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I. INTRODUCTION

In 2004, one record set the music world abuzz: *The Grey Album* by DJ Danger Mouse.[1] Although it was released without a record label and sold only 3000 copies,[2] music insiders, critics, and fans responded in large numbers to Danger Mouse's revolutionary music.[3] Instead of discussions on its potential for widespread sale or large concert revenue, music insiders focused on the content: remixed samples from two of the most popular and ambitious albums of the last fifty years of American music. Danger Mouse's record laid a cappella vocals from Jay-Z's *The Black Album* on top of instrumental samples taken from the Beatles' eponymous record commonly referred to as *The White Album*.[4] Naturally, as a mix of black and white, Danger Mouse's record is entitled *The Grey Album*.

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1. *See, e.g.*, Katie Dean, Grey Album *Fans Protest Clampdown*, WIRED, Feb. 24, 2004, http://www.wired.com/entertainment/music/news/2004/02/62372 (describing controversy in music circles over *The Grey Album*). Danger Mouse's real name is Brian Burton, and he currently composes half of the popular genre-bending musical group Gnarls Barkley. Chuck Klosterman, *The D.J. Auteur*, NY TIMES MAG., June 18, 2006, at 40–45, *available at* http://www.nytimes.com/2006/06/18/magazine/18barkley.html?_r=1&oref=slogin.

2. Joseph Patel, *Producer of* The Grey Album, *Jay-Z/Beatles Mash-Up, Gets Served*, MTV NEWS, Feb. 10, 2004, http://www.mtv.com/news/articles/1484938/20040210/jay_z.jhtml.

3. *See, e.g.*, Noah Shachtman, *Copyright Enters a Gray Area*, WIRED, Feb. 14, 2004, http://www.wired.com/entertainment/music/news/2004/02/62276?currentPage=1 (explaining the response from fans, critics, and The Beatles' record label as "thermonuclear"). Although sampling dates back more than thirty years to its roots in the South Bronx, and dance-style remixes (adding additional beats or background music to an existing song) and mash-ups (combining two songs to make a new song) have become *de rigueur* in club music, Danger Mouse's album was groundbreaking because of the artist's complete reliance on the source material. Danger Mouse recasts each song from *The Black Album* using material solely from *The White Album*, without using stock beats or material from other works by the same artists. Additionally, the seamless juxtaposition of two seemingly unrelated, culturally significant works distinguishes *The Grey Album* from more pedestrian mash-ups. *See* Renee Graham, *Jay-Z, the Beatles Meet in 'Grey' Area*, BOSTON GLOBE, Feb. 10, 2004, at E1.

4. *See* Graham, *supra* note 3.

Using commercially available software that sells for less than $400,[5] Danger Mouse scoured all thirty tracks on *The White Album*, deconstructing each song to find "every strike of a drum or cymbal when other instruments or voices were not in the mix."[6] Danger Mouse then repeated the process for every piano,[7] guitar, or bass line and began to pair the Beatles' instrumentation with Jay-Z's lyrics.[8] Despite the obvious play-on-words connection between the *Black* and *White* albums, *The Grey Album* was first conceived when Jay-Z released an a cappella version of his record to facilitate these kinds of projects. Despite Roc-A-Fella Records' (the record company, owned by Jay-Z, that released *The Black Album*) traditional policy of not releasing a cappella albums, Jay-Z's engineer, Young Guru, explained that Jay-Z released the vocals-only tracks so that producers "could 'remix the hell out of it.'"[9]

After two weeks of nonstop work, Danger Mouse completed a record that seamlessly blended two generations of revolutionary music.[10] Although originally conceived as a personal project with no real commercial aspirations, Danger Mouse produced a modest run

5. DJ Danger Mouse produced The Grey Album using Sony Acid Pro, one of many prosumer audio remixing software suites available for home computers. See Corey Moss, Grey Album Producer Danger Mouse Explains How He Did It, MTV News, Mar. 11, 2004, http://www.mtv.com/news/articles/1485693/20040311/jay_z.jhtml?headlines=true/. Acid Pro and its competitors (such as the better-known ProTools) offer home music producers and enthusiasts professional recording and remixing options previously available only in expensive recording studios. For an explanation of Acid Pro, see Sony Creative Software, Acid Pro 6, Introduction, http://www.sonycreativesoftware.com/products/product.asp?pid=383 (last visited Aug. 2, 2008).

6. Moss, *supra* note 5.

7. Shaheem Reid and Joseph Patel, *Remixers Turn Jay-Z's* Black Album *Grey, White and Brown*, MTV NEWS, Jan. 26, 2004, http://www.mtv.com/news/articles/1484608/20040126/jay_z.jhtml.

8. Moss, *supra* note 5.

9. Reid and Patel, *supra* note 7. Jay-Z's sentiments have not gone unnoticed. Already a favorite of remixers, the a cappella album spawned several popular remix albums. "Kardinal Offishall and Solitair, two dance-hall reggae artists from Canada, gave the record a rude-boy twist." Shachtman, *supra* note 3. *The Brown Album*, produced by former A Touch of Jazz producer Kevin Brown, remixes the original vocals with jazz- and funk-infused melodies. Kno of the Atlanta rap group CunninLynguists recast the album as the rhythmically abstract *Kno v. Hov: The White Album*, creating new southern-style "soundscapes" to highlight the mood of the original. Another popular remix, *DJ Lt. Dan Presents The Black Album Remixes: Back to Basics*, uses famous instrumentals from notable Brooklyn hip-hop artists. Of all the remixes, Danger Mouse's *The Grey Album* received the most critical acclaim and popular recognition. Reid and Patel, *supra* note 7.

10. Moss, *supra* note 5.

of 3000 copies, which were sold through small, local record stores.[11] However, news of the record quickly spread as it received favorable reviews in some of the nation's largest newspapers and music magazines.[12] Rather than just adding rap lyrics to 1960's pop, Danger Mouse earned critical acclaim for matching the tone of Jay-Z's words with beats culled from the Beatles' album. To do so, each of the songs on *The Grey Album* conrains as many as twenty-six layers of samples, most of them altered to match the tempo and tenor of the contemporaty hip-hop lyrics, making the record sound as though Jay-Z recruited the Beatles as his backing band.[13]

Despite its critical acclaim, *The Grey Album* faced a cold response from EMI, the record company that owns the rights to the Beatles' sound recording masters.[14] Upon receiving notice of the potential copyright violations, EMI's lawyers sprang into action, serving cease and desist letters to both Danger Mouse and the local record stores that stocked the limited-release CD.[15] EMI's lawyers also sent cease and desist letters ordering rhar all physical copies of the record be destroyed, thereby transforming the CD into a collector's item.[16] Fans of the work rallied in support of *The Grey Album*, with over 170 websites hosting free mp3 downloads of the record on what the organizers deemed "Grey Tuesday."[17] Additionally, following the

11. *See* Patel, *supra* note 2.

12. *See, e.g.*, Graham, *supra* note 3.

13. Moss, *supra* note 5. In fact, the cover art of the limited-release CD of *The Grey Album* featured a caricature of Jay-Z with caricatures of John, Paul, George, and Ringo standing in line behind the rapper. DANGER MOUSE, THE GREY ALBUM (2004).

14. *See* Patel, *supra* note 2. As is typical with musical copyrights, individual Beatles own the copyrights to the compositions they wrote (with Lennon/McCartney co-writing the vast majority of the songs and co-owning the copyrights). However, even as influential artists with significant bargaining power over their recording contracts, the actual sound recording copyrights belong not to the artists, but to the record company. *See Copyright Law Basics—Recording Artists Project*, http://cyber.law.harvard.edu/rap/copyright (last visited Aug. 2, 2008).

15. Patel, *supra* note 2. Although Beatles samples appear in a few hip-hop albums, most notably *Paul's Boutique* by the Beastie Boys, these samples are not licensed and were not challenged during the early era of hip-hop. *See* Eric Steuer, *The Remix Masters*, WIRED, Nov. 2004, 185–87, *available at* http://www.wired.com/wired/archive/12.11/beastie.html. EMI now fiercely protects The Beatles' catalog and does not license samples to hip-hop artists. Even assuming that Danger Mouse was able to secure permission to sample *The White Album*, the fees would likely be prohibitively expensive due to the value of the original and the sheer volume of material sampled.

16. Shachtman, *supra* note 3.

17. *Grey Tuesday—Free the Grey Album February 24*, http://www.greytuesday.org/ (last visited Dec. 20, 2007). Downhill Battle, a group focused on reforming the legal industry,

cease and desist, the album was widely downloaded on peer-to-peer websites, inspiring similar remix attempts[18] and even video mash-ups that place Jay-Z and the Beatles in concert together.[19]

Although EMI declined to pursue action against either Danger Mouse or the "Grey Tuesday" participants, *The Grey Album* remains illegal. Still actively shared on peer-to-peer websites, it made significant cultural contributions to the rising mash-up scene.[20] However, its quick removal from commercial channels and subsequent banishment to the dark corners of the Internet robbed *The Grey Album* of its rich porential to change the mainstream musical landscape. Perhaps its revolutionary blending of seemingly unrelated musical milestones would have fostered a shift in the musical landscape, or perhaps it would have failed commercially, with both Beatles and Jay-Z fans taking umbrage at the recast classics. However, these questions go unanswered due to the failings of the current musical copyright regime, which fails to compensate artists for their work and discourages innovation, while lining the pockets of corporations.

This Comment will examine how current musical copyright doctrines regarding digiral sampling fail to implement the goals of copyright protection; it will also propose a new solution to encourage innovation and still compensate artists for their creative

organized "Grey Tuesday" as a coordinated day of online civil disobedience. The group stated that the purpose of the demonstration was to protest the control exercised by lawyers over the creative process in the music industry. *Id.* Although the original Grey Tuesday website has been subsequently taken down, a copy of the website as it appeared on February 27, 2004 is available through Archive.org's "Wayback Machine" at http://web.archive.org/web/20040227024720/http://www.greytuesday.org/index.html (last visited Aug. 2, 2008).

18. *The Grey Album* has spawned a new genre of bootleg remix albums. Notable examples include: *Double Black*, which attempted to combine Jay-Z's *The Black Album* with Metallica's *The Black Album; The Black Album Unplugged* matches Jay-Z with a classic acoustic album from '90's grunge rockers Nirvana. *Grey Tuesday—Free the Grey Album February 24*, *supra* note 17.

19. The most famous of these is entitled *The Grey Video*. It visually depicts the remix of Jay-Z's "Encore" with samples from The Beatles' "Glass Onion" and "Savoy Truffle." Using footage from The Beatles' *Hard Days Night* and a Jay-Z performance, the video opens with The Beatles briefly performing in front of a live audience. After a few seconds, the performance is joined with Jay-Z's "Encore" while the rapper appears on video screens behind the audience and in the director's booth. As The Beatles play on, Ringo's drum kit transforms into turntables and a mixer; Paul and George are replaced by dancers midway through the song. John enthusiastically sings backup before dropping his guitar and beginning to break-dance, culminating in a head spin and back flip off the stage. *The Grey Video*, http://www.youtube.com/watch?v=3zJqihkLcGc (last visited Aug. 2, 2008).

20. *See* Graham, *supra* note 3.

works. To do so, Part II will look at the motivations and goals behind copyright protection. Also, in that context, the Comment will examine how early cases involving digital sampling helped to establish strong antisampling precedents. Part III will discuss *Bridgeport Music v. Dimension Films*,[21] a recent Sixth Circuit case that lays down a proposed bright-line rule regarding sampling. Finally, Part IV will argue that even if the *Bridgeport* court arrived at its rule for the wrong reasons, the end result is justifiable.

Though *Bridgeport* currently threatens digital sampling as an art form, in combination with another bright-line rule, a compulsory sample license, the *Bridgeport* rule is a fair, efficient standard that would benefit artists, record companies, and consumers. While other commentators have suggested compulsory sample licenses,[22] this Comment will argue that a compulsory license is by far the best solution to the growing problems concerning digital sampling for three reasons: 1) unlike other proposed solutions, a compulsory license preserves the benefits of the *Bridgeport* rule while mitigating its faults; 2) a compulsory sample license is consistent with the theories underlying copyright protection; and 3) only a compulsory sampling license fulfills the conflicting goals of copyright.

II. CONTEXT & BACKGROUND

A. Why Protect Intellectual Property: The Theories Behind Copyright Protection

Despite their obvious differences, arguments supporting the protection of inrellectual property—copyrights, patents, trademarks, etc.—rely heavily on traditional arguments for protecting tangible property. Three of those arguments that are particularly adaptable to intellectual property are Locke's natural rights argument, Hegel's personhood theory, and economic incentive theory. Briefly, Lockean theory suggests that personal properry (and intellectual property by extension) is protectable because of the labor a person adds to the property. "As much land as a man tills, plants, improves, cultivates,

21. 410 F.3d 792 (6th Cir. 2005).

22. While some of the scholarly works regarding *Bridgeport* address the possibility of compulsory sampling, most do so in the broader scheme of examining many proposed solutions and do not examine the issue in depth. *See, e.g.*, Jennifer R.R. Mueller, Note, *All Mixed Up:* Bridgeport Music v. Dimension Films *and De Minimis Digital Sampling*, 81 IND. L.J. 435, 461 (2006).

and can use the product of, so much is his property."[23] Hegel's personhood theory argues that property can become so bound up with personhood that it becomes part of the person's relationship with the real world. Therefore, under Hegelian theory, depriving a person of his property would be akin to stealing a piece of the person.[24]

The dominant theory in protecting intellectual property is the economic incentive theory.[25] This theory explains that protecting property allows people to invest in property to improve it or productively use it by allowing for incentives. In the case of intellectual property, economic incentive theory states that content producers will continue to produce due to the incentives that protection allows.[26] While all three theories have played a role in the development of copyright protection, beginning with the first instances of copyright protection, economic incentive theory has played the largest role.

B. Historical Foundations of Copyright

Although copyright law has recently come under fire with the rise of the Internet and the wide-scale copying potential provided by Napster and its ilk, since its inception copyright law has reacted to threats imposed by new technology.[27] Modern copyright regimes trace their origins back to the fifteenth century and Gutenberg's printing press.[28] Along with all of its culturally transformative effects on literacy and human knowledge, the printing press, like the Internet, allowed for previously difficult-to-copy literature to be

23. JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT 332 (Peter Laslett ed., Cambridge Univ. Press 1965) (1690).

24. ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 6–8 (4th ed. 2006).

25. *Id.* at 10 (stating that "[u]tilitarian theory, and the economic framework built upon it, has long provided the dominant paradigm for analyzing and justifying the various forms of intellectual property protection").

26. *Id.* at 10–14.

27. *See* Sony Corp. of Am. v. Universal City Studios, Inc. 464 U.S. 417, 430 (1984). The *Sony* opinion goes on to provide a list of technologies that have precipitated new copyright protections. The development and marketing of the player piano preceded the 1909 Copyright Act. Technological advances in copying prompted Congress to enact a statutory exemption for library copying in section 108 of the 1976 Copyright Act. The new technologies that allowed retransmission of television programs by cable or microwave and the personal cassette recorder also prompted new legislation meant to protect copyright holders. *Id.* at 430 n.11.

28. *Id.* at n.12.

quickly and much more cheaply reproduced, posing a threat to content producers.[29]

For the next several decades, as the printing press became more and more available, Venice established itself as the printing capital of the world.[30] Soon after, "the Venetian Cabinet recognized for the first time exclusive rights in the printing of particular books."[31] In reaction to the burgeoning industry and fears of an oversupply of books, the Venetian Senate restricted printing to new or previously unprinted works. In the middle of the sixteenth century, printers and booksellers were organized into a guild, and the Catholic Church was given power to suppress "heretical works," thus restoring control over printed works to the organization that sought to control literacy and literature for centuries prior to Gutenberg's invention.[32]

At the same time, the printing press moved into England, quickly prompting the first copyright—granted by royal decree.[33] Then, by another royal decree, the Crown granted all printing business to one company, reserving in the company, not the authors, "the exclusive right to control the printing and sale of books." After the royally granted monopoly expired in 1694, the printing industry opened to new competition.[34] Parliament responded in 1710 with the Statute of Anne, granting authors exclusive rights to their books for a fourteen-year period with the possibility of an additional fourteen-year renewal. The Statute of Anne also allowed customers to petition the government to set maximum prices for copyrighted works—a precursor to today's compulsory license schemes discussed below.[35]

Upon gaining independence from Britain, most states instituted their own copyright schemes under the Articles of Confederation. However, as with mosr pre-Constitution state laws, conflicting laws led to uneven enforcement and were abandoned in favor of a uniform national law.[36] The Constitution granted power to the

29. *See* MERGES, MENNELL & LEMLEY, *supra* note 24, at 368.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 368–69.
34. *Id.* at 369.
35. *Id.* For more discussion on compulsory licenses, see *infra* Part IV.
36. MERGES, MENNELL & LEMLEY, *supra* note 24, at 369–70.

federal government to create patents and copyrights,[37] which Congress did with the Copyright Act of 1790, an act largely based on the Statute of Anne.[38] In subsequent years, copyright laws have expanded to react to new technologies and to grant ever-longer copyright terms, lessening the flow of valuable works into the public domain.[39]

C. Musical Copyrights and Digital Sampling

1. Why Do Corporations Sue Sampling Artists?

A copyrighted song usually consists of two constituent, protectable parts. First, the underlying musical composition is copyrighted by the songwriter.[40] Second, the actual sound recording of the artist performing the song is also protected by copyright.[41] Under standard industry recording contracts, most artists surrender their sound recording copyrights to the record company that releases the performance.[42] This allows a record company to pay for the production of a record, invest money in promotion and touring, and reap the financial rewards if the record is a success. On a less positive note, because record companies typically own the rights to sound recordings, the use of those sound recordings in subsequent works—i.e. samples—is usually determined by profitability or legal concerns, rather than artistic potential. Thus, while some artists may have no

37. U.S. CONST. art. I, § 8, cl. 8.

38. MERGES, MENNELL & LEMLEY, *supra* note 24, at 370.

39. *Id.* Starting with the original fourteen years plus fourteen-year extension, Congress has continually increased the copyright protection term. The 1976 Act extended protection to the life of the author plus fifty years, or seventy-five years for corporate authors. In 1998, at the behest of major copyright holders, such as Disney, whose creations were close to losing protection, Congress passed the Sonny Bono Copyright Extension Term Act (CETA). CETA added an additional twenty years to the copyright term. In *Eldred v. Ashcroft*, the Court held that because the additional extension fell short of a perpetual copyright, CETA did not violate the Constitution's mandate that the copyrights be granted "for limited Times." 537 U.S. 186, 193 (2003) (quoting U.S. CONST. art. I, § 8, cl. 8). In his dissent, Justice Breyer used statistics to claim that the additional term created an almost perpetual copyright. Breyer sided with *amici* who argued that the extended copyright term was worth 99.8% of the value of a copyright, meaning that the lengthy term ensures that almost no copyrights will retain any value once they enter the public domain. *Id.* at 254–55 (Breyer, J., dissenting).

40. *Copyright Law Basics*, *supra* note 14.

41. *Id.*

42. *Id.*

objection to being sampled,[43] their record companies hold the final decision. Like any good corporation, record companies make that decision to maximize profits, not to benefit the arts, either by extracting maximum value from the sample or by preserving the integrity of the source by disallowing samples that might offend their primary market.

2. What Happened When Corporations Sued Sampling Artists?

Digital sampling defendants have struggled right out of the gate. Unfortunately for future sampling defendants, one of the cases of first impression involved a blatant intellectual theft and continues to cast a preemptive shadow across judicial opinions regarding sampling.[44] *Grand Upright Music Ltd. v. Warner Brothers Records, Inc.* ominously warns any potential sampler: "Thou shalt not steal. . . . The conduct of the defendants herein, however, violates not only the Seventh Commandment, but also the copyright laws of this country."[45] Although the district judge's Biblical references may have been a little over-the-top, there was little debate that the defendants had violated copyright laws. Grand Upright Music owned the copyrights to the composition and sound recording of "Alone Again (Naturally)" by Raymond "Gilbert" O'Sullivan.[46] Biz Markie, a hip-hop artist known more for his humorous songs than serious artistry,[47] and his record label admitted that Markie's song "Alone

43. George Clinton, one of the most sampled artists in contemporary hip-hop and the creator of the music at issue in *Bridgeport*, *see infra* Part III, positively comments on his popularity as a source of (often uncompensated) samples, citing that "it was a way to get back on the radio." Tim Wu, *The Shady One-Man Corporation That's Destroying Hip-Hop*, SLATE, Nov. 16, 2006, http://www.slate.com/id/2153961/.

44. The Sixth Circuit's opinion in *Bridgeport Music, Inc. v. Dimension Films* (*Bridgeport II*) quotes this case with approval, borrowing the opinion's opening line, the Biblical admonition: "'Thou shalt not steal.'" 410 F.3d 792, 801 n.12 (6th Cir. 2005) (quoting Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991)).

45. 780 F. Supp. at 183 (1991).

46. *Id.*

47. A listing of some of Biz Markie's songs illustrates this point well. Here are just a few of the gems: "Pickin' Boogers," "Let Go My Eggo," and "T.S.R. (Toilet Stool Rap)." The Official Biz Markie Website, http://www.bizmarkie.com/discography.html (last visited Aug. 2, 2008). Additionally, his largest mainstream hit, "Just a Friend," features humorous rap lyrics about a romantic conquest combined with a chorus of desperate pleas to the woman to be more than just a friend. Markie sings the choruses significantly off-key and out-of-tune. BIZ MARKIE, *Just a Friend*, *on* THE BIZ NEVER SLEEPS (Cold Chillin Records 1997) (1989). In this light, combined with the obvious theft, it might be easier for a court to dismiss any artistic

Again" sampled both words and a significant portion of the music from O'Sullivan's composition and recording.[48]

In a shockingly poorly argued case, the defense first asserted that Grand Upright Music, Inc. did not hold valid copyrights. To do so, defense counsel objected that the plaintiff's certificates of copyright were not "authenticated"—meaning that since the certificates were originally issued to a now-dissolved corporation, someone from that corporation would have to identify them to make them authentic.[49] The court immediately, and appropriately, dismissed this argument as baseless. Next, the defense attempted to exclude evidence documenting the copyright transfer to Grand Upright Music. The court quickly rejected this argument as well, saying that defense counsel's failure to "conduct any discovery . . . does not give the court cause to reject evidence of the transfer."[50] Next, defense counsel relied on a long-ago repealed section of copyright law to argue that the transfer documents were not legally binding.[51] Finally, as its trump card, the defense argued that while Biz Markie took copyrighted material, the taking "should be excused because others in the 'rap music' business [were] also engaged in illegal activity."[52] Not surprisingly, this "but my friends were doing it too" argument failed to persuade the court. Instead, the court entered a preliminary injunction against the sale of Biz Markie's album, ominously noting that "[t]he resolution of any issue left open in this civil matter should have no bearing on the potential criminal liability in the unique circumstances presented here."[53]

In the shadow of that precedent, digital sampling is still characterized by courts as the most "brazen stealing of music"

purpose in sampling, setting a tough precedent for more serious works incorporating samples. On this note, Adam Yauch of the Beastie Boys, one of the most prolific sampling bands in hip-hop, said:

> An example that's often brought up in court when we get sued over sampling is a Biz Markie track where he more or less used a whole Gilbert O'Sullivan song. Because it was such an obvious sample, it's the example lawyers use when trying to prove that sampling is stealing. And that's really frustrating to us as artists who sample, because sampling can be a totally different thing than that.

Steuer, *supra* note 15.

48. *Grand Upright Music Ltd.*, 780 F. Supp. at 183.

49. *Id.* at 184.

50. *Id.*

51. *Id.*

52. *Id.* at 185 n.2.

53. *Id.* at 185 n.3.

possible.[54] Few sampling cases have continued into litigation.[55] Most are settled out of court, likely due to fear of the potential for injunctions on the sale of the underlying album or worse, criminal sanctions, as outlined in *Grand Upright Music*. The few cases that have continued forward continue to be shaped by the "sampling is stealing" mindset.[56]

III. *BRIDGEPORT MUSIC, INC. V. DIMENSION FILMS*

Like most music copyright cases, the facts of *Bridgeport* are nearly as complicated as the underlying musical compositions in the dispute. Bridgeport Music is a one-person corporation with no employees and no assets other than a catalog of musical composition copyrights.[57] Run by a former music producer, Armen Boladian, Bridgeport produces nothing. Instead, it extracts money from previously recorded works. Unlike other catalog companies, who simply focus on licensing rights for commercials and other projects, Bridgeport has turned to "a far more lucrative business model—trolling for sampling cash."[58] Like a patent troll, Bridgeport holds the rights to a large portfolio and uses lawsuits to extort money from artists who sample from its catalog, no matter how minor or indistinguishable the sample.[59] In addition to extorting money from samplers, Bridgeport and other like-minded catalog companies often require a percentage ownership interest in the new work incorporating the sample. In this way, Bridgeport is assured of an ever-growing catalog of works, giving it even more ammunition to fight against artists who sample.[60]

In 2001, Bridgeport filed a massive thousand-page complaint in federal court alleging almost 500 causes of action against approximately 800 artists.[61] The court severed the complaint into

54. Jarvis v. A & M Records, 827 F. Supp. 282, 295 (D.N.J. 1993).

55. *See* Bridgeport Music, Inc. v. Dimension Films, LLC (*Bridgeport I*), 230 F. Supp. 2d 830, 840 n.11 (M.D. Tenn. 2002)(listing all seven cases the court found involving digital sampling).

56. *See supra* text accompanying notes 44–45.

57. Wu, *supra* note 43.

58. *Id.*

59. *See id.*

60. *See generally Bridgeport I*, 230 F. Supp. 2d 830. Bridgeport acquired portions of the songs at issue in the case in compensation for using samples it already owned.

61. *Id.* at n.1.

476 cases,[62] most of which were either dismissed or settled out of court.[63] The majority of these suits focused on infringing samples of George Clinton's catalog, which Bridgeport procured under questionable circumstances.[64] George Clinton's songs, particularly his revolutionary funk guitar riffs, are among the most sampled in hip hop and rap.[65]

In 2002, the District Court of Tennessee decided *Bridgeport Music, Inc. v. Dimension Films*,[66] one of the few Bridgeport cases that proceeded to trial. Bridgeport and Westbound Records claimed a percentage of the musical composition and sound recording copyrights in "Ger Off Your Ass and Jam" ("Get Off") by George Clinton and his band, the Funkadelics.[67] "Get Off" was sampled in the rap song "100 Miles and Runnin'," ("100 Miles") which was included in the soundtrack to the film "I Got the Hook Up." "100 Miles" sampled a single "arpeggiated chord—that is, three notes that, if struck together, comprise a chord but instead are played one at a time in very quick succession—that is repeated several times at the opening of "Get Off."[68] This sample was significantly altered in "100 Miles": The chord was lowered in pitch, extended from two seconds to seven, and looped throughout the background of the song five separate times.[69] Even to the musically trained ear, when compared to the original, the sample is almost unrecognizable.

62. *Id.* While it is true that most Bridgeport cases were dismissed or settled, many cases arising from that initial complaint continue to be litigated. *See, e.g.*, Bridgeport Music, Inc. v. Universal-MCA Music Publ'g, Inc., 481 F. 3d 926 (6th Cir. 2007). Bridgeport also continues to file new suits against any possible infringers. *See, e.g.*, Bridgeport Music, Inc. v. Justin Combs Publ'g, 507 F.3d 470 (6th Cir. 2007).

63. Wu, *supra* note 43.

64. In fact, Boladian apparently defrauded Clinton by forging contracts assigning to himself the copyrights to Clinton's songs and forging Clinton's signatures to those contracts. *Id.* When asked about the situation, George Clinton claimed that Boladian "stole" his songs. *Id.* Clinton has begun to fight back against former managers and business associates who similarly gained control of other copyrights belonging to the singer. In 2005, a federal district court granted Clinton ownership of four master recordings previously held by business partners. *See George Clinton Awarded Funkadelic Master Recordings*, SOUND GENERATOR, June 6, 2005, http://www.soundgenerator.com/viewArticle.cfm?ArticleID=5478; Jeff Leeds, *George Clinton Wins Funkadelic Rights*, N.Y. TIMES, June 7, 2005, at E3.

65. Wu, *supra* note 43.

66. *Bridgeport I*, 230 F. Supp. 2d 830.

67. *Id.* at 833.

68. *Id.* at 839.

69. Bridgeport Music, Inc. v. Dimension Films (*Bridgeport II*), 410 F.3d 792, 796 (6th Cir. 2005).

Like a good song, here is where the case picks up additional layers and subtle twists. The musical composition "100 Miles" was originally co-owned by Dollarz N Sense Music, Ruthless Attack Muzick, Stone Agate Music, and Hancock Music.[70] As compensation for the "Get Off" sample, Bridgeport acquired a twenty-five-percent interest in the musical composition of "100 Miles." When "100 Miles" appeared on the soundtrack to the movie "I Got the Hook Up," Bridgeport and Westport Records filed suit against Dimension Films, No Limit Films, and Miramax Film Corp. Miramax and Dimension settled the claims against them,[71] leaving the film's producer, No Limit Films, as the only defendant.[72]

A. The District Court's De Minimis Application

In granting summary judgment to No Limit, the district court quickly dismissed Bridgeport's claims of infringement on the underlying musical composition of "Get Off."[73] When the original owners of "100 Miles" granted twenty-five-percent ownership to Bridgeport, they did so in exchange for a license to reproduce and distribute "100 Miles" in all media formats.[74] The license also released all of the original owner's licensees, successors, and assignees from any legal actions regarding the use of the song.[75] Despite protests from Bridgeport regarding the validity of No Limit's license to use "100 Miles," the court dismissed "all claims arising from infringement of the musical composition 'Get Off.'"[76]

The district court then turned its attention to Westport Records' claims that "100 Miles" improperly infringed its copyright of the sound recording of "Get Off." No Limit argued two points. First, that the sampled portion of "Get Off" is merely a collection of notes that are not entitled to copyright protection alone.[77] Second, No Limit argued that the sampled portion was a *de minimis* use and therefore no actionable copying occurred.[78] In considering these

70. *Bridgeport I*, 230 F. Supp. 2d at 833.
71. *Bridgeport II*, 410 F.3d at 795 n.1.
72. *Id.* at 792.
73. *Bridgeport I*, 230 F. Supp. 2d at 842–43.
74. *Id.* at 834.
75. *Id.*
76. *Id.* at 838.
77. *Id.* at 838–39.
78. *Id.* at 839.

arguments, the court acknowledged that while the sampled chord in "Get Off" was a commonly used three-note figure, it was used in a nontypical fashion that produced a unique aural effect.[79] Therefore, while the chord alone is not original enough to be copyrightable, Clinton's rendition of the chord was original and creative enough to qualify for protection, especially where the sound recording was apparently chosen based on its unique sound.[80]

Moving to No Limit's second argument, the court explained that the Sixth Circuit recognized the principle of *de minimis non curat lex* ("the law cares not for trifles").[81] *De minimis*, therefore, functions as a defense to copyright infringement by showing that the amount taken was not substantial enough to merit protection.[82] In making such a determination, a court must balance the economic interests protected by copyright laws while preventing overly rigid applications of these laws that may stifle artistic creativity and decrease the development of new works. After considering those broad goals, the court held that the "Get Off" sample qualified as *de minimis* use and did not rise to the level of copyright infringement.[83]

In determining *de minimis* use, the district court ultimately looked to the quantitative and qualitative use of the "Get Off" sample in "100 Miles."[84] Quantitatively, the original sampled chord represented a small fraction of "Get Off."[85] While the slowed-down, looped sample ran throughout "100 Miles," it was still a fraction of the whole work.[86] More significantly, however, the court examined the qualitative use of the sample in both works. In the original, the sampled portion produced a rising sense of anticipation for the upbeat, celebratory dance song that followed.[87] Meanwhile, the court determined that in "100 Miles," the slowed-down, looped chord serves to create tension in an angry, disillusioned song about a

79. *Id.*

80. *See id.*

81. *Id.* at 839–40.

82. MERGES, MENNELL & LEMLEY, *supra* note 24, at 472–73.

83. *Bridgeport I*, 230 F. Supp. 2d at 841.

84. The court weighed various tests, including Professor Nimmer's fragmented literal similarity analysis, but quickly determined that the sample would be noninfringing under any of the tests, and provided an in-depth analysis under a quantitative/qualitative *de minimis* analysis. *See id.* at 840–42.

85. *Id.* at 841.

86. *Id.*

87. *Id.* at 841–42.

police chase.[88] The different tone of the works, combined with the fact that the lifted sample was nearly impossible to recognize in context, was enough for the court to warrant dismissal of any infringement claims on underlying sound recording. As a result, the court granted summary judgment to No Limit and dismissed all of the Bridgeport and Westbound's infringement claims.[89] As a final blow to the plaintiffs, the district court granted No Limit's postjudgment motion for attorney's fees.[90] Both Bridgeport and Westbound appealed.[91]

B. The Sixth Circuit: One Bright Line to Rule Them All

In 2005, the U.S. Court of Appeals for the Sixth Circuit introduced a musical copyright doctrine of its own, reversing the district court and sending waves through the music industry.[92] In *Bridgeport Music, Inc. v. Dimension Films*,[93] the Court agreed that if it had followed the district court's analysis, it too would have granted summary judgment to the defendants.[94] Instead, the Court adopted a legal theory that could pay huge dividends for copyright trolls like Bridgeport—and already has.[95] The court held that any sampling, regardless of how minute, constituted copyright infringement.[96]

88. *Id.*

89. *Id.* at 842–43.

90. Bridgeport Music, Inc. v. Dimension Films (*Bridgeport II*), 410 F. 3d 792, 797 (6th Cir. 2005).

91. *Id.* at 795.

92. *See id.*

93. *Id.*

94. *Id.* at 798 n.4.

95. Based on the Sixth Circuit's strict sampling infringement rule, Bridgeport and Westbound already succeeded in gaining a four-million-dollar judgment against Sean "Diddy" Combs' record label Bad Boy Records and its affiliated music publishers. Bridgeport Music, Inc. v. Justin Combs Publ'g, 507 F.3d 470, 475 (6th Cir. 2007). On appeal to the Sixth Circuit, the court lowered the damages against the defendants, but upheld the trial court's injunction against the sale of Notorious B.I.G.'s debut album, *Ready to Die*, released by Bad Boy Records and a tremendous commercial success, reaching multi-platinum status. *Id.* at 476, 494. The sample at issue was a five-second horn selection from a 1972 recording by the Ohio Players entitled "Singing in the Morning." Anthony Falzone, *Why Hasn't Diddy Tried to Save Music Sampling*, SLATE, Nov. 2, 2007, http://www.slate.com/id/2177238/pagenum/2/. Bridgeport also filed suit against Jay-Z and his record company for allegedly infringing samples in the song "Justify My Thug" from *The Black Album*. Complaint at 3–4, Bridgeport Music, Inc., v. Island Def Jam Music Group (S.D.N.Y. filed Nov. 3, 2006) (No. 06 Civ. 12917). Bridgeport alleges that Jay-Z's song contains an infringing sample from Bridgeport's catalog of—who else—George Clinton compositions and recordings. *See Bridgeport Music: Know Your*

The Court began its opinion by noting the proliferation of disputes over copyright infringements by digital samples in hip-hop and rap songs.[97] In light of this problem, the Court attempted to formulate a bright-line rule to "add[] clarity to what constitutes actionable infringement with regard to the digital sampling of copyrighted sound recordings."[98] In formulating such a rule, the Court first looked into the text of the Copyright Act.[99] Section 106 enumerates the exclusive rights of a copyright holder, among them:

> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
>
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.[100]

The Court then explained that the rights in section 106 are further limited by section 114(b), which "provides that '[t]he exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.'"[101] Additionally, the Sixth Circuit found great importance in the fact that the Copyright Act of 1976 added the

Enemy, GROUND UP HIP HOP, Nov. 20, 2006, http://www.grounduphiphop.com/2006/11/20/bridgeport-music-know-your-enemy/.

96. *Bridgeport II*, 410 F. 3d at 800–01.

97. *Id.* at 798–99.

98. *Id.* at 799.

99. *Id.*

100. 17 U.S.C. § 106 (2000).

101. *Bridgeport II*, 410 F. 3d at 800 (quoting 17 U.S.C. § 114(b) (2000)).

word "entirely" to the second portion of section 114(b), which further limits the rights of the owner of a copyright in a sound recording.[102] Those rights "'do not extend to the making or duplication of another sound recording that consists *entirely* of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.'"[103] The Court read this language limiting the copyright holder's claim on derivative works to grant to the holder an exclusive right to sample.[104] Because the section specifically exempts only works composed entirely of independent fixation of other sounds, works composed with any sounds that were not independently fixed—like digital samples—must necessarily infringe.[105] The Court specifically noted that one of the factors most relevant to the district court, a lay observer's inability to recognize the source of the sample, is not a proper consideration because altering the actual sound of the recording is an exclusive right of the copyright holder.[106]

In defense of its new rule, the Court pointed to the ease of enforcement. "Get a license or do not sample."[107] The Court then explained three reasons why this rule is justified. First, this will not stifle creativity in any significant way. If an artist wants to include a riff from another work, that artist is free to reproduce the riff in the studio rather than grabbing it from the work of another.[108] "Second, the market will control the license price and keep it within bounds."[109] The Court does not provide much analysis on this point, only remarking that a copyright holder will not ask for "a license fee greater than what it would cost the person seeking the license to just duplicate the sample" in the studio.[110]

Additionally, the Court pointed to the development of sampling clearinghouses authorized to license samples from their member copyright owners as further evidence of the market's efficient

102. *Id.* at 800–01.

103. *Id.* at 800 (quoting 17 U.S.C. § 114(b) (2000)).

104. *Id.* at 801.

105. *See id.* at 800–01.

106. *Id.* at 801 n.10 (citing 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 (2003) (footnotes omitted)).

107. *Id.* at 801.

108. *Id.*

109. *Id.*

110. *Id.*

response to demand for samples.[111] If this is not sufficient, the Court suggested that "the record industry, including the recording artists, has the ability and know-how to work out guidelines, including a fixed schedule of license fees, if they so choose."[112] Third, the Court stated that sampling, unlike other musical copyright infringements, could never be accidental; samples are always taken with the knowledge that the artist is taking another's work product.[113] In one of the opinion's final footnotes, the Court approvingly echoed *Grand Upright Music Ltd.*'s opening line, "'Thou shalt not steal.'"[114] Finally, the Court reversed the entry of summary judgment for the defendants and remanded to the district court to reconsider Westbound's infringement claims.[115]

IV. ANALYSIS

A. Currently, the Bridgeport *Rule is Not a Workable Standard*

The *Bridgeport* court got it right—but without a compulsory sample license, its rule threatens samples as a legitimate art form and empowers corporations rather than artists. The implicit objective of the Sixth Circuit's opinion in *Bridgeport* was to lay down a bright-line rule, and that is exactly what it did.[116] The Court's rule—get a license or do not sample[117]—is easy to understand, encourages judicial efficiency, and helps artists by ensuring them that their compositions are safe from sample trolls like Bridgeport. That is how the court got it right. Even though there are plenty of good arguments for why *Bridgeport* should not have come out the way that it did—for instance, the almost complete reliance on law review articles as authority,[118] the court's labored attempt to read digital

111. *See id.* at 804 n.19 (citing A. Dean Johnson, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits*, 21 FLA. ST. U. L. REV. 135, 163 (1993) (footnote omitted)).

112. *Id.* at 804.

113. *Id.* at 801.

114. *Id.* at 801 n.12 (quoting Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991)).

115. *Id.* at 805.

116. *See id.* at 801.

117. *Id.*

118. *See id.* at 801–03. After dismissing prior precedent, the court notes that although their "holding arguably sets forth a new rule," they are on solid legal ground because their holding is supported by several law review articles. *Id.* at 803.

sampling rights as being contemplated in the 1976 Copyright Act,[119] etc.—the end result is salvageable. However, it can only be saved by Congress enacting a compulsory sample license. When combined with a compulsory sample license, the *Bridgeport* rule has the potential for both artistic and economic benefits, while still accomplishing the goals of copyright protection.

While many commentators have used *Bridgeport* as an opportunity to argue for expanded fair use for sampling,[120] the fair-use defense is not the saving grace of *Bridgeport*. The fair-use defense functions as follows: a person accused of copyright infringement may claim that her use of the material was fair, that is, not meant to take away from the copyright holder's rights, but instead to otherwise benefir society.[121] A classic example of a fair use is a book review.[122] Even though a book review may quote portions of the book and give away the story, it does not do so in an attempt to take away the copyright holder's rights.

While the court suggests that artists are free to claim fair use,[123] the defense fits poorly with the *Bridgeport* decision for several reasons. First, the court labors to establish a bright-line rule, citing the benefits to the artists in avoiding any disputes that could place their albums in legal limbo and the benefits to the courts by avoiding litigation over the growing use of samples. Fair use is anything but bright-line in its application.[124]

119. *See id.* at 800–01.

120. *See, e.g.*, Jeremy Beck, Article, *Music Composition, Sound Recordings and Digital Sampling in the 21st Century: A Legislative and Legal Framework to Balance Competing Interests*, 13 UCLA ENT. L. REV. 1 (2005).

121. *See* MERGES, MENNELL & LEMLEY, *supra* note 24, at 506–07 (explaining that fair use is "one of copyright law's most important safety valves for promoting cumulative creativity and free expression").

122. *See* Stanford Copying & Fair Use—What Is Fair Use?, http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-a.html (last visited Aug. 19, 2008) (pointing to a book review as an example of commentary and criticism and noting that fair use allows the author to reproduce portions of the original source to achieve those goals).

123. *Bridgeport II*, 410 F.3d at 805.

124. Fair use is one of the most difficult outcomes to predict in copyright law. Judge Learned Hand famously regarded the doctrine of fair use as "the most troublesome in the whole law of copyright . . . ." Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939). Many commentators, most notably Judge Alex Kozinski of the Ninth Circuit, have proposed eliminating the fair-use defense, in part because of the impossibility of predicting judicial outcomes regarding fair use. *See generally* Alex Kozinski and Christopher Newman, *What's So Fair About Fair Use?*, 46 J. COPYR. SOC. 513 (1999).

One reason that fair use is so unpredictable is because of the different way courts have interpreted the statute outlining fair use. The Fair Use Act states:

> [i]n determining whether the use made of a work by any particular case is a fair use the factors to be considered shall include —
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[125]

Looking to other fair-use cases, each of the factors contains a certain ambiguity. Under the first factor, commercial purposes are not fatal to fair use and can even weigh in favor of the potential infringer if the court determines the commercial use is transformative.[126] However, the decision between transformative and nontransformative works is far from bright-line. Some courts have stated that a transformative work must contribute significant additional copyrightable expression.[127] Other courts have held transformative works result from creating a different purpose for the work, such as making thumbnail copies of original pictures for use in an Internet search engine.[128]

While the second and third fair-use factors are also inconsistently applied, the fourth factor is particularly open to both judicial interpretation and some gerrymandering from copyright-holding plaintiffs. For example, in another case involving thumbnail copies for Internet search engines, the plaintiff was granted a preliminary injunction against the search engine in part because it recently

125. 17 U.S.C. § 107 (2000).

126. *See* Weismann v. Freeman, 868 F.2d 1313, 1324 (2d Cir. 1989) (explaining that a nontransformative use weighs heavily against the secondary user and seriously weakens a claimed fair use).

127. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578–80 (1994) (requiring added copyrightable expression furthers the goals of copyright by generating value extrinsic to the original and promoting science and the arts).

128. Kelly v. Arriba Soft Corp., 336 F.3d 811, 819–20 (9th Cir. 2003).

decided to begin selling its own thumbnail pictures for use as cell phone wallpapers.[129] While those plans may have been in place far before the litigation arose, it is not difficult to see how a plaintiff could manipulate the fourth factor by entering the same market as the potential infringer and then claiming that fair use could not apply because of the market effects. In sum, all of the potential ambiguities involved in fair use defeat the benefits of the *Bridgeport* rule. Fair use does not promote judicial or economic efficiency and gives artists no assurances that their albums are safe from infringement claims.[130]

Second, it is unrealistic to expect that a district court following *Bridgeport* would grant a fair-use defense to sampling artists or that the circuit would uphold it on appeal. Although the decision in *Bridgeport* states "the trial judge is free to consider this defense and we express no opinion on its applicability to these facts,"[131] the opinion strongly suggests otherwise. Language like "[t]hou shalt not steal,"[132] "[w]hen you sample . . . you know you are taking another's work product,"[133] and "[g]et a license or do not sample"[134] all but states that the court does not look favorably upon sampling as fair use.

Furthermore, regardless of the disposition of the opinion in *Bridgeport*, samplers claiming fair use face an uphill battle.[135] Using the fair-use factors above, a sampler would have to overcome the commercial use of the sample, the inherently protected nature of sound recordings, the qualitative and quantitative portion of the song sampled, and the effects on the potential market. The last factor is the most troubling for samplers. Although an artist could make a strong argument that sampling increases the market for the original

129. Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 850–52 (C.D. Cal. 2006).

130. *See* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A], at 13–160–13–1601 (1997) (explaining that 17 U.S.C. § 107 and the case law fail to offer any realistic guidance on when fair use claims will succeed).

131. Bridgeport Music, Inc. v. Dimension Films, LLC (*Bridgeport II*), 410 F.3d 792, 805 (6th Cir. 2005).

132. *Id.* at 801 n.12.

133. *Id.* at 801.

134. *Id.*

135. *But see* Beck, *supra* note 120. Although many commentators suggest that fair use is a good fit for digital sampling cases and that Congress alter the Fair Use Act to better accommodate sampling, I feel a compulsory license is a better solution. *See infra* Part IV.B.

by exposing it to a new audience,[136] the sampler would have to overcome the presumption that unlicensed samples affect the market for licensed samples. Companies like Bridgeport make millions from samples[137] and would likely be able to convince a court that their right to license samples would be damaged by unlicensed samples. Because of these factors, a fair-use defense for sampling seems unlikely under the current statutory scheme;[138] however, there is a better solution.

B. The Compulsory Sample License Makes Bridgeport *Work*

A compulsory license not only saves *Bridgeport*, but actually produces a fair, efficient standard that benefits all parties. Similar to compulsory licenses for playing recordings on the radio[139] and performing cover songs,[140] a compulsory sample license would allow any artist creating a new work to include previously recorded samples for a predetermined price. A compulsory sampling license would generally work like this: rather than leaving it to artists and corporations to fight over the value of different samples, Congress would enact a statutory price. Artists could use any sample from any song by paying that predetermined amount to the corporate owner of the song rights.

Congress would also be free to work out the contours of the particular license, including: making the cost of the sample proportional to the length of the sample, making the cost of the sample proportional to the sales of the underlying record, (i.e., the more popular the source, the more expensive the sample), or other schemes that Congress finds most appropriate, so long as samples are easy and affordable, thus eliminating the market for unlicensed

136. Apparently George Clinton, the artist behind Bridgeport's sampling lawsuits, feels that sampling is a great way to introduce his music to new generations of listeners. *See generally* Wu, *supra* note 43.

137. *See id.*

138. Even if judges were predisposed to bend fair use to apply to sampling, the ambiguity behind the application of fair use makes the defense unlikely to convince sampling artists that their samples will not be challenged. *See supra* notes 124–30 and accompanying text.

139. 17 U.S.C. § 114(d)(2) (2000) (explaining a statutory license for certain types of Internet radio). Additionally, broadcast radio functions under a similar system of compulsory licenses managed by the two largest music publishing corporations, BMI and ASCAP. These blanket compulsory licenses allow radio stations to play virtually any song for a flat fee. *BMI-ASCAP Royalties*, http://www.musiclaw.info/ascapbmi.html (last visited Aug. 2, 2008).

140. *Id.* § 115(a)(2).

samples. In this way, unlike a reformulated fair-use standard, a compulsory sample license achieves all of the judicial and economic efficiency arguments set forth in *Bridgeport*. Courts would not have to weigh fair use or *de minimis* arguments, and artists would be assured that their albums remain safely on the shelves and out of legal limbo.

Like other compulsory licenses, a compulsory sampling license comes in reaction to a market failure.[141] While the Sixth Circuit briefly looks at the sampling market, it does so with rose-colored glasses. "[T]he market will control the license price and keep it within bounds."[142] Several examples suggest that the sample market is broken. First, the court assumes that the samplers become the sampled and will be more likely to "live and let live."[143] While it is true that many artists and some record companies would be inclined to forgive other samplers, the same does not hold true for companies like Bridgeport who have nothing to gain from this permissive attitude. Bridgeport will never become the sampler and derives its income from being the sampled.

Second, some of music's most significant samples are practically off the market because of their exorbitant license fees. As evidenced by Danger Mouse's understanding that he could never release *The Grey Album* commercially,[144] the Beatles' songs are the hip-hop industry's white whale; EMI has never cleared a single sample of Beatles material.[145] Because of the market failure surrounding samples, many of hip-hop's most enduring and pioneering albums

141. *See* MERGES, MENNELL & LEMLEY, *supra* note 24, at 500–02 (noting that Congress enacted compulsory licenses in several categories in order to serve content users that were underserved by market forces).

142. Bridgeport Music, Inc. v. Dimension Films (*Bridgeport II*), 410 F.3d 792, 801 (6th Cir. 2005).

143. *Id.* at 804.

144. *See* Patel, *supra* note 2. DJ Danger Mouse created the album only as a limited issue promotional record with a limited 3000-copy release.

145. It is true that early albums, such as *Paul's Boutique* by the Beastie Boys, sampled Beatles songs, but they did so without cleared samples in the pre-sampling lawsuit era. Currently, several artists have attempted to sample Beatles songs, but none have been granted clearance from EMI. Even hip-hop heavyweights such as Ja Rule have been unable to secure clearance, forcing them to shelve songs including the offending samples. James Montgomery, *Wu-Tang Clan's 'First-Ever Cleared Beatles Sample' Claim is Incorrect*, MTV NEWS, Oct. 3, 2007, http://www.mtv.com/news/articles/1571114/20071003/wu_tang_clan.jhtml (explaining that despite the band's claim, the excerpted song was not sampled, but re-recorded in the studio).

could never be made today. For example, one of the most famous early hip-hop albums to heavily utilize samples was the Beastie Boys' *Paul's Boutique*, which allegedly includes samples from between 100 and 300 songs.[146] Because *Paul's Boutique* was an early hip-hop album, recorded before the case law addressed sampling and before corporations discovered the lucrative practice of suing samplers, it has never been challenged in court. Today, such an album would be prohibitively expensive, even assuming that the artists could gain clearance for the samples.

Furthermore, the broken sampling system has punished artists who attempted to clear samples. British pop band the Verve had a breakout hit in 1997 with the song "Bittersweet Symphony."[147] The song sampled several seconds of a symphonic cover version of a Rolling Stones song called "The Last Time." The Verve secured a license to sample the song, but ABKCO, the company that owned the rights to the Rolling Stones' catalog from that period,[148] argued that the Verve used too much of the sample.[149] The matter was settled out of court. Despite writing all of the lyrics and all but four bars of the music,[150] The Verve was stripped of its songwriting credit; Mick Jagger and Keith Richards were credited as the authors of the track and ABKCO secured the copyright to both the recording and the underlying composition, the Verve's considerable contributions notwithstanding.[151]

Despite the song's meteoric rise to the top of the charts, the Verve turned over 100 percent of the considerable royalties to the Rolling Stones.[152] Against the Verve's will, ABKCO licensed the song for use in several commercials and a film soundtrack before the Verve was able to successfully halt any further commercial

146. DAN LEROY, PAUL'S BOUTIQUE 45 n.18 (2006).

147. Christopher O'Connor, *The Verve Sued Again Over 'Bittersweet Symphony,'* VH1.COM, Jan. 11, 1999, http://www.vh1.com/artists/news/511079/01111999/verve.jhtml.

148. *Id.*

149. Paul Foster, *Growing Tremors From the Verve*, THE WIRE, Aug. 2, 2007, http://www.wirenh.com/Music/Music_-_general/growing_tremors_from_The_Verve_2007 08022265.html.

150. *See* Madeleine Baran, *Copyright and Music: A History Told in MP3's*, http://www.illegal-art.org/audio/historic.html (last visited Aug. 2, 2008).

151. O'Connor, *supra* note 147.

152. Baran, *supra* note 150.

distribution under a moral rights argument.[153] Unfortunately, the Verve broke up without releasing another album.[154] The Verve suffered the consequences of the current broken sampling system. A compulsory sample license would alleviate some of these problems. It would allow for creativity unrestrained by the current exorbitanr cosr of sampling and would protect artists by ensuring that their creative works are not hijacked by those looking merely to profit from sample licensing.

Although the sample market is broken, record labels are not in the position to fix it. As discussed above, record companies disproportionately profit from sample revenue, often leaving artists stripped of their creative works. Therefore, it is unlikely that the recording industry, composed mostly of powerful record companies and less powerful artists, would voluntarily choose to alter the balance of power for the benefit of the artists. For this reason, the *Bridgeport* court's admonition that the recording industry is in the best position to fix any anomalies in the market rings hollow. Instead, Congress should take its *constitutional*[155] responsibility to reform copyright law without relying on the industry to reform itself. Corporations generally loathe reformation when reforin means fewer sources of revenue and surrendering power for little to nothing in return. For this reason, a compulsory sample license, established by Congress, is the best solution to the present broken sample market.

Of all the proposed remedies, a compulsory sample license is the most compatible with the doctrines of copyright. As discussed in Part II, copyright law has two objectives: the first is to ensure that content producers are adequately recompensed to continue producing, and the second is to encourage innovation. Both of those goals serve to benefit the public by enriching the nation's culture. Therefore, however Congress decides to establish the compulsory sample license, it should include compensation for both the artist

153. *The Verve Biography*, http://artist.lyricspub.com/The_Verve_biography/3657/ (last visited Oct. 30, 2007). Moral Rights is a copyright doctrine more thoroughly accepted in European law. It is an offshoot of the Hegelian personhood theory and allows for an artist to prevent destruction or misuse of her creative work by claiming a moral right in its existence or connection with the artist. *See* MERGES, MENNELL & LEMLEY, *supra* note 24, at 503–06.

154. Fortunately, the Verve recently announced that they would reunite for a tour and record a new album after eight years of separation. *The Verve Reunite for Tour*, NME, June 26, 2007, http://www.nme.com/news/the-verve/29261.

155. The Constitution grants to Congress the exclusive power to regulate copyright. U.S. CONST. art. I, § 8, cl. 8.

and the sound-recording copyright holder. Currently, most sound-recording copyrights are held by corporations, not artists.[156] The broken sample market overcompensates corporations, while not usually requiring any payment for artists. This is inconsistent with the first goal of copyright protection.

Additionally, compulsory sampling licenses do not conflict with current copyright doctrine because they provide *adequate* protection for copyright holders. The law need not vest corporate copyright holders with strong Lockean or Hegelian property rights. Corporations purchase property rights in music. They do not cultivate with the sweat of their brows nor invest their personhood in the creation of music; they expend money and pursue profit. For this, the law should only provide the level of protection provided by an economic incentive theory of protection. Although a compulsory license revokes the ability to object to sampling, it provides more than enough economic incentive to justify continued copyright production and protection. While it is true that some artists—very few—hold the copyrights to their master sound recordings, this is the exception and not the rule. However, even for those artists, an economic incentive-based copyright is sufficient to balance the protection of their interests with the benefits for society as a whole.

Unlike an expanded fair-use defense or other proposed solutions, a compulsory sampling license could ensure that artists are paid for their sampled material. While those artists would no doubt argue for a more encompassing Hegelian property right in their music, that is not the case currently, as evidenced by the overwhelming corporate ownership of sound recordings and by the compulsory cover license for musical compositions. Although no solution may be perfect, a compulsory sample license achieves the first goal of copyright by reforming the current broken system, while still protecting copyright holder's economic interests.

The current sampling market also fails on the second goal of copyright protection by discouraging innovation. Artists are penalized for building upon previously recorded works, stripping the songs and recontextualizing them in profound and original ways. The current sampling market would have prevented some of hip-hop's most celebrated records and continues to frustrate potential masterpieces like *The Grey Album*. Instead, a compulsory license

156. *See Copyright Law Basics*, *supra* note 14.

would encourage innovation, while balancing the prior artist's rights against the cultural importance of the new songs.

V. CONCLUSION

Although the Sixth Circuit's decision in *Bridgeport Music, Inc. v. Dimension Films* created a stir in the music industry, and legal scholars declared the death of hip-hop as we know it, the court made the right decision. However, unfortunately for the Sixth Circuit, it made the right decision, but at the wrong time, before a compulsory sample license could mitigate its faults. The *Bridgeport* Court is right in extolling the virtues of a bright-line rule. Bright-line rules are easy to apply, judicially efficient, and economically efficient for artists potentially facing sampling lawsuits. The catch is that the *Bridgeport* rule currently threatens samplers and empowers corporations, not artists. When combined with a compulsory sampling license, the bright-line rule also serves creativity, allowing artists to build upon the traditions that precede them. Additionally, the bright-line rule and compulsory license combination is the one solution that complies with the goals and philosophical backgrounds of copyright law by fairly compensating artists while still encouraging innovation.

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