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## Care for a Sample? De Minimis, Fair Use, Blockchain, and an Approach to an Affordable Music Sampling System for Independent Artists

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## **Cover Page Footnote**

Senior Writing & Research Editor, Fordham Intellectual Property, Media & Entertainment Law Journal, Volume XXIX; J.D. Candidate, Fordham University School of Law, 2019; B.A., English Writing & Communications Rhetoric, University of Pittsburgh, 2014. I would like to thank Professor Ron Lazebnik for his guidance and advice throughout the writing process, as well as the editors of the journal for their editing and feedback. I would also like to extend a special thank you to Lindsey Corrado, Dylan LeRay, Sabina Yevdayeva, and my parents for their unconditional love and support.

# Care for a Sample? De Minimis, Fair Use, Blockchain, and an Approach to an Affordable Music Sampling System for Independent Artists

Sean M. Corrado\*

*Thanks, in part, to social media and the digital streaming age of music, independent artists have seen a rise in popularity and many musicians have achieved mainstream success without the affiliation of a major record label. Alongside the growth of independent music has come the widespread use of music sampling. Sampling, which was once depicted as a crime perpetrated by hip-hop artists, is now prevalent across chart-topping hits from all genres. Artists have used sampling as a tool to integrate cultures, eras, and styles of music while experimenting with the bounds of musical creativity. Artists whose works are sampled have profited from royalties and the exposure of their original work in modern art. However, the laws that shaped the sample licensing system helped solidify financial and political obstacles that prevent independent artists from sampling. Therefore, while major label-affiliated artists can use their status and financial capital to bypass the obstacles, it is practically impossible for independent artists to afford sampling and participate in modern music's sonic creativity.*

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## INTRODUCTION

“The thing that pisses me off is that sampling still exists, it just only exists for the motherfuckers who can afford it,” the owner of the independent record label Def Jux, El-P, asserted in an interview with professors Kembrew McLeod and Peter DiCola.<sup>1</sup>

Music sampling, also referred to as “digital sampling,” is the process of utilizing elements of a prior-released song within a new composition.<sup>2</sup> The practice, which was popularized through hip-hop music in the late 1980s and early 1990s, was met initially with public outcry and harsh legal punishment.<sup>3</sup> In 1991, Judge Kevin Thomas Duffy infamously scolded the use of sampling without citing to any copyright case precedents.<sup>4</sup> He began his opinion with the phrase “Thou shalt not steal,” granted an injunction to take Biz Markie’s album off of the shelves, and recommended the case to the United States Attorney for criminal prosecution.<sup>5</sup>

The characterization of sampling as a sin has dwindled in the modern-day music world.<sup>6</sup> Sampling, when done so appropriately, is now considered a creative tool for artists to match new sounds with elements from prior art.<sup>7</sup> Sampling is no longer limited to

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<sup>1</sup> See KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 117 (2011).

<sup>2</sup> 8 DINA LAPOLT & SAMUEL J. FOX, SAMPLING, ENTERTAINMENT INDUSTRY CONTRACTS ¶ 161.02 (Doug Nevin ed., LexisNexis 2018).

<sup>3</sup> See Dean Kuipers, *Vanilla Ice Returns Buff but Still Bland*, L.A. TIMES, Sept. 10, 2004, at E23 (describing the critical and public backlash from Vanilla Ice releasing “Ice Ice Baby,” which contained an unlicensed sample from Queen and David Bowie’s “Under Pressure”); see also *Grand Upright Music, Ltd. v. Warner Bros. Records*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (ruling that Biz Markie’s unlicensed use of Gilbert O’Sullivan’s “Alone Again (Naturally)” “violates not only the Seventh Commandment, but also the copyright laws of this country”).

<sup>4</sup> See generally *Grand Upright Music, Ltd.*, 780 F. Supp. 182.

<sup>5</sup> See *id.* at 185.

<sup>6</sup> See *id.*; MCLEOD & DICOLA, *supra* note 1, at 99.

<sup>7</sup> According to Matt Black, one half of the independent electronic music duo Coldcut, a good appropriated sample has a good quality of its own and a “strong reference that evokes cultural resonance.” MCLEOD & DICOLA, *supra* note 1, at 99; see also Adam Behr, Keith Negus & John Street, *The Sampling Continuum: Musical Aesthetics and Ethics in the Age of Digital Production*, 21 J. FOR CULTURAL RES. 223, 231 (2017) (“The

solely hip-hop and R&B, as the practice entered the realm of mainstream pop and songs containing samples now secure top spots on the Billboard Charts.<sup>8</sup> Singles from pop artists like Rihanna, Bruno Mars, Lady Gaga, Gwen Stefani, and Gotye have all claimed number-one charting positions with the help of samples.<sup>9</sup> Presently, songs that contain samples are depicted less as stolen art in district court cases, and more often seen receiving Grammy Awards.<sup>10</sup>

Because of the popularity and commercial success of sampling, as well as the legal landscape that mandates licensing, the sampling market has become more active.<sup>11</sup> With the increase in demand, copyright holders realized that licensing off samples of their music could be a lucrative business in and of itself.<sup>12</sup> Superstars, with financial help from their major labels, are choosing to invest in clearing samples for their next hit.<sup>13</sup> Because

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techniques of cutting, pasting, chopping and looping that are applied to samples, whether of prior works or bespoke products, match those used in other aspects of recording.”).

<sup>8</sup> See Behr et al., *supra* note 7, at 224 (“Sampling is no longer exceptional but, rather, embedded in commercial (and much other) popular music practice with significant consequences for the aesthetics and ethics of music making.”).

<sup>9</sup> See J.R. ROTEM, E. KIDD BOGART & ED COBB, *SOS*, on *A GIRL LIKE ME*, (Def Jam Recordings 2006) (noting songwriting credits for Rihanna’s use of Ed Cobb’s “Tainted Love”); JEFF BHASKER & PHILIP LAWRENCE, *Uptown Funk*, on *UPTOWN SPECIAL* (RCA Records 2015) (crediting Lonnie Simmons and Charlie Wilson for Bruno Mars and Mark Ronson’s use of a 1979 hit from The Gap Band, and crediting Nicholas Williams for the use of Trinidad James’s “All Gold Everything”); WALLY DE BACKER, *Somebody That I Used to Know*, on *MAKING MIRRORS* (Eleven: A Music Company 2011) (sampling Luiz Bonfá’s 1967 song “Seville”); STEFANI GERMANOTTA, *Poker Face*, on *THE FAME* (Interscope Records 2008) (sampling Boney M.’s song “Ma Baker”); GWEN STEFANI, *Rich Girl*, on *LOVE. ANGEL. MUSIC. BABY.* (Interscope Records 2004) (crediting Sheldon Harnick for use of the song “If I Were a Rich Man”).

<sup>10</sup> Through case law and market examples, this Note will display how sampling, although once notoriously described as stealing, is currently associated with critically acclaimed composers and producers of all genres. See Behr et al., *supra* note 7, at 232 (“[Sampling] has thus become accepted into popular musical practice and distanced from unease about ‘cheating.’”).

<sup>11</sup> See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 799 (6th Cir. 2005); *MCLEOD & DiCOLA*, *supra* note 1, at 149.

<sup>12</sup> See *MCLEOD & DiCOLA*, *supra* note 1, at 93.

<sup>13</sup> See, e.g., *CARDI B, INVASION OF PRIVACY* (Atlantic Records 2018) (crediting five separate samples for the album, including twelve writing credits for “Be Careful’s” use of Lauryn Hill’s “Ex-Factor,” which samples Wu-Tang Clan’s “Can It Be All So Simple,” which samples Barbara Streisand’s “The Way We Were”).

the sampling process has drawn bigger players, copyright holders have been charging greater upfront payments and royalty fees in correspondence with the market demand.<sup>14</sup> While copyright holders have seen an increase in their income, the influx of market activity has left a group of artists struggling to sample.<sup>15</sup>

Independent artists<sup>16</sup> and up-and-coming musicians have seen greater exposure in the streaming era of music.<sup>17</sup> While large record labels are still considered vital machines for an artist's commercial success, some independent artists have proven that commercial success can now be achieved without the promotion of a major label.<sup>18</sup> Streaming systems collect data on listeners'

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<sup>14</sup> See Jimmy Ness, *The Queen of Sample Clearance: An Interview with Deborah Mannis-Gardner*, FORBES (Feb. 19, 2016, 8:00 AM), <https://www.forbes.com/sites/passionoftheweiss/2016/02/19/the-queen-of-sample-clearance-an-interview-with-deborah-mannis-gardner/#724dd61064e1> [<https://perma.cc/4DDN-DWTX>] (detailing a licensing transaction where an artist, who does not normally license their work for sampling, cleared the use of sample for a six-figure sum).

<sup>15</sup> See MCLEOD & DICOLA, *supra* note 1, at 119.

<sup>16</sup> Independent music is defined in a creative manner and practical manner. It is often associated with the 'indie' aesthetic which offers an alternative to mainstream popular music. Practically, independent artists and labels are not owned or controlled by the major labels, which allows for artists to have more creative control and artistic freedom over their music. *Worldwide Independent Market Report: The Global Economic & Cultural Contribution of Independent Music*, WORLDWIDE INDEP. NETWORK 15 (June 2016), <http://winformusic.org/files/WINTEL%202015.pdf> [<https://perma.cc/JS6H-BC3R>].

<sup>17</sup> See *id.* at 25 (finding that independent labels today have a yearly revenue of \$5.6 billion, with \$2.6 billion stemming from digital releases); see also *id.* at 38 (“[I]t is clear that streaming has been hugely beneficial to independent labels in terms of share and reach and it looks set to continue tipping the scales.”).

<sup>18</sup> With streaming services now acting as a promotional tool, affiliation with a major label is no longer necessary to negotiate a distribution deal. See *id.* at 32. Because independent artists receive most of their income through music sales, many were reluctant to jump into deals with streaming services; nevertheless, independent artists saw streaming and social media as an opportunity to expand a fan base and increase their revenue via performances and merchandise sales. See Ron Pope, *An Independent Artist's Take on Spotify*, TUNECORE BLOG (Feb. 28, 2014), <https://www.tunecore.com/blog/2014/02/an-independent-artists-take-on-spotify.html> [<https://perma.cc/4VYG-RTVE>]; see e.g., Chris Morris, *Band Shines on Slow Road*, VARIETY (Sept. 22, 2012), <https://variety.com/2012/music/news/band-shines-on-slow-road-1118059604/> [<https://perma.cc/MD5G-3ABN>] (discussing how social media helped launch The Lumineers because people shared eventual number one hit “Ho Hey” after it debuted at the end of a CW TV show. Streaming catapulted the folk band to a triple platinum debut album) and Hao Nguyen, *How Macklemore Went Platinum as An Independent Hip-Hop Artist*, STOP THE BREAKS (Mar. 2, 2015),

preferences and recommend artists that listeners may enjoy but were previously unknown to them.<sup>19</sup> Currently, independent artists make up nearly 36% of the U.S. music revenue share and independent labels around the globe operate with an average of forty artists.<sup>20</sup> Independent artists now contribute a significant amount of streams to the overall music industry, and their request to more affordably attain creativity should be recognized.<sup>21</sup>

Even with their rise in popularity, independent labels and artists cannot operate under budgets that incorporate the costs of obtaining sampling licenses.<sup>22</sup> Owners of independent labels are calling for a reformation of the sample licensing system to provide independent artists a better opportunity to use sampling to perpetuate musical culture,<sup>23</sup> but for now, mainstream artists are dominating the sampling market with their checkbooks.<sup>24</sup>

To better understand the struggle of independent artists who wish to sample, this Note explores how judicial rulings, legislative propositions, and marketplace controls have shaped the current

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macklemore-went-platinum-independent-hip-hop-artist/ [https://perma.cc/22YV-SYEB] (discussing that Macklemore and producer Ryan Lewis used online buzz through YouTube views to propel themselves to six million downloads for their eventual lead single, “Thrift Shop”).

<sup>19</sup> See *Worldwide Independent Market Report: The Global Economic & Cultural Contribution of Independent Music*, *supra* note 16, at 32 (“Although the majors still dominate, the stronger focus on user-led discovery and behavioral recommendations compensate for the traditional major label dominance of ‘store front’ inventory in both physical and digital channels.”); see also *AWAL Demystifies Streaming Data for Independent Artists*, KOBALT MUSIC (Mar. 28, 2017), <https://www.kobaltmusic.com/press/awal-de-mystifies-streaming-data-for-independent-artists> [https://perma.cc/9XV3-9TCR] (noting how an application provides independent artists with listeners’ locations, genders, ages, and time of listening across multiple streaming services while also providing benchmarks against similar artists and methods for driving engagement).

<sup>20</sup> See *Worldwide Independent Market Report: The Global Economic & Cultural Contribution of Independent Music*, *supra* note 16, at 19, 40.

<sup>21</sup> See *id.*

<sup>22</sup> See McLEOD & DICOLA, *supra* note 1, at 119.

<sup>23</sup> Matt Black, also the co-owner of the independent label Ninja Tune, states that sample fees should be more reasonable and more accurately reflect their size and significance. *Id.* at 100.

<sup>24</sup> See *id.* at 173 (“Still, commercial success has become a threshold for being able to clear samples. Without commercial success, it is quite difficult to have money and the relationships to afford the transaction costs of licensing.”).

inefficient sample licensing system. Part I of this Note details the varying forms of music sampling, the financial means necessary to sample, and how the law currently dictates the licensing scheme. Part II examines the barriers that artists face when attempting to locate and negotiate a license for a sample, and the costs associated with those barriers. Part III analyzes the judiciary's impact in determining the roles of the fair use and de minimis doctrines in music sampling. Part IV presents the legislature's attempts to cure the complexity within the current licensing system. Finally, Part V provides examples of how the sampling licensing market should evolve to make sampling more affordable for independent artists without weakening an artist's copyright to her music. The prevalence of sampling in today's music is a byproduct of technological advances, and technology may also aid in the solution to a less expensive, more efficient licensing system.<sup>25</sup>

## I. THE ANATOMY OF MUSIC SAMPLING

This Part discusses the various appearances of a music sample and what instruments are integral to its creation. Section I.A illustrates the numerous shapes and sizes that sampling can take. Section I.B discusses the copyrightable elements of a song and how they are considered throughout the sampling process. Section I.C estimates the cost associated with sampling copyright-protected songs. Section I.D introduces the de minimis and fair use doctrines as the two most prominent defenses to copyright infringement in unlicensed music sampling matters.

### A. *The Spectrum of Sampling*

As sampling spread across multiple genres of music and into the mainstream, the technique has been understood as an innovative art form rather than a violation of the Seventh

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<sup>25</sup> Jacqueline D. Lipton & John Tehranian, *Derivative Works 2.0: Reconsidering Transformative Use in the Age of Crowdsourced Creation*, 109 NW. U. L. REV. 383, 390 (2015) (“Until the early 1990s, no court had considered whether such uses—only recently made possible with the advent of splicing technologies, and quickly popularized in hip-hop—constituted infringement or fair use.”).

Commandment.<sup>26</sup> Experimenting with an innovative juxtaposition of sounds, whether chopped or looped from previous compositions, can provide artists with valuable and creative experiences in music.<sup>27</sup> Artists can achieve this creative experience in a variety of methods along a spectrum from being minimal and discrete to using a sample as their song’s entire refrain.<sup>28</sup>

The spectrum can be best exemplified with the samples used in Kanye West’s “Good Life” and Jason DeRulo’s “Whatcha Say.”<sup>29</sup> In “Good Life,” West took a six-note progression from the keyboard outro of Michael Jackson’s “P.Y.T. (Pretty Young Thing),” slowed it down, lowered its pitch, and layered it behind a T-Pain-emblazoned hook.<sup>30</sup> The sample is small and adds a playful sound to a catchy refrain accompanying lyrics that promote

<sup>26</sup> See Christopher Weldon, Note, *The De Minimis Requirement as a Safety Valve: Copyright, Creativity, and the Sampling of Sound Recordings*, 92 N.Y.U. L. REV. 1261, 1266 (2017) (“The cultural import of sampling comes from two considerations: first, the connection between sampling and creativity, and second, the importance of sampling to many forms of modern music.”); see also Tonya M. Evans, *Sampling, Looping, and Mashing . . . Oh My!: How Hip Hop Music is Scratching More Than the Surface of Copyright Law*, 21 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 843, 856–57 (2011) (“The sampler has ingrained aesthetic value to hip hop music and, ultimately, to music creation as a whole. To understand the importance and pervasive presence of digital sampling in hip hop on a broader scale one need only turn to the *Billboard* charts of the most prominent albums. In 1989 only eight of the top 100 albums contained samples but by 1999 almost one-third of the *Billboard 100* incorporated samples in some capacity.”).

<sup>27</sup> See MCLEOD & DICOLA, *supra* note 1, at 99. (“Sampling artists draw on deep musical and cultural traditions that are connected to the sounds they sample, whether they are referencing a specific figure like James Brown or a funky decade like the 1970s more generally.”); see also *infra* Section I.A for a discussion on the modern cultural and financial impact of sampling.

<sup>28</sup> Compare Kanye West’s “Good Life” Sample of Michael Jackson’s “P.Y.T. (Pretty Young Thing),” WHOSAMPLED, [https://www.whosampled.com/sample/2112/Kanye-West-T-Pain-Good-Life-Michael-Jackson-P.Y.T.-\(Pretty-Young-Thing\)/](https://www.whosampled.com/sample/2112/Kanye-West-T-Pain-Good-Life-Michael-Jackson-P.Y.T.-(Pretty-Young-Thing)/) [<https://perma.cc/XJ68-KC9N>] (last visited Feb. 8, 2018), with Jason DeRulo’s “Whatcha Say” Sample of Imogen Heap’s “Hide and Seek,” WHOSAMPLED, <https://www.whosampled.com/sample/5614/Jason-Der%C3%BClo-Whatcha-Say-Imogen-Heap-Hide-and-Seek/> [<https://perma.cc/K73H-7RPP>] (last visited Feb. 8, 2018).

<sup>29</sup> Kanye West and Jason DeRulo obtained sample licenses for their respective use of Jackson’s and Heap’s work. See KANYE WEST, *GRADUATION* (Def Jam Recordings 2007) (denoting songwriting credits to Quincy Jones and James Ingram, the songwriters of “P.Y.T.”); JASON DERULO, *JASON DERULO* (Warner Bros. Records 2009) (crediting Imogen Heap as a songwriter for “Whatcha Say”).

<sup>30</sup> Kanye West’s “Good Life” Sample of Michael Jackson’s “P.Y.T. (Pretty Young Thing),” *supra* note 28.

working toward personal success.<sup>31</sup> On the other end of the spectrum lies producer J.R. Rotem's use of Imogen Heap's "Hide and Seek" in Jason DeRulo's breakout hit, "Whatcha Say."<sup>32</sup> Heap's lyrics in her original song represented a child's emotional devastation from a parent's divorce.<sup>33</sup> In DeRulo's song, Rotem took the exact chorus from Heap's 2005 hit, pitched up the vocals, and provided new percussion underneath.<sup>34</sup> DeRulo used the Heap sample as the main hook for his song, which repeats seven times, and surrounded it with lyrics that depict a man begging for forgiveness after his partner discovered that he was being unfaithful.<sup>35</sup> Because of the various lengths and uses of music sampling, its position in the legal world has become difficult to navigate.<sup>36</sup> Whether the sample adds small creative background notes to a new song, or provides a large focal point of a new song, digital sampling is a diverse assortment that can produce a myriad of implications.<sup>37</sup>

Since there are several forms of digital sampling, courts and legislatures have found difficulty in applying general copyright concepts.<sup>38</sup> The six-note sequence in "Good Life" could be considered immune from infringement as it is small enough to be considered a *de minimis* use of "P.Y.T. (Pretty Young Thing)"; however, one must also consider that West sampled a memorable melody from a largely successful hit of one of music's most

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<sup>31</sup> *Id.*

<sup>32</sup> Jason DeRulo's "Whatcha Say" Sample of Imogen Heap's "Hide and Seek," *supra* note 28.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 798–99 (6th Cir. 2005) ("Advances in technology coupled with the advent of the popularity of hip hop or rap music have made instances of digital sampling extremely common and have spawned a plethora of copyright disputes and litigation.").

<sup>37</sup> Compare Kanye West's "Good Life" Sample of Michael Jackson's "P.Y.T. (Pretty Young Thing)," *supra* note 28, with Jason DeRulo's "Whatcha Say" Sample of Imogen Heap's "Hide and Seek," *supra* note 28.

<sup>38</sup> See *Bridgeport*, 410 F.3d at 799 ("The music industry, as well as the courts, are best served if something approximating a bright-line test can be established. Not necessarily a 'one size fits all' test, but one that, at least, adds clarity to what constitutes actionable infringement with regard to the digital sampling of copyrighted sound recordings.").

influential icons in Jackson.<sup>39</sup> The hook of “Whatcha Say” may be considered fair use of Imogen Heap’s 2005 song as it was sonically and narratively transformative, but it would greatly weaken a songwriter’s copyright if it were considered fair use to use another artist’s refrain as one’s own.<sup>40</sup> Answers to the issues in these two specific incidents of sampling were never obtained, however, as licenses for use were eventually granted.<sup>41</sup> Because sampling licenses are usually either granted or denied, and when denied subsequently removed from the new track, artists who wish to sample are without much judicial clarity on how sampling fits within copyright law.<sup>42</sup> It is a long road full of obstacles, road blocks, and hefty tolls for artists who wish to sample and the journey begins with seeking out specific licenses to authorize the use of a prior work.<sup>43</sup>

### *B. Legally Sampling: Acquiring Two Licenses*

Per the Copyright Act of 1976, to directly sample a track every artist who wishes to sample must clear, or obtain license for, the two separate copyrightable elements of every song.<sup>44</sup> For one, an artist wishing to sample must obtain license for the “musical composition” of the song, which includes the lyrics and melody, rhythm, and pronunciation.<sup>45</sup> The artist wishing to sample must also obtain a license to use the “sound recording,” which is the

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<sup>39</sup> See Kanye West’s “Good Life” Sample of Michael Jackson’s “P.Y.T. (Pretty Young Thing),” *supra* note 28; see also *infra* Part III.A for a discussion on the current de minimis standard in music sampling.

<sup>40</sup> Jason DeRulo’s “Whatcha Say” Sample of Imogen Heap’s “Hide and Seek,” *supra* note 28; see also *infra* Part III.B for a discussion on the current fair use standard in music sampling.

<sup>41</sup> See KANYE WEST, *GRADUATION* (Def Jam Recordings 2007) (denoting songwriting credits to Quincy Jones and James Ingram, the songwriters of “P.Y.T.”); JASON DERULO, *JASON DERULO*, (Warner Bros. Records 2009) (crediting Imogen Heap as a songwriter for “Whatcha Say”).

<sup>42</sup> See *infra* Part III.A for a discussion on the scarcity of judicial rulings on sampling cases.

<sup>43</sup> See *infra* Part II.A for a discussion on the complexity of the current licensing system.

<sup>44</sup> See 17 U.S.C. § 102(a)(2), (7) (2012); see also ALLEN BARGFREDE, *MUSIC LAW IN THE DIGITAL AGE: COPYRIGHT ESSENTIALS FOR TODAY’S MUSIC BUSINESS* 41 (2d ed. 2017).

<sup>45</sup> See 17 U.S.C. § 102(a)(2).

actual mixed and mastered track commonly referred to as the “master” in the music industry.<sup>46</sup> Each copyrightable element possesses its own difficult and stressful path for obtaining a license, and quite possibly its own solution in remedying the complex system.<sup>47</sup>

Songwriters and their affiliated publishers usually own the copyright to the musical composition, which is typically registered through a performing rights organization (“PRO”) and publishing agencies to collect royalties.<sup>48</sup> The copyright of the composition consists of the “rhythm, harmony, and melody” that make up the song as well as the “particular sequence and arrangement of lyrics and/or music.”<sup>49</sup> The difficulty in obtaining a sampling license for a musical work is the amount of time, diligence, and costs it takes to find every owner of a certain musical work and negotiate deals with each one.<sup>50</sup> On the other hand, many artists enjoy licensing their musical work to other artists because it exposes their music to a larger audience and, perhaps, a new platform.<sup>51</sup>

Record labels usually own the copyright of the master of a recorded song; therefore, artists who wish to sample must obtain a license from the label itself.<sup>52</sup> While holders of a sound recording copyright hold the rights of reproduction and preparation of derivative works, their copyright is limited to only the sounds within the actual recording.<sup>53</sup> Thus, the copyright does not extend to an independent recording of the sound, even if an artist intentionally simulates the sound recording.<sup>54</sup> Distinctively,

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<sup>46</sup> See 17 U.S.C. § 102(a)(7).

<sup>47</sup> See *infra* Part V for a discussion on remedying the complexity of the current licensing system.

<sup>48</sup> See BARGFREDE, *supra* note 44, at 63–65.

<sup>49</sup> *Bridgeport Music, Inc. v. Still N The Water Pub.*, 327 F.3d 472, 475 n.3 (6th Cir. 2003).

<sup>50</sup> See MCLEOD & DICOLA, *supra* note 1, at 119.

<sup>51</sup> See *id.* at 93 (quoting Parliament-Funkadelic creator George Clinton) (“I was glad to hear it, especially when it was our songs. You know, it was the way to get back on the radio.”). Samples from Clinton’s work would become a sample at issue in *Bridgeport v. Dimension Films*, and Clinton was often in court to regain some of his copyrights lost in a fabricated contract with his publishing company. See *id.* at 93–94.

<sup>52</sup> See BARGFREDE, *supra* note 44, at 99.

<sup>53</sup> See 17 U.S.C. § 114(a)–(b) (2012).

<sup>54</sup> See 17 U.S.C. § 114(b) (2012).

holders of the musical work copyright maintain a stronger copyright that encompasses simulated sounds, with the additional right of publicly performing or displaying their work.<sup>55</sup>

### *C. The Cost of Sampling*

Sample licenses may be difficult to afford for certain artists primarily because artists must obtain the two separate licenses.<sup>56</sup> Generally, sound recording samples are licensed in exchange for a lump sum payment or royalty rate, while licenses for musical compositions return an ownership stake in the new song.<sup>57</sup> Copyright owners of the sound recordings and musical compositions understand that both usually need to be cleared to properly utilize the sample; therefore, the owners use the two-license requirement as leverage in negotiations.<sup>58</sup> If the copyright owner of one of the two elements infers that the artist who wishes to sample obtained or could easily obtain the other element, the owner's copyright becomes much more valuable.<sup>59</sup>

Although the terms of many licensing agreements are not made public, members of the music industry and researchers with inside sources have collected data estimates of the sampling market.<sup>60</sup> Professors Kembrew McLeod and Peter DiCola, through interviewing producers and songwriters who have sampled work or have had their work sampled, created a model sample license cost matrix that describes an approximate value based on two metrics: the profile of the sampled work and the substantiality within the sampling work.<sup>61</sup>

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<sup>55</sup> See 17 U.S.C. § 106 (2012).

<sup>56</sup> See *supra* Part I.A.

<sup>57</sup> See JOANNA DEMERS, *STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY* 117 (2006); McLEOD & DiCOLA, *supra* note 1, at 204–06 (identifying trends in the contemporary music industry with the help of a two-dimensional table from music lawyer Whitney Broussard).

<sup>58</sup> See McLEOD & DiCOLA, *supra* note 1, at 165.

<sup>59</sup> This is even more true for pursuing a musical composition copyright after obtaining a sound recording copyright because a sound recording license does not do much on its own unless the artist feels a fair use or *de minimis* argument is likely to work in his or her favor. See McLEOD & DiCOLA, *supra* note 1, at 169.

<sup>60</sup> See *id.* at 204–05.

<sup>61</sup> See *id.*

The profile refers to the sampled work's recognition, star power, and label affiliation, which can range from relatively unknown, like a foreign folk singer, to superstar status, like Michael Jackson.<sup>62</sup> Substantiality evaluates the length and "heart" of the sample, which can range from small, like the "Good Life" sample, to extensive, like "Whatcha Say's" use of Imogen Heap's work.<sup>63</sup>

Depending on the profile of the sampled work, even trivial samples can exceed the budget limitations for any artist.<sup>64</sup> Due to Jackson's superstar status, the sound recording license for the six-note sample of "PYT" may have cost Kanye West's team between \$50,000 and \$100,000 or between \$0.12 and \$0.15 per "Good Life" sale.<sup>65</sup> Generally, such a small sample would also cost the artist a complete assignment of copyright ownership for the musical composition.<sup>66</sup> High profile works, but not necessarily famous works, can cost up to \$5,000 for a small sound recording license and 25% of the newly created musical composition.<sup>67</sup>

More extensive samples are also costly, although they usually come from non-superstar sources.<sup>68</sup> Imogen Heap's "Hide and Seek" license, which authorized a large portion of the track as a refrain, is likely to have fetched between \$15,000 and \$25,000 or between \$0.05 and \$0.10 per "Whatcha Say" sale.<sup>69</sup> Additionally, Heap most likely owns between 40% and 50% of the musical composition for Jason DeRulo's hit.<sup>70</sup> Heap looks to promote how elements of "Hide and Seek" succeeded in gaining ownership

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<sup>62</sup> *See id.* at 204.

<sup>63</sup> *See id.* at 205. This evaluation is a semblance of the amount and substantiality factor of fair use. *See infra* Part III.B for a discussion of fair use.

<sup>64</sup> This includes samples so trivial that they could be considered *de minimis* should the artist choose to risk not clearing the sample. *See* MCLEOD & DICOLA, *supra* note 1, at 204.

<sup>65</sup> *See id.* at 205.

<sup>66</sup> Artists may choose to allocate 100% of the composition right to the artist they are sampling in order to use the sample to gain notoriety among a broad audience. *See id.*

<sup>67</sup> *See id.*

<sup>68</sup> *See id.*

<sup>69</sup> *See id.*

<sup>70</sup> *See id.*

stakes and earning royalties through remixes and samples like DeRulo's in her "Life of a Song" digital exhibit.<sup>71</sup>

Because of the associated costs, including samples on a song or album would greatly exceed an independent artist's budget.<sup>72</sup> Even many popular up-and-coming artists affiliated with a major label only work with a recording budget of about \$150,000 for the creation of an entire album.<sup>73</sup> When calculating the upfront payments, transaction costs, and royalty/share payments on the backend, obtaining licenses for multiple samples can even sink popular albums into an unprofitable hole.<sup>74</sup>

Sampling generates a healthy revenue for songwriters, publishers, and record labels who license and use samples, but the benefits remain in the hands of established and/or rich artists.<sup>75</sup> Because publishing companies and record labels determine the market of sampling compositions and sound recordings, the sample clearance system creates a noticeable gap between those who can afford samples and those who cannot.<sup>76</sup>

#### *D. Defenses within Copyright Law*

Currently, artists who wish to sample have few options to legally defend unlicensed use.<sup>77</sup> Cases rarely reach a judicial

<sup>71</sup> See *infra* Part V for a discussion of Heap's exhibit.

<sup>72</sup> See McLEOD & DICOLA, *supra* note 1, at 118.

<sup>73</sup> *How Record Labels Invest*, INT'L FED'N OF THE PHONOGRAPHIC INDUSTRY, <http://www.ifpi.org/how-record-labels-invest.php> [<https://perma.cc/J6E3-7WDU>] (last visited Apr. 24, 2018) ("Recording costs for an emerging pop act in a major market are estimated to be between US \$150,000 and US \$500,000.").

<sup>74</sup> See McLEOD & DICOLA, *supra* note 1, at 206–10 (proposing that if hip-hop artists of the late 1980s and early 1990s received licenses for all their samples, Public Enemy would have lost about \$6.7 million for *Fear of a Black Planet* and the Beastie Boys would have lost \$19.8 million for releasing *Paul's Boutique*).

<sup>75</sup> Curtis Mayfield, a 1970s-funk artist from Chicago whom Kanye West frequently samples, used income from licensing samples to help finance his medical bills after he was no longer able to perform following a stage accident in 1990 that left him paralyzed. See McLEOD & DICOLA, *supra* note 1, at 86.

<sup>76</sup> See *id.* at 118 (quoting music critic Jeff Chang) ("You've got this huge gap now that's been created. Now the only people that can make hip-hop throwback records—where the canon of breakbeats is being used—are the folks that are so rich that they can afford to do anything they want anyway.").

<sup>77</sup> See, e.g., *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 798 (6th Cir. 2005) (eliminating the *de minimis* standard for sampling sound recordings).

resolution because record labels often settle with artists to avoid unfavorable decisions that could affect their sound recording copyrights or other aspects of the music business.<sup>78</sup> Courts have debated the merits of two legal defenses in unlicensed sampling: the de minimis doctrine when evaluating infringement and the fair use doctrine when defending infringement.<sup>79</sup>

### 1. The De Minimis Doctrine and Sound Recordings

The de minimis doctrine in copyright law imposes a certain threshold of copying to constitute infringement.<sup>80</sup> De minimis claims are still asserted in the music business because artists will feel, however, that someone inappropriately swindled a few of their notes or lyrics.<sup>81</sup> In sampling, the de minimis standard is theoretically a bar that determines whether a certain size or substantiality of a sample is so trivial that it could not be the basis for legal action.<sup>82</sup> Defendants and courts have applied or invoked

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<sup>78</sup> See BARGFREDE, *supra* note 44, at 56.

<sup>79</sup> See VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 885 (9th Cir. 2016); Estate of Smith v. Cash Money Records, 253 F. Supp. 3d 737, 750–51 (S.D.N.Y. 2017).

<sup>80</sup> See Walt Disney Prod. v. Air Pirates, 581 F.2d 751, 758–59 (9th Cir. 1978) (finding “the idea-expression line” separating infringement from non-infringement “represents an acceptable definitional balance as between copyright and free speech interests”); see, e.g., Sandoval v. New Line Cinema Corp., 147 F.3d 215, 218 (2d Cir. 1998) (finding the use of copyright-protected photos in a feature film was de minimis and did not constitute infringement because the photos were barely identifiable and were shown only briefly); Ringgold v. Black Entm’t Television, Inc., 126 F.3d 70 (2d Cir. 1997) (finding the use of a copyright-protected poster for a total of 26.75 seconds in a film surpassed the de minimis threshold).

<sup>81</sup> See, e.g., Newton v. Diamond, 349 F.3d 591, 598 (9th Cir. 2003) (finding a generic three note sequence “failed to demonstrate any quantitative or qualitative significance” to surpass the de minimis threshold); Elsmere Music, Inc. v. Nat’l Broad. Co., 482 F. Supp. 741, 744 (S.D.N.Y.), aff’d 623 F.2d 252 (2d Cir. 1980) (finding copying was not de minimis where the copied musical phrase was “the heart of the [original] composition”); see also 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][2] at 13–47 (describing fragmented literal similarity in the context of music sampling).

<sup>82</sup> See VMG Salsoul, 824 F.3d at 881. In the context of fair use, a determination of de minimis use would also prove helpful for courts to conclude whether a work is substantially similar in relation to the entire copyrighted work. See Deborah F. Buckman, Annotation, *Application of “De Minimis Non Curat Lex” to Copyright Infringement Claims*, 150 A.L.R. Fed. 661 (1998).

the doctrine in several sampling suits, but the de minimis standard's place in sampling remains an enigma.<sup>83</sup>

Courts are divided as to how the de minimis doctrine applies to sampling. In *Newton v. Diamond* the Ninth Circuit found that a musical composition sample of a few notes was de minimis, apparently in agreement with popular belief in the music industry.<sup>84</sup> The Sixth Circuit in *Bridgeport v. Dimension Films*, however, determined in 2005 that the de minimis standard does not apply for sound recording sampling and mandated that artists “[g]et a license or do not sample.”<sup>85</sup> The bright-line rule destroyed the de minimis defense, primarily for the reason that it was arduous for courts to determine how much of a general sample is substantial enough to surpass the de minimis threshold.<sup>86</sup>

The Ninth Circuit in *VMG v. Salsoul*, more than a decade later, reaffirmed the availability of the de minimis doctrine when it ruled that a .23 second horn-synth sample on Madonna's “Vogue,” which was sampled from “Ooh I Love it (Love Break),” was too small to warrant infringement.<sup>87</sup>

While the de minimis defense could help independent artists who wish to sample small portions of prior work, it may not be a feasible tool in remedying the sample licensing because, as the circuit split shows, courts are reluctant to provide a delineated definition of a de minimis sound recording sample.<sup>88</sup>

## 2. The Fair Use Doctrine and Musical Compositions

Sampling, as a fair use, is a double-edge sword, as artists will favor expanding fair use when sampling, but may advocate for

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<sup>83</sup> Compare *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005) (finding the de minimis standard does not apply to sound recordings) with *VMG Salsoul*, 824 F.3d 871 (finding the de minimis standard applied to a .23-second sound recording sample).

<sup>84</sup> See *Newton*, 349 F.3d at 598; see *infra* Section III.A.

<sup>85</sup> See *Bridgeport*, 410 F.3d at 801.

<sup>86</sup> See *id.* at 802.

<sup>87</sup> See *VMG Salsoul*, 824 F.3d at 885.

<sup>88</sup> See *infra* Section V.A for a discussion on the de minimis doctrine's effect on the licensing market.

weakening the doctrine when being sampled.<sup>89</sup> The doctrine of fair use operates under the premise that art, at times, must borrow from copyright-protected works, and permits certain circumstances of unlicensed use to encourage freedom of expression.<sup>90</sup> The Copyright Act dictates that the unlicensed use of copyright-protected works for news reporting, scholarship, criticism, or research may be acceptable under the doctrine.<sup>91</sup> To determine whether a work falls under fair use, courts evaluate the unlicensed work through four factors: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the work as a whole; and (4) the effect of the use upon the potential market of the work.<sup>92</sup> No single factor is determinative; therefore, a court weighs all factors to collectively evaluate the unlicensed use of the copyrighted work.<sup>93</sup> The Supreme Court does, nonetheless, consider certain factors more important than others, and has held that the fourth factor of market impact is “the single most important element of fair use.”<sup>94</sup>

When evaluating the fourth factor, courts consider two types of harm to the potential market.<sup>95</sup> Courts first consider whether the use is a direct market substitute for the original work, and then

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<sup>89</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 599 (1994) (Kennedy, J. concurring) (“Just the thought of a rap version of Beethoven’s Fifth Symphony or ‘Achy Breaky Heart’ is bound to make people smile. If we allow any weak transformation to qualify as parody, however, we weaken the protection of copyright. And underprotection of copyright disserves the goals of copyright just as much as overprotection, by reducing the financial incentive to create.”).

<sup>90</sup> See *id.* at 575 (“In truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.”). The fair use doctrine was originally developed through common law until it was codified in the Copyright Act of 1976. See *id.* at 576.

<sup>91</sup> 17 U.S.C. § 107 (2012).

<sup>92</sup> *Id.*

<sup>93</sup> See *Campbell*, 510 U.S. at 578; see, e.g., *Bill Graham Archives, LLC v. Dorling Kindersley Ltd.*, 386 F. Supp. 2d 324, 333 (S.D.N.Y. 2005) (finding the first, third, and fourth fair use factors weighed in favor of a biography’s non-infringing use of copyright-protected Grateful Dead posters).

<sup>94</sup> See *Harper & Row, Publishers, Inc., v. Nation Enters.*, 471 U.S. 539, 566 (1985); *Fox News Network, LLC v. TVEyes, Inc.* 883 F.3d 169, 176 (2d Cir. 2018).

<sup>95</sup> See *Campbell*, 510 U.S. at 590 (quoting *Harper & Row*, 471 U.S. at 569).

consider whether any market harm may exist beyond the direct substitution, such as the existence of a licensing market.<sup>96</sup> A direct market substitute exists when the alleged infringer “cites the most important parts of the work, with a view . . . to supersede the use of the original work, and substitute [the secondary use] for [the original use].”<sup>97</sup> Courts developed this standard to prevent secondary copies from usurping the economic success of original creativity.<sup>98</sup>

Sampling artists who seek a fair use defense often fail under a hybrid analysis of the first and fourth factors because if the nature of the sample is a “mere duplication” of a sound recording, the sample can be considered a “market replacement.”<sup>99</sup> When evaluating the purpose and character of the use, the Supreme Court’s analysis in *Campbell v. Acuff-Rose* highlights the importance of “transformation,” to which the new material “alter[s] the original with new expression, meaning, or message.”<sup>100</sup> The Court insisted that if the new work is more transformative in expression, then the other factors, like commercialism, may carry less weight.<sup>101</sup> Although the Court in *Campbell* evaluated a transformative expression in a music parody, its application has been applied to non-parodic samples in music.<sup>102</sup>

Additionally, because courts have ordered that *any* unlicensed use of sound recording is unlawful and record labels are reluctant to pursue cases where the defense of fair use can be raised, sampling artists have not had the opportunity to test a fair use defense for the unlicensed use of a sound recording.<sup>103</sup> Nevertheless, the fair use defense has seen mixed success for

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<sup>96</sup> See *id.* at 591 (“[W]hen, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.”).

<sup>97</sup> See *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841); see also Michael G. Anderson, Paul F. Brown & Andrew P. Cores, *Market Substitution and Copyrights: Predicting Fair Use Case Law*, 10 U. MIAMI ENT. & SPORTS L. REV. 33, 39 (1993).

<sup>98</sup> See Anderson et al., *supra* note 97.

<sup>99</sup> See *Campbell*, 510 U.S. at 591.

<sup>100</sup> See *id.* at 579.

<sup>101</sup> See *id.*

<sup>102</sup> See *id.* at 588; *Estate of Smith v. Cash Money Records*, 253 F. Supp. 3d 737, 743 (S.D.N.Y. 2017).

<sup>103</sup> See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 798 (6th Cir. 2005).

unlicensed musical compositions, which generally do not fall under record label ownership.<sup>104</sup>

Since music samples often distort the sound of the original work and give the original work new meaning, the considerations of transformative expression and market harm under fair use have evolved to give artists wishing to sample a possible defense for unlicensed use of a musical work.<sup>105</sup> However, because of the case-by-case analysis that is inherent in the fair use framework, relying on fair use will likely involve heavy litigation costs.<sup>106</sup> An artist who wishes to sample must decide if asserting fair use is financially feasible at the conception of the sampling process.<sup>107</sup>

## II. OBSTACLES WITHIN THE LICENSING MARKET

In the modern sampling licensing market, flaws exist that obstruct and deter independent artists from utilizing the market to expand their bounds of creativity. Section II.A discusses the transaction costs and expensive efforts that bar independent artists from exploring music samples within their own work, while Section II.B discusses the industry's attempt to mitigate the high transaction costs.

### A. *Struggling to Start the Sampling Process*

Artists are legally barred from using a sound recording in a sample without license to do so;<sup>108</sup> however, the process of obtaining sample licenses is levied with burdensome obstacles that

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<sup>104</sup> See *Campbell*, 510 U.S. at 579 (rev'g *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)) (finding a song's commercial nature is not dispositive when evaluating its fair use); see also *Estate of Barré v. Carter*, 272 F. Supp. 3d 906, 932 (E.D. La. 2017) (finding an unlicensed sample of a YouTube clip does not amount to fair use); *Cash Money Records*, 253 F. Supp. 3d at 751 (finding an unlicensed use of a spoken word record did amount to fair use).

<sup>105</sup> See *Cash Money Records*, 253 F. Supp. 3d at 751.

<sup>106</sup> See McLEOD & DiCOLA, *supra* note 1, at 131.

<sup>107</sup> See *id.* ("Legal abstractions can only provide so much guidance to the music industry. Musicians need to know how close they can come to previous songs and how much of those previous songs they can use.").

<sup>108</sup> See *Bridgeport*, 410 F.3d at 798.

prevent independent artists from commencing the process.<sup>109</sup> Independent artists like Chance the Rapper, Macklemore, and Bon Iver have become Grammy-award winning influencers without affiliating themselves with a major record label.<sup>110</sup> Success through independence inspired other artists like Lupe Fiasco and Frank Ocean, who both dealt with numerous record label frustrations, to find creative ways to escape their major label contracts and to release their music independently.<sup>111</sup> While the distance between an artist and major record label can increase creative control of one's music, it also significantly lowers the available budget and labor force for a project.<sup>112</sup> An independent label cannot afford to cover the transaction costs of a sample clearance, let alone the license itself.<sup>113</sup>

To clear any sample, the artist must often first record the entire song with the sample because the way a sample is used can be a pivotal factor for the copyright owner when deciding to authorize

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<sup>109</sup> See MCLEOD & DiCOLA, *supra* note 1, at 168 (“Smaller labels or musicians would have a hard time bearing the search costs of tracing the ownership of copyrights....”).

<sup>110</sup> See Nguyen, *supra* note 18; Reggie Ugwu, *How 20-Year Old Chance The Rapper Has Nearly Every Major Label Chasing Him*, BILLBOARD (May 01, 2013, 1:40 PM), <https://www.billboard.com/biz/articles/news/indies/1560132/how-20-year-old-chance-the-rapper-has-nearly-every-major-label> [https://perma.cc/C38W-DMMM]; Jon Caramanica, *Who, What and Where is Bon Iver?*, N.Y. TIMES (June 3, 2011), <https://www.nytimes.com/2011/06/05/magazine/who-what-and-where-is-bon-iver.html> [https://perma.cc/UG3A-WPV].

<sup>111</sup> Frank Ocean famously dropped *Endless* to fulfill the last album of his contract with Def Jam, before independently releasing the chart-topping *Blonde* a day later. See Natalie Robehmed, *Frank Ocean Already Made \$1 Million by Going Independent*, FORBES (Aug. 30, 2016, 12:24 PM), <https://www.forbes.com/sites/natalierobehmed/2016/08/30/frank-ocean-already-made-1-million-by-going-independent/#1e7f0cd7308f> [https://perma.cc/3E9N-ZYF5]. To fulfill the six-album obligation of his original contract, Lupe Fiasco dropped an album of “old-ass songs [he] had kinda just laying around.” See Trevor Smith, *Lupe Fiasco Says He Intentionally Took an L with DROGAS Light*, HOTNEWHIPHOP (May 1, 2017, 2:16 AM), <https://www.hotnewhiphop.com/lupe-fiasco-says-he-intentionally-took-an-l-with-drogas-light-to-punish-atlantic-news.32094.html> [https://perma.cc/RZ79-YRS6].

<sup>112</sup> See MCLEOD & DiCOLA, *supra* note 1, at 118; see also *Worldwide Independent Market Report: the Global Economic & Cultural Contribution of Independent Music*, *supra* note 16, at 25.

<sup>113</sup> See MCLEOD & DiCOLA, *supra* note 1, at 118 (explaining how El-P attempted to negotiate a sample but was unable to fully acquire the license due to the high price demand).

its use.<sup>114</sup> The sampling artist must sacrifice studio, production, and mixing costs prior to gaining clearance.<sup>115</sup> Next, the artist who wishes to sample has the difficult task of locating each of the copyright holders for the composition and recording.<sup>116</sup> Once the artist locates copyright holders, it can take months to negotiate a deal for a license, which usually comes at a hefty fee even for non-famous works.<sup>117</sup> To speed up the clearance process, artists can hire a third party sample clearance firm that is able locate copyrights and negotiate on their behalves because of the relationships it has within the industry, but that service does not come free.<sup>118</sup> Oftentimes artists refuse to grant licenses because of distaste for a certain music genre, like how Steve Miller refuses to license samples for hip-hop music.<sup>119</sup> Also, artists often condition the license on certain demands they may have, like how an Australian musician ordered Jay-Z to not use profanity on a record.<sup>120</sup> If a license is not granted, all the costs from producing the song, locating the copyright, and negotiating deals are sunken, and the artist who wished to sample is forced to head back to the drawing board in the studio.<sup>121</sup>

Oftentimes, the inability to obtain licenses forces independent artists to significantly delay the distribution of their projects or to release incomplete projects.<sup>122</sup> Delays and incomplete albums not

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<sup>114</sup> See *id.* at 119.

<sup>115</sup> See *id.* at 214; Jimmy Ness, *The Queen of Sample Clearance: An Interview with Deborah Mannis-Gardner*, FORBES (Feb. 19, 2016, 8:00 AM), <https://www.forbes.com/sites/passionoftheweiss/2016/02/19/the-queen-of-sample-clearance-an-interview-with-deborah-mannis-gardner/#724dd61064e1> [<https://perma.cc/4DDN-DWTX>] (detailing that Eminem and Kendrick Lamar were the only clients able to negotiate a sample licensing without sending over the full recorded track).

<sup>116</sup> There may be many different owners of a copyright or the holder of the copyright might be an obscure musician who is difficult to locate. See MCLEOD & DICOLA, *supra* note 1, at 119 (Jay-Z and his producer had a difficult time in locating an Australian musician for a sample of the “Streets is Watching”); see also *infra* Part IV.A.

<sup>117</sup> See MCLEOD & DICOLA, *supra* note 1, at 119.

<sup>118</sup> Sampling agencies cost at a minimum \$500 per negotiation, and difficult negotiations can cost thousands of dollars. See *id.* at 165.

<sup>119</sup> See *id.* at 119.

<sup>120</sup> See *id.* 119–20.

<sup>121</sup> See *id.*

<sup>122</sup> See *id.* at 171 (quoting music lawyer Whitney Broussard) (explaining that if an artist misses a release date, it can affect the financial reporting for the label and skew the overall earnings for a record).

only damage the market value of projects, but hinder the consumers' experience.<sup>123</sup> Listeners are not able to experience a project that the artist truly wished to distribute and are left to imagine what the project could have been if completed or released at a more relevant date.<sup>124</sup>

Grammy-award winning rapper Wasalu Jaco, professionally known as Lupe Fiasco, had his first fully independent release delayed for more than a year and a half because of sampling issues.<sup>125</sup> Jaco, who dealt with numerous record label frustrations during his tenure with Atlantic Records, was unable to clear samples in four songs of his seventh studio album, a conceptual project titled "*DROGAS: Wave*."<sup>126</sup> Jaco stated that the copyright holders demanded terms for the album that were "overboard," while the upfront costs and song ownership shares were "unacceptable" for the project's razor thin budget.<sup>127</sup> He was forced to rework sonic elements of the tracks and determine if the sound still worked with the overall auditory elements of the album, a process that required additional studio time.<sup>128</sup> Furthermore, the delay cost Jaco the ability to directly build off the digital success of his 2017 hit single, "Jump."<sup>129</sup>

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<sup>123</sup> See *id.* at 172 (quoting Eothen Alapatt) ("[I]f you're an independent, you don't have the luxury of pushing [the release date] back to November because you can't afford the retail programs necessary to market the record between October and December.").

<sup>124</sup> See *id.* at 212 (quoting Bill Stafford) ("I think that there should be some way of streamlining it. It shouldn't take eight months to clear something. I think that there needs to be something better.").

<sup>125</sup> See Eric Diep, *Lupe Fiasco Talks Guest-Starring on 'ELEAGUE The Challenger: Street Fighter V,' Nicki Minaj's 'Chun-Li' & His Upcoming Music*, BILLBOARD (Apr. 18, 2018), <https://www.billboard.com/articles/columns/hip-hop/8347165/lupe-fiasco-interview-eleague-the-challenger-street-fighter> [<https://perma.cc/ZS4Q-UA2P>]; Lupe Fiasco, (u/YoBossWillHearOfThis), REDDIT (Dec. 29, 2017, 2:25 PM), [https://www.reddit.com/r/LupeFiasco/comments/7mweqv/the\\_wavelength/?sort=new](https://www.reddit.com/r/LupeFiasco/comments/7mweqv/the_wavelength/?sort=new) [<https://perma.cc/ZU7Y-KW93>].

<sup>126</sup> See Lupe Fiasco, *supra* note 125.

<sup>127</sup> See *id.*

<sup>128</sup> See *id.*

<sup>129</sup> See *Lupe Fiasco Chart History*, BILLBOARD (last visited Sept. 16, 2018), <https://www.billboard.com/music/lupe-fiasco/chart-history/r-and-b-hip-hop-digital-song-sales> [<https://perma.cc/YV5H-C9TR>] (listing that in early 2017 "Jump" peaked at No. 42 on Billboard's Top Digital Sales Chart, which was n Jaco's first entry on the chart since 2014). *DROGAS: Wave* was initially slated to be released in Spring 2017. See Smith, *supra* note 111.

The famously independent Chancelor Bennett (professionally known as “Chance the Rapper” or simply “Chance”), was forced to release his third project, *Coloring Book*, incomplete.<sup>130</sup> Chance, a Grammy-award winning hip-hop artist who feuded with record labels, revealed that the project was to include the song “Grown Ass Kid” as the eleventh track between “All Night” and “How Great,” but Chance was unable to obtain a license.<sup>131</sup> After “Grown Ass Kid” was leaked, fans could hear that the song contained looped elements of Roberta Flack and Peabo Bryson’s 1980 classic soul tune “If Only for One Night.”<sup>132</sup> Flack and Bryson’s label Atlantic Records, which was among the various record labels Chance teased during a live concert, most likely owns the master of the song.<sup>133</sup> If a record label feels that an artist who wishes to sample previously wronged them, the label sometimes pushes back in negotiations and demands a penalty fee prior to granting clearance.<sup>134</sup>

Artists can avoid negotiating with record labels for a sound recording license and still sample with only a license to the musical work through the use of an interpolation.<sup>135</sup> Kanye West famously interpolated a line from Lauryn Hill’s “Mystery of

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<sup>130</sup> Eddie Gonzalez, *Chance The Rapper Is Still Mad He Couldn’t Get ‘Grown Ass Kid’ Onto ‘Coloring Book,’* UPROXX (Sept. 3, 2017), <https://uproxx.com/music/chance-the-rapper-grown-ass-kid-coloring-book-tweet/> [<https://perma.cc/4MFZ-64X4>].

<sup>131</sup> Chance the Rapper, (u/ChanceRaps), REDDIT (May 14, 2016, 10:09 PM), [https://www.reddit.com/r/hiphopheads/comments/4je7ig/hey\\_this\\_is\\_chance\\_coloringbook\\_is\\_out\\_ask\\_me/?sort=confidence](https://www.reddit.com/r/hiphopheads/comments/4je7ig/hey_this_is_chance_coloringbook_is_out_ask_me/?sort=confidence) [<https://perma.cc/EPA2-DAAE>].

<sup>132</sup> *Chance the Rapper’s “Grown Ass Kid” Sample of Roberta Flack and Peabo Bryson’s “If Only for One Night,”* WHOSAMPLED, <https://www.whosampled.com/sample/427893/Chance-the-Rapper-Mick-Jenkins-Alex-Wiley-Grown-Ass-Kid-Roberta-Flack-Peabo-Bryson-If-Only-for-One-Night/> [<https://perma.cc/6HNC-9EL2>] (last visited Feb. 8, 2018).

<sup>133</sup> *See id.*

<sup>134</sup> Rick Goetz, *All About Music Clearance*, MUSICCONSULTANT (Nov. 22, 2011), <http://musicconsultant.com/music-placement/music-clearance/#.WuKhc9PwaRs> [<https://perma.cc/8QVY-GLKC>] (describing, in an interview with sample clearance expert Deborah Mannis-Gardner, a time where an artist who wishes to sample had to back clear samples released on a free mixtape prior to clearing samples on a new project).

<sup>135</sup> An interpolation is essentially a replay, where an artist duplicates a track or melody by re-recording it in the studio. By utilizing a replay, an artist who wishes to sample eliminates the need for a sound recording license, but still needs to obtain the license for using the musical composition. *See* DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 319 (9th ed. 2015).

Iniquity” in his 2004 hit “All Falls Down.”<sup>136</sup> While Kanye received a composition license from Hill, he was unable to secure licenses from MTV (which broadcasted the live performance) and Sony Music (which owned the sound recording).<sup>137</sup> West then enlisted the voice of R&B singer Syleena Johnson to re-record Hill’s lyrics to use as the hook of his song.<sup>138</sup> The interpolation, which portrayed the vulnerabilities of American consumerism through West’s and Hill’s juxtaposed lyrics, was a creative and commercial success.<sup>139</sup> In many cases, however, due to the nature of the sample in use, an artist who does not successfully negotiate a license for the master would have to remove the sample from his or her track because either the re-played elements did not fit into the new composition or the original sound was not effectively reproduced.<sup>140</sup>

### *B. Market Attempts at Affordability*

A potential market solution to licensing complexity was born out of Creative Commons, a non-profit organization that provides creators with free legal tools that educate them about what can be done with a particular work.<sup>141</sup> Creative Commons attempted to streamline the sampling licensing system in 2005 with its own licensing mechanisms.<sup>142</sup> The organization initially offered three different types of licenses for samples, but due to the licenses’ limiting framework and subsequent lack of demand, Creative Commons retired their tiered sampling system after only two

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<sup>136</sup> See MCLEOD & DICOLA, *supra* note 1, at 171.

<sup>137</sup> See *id.*

<sup>138</sup> See *id.*

<sup>139</sup> See *id.*

<sup>140</sup> See *id.* at 118 (citing record producer El-P’s disgust in failing to obtain a license for a simple bassline).

<sup>141</sup> See CREATIVE COMMONS, <https://web.archive.org/web/20050211030544/http://creativecommons.org:80/> [<https://perma.cc/D6C4-NUA2>] (last visited Aug. 28, 2018). In 2005, Creative Commons advertised its novel database by promoting “Fine Art of Sampling” contests, where users would sample tracks licensed in the Creative Commons registry to create transformative pieces of work “without legal hassle.” See CREATIVE COMMONS CONTESTS, <https://web.archive.org/web/20050209040436/http://cmixer.org:80/contests/wired/> [<https://perma.cc/2YJ9-2JQL>] (last visited Aug. 28, 2018).

<sup>142</sup> See MCLEOD & DICOLA, *supra* note 1, at 244.

years.<sup>143</sup> Today, artists can still register their music through a general Creative Commons license (“CC-License”), which offers a searchable database that lets artists freely reuse works for remixes, samples, or mashups, and, in exchange, those artists relinquish a certain amount of control to their works.<sup>144</sup>

Although Creative Commons can correct some inefficiencies of the sampling market by acting as a transaction-facilitating registry, the CC-License, in any state, does not appeal to the greater music industry because it is perceived to greatly weaken an author’s copyright to his or her song.<sup>145</sup> Therefore, there is no financial incentive for artists to register their work within the Creative Commons registry.<sup>146</sup>

While CC-Licenses can dictate how an original work could be used in a sample, Creative Commons is not an entity that enforces the terms and conditions of each CC-License and oftentimes CC-Licensed works are used inappropriately.<sup>147</sup> The largest concern with a CC-License is that the terms are irrevocable; therefore, if an artist’s song suddenly becomes a hit, that artist cannot change his or her mind and obtain the deserved royalties after licensing through Creative Commons.<sup>148</sup> These limitations render CC-licenses unviable for artists who seek compensation for their

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<sup>143</sup> See *id.* at 245 (detailing three separate types of licenses for sampling: (1) the “Sampling” License which allows all use except for advertising, copying, and distribution, (2) the “Sampling Plus” License which is like the Sampling License but allows for noncommercial copying and distribution, and (3) the “Noncommercial Sampling Plus” License that only allows for noncommercial transformation of the work).

<sup>144</sup> See *Print Symposium: Contract Options for Individual Artists: Association Littéraire Et Artistique Internationale (Alai): Memorandum on Creative Commons Licenses*, 29 COLUM. J.L. & ARTS 261 (2006); MCLEOD & DiCOLA, *supra* note 1, at 245.

<sup>145</sup> See *Print Symposium: Contract Options for Individual Artists: Association Littéraire Et Artistique Internationale (Alai): Memorandum on Creative Commons Licenses*, *supra* note 144.

<sup>146</sup> See *id.*; MCLEOD & DiCOLA, *supra* note 1, at 246–47.

<sup>147</sup> See *Print Symposium: Contract Options for Individual Artists: Association Littéraire Et Artistique Internationale (Alai): Memorandum on Creative Commons Licenses*, *supra* note 144 (“Creative Commons does not provide any means to vindicate the author’s rights if the user of a work placed under a Creative Commons license violates any of the rights retained by the author, such as the right of name attribution and/or of commercial exploitation.”).

<sup>148</sup> See *id.* (“This means that there is no going back: once Creative Commons licensed copies are made available, they will generate more licensed copies, and it will be too late to call them back.”).

music, thus Creative Commons' catalog of CC-License-eligible songs is not substantial enough to generate an interchangeable licensing system.<sup>149</sup>

On the other hand, many aspects of Creative Commons' initiative may prove to complement a feasible solution to the sample licensing system.<sup>150</sup> A central location of music that welcomes sampling would simplify the costly process of locating and negotiating licenses.<sup>151</sup> Detailed predetermined agreements would aid independent artists in considering samples that are financially feasible for them without having to invest in recording and mixing the sample first.<sup>152</sup> Creative Commons is an example of how developing technology can, in part, provide a marketplace solution to a tangled licensing system while courts attempt to balance freedom of expression with copyright protection.<sup>153</sup>

### III. UNCERTAIN & UNPREDICTABLE JUDICIAL DECISIONS

Because the issues that fall before the judiciary frequently involve either the dispute of a sound recording infringement or a composition infringement, courts evaluate the infringement of each copyrightable element separately.<sup>154</sup> Therefore, it is best to analyze how courts determine fair use and *de minimis* within each copyrightable element of a song and consider how these defenses receive different treatment across circuits. Section III.A discusses how courts have examined the sound recording copyright in

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<sup>149</sup> See MCLEOD & DICOLA, *supra* note 1, at 246 (quoting Peter Jaszi) (“I don’t think any of the existing CC licenses would work very well because they don’t involve money, and if what artists want is to get money, and if what other artists want to do is pay fair money, then it would have to be some different kind of license and not one of the off-the-shelf Creative Commons licenses.”).

<sup>150</sup> See MCLEOD & DICOLA, *supra* note 1, at 247.

<sup>151</sup> See *id.*

<sup>152</sup> See *id.*

<sup>153</sup> See *id.* at 244 (quoting Mia Garlick, former general counsel for Creative Commons) (“Creative Commons has arisen as a solution to a problem that arose because of digital technology.”).

<sup>154</sup> Compare *Newton v. Diamond*, 349 F.3d 591, 598 (9th Cir. 2003) (finding *de minimis* standard applies to a three-note musical composition sample) with *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 798 (6th Cir. 2005) (finding *de minimis* does not apply for any sound recording sample).

sampled works, while Section III.B details the courts treatment of musical compositions.

*A. The Judiciary and Sound Recording Samples*

1. Diverging Decisions of the De Minimis Doctrine

A persistent myth within the music industry is that any sample of only a few notes is not substantial enough to amount to copyright infringement, and that myth holds true in some cases of musical composition samples.<sup>155</sup> In 2005, however, the Sixth Circuit announced that the analysis for determining infringement of a musical composition copyright is not appropriate when determining infringement of a sound recording copyright.<sup>156</sup> The decision dictated a new pace of play in hip-hop's sampling culture: you shall not sample without a license, no matter how small.<sup>157</sup> The new pace of play remained unchallenged until 2017, when the Ninth Circuit found a sound recording sample to be de minimis.<sup>158</sup> Not only does the current circuit split highlight the difficult task of defining a de minimis sample, its potential resolution could influence the bounds of creativity in independent music.

In *Bridgeport Music, Inc. v. Dimension Films*, plaintiff Westbound Records held the copyright to the sound recording of the George Clinton-written funk song “Get Off Your Ass and Jam” (“Get Off”).<sup>159</sup> Andre Young, famously known as Dr. Dre, used many George Clinton samples to pioneer the “G-Funk” sound of West Coast hip-hop in the late 1980s and early 1990s.<sup>160</sup> Young used approximately two seconds of a guitar riff from “Get Off,” lowered the pitch, and looped it for N.W.A.’s “100 Miles and

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<sup>155</sup> See *Newton*, 349 F.3d at 598.

<sup>156</sup> See *Bridgeport*, 410 F.3d at 798.

<sup>157</sup> See *id.* at 802; see also DEMERS, *supra* note 57, at 96 (“Unless other judges radically critique the *Bridgeport v. Dimension* decision, this verdict will probably force sampling to remain a pay-per-use technique in commercially released music.”).

<sup>158</sup> See *VMG Salsoul v. Ciccone*, 824 F.3d 871, 874 (9th Cir. 2017) (“We recognize that the Sixth Circuit held to the contrary in *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005), but—like the leading copyright treatise and several district courts—we find *Bridgeport*’s reasoning unpersuasive.”).

<sup>159</sup> See *Bridgeport*, 410 F.3d at 796.

<sup>160</sup> See DEMERS, *supra* note 57, at 82.

Runnin’” (“100 Miles”).<sup>161</sup> Defendant No Limit Films then used “100 Miles” in the film *I Got the Hook Up*.<sup>162</sup>

The parties did not dispute that the riff was copied directly from “Get Off,” but the district court ruled that the small size of the copying did not “rise to the level of a legally cognizable appropriation” to warrant infringement.<sup>163</sup> On appeal, however, the Sixth Circuit believed that a substantial similarity analysis, which is generally used in evaluating alleged copyright infringement,<sup>164</sup> should not be “undertaken at all when the defendant has not disputed that it digitally sampled a copyrighted sound recording.”<sup>165</sup> The court justified eliminating the de minimis threshold in sound recordings by defining sound recording samples as a “physical taking rather than an intellectual one.”<sup>166</sup> The Sixth Circuit also asserted that producers intentionally sampled sound recordings to “save costs” or “add something to the new recording.”<sup>167</sup> The justifications revealed a lack of understanding of the sampling market and sampling culture.<sup>168</sup> Utilizing a sample’s sonic elements is not a cost-saving technique to add something to a record, but rather an integral part of the musical experience of the new composition.<sup>169</sup>

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<sup>161</sup> See *Bridgeport*, 410 F.3d at 796.

<sup>162</sup> See *id.*

<sup>163</sup> See *id.* at 797.

<sup>164</sup> The substantial similarity requirement for infringement, which is usually an issue of fact, evaluates whether the accused work is substantially similar “in ideas and expression” to the copyrighted work. See *Frybarger v. Int’l Bus. Machs.*, 812 F.2d 525, 529 (9th Cir. 1987). Courts have used a multitude of tests to determine whether a work of art is substantially similar to an original piece. See *Benay v. Warner Bros. Ent.*, 607 F.3d 620, 624 (9th Cir. 2012).

<sup>165</sup> See *Bridgeport*, 410 F. 3d at 798.

<sup>166</sup> See *id.* at 802. The distinction would affect how the music industry approached the fair use defense for sound recording samples. See *infra* Part III.B for a discussion of fair use.

<sup>167</sup> See *Bridgeport*, 410 F.3d at 802.

<sup>168</sup> See DEMERS, *supra* note 57, at 96 (“This verdict mistakenly assumes that the compulsory license for song covers exerts any influence on licensing fees for master recordings.”).

<sup>169</sup> MCLEOD & DICOLA, *supra* note 1, at 45 (noting independent artist Matt Black believes that sampling “operates as a metaphor for the way people participate with culture more broadly.”).

While the *Bridgeport* court came to its conclusion on multiple inferences,<sup>170</sup> the court relied overwhelmingly on policy implications for jettisoning the de minimis threshold.<sup>171</sup> The court concluded that eliminating the substantial similarity analysis for music samples would lend itself to easy enforcement<sup>172</sup> and make things cheaper for the music industry.<sup>173</sup> The court also proclaimed that considering any unlicensed sample as an infringement would not stifle creativity because the “market will control the license price and keep it within bounds.”<sup>174</sup> Despite the Sixth Circuit’s proclamations, commenters immediately deplored the decision for stifling creativity and contravening the purpose of copyright law.<sup>175</sup>

*Bridgeport*, as the court intended, effectively deterred artists from choosing to sample without clearances; however, since the licensing market has made it nearly impossible to obtain these clearances, certain artists simply cannot sample.<sup>176</sup> While Kanye West was able to bear the expense of clearing six Michael Jackson notes, new and independent artists lost the de minimis doctrine to defend a small sampled recording.<sup>177</sup> These artists were forced to compete in the market no matter what, as any sample that they

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<sup>170</sup> The court stated that Congress intended that the sound recording copyright be extended to ensure the owner “has the exclusive right to ‘sample’ his own recording.” The Sixth Circuit deduced that a 17 U.S.C. § 114(b) exception eliminated traditional prerequisites of the infringement analysis because the word “entirely,” which was added several years after the passing of the original statute that established a copyright in sound recording, should be given heightened significance. Therefore, the Sixth Circuit determined that if you cannot pirate the whole sound recording, you cannot ‘sample’ something less than the whole. See *Bridgeport*, 410 F.3d at 799–803; see also *infra* Section III.B for a discussion of fair use.

<sup>171</sup> See *Bridgeport*, 410 F.3d at 799 (“The music industry, as well as the courts, are best served if something approximating a bright-line test can be established.”).

<sup>172</sup> See *id.* at 801–02.

<sup>173</sup> See *id.* at 802.

<sup>174</sup> See *id.* at 801.

<sup>175</sup> See John Schietinger, Note and Comment, *Bridgeport Music, Inc. v. Dimension Films: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 210 (2005); Matthew R. Brodin, *Bridgeport Music, Inc. v. Dimension Films: The Death of the Substantial Similarity Test in Digital Sampling Copyright Infringement Claims – The Sixth Circuit’s Flawed Attempt at a Bright-Line Rule*, 6 MINN. J.L. SCI. & TECH. 821, 823 (2005).

<sup>176</sup> See DEMERS, *supra* note 57, at 96; see also *supra* Section II.A.

<sup>177</sup> See *supra* Section I.B.

encounter would be automatically subjected to infringement laws.<sup>178</sup>

Eleven years later, the Ninth Circuit determined that the analysis for sound recording infringement should not differ from the framework in evaluating musical composition infringement.<sup>179</sup> In *VMG Salsoul v. Ciccone*, the Ninth Circuit reinstated the de minimis exception because “the ‘de minimis’ exception applies to infringement actions concerning copyrighted sound recordings just as it applies to all other copyright infringement actions.”<sup>180</sup>

VMG Salsoul, the owner of the sound recording copyright for The Salsoul Orchestra’s “Ooh I Love it (Love Break)” (“Love Break”), sued Madonna for sampling 0.23 seconds of a disco horn synth in her 1990 pop hit “Vogue.”<sup>181</sup> Shep Pettibone, the producer of Madonna’s hit, admittedly took a quarter-note trumpet sound from Love Break, gave the note a higher pitch, truncated the tail end of the note, and overlaid it with other effects.<sup>182</sup> Pettibone also aided in the recording of Love Break, which was released in 1983, and the disco synth was a staple of his sound during a production career in the 80s and early 90s.<sup>183</sup> The horn synth repeated multiple times throughout “Vogue,” but it was not a continuous loop like when Young used elements of Clinton’s “Get Off.”<sup>184</sup>

The Ninth Circuit ruled that the sampling of the sound recording was de minimis because “a highly qualified and trained musician listened to the recordings with the express aim of discerning which parts of the song had been copied” and failed to

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<sup>178</sup> See Brief for the RIAA as Amicus Curiae at 6, *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

<sup>179</sup> See *VMG Salsoul v. Ciccone*, 824 F.3d 871, 885 (9th Cir. 2017).

<sup>180</sup> See *id.* at 874.

<sup>181</sup> VMG Salsoul also owned the musical composition copyright to Love Break, but the Ninth Circuit quickly struck down the composition infringement claim due to the de minimis precedent in *Newton*. See *id.* at 875. This case also revealed to the court that sampling can and has occurred outside of the hip-hop genre. See *id.*

<sup>182</sup> See *id.* at 879.

<sup>183</sup> See Keith Caulfield, ‘Vogue’ Producer Shep Pettibone’s First Interview in 20 Years: On Making a Madonna Classic & Why He Left Music Behind, *BILLBOARD* (May 22, 2015), <https://www.billboard.com/articles/columns/pop-shop/6575923/vogue-producer-shep-pettibone-interview> [<https://perma.cc/9GPJ-B2L8>].

<sup>184</sup> See *VMG Salsoul*, 824 F.3d at 875; *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 796 (6th Cir. 2005).

do so accurately.<sup>185</sup> The court also heavily critiqued the Sixth Circuit's interpretation that a sound recording sample is immune to a substantiality analysis because it is a "physical taking."<sup>186</sup> The Ninth Circuit also explicitly disagreed with the Sixth Circuit's "illogic" because the statute did not indicate that Congress intended for sound recordings to be treated differently than other forms of copyrightable art.<sup>187</sup>

When evaluating the circuit split, the significantly different samples in question for the Sixth and Ninth Circuits prompted further conjecture for the creation of a useful definition of *de minimis*.<sup>188</sup> It is not clear what effect, if any, the *Ciccone* decision has had over the sample licensing market because it is still unknown as to what specific criteria defines a *de minimis* sample.<sup>189</sup>

The lack of a clear definition for "de minimis" creates a fear of litigation for artists who wish to utilize small samples.<sup>190</sup> The perceived circuit split may just infer that a sound recording sample of a single note is *de minimis*, but anything greater infringes on the

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<sup>185</sup> See *VMG Salsoul*, 824 F.3d at 880.

<sup>186</sup> See *id.* at 885 (stating that a computer program can sample a piece of a photograph and insert it into another piece of art and it would not carve out an exception to the *de minimis* requirement).

<sup>187</sup> The Ninth Circuit also described how a circuit split essentially already existed because district courts around the country refused to embrace that sound recordings should be treated differently. See *id.* at 884–86 (finding the Sixth Circuit ignored statutory structure, declined to consider legislative history, and failed to acknowledge contemporary technology).

<sup>188</sup> See *id.* at 878; *Bridgeport*, 410 F.3d at 797.

<sup>189</sup> If a *de minimis* threshold is a strand of three notes—the threshold for a musical composition—the significance of these three notes must also be measured. The significance of the music lays not only the amount of music being used, but the value of actual sonic elements. The first two notes of Michael Jackson's *Thriller*, which while are only a couple notes, may be considered sonically unique and memorable and could not be considered equal with a couple quarter-note horn synths from an underground disco beat. See 4 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 13.03[A][2] at 13–47 (describing fragmented literal similarity in the context of music sampling).

<sup>190</sup> See Christian Palmieri & Monica B. Richman, *Music Sampling: Has the Tune Changed?*, ACC DOCKET, Jan.-Feb. 2017, at 57. ("The US Supreme Court may one day resolve the divergent rulings of the Ninth and Sixth Circuits. In the meantime, it is likely that copyright holders bringing suit over sampling will select a venue within the Sixth Circuit, while musicians seeking a declaratory judgment will file in the Ninth Circuit or in a district court that had previously rejected *Bridgeport*.")

copyright of the original sound recording.<sup>191</sup> Record labels are risk-averse businesses that are unwilling to release an unlicensed sample and risk compensatory damages or, sometimes even worse, injunctive relief.<sup>192</sup> Despite the ruling in *VMG Salsoul*, it is common for current recording agreements to stipulate that an album will not be released until the artist clears every sample, no matter the size, on the project.<sup>193</sup>

Due to the variety of fact patterns, sampling in music is a case-by-case analysis and courts like *Bridgeport* want to rid the substantially similar requirement in its entirety to deter unlicensed sampling and avoid litigating such unique fact patterns.<sup>194</sup> In effect, *Bridgeport* influenced a licensing market that has obstructed many independent artists from exploring a level of common creativity in their music.<sup>195</sup>

## 2. A Dormant Fair Use Defense

The *Bridgeport* court's declaration that one must "get a license" to sample may have also indirectly terminated the fair use defense for unlicensed samples of sound recordings.<sup>196</sup> Although the court in *Bridgeport* never intended for the defense to be legally barred,<sup>197</sup> fair use has become dormant in defending sound

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<sup>191</sup> See *infra* Section V.A.1 for a discussion of the de minimis standard's effect on the sample licensing market.

<sup>192</sup> The Notorious B.I.G. and Sean "Puffy" Combs (also known as Puff Daddy, P. Diddy, and Diddy) were forced to take *Ready to Die* off the shelves after a trial court ruled they were liable for infringing on the recording and composition copyrights of the Ohio Players' "Singing in the Morning." After a license for the two-second sample could not be agreed upon, the album needed to be remastered and redistributed. See MCLEOD & DICOLA, *supra* note 1, at 31.

<sup>193</sup> See generally LAPOLT & FOX, *supra* note 2.

<sup>194</sup> See Palmieri & Richman, *supra* note 190, at 56.

<sup>195</sup> See *id.* at 57 ("*Bridgeport*'s holding definitively ended the permissive sample culture.").

<sup>196</sup> See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801–02 (6th Cir. 2005). While fair use was not a defense claimed in the matter, commenters were concerned that its application was rendered useless after the removal of the substantially similar analysis. See Brief for the RIAA as Amicus Curiae, at 10, *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005) ("[T]he panel's bright-line rule improperly reads 'fair use'—a defense expressly provided in the text of the Copyright Act—out of copyright law altogether for sound recordings.").

<sup>197</sup> See *Bridgeport*, 410 F.3d at 805 ("[T]he trial judge is free to consider [fair use] and we express no opinion on its applicability to these facts.").

recording copyright infringement.<sup>198</sup> While fair use has recently become a potential tool for artists to defend a musical composition sample, many commenters attribute two primary reasons to its disappearance in sound recording matters: (1) the *Bridgeport* bright-line rule dissuaded artists from attempting to use the defense and (2) owners of sound recording copyrights, which are predominantly record labels, push for settlements or post-release licensing arrangements with artists who do not clear a sample to avoid the possibility of a court granting a favorable fair use argument for samplers.<sup>199</sup>

Firstly, in emphasizing that a bright-line rule was “necessary” for judicial efficiency, the *Bridgeport* ruling came into a noticeable conflict with § 107 of the Copyright Act, which avails the argument of fair use in all copyright infringement cases.<sup>200</sup> Nowhere in the statute does it prohibit the fair use defense in sound recording cases and, further, the Supreme Court ruled that such a defense requires a case-by-case analysis rather than a bright-line rule.<sup>201</sup>

In its amicus brief, the Recording Industry Association of America (“RIAA”) warned that eliminating the substantially analysis could destroy the statutorily defined fair use defense.<sup>202</sup> The RIAA stated that the Sixth Circuit made its decision “without even considering whether the copying may be subject to potential defenses, including fair use.”<sup>203</sup> If the Sixth Circuit understood that the fair use defense doctrine would still be available, sampling issues would continue to undergo nuanced, case-by-case analyses and render the court’s bright-line test useless.<sup>204</sup> Because the court’s own policy justifications contradicted each other, the RIAA inferred that the Sixth Circuit either (1) “intended by its decision to

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<sup>198</sup> See Palmieri & Richman, *supra* note 190, at 57.

<sup>199</sup> See Brief for the RIAA as Amicus Curiae, at 12, *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005); BARGFREDE, *supra* note 44, at 56 (noting that Girl Talk’s work has yet to be challenged legally).

<sup>200</sup> See 17 U.S.C. § 107 (2012).

<sup>201</sup> See *id.*; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574–78 (1994).

<sup>202</sup> See Brief for the RIAA as Amicus Curiae, at 10, *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

<sup>203</sup> See *id.* at 6.

<sup>204</sup> See *id.* at 11.

abrogate the fair use defense for sound recording copyrights in violation of the express terms of the Copyright Act” or (2) failed to consider statutory defenses, making its rationale for the bright-line test “fatally flawed.”<sup>205</sup>

The Ninth Circuit’s decision could vitalize the fair use defense for unlicensed sampling of sound recordings because it recognizes that no bright-line rule exists.<sup>206</sup> In *VMG Salsoul v. Ciccone*, the court evaluated the parameters of 17 U.S.C. § 114, which dictates the scope of exclusive rights of sound recordings.<sup>207</sup> The copyright to sound recordings is unique, as the holder does not possess the right to publicly perform, but § 114(d) details how holders can “digitally perform” the recording subject to limitations on the medium used.<sup>208</sup> When ruling that the de minimis doctrine is applicable toward sound recordings, the Ninth Circuit read the § 114(b) provision, which outlines the owner’s right to sound recording duplication, through a less literal lens than the *Bridgeport* court and incorporated a “background of consistent application” of de minimis “across centuries of jurisprudence.”<sup>209</sup> In reviewing legislative history, the court differed from *Bridgeport* and stated that Congress never intended for § 114 to expand the copyright of sound recordings, but rather made clear that imitation “cannot be infringement so long as no actual copying is done.”<sup>210</sup> The Ninth Circuit utilized the audience test to determine substantial similarity, which often guides courts in determining the amount and substantiality factor of fair use.<sup>211</sup>

Secondly, fair use has not been expansively dissected for sound recordings because many music executives fear that fair use could

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<sup>205</sup> *See id.*

<sup>206</sup> *See VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 883 (9th Cir. 2016).

<sup>207</sup> *See* 17 U.S.C. § 114 (2012).

<sup>208</sup> *See* 17 U.S.C. § 114(d) (2012).

<sup>209</sup> *See VMG Salsoul*, 824 F.3d at 883.

<sup>210</sup> *See id.* at 884.

<sup>211</sup> *See id.* at 878; *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 76 (2d Cir. 1997) (“If the allegedly infringing work makes such a quantitatively insubstantial use of the copyrighted work as to fall below the threshold required for actionable copying, it makes more sense to reject the claim on that basis and find no infringement, rather than undertake an elaborate fair use analysis in order to uphold a defense.”); *see also supra* note 93 and accompanying text for an overview of the four fair use factors.

change the game in a sampler's favor.<sup>212</sup> Even if an artist is sued, record labels and music publishers have been quick to strike a deal, effectively preventing courts from ruling on the issue.<sup>213</sup> DJ Greg Gillis, known professionally as Girl Talk, compiles sound recordings from dozens of unlicensed samples and, consequently, was dubbed a "lawsuit waiting to happen."<sup>214</sup> Despite that title and five LP releases since 2002, Girl Talk has yet to see a lawsuit.<sup>215</sup> Philo Farnsworth, who operates Girl Talk's aptly named independent label "Illegal Art," believed that Girl Talk would not be sued because if a case went in his favor, it could open the door for a multitude of artists feeling more comfortable releasing tracks with unlicensed samples.<sup>216</sup>

The hesitancy to pursue lawsuits in sound recording samples may be a result of the Second Circuit's 2006 ruling in *Blanch v. Koons*.<sup>217</sup> Much like Girl Talk uses recorded music to create a "collage" song, Jeff Koons collected images from advertisements and digitally superimposed the images against a background of scenic landscapes.<sup>218</sup> In one specific painting titled "Niagara," Koons placed four images of women's legs next to images of ice cream and brownies on top of a background of Niagara Falls.<sup>219</sup> One of the pairs of legs was, without permission, adapted from Andrea Blanch's photography.<sup>220</sup> The court found that Koon's

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<sup>212</sup> See BARGFREDE, *supra* note 44, at 56.

<sup>213</sup> See Amanda G. Ciccattelli, *The Impact of Drake's Fair Use Copyright Victory on Music Copyright Infringement*, IPWATCHDOG (June 17, 2017), <http://www.ipwatchdog.com/2017/06/17/drakes-fair-use-copyright-victory-music-copyright-infringement/id=84504/> [https://perma.cc/YNG9-UMPV] (quoting music attorney Morgan Pietz) ("Defendants assert fair use all the time, in sampling cases especially. But it seems like it is only once in a blue moon that a defendant sticks in the fight long enough to actually succeed in getting rid of a case based on a fair use defense as happened [in *Smith v. Cash Money*]."); see also *infra* Part III Section B.1 for a discussion of Drake's fair use victory.

<sup>214</sup> See MCLEOD & DICOLA, *supra* note 1, at 118; Palmieri & Richmond, *supra* note 190, at 57.

<sup>215</sup> See MCLEOD & DICOLA, *supra* note 1, at 118.

<sup>216</sup> See *id.* at 242.

<sup>217</sup> See *Blanch v. Koons*, 467 F.3d 244, 247 (2d Cir. 2006) (finding that superimposing a copyright-protected photograph onto other images is transformative enough to warrant fair use); BARGFREDE, *supra* note 44, at 56.

<sup>218</sup> See *Blanch*, 467 F.3d at 247; BARGFREDE, *supra* note 44, at 56.

<sup>219</sup> See *Blanch*, 467 F.3d at 247.

<sup>220</sup> See *id.* at 248.

collage-inspired painting, which was displayed in the Guggenheim Museum in New York, amounted to fair use primarily because the sharply different objectives that Koons had in “Niagara” from Blanch’s original work was “transformative.”<sup>221</sup> The Second Circuit believed that copyright law’s primary goal of “promoting the Progress and of Science and useful Arts” would be “better served” by finding that Koons’ creative transformation of the images would not be held liable for infringement.<sup>222</sup>

In the realm of music, *Girl Talk* digitally superimposes recorded music against a background of other recorded music, without license, to make a unique, and arguably “transformative,” work.<sup>223</sup> The decision in *Blanch* was enough to scare many music executives from pursuing sound recording infringement suits against artists who take separate recordings to make a “mashup.”<sup>224</sup> In the case of musical compositions, on the other hand, owners of the copyright are less frequently music executives and have been more willing to fight infringement long enough for a judge to rule on potential fair use.<sup>225</sup>

### *B. The Judiciary and Musical Work Samples*

Occasionally, some artists who wish to sample obtain a license to the sound recording, but fail to receive the license for the musical work.<sup>226</sup> While musical compositions are, without the discrepancy of a circuit split, subject to the *de minimis* threshold,<sup>227</sup> further lessening the necessity for a musical composition license by expanding fair use would eliminate many

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<sup>221</sup> See *id.* at 252–53 (“Koons is, by his own undisputed description, using Blanch’s image as fodder for his commentary on the social and aesthetic consequences of mass media. His stated objective is thus not to repackage Blanch’s ‘Silk Sandals,’ but to employ it ‘in the creation of new information, new aesthetics, new insights and understandings.’”).

<sup>222</sup> See *id.* at 259 (quoting U.S. CONST. art. I, § 8, cl. 8).

<sup>223</sup> See *id.* at 259.

<sup>224</sup> See MCLEOD & DICOLA, *supra* note 1, at 242 (quoting Philo Farnsworth) (“I think that the Jeff Koons *Niagara* case could be used as a model for non-parody appropriation in music.”).

<sup>225</sup> See, e.g., *Estate of Smith v. Cash Money Records*, 253 F. Supp. 3d 737 (S.D.N.Y. 2017); *Estate of Barré v. Carter*, 272 F. Supp. 3d 906 (E.D. La. 2017).

<sup>226</sup> See MCLEOD & DICOLA, *supra* note 1, at 189.

<sup>227</sup> See *Newton v. Diamond*, 349 F.3d 1189 (9th Cir. 2003).

costs and hurdles that currently exist for artists who wish to sample.<sup>228</sup>

Courts have not answered many sampling questions under the fair use doctrine because the issues have not been tested enough.<sup>229</sup> The most thorough analysis came in *Campbell v. Acuff-Rose Music*, where the Supreme Court dissected the first and fourth elements of fair use in evaluating whether a commercial parody of a song was fair use.<sup>230</sup> Although the case dealt primarily with how a parody fits in a “transformative” context, courts in recent years have used the ruling in *Campbell* to evaluate how unlicensed appropriation of music can lawfully operate behind a fair use defense.<sup>231</sup>

#### 1. Drake, Beyoncé, and a Sample’s Fair Trans-“Formation”

In *Campbell v. Acuff-Rose Music*, the rap duo 2 Live Crew wrote the 1989 song “Pretty Woman,” which intended to satirize the Roy Orbison classic “Oh, Pretty Woman” through comical lyrics.<sup>232</sup> To do so, 2 Live Crew needed to sample portions of the original musical composition, which was owned by Orbison’s publisher Acuff-Rose.<sup>233</sup> 2 Live Crew originally attempted to clear the composition sample with Acuff-Rose, but after the publisher denied the request, 2 Live Crew decided that it would release the song and defend the infringement through fair use.<sup>234</sup> After Acuff-Rose brought suit, the district court ruled that 2 Live Crew’s parody did amount to fair use.<sup>235</sup> The Court of Appeals for the

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<sup>228</sup> See McLEOD & DICOLA, *supra* note 1, at 237 (citing Artistic Property Law Professor Jane Ginsburg).

<sup>229</sup> See Ciccattelli, *supra* note 213 (quoting music attorney Morgan Pietz).

<sup>230</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578, 590 (1994).

<sup>231</sup> See generally *Estate of Smith v. Cash Money Records*, 253 F. Supp. 3d 737 (S.D.N.Y. 2017); *Estate of Barré v. Carter*, 272 F. Supp. 3d 906 (E.D. La. 2017).

<sup>232</sup> See *Campbell*, 510 U.S. at 572, 582. “Pretty Woman” critiqued the original work by copying the well-known first line and providing subsequent lyrics that depict catcalling women in a non-romantic light. See *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1442 (6th Cir. 1992) (Nelson, J., dissenting) (“[The 2 Live Crew song] reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences.”).

<sup>233</sup> See *Campbell*, 510 U.S. at 572.

<sup>234</sup> See *id.* at 572–73.

<sup>235</sup> See *id.* at 573.

Sixth Circuit, on the other hand, reversed the district court's decision stating that *any* commercial use of copyrighted material was unfair.<sup>236</sup>

While the Supreme Court ultimately remanded the case for evidentiary purposes, it ruled that the commercial nature of a musical composition sample was not dispositive for unfair use but rather “one element to be weighed” in the fair use analysis.<sup>237</sup> The ruling opened the door for the possibility that a sample, whether or not a parody, could be transformative to a degree that swings the fair use factors in a sampler's favor.<sup>238</sup> In doing so, the court highlighted the importance of transformative use when conferring the nature and purpose of the new composition and when evaluating harm to the original composition's market.<sup>239</sup>

The Supreme Court stated that the Sixth Circuit erred in determining that 2 Live Crew unfairly copied Roy Orbison's “Oh, Pretty Woman” because it did not take into consideration the transformative elements when evaluating the purpose and character of the taken work.<sup>240</sup> In this case, the lyrics taken from Orbison were presented in a parody, which altered the expression and meaning of the words.<sup>241</sup> The Court's emphasis on transformation in *Campbell* created an avenue for artists who wish to sample, if they chose to risk the uncertainty of litigation, to proceed without obtaining a license to sample musical work.<sup>242</sup> The creation of transformative works like samples may, as Justice Blackmun stated, “lie at the heart of the fair use doctrine's guarantee of breathing space” and it is the court's discretion to determine the

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<sup>236</sup> See *id.* at 573–74.

<sup>237</sup> See *id.* at 572.

<sup>238</sup> See *id.* at 579 (holding the more transformative a work, the less significant other factors that may weigh against a finding of fair use); see also Ciccatelli, *supra* note 213 (quoting music attorney Morgan Pietz) (“Whether or not a work is ‘transformative’ has kind of become a shorthand way for a court to say that what a defendant is doing seems different and good, so I think they should escape liability.”).

<sup>239</sup> See *Campbell*, 510 U.S. at 579.

<sup>240</sup> See *id.* at 594.

<sup>241</sup> See *id.* at 583 (discussing how 2 Live Crew transformed the denotation of “Pretty Woman” from a romantic daydream, to a parodic “bawdy demand for sex, and a sigh of relief from paternal responsibility.”).

<sup>242</sup> See *Estate of Smith v. Cash Money Records*, 253 F. Supp. 3d 737, 749 (S.D.N.Y. 2017).

size of that space on a case-by-case basis.<sup>243</sup> The uncertainty of the size of the breathing space, however, is indicative in a pair of recent cases at the district court level.<sup>244</sup>

In the thirteenth track off his third studio album, *Nothing Was the Same*, three-time-Grammy winner Drake used a spoken-word recording from a 1982 Jimmy Smith song titled “Jimmy Smith Raps” (“JSR”).<sup>245</sup> While Drake received a license to sample the sound recording, which was owned by Elektra/Asylum Records, he did not obtain a license from Smith for the musical composition.<sup>246</sup> In Drake’s song, “Pound Cake/Paris Morton Music 2” (“Pound Cake”), he took approximately 35 seconds of “JSR” and rearranged or deleted certain words and phrases.<sup>247</sup> The 35 second sample, which prefaced the entrance of “Pound Cake’s” background beat, served as the introduction for Drake’s track.<sup>248</sup> Smith’s family maintained that Smith would not have granted Drake a license for the composition because he “wasn’t a fan of hip hop.”<sup>249</sup>

The court found that “Pound Cake” fundamentally altered the message of the original work and its purpose was “sharply different” from “JSR” to the point where Drake’s use was transformative.<sup>250</sup> Drake’s edit of “JSR” changed Smith’s phrase from “[j]azz is the only real music that’s gonna last” to “[o]nly real music is gonna last.”<sup>251</sup> The court found that Drake’s slight twist of Smith’s words, which turned a dismissive comment into a statement about the certitude of real music, was enough to weigh in favor of fair use.<sup>252</sup>

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<sup>243</sup> See *Campbell*, 510 U.S. at 579 (quoting *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 478–80 (1984) (Blackmun, J., dissenting)).

<sup>244</sup> See generally *Cash Money Records*, 253 F. Supp. 3d 737; *Estate of Barré v. Carter*, 272 F. Supp. 3d 906 (E.D. La. 2017).

<sup>245</sup> See *Cash Money Records*, 253 F. Supp. 3d at 743.

<sup>246</sup> See *id.*

<sup>247</sup> See *id.*

<sup>248</sup> See *id.*

<sup>249</sup> See *id.*

<sup>250</sup> See *id.* at 750–51.

<sup>251</sup> See *id.* at 749.

<sup>252</sup> See *id.* at 750–51.

On the other hand, in the Eastern District of Louisiana, the estate of Anthony Barré, a comedian and musical artist also known as Messy Mya,<sup>253</sup> sued Beyoncé for sampling his voice from his YouTube videos for her hit single “Formation.”<sup>254</sup> Beyoncé’s track opens with Barré’s voice questioning “What happened at the New Wil’ins” and proclaiming “Bitch, I’m back by popular demand.”<sup>255</sup> Later, Barré’s voice is heard in an interlude, “Oh yeah, baby, oh yeah I, oh, yes, I like that.”<sup>256</sup>

Beyoncé and her producer Michael Williams, known professionally as Mike Will Made-It, stated that they took Barré’s stream of consciousness about New Orleans, distorted the sound, and created a new and transformed message for “Formation.”<sup>257</sup> The district court, however, denied Beyoncé’s motion to dismiss and determined that it was plausible that the use of Barré’s words was not transformative to create a different expression because it merely adapted Barré’s own expression to provide “Formation’s” New Orleans aesthetic.<sup>258</sup>

While the transformative element of fair use has created a path for artists who wish to sample musical works without a license, the “breathing space” of the element is not defined sufficiently to risk infringement and litigation costs.<sup>259</sup> Additionally, the fair use arguments in samples since *Campbell* have only defended against the unlicensed use of artist-owned spoken-word works without

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<sup>253</sup> Barré was a social media sensation and burgeoning rapper who garnered tens of thousands of views on YouTube and was tragically murdered in New Orleans after leaving a baby shower in 2010. See Christopher Rudolph, *Who Was Messy Mya?*, LOGO NEWNOWNEXT (Feb. 9, 2016), <http://www.newnownext.com/who-was-messy-mya/02/2016/> [<https://perma.cc/Q3PN-WZSZ>].

<sup>254</sup> Barré’s compositions were also used within Beyoncé’s *Formation World Tour*. See *Estate of Barré v. Carter*, 272 F. Supp. 3d 906, 912 (E.D. La. 2017) (detailing that “Formation” features Barré’s New Orleans commentary from his video “Booking the Hoes from New Wildin’” in the song’s introduction and following its first refrain).

<sup>255</sup> *See id.*

<sup>256</sup> *See id.*

<sup>257</sup> *See id.* at 916.

<sup>258</sup> *See id.* at 932.

<sup>259</sup> *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (quoting *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 478–80 (1984) (Blackmun, J., dissenting)); *see infra* Section V.A.

underlying instrumentation.<sup>260</sup> Therefore, it is unclear how much “breathing space” would be granted in cases of sampling songs that contain music and lyrics.<sup>261</sup> The inclusion of recorded music and a unique melody in a sample could place more weight on the amount and substantiality taken from the original work.<sup>262</sup>

The artists who have risked litigation, Beyoncé and Drake, have the monetary means and clout within the music industry to take a chance in litigation.<sup>263</sup> Beyoncé and Drake, who were both coming off multiple-platinum certified albums before releasing “Pound Cake” and “Formation,” had millions of fans on the edge of their seats waiting to purchase their next projects.<sup>264</sup> Their respective labels likely favored taking a chance on releasing the non-cleared sample that could possibly be deemed fair use, rather than delaying or scrapping a highly-anticipated album.<sup>265</sup> Independent artists or up-and-coming artists, on the other hand, do not have the financial means or market anticipation to test a fair use defense.<sup>266</sup> Generally, artists who wish to sample would likely

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<sup>260</sup> These suits from artists’ estates further show that record labels and large publishers are usually not a complainant in these matters determining fair use, as they avoid unfavorable decisions. *See generally* Estate of Smith v. Cash Money Records, 253 F. Supp. 3d 737 (S.D.N.Y. 2017); *Carter*, 272 F. Supp. 3d 906.

<sup>261</sup> *See Campbell*, 510 U.S. at 579 (quoting Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 478–80 (1984)) (Blackmun, J., dissenting); *see also infra* Section V.A.

<sup>262</sup> *See Carter*, 272 F. Supp. 3d at 937 (stating that it is plausible that a couple of catch phrases could be deemed substantial); *Cash Money Records*, 253 F. Supp. 3d at 751 (quoting *Campbell*, 510 U.S. at 588) (finding a thirty-five second spoken-word sample was enough for an artist “to ‘conjure up’ at least enough of the original” to accomplish his transformative purpose) (emphasis in original).

<sup>263</sup> *See McLEOD & DiCOLA*, *supra* note 1, at 173.

<sup>264</sup> Drake’s second studio album, *Take Care*, which preceded *Nothing Was the Same*, was certified platinum prior to his next release. *Take Care* is now certified quadruple platinum as of March 2016. *Drake, Gold & Platinum Records*, RIAA, [https://www.riaa.com/gold-platinum/?tab\\_active=default-award&ar=Drake&ti=Take+Care#search\\_section](https://www.riaa.com/gold-platinum/?tab_active=default-award&ar=Drake&ti=Take+Care#search_section) [<https://perma.cc/AAC5-KE9Z>] (last visited Feb. 8, 2018). Beyoncé’s self-titled album, which preceded the release of “Formation” was certified double platinum prior to her next release. *Beyoncé, Gold & Platinum Records*, RIAA, [https://www.riaa.com/gold-platinum/?tab\\_active=default-award&se=beyonce#search\\_section](https://www.riaa.com/gold-platinum/?tab_active=default-award&se=beyonce#search_section) [<https://perma.cc/4R9V-2NZS>] (last visited Feb. 8, 2018).

<sup>265</sup> *See supra* Section II.A.

<sup>266</sup> *See infra* Section V.A.

need to rely on more than transformative use to ensure that the fair use factors fall into their favor.<sup>267</sup>

## 2. Girl Talk, Social Media, and the Prospect of a “Market Benefit”

Philo Farnsworth, the independent label operator for Girl Talk, proposed that market harm, the key fourth factor of fair use, generally should fall in the favor of the sampler; however, courts have been reluctant to weigh a potential market benefit that a sample may have on the original work.<sup>268</sup> The transformative analysis has shown that samples do not hurt the market for the original composition because the new work usually incorporates an entirely new genre, sound, lyrics, and message.<sup>269</sup> However, courts not only evaluate the harm to the original work’s market, but also the sample’s effect on the licensing market as well.<sup>270</sup>

The Supreme Court in *Campbell*, stated that commercial use of a work does not outright create an unfair use, but when evaluating market harm the court “must take account not only of harm to the original but also of harm to the market for derivative works.”<sup>271</sup> This consideration, however, is always incriminatory as courts infer market harm because an unlicensed sample could have provided the copyright owner an economic benefit if it was instead licensed.<sup>272</sup>

While the use of the transformative element was a positive for artists who wish to sample, courts have generally ignored the possibility that a use of a copyrighted work might confer market benefits on the copyright holder as well.<sup>273</sup> Commenters have

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<sup>267</sup> See *infra* Section V.A.

<sup>268</sup> See McLEOD & DiCOLA, *supra* note 1, at 242 (“That seems to weigh in our favor, as it would be ridiculous to suggest that anyone was buying a Girl Talk album in place of buying one of the original sources he is sampling.”).

<sup>269</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 593 (1994) (finding 2 Live Crew’s appropriation of “Oh, Pretty Woman” was a widely different rap parody and did not harm the market of the original work).

<sup>270</sup> See *id.*

<sup>271</sup> *Id.* at 592 (quoting *Harper & Row Publishers, Inc., v. Nation Enters.*, 471 U.S. 539, 568 (1985)).

<sup>272</sup> See *id.* at 583–84.

<sup>273</sup> See W. Michael Schuster, *Fair Use, Girl Talk, And Digital Sampling: An Empirical Study of Music Sampling’s Effect on The Market for Copyrighted Works*, 67 OKLA. L.

stressed that courts should include market benefit to its analysis, because it “actually furthers the utilitarian goal of copyright by incentivizing the creation of new works through economic gain.”<sup>274</sup> The current binary system of market harm, which weighs a neutral market in favor of fair use, fails to recognize that unlicensed sampling actually benefits sales of the sampled song.<sup>275</sup>

To properly evaluate the fourth factor of fair use in a sampling context, courts should not consider the sampling work as a substitute, but rather a promotion.<sup>276</sup> No one is purchasing Girl Talk’s music as a replacement for the original works that he samples; however, the sales of the original works he sampled increase after his audience purchases his work.<sup>277</sup> Girl Talk’s 2010 album *All Day* featured 237 recognizable samples from different genres and generations.<sup>278</sup> A study compiled the total sales data for the original compositions that Girl Talk sampled from the year prior to *All Day*’s release and the year after.<sup>279</sup> The study shows that after *All Day*’s release, the original songs that Girl Talk sampled saw a sizable increase in sales.<sup>280</sup>

The Girl Talk phenomenon is partly explained by devoted music fans researching the samples their favorite artists incorporate into their work. When devoted fans appreciate an artist’s use of a sample, they want to learn more about the source behind the

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REV. 443, 474 (2015); Jeanne C. Fromer, *Symposium: Campbell at 21: Market Effects Bearing on Fair Use*, 90 WASH. L. REV. 615, 618 (2015) (“To break out of the analytical circularity of weighing against fair use the possibility that the defendant’s use could have been licensed, courts should focus on market benefit alongside market harm in assessing fair use”); see also *Bond v. Blum*, 317 F.3d 385, 396 (4th Cir. 2003) (noting in its analysis of market harm that the market would actually benefit from use).

<sup>274</sup> See Schuster, *supra* note 273, at 445.

<sup>275</sup> An empirical study of Girl Talk’s *All Day* found that unlicensed samples actually benefited sales of the sampled songs to a 92.5% degree of statistical significance. See *id.* at 487.

<sup>276</sup> See *id.* at 474.

<sup>277</sup> See *id.* at 473–74.

<sup>278</sup> See Schuster, *supra* note 273, at 473. The data set does not include songs that were released less than two years before *All Day* to avoid calculating a large sales spike or sales decline from non-*All Day* factors. See *id.* at 473–74.

<sup>279</sup> See *id.* at 474–75.

<sup>280</sup> According to Schuster, the likelihood of 237 random Billboard-charting songs seeing a similar rise in sales in any given year is only about 7.5%. See Schuster, *supra* note 273, at 474.

original work and often find themselves listening to artists or genres that they would not normally find on their playlists.<sup>281</sup> With the user-friendly interfaces of streaming services and near-endless discography, samples are driving up streaming numbers for original works.<sup>282</sup>

Hassan Bargathi<sup>283</sup> saw the demand among the followers of his @OnlyHipHopFacts Twitter account for a simple method to interact with the original source behind a favorite artist's sample.<sup>284</sup> Bargathi created "Song & Sample" playlists through the Apple Music streaming platform, where Bargathi juxtaposed a beloved hip-hop artist's song next to the original song that it sampled.<sup>285</sup> Fans of Kanye West utilize the playlist to experience West's hits alongside the original Elton John, Sister Nancy, and Nina Simone tracks featured within West's production.<sup>286</sup>

In addition to West, Bargathi created popular playlists for prominent hip-hop artists Kendrick Lamar and J. Cole, and the playlists have reached millions of listeners.<sup>287</sup> When Bargathi directed his followers on Twitter to the Apple Music link to his three playlists, his tweets received a total of 4.6 million impressions, which lead to 822,263 visits to his playlists.<sup>288</sup> For many fans, their favorite artist has also served as an introduction to different cultures and generations; therefore, a sample has a dual function of not only creating a new sound, but it also operates as a marketing campaign for the artists of the original sampled work.<sup>289</sup>

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<sup>281</sup> E-mail from Hassan Bargathi, Social Influencer, @OnlyHipHopFacts, to Sean M. Corrado, Senior Research and Writing Editor, *FORDHAM INTELL. PROP., MEDIA & ENT. L.J.* (July 24, 2018, 9:54 AM EST) (on file with author).

<sup>282</sup> *Id.*

<sup>283</sup> Bargathi is a social influencer who operates the @OnlyHipHopFacts Twitter account, which provides 441,700 followers with daily music trivia and breaking news in the music industry.

<sup>284</sup> Email from Hassan Bargathi, *supra* note 281.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> Due to recent popular demand, Bagarhi has also created playlists for fans of Drake, Notorious B.I.G., Lil Wayne, Dr. Dre, The Game, Just Blaze, Eminem, Nas, Logic, A Tribe Called Quest, Big K.R.I.T., and Aretha Franklin. *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

If courts were to consider a market harm analysis through a tripartite framework that includes whether the sampled song (1) negatively affected the original song's market, (2) had no effect on the original song's market, or (3) positively affected the original song's market, the market effect of sampling would be appraised differently.<sup>290</sup> When evaluating the fourth factor of fair use, courts would compare any alleged market harm with a quantified market benefit.<sup>291</sup> If that benefit greatly outweighs the harm, the alleged infringer may receive an improved evaluation under the fourth factor that could influence an overall determination of fair use.<sup>292</sup>

#### IV. CURING THE COMPLEXITY OF THE LICENSING SYSTEM THROUGH LEGISLATION

Part IV discusses the legislature's inability to streamline inefficiencies of the current music licensing system. Section IV.A describes the convoluted path that arises when attempting to track down current copyright holders. Section IV.B presents a background of the often-proposed possibility of utilizing a compulsory license to remedy the complex sampling system. Section IV.C, however, discusses how the artists in the music industry heavily disapproved of utilizing compulsory licenses for sampling and effectively terminated the effort.

##### A. *Locating Copyright Owners*

Licensing within the music industry has developed into an obstacle course that artists who wish to sample must either attempt to weave through themselves or hire an agency to do it for them.<sup>293</sup> Although artists who wish to sample are often familiar with the

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<sup>290</sup> See Schuster, *supra* note 273, at 484.

<sup>291</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994); see Schuster, *supra* note 273, at 484.

<sup>292</sup> See *Campbell*, 510 U.S. at 583; see Schuster, *supra* note 273, at 484.

<sup>293</sup> MCLEOD & DICOLA, *supra* note 1, at 168 (quoting hip hop producer Hank Shocklee) (“The question is, who do you contact? You have to find the writers on the record. Then when you go and look and find the writers of the record, you try to find the publishing company that was associated with those writers. Well, when this thing starts getting transferred and people start signing their rights over to the next third party and the fourth party and fifth parties and things of that nature, well, we’re not privy to that information.”).

artist who performed the work, more than just that artist may own the rights to that song and the information about all a composition's copyright owners are generally not readily available.<sup>294</sup> Songwriters, producers, sound-engineers, and other credited artists oftentimes share the copyright to a musical composition.<sup>295</sup> These artists then frequently assign some or all of their publishing rights to third-party publishers and sell their performance rights to performing rights organizations ("PROs") which take an ownership stake in the copyright for a share of the profits.<sup>296</sup>

Holders of the sound recording copyright can also be difficult to locate.<sup>297</sup> While record labels generally claim title to the masters, artists sometimes can share an interest in their master or acquire it outright.<sup>298</sup> Additionally, sound recordings only became copyrightable in 1972, so many sound recordings produced earlier were not registered through the Copyright Office and their subsequent transfers of title were not carefully documented.<sup>299</sup> Since sound recordings created prior to 1972 did not have federal protection, many of their copyrights are governed under state laws, which dictate different rules for digital performances.<sup>300</sup> Because of the difficulties in finding the current copyright holders for musical compositions and sound recordings, the licensing system is a complicated affair that obstructs the clearance process and increases transactional costs.<sup>301</sup>

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<sup>294</sup> See BARGFREDE, *supra* note 44, at 65.

<sup>295</sup> See *id.*

<sup>296</sup> See *id.* (further describing how publishing rights are usually acquired in one of three types of deals: (1) a standard deal that assigns 100% of the ownership to the publisher, (2) a co-publishing deal in which the ownership is split in half, or (3) an administrative deal in which the songwriter retains the full copyright ownership).

<sup>297</sup> See Lisa Weiss, *Music Licensing*, PRACTICAL LAW, note 6-584-9909 at 10–12 (Dec. 2014-Jan. 2015).

<sup>298</sup> See *id.*

<sup>299</sup> See *id.* at 4.

<sup>300</sup> See BARGFREDE, *supra* note 44, at 115. ("Given that Aretha Franklin . . . and other high profile acts recorded some of their most popular works in the 1960s, this means that their works might be being streamed illegally. The group the Turtles recently filed and won a lawsuit against SiriusXM for performing their sound recordings without a license.").

<sup>301</sup> See Weiss, *supra* note 297; *supra* Section II.A.

The complex path to locate a true copyright owner of a musical composition was highlighted in a legal dispute over the payment of royalties for Christina Aguilera's 2006 hit "Ain't No Other Man."<sup>302</sup> Famous hip-hop producer DJ Premier produced Aguilera's track and utilized a pair of brass samples from 1960s soul records to provide a high-tempo funk that would show off Aguilera's voice.<sup>303</sup> Prior to the song's release in 2006, Christina Aguilera and her record label, RCA Records, obtained a license from Codigo Music to sample a 1960s song titled "Hippy Skippy Moon Strut" ("Hippy Skippy").<sup>304</sup> After the song's commercial success, Emusica Records requested RCA Records to withhold the sample's attributable royalty payments to Codigo Music because Emusica claimed to be the true owner of Hippy Skippy's sound recording, and later, the musical composition as well.<sup>305</sup>

Through numerous claims and years of discovery, the court in *TufAmerica. v. Codigo Music*<sup>306</sup> sorted out plausible chains of ownership for Hippy Skippy.<sup>306</sup> Sometime in 1966 or 1967, Bobby Marin wrote the song "I'll Be a Happy Man" ("Happy Man") for a record label called "Speed" and it was unclear whether one or both parties possessed its musical composition copyright.<sup>307</sup> In 1969, Harold Beatty composed Hippy Skippy, which was a derivative work of the original Marin composition, and sold the rights of the work to Slew Enterprises.<sup>308</sup> Slew Enterprises then assigned the rights of the work to Eden Music Co., which was owned by Clyde

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<sup>302</sup> See *TufAmerica v. Codigo Music*, 162 F. Supp. 3d 295 (S.D.N.Y. 2016). In yet another example of a song receiving critical acclaim while containing a sample, "Ain't No Other Man" won a Grammy for Best Female Pop Vocal Performance. *Artist: Christina Aguilera*, RECORDING ACADEMY GRAMMY AWARDS, <https://www.grammy.com/grammys/artists/christina-aguilera> [<https://perma.cc/8GSP-T5LE>] (last visited Oct. 5., 2018).

<sup>303</sup> See Corey Moss, *Christina's New Split-Personality Album is Mature And 'Dirty'*, MTV (Apr. 27, 2006), <http://www.mtv.com/news/1529698/christinas-new-split-personality-album-is-mature-and-dirty> [<https://perma.cc/Y3HD-XDEF>].

<sup>304</sup> See *TufAmerica*, 162 F. Supp. 3d at 303.

<sup>305</sup> See *id.* at 303, 309.

<sup>306</sup> See *id.* at 310.

<sup>307</sup> Approximately a year after the original song's creation, Marin and Morton Craft, an owner of Speed, edited an instrumental version of Happy Man and credited the new song to The Moon People, which was another band on the Speed label. See *id.* at 302–03, 310.

<sup>308</sup> Slew Enterprises was owned and operated by Stanley Lewis, who was a business associate of Morton Craft. See *id.* at 302.

Otis, the eventual founder of Codigo Music.<sup>309</sup> Allegedly, Craft sold the rights to all of Slew's recording catalog in 1969 to Roulette Records, which then sold the catalog to Fania Records in 1975.<sup>310</sup> Fania Records, through a series of name changes and acquisitions, became Emusica in 2005.<sup>311</sup> Despite that transaction, Craft sold the rights of Happy Man to TufAmerica in 2004.<sup>312</sup>

The messiness of the Hippy Skippy sample occurred in part because sound recording copyrights were not recognized until 1972.<sup>313</sup> Because he received no compensation for writing the song, Marin was under the impression that the musical composition copyright for Happy Man, which was published and listed in BMI's database under "Bobby Marin Music Publishing," lied with him and that Craft originally owned the sound recording.<sup>314</sup> After the success of "Ain't No Other Man," Marin sold the musical composition copyright to Emusica for \$25,000, giving Emusica what they thought was complete control of both copyrights.<sup>315</sup>

The court is still attempting to sort out the ownership debacle for Aguilera's sample.<sup>316</sup> The number of times that title changed hands and the number of people who had a hand in creating the music exemplifies an ownership system unsuitable for today's mainstream sampling culture.<sup>317</sup> To further obscure the issue,

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<sup>309</sup> *See id.*

<sup>310</sup> *See id.* at 307–08.

<sup>311</sup> *See id.* at 308–09.

<sup>312</sup> *See id.* at 304–05.

<sup>313</sup> *See* PASSMAN, *supra* note 135, at 231; *see also* TufAmerica, 162 F. Supp. 3d at 319.

<sup>314</sup> *See* TufAmerica, 162 F. Supp. 3d at 307.

<sup>315</sup> *See id.* at 308–09.

<sup>316</sup> *See generally* TufAmerica, Inc. v. Codigo Music LLC, 11 Civ. 1434 (ER), 2017 U.S. Dist. LEXIS 128054 (S.D.N.Y. Aug. 11, 2017).

<sup>317</sup> *See* TufAmerica, 162 F. Supp. 3d at 308–09; *see also* MCLEOD & DICOLA, *supra* note 1, at 97–98 (describing how Alan Lomax, a 1930s folk song writer received a songwriting credit for Jay-Z's Takeover through three generations of music: (1) Lomax was added as a co-author to the Animals' version of the song in the 1960s and Grand Funk Railroad covered the song a few years later, (2) KRS-ONE sampled a brief guitar riff from Grand Funk Railroad's cover for his 1990s hit "Sound of Da Police" and attributed writing credits to the Animals and Lomax, and (3) Jay-Z sampled "Sound of Da Police" and attributed credit all of the artists named in the chain); Marya v. Warner/Chappell Music, Inc., 131 F. Supp. 3d 975, 1002 (C.D. Cal. 2015) (finding the

Aguilera, who credited Harold Beatty as a songwriter assumedly per the sampling agreement with Codigo Music, also enlisted a team of high profile songwriters to construct “Ain’t No Other Man.”<sup>318</sup> In addition to DJ Premier, popular songwriter Kara DioGuardi and album producer Charles Martin Roane were afforded musical composition credit.<sup>319</sup> Therefore, in this current licensing system, if someone were to ever sample “Ain’t No Other Man,” which sampled Hippy Skippy (which sampled Happy Man), the process of tracking and securing clearance may require a prohibitive amount of effort and funds.<sup>320</sup>

### *B. The Possibility of Compulsory Licensing*

As sampling became more prevalent, many have looked toward the legislature to tame the sample licensing system by creating a compulsory license for sampling.<sup>321</sup> If sampling met all of the conditions under Section 115 of the Copyright Act and could be found eligible for compulsory licensing, transaction costs and licensing costs would decrease for artists who wish to sample.<sup>322</sup> To acquire a compulsory license, an artist avoids transaction costs by simply filing a notice with the Copyright Office and paying a cut-rate fee per record.<sup>323</sup> Currently, sound recordings and musical compositions are only subject to compulsory licenses for five purposes: (1) cable television rebroadcasts, (2) licensing to Public Broadcasting System (“PBS”), (3) jukeboxes, (4) radio and non-

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record label had no evidence that it properly acquired the musical composition right of the traditional “Happy Birthday” song over the course the song’s century-long existence).

<sup>318</sup> See CHRISTINA AGUILERA, *BACK TO BASICS* (RCA Records 2006) (denoting songwriting credits for “Ain’t No Other Man” to Aguilera, DioGuardi, Chris E. Martin p.k.a “DJ Premier,” Beatty, and Roane).

<sup>319</sup> See *id.*

<sup>320</sup> See *TufAmerica*, 162 F. Supp. 3d at 308–09. Not only would the chain of copyright title be difficult to locate, but artists who wish to sample could end up having to divide a significant share of musical composition royalties with numerous artists from several generations. MCLEOD & DICOLA, *supra* note 1, at 97–98.

<sup>321</sup> Compulsory licenses are the exceptions to the monopoly of a copyright, where the owner must issue a license at a statutory rate to someone who wants to use the copyrighted work. See PASSMAN, *supra* note 135, at 228.

<sup>322</sup> See *id.* at 231.

<sup>323</sup> See *id.*

interactive streaming, and (5) use of non-dramatic musical compositions through digital or physical phonorecords.<sup>324</sup>

The fifth purpose is the most relevant in discovering a potential pathway for compulsory sampling, but current conditions for compulsory licenses dictate that the licensee “shall not change the basic melody or fundamental character of the [original] work.”<sup>325</sup> For artists who wish to take a copyrighted work and make it their own, this provision limits the use of compulsory licensing to cover songs.<sup>326</sup> When an artist is granted a compulsory license, the only change that he or she can make to the original work is to “conform it to the style or manner of interpretation of the performance.”<sup>327</sup> The provision allows an artist to tweak a work sonically, without changing or adding any lyrics or melodies,<sup>328</sup> but does not provide proper grounds for an artist who wishes to sample another work.<sup>329</sup>

Recently, the “no major changes” provision became more permeable with the booming ringtone industry in the 2000s.<sup>330</sup> Record labels wanted to acquire the composition copyright from PROs at a statutory rate and become a one-stop shop for ringtone companies looking to purchase the rights to thirty-second clips.<sup>331</sup> Publishing companies, hoping to not have ringtones subjected to a compulsory license so they could charge their own rate, argued

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<sup>324</sup> The Copyright Act defines a phonorecord as material object that embodies sounds other than those accompanying audio-visual recordings such as movies. 17 U.S.C. § 115 (2012); see also PASSMAN, *supra* note 135, at 228–29.

<sup>325</sup> 17 U.S.C. § 115(a)(2).

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> Compare DOLLY PARTON, *I Will Always Love You*, on JOLENE (RCA RECORDS 1974) (Parton, who originally wrote “I Will Always Love You,” sang the tune in a country folk style and the song reached number one in 1974) with WHITNEY HOUSTON, *I Will Always Love You*, on THE BODYGUARD: ORIGINAL SOUNDTRACK ALBUM (Arista Records 1992) (Houston, who covered “I Will Always Love You” for a movie soundtrack, sang the same melody and lyrics, but with a pop-gospel assertion).

<sup>329</sup> 17 U.S.C. § 115(a)(2).

<sup>330</sup> A ringtone, which is a thirty-second edit of a full song played when a cell phone receives a call, could be considered a significant change of an original song. Ringtones often cut out the majority of a song to leave a catchy refrain for listeners to enjoy prior answering the phone. See PASSMAN, *supra* note 135, at 231.

<sup>331</sup> When paired with their own sound recording copyright, record labels would come into sole possession of ringtone rights; however, the musical composition copyright would be more valuable because many mobile products re-recorded the songs used for ringtones. See Weiss, *supra* note 297, at 16.

that the cutting of the song was a change too significant to fall under Section 115(a)(2).<sup>332</sup> After several years of debating, the Copyright Office issued an opinion that formed a compromise, where ringtones would be considered a work subject to compulsory licenses, but the statutory rate for ringtones would be greater.<sup>333</sup>

In its ringtone decision, the Copyright Office, without consulting the artists themselves, was adamant on making a distinction between ringtones and samples.<sup>334</sup> The legislative intent of the Copyright Act's "no major changes" clause was to permit some creativity for music being used under a compulsory license, "but without allowing the music to be perverted, distorted, or travestied."<sup>335</sup> While the flourishing ringtone industry spawned a conversation about sampling's place in Section 115, the underlying intent of the clause and the Copyright Office's distinction between ringtones and samples appeared to extinguish the possibility of compulsory sample licensing under the Act as currently written.<sup>336</sup> Thus, in order for compulsory sampling to exist, new provisions would have to be added to the Copyright Act.<sup>337</sup>

### *C. An Objectionable Push for Legislative Clarity*

In July of 2013, the U.S. Department of Commerce Internet Policy Task Force (the "Task Force") issued a proposal for a discussion on copyright policy, creativity and innovation in the

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<sup>332</sup> See also *Passman*, *supra* note 313, at 231.

<sup>333</sup> See Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. 64,303, 64,317 (Nov. 1, 2006); see also BARGFREDE, *supra* note 44, at 81 (noting that the Copyright Office ruled that ringtones were subject to the compulsory license in 2006, but the Copyright Royalty Board in 2008 upped the statutory rate for ringtones from 9.1 cents to 24 cents).

<sup>334</sup> See Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. at 64,308 ("ringtones are excerpts that are taken from musical works and distributed as such; samples, however, are short excerpts that are blended into what are clearly new creative works.").

<sup>335</sup> H. R. REP. NO. 94-1476, at 109 (1976).

<sup>336</sup> See Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. at 64,307 (Nov. 1, 2006).

<sup>337</sup> See U.S. DEP'T OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 28-9 (2013).

digital economy.<sup>338</sup> The proposal suggested a compulsory license to ease the path for remixing and sampling by harmonizing fees based on the size and substance of the sample.<sup>339</sup> The compulsory license would put a ceiling on what a composition or recording copyright owners could charge for any sample.<sup>340</sup>

While the proposition would undeniably make the process more affordable and efficient for artists who wish to sample, the Task Force did not solve the contention between making sampling more affordable and not greatly weakening the copyright protections of music.<sup>341</sup> In response to the Task Force's proposal for a discussion, artists Steven Tyler, Don Henley, Dr. Dre, Sting, Deadmau5, and Britney Spears penned a joint letter stating, "Artists can, and should continue to be able to, deny a use that they do not agree with. For one, an artist should be able to turn down uses in connection with messages that the artist finds objectionable."<sup>342</sup>

Artists do not want to be forced to license their music to sample because it could result in an unwanted endorsement, inappropriately transform their own art, or greatly reduce the overall value of their music.<sup>343</sup> Stripping an artist of their right to say no, even in the spirit of allowing more creativity, could stifle creativity, as an artist may withhold their work if they knew that one day they must give up their right to approve derivative uses.<sup>344</sup>

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<sup>338</sup> Request for Comments on Department of Commerce's Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy, 78 Fed. Reg. 61,337 (Oct. 3, 2013).

<sup>339</sup> See U.S. DEP'T OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 29 (2013).

<sup>340</sup> See *id.*

<sup>341</sup> See *id.*

<sup>342</sup> The letter in response to the task force's request for comments also reveals the government's poor understanding of sampling culture. See Dina LaPolt & Steven Tallarico, Comment Letter on Request for Comments on Department of Commerce's Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy (Feb. 10, 2014) ("The Green Paper uses 'remix' interchangeably to refer to what are known in the industry as remixes, mash-ups, and sampling . . . It is important to clarify exactly what we are talking about by using the proper industry terminology. Artists and songwriters do not usually equate 'remixing' with mash-ups or sampling.").

<sup>343</sup> See *id.*

<sup>344</sup> See Andre Young, Comment Letter on Request for Comments on Department of Commerce's Green Paper on Copyright Policy, Creativity, and Innovation in the Digital

Recently, artists have exercised their objections to their music being played at political rallies<sup>345</sup> or during news segments.<sup>346</sup>

After the resistance against the compulsory license proposal, the legislature has been more focused on the creation of a centralized licensing system that would streamline licensing and simplify information on current music copyrights.<sup>347</sup> Currently, the recently passed Music Modernization Act (“MMA”) presents a system that unites all PROs to create a “Super PRO” and allows blanket licenses for digital streaming.<sup>348</sup> While the MMA may not specifically address sampling issues, the creation of a centralized Super PRO may trim transactions costs within the complex sampling system.<sup>349</sup>

#### V. ENHANCING THE SAMPLE LICENSING SYSTEM WITH ORGANIZATION AND TECHNOLOGY

Since the current sample clearance system possesses unreasonably high transaction costs, a lack of organization in

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Economy (Feb. 3, 2014), [https://www.uspto.gov/sites/default/files/documents/lapolt\\_and\\_tyler\\_comment\\_paper\\_02-10-14\\_0.pdf](https://www.uspto.gov/sites/default/files/documents/lapolt_and_tyler_comment_paper_02-10-14_0.pdf) [<https://perma.cc/EFQ9-Q6AB>].

ANDRE YOUNG, RE: REQUEST FOR COMMENTS ON DEPARTMENT OF COMMERCE’S GREEN PAPER ON COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (2014) (“I know that I wouldn’t have released some of my own songs had I known that, in the future, anyone could remix or alter them without my permission. There are others that feel the same way. Why create something when, ultimately, it could be legal for somebody else to destroy it?”).

<sup>345</sup> See Deena Zaru, *Steven Tyler Threatens Trump with Legal Action for Playing Aerosmith Music at Rallies*, ABC NEWS (Aug. 23, 2018, 4:50 PM), <https://abcnews.go.com/Politics/steven-tyler-trump-aerosmith-music-rallies-dream/story?id=57364775> [<https://perma.cc/HZ4U-XXA5>] (noting that Steven Tyler sent President Donald Trump a cease and desist letter for Trump’s use of Aerosmith’s “Livin’ on the Edge” at a political rally in West Virginia).

<sup>346</sup> In one example, Elly Jackson, professionally known as La Roux, stated that Fox Business’s use of her 2009 hit “Bulletproof” during a segment introducing bulletproof backpacks for school children was “abhorrent” and she would “never approve [her] music to be used in [that] way.” See Joshua Bote, *La Roux Calls Fox Business Using ‘Bulletproof’ in Back-to-School Segment ‘Abhorrent,’* BILLBOARD (Aug. 21, 2018), <https://www.billboard.com/articles/news/pride/8471506/la-roux-calls-out-fox-business-bulletproof-back-to-school> [<https://perma.cc/3FH3-ZK7J>].

<sup>347</sup> See Music Modernization Act of 2018, S. 2823, 115th Cong. (Oct. 11, 2018).

<sup>348</sup> See *id.*

<sup>349</sup> See *id.*; see also *infra* Section V.B for a discussion on how the MMA could initiate a streamlined sampling system.

identifying copyright ownership, and a serious disparity between the artists who can afford a sample and those who cannot, the sample clearance system ought to be redesigned. Due to a lack of clarity from the courts, an optimal solution to the expensive and bureaucratic sampling licensing system may be a solution that combines legislation with developing technologies in the marketplace. With these tools at hand, there is an opportunity to create a more affordable licensing system without critically weakening an artist's copyright, and achieve a balance between expression and control that is fairer for independent artists. To do so, it may be best to resolve the issues in licensing the musical composition copyright and the sound recording copyright separately. Section V.A will propose a compulsory license solution for sound recording samples, while Section V.B proposes a solution for musical compositions by applying blockchain technology to a unified licensing system.

*A. Sound Recording Solution: Tethering a Legislative Compulsory License*

Although a recent movement for a sample compulsory license was met with immediate pushback, a sample license can become affordable without sacrificing author control by involving the two copyrightable elements of a song in a compulsory license. Sound recordings and musical compositions are two separate copyrightable elements held by two different owners, but oftentimes share the same product.<sup>350</sup> Negotiating for two separate licenses for sampling creates a burdensome market for artists who wish to sample, especially for those who do not have the finances to afford both clearances.<sup>351</sup> Therefore, to promote the use of sampling, the licensing system must lower the amount of upfront costs for artists who wish to sample.

As discussed in Part IV, artists are profoundly not in favor of being required to license their work at a statutory rate to whomever

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<sup>350</sup> See generally LAPOLT & FOX, *supra* note 2.

<sup>351</sup> See *supra* Section II.A for a discussion on the difficulties of acquiring sample licenses and *supra* Section IV.A for a discussion on the complexity of the licensing system.

wishes to use it.<sup>352</sup> Because more artists generally possess ownership in the musical composition rather than the sound recording, the artists may feel differently toward imposing a compulsory license for sound recordings without altering the current freedoms within the composition copyright. Beyond financial interests, record labels, which usually are in possession of the recording copyright, do not possess much concern in copyrightable works.<sup>353</sup> If an artist clears a musical composition for another artist who wishes to sample, a record label should not be an insurmountable financial obstacle for independent artists attempting to create.

It may be in creativity's best interest for the legislation of a compulsory license for sound recordings that is only activated if an artist who wishes to sample successfully negotiates clearance for the corresponding musical composition sample. In this case, an artist's copyright to her music is not restricted and musical creativity is still afforded proper protection. Record labels, on the other hand, may not enjoy the limitation of the sound recording copyright because it would eliminate their ability to set their own fees for samples. Because of the size of the music industry, the sample licensing system is not an overwhelmingly lucrative part of a record label's business; therefore, a statutory rate for sound recording sampling licenses may be attainable.

If a compulsory license for sound recordings were to be implemented in this conditional fashion, it would most likely increase the value of the musical composition license. To ensure that sample clearances would remain affordable, musical compositions should be licensed at a certain percentage of ownership, as they usually are now, rather than a lump sum payment.<sup>354</sup> This would lower the upfront costs of sampling and allow independent artists to sample prior art while also ensuring that proper credit is attributed to the original artist on the back end. The ownership percentage could also be tethered to a statutory royalty rate for the corresponding sound recording.

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<sup>352</sup> See, e.g., YOUNG, *supra* note 344.

<sup>353</sup> See generally LAPOLT & FOX, *supra* note 2.

<sup>354</sup> See *id.*

For example, if an artist who samples negotiates a 25% ownership interest in exchange for the license to use the musical composition, the artist who samples would be entitled to sample the sound recording at a rate of \$0.005 per copy.<sup>355</sup> Perhaps a 50% ownership in the new composition, which is more common in extensive or higher profile samples, would correspond with a statutory sound recording rate at \$0.01 per copy.<sup>356</sup> This system would ensure that the overall costs of sampling would decrease and that both licenses would not possess an overwhelming cost at the onset of creation. Additionally, this would lower the transaction costs in obtaining each sound recording license because the clearance for one of the copyrightable elements would not invoke a months-long negotiation period.<sup>357</sup>

Artists still may only wish to sample a musical composition and would not want to pay a potential premium for the activation of the sound recording compulsory license.<sup>358</sup> Those artists could still negotiate a lump sum payment with the owner of the composition copyright and stipulate that a compulsory license for the sound recording would not be activated.<sup>359</sup> These terms can be documented with the Copyright Office, which will publicly recognize whether the musical composition agreement induces the compulsory use of its corresponding sound recording. If the sound recording was taken after previously stipulating that its use was

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<sup>355</sup> According to McLeod & DiCola, a 25% interest in return for a musical composition usually corresponds with a \$0.025 per copy rate for the sound recording. *See* McLEOD & DiCOLA, *supra* note 1, at 205.

<sup>356</sup> According to McLeod & DiCola, a 50% interest in return for a musical composition usually corresponds with a \$0.10 per copy rate for the sound recording. *See id.*

<sup>357</sup> *See supra* Section II.A for a discussion on the transaction costs of obtaining sampling licenses.

<sup>358</sup> *See supra* Section I.B for a discussion on sampling without a sound recording license.

<sup>359</sup> When an artist only samples the musical composition, the new song's similarities to the original track tend to be less than if it utilized the original sound recording. Because of the decrease in similarity, artists who wish to sample may bargain for a better deal if they are choosing to forgo the sound recording clearance. Hypothetically speaking, Lauryn Hill may have requested a larger share of Kanye West's "All Falls Down" musical composition if she knew that her voice was going to provide the hook, rather than Syleena Johnson's. *See supra* Section II.A for a discussion on interpolations and sampling without a sound recording license.

unwanted, the use of the composition would be in violation of the agreement and would amount to prima facie infringement.

The proposed conditional compulsory licenses for sound recordings would keep creative control in the hands of the artists, while also providing a more affordable system for artists who wish to sample. Additionally, if the need for negotiations between artists and record labels are eliminated, artists who wish to sample would not face discrimination for their status within the music industry. Whether it be acts like Lupe Fiasco and Frank Ocean who had public frustrations with their former labels or artists like Chance the Rapper who have made chart-topping hits about defying the label-dominated industry, these artists would primarily negotiate with other artists and their representatives, rather than the record labels themselves.<sup>360</sup>

Also, artists who wish to sample will not have to enlist the aid of third-party sample clearance agencies who have relationships in the industry to negotiate on their behalf, thus greatly lowering the amount of transactional costs associated with licensing sound recordings.

*B. Musical Composition Solution: Unified Licensing System & Blockchain Technology*

Because it is notably difficult to track down all the copyright ownerships within one musical composition without a thorough investigation, transaction costs can be significantly lessened if ownership information became readily accessible and the quantity of performing rights organizations (“PROs”) decreased. Two budding movements within the music industry can streamline a licensing system that needs organization and clarity: (1) the unification of PROs and (2) the development of blockchain technology. While this Note will not perform a deep analysis of how blockchain ledgers operate, it will demonstrate how members of the music industry have looked toward the technology to help alleviate general copyright complications and propose that its utility could improve the sample licensing system.

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<sup>360</sup> See *supra* Section II.A for a discussion on independent artists’ nonfinancial obstacles along the road to sampling.

### 1. Unification of the Licensing System

A current movement under the likes of the MMA would unite all PROs and create a “Super PRO” to allow blanket licenses for streaming services.<sup>361</sup> If the proposed Super PRO could act as an all-encompassing search tool for sample licensing, artists who wish to sample would not be required to enlist third party help to locate all the separate owners of the musical composition copyright. Presumably, most artists would sign their performances rights over to the Super PRO which would then keep a searchable database of all owners of the composition.<sup>362</sup> There would be no need to search through a myriad of PROs or email representatives of the original artists to track down the copyright’s current ownership status.<sup>363</sup>

A unified system for sampling would also serve a secondary purpose of educating artists and fans. If all musical compositions are documented within one publishing rights organization, artists and fans would also have the benefit of locating which artists have ownership interests in different musical works. If the Super PRO shares a public database, like BMI and SESAC currently do,<sup>364</sup> users can search for songwriting and production credits to understand how a sample was used in the making of a composition. Sampling culture has brought together sounds from different genres and generations to give a wide audience an insight into music history.<sup>365</sup> In recent years, there has been an interest for fans to obtain knowledge of who has been musically credited on their favorite artist’s album.<sup>366</sup> The more accessible the information of a

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<sup>361</sup> See *supra* Section IV.C for a discussion of the recently signed Music Modernization Act; see H.R. 4706, 115th Cong. (2017).

<sup>362</sup> See generally LAPOLT & FOX, *supra* note 2.

<sup>363</sup> See *supra* Section II.A for a discussion on the transaction costs of obtaining sampling licenses.

<sup>364</sup> BMI REPERTOIRE, <http://repertoire.bmi.com/DetailView.aspx?detail=titleid&keyid=12244833&ShowNbr=0&ShowSeqNbr=0&blnWriter=True&blnPublisher=True&blnArtist=True&blnAltTitles=True> [https://perma.cc/DYL6-TCBQ] (last visited Aug. 29, 2018) (advertising that BMI’s search engine allows for viewers to search through more than 13 million works from more than 800,000 songwriters); SESAC Repertory, <https://www.sesac.com/#/repertory/search?term=&category=song&page=1> [https://perma.cc/DF58-C56Z] (last visited Aug. 29, 2018).

<sup>365</sup> See *supra* Section I.A.

<sup>366</sup> To capture listeners’ interest in what artists are behind their favorite tracks, Spotify has recently developed its web player to show all attributable credits for songs and

song's creation is for artists and fans, the easier it is for them to learn about different artists, genres, and the overall evolution of music and entertainment.

## 2. Blockchain Technology to Track Copyrights and Cut Transaction Costs

The music industry has invested into new technologies that will evolve the entertainment experience.<sup>367</sup> In the past two decades, the music industry was drastically altered with the development of digital downloadable songs and once again with the popularity of streaming music.<sup>368</sup> New technologies can also shape how the music industry, especially sampling culture, will evolve in the future. Technologies and advancements that use blockchain ledgers could provide a more successful system for artists who wish to sample by significantly decreasing transactional costs and documenting copyright owners' identities.<sup>369</sup>

Blockchain technology aims at utilizing a decentralized secure database technology to document the recordation, reproduction, distribution, and trade of digital works of art.<sup>370</sup> Many industries that deal primarily with copyright issues, like photography and literature, have researched and developed blockchain databases that enable anyone to find, use, and trade the works of art in an authorized way.<sup>371</sup> Kodak recently partnered with WENN digital to launch KODAKOne, an image rights management platform, and KODAKCoin, a photo-centric cryptocurrency.<sup>372</sup> The two systems use blockchain technology to create an encrypted, digital ledger of photography ownership.<sup>373</sup> Photographers can use the systems to

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albums. *Spotify (Finally) Adds Songwriter and Producer Credits*, VARIETY (Feb. 2, 2018), <http://variety.com/2018/digital/news/spotify-adds-songwriter-and-producer-credits-1202684818/> [<https://perma.cc/BNZ5-TWPP>].

<sup>367</sup> See BARGFREDE, *supra* note 44, at 130.

<sup>368</sup> *Id.*

<sup>369</sup> *See id.*

<sup>370</sup> *See id.*

<sup>371</sup> *See id.*

<sup>372</sup> See *KODAK and WENN Digital Partner to Launch Major Blockchain Initiative and Cryptocurrency*, KODAK (Jan. 9, 2018), [https://www.kodak.com/corp/press\\_center/kodak\\_and\\_wenn\\_digital\\_partner\\_to\\_launch\\_major\\_blockchain\\_initiative\\_and\\_cryptocurrency/default.htm](https://www.kodak.com/corp/press_center/kodak_and_wenn_digital_partner_to_launch_major_blockchain_initiative_and_cryptocurrency/default.htm) [<https://perma.cc/C5JZ-58N9>].

<sup>373</sup> *See id.*

register new images or archive older works and license them within the platform.<sup>374</sup>

The technology is not unknown in the music industry. Musicoin, the world's first streaming blockchain that presents itself as a "cross between SoundCloud and Bitcoin," currently operates more than 1,500 verified independent artists and labels.<sup>375</sup> Artists like Lupe Fiasco, Imogen Heap, and EDM producer Gramatik currently view blockchain technology as a revolutionizing force for musical artists and have explored the technology as a source of income.<sup>376</sup> Organizations like the American Society for Composers, Authors and Publishers (ASCAP) and the Society of Authors, Composers and Publishers of Music (SACEM) have teamed with IBM to prototype a shared system of managing authoritative music copyright information using blockchain technology.<sup>377</sup>

In a blockchain ledger for music, songs would be registered through tagging and storing the musical composition in a database.<sup>378</sup> The service can provide a public record of ownership and a means to directly track a work back to its author.<sup>379</sup> Additionally, blockchain networks have the capability of recording

<sup>374</sup> *See id.*

<sup>375</sup> The platform has attributed more than three-hundred thousand plays and artists utilizing the platform have received more than four-hundred and twenty-thousand monetary tips from their listeners. *See Over 1,500 Verified Independent Musicians, Bands and Labels Now Use Musicoin*, MUSICOIN (Dec. 17, 2017), <https://medium.com/@musicoin/over-1500-verified-independent-musicians-bands-and-labels-now-use-musicoin-a87cfb1f2b1f> [<https://perma.cc/W8K4-URZK>].

<sup>376</sup> *See* John Lynch, *Rapper Lupe Fiasco Says Cryptocurrencies Are Like 'Baseball Cards,' but that Blockchain Can 'Revolutionize' the Music Industry*, BUSINESS INSIDER (Feb. 23, 2018, 1:59 PM), <http://www.businessinsider.com/lupe-fiasco-says-blockchain-can-revolutionize-the-music-industry-2018-2> [<https://perma.cc/2BHX-E7GP>] (quoting Lupe Fiasco) ("It's a disagreement that I've always had with Spotify, which was, they're saying, you can never get rid of piracy. And that's the reason we can charge .00000 nothing for a song, and completely devalue music, but then you have blockchain technology coming around, where you say, 'Ah, now we're able to kind of reverse that process,' by implementing a blockchain strategy when it comes to licensing music.").

<sup>377</sup> *See ASCAP, SACEM, And PRS For Music Initiate Joint Blockchain Project To Improve Data Accuracy For Rightsholders*, ASCAP, <https://www.ascap.com/press/2017/04-07-ascap-sacem-prs-blockchain> [<https://perma.cc/J3RL-PXSW>] (last visited Apr. 25, 2018).

<sup>378</sup> *See* BARGFREDE, *supra* note 44, at 130.

<sup>379</sup> *See id.*

self-executing contracts between parties, known as “smart contracts.”<sup>380</sup> After parties agree to certain terms, the smart contract is automatically performed through the technology.<sup>381</sup> Therefore, controlling licenses through smart contracts automatically enforces provisions like payment procedures and royalties.<sup>382</sup>

As discussed in Part III, it is currently difficult to simply discover and locate the rights-holders within the music industry. Allowing any composer or artist to register their own work in a central place and accurately define those involved in the production would simplify the process.<sup>383</sup> Spotify claimed that it did not have the technology to maintain licensing data about every artist on its platform.<sup>384</sup> The streaming service also admitted that it could not locate copyright owners to acquire mechanical licenses to use the artists’ work on its streaming service.<sup>385</sup> After being hit with a \$5 million penalty and settling a dispute with the National Music Publishers Association (NMPA) for upwards of \$20 million for unpaid royalties, Spotify acquired a blockchain start-up company called Mediachain Labs that can allow artists to claim attribution rights and receive payments in cryptocurrency for their contributions.<sup>386</sup>

Mediachain Labs has stated that digital rights management companies that utilize blockchain technology intend for their tools to solve a problem of lost or unknown identities within

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<sup>380</sup> *See id.*

<sup>381</sup> *See id.*

<sup>382</sup> *See id.*

<sup>383</sup> *See* Imogen Heap, *Blockchain Could Help Musicians Make Money Again*, HARV. BUS. REV. (June 05, 2017), <https://hbr.org/2017/06/blockchain-could-help-musicians-make-money-again> [<https://perma.cc/53AV-UGUP>] (“One of the biggest problems in the industry right now is that there’s no verified global registry of music creatives and their works.”).

<sup>384</sup> *See* Ben Sisario, *Spotify Reaches Settlement with Publishers in Licensing Dispute*, N.Y. TIMES. (Mar. 17, 2016), [https://www.nytimes.com/2016/03/18/business/media/spotify-reaches-settlement-with-publishers-in-licensing-dispute.html?\\_r=0](https://www.nytimes.com/2016/03/18/business/media/spotify-reaches-settlement-with-publishers-in-licensing-dispute.html?_r=0) [<https://perma.cc/M68H-7325>].

<sup>385</sup> *See id.*

<sup>386</sup> *See id.*; Joseph Young, *Spotify Acquires Blockchain-Based Startup to Tackle Fair Royalty Issues*, BITCOIN MAGAZINE (Apr. 29, 2017 9:33 AM) <https://bitcoinmagazine.com/articles/spotify-acquires-blockchain-based-startup-tackle-fair-royalty-issues/> [<https://perma.cc/DK46-NZ4X>].

copyright.<sup>387</sup> This could also aid the process of identifying copyright owners for the sake of acquiring a license to sample a musical composition.<sup>388</sup>

Such a large system would likely need assistance from the U.S. Copyright Office. Typically, ownership is established by referring to a U.S. Copyright registration certificate,<sup>389</sup> but blockchain technology would require an artist to register a work by time-stamping a transaction to show ownership at a particular time.

By cutting out a middle man and lowering the barrier of access within a common system, artists will be able to directly contact the owners of a copyrighted work for licensing purposes. Artists who wish to sample could proceed without the cost of hiring third parties to locate and negotiate with copyright owners.

Imogen Heap, who has detailed her licensing experiences and proposed various solutions in the *Harvard Business Review*, founded the blockchain-based service *Mycelia* that provides her more control over how her songs are circulated among fans and other musicians.<sup>390</sup> Fans have been going directly to Heap through *Mycelia* to purchase her music.<sup>391</sup> Artists are going directly to Heap for licenses to stream, remix, or sample.<sup>392</sup> Heap believes that blockchain “has the potential to get the music industry’s messy house in order.”<sup>393</sup> Heap envisions a music industry where artists own their own verified music creative platform that possess a blockchain-enabled registry storing data like biographies, tour dates, press images, charities, and song authorship information.<sup>394</sup>

Heap’s *Mycelia* is also experimenting with a “Life of a Song” exhibit that will launch as part of Heap’s “*Mycelia World Tour*”

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<sup>387</sup> See Sarah Perez, *Spotify Acquires Blockchain Startup Mediachain to Solve Music’s Attribution Problem*, TECHCRUNCH, (Apr. 26, 2017), <https://techcrunch.com/2017/04/26/spotify-acquires-blockchain-startup-mediachain-to-solve-musics-attribution-problem/> [https://perma.cc/BC4A-HHR9].

<sup>388</sup> See *id.*

<sup>389</sup> See *Records Research and Certification Services*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/trc/> [https://perma.cc/D8RJ-EHQJ] (last visited Oct. 5, 2018).

<sup>390</sup> See Heap, *supra* note 383.

<sup>391</sup> See *id.*

<sup>392</sup> See *id.*

<sup>393</sup> See *id.*

<sup>394</sup> See *id.*

and may inspire a streamlined world of music.<sup>395</sup> “Life of a Song” will develop a “Hide and Seek” song biography in an interactive system.<sup>396</sup> The exhibit will show “Hide and Seek’s” breakdown of ownership rights and split percentages for all copyrightable elements.<sup>397</sup> It will show each artist and contributor’s income from the track, as well as the song’s overall worth in sales, streams, and radio spins.<sup>398</sup> Viewers will also see “Hide and Seek’s” ownership stakes and revenue from covers, remixes, and samples.<sup>399</sup> The platform and its blockchain-enabled registry will give artists and fans the ability to see how “Hide and Seek’s” legacy has influenced and profited from Jason DeRulo’s “Whatcha Say.”<sup>400</sup>

By exploring Heap’s use of new technology, all information about the copyright life of a single song can be documented in one interactive display of the complex, yet beautiful music industry. Independent artists who wish to sample could have all that information at the touch of a button without emptying their wallets for third-party services. With less transactional costs and barriers in the sample licensing system, more funds and effort can be placed in negotiating for proper license and creating innovative music. By finally organizing a complicated music licensing system, blockchain “holds the potential to give us a golden age of music not just for its listeners, but for those who make it, too.”<sup>401</sup>

## CONCLUSION

American percussionist and record producer Ahmir Thompson, known professionally as Questlove, took to Instagram in September 2016 to voice his displeasure with the current sample

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<sup>395</sup> *Mycelia Life of a Song Website Project Brief*, MYCELIA FOR MUSIC, <http://www.myceliaformusic.org/loas/LOAS-Brief.pdf> [https://perma.cc/8UHN-LQWR] (last visited Apr. 4, 2018).

<sup>396</sup> *See id.*; *Life of a Song*, MYCELIA FOR MUSIC, <http://myceliaformusic.org/life-of-a-song/> [https://perma.cc/9SMA-TQYR] (last visited Apr. 4, 2018).

<sup>397</sup> *Mycelia Life of a Song Website Project Brief*, *supra* note 395.

<sup>398</sup> *See id.*

<sup>399</sup> *See id.*

<sup>400</sup> *See id.*

<sup>401</sup> *See* Heap, *supra* note 383.

licensing system.<sup>402</sup> After he described what he feels is “beautiful” in hip-hop sampling, Thompson called out the corporate side of the industry and stated that publishers and record labels have made sampling “unobtainable and only an option for the rich.”<sup>403</sup> In somewhat of a hyperbole, Thompson also wrote “let’s face it: [Kanye West] & [Jay-Z are] the only cats who can afford samples in hip-hop.”<sup>404</sup>

Because sampling has been instilled in hip-hop’s culture since its birth and it is now utilized routinely in other genres of popular music,<sup>405</sup> it is problematic that only those with financial means can capitalize on a form of creativity so heavily embraced in modern music.<sup>406</sup> Only already-successful artists or artists who can obtain large investments for their projects dictate the scope of creativity in the music world.<sup>407</sup> New and independent artists wish to dictate the bounds of sonic creativity as well, but the current system denies them of that possibility.

The balance between creativity and copyright protection has been a difficult task for the legal world to sort since Biz Markie was recommended for criminal prosecution, and while courts have ruled on whether to afford defenses to samplers, the decisions have led many independent artists to play it safe and avoid the sampling process.<sup>408</sup>

Through legislative creativity and embracing the assistance of coordination-enhancing technologies, the music industry can place itself in a position where financial capabilities no longer define the bounds of artistic creativity.

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<sup>402</sup> Questlove (@questlove), INSTAGRAM (Sept. 9, 2016), <https://www.instagram.com/p/BKIHA3ABvyd/> [<https://perma.cc/QZA5-CT7G>].

<sup>403</sup> *See id.*

<sup>404</sup> *See id.*

<sup>405</sup> *See generally* LAPOLT & FOX, *supra* note 2.

<sup>406</sup> *See* MCLEOD & DICOLA, *supra* note 1, at 173.

<sup>407</sup> *See id.*

<sup>408</sup> *See generally* Grand Upright Music, Ltd. v. Warner Bros. Records, 780 F. Supp. 182 (S.D.N.Y. 1991); *see also supra* notes 4–5 and accompanying text.