215] *See* SCHUR, *supra* note 202, at 64 (asserting the ironic nature of music sampling and copyright protection).
[216] *See* SCHUR, *supra* note 202, at 65-66 (reasoning that hip-hop inverts and transforms single expressions into multiple ideas).
[217] *See* SCHUR, *supra* note 202, at 64-65 (detailing how the idea/expression dichotomy influences intellectual property law). Schur explains:

> While irony revels in ambiguity and double meanings, intellectual property law operates as if words have a distinct meaning without reference to any particular audience or cultural context. [As the function of the idea/expression dichotomy,] [o]ne of the primary analytical tools upon which courts have relied in copyright law is the idea/expression dichotomy. Thus, an author can own the expression or particular wording of a concept, but not the concept itself […]. The idea/expression dichotomy breaks down when applied to hip-hop producers because their verbatim copying frequently shows how multiple ideas exist within a single expression.

Id. at 65-66.
[218] *See* SCHUR, *supra* note 202, at 65 (stating the sampling of sounds, images and texts allows cultures to transform the original meaning and create something new).
[219] *See* SCHUR, *supra* note 202, at 58-59 (describing how police misinterpreted N.W.A.'s song "Fuck tha Police" as advocating for the killing of law-enforcement officials).

authorship, ownership, and their limitations in the copyright system.[220]

C. Why Focus on Copyright's Technological Biases?

Coming from a rather critical race theory (CRT) perspective, Kevin J. Greene argues that copyright law is biased against the African American community's oral practices.[221] The fixation requirement "impose[s] disadvantages on Black artists as a class, who were raised in an oral tradition dating back to Africa."[222] Greene's analysis explains the imbalance of power between different racial groups by revealing the social structural and institutional background in both the overall legal system and the music industry.[223] As sound recording became a subject matter in 1976, it would seem that, arguably, fixation has become less of a hurdle for people with oral traditions.[224] Orators, singers, musician – professional or not – can obtain copyright for sound recordings with some basic technological capacity.[225]

Via sampling as a secondary orality practice, hip hop and rap renewed the African American oral traditions.[226] Sampling allows African American musicians to comment on preexisting cultural materials, pay homage to forefathers, and reinterpret the shared sonic/musical experience of the African American

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[220] *See* SCHUR, *supra* note 202, at 60 (explaining how sampling services the dialogue for race and complex cultural issues which bury truth into lyrics); *see also* John Lindenbaum, Music Sampling and Copyright Law at 17 (Apr. 8, 1999) (unpublished B.A. thesis, Woodrow Wilson Sch. of Pub. and Int'l Affairs) (on file with Princeton Univ.) (expressing that music sampling has not been limited by statutes, court decisions or policy makers).

[221] *See* Kevin J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 379 (1999) (noting inadequate protections in the copyright system for African-American musicians).

[222] *See id.* (explaining the ineffectiveness of copyright law protections when African oral traditions lacked documentation).

[223] *See id.* at 387-88 (discussing the societal, legal, and cultural disadvantages facing minority groups in the music industry).

[224] *See* Olufunmilayo B. Arewa, *A Musical Work Is a Set of Instructions*, 52 HOUS. L. REV. 467, 483 (2014) (alluding to issues with visual and written bias in copyright law).

[225] *See id.* at 475-76 (describing the ease of recording today with the digital audio technologies).

[226] *See* ROSE, *supra* note 16, at 85-86 (characterizing the emergence of rap music as a fusion between orality and technology).

community.[227] Since the access to preexisting material is of crucial importance for this practice of secondary orality, the CRT analysis is insightful by bringing in the socio-economic structure: the unequal bargaining power between musicians and music labels, the unequal access to legal tools and the discrimination which devalued the artistic contribution of African Americans.[228] Richard Schur considers the importance of *Signifyin'* in African American culture (the use of the signifier to invoke ambiguity and mine the indeterminacy of meaning by "citing or rewriting well-known symbols, metaphors or objects"),[229] and suggests that copyright law is a suitable ground for the next civil rights struggle.[230]

Nevertheless, instead of following the lead of CRT scholars, this article looks at the sampling practice by focusing on copyright's technological biases for the following reasons. (1) Sampling as a technique is widely adopted in contemporary music production.[231] Intertextuality and indeterminacy of meaning are not exclusive to

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[227] *See* ROSE, *supra* note 16, at 40 (observing the importance of literate and musical formulations in rap music); *see also* SCHUR, *supra* note 202, at 46 (stating that sampling connects the lyrical embodiment of hip-hop with its music production).

[228] *See* ROSE, *supra* note 16, at 34 (showing the identity in the music industry is strongly correlated to one's background).

[229] *See* SCHUR, *supra* note 202, at 28 (referring to Henry Louis Gates Jr's widely acclaimed book *The Signifying Monkey: A Theory of Afro-American Literary Criticism*, which was central in the debate about African American culture in 1980s and 1990s). Contrasted with what Gates calls a "white" term, "signifying," Gates adopts a "black term" *signifyin(g)*). *Id.* The bracketed final "g" refers to the fact that "g" is often not pronounced, and that in black vernacular the word is spoken as "signifyin'." *Id.* at 29. The former denotes the conventional meaning a signifier is intended to convey, and the latter disrupt that (White) conventional equation by filling the signifier with Black's own concepts. *Id.* at 29-30. *See also* HENRY L. GATES, JR., THE SIGNIFYING MONKEY: A THEORY OF AFRO-AMERICAN LITERARY CRITICISM 44 (1988) (setting forth the concept of signifiers in language). Signifyin' "constitutes the black Other's discourse as its rhetoric," yet has a symbiotic relationship with signifying – the White, standard English and the Black vernacular Other are mutually dependent on each other. *Id.* at 50. *See also Free Culture Movement*, THE DAILY OMNIVORE (Oct. 8, 2012) *archived at* https://perma.cc/X5YY-NPEZ (describing the "free culture movement" of the 1990s).

[230] *See* SCHUR, *supra* note 202, at 27 (paraphrasing the works of Richard Delgado, "the new grammar of race requires a shift in tactics away from civil rights or constitutional law to other areas").

[231] *See* Thomas W. Joo, *Remix Without Romance*, 44 CONN L. REV. 415, 443 (2011) (discussing how sampling became a prominent method of production for different kinds of music).

African American traditions – for example, Dadaist used randomly pulled words to compose poems in the 1920s.[232] (2) While it might be true that African American music tradition has a strong emphasis on rhythm, percussion and other musical elements that are not easily notated or not typically included in the copyright system, such discrimination affects musicians across race and genre.[233] (E.g. as discussed earlier, in *BTE v. Bonnecaze*, the contribution of Cary Bonnecaze as a drummer to the composition of a song might have been undervalued and his joint authorship claim denied).[234] (3) There are different attitudes among African American copyright holders regarding granting access and permitting reuses.[235] George Clinton has given sampling musicians his blessings, finding the licensing fees Bridgeport, the catalog company that owns many pieces of his music, charges too high and prohibitive.[236] On the other hand, Martin Luther King's heirs had been criticized for closely guarding the use of his image and words.[237] (Some do believe it is fair for King's heirs to

[232] *See Dada*, MOMA LEARNING (last visited Mar. 21, 2017), *archived at* https://perma.cc/6A85-PFZS (explaining the origins and philosophy behind Dadaism).

[233] *See* BTE v. Bonnecaze, 43 F. Supp. 2d 619, 627-28 (E.D. La. 1999) (highlighting a case where a band member's musical contributions were overlooked with respect to copyright authorship).

[234] *See id.* at 628 (discussing how Bonnecaze failed to satisfy the requirements of joint authorship).

[235] *See* Courtney Bartlett, *Bridgeport Music's Two-Second Sample Rule Puts the Big Chill on the Music Industry*, 15 DEPAUL J. ART TECH. & INTELL. PROP. L. 301, 325 (2005) (recognizing the attitudinal shift toward sampling in the hip-hop community).

[236] *See* Justin Hunte, *George Clinton Explains Saving Hip Hop Artists on Samples, Recalls Early Days of Dr. Dre, Afrika Bambaataa, Eminem*, HIPHOPDX (Jan. 10, 2012), *archived at* https://perma.cc/8LX4-2FWW (explaining how George Clinton is fighting several record labels in hopes of reducing cost of obtaining samples for musicians); *see also* Dana Forsythe, *Tour Stop: George Clinton Talks About Copyright Law, Reality TV and Getting Clean*, WICKEDLOCAL WATERTOWN (Feb. 11, 2013), *archived at* https://perma.cc/5GS9-C7J7 (identifying Clinton's dispute with his previous record company). Clinton also contests Bridgeport's copyright ownership of his songs, asserting that documents have been forged. *Id.*

[237] *See* Charles E. Cobb Jr., *The Shakedown at the King Monument*, THE ROOT (Sept. 6, 2011), *archived at* https://perma.cc/6UVN-J4WF (describing how the builders of the Martin Luther King Jr. memorial at the National Mall had to pay $761,160 for the right to use his words and images); *see also* Kieran Corcoran, *I Didn't Have a Dream, for Copyright Reasons: How Martin Luther King Film Selma Was Made Without Quoting Civil Rights Leader for Fear of Being Sued by His Family*, DAILYMAIL (Jan. 4, 2015), *archived at* https://perma.cc/D3FV-BG4B

exercise such control).[238] (4) Those African American musicians who have become more mainstream in the industry could be taking samples from persons who are less resourceful.[239] For example Timbaland (a.k.a. Timothy Zachery Mosley), a producer and Grammy Award winner, was caught plagiarizing[240] from a track by Janne Suni,[241] a Finn who uploaded this track to a website for a specialized community sharing an interest in making demos (multimedia animations on early consumer computers that are under technical restraints) but was never commercially released.[242] CRT arguments would not justify Timbaland's appropriation, nor did Timbaland attempted such an assertion.[243] He simply argued that sampling is a common technique that everyone in the industry employs.[244]

(discussing how Paramount avoided using Martin Luther King Jr.'s words to avoid being sued by his family).

[238] *See* Gene Demby, *King's Family Builds Its Own Legacy of Legal Battles,* NPR: CODE SWITCH (Jan.18, 2015), *archived at* https://perma.cc/7FEY-59XT (contending that King's words are part of his legacy and are the "rightful inheritance" of his family).

[239] *See* Elizabeth Goodman, *Is Timbaland a Thief?*, ROCK & ROLL DAILY (Jan. 18, 2007), *archived at* https://perma.cc/SDC5-AS7B (highlighting a case where an influential producer was accused of stealing sounds from a Finnish artist).

[240] *See id.* (detailing the plagiarism accusations against Timbaland).

[241] *See id*. (indicating that Timbaland's song "Do It" sounds similar to "Acid Jazzed Evening" by Janne "Tempest" Suni).

[242] *See* Joe Bosso, *Timbaland, Nelly Furtado sued for plagiarism*, MUSICRADAR (June 17, 2009), *archived at* https://perma.cc/4A39-5HPD (confirming the authenticity of the original Tempest piece).

[243] *See Timbaland interviewed on "Elliot in the Morning", 2007-02-02*, ELIOT IN THE MORNING (Feb. 2, 2007) *archived at*, https://perma.cc/RL3C-8MMD (citing the transcript of Timbaland's interview and his failure to mention any critical race theory argument); *see also* DieStimmeAusDemOff, *Timbaland's answer to this "controversy" (uncensored)*, YOUTUBE (Feb. 8, 2007), *archived at* https://perma.cc/7G64-NARG (mentioning an audio of the interview is available).

[244] *See Timbaland interviewed on "Elliot in the Morning"*, *supra* note 243 (noting Timbaland's response to the plagiarism claim). He ridiculed the plagiarism accusation and responded in an interview that he was only "sampling," not "stealing," and that "everybody samples from everybody every day." *Id.* He commented:

> Then sample is like, you heard it somewhere, and you just sample it . . . [m]aybe somebody, you know, might well put a sample claim in … I don't have no researchin'- time is coming up when I got to turn a record in. … I like it. I found it. I got sounds upon sounds upon sound. I don't know what's public

The framing of sampling as stealing – an easy shortcut for people without proper musical training – has made it difficult for the courts to understand sampling as a secondary orality practice and to take its aesthetics seriously as a valuable form of musical expression and critique.[245] Yet the predicament and legal threats are not faced by African American musicians alone, but shared by musicians practicing this technique regardless of their race or identity.[246] In addition to CRT analyses, the analysis of technological biases has the potential to offer support to an even broader critique of copyright law and its treatment of sampling practices.[247]

IV. Sampling on Trial

Sampling first went unnoticed for being part of the ghetto culture.[248] Once it became popular with a wider audience, many lawsuits followed.[249] In the late 1980s, hip hop musicians such as Stetsasonic and Public Enemy responded to the emerging copyright infringement charges, calling sampling a "tactic," a "tool,"[250] as it helps to refresh people's memory for older musicians,[251] and one that breaks with the mainstream music style for something with stronger and better character.[252] To this date, the courts either have failed to

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domain and what's not. Some stuff don't say.

Id.

[245] *See* Joo, *supra* note 231, at 434 (reviewing a previous court's decision to associate sampling with stealing).

[246] *See* Joo, *supra* note 231, at 438 (describing the evolution of sampling with various artists, including independent artist Beck in the 1990's).

[247] *See* Joo, *supra* note 231, at 467 (asserting that powerful members of the industry will continue to find advantages in technological innovations).

[248] *See* SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYRIGHT WRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 138-39 (2001) (providing the history of sampling).

[249] *See id.* at 139 (showing the legal implications and questions surrounding sampling).

[250] *See* Stetsasonic, *supra* note 171 (quoting "[y]ou see, you misunderstood, a sample's just a tactic . . . [a] portion of my method, a tool"); *see also*, Public Enemy, *supra* note 171 (quoting "I found this mineral that I call a beat").

[251] *See* Stetsasonic, *supra* note 171 (quoting "[...] [t]ell the truth, James Brown was old/'Til Eric and Ra came out with 'I Got Soul'/Rap brings back old R&B/And if we would not, people could've forgot").

[252] *See* Public Enemy, *supra* note 171 (quoting "[u]nderstand where we're goin/Then listen to this, plus my Roland/Comin' from way down below/Rebound

understand sampling as a secondary orality practice, or resisted interpreting copyright law in a way that would accommodate it.[253] Part of the reluctance comes from copyright's technological biases for literary culture, which prevented the courts to comprehend why sampling deserves more room.[254] Seeing sampling as a secondary orality, this article re-reads major sampling cases and analyzes how the court decisions have revealed the technological biases in copyright law.

A. Fair Use Requires Criticisms Must Be Textual and Make a Direct Comment

In 1991, a New York district court trialed the first case on sampling, *Grand Upright Music, Ltd v. Warner Bros. Records Inc.*[255] Singer-songwriter Raymond Gilbert O'Sullivan sued rapper Biz Markie for sampling his 1970 hit *Alone Again (Naturally)* in "*Alone Again."*[256] Markie had sought to license the sample, but O'Sullivan refused because Markie's humorous interpretation would not maintain the integrity nor the original meaning of the song.[257] According to *Vaidhyanathan*, O'Sullivan would "license it to be used only in its complete, original form."[258] Ironically, O'Sullivan would only agree to license a cover version, which Markie and any other musician was

c'mon boost up the stereo […]/You singers are spineless/As you sing your senseless songs to the mindless/Your general subject love is minimal/It's sex for profit/Scream that I sample").

[253] *See* Fleet, *supra* note 151, at 1252-53 (noting the inadequate recognition of orality under the current copyright regime).

[254] *See* Fleet, *supra* note 151, at 1250 (outlining some of the misapprehension towards secondary contributors receiving copyright protection).

[255] *See* Grand Upright Music, Ltd. v. Warner Bros. Records, 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (holding that the defendants intentionally violated the plaintiff's rights by using a portion of the plaintiff's song and master recording).

[256] *See* VAIDHYANATHAN, *supra* note 248, at 141 (pointing to the litigated facts in *Grand Upright Music, Ltd. v. Warner Bros. Records Inc.*).

[257] *See* VAIDHYANATHAN, *supra* note 248, at 142 (noting that O'Sullivan did not want his song to be used in a humorous context).

[258] *See* VAIDHYANATHAN, *supra* note 248, at 142 (stating that O'Sullivan would only accept a license to use the completed and unaltered song).

already free to do with the compulsory licensing clause.[259] Markie wanted to do something more, and went ahead without a license.[260]

Judge Duffy opened the verdict sternly with "[t]hou shalt not steal."[261] He did not bother to discuss whether sampling, or building on existing material, is a music producing technique.[262] He started by saying stealing is against civilization and should not be allowed, and then went on to affirm that the plaintiff owns the copyright and has proper standing in the case.[263] Judge Duffy also detailed Markie's failed request to license, and asserted that defendant's *only* purpose of his "callous disregard for the law" was to make a big sale.[264] Markie's attempt to obtain license could have been regarded as a sign of good faith and a reason for a more sympathetic judgment.[265] In *Fisher v. Dees*[266], the Ninth Circuit already noted that it is difficult for parodists to obtain permissions, and to hold a rejection against the

[259] *See* 17 U.S.C. § 115(a)(1) (2010) (noting that the law does not extend protection to duplication).

> A person may not obtain a compulsory license for use of the work in the making of phonorecords duplicating a sound recording fixed by another, unless: (i) such sound recording was fixed lawfully; and (ii) the making of the phonorecords was authorized by the owner of copyright in the sound recording or, if the sound recording was fixed before February 15, 1972, by any person who fixed the sound recording pursuant to an express license from the owner of the copyright in the musical work or pursuant to a valid compulsory license for use of such work in a sound recording.

Id.

[260] *See* VAIDHYANATHAN, *supra* note 248, at 141 (describing how Markie sampled O'Sullivan's song to create the musical background for his piece).

[261] *See* VAIDHYANATHAN, *supra* note 248, at 142 (holding against the defendants for copyright infringement).

[262] *See* Benjamin Franzen & Kembrew McLeod, *Copyright Criminals*, COMMUNITY CLASSROOM (last visited Mar. 22, 2017), *archived at* https://perma.cc/3TVY-RYRA (commenting on sound ownership). Cultural historian Siva Vaidhyanathan commented that "the courts were not interested in hearing young black men describing their creative processes." *Id.*

[263] *See* VAIDHYANATHAN, *supra* note 248, at 142 (maintaining that stealing has been shunned by the courts).

[264] *See* VAIDHYANATHAN, *supra* note 248, at 142 (opining that Markie's only goal was to profit from the sale).

[265] *See* VAIDHYANATHAN, *supra* note 248, at 143 (recognizing that a settlement was a better alternative).

[266] *See* Fisher v. Dees, 794 F.2d 432, 434 (9th Cir. 1986) (affirming summary judgment for copyright infringement).

parodist would be penalizing him for the courtesy of giving notification.[267] But Judge Duffy saw quite the opposite, interpreting it as a proof of an ill intention, and thus allowing O'Sullivan to use copyright to prevent his song from being mocked.[268] Also, as will be explained below, copyright's technological bias could have also lead to Judge Duffy's failure to see Markie's playful spin as a possible musical critique or parody of the original.[269] Hence, the sympathetic treatment of a failed attempt to license in *Fisher v. Dees* might not occur to Judge Duffy as at all relevant.[270]

Three years after *Grand Upright*, the Supreme Court delivered another important case for hip hop with a unanimous opinion in *Campbell v. Acuff-Rose*.[271] The case does not involve sampling, but the situation is somewhat similar to the previous case.[272] Roy Orbison sued Luther Campbell from the group "2 Live Crew" for using some melody and lyrics from his 1964 hit song *Oh! Pretty Woman.*[273] Campbell also had sought to license but was denied.[274] The Supreme Court ruled in favor of Campbell, for the Sixth Circuit erroneously assumed that the commercial nature of the parody necessarily makes the use not "fair."[275] Commentators often find *Campbell* a more positive case for hip hop than *Grand*

[267] *See id.* at 437 (stating parodies rarely receive permission from the authors of the original work).
[268] *See* VAIDHYANATHAN, *supra* note 248, at 143 (quoting that "[s]ampling is a euphemism that was developed by the music industry to mask what is obvious thievery").
[269] *See* Alan K. Chen, *Instrumental Music and the First Amendment*, 66 HASTINGS L.J. REV. 381, 384-85 (2015) (observing instrumental music is also speech protected under the Constitution).
[270] *See Fisher*, 794 F.2d at 439 (reasoning that licenses are not limitless – the parodist's interest is "balanced against the rights of the copyright owner in his original expressions" in order to allow the ability of the parodist to create his own work); *see also* VAIDHYANATHAN, *supra* note 248, at 143 (inferring that Judge Duffy's position would not be as sympathetic as Judge Sneed's).
[271] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 593-94 (1994) (holding that 2 Live Crew's parody might be protected as fair use because no identifiable market harm was found).
[272] *See id.* at 573-74 (explaining the parody at issue in this case and the lower courts' application of the fair use doctrine).
[273] *See id.* at 572-73 (detailing the events leading up to the case).
[274] *See id.* at 572-73 (noting the steps taken by 2 Live Crew to secure the legal right to use the song).
[275] *See id.* at 594 (reversing the decision of the Court of Appeals that heavily weighed the commercial nature of the song parody).

Upright.[276] Yet, the difference is partly because the lyrical form makes the parody in the Campbell song a clearer case.[277] It is easier for the court to read and understand the criticism in written text than to discern a criticism of musical style with emphasis on different musical genres.[278] This is not to say that a lyrical parody is always easily recognized.[279] The majority of the Sixth Circuit was unwilling to accept the lyrics in *Pretty Woman* as parody: "even accepting that 'Pretty Woman' is a comment on the banality of white-centered popular music, . . . [f]ailing a direct comment on the original, there can be no parody."[280] Vaidhyanathan criticized the Sixth Circuit for requiring the critical statement to direct at the "source text" itself.[281] While the Sixth Circuit did not expressly require the criticism to be textual, it was mute on the music style in the parody analysis, even though 2 Live Crew also gave a transformative spin to the melody they took from Orbison.[282]

One may question if Markie's case was well-defended, as it did seem rather ineffective to argue in the court that sampling is legal because everybody in the music industry was doing it.[283] On the other hand, Judge Duffy seemed to have taken author's permission as absolute, seeing Markie's use as necessarily illegitimate once the license was denied.[284] O'Sullivan expressed an "artist's motive" to control the integrity of his work, and the court fully supported it.[285]

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[276] *See* VAIDHYANATHAN, *supra* note 248, at 148 (summarizing the principles set forth in *Campbell* that impacted future sampling cases).
[277] *See Campbell*, 510 U.S. at 589 (examining the role the lyrics play in the Court's analysis).
[278] *See id.* (placing a greater significance on the lyrics than the musical composition).
[279] *See id.* (observing the difficulty in meeting the guidelines of a parody for copyright purposes).
[280] *See* Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1436 (6th Cir. 1992) (revisiting the district court's rejection of Campbell's parody argument).
[281] *See* VAIDHYANATHAN, *supra* note 248, at 146 (disagreeing with the Sixth Circuit's narrow interpretation of a critical statement in a parody context).
[282] *See Acuff-Rose Music*, 972 F.2d at 1438 (explaining the Sixth Circuit's analysis of the two songs).
[283] *See* Grand Upright Music, Ltd. v. Warner Bros. Records, 780 F. Supp. 182, 185 (S.D.N.Y. 1991) (observing the weakness in Biz Markie's legal argument for allowing the desired sampling).
[284] *See id.* at 184 (deeming that evidence of seeking a license is determinative of knowledge of a valid copyright).
[285] *See id.* (reviewing O'Sullivan's decision to refuse Biz Markie a license to use the song).

Nevertheless, copyright does not give authors an absolute power to interpret the work, especially if the subsequent users intend to use the copyrighted work "for purposes such as criticism, comment . . . "[286] One may also say Markie's song is not parody because it has a very different motif, the lyrics did not directly comment on O'Sullivan.[287] Nevertheless, as discussed earlier, through sampling, musicians can offer their musical critique by expressing a variety of different musical priorities that are often hidden, suppressed, or disallowed in "white" or mainstream music.[288]

The courts have had difficulties recognizing parodies of a genre not only in music but also in other non-textual forms of art.[289] In *Campbell*, the majority of the Sixth Circuit cited *Rogers v Koons* (Second Cir., 1992) as an authority, which demands a parodic work to comment directly on the copied work: "the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work."[290] *Koons* involved a sculptural work based on a postcard, with a couple and a string of puppies, appeared in an art exhibition entitled the *Banality Show*.[291] Koons unsuccessfully attempted a fair use defense.[292] The Second Circuit declared that it was not enough to comment on the banality of American culture, which Koons found in Roger's commercialization of the photo as a licensed greeting card,[293] a parody needs to comment directly on the work.[294]

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[286] *See* 17 U.S.C. § 107 (2016) (setting forth the fair uses of a copyrighted work).
[287] *See Grand Upright Music*, 780 F. Supp. at 184 (contesting the argument that the song was a parody within the authorized exceptions).
[288] *See* ROSE, *supra* note 16, at 80 (explaining the different strategies involved in rap production and the impact of sampling on artistic expression).
[289] *See* Rogers v. Koons, 960 F.2d 301, 309-10 (2d Cir. 1992) (illustrating the court's analysis that a sculpture based on a photograph is a parody).
[290] *See* Campbell v. Acuff-Rose, 510 U.S. 569, 597 (1994) (citing *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992) and emphasizing that the parody must imitate the style of the original work).
[291] *See Rogers*, 960 F.2d at 304 (establishing the use of the sculptures in Koons' exhibition which lead to this case).
[292] *See id.* at 309 (finding no error in the trial court's determination that there was no genuine issue of fact in regards to the fair use exception).
[293] *See id.* at 310 (explaining that merely commenting on an aspect of society is not enough to establish a parody).
[294] *See id.* (asserting that if the parody does not comment on the object of the parody, there would be no purpose in using parody for social commentary).

Reading *Koons* and *Campbell* (Sixth Cir.) together, copyright law appears to be less friendly to parodists who criticize or comment not (only) the work itself but use a work as a proxy to criticize the genre and concept it represents.[295] Copyright law takes fair use as an important exception necessary for the fulfillment of its goal.[296] The scope of fair use directly affects the range of works copyright law encourages and prohibits.[297] Even if the original work is not the main object of criticism, it can still be an important cultural reference, a proxy, which will allow the parodist to convey his message about society, culture, or a genre of expression.[298] A restricted understanding of fair use will cause hardship for musical experiments brought by sampling and limit the possibilities in our soundscape.[299]

Alan K. Chen, a professor in constitutional law and the First Amendment, argues that instrumental music is also "speech" because it is a powerful way for communities and individuals to convey emotional expressions, cultural and aesthetic values, and should be protected by the First Amendment.[300] Musical and rhythmic patterns may be distinctively associated with particular cultures, and adapting music of one culture to the practice and instrument of another culture can evoke new meaning.[301] Empowered by sound technologies, contemporary musicians engage such cross-culture breeding and adaptation in a condensed and intense way.[302] Sampling is not just

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[295] *See, e.g.*, *Campbell*, 510 U.S. at 569 (summarizing that there is a higher standard required in order to qualify for fair use); *Rogers*, 960 F.2d at 310 (commenting on the need for the parody to comment on the genre more broadly to qualify for fair use).

[296] *See Rogers*, 960 F.2d at 308 (identifying that the exception exists for reasonable uses).

[297] *See More Information on Fair Use*, U.S. COPYRIGHT OFFICE (Jan. 2017), *archived at* https://perma.cc/Z7DL-HRGD (detailing statutory exceptions for fair use and illustrating the case by case determination made by courts).

[298] *See* Guilda Rostama, *Remix Culture and Amateur Creativity: A Copyright Dilemma*, WORLD INTELLECTUAL PROPERTY ORGANIZATION MAGAZINE (June 2015), *archived at* https://perma.cc/S3CW-US3Z (using Canada's Copyright Modernization Act as an example of how countries have started to recognize important uses for the fair use doctrine).

[299] *See id.* (highlighting the importance of fair use in the development of music).

[300] *See* Chen, *supra* note 269, at 384-85 (establishing instrumental musical expression as a constitutional objective).

[301] *See* Chen, *supra* note 269, at 427 (portraying the results of mixing musical traditions from two different cultures).

[302] *See* THÉBERGE, *supra* note 182, at 94 (describing how global music sound sampling is changing contemporary music).

taking segments randomly from pre-existing material, but involves a process of surveying the soundscape, selecting segments, modifying, layering and rearranging.[303] Sampling is not just mining for sound elements, but expressing different musical priorities and aesthetics.[304] If we consider the possibility of critiquing/commenting on a musical style/genre, a humorous treatment of a sample from a teary ballad in hip hop, such as in *Grand Upright*, could be a musical commentary or criticism of the mainstream pop, even though it does not comment on the lyrics or the very ballad itself.[305]

B. De minimis Defense for Sound Recordings?

In the Ninth Circuit, another major hip hop case was *Newton v. Diamond* in 2003.[306] The Beastie Boys, a popular hip hop band, obtained a license for using a sound recording, but not one for its music composition.[307] Newton only had copyright in the latter and thus was not compensated.[308] The sample is 6 seconds long and contains 3 notes (C – D flat – C, over a held C note).[309] The Ninth Circuit appeared to be aware of the importance of this case for sampling as a music genre, offering an overview of the development and the details of the musical practices.[310] The Ninth Circuit affirmed the district court decision which was in favor of the Beastie Boys.[311] The court questioned whether the disputed notes were sufficiently original, and opined that even if they were original

[303] *See* Lindenbaum, *supra* note 220 (indicating that sampling is not a simple process).
[304] *See* ROSE, *supra* note 16, at 73, 78 (inferring that music created through sampling results in a brand new unique piece).
[305] *See* Grand Upright Music, Ltd. v. Warner Bros. Records, 780 F. Supp. 182, 182 (S.D.N.Y. 1991) (inferring that sampling cross-genre is musical commentary).
[306] *See* Newton v. Diamond, 388 F.3d 1189, 1190 (9th Cir. 2003) (discussing the important legal issue of "sampling" and whether it requires a license to various components of the original recording).
[307] *See id.* (explaining the plaintiff's action).
[308] *See id.* (describing how the defendant's license did not cover the underlying composition of the plaintiff's piece).
[309] *See id.* at 1190, 1198 (describing the composition of the sample).
[310] *See id*. at 1191-92 (outlining the relevant background and procedural history of the practice of sampling).
[311] *See id*. at 1196-97 (affirming the decision of the lower court in favor of the Beastie Boys).

enough, Beastie Boys' use was *de minimis*.[312] Newton's emphasis on his unique performance worked against him, as the issue in question was the copyright of musical composition, not sound recording.[313] In dissent, Judge Graber found the sampled material not *de minimis*, and that Newton's composition was sufficiently original, if taken into account the instructions on the playing technique.[314] However, the Beastie Boys did obtain a license for the sound recording.[315] This disagreement on whether the instructions in sheet music gave enough information to be sufficiently original came from the legacy of copyright's biases for chirography/typography, which treated sound recording and composition as two separate subject matters.[316] It is known that sound recordings do document more subtleties of a musical expression than sheet music does.[317] Even if Newton's recorded performance is closer to what he intended to achieve when composing the music, the written instructions in sheet music just would not be as informative as listening to his performance.[318] Nevertheless, the separation of sound recording and music composition as two distinct categories of subject matter prevented the possibility of using the sound recording as a supplementary note to the written instructions.[319]

In *Bridgeport Music v. Dimension Films* (2005, hereinafter *Bridgeport I*), the Sixth Circuit categorically denied the *de minimis* defense in sampling from sound recordings.[320] The district court found the sample in question to be almost not recognizable and that

[312] *See Newton*, 388 F.3d at 1196-97 (opining that the use of sampled segment was not considerable enough to have constituted infringement).
[313] *See id.* at 1193-94 (narrowing the issue to be analyzed in the case).
[314] *See id.* at 1197 (Graber, J., dissenting) (arguing that the use of the sample in question was not *de minimis*).
[315] *See id.* at 1191 (identifying that the Beastie Boys purchased the license in 1992 for a one-time fee of $1,000).
[316] *See* discussion *supra*, Part II (referencing the historical biases of legislation governing copyright); *see also* Chen, *supra* note 31, at 71 (discussing legislative history behind sound recording's recognition in the copyright law).
[317] *See* UNITED STATES COPYRIGHT OFFICE, *supra* note 147, at 10 (differentiating between musical compositions and sound recordings).
[318] *See Newton*, 388 F.3d at 1194 (contrasting musical notations and unique performance elements that come from a sound recording).
[319] *See id.* (showing the two components as distinct).
[320] *See Bridgeport I*, 410 F.3d at 792 (6th Cir. 2005) (reversing the holding of the district court).

the substantial similarity between the two works was lacking.[321] The district court also recognized that the use was transformative as both the motif of the resulting song and the emotion the sample was used to introduce are very different from the original.[322] Nevertheless, the Sixth Circuit overturned the lower court decision, arguing that in light of the large number of sampling cases, a bright line rule would best serve not only the music industry but also the courts.[323] Finding the "mental, musicological and technological gymnastics" to be too much work, the Sixth Circuit was unwilling to consider arguments that support a detailed analysis of the *de minimis* defense.[324] Instead, the Sixth Circuit argued that the statutory language in Section 114(b) gives the sound recording owner the exclusive right to sample his own sound recording.[325] Ironically, as already noted by some commentators,[326] one of the authorities the Sixth Circuit cited to support its interpretation of the statute asserted the opposite, recognizing the possibility of using the *de minimis* defense in sound recording cases.[327]

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[321] *See Bridgeport Music, Inc.*, 230 F. Supp. 2d at 842 (discussing the distinction between the two sounds and that the average person would not view them as the same).

[322] *See id.* (distinguishing between the guitar introduction of one song and the sound of sirens in the other).

[323] *See Bridgeport I*, 410 F.3d at 803 n.18 (arguing the substantial reduction of litigation costs realized through establishing a bright line rule).

[324] *See id.* at 802 (describing the difficulties that would ensue if the court adopted a *de minimis* analysis).

[325] *See* 17 U.S.C. § 114(b) (2016) (delineating the rights a person has over their own sound recording). Section 114(b) provides that:

> The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 [the right to prepare derivative works] is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.

Id.

[326] *See* Carter, *supra* note 11, at 686-87 (referring to Latham's argument regarding *de minimis* as a defense).

[327] *See Bridgeport I*, 410 F.3d at 803, n.18 (indicating that the Sixth Circuit relied heavily on Al and Bob Kohn when interpreting Section 114); *see also* Carter, supra note 11, at 686-87 (outlining Latham's argument that to avoid copyright infringement, digital sampling of a sound that is copyrighted must typically be licensed); Latham, *supra* note 11, at 125 n.35 (2003) (noting that there could be *de minimis* defense depending on the interpretation of "actual sounds").

Most curiously, the Sixth Circuit argued that what makes the *de minimis* defense permissible for musical compositions and not permissible for sound recordings is the difference in the materiality, which is the medium on which the fixation is done.[328] "For the sound recording copyright holder, it is not the 'song' but the sounds that are fixed in the medium of his choice. When those sounds are sampled they are taken directly from that fixed medium. It is a physical taking rather than an intellectual one."[329] The Sixth Circuit seems to have a very peculiar understanding of "physical" taking, which leads to its belief that such distinction can be sustained in copyright law.[330] Following this rationale, highlighting a sentence from a document on a computer screen and dragging it over to the document one is editing should also count as a "physical taking."[331] A non-physical copy of the sentence cannot be copy-pasted, but has to be retyped or hand-transcribed.[332] If this example sounds strange and is not really the case in textual copyright, what exactly are the differences between the bits of digital memory that store text and the bits of memory that store sound? Why is it more intellectual to take written inscriptions than taking recorded sounds? The Sixth Circuit neglected to explain why the medium used to fix the sound is so different from the media used to fix other types of expression.[333]

In *VMG Salsoul v. Ciccone* (2016), the Ninth Circuit decided to break away from the Sixth Circuit and found the 0.23 second sample in Madonna's *Vogue* to be *de minimis*, although Judge Silverman dissented and fully endorsed *Bridgeport I*.[334] The majority in *VMG* is also puzzled by the Sixth Circuit's notion that sampling is a physical taking, as well as by the argument that Congress has

[328] *See Bridgeport I*, 410 F.3d at 801-02 (providing that sounds that are fixed in the medium of the copyright holder's choice are the protected material).
[329] *See id.* at 802 (explaining the court's rationale behind valuing even the smallest sample of a sound recording).
[330] *See id.* (distinguishing between the physical and intellectual theft of the copyrighted song).
[331] *See id.* (applying the Sixth Circuit's argument about music sampling to plagiarism).
[332] *See id.* (reaffirming the idea that the physical taking argument is unsustainable).
[333] *See id.* at 800 (mentioning briefly the lack of a distinction in the interpretation between sound and print mediums).
[334] *See* VMG Salsoul v. Ciccone, 824 F.3d 871, 888-89 (9th Cir. 2016) (disputing the majority's acceptance of the *de minimis* rule and arguing *Bridgeport* is good law).

chosen to treat sound recordings differently from other subject matters.[335]

To understand why the Sixth Circuit in *Bridgeport I* awkwardly finds more physical attributes in recorded sound than in recorded symbols, Walter Ong's analysis of the different mentality in oral and literary cultures offers a hint.[336] According to Ong, oral people consider words to be potent, as they are "spoken, sounded and power-driven," while typographic or chirographic people see words as a thing "out there" that can be owned.[337] In *Bridgeport I*, the Sixth Circuit seems to suggest, if instead of breathing new life into the written score ("did not physically copy"), one samples and resurrects the power stored in the sound recording, one would be taking the physical power of an earlier performer.[338] Hence, only the sound recording owner can sample his own sound recording.[339] Yet, copyright law has already alienated fixed expressions, either in the form of written symbols or recorded sound bits, from the author's mind and body.[340] As the Ninth Circuit explains in *VMG*, the Copyright Act is neutrally worded in terms of fixation technologies and does not see sound recordings as different from other subject matters.[341] Nevertheless, the Sixth Circuit drifted back to the psyche of primary orality cultures as Ong describes.[342] The Sixth Circuit reconnects the alienated expression in the form of sound recording to its physical source of the sound, treats sound bytes as an extension of the performer, and denies the *de minimis* defense in sampling

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[335] *See id.* at 885 (rejecting the majority's "physical taking" argument in *Bridgeport*).

[336] *See* ONG, *supra* note 17, at 32 (comparing traditional oral and written word cultures and how they passed down stories).

[337] *See* ONG, *supra* note 17, at 32 (highlighting the immense power orality can have over typographic traditions).

[338] *See Bridgeport I*, 410 F.3d at 803 n.18 (referencing that music infringement must first go through a substantial similarity analysis).

[339] *See id*. (indicating that any time a sampler physically copies a portion of another's sound recording there is infringement).

[340] *See* 17 U.S.C. § 102 (1976) (defining copyright protection to those works which are "fixed in any tangible medium of expression").

[341] *See* VMG Salsoul v. Ciccone, 824 F.3d 871, 882 (9th Cir. 2016) (arguing that because of the neutrality of the definition, Congress could not have intended to eliminate the *de minimis* exception).

[342] *See Bridgeport I*, 410 F.3d at 801-02 (explaining why sampling is considered copyright infringement); *see also* ONG, *supra* note 17, at 128 (discussing the psyche of primary orality cultures).

cases.[343] By doing so, the Sixth Circuit puts higher burden on sampling practitioners than those interlocutors using literary material and imposes a sanction that is much more restrictive than what is dictated by copyright law.[344]

C. More Room for Making Tributes – Digital Samplers as Quoting Machines

In *Bridgeport I*, the Sixth Circuit did not see its bright line rule to be significantly "stifl[ing] creativity," arguing that: the musicians can still produce/imitate the desired sound in a studio; the market will keep the price in check, and it cannot charge more than the cost of making a new recording.[345] Such reasoning shows that the Sixth Circuit had unfortunately misunderstood sampling as merely a way to save efforts and cost.[346] In fact, musicians often sample because some of the sound qualities of an existing recording cannot be recreated.[347] The difficulties can have a variety of reasons: recording studios were set up differently in the old days, the machines used were different and gave a particular characteristic, the sample contains the voice of a particular person.[348] In other words, sampling is not only about economic factors but about a desired sound quality.[349] When a unique sound quality of an old recording is at issue, the Sixth Circuit's market argument becomes invalid.[350]

Either with analog turntables or digital samplers, sampling musicians are able to achieve what literary authors constantly do:

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[343] *See Bridgeport I*, 410 F.3d at 801-02 (outlining the Sixth Circuit's reasoning as to why *de minimis* should not apply to music sampling).
[344] *See id.* (expanding on the higher burden placed on music sampling).
[345] *See id.* at 801 (explaining how a bright line rule would not stifle creativity).
[346] *See id.* (explaining the court's thought process regarding how the market will control the license price).
[347] *See Sampling – History and Definition (part I),* IMUSICIAN (last visited Feb. 27, 2017), *archived at* https://perma.cc/N4GN-2K8L (indicating that the first samples were created by manipulating tape recordings).
[348] *See* MILTON T. PUTNAM, A THIRTY-FIVE YEAR HISTORY AND EVOLUTION OF THE RECORDING STUDIO 5 (Audio Engineering Society, 1980) (describing the history of recording studios and providing how new studio techniques stimulated innovation and experimentation).
[349] *See Sampling – History and Definition (part I), supra* note 347 (explaining that musicians use sampling for quality purposes, not just cost effectiveness).
[350] *See* Jennifer R.R. Mueller, *All Mixed Up: Bridgeport Music v. Dimension Films and De Minimis Digital Sampling*, 81 IND. L. J. 435, 463 (2006) (illustrating recording artists' autonomy without limitation by a license).

quoting from each other.[351] Literary authors have been able to refer to existing texts at ease by using quotation marks and citation systems to identify the original source.[352] Composers and songwriters have also been able to quote from each other, and have done so liberally.[353] Sampling is a way to quote from performing musicians, a secondary orality practice that was earlier not technologically possible in musical expressions.[354] The early sampling devices were soon called "quoting machines."[355] Nevertheless, instead of using notes and quotes as in literary practices, musicians use samples to cross-reference pre-existing resources.[356] According to Diedrich Diederichsen, a cultural critic, sampling is not considered as "an aggressive gesture toward the material but one of a friendly reclamation of a collective ownership based on the collective memories around musical elements (breakbeats, instrumental parts, and so on) that were connected with a genre and a style rather than with individuals."[357] The technologies and the practices with them led to new music styles in the 1980s.[358]

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[351] *See id.* at 436 (comparing digital sampling to quoting in literary work).
[352] *See Quoting Material*, PLAGIARISM.ORG (last visited Feb. 27, 2017), *archived at* https://perma.cc/HRX2-9ZNX (providing information on when to quote and when to paraphrase).
[353] *See* Myung-Ji Lee, The Art of Borrowing: Quotations and Allusions in Western Music (May 2016) (unpublished doctoral dissertation, University of North Texas) (on file with the University of North Texas Library) (discussing how musicians often quote and sample from one another).
[354] *See* MARK KATZ, CAPTURING SOUND: HOW TECHNOLOGY HAS CHANGED MUSIC 149-50 (2004) (referring to sampling as "performative quotation" and indicating that while "traditional musical quotations typically cite works, samples cite performances").
[355] *See* Diedrich Diederichsen, *Digital Sampling and Analogue Montage*, *in*, AFTER THE DIGITAL DIVIDE?: GERMAN AESTHETIC THEORY IN THE AGE OF NEW MEDIA 32, 39 (Lutz Koepnick & Erin McGlothlin eds., 2009) (highlighting the emergence of technological sampling tools in the late 1980s and early 1990s).
[356] *See* John Oswald, *Bettered by the Borrower: The Ethics of Musical Debt* in AUDIO CULTURE READINGS IN MODERN MUSIC 131, 135 (Christopher Cox & Daniel Warner eds., 2009) (discussing how samples come from musical compositions which have copyright)*; see also* Sanjek, *supra* note 163, at 608 (discussing how "recorded music possess[es] a range of options for the re-contextualization of preexisting compositions).
[357] *See* Diederichsen, *supra* note 355, at 41 (commenting that sampling can be a positive reflection on the originator's composition).
[358] *See* HEBDIGE, *supra* note 1, at 10 (illustrating how new technologies influenced new music styles such as rock 'n' roll and rhythm 'n' blues).

Media theorist Dick Hebdige calls these new practices and genres "cut n' mix," which show an attitude that "…no one owns a rhythm or a sound. You just borrow it, use it and give it back to people in a slightly different form."[359] Many of those who sample do so not because sampling is a cost-saving tool, but because the secondary orality finally realizes the possibilities to quote performing musicians.[360] They sample because the quality of an existing recording contains the emotion and message they intend to convey.[361] Failing to comprehend this, and applying copyright law rigidly to disallow such quoting, the courts would make it prohibitively expensive when the market is unable to keep price at a reasonable level.

In 2009, the Sixth Circuit handed down another sampling case, *Bridgeport Music Inc. v. UMG Recordings Inc. (Bridgeport II)*.[362] Unlike in *Bridgeport I*, the alleged infringement does involve compositional and lyrical elements.[363] After finding substantial similarity between the two works, the Sixth Circuit considered the fair use defense.[364] UMG claimed that the use of the original work was "intended as an homage or tribute."[365] The Sixth Circuit did seem to recognize sampling as quoting.[366] However, the Sixth Circuit was unconvinced that the use was fair after finding the citation to be improperly done, noting that "the purported tribute was not acknowledged in the credits or liner notes."[367] The Sixth Circuit might be suggesting a good practice which allows the courts to

[359] *See* HEBDIGE, *supra* note 1, at 141 (providing an explanation of the "cut 'n' mix" attitude).
[360] *See* ONG, *supra* note 17, at 132 (introducing the benefits of secondary orality).
[361] *See* ROSE, *supra* note 16, at 89 (explaining how a sampling in rap is "a process of cultural literacy and intertextual reference").
[362] *See Bridgeport II*, 585 F.3d 267, 278 (6th Cir. 2009) (affirming the judicial decision in Bridgeport I).
[363] *See id*. at 275 (referencing lyrics and compositional elements used in the musical piece).
[364] *See id*. (indicating that the substantial similarity between the two works was the issue before the Sixth Circuit).
[365] *See id*. at 278 (stating the appellant's claim that the use of similar musical elements were intended to pay homage to *Atomic Dog*).
[366] *See id*. (acknowledging that a jury could have properly concluded that the use of the original work was fair).
[367] *See id.* (reasoning that no credit was given to the original songwriters in the album credits or liner notes).

discern the good will of subsequent musicians.[368] Nevertheless, the Sixth Circuit again failed to grasp the reality of secondary orality.[369] Using liner notes as a default form of citation is assuming listeners would obtain a copy of such textual material and read it.[370] This may be impossible or difficult when they listen to the work via broadcast radio wave or streaming.[371] Considering these frequent situations, it is more important that a song which uses a sample to pay homage or as a quote allows listeners to clearly relate to the original when listening to the sample -- as Hebdige puts it: "in order to *e*-voke, you have to be able to *in*-voke."[372]

D. Is a Sampling-Friendly Fair Use Doctrine Possible?

Based on the court decisions and the analyses above, this section explores how the fair use doctrine can be friendlier for sampling from the following perspectives.

1. The Four Factors and Sampling

Copyright law permits the fair use defense for purposes such as criticisms and commentaries,[373] and asks the courts to consider the following factors: (i) purpose and character of the use, (ii) the nature of the copyrighted work, (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (iv) the effect of use upon the potential market for or value of the copyrighted work.[374] As for factor one, the Supreme Court correctly noted in *Campbell* that commercial uses do not necessarily preclude

[368] *See Bridgeport II*, 585 F.3d at 278 (inferring that the court is deferential in determining the intentions of the musician).
[369] *See* ROSE, *supra* note 16, at 79 (suggesting that sampling is more than just copying elements of another artist's work).
[370] *See Bridgeport II*, 585 F.3d at 278 (assuming that credit in liner notes will be read by listeners).
[371] *See id.* (inferring that credits and liner notes are only present on a physical album).
[372] *See* HEBDIGE, *supra* note 1, at 14 (highlighting the importance of paying homage to the original composition when sampling).
[373] *See* 17 U.S.C. § 107 (1976) (highlighting the acceptable uses of copyright law). Copyright law also permits the fair use defense for "news reporting, teaching, scholarship and research," which are less relevant to this article. *Id*.
[374] *See id*. (listing factors considered in "fair use").

the fair use defense.[375] For factor two, samples could come from factual material, which receive less copyright protection than original expressions, but they are usually from "works of original authorship."[376] Hence, this factor often weighs against samplers in lawsuits.[377] However, this factor should weigh less if we consider sampling as a musical production method that is supposed to facilitate the (re)interpretation of cultural references and thus transformative.[378]

For factor three, because sampling often involves small segments of the original, the amount is often not as important an issue, although exceptions have occurred before.[379] Samples, especially for the purposes of paying homage and doing criticism, are often used as quotes.[380] In these situations, the courts could still perform an analysis to see if the sampling musicians have taken more than needed, but the courts should not weigh this factor against sampling musicians simply for taking the "hook" or a more recognizable part of a work.[381]

Factor four is often the most difficult one to determine.[382] Since samples are often used in a transformative fashion, there is normally no direct market harm.[383] Yet, if one considers the potential financial interests in licensing, all reuses will likely affect the market and value of the copyrighted work.[384] In parody cases, one might

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[375] *See* Campbell v. Acuff-Rose, 510 U.S. 569, 569 (1994) (setting out the Supreme Court's holding that commercial character does not create a presumption of fair use).

[376] *See* 17 U.S.C. § 107 (1976) (indicating that factual materials do not receive copyright protection).

[377] *See Bridgeport II*, 585 F.3d 267, 278 (6th Cir. 2009) (inferring that the original work used by samplers is "clearly within the core copyright protection).

[378] *See id.* at 277 (showing the second factor as elusive).

[379] *See id.* at 277 (describing that quantity of the sample used is not dispositive); *see also* Timothy D. Taylor, *A Riddle Wrapped in a Mystery: Transnational Music Sampling and Enigma's "Return to Inno*cence," *in* MUSIC AND TECHNOCULTURE 64, at 76-77 (René T. A. Lysloff & Leslie C. Gay, Jr. eds., 2003) (noting the different treatments with regard to sampling). For example, almost half of Enigma's *Return to Innocence* sampled chanting from an elderly indigenous couple from Taiwan -over two minutes out of four minutes sixteen seconds. *Id.* Samples are often processed to various degrees and some are heavily manipulated. *Id.* But the chanting sample in *RtI* was minimally treated, in order to serve as an "intact sign of the ethnic/exotic unspoiled by technology or even modernity." *Id.*

[380] *See Bridgeport II*, 585 F.3d at 278 (articulating other purposes of sampling).

[381] *See id.* at 275 (discussing the importance of hooks being readily recognizable).

[382] *See id.* at 277 (defining factor four and its applications).

[383] *See id.* (addressing the market harm caused by infringement).

[384] *See id.* (commenting on potential market value effects of reuse).

argue that the permission is often difficult to obtain from the copyright holders and hence the unlicensed use should be excused.[385] Does this mean that an unlicensed use is more blameworthy if it is not criticizing or mocking the original?[386] *Bridgeport II* suggested that the fourth factor should take into account all other potential subsequent uses.[387]

The Sixth Circuit is concerned about *any* harm to the market for derivative works,[388] and considers paying homage as "weaken[ing] the market for licensed derivative works."[389] The notion has a certain logic to it, though it reveals a restricted understanding of how a market can be weakened, and overlooks the symbolic and material gain the original works might receive from being sampled.[390] When being repeatedly sampled, musicians of original works may benefit from a renewed interest in their work.[391] In fact, both James Brown and George Clinton, two of the most sampled musicians, have declared their support for the practice of sampling.[392] Brown joined forces with Afrika Bambaataa in making a rap record as early as 1984.[393] Clinton believes that "allowing his music to be sampled has been instrumental in keeping his career alive."[394] While it may be difficult to balance the

[385] *See id.* (stating that unlicensed use is a potential defense for a parody).
[386] *See Bridgeport II*, 585 F.3d at 277 (questioning whether stricter scrutiny is placed on unlicensed uses outside the context of parody).
[387] *See id.* (recognizing the broad application of the fourth factor).
[388] *See id.* (opining that derivative works may harm the market through infringement and subsequent use).
[389] *See id.* (setting forth the argument that tributes diminish economic value).
[390] *See* Campbell v. Acuff-Rose, 510 U.S. 569, 597 (1994) (highlighting the socially valuable uses). In *Campbell*, the Sixth Circuit dismissed the argument of the renewed interest in the original. *Id.* Citing *Rogers*, the majority argued that the copyright holder can still lose the potential interests in the sale of adaptation rights, even if parody has its own market and the target groups do not overlap. *Id.* However, *Rogers* might not serve as a good precedent for sampling cases as it involves very substantial copying both in quantity and in quality. *Id.*
[391] *See* HEBDIGE, s*upra* note 1, at 141 (reasoning the possibility for renewed interest in the original work exists).
[392] *See* HEBDIGE, s*upra* note 1, at 141 (explaining that James Brown is the godfather of funk); s*ee also* Hunte, *supra* note 236 (citing that George Clinton has been in the music industry for over 30 years).
[393] *See* HEBDIGE, s*upra* note 1, at 141 (highlighting James Brown's affiliation with Bambaata).
[394] *See* Hunte, *supra* note 236 (advocating for the sampling of music as the means of facilitating the careers of musicians).

potential harms and the potential interests, leaving the latter out in the analysis is rather one-sided and unfair.[395]

2. A Broader Definition for "Commentary" and "Critique"

Another important issue is whether the court would even be willing to consider a fair use analysis.[396] *Bridgeport II* advanced in this direction, for it took the step to measure the four factors, even though "paying homage" is not a typical category of fair use.[397] As intertextuality is an essential quality in the remix culture or the new media aesthetics, sampling authors constantly modify or flip what they take from the original (as substantially as needed or only small segments) based on their understanding and (re)interpretation.[398] If the courts granted authors/copyright holders the power to dictate the meaning of the original works, as Richard Schur warned, there will be little room left for the play of intertextuality, as well as the possible forms of critique and commentary.[399]

3. Industry-Led Best Practices as a Reference When Determining Fair Use

In *Bridgeport II*, the Sixth Circuit is skeptical of the homage argument partly because the liner notes did not mention the original work.[400] Although the court may be imposing a literary culture on the secondary orality practice and does little for the audience who do not read liner notes, attributing the sample source in writing may still be a potential solution for sampling artists and the industry to adopt as a communal norm.[401] As the Sixth Circuit noted in *Bridgeport I*,

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[395] *See Campbell*, 510 U.S. at 585 (applying a balancing test in weighing the dueling interests).
[396] *See Bridgeport II*, 585 F.3d 267, 277 (6th Cir. 2009) (identifying the fair use analysis as an important consideration).
[397] *See id.* (employing paying homage as part of the analysis of the fourth factor).
[398] *See id.* (noting the qualitative importance of the third factor).
[399] *See* SCHUR, *supra* note 202, at 64 (articulating the concern for copyright laws to limit benefits of intertextuality).
[400] *See Bridgeport II*, 585 F.3d at 277-78 (dismissing the homage theory advanced by UMG in their appeal).
[401] *See id.* (suggesting attribution of source material as a way to credit the originating artist).

sampling is a very common practice among big music labels.[402] With their musicians sampling or being sampled regularly, labels could work out rules that most find acceptable.[403] If industry-led efforts can lead to an agreement on what the best sampling practices are (e.g. the recognition in liner notes, a standard for *de minimis* use, a fee scheme, etc.), the courts would not need to arbitrarily propose a bright-line rule and then to justify how such line is drawn.[404] Rather, the courts could simply refer to the established industry norms as the standard in a fair use analysis.[405] The courts should be aware of the existence of catalog companies, or sample trolls, which do not represent artists nor produce new works but base their business model on rent-seeking.[406] These companies may lack motivations to join labels in such negotiations.[407] Yet, if there is a widely-accepted best practice that the courts would follow, these companies' rent-seeking strategies can also be restrained.[408]

V. Conclusion: Secondary Orality, Remix Culture and a Disclaimer

The technologizing of sound has triggered a transition from a chirographic/typographic culture to a secondary oral culture.[409] Recorded sound can reach its audience directly, without being

[402] *See Bridgeport I*, 410 F.3d 792, 798-99 (6th Cir. 2005) (acknowledging the ubiquitous use of sampling in hip-hop and rap music).
[403] *See id.* at 799 (highlighting the potential solution may come from industry rather than the courts).
[404] *See id.* (proposing industry cooperation in standardizing use of sampling in musical composition).
[405] *See id.* (recognizing the court's limited knowledge in the specialized field of music sampling).
[406] *See* James DeBriyn, Note, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 UCLA ENT. L. REV. 79, 86 (2012) (admonishing sample trolls for purchasing the rights to older copyrighted songs so that they can sue an artist for creating an unauthorized derivative work). DeBriyn characterizes Bridgeport as a sample troll. *Id.*
[407] *See id.* (implying that copyright trolls would be reluctant to cooperate with the rest of the music industry to establish standardized sampling rules).
[408] *See id.* at 105 (considering limitations that may be imposed judicially to copyright trolls).
[409] *See* Karl Dallas, *The Roots of Tradition*, in THE ELECTRIC MUSE: THE STORY OF FOLK INTO ROCK (1975) 122-23 (illustrating the importance of electronics in returning music to a form of oral culture).

represented by written notations.[410] Even though some musicians in this secondary orality are musically literate, they may still "use notation as a descriptive rather than a prescriptive tool."[411] The use of sampling technologies has transformed the process of music making, and enabled the production and consumption of music to become a simultaneous process.[412] Using sampling as a technique, and being empowered by digital equipment, musicians regained their Dionysian ability to reorganize and reinterpret historical sonic like modern bards.[413] Such technologically-enabled liberty, however, faces restraints imposed by copyright law – a legal instrument which has derived from the chirographic/typographic culture and has been an awkward fit for both primary orality and secondary orality cultures.[414]

In recent years, some music labels which zealously pursued their copyright interests are frequently criticized for being ignorant of the new forms of art, sterile in innovation, and incapable of adapting to a business model that fits the contemporary technological reality.[415] These criticisms joined the flux of the larger criticism of copyright law under the umbrella of the "free culture movement," which began to form in the late 1990s and has continued to grow in the twenty-first century.[416] Sampling musicians who had been sued by music labels, such as Negativland and the Beastie Boys, were among the early supporters of Creative Commons licenses, which are alternative copyright licenses designed for authors to freely relinquish certain exclusive rights and grant users more liberty to access and

[410] *See id.* (comparing the experience of reading a passage of text to listening to a song and how the medium affects how the reader or listener experiences the work).
[411] *See id*. at 124 (stating "the sound of music already performed rather than what should be played in future, 'ear marks' as the students of the old Hebrew chants used to call it").
[412] *See* THÉBERGE, *supra* note 182, at 213 (arguing that new technology has transformed music genres and production).
[413] *See* THÉBERGE, *supra* note 182, at 213 (articulating the improvements in the music making process attained through sampling of old sounds).
[414] *See* THÉBERGE, *supra* note 182, at 237 (discussing the creative freedom available through sampling and the difficulties complying with copyright).
[415] *See Record Companies Must Embrace Changing Digital Landscape*, *supra* note 75 (indicating the necessity for record labels to accept more innovative business practices, including letting artists exercise creative control).
[416] *See Free Culture Movement*, *supra* note 229 (describing the free culture movement and its objectives).

reuse their copyrighted works.[417] In this scope, sampling as a secondary orality practice is portrayed positively for allowing the pursuit of greater freedom of expression.[418]

Many cultural critics likewise take a positive view on sampling, as a tool for younger generations of African Americans to reclaim the oral tradition of their culture and to reinterpret their musical heritage.[419] Tricia Rose calls rappers the "cultivators of communal artifact, refining and developing the framework of an alternative identity that is at times unintelligible to those outside of it."[420] Richard Schur finds hip hop and sampling to be productive

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[417] *See The WIRED CD: Rip. Sample. Mash. Share.*, CREATIVE COMMONS (Nov. 2004) *archived at* https://perma.cc/EK8S-J2ME (listing the songs off the Beastie Boys album available for both sampling and noncommercial sampling). Nevertheless, they often prefer their less "free" variants (in the sense that copyright owners/authors retain more exclusive rights and grant users fewer rights to use and to build upon their works) rather than the freer ones. *Id.* The Beastie Boys contributed to *The WIRED CD: Rip. Sample. Mash. Share. Id.* The Beastie Boys licensed their contributing song under the Creative Commons Noncommercial Sampling Plus License, allowing only noncommercial sharing and noncommercial sampling. *Id. See also* mike, *Celebrating Freesound 2.0, retiring Sampling+ licenses*, CREATIVE COMMONS (Sept. 12, 2011) *archived at* https://perma.cc/HR6F-XSYZ (offering a review of the history of the Wired CD and explaining how the creation of the Noncommercial Sampling Plus license was due to the unwillingness of some participating musicians (or their management) to allow any form of commercial use); matt, *Creative Commons and Negativland Begin Work on Free Sampling and Collage*, CREATIVE COMMONS (May 30, 2003) *archived at* https://perma.cc/9ZC9-2YQJ (describing Creative Commons' new copyright tool, the original Sampling License, which CC began to offer in 2003, was initiated by a discussion with Negativland that would allow artists more control of their work); Lawrence Lessig, *Retiring Standalone DevNations and one Sampling license*, CREATIVE COMMONS (June 4, 2007) *archived at* https://perma.cc/G8UV-JHFB (explaining Creative Commons' decision to end one of the three sampling licenses they offered). Note that CC retired this Sampling License in 2007, because although it did permit commercial sampling, it did not "permit the freedom to share a work non-commercially." *Id*.

[418] *See* Chino Mendiola, *Music Sampling: A Good Thing or Bad Thing?*, REINVENT (Jan. 12, 2015) *archived at* https://perma.cc/4FAM-BXZZ (suggesting that rather than a detriment to the music industry, sampling actually allows for more creativity).

[419] *See* Susan Altman, *Rap, A Music, An Industry, and a Culture*, AFRICAN AMERICAN REGISTRY (1997) *archived at* https://perma.cc/8LM9-8LGG (examining how sampling has helped preserve the use of oral tradition in African American music styles).

[420] *See* ROSE, *supra* note 16, at 185 (illustrating both the distinguished style and sound of rappers).

ways to deal with what is left from the civil rights struggles, the ownership of intangibles, symbols, the discursive power.[421] This line of critique is important especially when considering copyright's late recognition of performers' contributions.[422] In the past, copyright's technological biases had worked against African American musicians and denied them any claim for their sound recordings.[423]

Today, due to the longevity of copyright terms, copyright law's past technological biases and its failure to grasp the secondary orality continue to lay heavy burdens on contemporary African American musicians when they refer to their forefathers.[424] African American musicians also face legal challenges when they seek to reinterpret the mainstream cultural references.[425]

Several scholars see the process of copyright law expansion as intellectual land grab, and those who have control or better access to information technologies have been able to shape the copyright system to enclose more resources. [426] Both free culture sympathizers and critical race theorists have perceived sampling positively[427], because this musical practices reflect their respective politics and the

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[421] *See* SCHUR, *supra* note 202, at 96 (arguing that hip hop has helped keep the ideas of the Civil Rights movement relevant).

[422] *See* SCHUR, *supra* note 202, at 96 (expounding that modern African American music productions are useful cultural tools in establishing ownership and property rights).

[423] *See* Noah Berlatsky, *Elvis Wasn't the First to Steal Black Music: 10 White Artists Who "Borrowed" from R&B Before The King*, SALON (May 17, 2014), *archived at* https://perma.cc/HT6C-25A3 (exposing the instances of white musicians stealing music produced by African American musicians).

[424] *See* K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 J. GENDER, SOC. POL. & L. 365, 369-70 (2008) (stating that copyright law and racial discrimination impact the cultural production of African Americans).

[425] *See id*. at 369-70 (inferring that intellectual property laws have had adverse effects on African American musicians).

[426] *See, e.g.*, CHRISTOPHER MAY, A GLOBAL POLITICAL ECONOMY OF INTELLECTUAL PROPERTY RIGHTS: THE NEW ENCLOSURES 25 (2d ed. 2010) (stating that the advent of technology shaped the way copyright laws were enforced and seen by musicians); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW AND CONTEMP. PROBS. 33, 66 (2003) (stating that copyright law has created an incentive for people to act outside of common community norms); Eva Hemmungs Wirten, *Out of Sight and Out of Mind: On the Cultural Hegemony of Intellectual Property (Critique)*, 20 CULTURAL STUDIES 282, 283 (2006) (describing the results of intellectual property expansion).

[427] *See* Roe & Ramirez, *supra* note 6 (stating that sampling is viewed positively in the social science community).

power struggles between, on the one hand, individual/independent musicians who assert freedom of expression[428] v.s. rent-seeking music labels which see music as their commodity, and on the other hand, a historically marginalized community which seeks to take back rhetorical power v.s. the dominant community which has shaped the copyright system for its own benefits and suppresses the reinterpretation of existing material.[429] Since the early 2000s, many copyright reformers have agreed that sampling deserves more room in the copyright system, in order to encourage new forms of music and empower historically marginalized people.[430] This article is in general agreement with these scholars and reformers, and contributes to the scholarship by calling for a new understanding for sampling as a secondary orality practice.[431] Based on an examination of copyright law's long uneasiness with mechanically reproduced music, the article discussed how the technological biases – as shown in Congressional discussions and the courts' legal interpretations – have disadvantaged certain categories of practitioners, especially those in oral cultures, both primary and secondary.[432] Revealing such biases would help the courts to revise previous interpretations and provide a more sample-friending legal environment.[433]

The scope of this article is largely limited by available case material and does not include cases that involve "world beat" or "ethnic pop," which are popular genres that heavily relied on sampling.[434] Beginning in the 1990s, these genres enjoyed market

[428] *See* Ken Paulson, *Introduction* to JEAN PATMAN, FREE SPEECH AND MUSIC: A TEACHER'S GUIDE TO FREEDOM SINGS 5 (Natilee Duning, 2001) (explaining how music is a venue for freedom of expression).

[429] *See* Greene, *supra* note 424, at 373-74 (describing how non-marginalized community has dominated the copyright system to their own advantage).

[430] *See* Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, 61 J. COPYRIGHT SOC'Y U.S.A. 235, 353 (2014) (noting the constraints imposed on the hip-hop industry because of copyright permission negotiations).

[431] *See id.* (advocating the relief from industry restrictions through evaluation of sampling practices from an orality perspective).

[432] *See* Greene, *supra* note 424, at 371 (highlighting rigidity of copyright legal structure and how it disproportionately harms black artists).

[433] *See* Greene, *supra* note 424, at 371-72 (proposing honesty regarding judicial bias as a way to improve analysis of sampling in the copyright context).

[434] *See* Taylor, *supra* note 378, at 76 (discussing sampling use in the ethnotechno genre). Many of those disputes involving sampling indigenous or ethnic sounds did not result in court decisions. *Id.* One of the most famous case in which indigenous persons from Taiwan brought suit against the German music project Enigma was

success, but their urge for "truly exotic" sounds gave rise to concerns about the exploitation of other cultures, many belonging to formerly colonized or marginalized communities, or the culture of *Others*.[435] Many Western musicians have failed to attribute and compensate the non-Western from whom they sampled.[436] Either to evade licensing problems or to hinder imitators, some have chosen to intentionally obscure the source of music.[437] Even if the musicians had obtained a license or negotiated a deal to omit the sources, there may still be other legitimacy and moral concerns – the power imbalance between

settled out of court. *Id. See also* Austin Siegemund-Broka, *Jay Z Wins Copyright Trial Over Egyptian "Big Pimpin'" Sample*, THE HOLLYWOOD REPORTER (Oct. 21, 2015), *archived at* https://perma.cc/KX22-GS6F (reporting a recent case where Jay Z and his producer Timbaland prevailed because the plaintiff did not have standing and hence offers little for the analysis of this article).

[435] *See* Jan Fairley, *"The Blind Leading the Blind:" Changing Perceptions of Traditional Music. The Case of the Peruvian Ayllu Sulca*, *in* MUSIC IN THE DIALOGUE OF CULTURES: TRADITIONAL MUSIC AND CULTURAL POLICY 273, 284 (Max Peter Baumann ed., 1991) (stating that the thirst for different musical traditions are "'vampire' syndrome, sucking the elixir, the raw strength and vitality of other traditions").

[436] *See* David Hesmondhalgh, *International Times: Fusions, Exoticism, and Anti-racism in Electronic Dance Music, in* WESTERN MUSIC AND ITS OTHERS: DIFFERENCE, REPRESENTATION, AND APPROPRIATION IN MUSIC 280, 288 (Georgina Born & David Hesmondhalgh eds., 2000) (describing a scenario where a UK artist used a sample from a Mauritanian vocal artist prior to obtaining permission). To justify their failure to clear the samples, some of these musicians committed to donate part of the profits to help the "people" as an alternative way to compensate. *Id.* at 291-92. Aki Nawaz, the leader of the British group Fun-da-mental, argued that the Third World conceives music ownership differently. *Id.* Hence, instead of clearing his samples, he would donate to humanist groups. *Id.* Yet, Fun-da-mental did not disclose the beneficiary humanist group(s). *Id. See also* Steven Feld, *Pygmy Pop*: *A Genealogy of Schizophonic Mimesis*, 28 Y.B. FOR TRADITIONAL MUSIC 1, 25 (1996) (examining a French pop group's charitable practices). The French music project, Deep Forest, claims to donate part of their profit to a Pygmy Fund. *Id.* According to Feld, the Pygmy Fund which Deep Forest claims to benefit was in fact not designated to help the very Pygmy group from which they sampled, and the tax return of this organization showed little change in their contribution base. *Id.* at 26.

[437] *See The Cross of Changes*, ENIGMA (May 12, 1993), *archived at* https://perma.cc/RN42-DS3K (providing a brief overview of Enigma's second album *The Cross of Changes*). In the Enigma case, Enigma sampled chanting by an elderly indigenous couple from Taiwan without giving attribution, even though the song heavily relied on the sample and left the sample largely intact for the "primal and timeless" quality in accordance to spirit of the album. *Id.* Enigma and its manager deliberately chose not to disclose the source of their samples, as a response to the copycats of Enigma's previous album *MCMXC a.D. Id.*

negotiating parties, whether the sampled work belongs to a community or the negotiating individual, whether the negotiating person legitimately represents the interest of respective community, etc.[438]

Many of the sampled ethnic sound recordings were initially made for research but were published for outreach purposes without foreseeing the potential of being sampled for commercial uses.[439] The idea has been put forth that "world beat" and "ethnic pop" provide the Western audience something "real," "direct" and "innocent" by introducing the exotic sounds of the native.[440] These emphases cast Western ethnomusicologists in an uneasy role which potentially facilitates such exploitation.[441] The Western academia had done little to recognize and advance indigenous peoples'

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[438] *See* Sara Karubian, Note, *360° Deals: An Industry Reaction to the Devaluation of Recorded Music*, 18 S. CAL. INTERDISC. L.J. 395, 411 (2009) (explaining that the more bargaining power an artist has the more their contract will provide future royalties). For example, Madonna's "uniquely powerful bargaining position" contributes to her substantial success in the music industry in terms of both her music and image. *Id.* at 428.

[439] *See* Hugo Zemp, *The/An Ethnomusicologist and the Record Business*, 28 Y.B. FOR TRADITIONAL MUSIC 36, 46 (1996) (detailing the Deep Forest lullaby scandal). Deep Forest's *Sweet Lullaby* sampled from Hugo Zemp's recording of a Solomon Islands lullaby, published by the UNESCO. *Id*. at 45. Both Zemp and UNESCO are noted in the liner notes as supporters of (the purpose of) Deep Forest's music. *Id.* at 46. However, according to Zemp account, UNESCO never confirmed the said permission, and he himself only granted the group to use another recording for a public-interest event. *Id.* at 47.

[440] *See* Simon Frith, *The Discourse of World Music*, *in* WESTERN MUSIC AND ITS OTHERS: DIFFERENCE, REPRESENTATION, AND APPROPRIATION IN MUSIC (2000) 305, 308 (indicating how native sounds are celebrated as more real and natural than those of Western origins); *see also* Siegemund-Broka, *supra* note 434 (elaborating on Jay-Z's sampling of native music). One should note that African American sampling musicians can be among these "Western pop stars" - for example, Jay-Z's sampling Khosara in *Big Pimpin'*, and Truth Hurts' sampling an Indian song *Thoda Resham Lagta Hai* without permission. *Id. See also* MTV News Staff, *Dr. Dre, Interscope Stung With $500 Million Lawsuit over 'Addictive'*, MTV NEWS (Sept. 19, 2002), *archived at* https://perma.cc/KLB9-DZWX (discussing Truth Hurts' copyright infringement of the popular Indian artist Lata Mangeshkar).

[441] *See* Dieter Christensen, *Editor's Preface: Ethnomusicologists' Innocence Lost*, 28 Y.B. FOR TRADITIONAL MUSIC, preface (1996) (outlining the trajectory of recorded music). In 1996, ethnomusicologist Dieter Christensen lamented that ethnomusicological recordings of traditional music – done "in the name of mankind at large" – were no longer something "innocent of any mercantile thoughts," but have "entered into the limelight of global, multi-million business, of entertainment and advertising, of social movements and national symbolisms." *Id.*

credibility and prestige as "authors" in copyright law.[442] Rather, indigenous singers are portrayed as guardians of tradition, but not as authors of original expressions.[443] The equation of the authentic with the exotic caused anxiety among the Western ethnomusicologists: "authenticity," initially a construction of academic discourse, becomes a construction of commercial interest in this process of music appropriation.[444] "World beat" and "ethnic pop" thus become suspicious new embodiments of cultural imperialism, with "[t]hird World musicians being treated as raw materials to be processed into commodities for the West."[445]

While sampling may be celebrated as having positive roles in reclaiming African American identity or in promoting free culture, it is important to acknowledge that in other music genres sampling may involve very different sets of power relations.[446] World beat and ethnic pop, for the above reasons, may be seen as reinforcing or prolonging an ongoing exploitation, even though the sampling in these genres can also reflect intertextuality in the new media aesthetics as earlier discussed.[447] Yet, as the CRT scholarship on copyright reminds us to review the exploitation and politics beyond copyright law itself, the sampling of "exotic" sounds of the natives could only be fully understood when taking these other types of exploitation and politics into account.[448] On the other hand, as the access to sampling technologies continues to grow, natives, or the descendants of formerly colonized communities, have also begun to

[442] *See* Megan M. Carpenter, Note, *Intellectual Property Law and Indigenous Peoples: Adapting Copyright Law to the Needs of a Global Community*, 7 YALE HUM. RTS. DEV. J. 51, 53 (2004) (indicating that intellectual property rights were developed based on Western ideals).

[443] *See id.* at 54-56 (elaborating on the potential protections offered for indigenous peoples' cultural heritage and traditional knowledge).

[444] *See* Frith, *supra* note 440, at 308 (explaining how the idea of authenticity has changed with the passage of time).

[445] *See* Frith, *supra* note 440, at 308-09 (indicating how world music could lead to the exploitation of third world musicians).

[446] *See* Becky Blanchard, *The Social Significance of Rap & Hip-Hop Culture*, EDGE (last updated July 26, 1999), *archived at* https://perma.cc/U4SL-AREF (discussing the roots of rap music and hip-hop and how they can be utilized as tools to address social, economic and political issues).

[447] *See* Frith, *supra* note 440, at 308-09 (discussing the "lurking problem" of cultural imperialism and exploitation).

[448] *See* Martin Stokes, *On Musical Cosmopolitanism*, THE MACALESTER INTERNATIONAL ROUNDTABLE 1, (2007) (delineating the "ambiguities and anxieties" that arise from world music's publication into public commercial spaces).

articulate their identity by using a mixture of their own culture and contemporary mainstream culture elements.[449] Thus, it is possible that issues similar to hip hop and African American culture will also arise in other indigenous cultures with strong oral traditions, and some of the above analyses can offer some insights to modern day indigenous singers' musical practices.

[449] *See e.g.,* INDIGENOUS HIP HOP PROJECTS (2015), *archived at* https://perma.cc/F9VJ-9DFZ (identifying IHHP as a group of artists working with indigenous communities in Australia); Glenn Alteen, BEAT NATION: HIP HOP AS INDIGENOUS CULTURE (last visited Mar. 5, 2017), *archived at* https://perma.cc/E4J6-YQTK (discussing hip hop culture within Aboriginal communities and culture); NATIVE HIP HOP (last visited Mar. 5, 2017), *archived at* https://perma.cc/TH7M-F9NC (providing examples of various cultures implementing elements of their traditional culture into mainstream music); Futuru C.L. Tsai, *"Amis Hip Hop": The Bodily Expressions of Contemporary Young Amis in Taiwan*, INSTITUTE OF ANTHROPOLOGY, NATIONAL TSING HUA UNIVERSITY (2005), *archived at* https://perma.cc/KNJ7-LX8J (comparing hip hop with dance performed by the young men of Amis village in Taiwan); TONY MITCHELL, GLOBAL NOISE: RAP AND HIP HOP OUTSIDE THE USA 1 (2002) (providing examples of cultural music being introduced into the modern mainstream music culture); Andrew Warren et al., *Indigenous Hip Hop: Overcoming Marginality, Encountering Constraints*, 41 AUSTL. GEOGRAPHER 141, 142 (2010) (exhibiting scholarly analyses of the aforementioned phenomenon).