

"Not because it is convenient, but because it is beautiful:"<sup>1</sup>  
The need for a robust fair use defense to save the art of digital sampling in music

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## I. Intro

Digital sampling - the art of taking previously existing sound clips and manipulating and/or recontextualizing them into new works - is a mainstay of modern music. Listeners and creators of hip-hop and electronic music find the art of sampling to be culturally important and aesthetically pleasing. With the use of modern technologies, any sound can become a sample. An artist may use a portable recording device to capture snippets of conversation, the sound of construction, or the noise created by wind running through a tiny microphone, and later integrate those sounds into complex rhythmic collages.<sup>2</sup> Some artists choose to take clips of pre-recorded sounds - whether from films, television, spoken word recordings, or other songs - and digitally manipulate these clips into otherworldly shapes and timbres, fascinating the ears of discerning and adventurous listeners. Still others integrate these pre-recorded clips, un-manipulated, into new songs, re-contextualizing portions of original songs into new works, perhaps evoking and elaborating upon an emotion created by the original. The use of clips from previously recorded original works has been the source of much legal controversy.

Unfortunately, the predominant view of American copyright law serves to penalize artists who sample. Perhaps not surprisingly, music's evolution has outpaced

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<sup>1</sup> Paraphrased from Joseph G. Schloss, MAKING BEATS: THE ART OF SAMPLE-BASED HIP-HIP, 65 (2004) ("Simply put, sampling is not valued because it is convenient, but because it is beautiful.")

<sup>2</sup> See e.g. the works of Prefuse 73 (demonstrating through albums such as "Surrounded by Silence," "One Word Extinguisher," and "Vocal Studies and Uprock Narratives" potential for experimental musical soundscapes driven by samples of pre-recorded works); and the works of DJ Shadow (demonstrating through albums such as "The Private Press," "ENDtroducing..." and "Preemptive Strike" potential for experimental, instrumental hip-hop, driven by samples of pre-recorded works).

that of the law. The common conception of a sampler's obligation to the owner of a sampled work - "get a license or do not sample"<sup>3</sup> - gives creators of sample-based music reason to fear litigation as a consequence of their art. While this rule of law certainly has not thwarted sample-based music altogether, it does create a legal deterrent to creative sampling. Artists who lack the financial resources to pay the often exorbitant clearance fees required by copyright owners may find themselves unable to market their work, even on a small scale.

This result is especially troubling in light of the United States Constitution's mandate that the law of copyright be designed to encourage and reward the creation of new forms of art. A rule of law that actively discourages the creation of new and innovative expressions is directly contrary to this constitutional mandate. Fortunately, the copyright doctrine known as "fair use" provides a solid ground upon which samplers may assert their constitutional rights to create. This doctrine, codified into the copyright statute, provides a defense to those who copy the art of others for a use that is highly transformative, is non-plagiaristic, and that does not displace the market for the original. "Fair use" is thus perfectly suited to accommodate the digital sampler who copies a small part of another work and incorporates it into something new and never before heard. The Supreme Court should clear the way for non-excessive sampling by expressly endorsing the fair use defense in the sampling context. Such a move would alleviate the fear of litigation created by case law from the Sixth Circuit, and would thus give artists the breathing room to create new works. Sampling artists should be allowed to actively create new and innovative works, knowing that a robust fair use defense

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<sup>3</sup> Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 (6<sup>th</sup> Cir. 2005).

protects them against claims that they have merely stolen from the artists from whom they sample.

While other scholars have analyzed the fair use defense as it may apply to sampling, the advocacy in favor of sampling as a fair use has been lukewarm. Plus, many of the articles applying fair use to the sampling context have generally failed to take into consideration the immense cultural significance of sample-based music. The history of sampling, its significance to modern art and culture, and the way it has transformed music in recent decades, all should be considered in any individual decision as to whether a particular act of sampling is a fair use. A proper understanding might help judges, lawmakers, and those in the music business to realize the deleterious cultural and creative effect of deterring and penalizing creators of sample-based music. The recognition of a robust fair use defense will encourage the creation of new, creative, and challenging works of art, and is thus necessary to fulfill the Constitution's purpose.

## II. The history and aesthetic of sample-based music

Digital sampling, the art of "us[ing] digital technology to take sounds from old records and organize them into new patterns<sup>4</sup>," has become an important element of contemporary music.<sup>5</sup> The selecting and arranging of clips from pre-existing recordings into new compositions often forms the basis not only of "from the streets"-style rap

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<sup>4</sup> Schloss, *supra* note 1, at 1.

<sup>5</sup> See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d, at 798-99 (conceding that "[advances] in technology coupled with the advent of the popularity of hip-hop or rap music have made instances of digital sampling extremely common. . . .")

music, but also defines the art of many avant garde musicians who digitally manipulate and reorganize pre-existing sounds into strange and stimulating musical soundscapes.<sup>6</sup>

The history of digital sampling presents a colorful story of sampling's rise from an obscure form of listening to a complex and innovative musical style. By listening to this story, we may be able to gain a better understanding of why so many artists and listeners consider sampling to be so, as hip-hop scholar Joseph Schloss puts it, "beautiful."<sup>7</sup> Of course, as we shall see, whether or not any given individual can be convinced that sample-based music is beautiful is irrelevant to the question of whether it is protected by the principles of our copyright law.<sup>8</sup> However, the fact that sampling possesses such immense and inherent value to so many, combined with the fact that sampling is deeply embedded in the history of American culture and art, should be an important factor for any court to consider in deciding whether sampling is a "fair use" of a copyrighted sound recording. Why are these facts important? They are important because they demonstrate how high the stakes are in the sampling controversy. A legal regime that treats transformative, tasteful sampling as stealing is a regime that threatens to severely undermine an art form that is deeply valued by many for its cultural significance and aesthetic beauty.

#### A. The history of sampling in the hip-hop context

Sample-based music, in its modern form, evolved out of a storied and colorful history. This history began with a folk tradition of music-listening unique to the poor,

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<sup>6</sup> See *supra* note 2 and accompanying text (identifying sample-based musical soundscapes).

<sup>7</sup> Schloss, *supra* note 1, at 65.

<sup>8</sup> See *infra* notes 98-100 and accompanying text (discussing Supreme Court's principle of aesthetic non-discrimination in copyright jurisprudence).

disenfranchised minorities of post-colonial Jamaica, and evolved into a complex and highly skillful method of selecting and arranging musical sounds for large audiences. That method has now evolved even further, and has become an essential component of contemporary music. Today, there exists a diverse community of musicians to whom the sample is an integral component of a myriad variety of musical expressions.

The use of the sample is fundamental to hip-hop music and the cultural roots from which it sprung. The concept of sampling grew out of the musical traditions of post-colonial Jamaica, where popular music was primarily disseminated among the people by the use of "sound systems," "massive sets of amplifiers and speakers that were moved from town to town to entertain dancers at outdoor parties."<sup>9</sup> The artist behind these sound systems was commonly known as the "selector."<sup>10</sup> These "selectors" chose which songs to play, and often announced their selections, via microphone, over the loudspeakers.<sup>11</sup> Sometime around 1956, several selectors began to experiment with talking over the music, often making social commentary on the impoverished condition of the people, and speaking in regional slang.<sup>12</sup> The popularity of this "talkover" style rose throughout the 1960's, making regional superstars out of many of its Jamaican practitioners.<sup>13</sup> Many hits were generated by popular vocalists' talking over, or "riding" the rhythms of pre-existing material.<sup>14</sup> The pre-existing songs over which the vocalist performed were known as "riddims," and the goal of the artist was to create a

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<sup>9</sup> Henry Self, Digital Sampling: A Cultural Perspective, 9 UCLA ENT. L. REV. 347, 348 (2002).

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> Id. at 349.

<sup>14</sup> Id.

compelling piece with the combination of original vocals and the perfect selection of musical accompaniment.<sup>15</sup>

Clive Campbell, popularly known as DJ Kool Herc, is widely credited for bringing the soundsystem concept to the United States sometime in the late 1960's.<sup>16</sup> Herc realized great popularity in the South Bronx, New York City, when in 1974 he switched his emphasis from reggae music to the funk records popular at the time with African American youth.<sup>17</sup> Herc noticed the popularity of "break dancing," in which young Black men would perform intricate solo dance moves on the dance floor during instrumental "breakdowns" or "breaks" in the midst of funk songs.<sup>18</sup> To accommodate these dancers, Herc developed a two-turntable style, in which he would play only the crucial "breakdowns" of records, fading one break into the other throughout the night, facilitating perpetual break-dancing among the youth.<sup>19</sup>

The style was all the rave among Bronx audiences, and soon, other artists began to expand upon Herc's musical style, most notably Grandmaster Flash and Afrika Bambaataa, who developed new and innovative ways to excite audiences by manipulating the turntables.<sup>20</sup> The "talk over" tradition also followed this innovative style of mixing. As the complexity of "selector"-style mixing evolved, so did that of the vocal work, eventually evolving into the more complex rhyming that typifies modern hip-hop music.<sup>21</sup>

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<sup>15</sup> See id. (describing rise of "riddim"-based music in Jamaica).

<sup>16</sup> Id. See also Andrew Bartlett, Airshafts, Loudspeakers, and the hip-hop sample: Contexts and African American musical aesthetics, 28.4 AFRICAN AMERICAN REVIEW 639, par. 44 (1994) (describing Kool Herc's role in hip-hop's foundation).

<sup>17</sup> Self, 9 UCLA ENT. L. REV. at 350.

<sup>18</sup> Id.

<sup>19</sup> See id. (describing evolution of Herc's style).

<sup>20</sup> Id.

<sup>21</sup> Id.

The artful selection of break-beats laid the foundation for modern sample-based music. With the advent of digital sampling technologies, such as the SP-12 E-mu Systems "sampling drum computer" in 1986, hip-hop DJs were given the ability to record sounds from multiple different records into a sampling machine and play the parts atop one another.<sup>22</sup> While selector-style DJing had been the art of repeatedly playing a song's most dance-inspiring portions, sampler-based DJing became the art of combining sounds from different songs into new and previously unheard compositions. This ability thus "substantially broadened the spectrum of music that could be pressed into service for hip-hop,"<sup>23</sup> allowing combinations as radical as a James Brown drum beat combined with a portion of a symphony orchestra playing classical Bach. The work of contemporary hip-hop artists is built upon this format, with rappers performing rhythmic vocal rhyming over beats that are often built with combination sampler-sequencer-drum machines such as the Akai MPC 1000.<sup>24</sup>

#### B. The emphasis upon aesthetic within the hip-hop community

Unfortunately, this method of music-making has come as a shock to many musical traditionalists. Some view sampling as an unfair "shortcut," allowing artists untrained in traditional instruments to bypass the need for those skills, essentially "fooling" their audience into believing they are hearing a skilled arrangement rather

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<sup>22</sup> Schloss, *supra* note 1, at 36 (2004).

<sup>23</sup> *Id.*

<sup>24</sup> "MPC" stands for "Music Production Center." See Akai Pro online, at <http://www.akaipro.com>, for more information about the Akai line of equipment. See also MPC Forums, at <http://www.mpc-forums.com> for various discussions among sample-based musicians about varying techniques and styles for making music with the MPC.

than merely a sampling of another's craft.<sup>25</sup> As one author put it, "[m]any musicians resent having spent years developing a personal style, only to have it become commonplace as a result of continuous sampling of their recordings. . . . Using sampling, an entire symphony orchestra could conceivably be replaced. . . . Many musicians worry that digital technology will soon replace acoustic instruments."<sup>26</sup> However, the discourse among actual practitioners of sample-based music reveals a community not concerned with convenience, but with aesthetic value.

While modern scholarship has had much to contribute to the debate over justifications for sampling<sup>27</sup>, the debate has not been a pre-occupation of actual practitioners of sampling. Given the fact that sample-based music-making is so embedded in history and so significant to a musical culture, it should not be surprising that sampling artists have been largely unresponsive to admonitions that they discontinue their craft absent an expensive license. In fact, the question of how sampling may be justified, theoretically or musically, is simply not a part of the discourse of the sampling community, any more that the question of how to justify playing classical guitar is a part of the discourse of that community. Sampling musicians are practicing a form of art that they find both culturally significant and aesthetically satisfying. As Joseph Schloss argues:

"I believe that the main reason [the discourse among creators of sample-based music] is overlooked is that it is not primarily concerned with the issue that most

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<sup>25</sup> Mary B. Percifull, "Digital Sampling: Creative or Just Plain 'CHEEZ-OID?'" 42 CASE W. RES. 1263,1268-69 (1992).

<sup>26</sup> *Id.*

<sup>27</sup> So much scholarship has been addressed to the sampling issue that one author has called the issue "the student author's favorite dead horse." Matthew Africa, "The Misuse of Licensing Evidence in Fair Use Analysis: New Technologies, New Markets, and the Courts," 88 CALIF. L. REV., 1145, n. 121 (2000). I tend to disagree with the "dead horse" characterization, given that few scholars have offered much in the way of a robust advocacy for the fair use of samples, and given the fact that the legal status of sampling is far from resolved.

sympathetic researchers are interested in: justifying the use of sampling. By this I mean that most scholars seem concerned with demonstrating ways in which sampling, despite its rejection of live instruments, is consistent with more conventional value systems, whether those be social, political, musical, or otherwise. Hip-hop producers, by contrast, are rarely interested in such moves because for them sampling doesn't require justification on any grounds; it is the foundation of the musical form. If anything it is the lack of samples - the use of live instrumentation - that must be justified."<sup>28</sup> (emphasis added)

To sample-based musicians, the use of the sample is essential to the authenticity of their music; the sampled element is "the defining - though not sole - factor of the hip-hop sound."<sup>29</sup> Schloss, whose immersion in the culture of sample-based hip-hop provides a unique insight on the art form, finds that "The hip-hop discourse is primarily concerned with aesthetics. Simply put, sampling is not valued because it is convenient, but because it is beautiful."<sup>30</sup>

### III. Other Theoretical Approaches to Sampling

As Schloss points out, the discourse of the community of sampling musicians tends not to concern itself with the need to justify sampling. To these musicians, sample-based music-making is self-evidently legitimate, an art deeply rooted in their culture and immediately responsive to their aesthetic values. However, it is still worth

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<sup>28</sup> Schloss, *supra* note 1, at 69.

<sup>29</sup> Schloss, *supra* note 1, at 68.

<sup>30</sup> Schloss, *supra* note 1, at 65.

noting that, to many, sampling possesses a significance that transcends its aesthetic value.

#### A. Subversive music in the African-American tradition

The concept of selecting pre-existing sounds, bringing them into a new context, and arranging them into new music can also be seen in the jazz tradition, a tradition that, like hip-hop, finds its roots in the music of African-Americans. One scholar points to the works and ideas of Duke Ellington to make this argument, quoting Ellington's thoughts on his 1940 work "Harlem Air Shaft:"

You get the full essence of Harlem in an air shaft. You hear fights, you smell dinner, you hear people making love. You hear intimate gossip floating down. You hear the radio. An air shaft is one great big loudspeaker. You see your neighbor's laundry. You hear the janitor's dogs. The man upstairs' aerial falls down and breaks your window. You smell coffee. . . . An air shaft has got every contrast. . . . You hear people praying, fighting, snoring.<sup>31</sup>

The idea of a music comprised of the selection and arrangement of the myriad sounds that surround us, then, is an important concept in jazz music as well.

Ellington's craft of pulling from the myriad sounds around him is more than merely an aesthetic choice. This use of sample is rooted in an artistic philosophy that African American scholar W.E.B. Du Bois called the "second sight," in which some outsider (the African American, in Du Bois' writings) actively engages the popular

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<sup>31</sup> Andrew Bartlett, 4 AFRICAN AMERICAN REVIEW, at par. 7, quoting Nat Shapiro & Nat Hentoff. HEAR ME TALKIN' TO YA: THE STORY OF JAZZ AS TOLD BY THE MEN WHO MADE IT 1955. (1966).

culture, taking pieces of it and combining it with his own experience, to create something complex and new.<sup>32</sup> This artistic philosophy may be prominently observed in the music of Black slaves in the Americas, who combined the only texts available to them - Biblical passages - with thinly veiled ideological commentary to create their own brand of music - the spiritual.<sup>33</sup>

Black slaves took the stories from their slave-owners' religious texts, and transformed them into something new. One scholar notes "the slave's special attitude toward the Bible, his selectivity with respect toward its contents, and his special way of turning Biblical materials to imaginative purpose."<sup>34</sup> "Rather than the literal learning of the Biblical text," the slave carefully selected among portions of the text, using it to symbolize "the deliverer," and "overcoming the oppressors."<sup>35</sup> "Nearly all of the Biblical personages the slave poet dealt with were involved in upheaval and revolution (Moses, Daniel, David, the Hebrew children, Samson, Elijah, Gideon, Jesus, Paul)."<sup>36</sup> In a sense, then, the songs of Black slaves were built upon samples of the slave owner's religion.

Sampling, then, can be seen as part of both the jazz tradition, in its celebration of the myriad sounds that surround us, and the slave music tradition, which takes sounds from the popular cultural, and reinterprets them to give them new meaning. One scholar argues that sampling is a part of these traditions in that it is "intricately connected to an African American/ African diasporic aesthetic which carefully selects available media,

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<sup>32</sup> Id., at par. 13

<sup>33</sup> Id.

<sup>34</sup> See id., quoting John Lovell, Jr., *BLACK SONG: THE FORGE AND THE FLAME--THE STORY OF HOW THE AFRICAN AMERICAN SPIRITUAL WAS HAMMERED OUT*, 255 (1986).

<sup>35</sup> Id. quoting id. at 257.

<sup>36</sup> Id. quoting id. at 228.

texts, and contexts for performative use."<sup>37</sup> The "archiving" of and interaction with pre-existing material is essential to this tradition:

The hip-hop archive serves as a miniaturized repository for vast interactive historical material--interactive because all archival material is handled by the archivist, who listens carefully (with Du Boisian "second sight") for the beats and snippets which will accompany and be accompanied by vocalized narrative. The pro-active artistic process which utilizes and makes functional what is heard backdrops from start to finish.<sup>38</sup>

Furthermore,

Sampling in hip-hop is not collaboration in any familiar sense of that term. It is a high-tech and highly selective archiving, bringing into dialogue by virtue of even the most slight representation--"a short horn blast, a James Brown scream, a kick or snare drum"--any range of "voices." The transformation enacted in hip-hop's "radical acts of counterinsurgency" hinge on the recording which turns, as [scholar Greg] Tate notes, the "community of passive pop consumers into one of creative producers."<sup>39</sup>

Thus, in addition to the aesthetic value sampling has gained throughout the history of hip-hop, the practice of sampling is viewed by many as an important part of the tradition of subversion in African American music.

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<sup>37</sup> Id. at par. 59.

<sup>38</sup> Id.

<sup>39</sup> Id., at par. 61, quoting Mark Kemp, "Issue by Issue: The Death of Sampling," *option Magazine*, Mar-Apr. 1992, 20; GREG TATE, *FLYBOY IN THE BUTTERMILK: ESSAYS ON CONTEMPORARY MUSIC* (1992), 154.

## B. Quotation, collage, and experimental music

The use of previously existing material in new compositions is nothing new. As one scholar notes, "[t]here is an element of borrowing - whether by literal quotation (of, for example, an existing melody) or by generalized appropriation (e.g. reference to a stereotyped musical style) - in every successful instance of musical communication."<sup>40</sup>

He continues:

Contemporary sampling of a James Brown beat is not so far removed from Mozart's appropriation of a gavotte dance rhythm in a piano sonata. Both are examples of stylistic appropriation drawing upon commonly recognized dance rhythms of the particular culture within which the new work is created. . . .

Specific melodic quotation, closer to the literal sampling that is so controversial in the music industry, is also commonplace in art-music repertoires. In the Middle Ages, a popular type of mass was composed using the secular tune "L'Homme Arme" as a structural backbone. Bach and other composers of the Baroque incorporated Protestant choral tunes in their organ and choral works; these melodies were themselves sometimes "borrowed" from secular sources.<sup>41</sup>

Such quotation is a form of "stylistic connotation," in which some familiar sound is referenced either to evoke a warm sense of familiarity or to create some interesting juxtaposition between a familiar sound and a new, unfamiliar context.<sup>42</sup> An example of this latter function appears in the music of electronic dance musicians "The Orb," who

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<sup>40</sup> Kevin Holm-Hudson, "Quotation and Context: Sampling and John Oswald's Plunderphonics." 7 LEONARDO MUSIC JOURNAL 17, 17 (1997).

<sup>41</sup> Id.

<sup>42</sup> Id.

sample an interview with American singer Rickie Lee Jones in which she describes "in rhapsodic detail, the skies of her Arizona childhood home."<sup>43</sup> In the context of the strange electronic noises and dance rhythms of The Orb, a fairly innocuous interview becomes a "psychedelic epiphany" for listeners and dancers.<sup>44</sup>

This sort of reference and re-contextualization is also prominently displayed in the visual works of artists such as Andy Warhol. The use by these visual collage artists of pre-existing images is closely analogous to the sampling context:

Existing recordings are not randomly or instrumentally incorporated so much as they become simultaneously subject and object of a creative work. Current copyright law is unable to distinguish between a plagiarized and a new work in such cases, since its concerns are still drawn from pen and paper paradigms. In the visual arts Duchamp, with ready-mades, Warhol with soup cans and Brillo boxes, Lichtenstein with cartoons and Sherry Levine with re-photographed "famous" photographs are only some of the many who have, one way or the other, broached the primary artistic question of "originality."<sup>45</sup>

Thus, quotation is an often-explored method of artistic creation, both in music and visual arts. The method has been used by classical composers to communicate familiar musical melodies to their listeners. The method has also been used by modern-day samplers and collage artists, both to evoke familiar images and to re-contextualize existing works. In either case, the use of previously existing materials serves a function that we have historically considered artistically valuable and ethically legitimate.

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<sup>43</sup> Id. at 18.

<sup>44</sup> Id.

<sup>45</sup> Id. at 20, quoting Chris Cutler, "Plunderphonia," MUSICWORKS number 60, 6, 17-18 (1994).

Copyright law has perhaps failed to reconcile itself with the theoretical underpinnings of quotation, at least in the context of digital sampling in music.<sup>46</sup> As one author argues: "Copyright rests upon a distinction between copying and creation. Sampling collapses that distinction. The sampler is at once a copying instrument - a recording device - and a creative instrument - a machine used for transformations. Such a technological undermining demands a rethinking of the law."<sup>47</sup> As an example of sampling as quotation, David Metzger uses the Janet Jackson hit "Got 'til it's Gone," in which Jackson's vocals are engagingly mixed with raps by rapper Q-Tip and bits from the Joni Mitchell folk classic "Big Yellow Taxi."<sup>48</sup> In the Jackson song, the sample of Joni Mitchell's voice is clearly distinguishable, clearly evocative of the original. The use of the sample creates "a constant give-and-take between the associations of the original source and those of the new surroundings."<sup>49</sup> He goes on: "Quotation - recalling - is a two-sided gesture: the original and the transformation. . . . The ability to draw upon specific sounds, be it those of a certain performer or those of everyday life, adds new dimensions to quotation."<sup>50</sup>

Thus, the use of the sample in the new song serves both to evoke memories of the original and to transform the original by placing it in the new, hip-hop context. Perhaps Metzger is correct, then, when he argues that the lawyers who view sampling as theft "have ignored the transformation and re-contextualization of the borrowing that completes a quotation, and creates a new work."<sup>51</sup>

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<sup>46</sup> David Metzger, QUOTATION AND CULTURAL MEANING IN TWENTIETH-CENTURY MUSIC 170 (2003).

<sup>47</sup> Id.

<sup>48</sup> Id. at 163.

<sup>49</sup> Id.

<sup>50</sup> Id. at 164.

<sup>51</sup> Id. at 166.

### III. Current copyright jurisprudence and the stifling of creative sampling

The current conception of a sampler's obligation under the law serves to deter the use of even a small portion of an already existing recording. While no published opinion has given us an analysis of sampling under the fair use doctrine, case law in the Sixth Circuit serves to bar a "de minimus" defense for samplers. The language of that decision, while not addressing fair use, has created a climate of fear and uncertainty among samplers. Furthermore, its rule has led to at least one seminal rap recording being removed from shelves, with its creators liable for millions of dollars in damages. This situation calls for the Supreme Court to make clear the existence of a robust fair use defense for sampling, thus giving artists the freedom to create new, original, and creative musical works.

#### A. "Get a license or do not sample"

Friday, March 17, 2006: the Chief Judge for the United States District Court for the Middle District of Tennessee banned future sales of one of the most influential hip-hop albums of all time, Notorious B.I.G.'s "Ready to Die."<sup>52</sup> The reason for the ban? A jury agreed with the lawyers for Bridgeport Music and Westbound Records that the producers of the album had used, without permission or payment, a brief sample from a song by classic R&B group "the Ohio Players" in one of the album's tracks.<sup>53</sup> Richard Bush, attorney for the plaintiffs, triumphantly explained to a National Public Radio

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<sup>52</sup> Associated Press, "Judge halts Notorious B.I.G. album sales," USA Today, 3/18/2006, available at [http://www.usatoday.com/life/music/news/2006-03-18-rap-sampling\\_x.htm](http://www.usatoday.com/life/music/news/2006-03-18-rap-sampling_x.htm) (last accessed March 28, 2006).

<sup>53</sup> *Id.*, See also NPR audio, *infra* note 54, for clip of sample in original context and in rap song.

reporter: "[the judge] did not believe that the monetary damages that were issued were sufficient to protect plaintiff's interests in their copyrights, and ordered that all copies of the album "Ready to Die" by Notorious B.I.G. be immediately pulled from all sales, including record stores, digital download availability, and airplay, and that they be impounded pending any appeals" (vocal emphasis in original).<sup>54</sup>

The album, which has been lauded by some as an "epic masterpiece,"<sup>55</sup> and that was included in Rolling Stone magazine's Top 500 albums of all time<sup>56</sup>, is, at the time of this writing, now completely absent from online music-sellers such as Amazon.com, iTunes, and Tower Records. The command of one judge, reacting to the use of an uncleared sample, was all it took to silence the music famously tailored to accompany Notorious BIG's "prodigious, . . . often booming voice."<sup>57</sup> The case was not some strange anomaly, but was entirely consistent with the law of the federal circuit in which that trial court sits.

"Get a license or do not sample."<sup>58</sup> This was the brightline rule established by the Sixth Circuit Court of Appeals in the 2005 decision of Bridgeport Music, Inc. v. Dimension Films. The holding of that case applies only to a "de minimus" defense, in which a sampler claims that the amount taken is insubstantial in proportion to the work

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<sup>54</sup> Allison Keyes, reporting, "Judge Halts Sales of Landmark Recording 'Ready to Die,'" National Public Radio, Morning Edition, March 20, 2006, audio available at <http://www.npr.org/templates/story/story.php?storyId=5289414> (last accessed March 28, 2006) (interviewing attorney Richard Bush).

<sup>55</sup> Rashaun Hall, "Beats & Rhymes: Today's Rap Pales Compared with '94" BILLBOARD (April 24, 2004).

<sup>56</sup> See K. Matthew Dames, "Uncleared Sample Halts Sales of Seminal Hip Hop Album," COPYCENSE, at [http://www.copycense.com/2006/03/uncleared\\_sampl.html](http://www.copycense.com/2006/03/uncleared_sampl.html) (March 20, 2006) (last accessed March 28, 2006) (noting inclusion in Rolling Stone's list).

<sup>57</sup> Cheo H. Coker, "Review: Notorious B.I.G., 'Ready to Die'," ROLLING STONE ONLINE, "November 3, 1994, available at [http://www.rollingstone.com/reviews/album/\\_/id/192664](http://www.rollingstone.com/reviews/album/_/id/192664) (last accessed April 27, 2006).

<sup>58</sup> Dimension Films, 410 F.3d, at 801.

as a whole; however, the Dimension Films court's tendency to discredit the creative importance of sampling is frightening for anyone who seeks to sample.<sup>59</sup>

What's more, the Dimension Films court was not confronted with a song in which the essential foundation of another song was sampled for its nostalgia-inducing effects. Rather, the court here dealt with the sampling and subsequent digital manipulation of a two-second segment from a guitar solo, taken from a George Clinton song and placed as one sound among others in the loop of a rap beat.<sup>60</sup> In fact, the Court of Appeals accepted the trial court's finding that "no reasonable juror, even one familiar with the works of George Clinton, would recognize the source of the sampling without having been told . . ." <sup>61</sup> Yet despite the fact that the defendant's use had transformed the original sound to such an extent that the original was unrecognizable, the court held that the defendant had infringed the copyright on the original.<sup>62</sup> To justify such a finding, the court crafted a new rule of law: where one claims that an act of sampling infringes upon a sound recording copyright (as distinct from a musical composition copyright), a "de minimus" defense is not available; the fact of sampling alone establishes infringement.<sup>63</sup>

It is notable that the Dimension Films court relied upon the "borrowing for convenience" conception of sampling in its characterization of a sampler's craft. To explain the rise of sampling, the court quoted from a law review article that explained sampling as follows:

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<sup>59</sup> See id. at 805 (noting that the decision does not apply to the "fair use" defense, given that the court below never reached the issue).

<sup>60</sup> Id. at 796.

<sup>61</sup> Id. at 798.

<sup>62</sup> Id.

<sup>63</sup> Id.

First, the cost barrier to enter into the audio production arena is low due to the influx of affordable digital recording equipment. The combination of a microphone, digital audio equipment, consumer audio equipment and an album or compact disc collection are the only tools needed to produce commercial rap music. Second, utilizing samples as the musical element of the song enables the producer to create commercial rap music without any original musical accompaniment prior to recording the vocals. Third, using music samples saves a considerable amount of time when compared to the traditional recording methods because another artist has already recorded the underlying music.<sup>64</sup>

Such an unflattering portrait of the sampler as a lazy, co-dependent, unoriginal wannabe gives one little reason to sympathize with one who samples. However, it is a portrait based entirely on an outsider's uninformed approach to the nature of hip-hop culture, and brings the court dangerously close to violating the Supreme Court's principle of aesthetic non-discrimination.<sup>65</sup> What's more, this characterization is wholly inaccurate, as revealed by Joseph Schloss' observations that beatmakers are generally hard-working, creativity-valuing musicians who sample not for reasons of convenience, but because of a love for an aesthetically pleasing and culturally valuable form of art.<sup>66</sup> In any case, both the court's legal rule and its disdainful characterization of sampling are cause for great concern among sampling musicians.

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<sup>64</sup> *Id.* at 798, n.7, quoting Stephen R. Wilson, "Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimus Defense?" 1 JOURNAL OF HIGH TECHNOLOGY LAW 179, n.9 (2002).

<sup>65</sup> See *infra* notes 98-100 (discussing *Bleistein* and principle of aesthetic non-discrimination).

<sup>66</sup> See *supra* notes 27-30 and accompanying text (discussing aesthetic value of sample-based hip-hop)

## B. The sampler's dilemma

The legal uncertainties surrounding sampling, combined with the fact that nearly every sampling controversy results in settlement, has created a climate of doubt and fear among the creators of sample-based music.<sup>67</sup> Furthermore, the notion that an often-expensive license is a prerequisite to legally practicing the art of sample-based music prominently raises the question "whether the freedom to be creative exists only for those who have enough money to pay the licensing fees. . ." <sup>68</sup>

This climate of uncertainty and fear can be seen manifest in recent online discussions at Futureproducers.com, one of many websites providing beatmakers with forums on which to discuss issues related to their craft. The site's "Legal" forum, a place where a great deal of (almost completely mis-)information is traded regarding copyright issues, recently contained a thread typifying some artists' concerns and misconceptions. One user posted a message expressing concern over whether a compact disc manufacturer would refuse to press his demo CDs if his works contained uncleared samples.<sup>69</sup> A discussion ensued in which other members posted messages with various reactions, some admonishing the poster to clear any samples, and others encouraging the poster to print his CDs without concern for sample clearance.<sup>70</sup>

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<sup>67</sup> See *Dimension Films*, 410 F.3d at 797 (noting "the paucity of case law on the issue of whether digital sampling amounts to copyright infringement"); *id.* at 801, n.11 (citing one scholar's observation that "[s]amplers realize that in the litigious environment of the United States, there is nothing to be gained and much money potentially to be lost by being a renegade."); *id.* at 804 (noting that "so many sampling controversies have been settled").

<sup>68</sup> Fredrich N. Lim, "Recent Development: Grey Tuesday Leads to Blue Monday? Digital Sampling of Sound Recordings After the Grey Album." 2004 U. ILL J.L. TECH & POL'Y 369, 380.

<sup>69</sup> "World Wide," "Will a discmaker listen to the music first and reject music with uncleared samples?" Futureproducers.com Forums, at <http://www.futureproducers.com/forums/showthread.php?s=73331ad98c10136dd78701a95ce66b15&theadid=115833> (original posting 7/20/200) (last accessed March 28, 2006).

<sup>70</sup> *Id.*

In reaction to the posts encouraging the use of uncleared samples, one of the forum's "moderators," employed to manage the message boards and remove potentially harmful content, responded: "I'd rather not have discussions on [futureproducers.com] on how to dodge copyright laws. . . . If you modify a piece of work in any way and the artist does not like what you did with their copyrighted work, they can stop you from using their work pretty easily on legal grounds."<sup>71</sup> The original poster replied in a manner that was compelling despite the misspellings and improper syntax (partially corrected by this author) typical of Internet communications:

I hear you on that and I can respect that, but on the other hand it's not like I'm trying to stick it to nobody or blatantly steal from people or nothing... I'm just a dude making beats/recording songs in the basement, trying to get something started from the bottom up, you know?

There's no way I'm gonna get these samples cleared, period. Its not like I'm trying to make millions off these songs, you know, honest to God, the only reason I'm selling the CD period instead of giving it away free is I'm trying to make enough money to record a second album in an actual studio.

And I really just feel like also in general these copyright laws are ridiculous... It's almost impossible to start out as a producer without breaking some sort of law. I mean, how do they expect anyone to learn how to make sampled beats? I'm all for everyone getting their just dues, but I think it should somehow be like you have

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<sup>71</sup> Id. (moderator "Sleepy.")

to make more than like \$10,000 or so on the album the song is on before you have to pay... Basically they shouldn't make people just starting out and selling CDs locally pay.<sup>72</sup>

Rather than allow the discussion to continue, and for differing views on copyright law and sampling to be exchanged, the board's moderator closed the particular discussion thread out of fear that the site's networks might be implicated in helping to subvert the law.<sup>73</sup> Thus is the sampler's dilemma: artists must decide whether to pursue their art in disregard for the potential legal consequences, or to abandon their work because of the possible, but far from certain, penalties one may face.

The increasing affordability of music recording and replication services has improved the average artist's ability to create marketable copies of his work. Unfortunately, the stringency of current copyright jurisprudence limits the sampling artist's ability to take advantage of these services. For example, the "Frequently Asked Questions" (FAQ) portion of popular replication service discmakers.com's website responds to the concerns of a small-budget musician who uses "a few short samples:"

You need to clear every sample on your recording, regardless of the length of the sample – even if it's under a second long! Prior to replication, you need to clear all permissions to use each sample on your recording. If you can recognize the original recording (the sample) in any way, you are considered to have taken value.<sup>74</sup>

The warning at popular compact disc manufacturer CDman.com is similar:

One common misconception is that you are allowed to use samples if they are less than a certain length in time. This is just not true. Regardless of the sample length,

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<sup>72</sup> Id. (poster "World Wide").

<sup>73</sup> Id. (moderator "Sleepy")

<sup>74</sup> Discmakers.com, Frequently Asked Questions (FAQ), at <http://www.discmakers.com/music/preparingyourorder/copyrights.asp#3> (last accessed 28 April 2006).

all recognizable works by a 3rd party require that you obtain authorization from the publisher and provide us a letter of authorization on the publisher's letter head.<sup>75</sup>

For artists without the financial resources or legal know-how to obtain sample clearance, such a view of the law can be the death-knell for any chance they had at marketing the music in which they have invested so much creative effort.

#### IV. The necessity of a robust fair use jurisprudence for sampling

The United States Constitution demands the availability of a fair use defense when rigid application of the copyright law would impede the progress of art or stifle artists' creative expression. In the case of Campbell v. Acuff-Rose Music, Inc., a unanimous Supreme Court expressed the Constitutional necessity for a robust fair use defense: "From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, "to promote the Progress of Science and useful Arts. . . ."<sup>76</sup> Furthermore, "[e]very book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before."<sup>77</sup>

When the Congress enacted § 107 of the 1976 Copyright Act, statutorily laying out a fair use defense, it intended simply to codify the age-old principles of fair use. § 107 reads, in pertinent part:

Limitations on exclusive rights: Fair use

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<sup>75</sup> CDman.com, Licensing and anti-piracy information, at <http://www.cdman.com/technical/anti-piracy.html#audio> (last accessed 28 April 2006).

<sup>76</sup> 510 U.S. 569, 575 (1994), quoting U.S. Const., Art. I, § 8, cl. 8.

<sup>77</sup> Id., quoting Emerson v. Davies, 8 F. Cas. 615, 619 (No. 4,436) (CCD Mass. 1845) (Story, J.).

[ . . . ] the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in 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.<sup>78</sup>

This doctrine must be applied in a way that "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." ("[and requires]" added by Campbell court).<sup>79</sup>

Furthermore, "[t]he text employs the terms 'including' and 'such as' in the preamble paragraph to indicate the 'illustrative and not limitative' function of the examples given."<sup>80</sup> "Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright."<sup>81</sup>

The Dimension Films bright-line rule, "get a license or do not sample" must not, as a matter of law, be applied to a fair use defense: "The task [of determining fair use] is

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<sup>78</sup> Id. at 576-77, quoting 17 U.S.C.S. § 107 (1976).

<sup>79</sup> Id. at 577, quoting Stewart v. Abend, 495 U.S. 207, 236 (1990).

<sup>80</sup> Id. citing, *inter alia*, Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 561 (1985).

<sup>81</sup> Id. at 578, citing Leval 1110-1111.

not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."<sup>82</sup>

A. The first factor: "transformative-ness"

The first factor of a fair use analysis is "the purpose and character of the use. . . ."<sup>83</sup> The "central purpose" of this factor is to determine "whether the new work merely 'supercedes the objects' of the original creation."<sup>84</sup> Another way of expressing the inquiry of the first factor is to ask whether the new work merely "supplants" the original, or whether it "[alters] the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'"<sup>85</sup>

The Supreme Court breathed purpose into this factor, noting that "the goal of copyright, to promote sciences and the arts, is generally furthered by the creation of transformative works."<sup>86</sup> And further: "Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright" (emphasis added).<sup>87</sup> And of paramount importance to the sampler, "the more transformative the new work, the less will be the significance of other factors, like commercialism."<sup>88</sup>

The Campbell court's description of this core fair use factor, in its emphasis on the transformative-ness of a work, speaks directly to the work of many samplers. Significant transformation of a sample is a key element of the work of all variety of

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<sup>82</sup> Id., citing Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 560 (1985).

<sup>83</sup> Campbell, 510 U.S., at 578, quoting 17 U.S.C.S. § 107(1) (1976)

<sup>84</sup> Id. at 579, citing Folsom v. Marsh, 9 F. Cas. 342 (No. 4,901) (CCD Mass. 1841) (Story, J.)

<sup>85</sup> Id. at 579, citing Harper and Leval.

<sup>86</sup> Id.

<sup>87</sup> Id.

<sup>88</sup> Id.

samplers, from the traditional hip-hop practitioner to the experimental evocations and re-contextualizations of the experimental musician.

The hip-hop beatmaking community has made an art out of taking sounds from old recordings and using them in new and creative ways. By isolating brief instrumental excerpts of funk records ("breaks"), and looping them for the benefit of dancers, the original DJs transformed the original funk recordings into something brand new, a music designed to facilitate the emerging "breakdancing" style. Contemporary sampling, even in its most basic form, goes far beyond this foundational repetition of records. As Schloss explains:

Today, the term "break" refers to any segment of music (usually four measures or less) that could be sampled and repeated. For example, the song "They Reminisce Over You (T.R.O.Y.)," by Pete Rock and C.L. Smooth (1992) is based on a break from a late-sixties jazz artist. The break in this case, however, is not a moment of intense drum activity [characteristic of traditional funk-record-based breaks] but a two-measure excerpt from a saxophone solo. Presumably one who was not already familiar with the hop-hop song would not hear those particular measures as being significant in the context of the original music. In contemporary terms, then, a break is any expanse of music that is thought of as a break by a producer. On a conceptual level, this means that the break in the original jazz record was brought into existence retroactively by Pete Rock's use of it. In other words, for the twenty-four years between its release and the day Pete Rock sampled it, the

original song contained no break. From that day on, it contained the break from "They Reminisce over You."<sup>89</sup>

Hip-hop sampling, then, is a process of altering the fundamental nature of a sound clip. Through the process of isolation, repetition through looping, and placing rhythmically among other sounds, a portion of an original recording becomes something entirely new; a brief series of notes from a saxophone becomes the backbone of a rap-inspired melody.

The process of looping, or taking a small portion of sound and mechanically repeating it in perfect time with the use of samplers and drum machines, is a prominent example of this transformative potential. The loop transforms a recorded clip of sound, "insofar as the end of the phrase is repeatedly juxtaposed with its beginning in a way that was not intended by the original musician."<sup>90</sup> "After only a few repetitions, this juxtaposition along with the largely arbitrary musical patterns it creates, begins to take on an air of inevitability. It begins to gather a compositional weight that far exceeds its original significance. . . ."<sup>91</sup>

Schloss continues:

While looping may not change the sound of the music--its rhythm, melody, harmony, or timbre--it changes the entire sensibility within which this sound is interpreted. Melodies become riffs. As the end of a phrase approaches, the listener begins to anticipate its beginning. In the best beats, in fact, a virtual call-and-response develops in which a break actually answers itself--the end of the break establishes a tension that is resolved by the return of its own beginning.

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<sup>89</sup> Schloss, *supra* note 1, at 36.

<sup>90</sup> Schloss, *supra* note 1, at 137.

<sup>91</sup> *Id.*

Looping--creating a cycle out of linearly conceived melody--imparts a new compositional logic to preexisting material and once-random juxtapositions. Moreover, in cases where the original recording was not in an African-influenced genre, it serves to "Africanize" musical material by reorganizing melodic material in accordance with specific African preferences such as cyclic motion, call and response, repetition and variation, the "groove."<sup>92</sup>

The transformation that Schloss describes can be seen in the sampling at issue in the both the Dimension Films case and the recent controversy over the Notorious B.I.G.'s "Ready to Die." In Dimension Films, the sample in question was a "three-note combination solo guitar 'riff' that lasts four seconds" taken by the sampler and modified extensively: "the pitch was lowered, and the copied piece was 'looped' and extended to 16 beats."<sup>93</sup> The district court had found that the new use of the original sample was used in such a way that "no reasonable juror, even one familiar with the works of George Clinton [from whose song the sample was taken], would recognize the source of the sample without have been told of its source," a finding that the 6<sup>th</sup> Circuit did not disrupt.<sup>94</sup>

The Notorious B.I.G. case involved a similarly transformative act of sampling. The brief excerpt taken from the Ohio Players song serves an entirely different function and takes on an entirely different meaning in the way it is used as a sample.<sup>95</sup> In the Ohio Players original, the sampled notes derive all of their meaning from their placement among the rest of the song's notes. The notes comprise a brief crescendo

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<sup>92</sup> Schloss, supra note 1, at 137-38.

<sup>93</sup> 410 F.3d at 796.

<sup>94</sup> Id. at 798.

<sup>95</sup> See Allison Keyes, supra note 54 (providing audio clips of original song and use of clip as sample in Notorious B.I.G. song).

among many other parts, a mere segment of the overall mood of the song. The notes are simply one element, albeit perhaps an important element, of a composition that far exceeds the length of this small portion. In its new context, the sample is an almost jarring blast of sound from a dusty old R & B record, a celebratory noise standing in an ironic contrast to the grimy, dark drums and bass that underscore B.I.G.'s fatalistic, hopeless oath that he is "Ready to die."<sup>96</sup> The sample is repeated several times, giving the sample a life of its own, an independence and an importance that it never had in the original production.<sup>97</sup>

Of course, one might object that these artists' claims of originality are post hoc rationalizations employed to cover up their theft of original materials. However, the sampling tradition is deeply embedded in history, and sampling in contemporary practice is regarded as a highly skillful art, rooted in decades of practice and evolution. Of course, one may counter that, even despite the fact that many believe sample-based hip-hop to be an original art, it is in fact merely theft and not something that a court should legitimize or protect. However, a court in step with the principles of the Supreme Court case of Bleistein v. Donaldson Lithographic Company is forbidden from making such a finding.<sup>98</sup> In Bleistein, the Court rejected the view that a work, before it receives legal protection, "must have some connection with the fine arts to give it intrinsic value."<sup>99</sup> Taking an approach of aesthetic non-discrimination to the question of whether several circus-poster illustrations deserved protection, the majority held:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside

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<sup>96</sup> Id.

<sup>97</sup> Id.

<sup>98</sup> 188 U.S. 239 (1903).

<sup>99</sup> Id. at 253 (Harlan, J., dissenting).

the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. . . . [I]f they command the interest of any public, they have a commercial value--it would be bold to say that they have not an aesthetic and educational value--and the taste of the public is not to be treated with contempt.<sup>100</sup>

The Sixth Circuit's approach is one that de-legitimizes the art of digital sampling, and that places large financial obstacles in the way of its practitioners. By creating special obstacles to the creation of a particular art form, such an approach functionally conflicts with Bleistein's principle of aesthetic non-discrimination. Dimension Films essentially announces: "while music made with live instrumentation is a legitimate art form, music made via digital sampling is illegitimate absent a license."

Many critics view sampling as a musical short-cut, a means by which wannabe artists may surpass the creative process and benefit from the fruits of another's labor. However, within the small, yet tightly-knit community of hip-hop beatmakers, one can observe a deeply-felt ethic that emphasizes the importance of creativity and originality. In his research on the culture of hip-hop beatmaking, Joseph Schloss discovered among members of the community a "general adherence to a defined set of professional ethics."<sup>101</sup> Importantly, "at base these ethics tend to equate creativity with moral value."<sup>102</sup> A producer may subject himself to ridicule and sustain within the small community of hip-hop producers for violating important standards that have developed

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<sup>100</sup> Id. at 251.

<sup>101</sup> Schloss, supra note 1, at 101.

<sup>102</sup> Id.

to protect the genre's creative integrity.<sup>103</sup> Important among these standards is the ethic of "no biting" and the related emphasis on the importance of "flipping."<sup>104</sup> "Biting" can be defined loosely as "a term that is used throughout the hip-hop world, and [that] refers pejoratively to the appropriation of intellectual material from other hip-hop artists."<sup>105</sup> Relatedly, "flipping" refers to "creatively and substantially altering material in any way."<sup>106</sup>

To use a sample that another has recently or prominently used is considered worthy of great scorn: by doing so, a beatmaker has demonstrated a lack of creativity and effort. However, an important exception exists for one who "flips" the sample by using it in a new and creative way.<sup>107</sup> A famous example of the "flipping" practice appears in the 1995 DJ Premier song "Ya' Playin' Yaself," in which Premier used a bass sample that also appear in Junior M.A.F.I.A.'s "Player's Anthem."<sup>108</sup> By using the same bass sample, yet chopping the sample up into notes and rearranging the "melodic contour and rhythmic emphasis" of the sample, Premier made subtle reference to the M.A.F.I.A. song, with its celebratory themes of materialism, in a beat Premier used to accompany rap lyrics that decried the pursuit of material gain.<sup>109</sup> Many hip-hop producers, then, adhere to an ethic that allows them to use the recordings of others, but only to the extent that they create something new and creative out of them. In other words, "transformative-ness" is an essential element of the culture of hip-hop

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<sup>103</sup> *Id.* at 102.

<sup>104</sup> Schloss, *supra* note 1, at 105-06.

<sup>105</sup> Schloss, *supra* note 1, at 106.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 106.

<sup>108</sup> *Id.* at 107.

<sup>109</sup> *Id.* at 107-08.

beatmaking. What we see, then, is not a community of thieves, but a community of artists governed by standards of creative integrity.

Of course, even a defender of sampling has to concede some instances where sampling is indeed used to bypass the need for creative effort. In such cases, few would argue that licensing is not most appropriate. Unfortunately, many of the most obvious and uncreative uses of sampling have also become the most popular, creating a misunderstanding by many as to the nature of most sample-based music.<sup>110</sup> For example, in the summer of 1997, rapper-producers Puff Daddy and Wyclef Jean both realized huge hits with pieces that, to many, seemed like simply "riding stolen songs."<sup>111</sup> To some, "little if anything was added to the originals, except for a few banal melodies and lines of rap."<sup>112</sup> Puff Daddy's song "I'll Be Missing You" took, verbatim, the entirety of the bass line and guitar parts that are the familiar signatures of the Police's hit song "Every Breath You Take."<sup>113</sup> Wyclef Jean's hit took, verbatim, the signature chorus and bass line, and much of the title, of the Bee Gees' hit "Staying Alive."<sup>114</sup> "Even with such cliché trappings, or perhaps because of them, these old hits once again climbed the Top 40."<sup>115</sup> One columnist concluded, perhaps correctly, "Nostalgia, not creativity, made the song[s] a success."<sup>116</sup>

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<sup>110</sup> See DAVID METZER, QUOTATION AND CULTURAL MEANING IN TWENTIETH-CENTURY MUSIC, 160 (2003) (noting aversion of New York Times columnist Neil Strauss to Puff Daddy hit "I'll Be Missing You" and Wyclef Jean hit "We Just Be Trying To Stay Alive.")

<sup>111</sup> *Id.*, quoting Neil Strauss, "Sampling is (a) creative or (b) theft?" NEW YORK TIMES, 14 September 1997, sect. 2, p.28.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*, quoting Neil Strauss, *supra* note 111.

B. The second factor: "the nature of the copyrighted work."

The second factor in a fair use analysis is "the nature of the copyrighted work."<sup>117</sup> "This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence being that fair use is more difficult to establish when the former works are copied."<sup>118</sup> Like the musical work parodied in the Campbell case, the musical recordings used by samplers are almost always the sorts of "creative expression for public dissemination" that fall "within the core of copyright's protective purposes."<sup>119</sup> But, as in a case of parody, this factor is not "ever likely to help much in separating the fair use sheep from the infringing goats" in a sampling case since, like parodists, samplers "almost invariably copy publicly known, expressive works."<sup>120</sup> Thus, because the very nature of sampling is to evoke a previously existing work, the second factor will not be one that samplers often dispute.

C. The third factor: "the amount and substantiality of the portion used"

"The third factor asks whether 'the amount and substantiality of the portion used in relation to the copyrighted work as a whole' . . . are reasonable in relation to the purpose of the copying."<sup>121</sup> This enquiry "will harken back to the first of the statutory

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<sup>117</sup> Campbell, 510 U.S. at 586, quoting 17 U.S.C.S. § 107(2) (1976).

<sup>118</sup> Id.

<sup>119</sup> Id.

<sup>120</sup> Id.

<sup>121</sup> Id., quoting 17 U.S.C.S. §107(3) (1976).

factors, for . . . [the Supreme Court recognizes] that the extent of permissible copying varies with the purpose and character of the use.<sup>122</sup>

In most cases, a sampler will have powerful arguments in her favor for this factor, both legally and factually. Legally, an analogy to the parody context favors transformative sampling. In the context of parody, the Supreme Court noted:

"Parody's humor . . . necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, the parody must be able to 'conjure up' at least enough of the original to make the object of its critical wit recognizable."<sup>123</sup>

By the same token, the effectiveness of sampling lies in its ability to "conjure up," or evoke, the original sound, whether to cast that sound into unfamiliar context, to quote and thus comment on that sound, or simply to evoke its aesthetic effect.

Furthermore, "context is everything, and the question of fairness asks what else the parodist did besides go to the heart of the original."<sup>124</sup> In the Campbell case, the parodist "not only copied the first line of [the parodied song], but thereafter departed markedly from the [original] Orbison lyrics for its own ends."<sup>125</sup> In many cases of sampling, the sampler will take only a small portion of another work to create some particular effect within a new, broader overall work. Other than the use of a particular sound, a sample-based work will very often "depart markedly" from the original work. Using the work at question in the Dimension Films case and the Notorious B.I.G. controversy as examples, we can see this principle in action. In the Dimension Films

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<sup>122</sup> Id. at 586-87.

<sup>123</sup> Id. at 588.

<sup>124</sup> Id. at 589.

<sup>125</sup> Id.

case, N.W.A. copied only a three-note segment of a guitar solo and slowed the segment down to the point of unrecognizability.<sup>126</sup> The sample was then incorporated into a rap song that sounded nothing like the original George Clinton funk piece from which it was taken.<sup>127</sup> Similarly, in the Notorious B.I.G. context, a few-second horn blast was taken from a much-longer R&B standard, and incorporated into a rap song that sounded nothing like the original.<sup>128</sup> In both these cases, as in many cases of sampling, the sampler took only enough to evoke the particular sound he wanted, but not enough to create the impression that he was merely repackaging the original tune and calling it his own. In both cases, the new work, other than the use of a brief sample, departed markedly from the original.

Of course, there will be cases where a sampler does take "too much," such that it would only be appropriate to use the sample if one first obtains a license. Classic examples of this are the Puff Daddy song "I'll Be Missing You" and the Wyclef Jean song "We Just Be Trying to Stay Alive," in which the overall melody and structure of a previous song is taken and simply added to. However, such cases are far different than a case in which a sampler takes some small portion of sound from an old recording and uses it, among other disparate sounds, as a building block to create a new and original composition that is a far different piece than any of the original recordings from which the original was taken.

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<sup>126</sup> See *supra* note 60-61 and accompanying text (discussing nature of Clinton sample in new use).

<sup>127</sup> See *supra* note 61 and accompanying text (noting that even a fan of Clinton's work would not recognize the sample as being part of a Clinton song).

<sup>128</sup> See *supra* note 94 (providing link to audio clip of sample in both original and new contexts).

D. The Fourth factor: "the effect ... upon the market"

"The fourth fair use factor is 'the effect of the use upon the potential market for or value of the copyrighted work'"<sup>129</sup> This analysis requires courts to consider not only the effect of an individual act of copying, but also "whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original."<sup>130</sup> "The enquiry 'must take account not only of harm to the original but also of harm to the market for derivative works.'"<sup>131</sup> When a new use is not a "mere duplication of the entirety of an original," but is rather a new, "transformative" use, a presumption or inference of market harm is not appropriate, as it would be in the case of a "mere duplication for commercial purposes," such as the illegal "bootlegging" of videos or compact discs.<sup>132</sup>

Like a parody, a work incorporating brief samples from another work will not likely have a cognizable impact on the market for the original. The Campbell court noted that a parody and an original "usually serve different market functions."<sup>133</sup> In other words, the buying public is not likely to purchase a recording of the parody as a "substitute" for the original work being parodied. By their very nature, the two works are fundamentally different, one being a scathing mockery of the other, and thus cater to fundamentally divergent consumer demands. By the same token, a George Clinton funk song is fundamentally different than a gangster rap song that incorporates a slowed-down, three second sample of one guitar solo in that funk song. The two works cater to

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<sup>129</sup> Campbell, 510 U.S. at 590, quoting 17 U.S.C.S. § 107(4) (1976).

<sup>130</sup> Id., quoting Nimmer § 13.05[A][4], p. 13-102.61.

<sup>131</sup> Id., quoting Harper & Row, 471 U.S. at 569.

<sup>132</sup> See id., at 591 (distinguishing Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 455 (1984)).

<sup>133</sup> Id.

fundamentally different consumer demands. One will not buy the rap record as a substitution for the funk record.

Of course, a court must also consider the degree to which a new use may displace the market for works derivative of the original. To be clear, "the only harm to derivatives that need concern [a court] . . . is the harm of market substitution."<sup>134</sup> In other words, a court is not to consider the fact that a copyright holder would simply prefer to be paid for a sampling license, or for a parody license, rather than for a new user to act without authorization. Rather, the question is whether the new use "substitutes" for the original in the market for derivative works. In other words, if there is a risk that a potential licensee wanting to create a work derivative of an original might seek a license to use the parody or a sample-based work instead, then we have market substitution. Again, the risk is apparent in a case in which the sampler takes the very core of an original and merely adds superfluously to it. One wishing to sample the bass line from The Police's "Every Breath You Take" could get that bass line either from the original or from Puff Daddy's "I'll Be Missing You," which incorporates the entirety of that bass line. However, one wanting to create a derivative work of the George Clinton original will be disappointed by a license to use the N.W.A. song that samples a small segment of it; one wanting to create a derivative work of the Ohio Players' recording will be severely underequipped to do so with a license to make a derivative work of the Notorious B.I.G.'s "Ready to Die."

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<sup>134</sup> *Id.* at 593.

## E. An analogy to visual collage

As noted previously, sampling is often used to create musical collages, complex works comprised of interacting sounds from myriad sources.<sup>135</sup> In the visual arts context, at least one federal court has addressed the fair use defense as it pertains to the art of collage. In Blanch v Koons, the United States District Court for the Southern District of New York encountered an infringement suit brought by a photographer against a collage artist who had used a segment of the photographer's photograph in one of his collages.<sup>136</sup> The photograph was entitled "Silk Sandals by Gucci," and depicted the lower part of a woman's bare legs adorned by elegant sandals and an ornate jeweled strap.<sup>137</sup> The collage artist had copied a segment of this photograph and incorporated the copy into an elaborate collage, entitled "Niagara," which the photographer-plaintiff described as follows:

["Niagara" depicts] four pairs of women's legs and feet which dangle over a landscape. Below them is a monstrous chocolate fudge brownie, served with a mound of ice cream and flanked by trays of glazed donuts and apple danish pastries. The sandals and feet which appear at the second from the left were slavishly copied from [photographer] Blanch's photograph. . . .

The court, in finding that the collagist's use of the photograph was a transformative fair use, noted that the "painting's use does not 'supercede' or duplicate the objective of the original, but uses it as raw material in a novel context to create new information, new

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<sup>135</sup> See supra note 2 (noting examples of use of samples in creating complex audio collages).

<sup>136</sup> 396 F. Supp. 2d 476, 478 (2005).

<sup>137</sup> Id. at 479.

aesthetics, and new insights. Such use, whether successful or not artistically, is transformative."<sup>138</sup>

The rationale behind the Blanch decision is a near-perfect fit for the digital sampling context. When digital samplers take from a song some small portion of sound and incorporate that portion into a brand-new work, substantially altering the context, aesthetic, and meaning of the sound, such use is transformative. A sample-based work will, quite often, "create new information, new aesthetics, and new insights." It will seldom ever "'supercede' or duplicate" the original work from which it is taken. When a sample-based work can be described as such, there is a very strong case that such work is a transformative fair use of the original sample.

In fact, one scholar has noted the necessity of analyzing visual collages under a fair use analysis.<sup>139</sup> Like sample-based music, collage was a form of art made possible by advances in technology. Advances in photography and the use of photographs in the mass media made available a wide array of images to artists.<sup>140</sup> These advances in photography, combined with the increasing influence of Cubist artists such as Juan Gris and Pablo Picasso, whose works emphasized the geographic arrangement of shapes and images, helped lend legitimacy to the collage form.<sup>141</sup> "Geometry in painting soon led to the gluing together of 'pieces of printed or decorative papers, or newsprint, to cardboard or canvas, and then [the application of] ink, pencil, or just a touch of gouache or oil paint.'"<sup>142</sup>

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<sup>138</sup> Id. at 481.

<sup>139</sup> Sonya del Peral, "Using Copyrighted Visual Works in Collage: A Fair Use Analysis," 54 Albany L. Rev. 141, 141 (1989).

<sup>140</sup> Id. at 147.

<sup>141</sup> Id. at 147, n.30.

<sup>142</sup> Id., quoting E. WOLFRAM, HISTORY OF COLLAGE, 18 (1975).

Like sample-based music, the effectiveness and integrity of collage depends upon the artist's ability to reproduce verbatim the works incorporated into the final piece. Three distinct arguments explain why the collagist should not be required to re-create each individual image herself:

First, the "collage experience" itself often derives from the actual viewing of other works. To require the collagist to recreate an image would be to invalidate that experience. Second, in the context of the unauthorized use of well-known works in collage, the collagist's purpose may be to "conjure up an idea," to elicit a presupposed reaction in his or her audience by using recognizable images. Finally, to require a collagist to recreate each individual image may be an unreasonable restraint on his or her ability to actually create. Suppose, for example, the collagist desires to incorporate various images of women world leaders to portray the international political movement of women. Ultimately, the collagist might be unable to reproduce the images due to a lack of access to those women and would decide against creating the collage. The result would deny the public the benefits of collage works and thereby defeat the primary purpose of copyright.<sup>143</sup>

These arguments parallel the needs of the sampler. To require samplers to recreate the individual sounds they incorporate would be a crippling blow to the art form. First, such a requirement would severely invalidate an experience that has been valued by so many for so long: the experience of hearing the effect of the bringing together of sounds from many unrelated and divergent sources. Second, such a requirement would stifle what is often the sampler's purpose: to evoke an idea or emotion connected with the sounds of a

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<sup>143</sup> *Id.* at 166.

particular familiar recording. Samplers pride themselves on the ability to select just the right sound to elicit an audience's response, and this art would be severely hampered by a requirement that the artist attempt to recreate the sound on his own. Finally, sample-based musicians may simply cease to create original works due to a lack of access to the instruments and sounds they wish to incorporate. Sampling musicians have spent years mastering their instruments and machines. They have spent countless hours and endured countless frustrations in developing the skills of selecting samples, rhythmically incorporating them, and manipulating sounds for desired effect. An artist who samples a symphony probably does not have access to his own orchestra. An artist who samples horn blasts from a brass band probably does not have access to her own band with the willingness to come into her home studio and perform the three-note segment she wishes to incorporate. Because samplers use so many different sounds, it would be almost physically impossible for them to re-create each and every one of these sounds themselves. The result of such an onerous requirement would be to deprive the public of the most complex sample-based music, a result that our copyright law must not allow.

## V. Conclusion

While the Sixth Circuit's proclamations have by no means shut down the use of digital sampling in music, its words have nonetheless reinforced sampling musicians' uncertainties regarding the legal status of their art. The art of taking small clips from other recordings and incorporating them into original musical soundscapes is deeply embedded in the musical history of the United States. To many, sampling is simply

beautiful. To others, it is part of an artistic statement about the struggle of minorities to reinvent elements of mainstream culture. To others, it is a way of commenting on and artistically re-contextualizing the sounds that form our popular music. To others still, the digital manipulation of analog sound waves is an innovative form of artistic and electronic experimentation, allowing the creation of strange and yet-unknown sounds. In any case, sampling has become an immensely important technique of artistic creation. The Sixth Circuit's conception of sampling as a banal short-cut to artistic legitimacy is thus offensive and wholly inaccurate.

Because our Constitution commands that our copyright laws be crafted to reward creativity, the Supreme Court should make clear that the fair use doctrine may be liberally applied to the digital sampling context. The lack of certainty in this area leaves sampling artists with grave doubts about the legitimacy of their art, and impedes their attempts to seek reward for their work through the marketing of their material. Given the rich history of the sampling tradition, a legal precedent endorsing the legitimacy of the practice is far overdue. In the meantime, copyright owners will continue to sue and harass the creators of sample-based music even in cases where the musician only uses some very small portion of a copyrighted work.

Given reasonable guidelines, the Supreme Court may create a fair use jurisprudence that protects both the artist who samples and the artist whose work may be sampled. By distinguishing between, on the one hand, works that take the core elements of a song, adding little, merely to invoke the emotion created by the original, and those, on the other hand, that take a small, less significant portion of another work and incorporate it into an entirely new and original context, the Court can protect all parties involved.

Digital sampling has contributed too much to our art and culture to leave it with such uncertain legal standing. If the Supreme Court does not act to correct the mistakes of the Sixth Circuit, future works may suffer the same fate as the Notorious B.I.G.'s "Ready to Die:" pulled from the shelves, with its creator liable for millions. The proliferation of anti-sampling lawsuits will make the stakes increasingly high for sampling musicians, perhaps to a point where they must abandon their art altogether. Such a result would be antithetical to our Constitution's value for artistic creativity, and would be a tragic loss for our art and culture.