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SAMPLING: MUSICAL AUTHORSHIP OUT OF TUNE WITH THE PURPOSE OF THE COPYRIGHT REGIME

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INTRODUCTION

While the present debate over the practice of sampling[1] may seem to be just a minuscule footnote in the evolution of copyright law, the legal battle that sampling is presently engaged in illuminates many of the future, and ongoing, issues that copyright law faces. One of those major issues is whether copyright law embraces the true nature of creation and authorship. An individual's view on the nature of authorship essentially frames his or her opinion on the legitimacy of creative forms built upon appropriation,

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1. Newton v. Diamond, 388 F.3d 1189, 1192 (9th Cir. 2004) (defining sampling as "the incorporation of short segments of prior sound recordings into new recordings").

such as sampling. This article asserts that there are two legitimate forms of authorship: romantic and dialogical. The prevalent view of authorship, in copyright law, is that of romanticism.[2] Romanticism is based upon the theory that an author is in essence a "lone genius," or one who creates from scratch.[3] The other end of the spectrum is that creation is by nature more dialogical, or collaborative.[4] The premise being that an artistic work is a product of the influences and creations which came before it. Hence, creativity is achieved by engaging and "borrowing" from the past. However, both conceptions of artistic creation do not necessarily have to be all or nothing.[5] A person, as well as a copyright system, can recognize that creation occurs both from scratch and collaboration. Nevertheless, the American courts and legislatures have refused to fully recognize this dialogical nature of creation, in addition to the well-recognized, so-called "original authorship." This failure of the courts to recognize the full range of authorship occurred most recently in *Bridgeport Music, Inc. v. Dimension Films.*[6] As a result of the court's unwillingness to acknowledge that creation can be collaborative in nature, an enormous amount of creative forms of expression are being suppressed. By extension, the failure of the copyright regime to encourage this form of artistic expression also hinders the purpose of American copyright law which is "[t]o promote the Progress of Science and useful Arts."[7] The American copyright regime must not only recognize a wider conception of artistic creation, but also must align such conception with the purpose of the copyright regime. Specifically in the context of sound recording appropriation, the American copyright regime can properly recognize the true nature of authorship and promote the purpose of the regime by slightly adapting currently

2. Olufunmilayo Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 550–51 (2006).

3. *E.g.*, *id.* at 550 (referencing the romanticism concept of authorship, "[e]xisting copyright structures are rooted in a notion of musical practice and authorship that is linked to the formation of the classical music canon, an invented tradition that had largely emerged by the last half of the nineteenth century.").

4. *See id.* at 630–31. This is similar to the postmodernist belief that nothing truly new can be created, and "new" creations are always influenced indirectly or directly by what came before them. *See id.*

5. *See id.* at 630. However, if you fully embrace the postmodernism theory that "original creations" are no longer achievable, then you could not reconcile such with the romanticism conception of creation. *Id.*

6. 383 F.3d 390 (6th Cir. 2004), reh'g en banc granted, 401 F.3d 647 (6th Cir. 2004).

7. U.S. CONST. art. I, § 8, cl. 8.

recognized copyright tests, such as the substantial similarity and fair use tests.[8]

I. COPYRIGHT PROTECTION OF SOUND RECORDINGS

A. STRUCTURE OF THE AMERICAN COPYRIGHT SYSTEM

The legitimacy of the American copyright regime is established through the Constitution which authorizes congressional action "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[9] Thus, an author's right to exploit his or her artistic work for gain is not the purpose of the copyright regime, but rather a means to achieve the overarching goal of progress (or public benefit).[10] The underlying logic is that the most effective approach in which to encourage the production and dissemination of creative works to the public is to provide authors with economic rights.[11]

The United States Copyright Act lists eight categories of works which are deemed to be the appropriate subject matter for copyright protection: literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial and sculptural works, motion pictures, sound recordings, and architectural works.[12] However, even if a work fits into one of the enumerated categories, the Act will only grant protection to "original works of authorship fixed in any tangible medium of expression."[13] In other words, in order to qualify for copyright protection, a work must be one of authorship, original and fixed.[14] Once a work is deemed "copyrightable," the Act confers upon the copyright owner

8. *See* Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc. 150 F.3d 132, 137 (2d Cir. 1998); 17 U.S.C. § 107 (2007).

9. U.S. CONST. art. I, § 8, cl. 8.

10. *See, e.g.*, MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A] (1978).

11. *See, e.g.*, Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1235 (3d Cir. 1986) (stating that "we must remember that the purpose of the copyright law is to create the most efficient and productive balance between protection (incentive) and dissemination of information, to promote learning, culture and development.").

12. 17 U.S.C. § 102(a) (2007).

13. *Id.*

14. *See generally* Bridgeport Music, Inc. v. Dimension Films, 401 F.3d 647, 655 (6th Cir. 2004) (holding that once the musical composition is determined to be original, the threshold for originality in a sound recording "is met by the fixation of sounds in the master recording").

exclusive rights.[15] Copyright infringement then occurs when, without permission or authorization, a person exercises one of the exclusive rights held by the copyright owner.[16]

1. Sound Recording Copyright Protection

A musical work is comprised of two copyrightable pieces: the sound recording and musical composition.[17] The Copyright Act defines sound recordings as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes or other phonorecords, in which they are embodied."[18] A musical composition, on the other hand, is a written arrangement containing notes and/or lyrics of a song.[19] For the most part, the practice of sampling can result in an actionable infringement claim of both the sound recording and musical composition.[20]

Historically, American copyright law did not acknowledge the protection of sound recordings. However, in 1971, due to the advent of duplication technology,[21] the United States Congress enacted the Sound Recordings Act,[22] and subsequently sound recordings found protection

15. 17 U.S.C. § 106 (2007). Under § 106, most copyright owners are granted the following exclusive rights:

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

Id.

16. 17 U.S.C. § 501 (2007).

17. *See* R.P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE, 371 (3d ed. 2003).

18. 17 U.S.C. § 101 (2007). In other words, a sound recording is the performance of a musical composition fixed onto a device capable of replaying the performance.

19. *See* MERGES, *supra* note 17, at 371.

20. *See Newton*, 388 F.3d at 1190.

21. *See* Ronald Mark Wells, *You Can't Always Get What You Want But Digital Sampling Can Get What You Need*, 22 AKRON L. REV. 691, 697 (1988) ("virtually one-fourth of all the records and tapes sold in the United States were illegal duplicates").

22. Sound Recordings Act, Pub. L. No. 92-140, 85 Stat. 391 (1971).

under the 1976 Copyright Act.[23] Interestingly, while Congress acknowledged that copyright laws should serve to protect the owners of sound recordings, the rights granted to such owners were limited.[24] Under the Act, copyright holders are usually entitled to five exclusive rights: reproduction, preparation of derivative works, distribution, public performance, and public display.[25] However, by statute, Congress did not grant copyright owners of sound recordings the right of public performance.[26] Furthermore, in addition to the exclusion of the right of public performance, copyright owners of sound recordings also have limited rights regarding reproduction and derivative works as compared to the copyright owners of other types of works.[27] The exclusive right that allows the copyright owner of a sound recording to reproduce the work is limited to the specific sounds contained in the fixed recording.[28] Thus, a copyright owner of a sound recording cannot prevent an artist from recording an imitation of the sound recording itself.[29] As a result, an infringement of a sound recording only occurs when a party reproduces the recording "in phonorecords by repressing, transcribing, recapturing off the air, or any other method, or by reproducing them in the soundtrack or audio portion of a motion picture or other audio visual work."[30] Similarly, the derivative rights of sound recordings are also limited to the fixed recording themselves.[31] Hence, an artist is free to imitate the sounds of a recording and alter them in sequence or quality, all without infringing on the derivative rights of the sound recording's copyright owner. Despite these limitations, some scholars still believe sound recordings have received substantial protection.[32]

B. FINDING INFRINGEMENT

A valid infringement claim requires a plaintiff to prove valid copyright ownership, actual copying, and unauthorized appropriation of the

23. 17 U.S.C. § 102(a)(7) (1976).
24. *See* 17 U.S.C. § 106 (2007).
25. *Id.*
26. 17 U.S.C. § 114(a) (2007). In essence their rights were limited to section 106 (1), (2), (3), and (6) of the Copyright Act.
27. *See* 17 U.S.C. § 114(b) (2007).
28. *See id.*
29. *Id.*
30. H.R. Rep. No. 94-1476, at 106 (1976).
31. *See id.*
32. *See, e.g.*, Jeffrey F. Kersting, Comment and Casenote, *Singing a Different Tune: Was the Sixth Circuit Justified in Changing the Protection of Sound Recordings in* Bridgeport Music, Inc. v. Dimension Films*?*, 74 U. CIN. L. REV. 663, 670 (2005).

original element of the work.[33] However, practically speaking, because sampling involves a literal taking,[34] valid copyright ownership and proof of copying are usually not contentious issues in sound recording infringement claims.[35] The contentious issue, and the issue we will be closely analyzing, is appropriation without authorization. Unlawful appropriation is for the most part determined by the application of the substantial similarity test.[36] However, even upon a court's finding that an original and appropriated work are "substantially similar," a defense of fair use is available for a defendant.[37]

1. Substantial Similarity Analysis

The test used by the courts to determine instances of unlawful appropriation is whether the two works can be considered to be substantially similar.[38] The courts have commented that "even where the fact of copying is conceded, no legal consequences will follow from that fact unless the copying is substantial."[39] Thus, if an appropriation is considered by the courts to be *de minimis*,[40] i.e. trivial or insignificant, such copying would not constitute infringement.[41] However, presently there is no bright-line standard to determine what constitutes *de minimis* copying.[42]

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33. Stephen R. Wilson, *Music Sampling Lawsuits: Does Looping Music Samples Defeat the De minimis Defense?*, 1 J. HIGH TECH. L. 179, 183 (2002).

34. Taking means appropriating an exact portion of the original work. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565 (1985) (noting that a taking can involve copying a work verbatim).

35. Usually the copyright owner of a sound recording will register the work, which creates a rebuttable presumption of ownership. *See* Bridgeport Music, Inc. v. Dimension Films, 230 F. Supp. 2d 830, 839 (M.D. Tenn. 2002). In terms of the originality of a sound recording, as previously indicated in *Bridgeport*, if the musical composition is deemed to be original, then the fixation of such sounds will be deemed original. *See generally id.* at 838–39. Lastly, often sampling artists admit to appropriating another's work, or it is relatively obvious that copying occurred, thus proof of copying in sound appropriation cases usually is not a contentious issue. *See* Lauren Fontein Brandes, Comment, *From Mozart to Hip-Hop: The Impact of* Bridgeport v. Dimension Films *on Musical Creativity*, 14 UCLA ENT. L. REV. 93, 106 (2007).

36. *See, e.g.*, Brandes, *supra* note 35, at 106.

37. *See id.* at 113.

38. *See e.g.*, *Newton*, 388 F.3d at 1194–95.

39. *Id.* at 1193.

40. *E.g.*, Wilson, *supra* note 33, at 185. *De minimis* is a Latin phrase meaning "the law does not concern itself with trifles." *Id.* (quoting Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74 (1997)).

41. *See Newton*, 388 F.3d at 1192–93. Prior to the decision in *Bridgeport*, *de minimis* use was a common claim by defendants in sound appropriation infringement cases.

42. *See* NIMMER, *supra* note 10, at § 13.03 [A][2]. *Cf. Newton*, 388 F.3d at 1195 (holding that *de minimis* use is when "the average audience would not recognize the appropriation," however this subjective test is a far cry from establishing a bright-line standard).

Nimmer holds that there are two types of similarities: comprehensive non-literal and fragmented literal.[43] Sampling cases are clearly a species of fragmented literal similarity, where the appropriated work is an exact copy of the original work; usually a "sample" contains only a small portion of the original work.[44] The substantial similarity test for works created by fragmented literal appropriations requires both a qualitative and quantitative analysis.[45] The quantitative analysis focuses on the amount, or length, of the material appropriated from the original work.[46] In essence, the analysis is one of determining how important the appropriated portions are to the original work; hence aspects like the recognizibility and popularity of the portions are considered.[47] The qualitative and quantitative factors are balanced by the courts to determine whether the defendant has taken so much as to have harmed the original copyright owner.[48] Recently, in cases pertaining to musical composition infringement, some courts have begun to utilize the "ordinary observer" test.[49] This test requires the court to inquire whether an ordinary observer, despite the differences between the two works in question, would consider the two works to have the same "aesthetic appeal."[50]

2. Fair Use

If a court finds an appropriation to be more than *de minimis*, and the appropriated work is substantially similar to the original, a defense of fair use is available to an accused.[51] As defined in Black's Law Dictionary, fair use is the "reasonable and limited use of a copyrighted work without the author's permission."[52] Traditionally, this defense has been most successful when the infringing work can be said to advance the public interest, while only minimally harming the economic prospects of the

43. *See* NIMMER, *supra* note 10, at § 13.03 [A][2] (explaining that comprehensive non-literal similarity relates to when a defendant copies the theme or underlying concept of a work).

44. *See Newton*, 388 F.3d at 1195.

45. *Ringgold*, 126 F.3d at 75.

46. *Id.*

47. *See* NIMMER, *supra* note 10, at § 13.03 [A][2][a].

48. *See* Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901).

49. *See Newton*, 388 F.3d at 1193. *See also Bridgeport*, 230 F. Supp. 2d at 840 (undertaking the ordinary observer test in determining substantial similarity); NIMMER, *supra* note 10, at § 13.03 [E][1].

50. *See, e.g.*, Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

51. *See* Brandes, *supra* note 35, at 113.

52. BLACK'S LAW DICTIONARY 634 (8th ed. 2004).

copyright holder of the original work.[53] The Copyright Act acknowledges that works "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" are most likely to constitute fair uses.[54] It is important to note that the enumerated purposes referred to in the Act are not exhaustive; as well the fact that a work's purpose is explicitly identified in the Act will not automatically qualify it for fair use protection.[55]

The Copyright Act explicitly states the guidelines a court should use in determining the legitimacy of a fair use claim.[56] First, the court will consider "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[57] Second, the court will determine "the nature of the copyrighted work."[58] Third, the court analyzes "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[59] Finally, the court considers the effect of the new work on the market potential of the original copyrighted work.[60] The court then balances the aforementioned factors to determine the validity of a fair use claim.[61]

II. SAMPLING OVERVIEW AND JURISPRUDENCE REVIEW

A. SAMPLING BACKGROUND

Sampling is "the incorporation of short segments of prior sound recordings into new recordings."[62] In essence, sampling is just a form of

53. ROBERT A. GORMAN & JANE C. GINSBERG, COPYRIGHT CASES AND MATERIALS 614 (6th ed. 2000).

54. 17 U.S.C. § 107 (2007).

55. *See* A. Dean Johnson, Comment, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits*, 21 FLA. ST. U. L. REV. 135, 144 (1993).

56. 17 U.S.C. § 107.

57. 17 U.S.C. § 107(1). *See also* Harper & Row Publishers, Inc. v. Nation Enters., 71 U.S. 539, 562 (1985) (explaining that commercial uses create a presumption against a finding of fair use).

58. 17 U.S.C. § 107(2). *See also* Johnson, *supra* note 55, at 149 (explaining that if the original work was creative, fictional, or unpublished, this heavily weighs against a finding of fair use).

59. 17 U.S.C. § 107(3). While this factor is also used during the substantial similarity analysis, at the fair use stage the amount and substantiality of the appropriated portion is just one of the four elements which must be analyzed and balanced.

60. 17 U.S.C. § 107(4). *See also* Johnson, *supra* note 55, at 154. The basic proposition of this factor is that "the court must weigh the benefit gained by the copyright owner when [the] use is deemed unfair against the benefit gained by the public when [the] use is deemed unfair." *Id.*

61. *See* Johnson, *supra* note 55, at 144–45.

62. *Newton*, 388 F.3d at 1192.

musical borrowing; a long-established musical practice.[63] In the past, musical borrowing consisted of artists appropriating general themes and ideas from other artists and incorporating them into their own new works.[64] However, with the advent of technology the fundamental nature of musical borrowing has undergone an important change.[65] Today, a music producer can digitally copy a sound recording, place it into his or her own work, and then have the option to use it only once, or loop it throughout the new work.[66] Basically, the practice of musical borrowing has evolved from the appropriation of intangibles, such as ideas and themes, to the appropriation of the exact expression itself.

The establishment of digital sampling as a prevalent practice in music has raised numerous challenges and questions for the American copyright regime. Firstly, should the courts recognize works derived through appropriation as deserving of copyright protection? Secondly, if we recognize this form of creation, where do we draw the line between protecting the original artist from inappropriate appropriations[67] and encouraging those appropriations which "push the boundaries of musical creativity"?[68] While the court in *Bridgeport* had a great opportunity to establish the foundation for such a balance, and to align the legal framework of sound appropriation with the purpose of the American

63. *See* J. PETER BURKHOLDER, THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 35 (2d. ed. 2001) (identifying Rap music as an extension of the musical tradition of borrowing).

64. *See* Eric Shimanoff, *The Odd Couple: Postmodern Culture and Copyright Law*, 11 MEDIA L. & POL'Y 12, 22–23 (2002) (discussing the postmodern appropriation in the musical arts).

65. *See, e.g.*, *id.* at 24 (discussing that sampling from sound recordings began in Jamaica in the 1960's with a practice called "dub Reggae," in which a disc jockey would use turntables to mix together two records and an artist would improvise lyrics over the records); Wilson, *supra* note 33, at 182 (discussing the massive proliferation in sampling as digital sampling became an inexpensive method for musical production where creators no longer had to hire musicians to produce sounds).

66. *See* Kersting, *supra* note 32, at 665–66. A "looped" sample is when the same sample is repeated numerous times throughout a new composition. *See id.* As current legal tests stand, courts only analyze the portion appropriated from the Plaintiff's work, thus looping would most likely not affect the outcome of an infringement claim. *See Newton*, 388 F.3d at 1195.

67. Examples of such appropriations would be those that do not progress music and/or the arts, appropriations where the new work acts as a substitute for the original work and appropriations solely for the purpose of subsidizing production costs. *See generally* Shimanoff, *supra* note 64, at 14.

68. Steven D. Kim, Casenote, *Taking De minimis Out of the Mix: The Sixth Circuit Threatens to Pull the Plug on Digital Sampling in* Bridgeport Music, Inc. v. Dimension Films, 13 VILL SPORTS & ENT. L.J. 103, 103 (2006).

copyright regime, instead the court issued the restrictive mantra "[g]et a license or do not sample."[69]

B. *BRIDGEPORT MUSIC, INC. V. DIMENSION FILMS*[70]

After years of confusing case law, pertaining to sampling, the Sixth Circuit court in *Bridgeport* laid down the fundamental rule, "[g]et a license or do not sample";[71] thereby rejecting traditional copyright tenets[72] and effectively outlawing the practice of sampling without authorization.

In *Bridgeport,* the court unanimously held that the two traditional tests to determine copyright infringement, *de minimis* and substantial similarity, were not appropriate for sound recording infringement cases, even though these tests are used for musical composition infringement cases.[73] The court justified this finding by interpreting the Copyright Act[74]

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69. *Bridgeport*, 383 F.3d at 398.

70. *Id.* at 390. *Bridgeport* was a case involving the 1998 movie soundtrack *I Got the Hook Up*. *Id.* at 393. The soundtrack contained the song *100 Miles and Runnin'* by N.W.A., which featured a sample from a George Clinton Jr. and the Funkadelics' work entitled *Get Off Your Ass and Jam*. *See id.* at 393–94. The appropriated sample was a three-note guitar segment, which was altered, extended and then looped throughout the entire song. *See id.* at 394.

71. *Id.* at 398.

72. *See* Kersting, *supra* note 32, at 665 (discussing the court's decision in *Bridgeport* to abandon the *de minimis* and substantial similarity tests).

73. *Bridgeport*, 383 F.3d at 396. *See also* Kersting, *supra* note 32, at 678–79 (discussing the court's rationale in *Bridgeport* for rejecting the use of "de minimis and substantial similarity analysis when evaluating infringement of a copyright in a sound recording").

74. 17 U.S.C. § 114(b) (2006); *see also Bridgeport*, 383 F.3d 390 at 398 (noting that:

> [T]he copyright act states that, 'The exclusive rights of the owner of copyright in a sound recording . . . do not extend to the making or duplication of another sound recording that consists *entirely* of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording' [17 U.S.C. § 114(b)] (emphasis added). By using the words '*entirely* of an independent fixation" in referring to sound recordings which may imitate or simulate the sounds of another, Congress may have intended that a recording containing *any* sounds of another recording would constitute infringement. Thus, it would appear that any unauthorized use of a digital sample taken from another's copyrighted recording would be an infringement of the copyrighted recording.).

But see Recent Case, Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390 (6th Cir. 2004), 118 HARV. L. REV. 1355, 1359 (2005) (stating that:

> Although the court in *Bridgeport Music* relied heavily on the copyright statute to justify its holding, nothing in the statute's history or language requires that a substantial-similarity inquiry not apply to a sound recording copyright. The court found that the sound recording copyright owner's right to create a derivative work leads to a strict prohibition of sampling, but even a purely textual analysis of the statute proves this interpretation misguided.).

But see also Kersting, *supra* note 32, at 681 (considering the "uncertainty of congressional intent regarding the treatment of copyrighted sound recordings, the better approach is to err on the side of traditional copyright jurisprudence and continue to apply the de minimis and the substantial similarity standards to all copyrighted works, including copyrighted sound recordings.").

as giving a "congressional grant of an unmitigated right to the owner of a copyright in a sound recording to sample or otherwise copy his recording."[75] Specifically, in other words, the court felt a literal reading of the Act gave copyright owners of sound recordings an exclusive right to sample their own sound recordings.[76] Therefore, the only relevant requirement needed in order to find copyright infringement of a sound recording is that the sound recording was copied without authorization;[77] hence the mantra "[g]et a license or do not sample."[78]

The court then proceeded to advance numerous policy rationales for its holding.[79] First, the court felt that considering the subjectivity and time-consuming nature of the *de minimis* and substantial similarity tests, a bright line test would increase judicial efficiency.[80] Second, the court acknowledged that, while it used its best efforts to give a literal reading to the statute, it was unable to unearth the exact intent of Congress.[81] The court further added that Congress is in the best position to sort out this complex matter, if needed.[82] Third, the court asserted that because artists are free to imitate sound recordings, the court's decision will not stifle creativity and may even encourage the establishment of a sound recording licensing scheme.[83] Finally, the court commented that "even when a small part of a sound recording is sampled, the part taken is something of value";[84] thus artists who appropriate could drastically reduce their

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Furthermore, as a general principle, when statutory provisions seem ambiguous, courts should turn to history of the legislation for guidance. *Id.* at 684. When analyzing the House Reports it becomes clear that Congress did not mean to eliminate the substantial similarity test for sound recordings. *Id.* at 685.

75. Recent Case, *supra* note 74, at 1356.

76. *Bridgeport*, 383 F.3d at 398.

77. *Id.* at 396 n.5 (citing BRADLEY C. ROSEN, 22 CAUSES OF ACTION § 12 (2d ed. 2003).

78. *Id.* at 398.

79. *See id.* at 398–400.

80. *Id.* at 402. However, the assumption that the creation of a bright-line standard will increase judicial efficiency is not sound. *See* Kersting, *supra* note 32, at 685. In practice, while the substantial similarity and *de minimis* tests will not be undertaken during the initial infringement analysis, they may still be undertaken during the fair use analysis. *See id.* at 685–86.

81. *Bridgeport*, 383 F.3d at 401–02.

82. *Id.* at 402.

83. *See id.* at 401. *But see* John Schietinger, Bridgeport Music, Inc. v. Dimension Films: *How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 236 (2005) (arguing that the court's assumption may be misguided due to the fact that many artists cannot afford to hire musicians, are sometimes interested in using the exact form of expression which is fixed on that sound recording, and moreover, due to the artist's skill, or luck, it is impossible to duplicate a specific sound).

84. *Bridgeport*, 383 F.3d at 399.

production costs, while others would be burdened with the full cost, thereby creating an unbalanced playing field.

1. Where Does This Leave "Fair Use"?

While legal scholars scold the court for its mantra "[g]et a license or do not sample,"[85] that phrase is not entirely accurate. Approximately three months after the decision, the court amended the last paragraph of its comments to read:

> These conclusions require us to reverse the entry of summary judgment entered in favor of No Limit Films on Westbound's claims of copyright infringement. Since, the district judge found no infringement, there was no necessity to consider the affirmative defense of 'fair use.' On remand, the trial judge is free to consider this defense and we express no opinion on its applicability to these facts.[86]

However, the *Bridgeport* decision, while keeping intact the substantive law behind the defense of fair use, may have drastically influenced the practical application of the defense in the context of sampling.[87] Of specific concern is how the decision may impact the third consideration of the defense, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[88] As a result of the court's finding that all license-less appropriations of sound recordings are infringing uses, subsequent courts could interpret such a holding as supporting the view that all appropriations are thereby substantial.[89] Thus, the fear is that, when courts examine the third consideration of the fair use defense, this factor will always weigh in favor of the owner of the original work, instead of using the qualitative and quantitative analysis.[90] While it is aptly noted that the fair use defense is one of balancing the appropriate factors, corrupting one factor will severely bias the whole analysis. Additionally, another concern is that despite the court's amended comments,[91] subsequent courts may be so heavily influenced by the "[g]et a license or do not sample"[92] mantra, that they may either ignore the

85. *Id.* at 398.

86. *Bridgeport*, 401 F.3d at 661.

87. *See* Kersting, *supra* note 32, at 686.

88. 17 U.S.C. § 107(3) (2007). *See* Kersting, *supra* note 32, at 686 ("Traditionally, when evaluating this particular factor of the fair use defense, courts have employed the same quantitative and qualitative analysis that is required under the *de minimis* and substantial similarity doctrines.").

89. *See* Kersting, *supra* note 32, at 686. *See also* Kim, *supra* note 68, at 130.

90. *See* Kersting, *supra* note 32, at 686–687.

91. *See Bridgeport*, 401 F.3d at 647.

92. *Bridgeport*, 383 F.3d at 398.

application of a fair use defense in sampling cases altogether, or apply only lip-service to evaluating the applicability of the defense.[93] Therefore, even though the fair use defense is technically still available to those who infringe copyrighted sound recordings, major barriers may exist for those infringers who attempt to rely on the defense.

III. ALIGNING SOUND APPROPRIATION WITH THE PURPOSE OF THE AMERICAN COPYRIGHT REGIME

A. ESSENCE OF CREATION

When considering the impact of *Bridgeport*,[94] it is important to remember that the purpose of the American copyright regime is "[t]o promote the Progress of Science and useful Arts."[95] To truly evaluate the effect of this decision, we must take a macro view on the issue of sampling and determine whether appropriated works even constitute art. If we exclusively accept the view that a creator is a "lone genius," one who creates from scratch, then works built upon appropriation should not constitute art, or for that matter be protected by copyright law. Therefore, the decision in *Bridgeport*, to prohibit all licensee-less sampling,[96] would be the correct holding. However, many courts have embraced a broader definition as to the nature of authorship and creation. The Ninth Circuit has commented that:

> [n]othing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture.[97]

Thus, once all courts accept that the nature of creation can be dialogical and conversational, the "[g]et a license or do not sample"[98] sentiment becomes unacceptable as an obvious measure of overprotection. Appropriation, especially in the context of sampling, should be recognized as a valid form of creation, and protected by copyright law to the extent that the re-created work progresses useful arts and the public good.

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93. *See* Kersting, *supra* note 32, at 687.
94. 383 F.3d at 398.
95. U.S. CONST. art. I, § 8, cl. 8.
96. *Bridgeport*, 383 F.3d at 394–95.
97. White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1513 (9th Cir. 1993).
98. *Bridgeport*, 383 F.3d at 398.

As previously alluded to, appropriation (or borrowing) has always been a part of musical authorship. Classical composers would often use segments, motifs, and themes from prior works to construct their new works.[99] The practice of appropriation ranged from "verbatim copying of musical phrases to uses of [pre-]existing works that involve some level of influence or allusion."[100] In addition to appropriation found in classical music, borrowing has also been an integral part of operatic musical works,[101] jazz and blues,[102] and rock & roll.[103] Furthermore, it should be noted that this borrowing has not led historians or music critics to question an artist's artistic merit or creativity.[104]

This article does acknowledge that the advent of sound appropriation technology, and the proliferation of sampling, significantly expands the theory of dialogical creation into unknown, and uncharted, waters. While in the past, creators would generally borrow themes and ideas from other artists, appropriation in the context of sound recordings results in the use of the actual fixed expression. However, the emphasis need not be placed on the nature of the appropriation, but rather on whether the appropriation of a sound recording progresses the useful arts and public good. As a result of sound appropriation, the public has been exposed to new genres of music and technological advances of sound appropriation equipment which may not have otherwise occurred. Once our legal system correctly embraces the conversational nature of creation, a regime must be put in place to allow a safe harbor for the appropriation of sound recordings which further the arts and the public good.

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99. *See* BURKHOLDER, *supra* note 63, at 5, 851. *See also* Howard Mayer Brown, *Emulation, Competition, and Homage: Imitation and Theories of Imitation in the Renaissance*, 35 J. AM. MUSICOLOGICAL SOC'Y 1, 1 (1982) *cited in* Arewa, *supra* note 2, at 600 ("Musicologists use a number of terms to describe composers' uses of existing works, including borrowing, self-borrowing, transformative imitation, quotation, allusion, homage, modeling, emulation, recomposition, influence, paraphrase and indebtedness."). It is interesting to note the neutral connotations of the terms used to describe composers' use of existing works. For more information regarding borrowing in music see *supra* note 32, at 665–66 or Arewa, *supra* note 2, at 599–605.

100. Arewa, *supra* note 2, at 603.

101. *See generally* Arewa, *supra* note 2, at 613 (stating the opera *Cinderella* was an English version of the original Italian opera *La Cenerentola* with some musical additions).

102. *See generally, e.g.*, Shimanoff, *supra* note 64, at 24; Arewa, *supra* note 2, at 615 ("Louis Armstrong, who borrowed from opera, and jazz soloists, who have created new jazz melodies to the chord changes or harmonic progressions of exiting popular tunes.").

103. *See generally* STEPHEN DAVIS, *HAMMER OF THE GODS: THE LED ZEPPELIN SAGA* 5 (1997) *cited in* Arewa, *supra* note 2, at 616 ("Rock and roll artists such as the Beatles, the Rolling Stones and Led Zeppelin incorporated and borrowed extensively from blues and African American musical traditions generally as well as from specific works and specific artists.").

104. Arewa, *supra* note 2, at 607.

B. POTENTIAL SOLUTIONS

Once we recognize sampling as a legitimate form of creation, the major question becomes, "when does a new work transform an old one, and when does it merely steal the work of another?"[105] Further, in accordance with the purpose of the American copyright regime, we must not only determine when a new work is created, but also how to encourage the creation of appropriated works, while continuing to provide adequate incentives for so-called "romantic" creators. While many scholars claim the solution to the appropriation of the sound recording dilemma is the adoption of a compulsory licensing scheme for sampling,[106] such a solution, while efficient, is not aligned with the purpose of the copyright regime. The proper solution to the appropriation of sound recordings is found by slightly adapting the substantial similarity and fair use tests.

1. Compulsory Licensing Scheme for Sound Recordings

One of the most popular solutions advocated for in the legal literature is the adoption of a compulsory mechanical licensing regime for sound recordings, similar to the regime which exists for musical compositions.[107] The mechanical licensing scheme for musical compositions allows artists to perform another's musical composition, i.e. perform "covers," with the remuneration being received by the copyright holder of the original work.[108] While there are numerous different logistical options for the application of a compulsory licensing regime for sound recordings,[109] the adoption of such a regime would generally have five basic strengths:

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105. Nicholas B. Lewis, Comment, *Shades of Grey: Can the Copyright Fair Use Defense Adapt to New Re-Contextualized Forms of Music and Art?*, 55 AM. U. L. REV. 267, 269 (2005).

106. *See generally* Arewa, *supra* note 2, at 643.

107. 17 U.S.C. § 115 (2007).

108. § 115. Note that when performing the musical composition it is required that the essence of the song stays intact.

109. *See generally* Charles E. Maier, *A Sample for Pay Keeps the Lawyers Away: A Proposed Solution for Artists Who Sample and Artists Who are Sampled*, 5 VAND. J. ENT. L. & PRAC. 100, 101–02 (2003) (dividing proposed sound recording compulsory licensing fees into a three-tiered system: (1) "substantial violations" for imitative rather than transformative uses, (2) *de minimis* and transformative uses which would require no payment, and (3) cases falling in the middle of these categories); Josh Norek, Comment, *"You Can't Sing Without the Bling": The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System*, 11 UCLA ENT. L. REV. 83, 92–93 (2004) (describing a three-tiered regime broken down into: (1) qualitative insignificant samples, (2) "[q]ualitatively [s]ignificant [s]ample of [t]hree [s]econds or [l]ess [u]sed [o]nly [o]nce," for which no payment is required, and (3) qualitatively significant samples greater than three seconds, for which negotiation would be required).

> (1) set clear, predictable boundaries for sampling artists, (2) keep costs reasonable for sampling artists, (3) minimize the use of litigation to settle infringement questions, (4) minimize the difficulties involved in negotiating licenses, and (5) provide adequate economic benefits for copyright owners.[110]

Despite these basic strengths, there are numerous well-recognized criticisms to the adoption of a compulsory license regime for sound recordings,[111] the most important being the failure of a licensing regime to promote the purpose of American copyright law.[112] Allowing an artist free-range to sample whatever he or she chooses does not promote and encourage innovation, instead it legitimizes forms of sampling without regard to whether the use was creative and furthers the progress of useful arts.[113] By placing few limitations on how a sample is used, licensing may just encourage artists to subsidize their production costs, rather than push the bounds of creativity. Also, up-and-coming artists, who sample numerous fragments of copyrighted material to create a truly innovative musical composition, may not be able to afford the numerous licensing fees the artists would be subject to; thus stifling creativity. As a result, this scheme could create a general divide between established artists who can afford to sample as a means to create new works, and those less-established who cannot afford to do so.[114] Theoretically, the foundation of copyright law has never been about the government acting as an intermediary to allow people almost unabated access to works. The role of copyright law is to establish a foundation that encourages the production of works that promote the progress of the arts,[115] which in turn will benefit the public.

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110. Carlos Ruiz de la Torre, *Digital Music Sampling and Copyright Law: Can the Interests of Copyright Owners and Sampling Artists be Reconciled?*, 7 VAND. J. ENT. L. & PRAC. 401, 403 (2005).

111. *See* Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271, 294–98 (1996) (discussing three major criticisms of a compulsory licensing regime: (1) the failure to take into account the drastically different levels of qualitative value of samples, (2) a failure of the compulsory licensing to adequately take into account the rights of the author, and (3) current systems already represent a scheme that encourages sampling, just not at an infinite free-ranging level).

112. U.S. CONST. art. I, § 8, cl. 8.

113. This paper recognizes that some of the licensing scheme proposals try to integrate this dichotomy between creative and non-creative uses. However, considering the judicial resources it would take to determine that distinction for each musical work in question, it is doubtful that Congress, if it decided to institute a licensing regime, would include this distinction.

114. Because the practice of sampling has proliferated to the point where anyone in their basement with a computer and the right software can partake in the practice, much of the most creative sampling is not done by professional artists, but by amateurs who could probably not afford licensing fees.

115. U.S. CONST. art. I, § 8, cl. 8.

While there is no doubt that a licensing scheme, or a bright-line test, would be judicially efficient, that is not the role of copyright law. In order to keep true to the purpose of the American copyright regime, courts must not waver from the tradition of applying the substantial similarity and fair use doctrines, as they provide the proper breathing room and structure to promote progress and serve the public good.

2. Slightly Adapted Substantial Similarity and Fair Use Tests

As this article advocates for the use of adapted versions of both the substantial similarity and fair use tests, it is important to clarify the function each test should perform. The purpose of the substantial similarity test is to give adequate protection to original works, and their authors, without stifling artists who appropriate smaller segments of sound recordings to create truly creative works.[116] The goal is to reach a level where the highest total number of creative works are being produced. To do so, it is imperative that the test coincides with the commercial realities of the music business. In terms of fair use, the function of the doctrine should be to encourage transformative uses.[117] Thus, even when an appropriated work is substantially similar to the original, if the new work is thought to be truly transformative, the fair use defense should allow for the creation of such work.

a. Substantial Similarity

In the context of sound recording appropriation, the proper substantial similarity test is one which discourages the use of samples as a method to subsidize production costs, while it embraces the use of sampling for creative purposes.[118] The underlying premise is that truly "original" works, and their creators, should not be subject to appropriations for the purpose of cost-savings, only appropriations for artistic progress. While this is a difficult dichotomy to mediate, it can be achieved by tweaking the existing framework.

The current substantial similarity analysis provides a good starting point for sound appropriation infringement cases. Generally, in cases of

116. *See* Recent Case, *supra* note 74, at 1358–59.

117. Campbell v. Acuff-Rose Music, Inc., 510 U.S., 569, 579 (1994) (stating that a transformative work is one that "adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning, or message").

118. Recent Case, *supra* note 74, at 1358–59.

fragmented literal similarity,[119] substantial similarity is determined by considering "whether the copied material is quantitatively and qualitatively important to the plaintiff's work as a whole."[120] Thus, this test focuses almost exclusively on the plaintiff's work in order to determine if an appropriation was overreaching. While this may ensure that copyright owners of sound recordings are protected from misappropriations, ignoring the defendant's work fails to give artists the room to use appropriated material in creative and progressive ways. By introducing additional considerations[121] which would promote innovative uses, such as the degree in which the sample has been altered, whether the sample is recognizable in the defendant's work and the frequency of use in the defendant's work, the test is better aligned with the purpose of the copyright regime. Practically, the adapted test would consist of three parts, all objectively determined from the perspective of an "ordinary observer":[122] "(1) whether the sample constitutes a trivial portion of the original song, (2) whether the sample is quantitatively recognizable in the alleged infringing song, and (3) whether the two songs are qualitatively similar."[123] This test would balance the above factors, with the underlying consideration being whether the sample was used for creative purposes, and not to subsidize production costs or used in a manner where the new work would become a substitute for the original. By focusing on both works, the original and the appropriated work, the substantial similarity test is better able to serve the purpose of the American copyright regime.

While the proposed test, on the surface, seems to lack adequate protection for the original creator, it is important to remember that copyright protection is only granted to authors as a means "[t]o promote the Progress of Science and useful Arts."[124] Thus, the concern must not be whether a creator or copyright owner is adequately protected, but if the proposed test will increase or decrease the aggregate number of creative works produced. Furthermore, it becomes evident that, when evaluating

119. Brandes, *supra* note 35, at 108 ("where the defendant copies plaintiff's work exactly or nearly exactly, but not the fundamental substance or overall scheme of the work").

120. *Id.*

121. It is important to note that this paper acknowledges the considerable overlap between this proposed substantial similarity test and the fair use defense. The important distinction is the breadth of focus. The substantial similarity test should function to protect smaller appropriations which are deemed to be creative, while the fair use defense will function to protect appropriated works, that while they may be substantially similar to the original, are considered to be so innovative that the public good weighs in favor of its production.

122. *See* Stromback v. New Line Cinema, 384 F.3d 283, 293 (6th Cir. 2004).

123. Schietinger, *supra* note 83, at 243.

124. U.S. CONST. art. I, § 8, cl. 8.

the commercial reality of the music business in conjunction with this proposed test, the lack of protection granted to original artists is justified. First, sound recording copyrights are held, for the most part, by record companies. Thus, licensing fees paid for the appropriation of sound recordings are received by the record company, which discredits any argument that licensing fees could act as an incentive for an artist to produce additional works.[125] Second, even if artists did receive licensing fees from sampling, it is just as likely that such remuneration would deter artists from producing new music, as it is to encourage it. For the most part, the economic rewards artists seek are not the back-end sampling fees, but the foreseeable rewards from concerts and record sales; therefore, it is possible that artists could view sampling licensing fees as an unanticipated windfall, which may induce them to rest on their laurels and not produce additional music.[126] As a result of the commercial realities of the music industry, it is asserted that providing original artists with only limited rights to prevent others from appropriating their work will only negligibly, if at all, affect the total amount of so-called "original" musical works created, while substantially increasing the total aggregate number of creative musical works.

b. Fair use

As previously mentioned, while the amended opinion of the court in *Bridgeport* provided the fair use defense in sound recording infringement cases still exists,[127] its decision may have fundamentally altered the application of the defense. As acknowledged by the Supreme Court, the purpose of the fair use defense is to allow courts to avoid rigidly applying the copyright statute in circumstances where such application would stifle creativity.[128] Despite such sentiment, as well as the suggestion of critics that the fair use defense is tailor-made to apply to sampling infringement cases, current judicial interpretation of the doctrine usually limits the defense to parodies; thereby making the defense unlikely to embrace sampling as fair use.[129] However, in 1992, the Supreme Court in *Campbell*

125. *See* Schietinger, *supra* note 83, at 216.

126. *See* Kenneth M. Achenbach, *Grey Area: How Recent Developments in Digital Music Production Have Necessitated the Reexamination of Compulsory Licensing for Sample-Based Works*, 6 N.C. J.L. & TECH. 187, 194–95 (2004).

127. *Bridgeport*, 401 F.3d at 661.

128. *See id.*; *Bridgeport*, 383 F.3d at 401–02.

129. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 594 (1994); Brandes, *supra* note 35 ("The Supreme Court recognized that the fair use defense can be applied to digital sampling in *Campbell v. Acuff-Rose*, holding that the defendant's rap parody of the plaintiff's song, 'Pretty

v. Acuff-Rose Music acknowledged the concept of transformative use, which could provide promise to sampling artists. With regard to fair use, the Supreme Court held that:

> The central purpose of this investigation is to see . . . whether the new work merely "supersede[s] the objects" of the original creation . . . ("supplanting" the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative." . . . [T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works . . . . [T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.[130]

Despite the Court's acknowledgement of transformative use, the defense is still limited to instances where the original "material is used to convey a specific transformative message about the original work itself,"[131] thereby, providing no safe harbor for sampling.[132]

This narrow definition and application of transformative uses does not adequately encourage the progression of useful arts. Creative works which fall outside the boundaries of the substantial similarity test and the narrow range of the fair use doctrine are being suppressed.[133] The American copyright regime, in order to be adequately aligned with its stated purpose, must consider works which "combine quantitatively large amounts of

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Woman,' may constitute a non-infringing fair use." (citing *Campbell*, 510 U.S. 569)). It is important to note that the findings in *Campbell* were limited to the application of parodies, not extended to sound appropriation. *See id.*

130. *Campbell*, 510 U.S. at 579 (footnotes and citations omitted). *See also* Jisuk Woo, *Redefining the "Transformative Use" of Copyrighted Works: Toward a Fair Use Standard in the Digital Environment*, 27 HASTINGS COMM. & ENT. L.J. 51, 60–61 (2004) (discussing *Campbell* Court's treatment of transformative use).

131. Lewis, *supra* note 105, at 288–89.

132. *See* Szymanski, *supra* note 111, at 312–14.

133. *See* Lewis, *supra* note 105, at 284–93. In 2004, Brian Burton (known as "DJ Danger Mouse"):

> fused the a capella lyrics of Jay-Z's *The Black Album* with music taken exclusively from The Beatles' *The White Album* to create an entirely new album called *The Grey Album* . . . . Danger Mouse, however had not received permission from the rights holders to the music and sound recording copyrights of either The Beatles' music or Jay-Z's album prior to his use of their materials . . . . In terms of *The Grey Album*, reviewers have widely praised Danger Mouse's ability to combine artists of different musical genres and eras in such a way as to create a "captivating" or "ingenious" new work.

Id. (footnotes omitted). This is the type of creation that transformative use should try to protect. Presently, the limitation of transformative uses to works that comment on the content of the original work is too narrowly defined to include Danger Mouse's work.

copyrighted material to create qualitatively new works . . . as valid transformative uses under the fair use doctrine."[134]

Typically, the courts have considered the transformative nature of the work throughout each component of the four-factor fair use test.[135] It is recommended that, not only should transformative uses be reinterpreted more broadly,[136] it should also be incorporated as a fifth factor in the fair use test.[137] This transformative use factor will inquire as to "whether the new work significantly adds to the universe of information available to society."[138] Thus, instead of the court engaging in the four-factor fair use test, with the overarching objective being to allow uses that contribute to the public good, the introduction of the transformative use factor allows a court to directly consider the new works relationship with the purpose of the copyright regime as a whole.[139] This alteration of the fair use test would improve the ability to identify works where, despite having appropriated large portions of copyrighted works, their innovative and creative merits are such that the copyright system should encourage it.

CONCLUSION

With the digital age upon us, copyright law has played a prominent role in development and use of technology. Despite this important responsibility imposed upon copyright law, it must stay true to the fundamental purpose of the regime. While the emergence of digital sampling as a form of creation does present unique issues for copyright law,[140] the regime must continue to stay true to its purpose by creating a foundation to encourage creativity and progress the arts for society's benefit. However, the failure of the courts to fully acknowledge the diverse

134. *Id.* at 287.

135. *See Campbell*, 510 U.S. at 576–77.

136. As previously discussed, transformative use should be interpreted more broadly to both embrace the definition given by the court in *Campbell v. Acuff-Rose Music* and be applicable to works other than those which comment on the original work (such as parodies). Furthermore, it is acknowledged that this article has not set a specific boundary as to what constitutes a transformative use or work. In order to determine what constitutes a transformative work, it would require a detailed analysis of all the fair use jurisprudence, which is beyond the scope of this article. Moreover, it is possible, and suggested, that the courts leave the term legally undefined and allow the principle to develop on a case-by-case basis.

137. *See* Woo, *supra* note 130, at 68.

138. *Id.*

139. *Id.*

140. *See* Wells, *supra* note 21 and accompanying text. As previously discussed, this is due to the fact that sampling involves a literal taking, where the exact original fixed expression is appropriated. *See supra* text accompanying notes 33–37.

forms of authorship, most recently in *Bridgeport*,[141] does not establish a judicial precedent, in relation to the use of sound recordings, which stays true to this purpose. Luckily, the solution to this disconnect is simple. As this article proposes, by applying slightly adapted versions of traditional copyright doctrines to cases of sound recording infringement, the copyright regime can properly allow for, and encourage, appropriations which produce creative new works and further the arts for society's benefit.

While technology may change the nature of appropriations, it does not alter the manner in which creation and progress occur. As acknowledged by the court in *White v. Samsung Electronics America, Inc.*, advancement is achieved by "each new creator building on the works of those who came before."[142] Presently, musical advancement is occurring through the practice of "sampling" those who came before, but instead of encouraging such progress, the courts and copyright regime are suppressing it. Technology does offer our society great benefits, however, it is imperative we embrace it in the right way. In order for the United States to prepare for the numerous unknown challenges new technology will create, we must pay closer attention to aligning the solutions to these new challenges with the purpose of our system.

141. *Bridgeport*, 383 F.3d at 398.
142. White v. Samsung Electronics Amer. Inc., 989 F.2d 1512, 1513 (9th Cir. 1993).