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Bits and Bytes from the Chair

By Charlie Bieneman, *Rader, Fishman & Grauer PLLC*

Our section is typically quiet during the summer months, but that does not mean we don't have a lot going on. In fact, planning is well underway for our Fifth Annual IT Law Seminar, to be held Thursday, September 27, 2012, at the St. John's Inn in Plymouth. We have a great lineup of topics:

- IT Caselaw Update
- Practical Approaches to Privacy Contracting
- Expecting the Unexpected in IT Implementations and What Customer's Counsel Can Do About It
- Protecting Software Trade Secrets
- Social Media in the Workplace
- Software Patents

I hope to see everyone there! And in the meantime, if you have any thoughts about the section, I'm always happy to hear from you.

Charlie Bieneman

2011-2012 IT Law Section Chair

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Digital Sampling of Music and Copyrights: Is it Infringement, Fair Use, or Should We Just Flip a Coin?

By Christopher C. Collie* & Eric D. Gorman**

“Thou shalt not steal.”¹

Introduction

D.J. Girl Talk is one of the budding artists in the music industry today, and his instrument is a laptop.² D.J. Girl Talk (hereinafter also referred to as “Girl Talk”), whose real name is Gregg Gillis, “samples,” or uses short clips, from other artists’ songs to create popular dance music.³ Girl Talk’s songs combine old, contemporary, and downright odd genres of music. Within these different genres, he samples from artists such as Clipse, Kelly Clarkson, and Hot Chip.⁴ At his live concerts, D.J. Girl Talk leads massive crowds who dance non-stop to his songs.⁵ Girl Talk’s songs fill the concert with energy and sometimes end with Girl Talk shirtless, or even stripped down to his boxers.⁶ While Girl Talk has had musical success creating songs from samples of other songs, some artists and producers believe that D.J. Girl Talk is using these samples illegally.⁷ This has caused iTunes and a CD distributor to stop carrying Girl Talk’s album, “Night Ripper,” due to growing legal concerns.⁸



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United States copyright law generally requires that artists obtain permission from the copyright owner before using a work.⁹ Still, D.J. Girl Talk believes that his works are valid under the “fair use” exception of copyright law.¹⁰ Girl Talk believes that the Fair Use Doctrine applies because his samples are too brief and his music sounds so different from the songs he samples that it is unlikely to affect the sales of those songs.¹¹ Due to little statutory guidance and inconsistent court rulings in the 1990s and 2000s sampling cases, there is still a great deal of confusion as to what constitutes valid or invalid “sampling” practices.¹² This has led many commentators to suggest ways of solving this dilemma.¹³

This article addresses whether digital sampling is copyright infringement and concludes that copyright law should be amended to fix the uncertainty surrounding copyright as it relates to digital sampling. Part I provides a background on digital sampling. Part II analyzes whether D.J. Girl Talk’s musical works fall

under the current exceptions to copyright infringement. Part III proposes a change to copyright legislation that gives the music industry more guidance. Part IV concludes that D.J. Girl Talk's compositions fall under the exceptions to copyright infringement, but that adoption of the proposed legislation will be more in line with the goals and fairness sought for copyright law.

I. Background

Part I of this article begins by briefly discussing the purpose of copyright law and providing more intimate knowledge of copyright law for music. Section A covers the bases of copyright protection. Section B explores the different types of copyrights in music. Section C discusses copyright infringement. Section D introduces the fair use exception to infringement and when it applies. Lastly, Section E reviews some important digital sampling cases to date.

A. Copyright Protection

The United States Constitution grants copyright protection.¹⁴ The Constitution gives Congress the power “[t]o promote the progress of science and useful arts, by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries.”¹⁵ The purpose of copyright law is “to secure ‘the general benefits derived by the public from the labors of authors,’” and to motivate authors and inventors by giving them a reward.¹⁶ The Copyright Act of 1790 was the first federal copyright act instituted in the United States.¹⁷ The Copyright Act of 1976 is the most recent enactment by Congress.¹⁸ The Copyright Act gives legal protection to the authors of original works that are “fixed in any tangible medium of expression.”¹⁹ Furthermore, the Copyright Act preempts state law and any conflicting state law is considered invalid.²⁰

B. Copyrights in Music

There are two types of music copyrights: (1) musical works and (2) sound recordings.²¹ Musical works, also referred to as musical scores, make up the written score for the musical composition,²² while “[s]ound recordings are works that result from the fixation of a series of musical, spoken, or other sounds . . . such as disks, tapes, or other phonorecords.”²³

The copyright for a musical score and sound recording are separate and do not overlap.²⁴ Sound recordings extend only to the master recording of the original work and not to separate recordings.²⁵ But, a sound recording is a derivative work of the musical score.²⁶

Furthermore, copyright owners of musical scores have typically had “more rights than sound recordings, including the rights of reproduction, preparation of derivative works, public display, and performance.”²⁷ Many musicians and producers have been advised to receive permission for the musical score and sound recording.²⁸ Sound recordings, however, began to receive more protection in 1972.²⁹

C. Copyright Infringement

To prove copyright infringement, the owners must show (1) ownership; (2) unauthorized copying; and (3) unlawful appropriation.³⁰ Ownership is the first element that copyright owners must demonstrate.³¹ The initial copyright is granted to the author(s) of the original work.³² Often, the copyrights to the sound recordings are bargained away to music companies as part of the artist's recording contract.³³ Therefore, the music companies are typically the owners of the copyright.³⁴

The second element needed to prove infringement is unauthorized copying.³⁵ Copying can be illustrated by either direct or indirect proof.³⁶ Direct proof is evidenced by the defendant admitting to copying the work or through eye-witness testimony that the defendant copied the work.³⁷ Direct admission is rare in copyright infringement cases, so the plaintiff must usually show indirect proof instead.³⁸ Indirect proof of copying is shown through circumstantial evidence that the defendant had access to the plaintiff's work.³⁹ Access to the plaintiff's work may involve proving that the defendant viewed the work, had knowledge of the work, or that the work was widely disseminated.⁴⁰

The third and last element of copyright infringement is unlawful appropriation. Unlawful appropriation lies at the heart of proving copyright infringement.⁴¹ In order to prove unlawful appropriation, the plaintiff must demonstrate that the use of his work by the defendant is substantial and material.⁴² If it is found that the copying is substantial and material, the defendant's work may infringe.⁴³

In order to determine whether there is substantial and material use of the plaintiff's work, courts typically utilize the “substantial similarity” standard.⁴⁴ Under substantial similarity, courts determine whether the defendant's use of the plaintiff's original work is reasonably recognizable to a lay listener.⁴⁵

If the defendant's work is not found to be substantial and material under the substantial similarity standard, then the defendant's use is *de minimis*.⁴⁶ When the defendant's work is *de minimis*, it means that the sampled portion of the original work is so small that it is immaterial.⁴⁷ However, *de minimis* use is only one way to avoid copyright infringement.

The most popular avenue of avoiding copyright infringement is the fair use exception.

D. Defenses to Infringement: Fair Use

The fair use exception is a defense to copyright infringement.⁴⁸ One of the first significant copyright infringement cases was *Folsom v. Marsh* in 1841.⁴⁹ In *Folsom*, the court held that a concern of copyright infringement is the “degree [that] the [defendant’s] use may prejudice the sale, or diminish the profits, or supersede the objects, of the [plaintiff’s] original work.”⁵⁰ *Folsom* additionally held that copyright infringement is found by “look[ing] to the nature and objects of the selections made, [along with] the quantity and value of the materials used.”⁵¹ Later, the *Folsom* holding was codified in Section 107 of the Copyright Act of 1976.⁵² Today, Section 107 is known as the Fair Use Doctrine.⁵³ The Fair Use Doctrine provides that the use of an original work “for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research” do not infringe upon a copyright.⁵⁴ Determination of fair use hinges upon the consideration of four factors.⁵⁵ These four factors include:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyright work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁵⁶

The Fair Use Doctrine will only be applied after the court has found copyright infringement.⁵⁷ In an infringement case, the *de minimis* use defense and the fair use exception are applied separately because *de minimis* use is found when substantial similarity has not been met.⁵⁸

E. Sampling Cases

One of the first music sampling cases was *Bright Tunes Music v. Harrisongs Music*.⁵⁹ In this case, the court held that the defendant, George Harrison, unconsciously misappropriated “He’s So Fine,” by Ronald Mack.⁶⁰ The court felt that Harrison did not intend to misappropriate the song, yet still found copyright infringement.⁶¹ This case demonstrates that misappropriation can occur without the conscious intent to copy.⁶²

Another important music sampling case was *Grand Upright Music Ltd. v. Warner Bros. Records*.⁶³ In this case,

the defendant, Biz Markie, admitted to sampling music from “Alone Again (Naturally)” by Gilbert O’Sullivan.⁶⁴ The court held that the defendant’s admission of copying the plaintiff’s original work constituted infringement.⁶⁵ The court’s holding in this case has drawn a large amount of criticism for not applying any substantial similarity or fair use analysis.⁶⁶

Another important music sampling case is *Newton v. Diamond*.⁶⁷ In this case, the hip-hop group, the Beastie Boys, obtained a license to use the sound recording to “Choir” by James Newton.⁶⁸ The Beastie Boys, however, did not obtain a license to the musical score and they were sued.⁶⁹ The court applied the substantial similarity standard,⁷⁰ and held that the Beastie Boys’ new work was neither qualitatively, nor quantitatively, significant.⁷¹ Therefore, the Beastie Boys’ use of the musical score was held to be *de minimis*.⁷² This decision was the first to move away from the belief that samplers were required to obtain licenses for sound recordings and musical scores.⁷³

One of the last significant musical sampling cases was *Bridgeport Music, Inc. v. Dimension Films*.⁷⁴ This case involved a sample from the sound recording “Get Off Your Ass and Jam” by George Clinton, Jr. and the Funkadelics, which was used in the rap song “100 Miles and Runnin” by N.W.A.⁷⁵ The defendants, N.W.A., used “100 Miles and Runnin” in the sound track of the movie *I Got the Hook Up*.⁷⁶ The plaintiffs claimed copyright infringement of their sound recording “Get Off Your Ass and Jam.”⁷⁷ Here, the Appellate Court of the Sixth Circuit rejected the district court’s use of substantial similarity.⁷⁸ Instead, the Sixth Circuit held that N.W.A. infringed the plaintiff’s copyright and created a bright-line rule of automatic infringement where an artist should either “[g]et a license or . . . not sample” at all.⁷⁹

The courts have not been uniform in applying fair use to copyright infringement. In many instances, the courts have drawn harsh criticism due to the wide range of surprising rulings.⁸⁰

The forthcoming sections will analyze a hypothetical case against D.J. Girl Talk to determine if there is copyright infringement. Then, determine whether Girl Talk’s use of samples is “fair” or not.

II. Analysis

In Part II of this article, a hypothetical case will be created in order to analyze the likely outcome in a case against D.J. Girl Talk. First, the analysis will show that Girl Talk has infringed upon other artists’ copyrights. Then, in section A, by applying the four factors of the Fair Use Doctrine, analysis will show D.J. Girl Talk’s use is fair.

As noted above, copyright infringement consists of: (1) ownership; (2) unauthorized copying; and (3) misappropriation.⁸¹ First, the court must determine whether the Plaintiff has valid ownership of the copyright.⁸² Under these hypothetical circumstances, one will assume that the Plaintiff has a valid copyright and that it has been registered within five years of publication.⁸³

Second, the court must decide whether there was unauthorized copying by D.J. Girl Talk.⁸⁴ Evidence of actual copying may be shown either directly or indirectly.⁸⁵ Direct evidence would entail an admission of copying by Girl Talk.⁸⁶ For D.J. Girl Talk, it is likely he would admit to copying since the artists' works he samples for his songs are easily discernible.⁸⁷ However, if Girl Talk does not admit to copying, the Plaintiff may show indirect evidence.⁸⁸

Indirect proof is shown by circumstantial evidence of access, such as where the work was widely disseminated and popular among listeners,⁸⁹ and if there is sufficient similarity between the two works.⁹⁰ If there is evidence of access and substantial similarity between the two works, then it may be enough for the court or jury to find there was copying.⁹¹ Girl Talk has access to all of the songs from the artists whom he samples, which are widely disseminated to the public and popular among listeners.⁹² Also, Girl Talk's songs are sufficiently similar to the songs he samples because he samples a very recognizable portion of the songs.⁹³

The third and last element of copyright infringement is misappropriation.⁹⁴ Misappropriation is shown by establishing substantial similarity between the two works.⁹⁵ There are several tests used among the Circuit Courts to establish substantial similarity, which include, but are not limited to, the average lay observer test,⁹⁶ the recognizability test,⁹⁷ and fragmented literal similarity.⁹⁸ To test for substantial similarity, multiple tests will be used.

First, under the ordinary lay person test or the average listener test,⁹⁹ if an ordinary person can discern that two songs are similar by listening to them, then there is infringement.¹⁰⁰ In this case, an ordinary listener will be able to discern many of the songs that D.J. Girl Talk has sampled.¹⁰¹ That is partly what makes Girl Talk so popular. Therefore, under the ordinary listener test, Girl Talk's songs are substantially similar.

Second, the same result is found under the recognizability test.¹⁰² Here, the court need merely ask whether Girl Talk's work is recognizable in any part to the Plaintiff's work.¹⁰³ The answer for Girl Talk will almost always be affirmative. Therefore, under the recognizability test, Girl Talk's songs are substantially similar.

Last, fragmented literal similarity looks to the quantity and quality of the Plaintiff's work that was copied.¹⁰⁴ Under this test the court should find that Girl Talk has copied a large quantity of the Plaintiff's work and in many cases captures the qualitative significance of the work. Therefore, under the fragmented literal similarity test, Girl Talk's works are substantially similar. Since Girl Talk's songs were found to be substantially similar to the sampled songs under each of the tests, the combined tests establish that Girl Talk's works are substantially similar to the Plaintiff's works and it can be determined that there is unlawful appropriation.¹⁰⁵

A. Fair Use

Once D.J. Girl Talk's work is found to be substantially similar to the Plaintiff's work, Girl Talk's claim of the fair use exception may be explored.¹⁰⁶ The Fair Use Doctrine under 17 U.S.C. § 107 provides an illustrative, but not exhaustive, list of means that may not infringe upon a copyright.¹⁰⁷ Since Girl Talk's use of copyrighted works does not fall under this list set out in the statute,¹⁰⁸ the four factors of fair use are applied.¹⁰⁹

1. First Factor – Purpose and Character of the Use

The first factor in determining whether there is fair use of a copyright is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."¹¹⁰ One goal of this factor is to establish whether the defendant's use of the work was to promote the progress of science and benefit the public.¹¹¹

Originally, if the author "supersede[d] the use of the original work,"¹¹² then the author was considered to have pirated, or copied, the work.¹¹³ But, if the artist has added something new to further the purpose with new meaning or expression, then the artist may have fair use.¹¹⁴ Girl Talk's songs are for the same entertainment purpose as the artists' he copied.¹¹⁵ In this regard, Girl Talk's use supersedes the original and goes against fair use.¹¹⁶ However, and more importantly, a court will find Girl Talk's work is transformative, or furthers the purpose of the work, because it does not supplant the original work.

Girl Talk's work is transformative because it "adds something new, with a further purpose or different character, altering the first [work] with new expression, [and] meaning."¹¹⁷ Furthermore, the Supreme Court stated that "transformative use is not absolutely necessary for a finding of fair use" but the more transformative a work is found to be then the more likely a work will be found to be fair use.¹¹⁸ Many of Girl Talk's works are transformative because they

mix together several diverse genres to provide upbeat dance songs that are different than the original works he samples.¹¹⁹ By determining that Girl Talk's works are transformative a court will strongly favor a finding of fair use.¹²⁰

A court must also look at whether Girl Talk's work is commercial in nature. The initial line drawn by the courts on the differences between commercial and nonprofit uses was that "every commercial use of copyrighted materials is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."¹²¹ However, the Supreme Court provided further language in the holding that made it clear that commercial use should only be considered and not given a presumption.¹²² In a case only one year after *Sony Corp. of America v. Universal City Studios, Inc.*,¹²³ the Supreme Court stated, "[t]he fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use."¹²⁴ Finally, the confusion was put to rest by the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.* when the Court held commercial use is not a bright-line rule against fair use, but merely as a separate factor to be weighed against the finding of fair use.¹²⁵

D.J. Girl Talk's sampling of other artists' works is for a commercial purpose.¹²⁶ He makes income on the sales of songs and CDs. According to *Campbell*, Girl Talk's commercial use of the work will be used as a factor to weigh against the finding of fair use.¹²⁷ However, most justified instances of fair use are commercial.¹²⁸ Most works created are for monetary gain, whether it is direct or indirect through some other personal gain.¹²⁹ Therefore, it is important to take into account that D.J. Girl Talk's use is commercial, but commercial use may still constitute a fair use.¹³⁰

Girl Talk's use of other artists' works is transformative in nature and for a commercial purpose. By finding Girl Talk's works transformative, the court will strongly favor a finding of fair use, even though his works are commercial.¹³¹ The fact that Girl Talk's work is also commercial will not bear as much weight with the court due to most findings of fair use being commercial.¹³² Therefore, this factor should be in Girl Talk's favor, because a finding that his works are transformative holds more weight than a finding of his work being commercial in nature.¹³³

2. Second Factor – Nature of the Copyrighted Work

The second factor in examining a fair use claim for a copyright is "the nature of the copyrighted work."¹³⁴ Sparse case law exists and there has been little attention given to this factor.¹³⁵ However, more leniency is generally given to those who seek to utilize fair use when copying informational

works than those who seek to utilize fair use when copying creative works.¹³⁶

Often times, creative works use other creative works.¹³⁷ For example, in classical music, small pieces of another artist's work are frequently used in a piece to pay homage to the influential author.¹³⁸

This factor is probably the least important of the four factors and does not hold much weight in the fair use analysis, because of the lack of attention it has received.¹³⁹ Therefore, the second factor of fair use would weigh against D.J. Girl Talk because he copied from creative works, but this finding would not hold much significance in a court's determination of fair use.

3. Third Factor – Amount and Substantiality of the Taking

The third factor in determining whether there is fair use of a copyright is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."¹⁴⁰ A defendant's success usually depends upon the quantitative and the qualitative amount that was copied.¹⁴¹ The qualitative amount copied is considered to be more important than the quantity copied because the quantity copied has been found to be very vague in analyzing a case.¹⁴² If copying the heart of a work occurs by using a substantial quantity of the original, then that will cause the third factor to weigh against a finding of fair use.¹⁴³

According to *Campbell*, if a work is transformative in character or purpose, then it may not go to the heart of the work.¹⁴⁴ In this case, D.J. Girl Talk's work is transformative in its purpose and character under the first factor of the Fair Use Doctrine because his work mixes together many diverse songs to create a different sound that provides new expression and meaning. Further, Girl Talk's work takes no more than is necessary from the original work to be recognizable to the listener. Therefore, the court should find this factor weighs towards a finding of fair use, because Girl Talk's work is transformative and takes no more than is necessary from the original work.¹⁴⁵

4. Fourth Factor – Effect Upon the Potential Market

The fourth factor in determining whether there is fair use of a copyright is "the effect of the use upon the potential market for or value of the copyrighted work."¹⁴⁶ Initially, *Sony* provided that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege."¹⁴⁷ However, *Campbell* put aside this presumption by stating there is no bright-line rule on whether a work is a fair use based upon whether it is commercial or non-commercial.¹⁴⁸

If a plaintiff does not believe fair use exists, the plaintiff should show that widespread use would hurt the potential market of the copyrighted work.¹⁴⁹ This potential market includes not only harm to the original work, but also potential harm to the derivative works.¹⁵⁰ This can also occur where a use supplants part of the original work's market.¹⁵¹

D.J. Girl Talk's work does not supplant or supersede the original work of the plaintiff, because his work is transformative and adds new expression and meaning to the original work.¹⁵² Because Girl Talk's work is transformative, it lessens the harm to the market of the original work.¹⁵³ However, Girl Talk must also avoid harming the potential derivative markets of a work.¹⁵⁴ Girl Talk samples original works and these copyright owners could become a part of a derivative market by developing or licensing others to develop their original works.¹⁵⁵ Therefore, Girl Talk would likely harm the potential derivative market of original works by not paying a licensing fee to the copyright owners.¹⁵⁶ The court would likely find that this factor slightly weighs against Girl Talk, because his works could potentially harm the derivative markets of original works. However, this factor does not strongly weigh against Girl Talk, because his works do not act as a market substitute to any original works.

After considering the four factors of the Fair Use Doctrine, two factors weigh in favor of D.J. Girl Talk, while two factors weigh slightly against Girl Talk. The first factor weighs in his favor, because a finding by the court that his works are transformative is more significant than the court finding Girl Talk's work is commercial in nature.¹⁵⁷ The second factor weighs against Girl Talk, because his works use creative works. However, the second factor is very insignificant in determining fair use, and therefore this factor should not hold much weight against Girl Talk.¹⁵⁸ The third factor weighs in his favor, because he only takes no more than is necessary from the original work so that his work is recognizable to a listener.¹⁵⁹ The fourth factor weighs slightly against Girl Talk, because his works harm the potential derivative market of an original work, but do not act as a market substitute for original works.¹⁶⁰ After weighing all the factors for and against Girl Talk, a court should find that his use is fair.

Upon this analysis, it is easy to see that copyright law and the fair use exception are very confusing. Congress must solve this problem.

III. Proposal

Part III of this article proposes a change to legislation. Section A reviews the purposes of copyright law. Section B offers a solution to the digital sampling problem. Furthermore,

section B offers arguments for and against the proposed solution.

To date, there have been several commentators who have written on this issue and offered various proposals.¹⁶¹ However, many of these proposals are flawed, and no proposal has been able to further the purposes of copyright law and balance the interests of both samplers and copyright owners.

Since a reasonable solution has not been enacted, artists and the public have been hindered. Today, artists have a disincentive to create new works through digital sampling due to the current legislation in place and prior case rulings. This deterrent or hindrance to create art runs counter to the purposes of copyright law.

A. Purposes of Copyright Law: The Sampling Problem

The Copyright Act was developed by Congress to promote the progress of science and the arts through extensive public dissemination.¹⁶² Furthermore, Congress granted these authors exclusive rights in their works to provide them an incentive to create and foster further ideas.¹⁶³ Ideally, new authors will create works that are inspired by pre-existing works and the world will benefit from these new works.

This is especially true for sampled music. Samplers take pre-existing works and use pieces of those works to create their own works.¹⁶⁴ However, this is part of the dilemma. Sampling allows artists to create music at a minimal cost.¹⁶⁵ Costs are kept low because a music producer does not have to hire musicians and can possibly skip studio costs by using a distinct sound that has already been created.¹⁶⁶ On the other hand, copyright owners of the pre-existing works believe they are losing out on licensing fees, along with their exclusive rights to deny access or use of the work.¹⁶⁷

One way that the music industry has counteracted the minimal guidance provided by Congress and the courts is an "ad hoc" approach to negotiating licenses that varies from deal to deal.¹⁶⁸ Record companies use several factors to assess each licensing deal.¹⁶⁹ While the record companies have created their own approach to solving this sampling and licensing dilemma, it leaves the courts and legislature few chances to address these issues.¹⁷⁰

Of the cases that have been litigated, few cases have provided any real true guidance. At one end of the spectrum rests the *Grand Upright* and *Bridgeport Music* cases, which do not allow sampling of any kind.¹⁷¹ At the other end of the spectrum are the *Campbell* and *Newton* cases, which have allowed copyrights to be used under the fair use exception.¹⁷²

B. Solution

Many samplers are weary of using a pre-existing work as a sample in their music due to the cases against music samplers' position and the possibility of record companies refusing to grant a license or request a large sum of money. This article suggests a different approach to balance the interests of both the copyright owners and samplers.

This approach proposes new legislation creating a section under the Copyright Act that focuses specifically on digital sampling of music.¹⁷³ The proposed statute is as follows:

After a determination of copyright infringement by the court, or agreement of copyright infringement by the parties, analysis under section 107 may not be applied in regard to suits involving digital sampling or copying of music. Instead, the copyright owner of the original work and the sampler of the original work will share profits of the sampler's new work based upon a formula. The formula allots to the copyright owner of the original work one-third of the sales profits from the new work multiplied by the percentage of the original work used in the new work. For example, if sixty (60) seconds of the copyright owner's original work were included in the sampler's new work that totals one-hundred twenty (120) seconds, then the copyright owner of the original work is entitled to one-half multiplied by one-third of the sampler's profits from that song.

This proposed statute is radical, yet necessary. This new legislation eliminates the fair use exception from being used as a defense for digital sampling of music and provides clear-cut guidance to the music industry. The application by the federal courts of the fair use exception in music digital sampling cases has basically become a "coin flip." The courts have made polar opposite rulings in these cases.¹⁷⁴ The law needs to be uniform, and it is apparent that the courts are unable to provide this uniformity.

Moreover, this proposed statute promotes the purposes of copyright law. The proposed statute allows samplers to create new works that may be disseminated to the public.¹⁷⁵ By allowing these works into the public, others may benefit and draw inspiration from these new works.¹⁷⁶

In some regards, it can be argued that this proposal goes against one of the purposes of the Copyright Act by taking away some of the exclusive rights granted to the original author.¹⁷⁷ Pursuant to the proposed statute, the original author would no longer be able to deny others from using his copyrighted work, but once the sampler "turns a profit" from their copied work, the copyright owner would then begin to collect

his portion of the profits.¹⁷⁸ This proposal would no longer hinder samplers from using a copyrighted work since they do not have to fear a flat denial from the copyright owner. Furthermore, samplers would only have to pay the copyright owner once their work returned a profit. If the samplers never return a profit, then it is unlikely that their works are well known among the public or other artists. This would calm the fear among copyright owners that the marketplace would be saturated with samples of the copyright owner's work.

However, another potential argument against the proposed statute is that it may be considered arbitrary and unfair for the copyright owners because alleged copiers are simply taking their copyrighted work, without putting forth any substantial labor, in order to make a profit and gain recognition. Despite this argument, the proposed statute furthers the purposes of copyright law for samplers by giving them an incentive to create new works. For artists like D.J. Girl Talk, that sample works for nearly every second of their songs, a large portion of their profits will go to the copyright owners of the original works under the proposed statute. This means that samplers like Girl Talk will pay out large percentages of their profits, sometimes more than one-third of the profits from their own works. This means that a larger percentage required for payout to the copyright owners under the proposed statute would only provide less and less incentive for artists like Girl Talk to create new works. Without this large portion of profits, artists that sample several works would be almost entirely pushed out of the music industry.

This article does not support any of the ideas crafted by other commentators such as a compulsory licensing scheme,¹⁷⁹ a subgenre of fair use analysis,¹⁸⁰ or a three second sample calling for an automatic license,¹⁸¹ just to name a few.

While a compulsory licensing system may make for quick and cheap transactional costs, the system proposed by many commentators sets up a system that is too uniform for the various cases of digital sampling.¹⁸²

A subgenre of the Fair Use Doctrine analysis still requires that parties pursue litigation.¹⁸³ Also, commentators are worried about the oversaturation of the marketplace and the potential for "knock-off" samples.¹⁸⁴

Lastly, a three second sample that results in an automatic licensing fee to the copyright owner is too stringent. This three second scheme does not require any analysis and does not take into account the nature of the sampled material, such as the degree of the qualitiveness of the sample. Furthermore, the three second licensing fee would be too uniform and not take into account any of the considerations commonly used by record companies in the music industry.¹⁸⁵

IV. Conclusion

Copyright law looks to balance the interests of copyright owners' economic incentives and the creation of new ideas by other authors. Cases such as *Grand Upright*, *Bridgeport*, *Newton*, and *Campbell* show how courts have struggled to come to grips with the digital sampling problem. This judicial confusion has led the music industry to enter the market with a degree of caution for digital sampling. What's more, the Copyright Act was created before digital sampling surfaced.

To better balance the needs of digital samplers and copyright owners, Congress must step in and create guidance for artists and record companies to follow. Compulsory licensing and other rigid schemes are overly simplistic and not needed. The statute proposed by this article fosters guidance for everyone.

Artists need unlimited access to copyrighted material in order to build and create new works. As the proposed statute illustrates, it would only come into effect if the sampling artists are successful. The proposed statute would not take away from the original author if the new work was not a success due to the fact that it would not be widely known to the public.

The existing market, driven by licensing schemes of the music industry, has been perfected over a number of years. These schemes of the music industry are good for now. But, to continue this positive trend, Congress must give further guidance in order for digital sampling to gain traction. To continue moving the music industry in the right direction, new statutes must be enacted that embrace digital sampling by artists. ■

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Endnotes

- 1 Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (citing *Exodus* 20:15, to set the tone for the district court judge's opinion that rap artist, Biz Markie, not only violated the Seventh Commandment, but also infringed upon the copyright of "Alone Again (Naturally)" composed by Gilbert O'Sullivan).
- 2 Robert Levine, *Steal this Hook? D.J. Skirts Copyright Law*, N.Y. TIMES, Aug. 7, 2008, at E1, available at <http://www.nytimes.com/2008/08/07/arts/music/07girl.html>.
- 3 See *Newton v. Diamond*, 349 F.3d 591, 593 (9th Cir. 2003) (defining sampling as the "incorporation of short segments of prior sound recordings into new recordings."); 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, 211 (2005) (defining sampling as "the incorporation of portions of an existing song into a new song"); Levine, *supra* note 2. Girl Talk's latest album, "Feed the Animals," used more than 300 samples and was released online in June 2008 at illegalart.net. *Id.* Furthermore, Girl Talk is allowing fans to determine how much they wish to pay to download the album. *Id.* See also Mary B. Percifull, Note, *Digital Sampling: Creative or Just Plain "Cheez-Oid?"*, 42 CASE W. RES. L. REV. 1263, 1265 (1992) (defining sampling as "making a short digital recording of sound").
- 4 *Dancing with Girl Talk, Sasha and John Digweed*, SPIN MAGAZINE, June 17, 2007, available at <http://www.spin.com/articles/dancing-girl-talk-sasha-and-john-digweed> (reviewing the live performances at the Bonnaroo Festival in June 2007).
- 5 Levine, *supra* note 2; *Dancing with Girl Talk, Sasha and John Digweed*, *supra* note 4.
- 6 Levine, *supra* note 2; *Dancing with Girl Talk, Sasha and John Digweed*, *supra* note 4.
- 7 Levine, *supra* note 2; see Percifull, *supra* note 3, at 1267–69 (discussing how musicians have spent years developing a style, which can be easily manipulated due to sampling). Artists feel they have a moral right to control how their works are used. *Id.* However, proponents of sampling feel that it is encouraging creativity, paying homage to the original artists, and boosting the sales of the original recordings. *Id.*
- 8 Levine, *supra* note 2 (stating how D.J. Girl Talk has not been threatened with a lawsuit to date). Furthermore, music labels and artists are afraid to sue Girl Talk because a lawsuit may bring a precedent setting judgment in Girl Talk's favor and the possibility of bad publicity. *Id.*
- 9 17 U.S.C. § 114 (2006) (stating the statutory scope of exclusive rights in sound recordings); Levine, *supra* note 2 (stating that hip-hop artists who have not obtained permission or licensing agreements from the copyright owners to sample recordings have been successfully sued).
- 10 Levine, *supra* note 2; see 17 U.S.C. § 107.
- 11 Levine, *supra* note 2; see 17 U.S.C. § 107 (stating the factors of the Fair Use Doctrine, which Girl Talk believes are the reason his songs do not infringe upon other artists' copyrights).

- 12 Lucille M. Ponte, *The Emperor has No Clothes: How Digital Sampling Infringement Cases are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 518–19 (2006) (discussing how the little statutory guidance led to earlier sampling cases being settled out of court, and now litigation has begun to increase but the courts have been come down with inconsistent opinions while applying different legal standards such as per se infringement, an exception under fair use, and an exception of de minimis under the substantial similarity test).
- 13 *Id.* at 518 (proposes creating a new statutory provision for digital sampling that would balance public access with artistic rights); see Schietinger, *supra* note 3, at 216 (suggesting that the Sixth Circuit should have agreed with the analysis of the District Court, and that a negative impact on the law will come out of the decision); Percifull, *supra* note 3, at 1263 (proposing a sampling act by Congress where any sound recording under three seconds does not constitute copyright infringement).
- 14 U.S. CONST. art. I, § 8, cl. 8; Percifull, *supra* note 3, at 1270.
- 15 U.S. CONST. art. I, § 8, cl. 8; see 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 1.03[A] (2008) [hereinafter NIMMER ON COPYRIGHT] (citing U.S. CONST., art. I, § 8, cl. 18, the Necessary and Proper Clause to show that the Copyright Clause could have been created at a later time for copyrights and patents); Percifull, *supra* note 3, at 1270; Schietinger, *supra* note 3, at 216.
- 16 NIMMER ON COPYRIGHT, *supra* note 15, § 1.03[A] (citing *New York Times Co. v. Tasini*, 533 U.S. 483, 519 (2001) (Stevens, J., dissenting)); see *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (discussing how the Copyright Clause encourages individuals by rewarding them through economic personal gain, which then advances the public welfare)); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003) (stating that the Copyright Act's purpose is to promote creativity, which will in turn benefit the artist and the public); see also *Feist Publ'ns, Inc. v. Rural Tel. Serv., Co.*, 499 U.S. 340, 359–60 (1991) (holding that “sweat of the brow” from one’s labor does not provide copyright protection); Ponte, *supra* note 12, at 521 (discussing how Congress enacted the Copyright Amendment to promote creativity and reward artists for their labor by granting them copyright ownership); Schietinger, *supra* note 3, at 216 (discussing how the two main purposes of Copyright law are to encourage people to create art for society and to protect the artist’s work from theft); Percifull, *supra* note 3, at 1270 (discussing how the primary benefit of a copyright owner obtaining a copyright are for economic reasons because artists are granted a limited monopoly for their work, which leads to artists continuing their creativity to create a public good).
- 17 NIMMER ON COPYRIGHT, *supra* note 15, § Appendix 7[D].
- 18 17 U.S.C. §§ 101–1332 (2006); see Percifull, *supra* note 3, at 1271.
- 19 17 U.S.C. § 102(a); see 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT, § 1:82 (2008) [hereinafter PATRY ON COPYRIGHT] (discussing the most important aspects of the Copyright Act of 1976 that were enacted by Congress, such as the limited time-frame a copyright exists, the fair use privilege, and a Copyright Royalty Tribunal). Congress enacted the first copyright act in 1790, which merely granted protection to authors of maps, charts, and books for 14 years. The next copyright act was in 1909. *Id.* at § 1.19.
- 20 17 U.S.C. § 301(a) (“On and after January 1, 1978 . . . no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State”); see 1 PATRY ON COPYRIGHT, *supra* note 19, § 1:82 (discussing how preemption of state law is one of the most important aspects in the passage of the Copyright Act of 1976); see also Schietinger, *supra* note 3, at 216.
- 21 17 U.S.C. § 102(a); see Schietinger, *supra* note 3, at 216 (discussing how the copyright of the musical composition protects the song, which includes the lyrics and music, and how the sound recording protects one particular recording). See generally 17 U.S.C. § 106, 114; 2 PATRY ON COPYRIGHT, *supra* note 19, § 3:160 (providing a general overview of sound recordings).
- 22 Ponte, *supra* note 12, at 523–24.
- 23 17 U.S.C. § 101; see 2 PATRY ON COPYRIGHT, *supra* note 19, § 3:160; Ponte, *supra* note 12, at 524 (discussing how the master tape of the recording represents the sound recording).
- 24 *Newton v. Diamond*, 349 F.3d 591, 592–93 (9th Cir. 2003) (citing 17 U.S.C. §§ 102(a)(2), (7)); Ponte, *supra* note 12, at 524; see 2 PATRY ON COPYRIGHT, *supra* note 19, § 3:160.
- 25 Ponte, *supra* note 12, at 525.
- 26 Ponte, *supra* note 12, at 526.
- 27 Ponte, *supra* note 12, at 524; see 17 U.S.C. §§ 106(1)–(5); 2 PATRY ON COPYRIGHT, *supra* note 19, § 3:160. Sound recordings are “purely aural works” and cover only a “series of recorded sounds.” 2 PATRY ON COPYRIGHT, *supra* note 19, § 3:160.
- 28 Ponte, *supra* note 12, at 526.
- 29 17 U.S.C. § 301(c) (“[N]o sound recording fixed before February 15, 1972, shall be subject to copyright under this title”); see Ponte, *supra* note 12, at 525. Ponte discusses how sounds recordings lacked copyright protection. *Id.* However, because piracy was such a big concern, Congress enacted the Sound Recording Amendment of 1971, which granted copyright protection to sound recordings effective on February 15, 1972. *Id.* All sound recordings prior to February 15, 1972, did not fall under the Copyright Act, but were to be governed by the common law of their respective states. *Id.*; see also Schietinger, *supra* note 3, at 216.
- 30 *Tuff ‘N’ Rumble Mgmt., Inc. v. Profile Records, Inc.*, 42 U.S.P.Q.2d 1398, 1399 (S.D.N.Y. 1997) (citing *M.H. Segan Ltd. P’ship v. Hasbro, Inc.*, 924 F. Supp. 512, 518 (S.D.N.Y. 1996)); Ponte, *supra* note 12, at 526–27; Schietinger, *supra* note 3, at 217–19 (discussing the elements of copyright infringement in depth); Percifull, *supra* note 3, at 1272–76 (discussing the elements of copyright infringement in depth); see also *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 817 (9th Cir. 2003) (stating that the Ninth Circuit requires proof of copyright infringement by showing that the plaintiff has ownership of the copyright and that there was copying by the defendant).
- 31 Ponte, *supra* note 12, at 526; Schietinger, *supra* note 3, at 217–18 (discussing how copyright registration may constitute prima facie evidence of ownership of a valid copyright); Percifull, *supra* note 3, at 1272; see *Bridgeport Music, Inc. v.*

- Dimension Films, 383 F.3d 390, 393 (6th Cir. 2004) (stating that ownership of the copyright was established by the plaintiffs because there was no dispute among the parties); *Kelly*, 336 F.3d at 817; *Williams v. Broadus*, 60 U.S.P.Q.2d 1051, 1051 (S.D.N.Y. 2001); *Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1399 (discussing how 17 U.S.C. § 410(c) provides prima facie evidence of a valid copyright if registration is within five years of first publication).
- 32 *Ponte*, *supra* note 12, at 526; *Schietinger*, *supra* note 3, at 217; *Percifull*, *supra* note 3, at 1272 (discussing how authors of the sound recording include performers, engineers, producers, and art). *But see Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1399–1400 (explaining how Roy Hammond was claimed to be the original copyright holder of “Impeach the President” but there was no evidence showing that Hammond was able to transfer the copyright to Tuff, so the court held that Tuff did not have ownership of a valid copyright).
- 33 *Ponte*, *supra* note 12, at 526; *Schietinger*, *supra* note 3, at 217; *Percifull*, *supra* note 3, at 1273.
- 34 *Ponte*, *supra* note 12, at 526; *Schietinger*, *supra* note 3, at 217.
- 35 *Ponte*, *supra* note 12, at 526; *Schietinger*, *supra* note 3, at 217; *Percifull*, *supra* note 3, at 1272; *see Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1400.
- 36 *Ponte*, *supra* note 12, at 526; *Schietinger*, *supra* note 3, at 218; *Percifull*, *supra* note 3, at 1272. *See Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1400.
- 37 *Ponte*, *supra* note 12, at 526; *Schietinger*, *supra* note 3, at 217; *Percifull*, *supra* note 3, at 1273; *see also Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991) (providing an example of how courts have found direct admission of unauthorized copying); *e.g.*, *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 817 (9th Cir. 2003) (stating that the defendant conceded that the plaintiff established a prima facie case of infringement); *Williams v. Broadus*, 60 U.S.P.Q.2d 1051, 1051 (S.D.N.Y. 2001) (revealing defendants admitted to using part of the plaintiffs’ song).
- 38 *Schietinger*, *supra* note 3, at 218.
- 39 *Schietinger*, *supra* note 3, at 218; *see Percifull*, *supra* note 3, at 1273.
- 40 *See Selle v. Gibb*, 741 F.2d 896 (7th Cir. 1984) (discussing how if the plaintiff presents evidence of striking similarity between the two works, then it is presumed that there was copying); *Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1401 (citing *Favia v. Lyons P’ship*, 1996 WL 194306, at *3 (S.D.N.Y. 1996), “[a]s proof of access, a plaintiff may show that ‘(1) the infringed work has been widely disseminated or (2) a particular chain of events exists by which the defendant might have gained access to work’”); *Schietinger*, *supra* note 3, at 218.
- 41 *Ponte*, *supra* note 12, at 527; *see Schietinger*, *supra* note 3, at 217; *Percifull*, *supra* note 3, at 1274.
- 42 *Newton v. Diamond*, 349 F.3d 591, 594 (9th Cir. 2003) (discussing that there will be no legal consequences for copying unless the copying is substantial); *see Percifull*, *supra* note 3, at 1274; *see also Williams*, 60 U.S.P.Q.2d at 1053; *Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1401.
- 43 *Ponte*, *supra* note 12, at 528; *see Newton*, 349 F.3d at 594.
- 44 *Percifull*, *supra* note 3, at 1274 (discussing how the substantial similarity test is vague and presents a difficult question in copyright law); *see Newton*, 349 F.3d at 594; *Ponte*, *supra* note 12, at 528 (discussing how substantial similarity examines the total concept and feel of disputed works). *But see Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 397 (6th Cir. 2004) (holding that use of the substantial similarity test was not required since the owner of the sound recording had the exclusive right to sample his own recording).
- 45 *Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1401; *see Newton*, 349 F.3d at 594 (citing *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986)); *see also Williams*, 60 U.S.P.Q.2d at 1053; *Ponte*, *supra* note 12, at 528; *Schietinger*, *supra* note 3, at 219 (referring to the average listener test instead as the “ordinary observer test”); *Percifull*, *supra* note 3, at 1274.
- 46 *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997) (defining de minimis as a “technical violation of a right so trivial that the law will not impose legal consequences”); *Schietinger*, *supra* note 3, at 219–20 (stating that de minimis is “copying so trivial that it does not gain copyright protection”); *see Newton*, 349 F.3d at 594–95 (discussing how the legal term, de minimis non curat lex means that ‘the law does not concern itself with trifles.’); *Bridgeport Music, Inc. v. Dimension Films*, 230 F. Supp. 2d 830, 841 (M.D. Tenn. 2002) *rev’d*, 383 F.3d 390 (6th Cir. 2004); *see also Ponte*, *supra* note 12, at 528.
- 47 *Percifull*, *supra* note 3, at 1281.
- 48 17 U.S.C. §§ 106, 107 (2006); *see Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 817 (9th Cir. 2003).
- 49 9 F. Cas. 342 (D. Mass. Oct. 1841). This case dealt with whether the use of letters written by President Washington constituted piracy. *Id.* at 345. Three hundred fifty-three out of eight hundred sixty-six pages of the defendant’s book were identical to the plaintiff’s book. *Id.* Plaintiff acquired an interest in President Washington’s letters and it was held that plaintiff owned these letters along with the exclusive copyright, which was infringed upon by the defendant. *Id.* at 345, 346.
- 50 *Id.* at 348.
- 51 *Id.*
- 52 17 U.S.C. § 107; *see Percifull*, *supra* note 3, at 1278.
- 53 17 U.S.C. § 107.
- 54 *Id.*; *see Percifull*, *supra* note 3, at 1278 (discussing how Congress’s use of the words “such as” provides that the statute only has a list of examples and there may be other permitted purposes that later come to light).
- 55 *Percifull*, *supra* note 3, at 1278; *see Schietinger*, *supra* note 3, at 220; *e.g.*, *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 822 (9th Cir. 2003).
- 56 17 U.S.C. §§ 107(1)–(4); *see Schietinger*, *supra* note 3, at 220; *see also Percifull*, *supra* note 3, at 1278.
- 57 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994) (holding that hip-hop group, 2 Live Crew’s song “Pretty Woman” was a parody that did not infringe upon the copyright of Roy Orbison’s song, “Oh Pretty Woman” ac-

- cording to the fair use doctrine); *Kelly*, 336 F.3d at 817 (discussing how fair use is an exception to copyright infringement and later holding that the defendant's use was fair); *Fisher v. Dees*, 794 F.2d 432, 440 (9th Cir. 1986) (holding that the works were substantially similar but they did not infringe because the work was found to be a parody under the fair use doctrine); Schietinger, *supra* note 3, at 220; see Ponte, *supra* note 12, at 528 (discussing how instances of parodies in disputes have brought out the fair use defense).
- 58 Schietinger, *supra* note 3, at 220; see, e.g., *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 77 (2d Cir. 1997) (showing that once the de minimis threshold has been crossed, then a defendant's next possible defense is fair use).
- 59 420 F. Supp. 177 (S.D.N.Y. 1976). This case was decided before the Copyright Act of 1976 came into effect on January 1, 1978. *Id.* at 177.
- 60 *Id.* at 180. Harrison recorded his song, "My Sweet Lord" in 1970 that nearly followed the exact same chord progressions as Ronald Mack's song, "He's So Fine," which was recorded in 1962. *Id.* Harrison also used an identically distinctive grace note, which helped solidify that both songs had identical harmonies. *Id.*
- 61 *Id.* George Harrison was a former member of The Beatles and was aware of "He's So Fine" when it topped No. 1 on the billboard charts for several weeks in 1963. *Id.* Harrison came up with the chord progressions while on tour in Denmark, but was not consciously aware that he had heard Mack's song before. *Id.*
- 62 *Id.* at 182 (holding that defendant subconsciously misappropriated the plaintiff's work).
- 63 780 F. Supp. 182 (S.D.N.Y. 1991); see Schietinger, *supra* note 3, at 221–22.
- 64 *Grand Upright Music*, 780 F. Supp. at 183–84. Finding the most persuasive evidence was a letter, with an enclosed copy of a tape, from the defendants to O'Sullivan and his agent requesting to use O'Sullivan's song, "Alone Again (Naturally)." *Id.* Therefore, the court held that Biz Markie knew he needed to obtain a license to use O'Sullivan's work, and the letter served as an admission. *Id.*; see Schietinger, *supra* note 3, at 221–22.
- 65 *Id.* at 185. The judge also referred the matter to the United States Attorney for the Southern District of New York to criminally prosecute the defendants. *Id.*; see also Schietinger, *supra* note 3, at 222.
- 66 Schietinger, *supra* note 3, at 222 (arguing that the court's per se ruling of automatic copyright infringement provided little guidance to help understand the thresholds quantitatively, or qualitatively for future sampling cases).
- 67 349 F.3d 591 (9th Cir. 2003).
- 68 See Ponte, *supra* note 12, at 532. Licensing to the sound recording for "Choir" was obtained from the copyright owner, ECM Records, for a one time fee of \$1,000. *Newton*, 349 F.3d at 593. The Beastie Boys sampled a six second, three note segment of "Choir" for their song, "Pass the Mic," which was repeated or "looped" throughout the song over forty times. *Id.*
- 69 *Newton*, 349 F.3d at 593; see 2 PATRY ON COPYRIGHT, *supra* note 19, § 3:163 (discussing how defendants can infringe on sound recordings and not musical compositions).
- 70 *Newton*, 349 F.3d at 594–95; Ponte, *supra* note 12, at 534; see *Williams v. Broadus*, 60 U.S.P.Q.2d 1051, 1054 (S.D.N.Y. 2001).
- 71 *Newton*, 349 F.3d at 597 (discussing how the sampling was not quantitatively significant because the six second segment comprised roughly only two percent of the four and one-half minute "Choir," nor was there any evidence that the sample had any qualitative significance to "Choir"); Ponte, *supra* note 12, at 534.
- 72 *Newton*, 349 F.3d at 594, 598 (citing *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986), where the court determined that a sample is de minimis when the average audience would not recognize the appropriation); see Ponte, *supra* note 12, at 537–38 (arguing that the court overlooked the fact that repeating or "looping" the sample were quantitative and qualitative elements that were significant to the new song).
- 73 Ponte, *supra* note 12, at 535.
- 74 383 F.3d 390 (6th Cir. 2004); see 2 PATRY ON COPYRIGHT, *supra* note 19, § 3:163 (discussing how infringement of sound recordings occurs where a license for the musical composition has been obtained).
- 75 *Bridgeport Music*, 383 F.3d at 393; see Schietinger, *supra* note 3, at 224–25 (reporting that N.W.A. repeated or "looped" the two second sample fourteen to sixteen times throughout "100 Miles and Runnin").
- 76 *Bridgeport Music*, 383 F.3d at 393; I GOT THE HOOK UP (No Limit Records 1998); see Schietinger, *supra* note 3, at 224.
- 77 *Bridgeport Music*, 383 F.3d at 394; see Schietinger, *supra* note 3, at 224; see also Ponte, *supra* note 12, at 531–33.
- 78 *Bridgeport Music*, 383 F.3d at 397 (arguing that 17 U.S.C. § 114 gives the owner of the sound recording the exclusive right to sample the recording); Ponte, *supra* note 12, at 545–46 (arguing that the court's ruling devalues the protection to musical scores compared to sound recordings, and creates more of a burden for the composers and owners of musical scores); see Schietinger, *supra* note 3, at 230 (arguing that the Sixth Circuit should have a substantial similarity-de minimis analysis because it generally applies to copyright infringement, de minimis analysis is not eliminated by any law, and not conducting a de minimis analysis is against the purposes of copyright law).
- 79 *Bridgeport Music*, 383 F.3d at 398 (arguing that they do not believe this significantly hinders creativity). First, artists are free to recreate the sound of the sample in the studio. *Id.* Second, the market will keep the price of licensing reasonable. *Id.* Last, sampling is not done by accident. *Id.*; see Schietinger, *supra* note 3, at 234–35 (arguing that the bright-line rule discourages artistic creation, which is a goal of copyright law). See generally 2 PATRY ON COPYRIGHT, *supra* note 19, § 3:163 (providing an overview and analysis of the case).
- 80 See Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1094–95 (2007) (discussing the difference of opinion by judges on the meaning of fair use); David Nimmer, "Fair-est of Them All" and Other Fairy Tales of Fair Use, 66 LAW & CONTEMP. PROBS. 263, 280 (2003) (noting the "malleability" of fair use factors).
- 81 *Jarvis v. A&M Records*, 827 F. Supp. 282, 288 (D.N.J. 1993) (stating the three elements of copyright infringement); see

- Tuff 'N' Rumble Mgmt., Inc. v. Profile Records, Inc., 42 U.S.P.Q.2d 1398, 1399 (S.D.N.Y. 1997) (citing *M.H. Segan Ltd. P'ship v. Hasbro, Inc.*, 924 F. Supp. 512, 518 (S.D.N.Y. 1996)); Ponte, *supra* note 12, at 526–27; Schietinger, *supra* note 3, at 217–19 (discussing the elements of copyright infringement in depth); Percifull, *supra* note 3, at 1272–76 (discussing the elements of copyright infringement in depth); see also *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 817 (9th Cir. 2003) (stating that the Ninth Circuit requires proof of copyright infringement by showing that the plaintiff has ownership of the copyright and that there was copying by the defendant).
- 82 Ponte, *supra* note 12, at 526; Schietinger, *supra* note 3, at 217–18 (discussing how copyright registration may constitute prima facie evidence of ownership of a valid copyright); Percifull, *supra* note 3, at 1272; see *Bridgeport Music*, 383 F.3d at 393 (stating that ownership of the copyright was established by the plaintiffs because there was no dispute among the parties); *Kelly*, 336 F.3d at 817 (conceding that the plaintiff had a prima facie case of infringement); *Williams v. Broadus*, 60 U.S.P.Q.2d 1051, 1051 (S.D.N.Y. 2001); *Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1399 (discussing how 17 U.S.C. § 410(c) provides prima facie evidence of a valid copyright if registration is within five years of first publication).
- 83 17 U.S.C. § 410(c) (2006) (stating that registration within five years after first publication shall constitute prima facie evidence of a valid copyright); see *Williams*, 60 U.S.P.Q.2d at 1051; *Jarvis*, 827 F. Supp. at 289.
- 84 Ponte, *supra* note 12, at 526; Schietinger, *supra* note 3, at 217; Percifull, *supra* note 3, at 1272; see *Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1400.
- 85 *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946) (stating that copying can be found by the defendant admitting to copying, or circumstantial evidence); *Jarvis*, 827 F. Supp. at 289; Ponte, *supra* note 12, at 526; Schietinger, *supra* note 3, at 218; Percifull, *supra* note 3, at 1272; see *Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1400.
- 86 See *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (providing an example of how courts have found direct admission of unauthorized copying); *Williams*, 60 U.S.P.Q.2d at 1051 (showing how defendants conceded to copying “The Symphony” for their song “Ghetto Symphony”); see, e.g., *Bridgeport Music*, 383 F.3d at 393 (providing a direct admission where there was no dispute that defendants’ song, “Get Off,” was copied); *Kelly*, 336 F.3d at 817.
- 87 *But see Jarvis*, 827 F. Supp. at 289 (stating that it is a rare case where indirect evidence is not necessary to establish infringement); *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706, 711 (S.D.N.Y. 1987) (citing *Reyher v. Children’s Television Workshop*, 533 F.2d 87, 90 (2d Cir. 1976), which cites *Arnstein* 154 F.2d at 468). It is often difficult to obtain a direct admission of copying, so typically circumstantial evidence is used to establish unauthorized copying. *Id.*
- 88 See, e.g., *Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1401–02; *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997).
- 89 *Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1402 (discussing how access may also be found through a particular chain of events where the defendant came across the plaintiff’s work); see *Ringgold*, 126 F.3d at 74; *Bright Tunes Music v. Harrisongs Music*, 420 F. Supp. 177, 179 (S.D.N.Y. 1976).
- 90 *Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1401.
- 91 *Arnstein*, 154 F.2d at 468; see *Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1401.
- 92 Levine, *supra* note 2 (discussing *Girl Talk*’s use of samples from popular artists such as Jay-Z, OutKast, Aerosmith, and AC/DC); *Dancing with Girl Talk, Sasha and John Digweed*, *supra* note 4 (discussing how *Girl Talk* samples from artists such as Nirvana, D.J. EZ Rock, and Rob Base).
- 93 Levine, *supra* note 2; *Dancing with Girl Talk, Sasha and John Digweed*, *supra* note 4.
- 94 See *Williams v. Broadus*, 60 U.S.P.Q.2d 1051, 1053 (S.D.N.Y. 2001); *Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1402.
- 95 *Williams*, 60 U.S.P.Q.2d at 1053; *Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1402; see *Newton v. Diamond*, 349 F.3d 591, 594 (9th Cir. 2003); see, e.g., *Bright Tunes Music v. Harrisongs Music*, 420 F. Supp. 177, 180–81 (S.D.N.Y. 1976) (finding unconscious misappropriation).
- 96 *Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1402 (stating the test for the Second Circuit).
- 97 Percifull, *supra* note 3, at 1276.
- 98 Percifull, *supra* note 3, at 1276.
- 99 *Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1402; *Jarvis v. A & M Records*, 827 F. Supp. 282, 290 (D.N.J. 1991).
- 100 *Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1402; *Jarvis*, 827 F. Supp. at 290.
- 101 Levine, *supra* note 2; *Dancing with Girl Talk, Sasha and John Digweed*, *supra* note 4.
- 102 Percifull, *supra* note 3, at 1276.
- 103 Percifull, *supra* note 3, at 1276.
- 104 *Jarvis*, 827 F. Supp. at 291.
- 105 *Williams v. Broadus*, 60 U.S.P.Q.2d 1051, 1053 (S.D.N.Y. 2001); *Tuff 'N' Rumble Mgmt., Inc.*, 42 U.S.P.Q.2d at 1402; see *Newton v. Diamond*, 349 F.3d 591, 594 (9th Cir. 2003); see, e.g., *Bright Tunes Music v. Harrisongs Music*, 420 F. Supp. 177, 180–81 (S.D.N.Y. 1976) (finding unconscious misappropriation).
- 106 *Gordon v. Nextel Commc’ns and Mullen Adver., Inc.*, 345 F.3d 922, 923–24 (6th Cir. 2003); see *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994) (holding that hip-hop group, 2 Live Crew’s song “Pretty Woman” was a parody that did not infringe upon the copyright of Roy Orbison’s song, “Oh Pretty Woman” according to the fair use doctrine); *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 80 (2d Cir. 1997); *Fisher v. Dees*, 794 F.2d 432, 440 (9th Cir. 1986) (holding that the works were substantially similar but they did not infringe because the work was found to be a parody under the fair use doctrine); Schietinger, *supra* note 3, at 220; see also Ponte, *supra* note 12, at 528 (discussing how instances of parodies in disputes have brought out the fair use defense).
- 107 17 U.S.C. § 107 (2006) (stating that there is not copyright infringement “for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research”).

- Furthermore, § 107 provides a limitation upon the exclusive rights granted to copyright holders under 17 U.S.C. § 106. *Id.*
- 108 *Id.*
- 109 No bright line rule for fair use may be adopted since each fair use case must be decided on its own merits. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984); see *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 552, 561 (1985) (stating that a fair use analysis must be applied on a case by case basis).
- 110 17 U.S.C. § 107(1). See generally *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C. Mass. 1841) (according to Justice Story the “look to the nature and objects of the selections made” is the foundation for the first factor of the fair use doctrine); 4 PATRY ON COPYRIGHT, *supra* note 19, § 10:5 (discussing how the first factor of the fair use doctrine was adopted from *Folsom v. Marsh*).
- 111 4 PATRY ON COPYRIGHT, *supra* note 19, § 10:4.
- 112 *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C. Mass. 1841); see *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003).
- 113 *Folsom*, 9 F. Cas. at 344.
- 114 *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 79 (2d Cir. 1997); see *Campbell*, 510 U.S. at 579 (discussing how transformative use is not absolutely necessary to find fair use, but the more transformative a work then the less likely the work will be found to be against fair use); *Kelly*, 336 F.3d at 818.
- 115 See *Ringgold*, 126 F.3d at 79. But see, e.g., *Kelly*, 336 F.3d at 819 (showing an example of transformative use where the defendant’s use of the plaintiff’s images was for a different function than the plaintiff’s use).
- 116 See *Ringgold*, 126 F.3d at 79.
- 117 *Campbell*, 510 U.S. at 579.
- 118 *Id.*
- 119 *Levine, supra* note 2; *Dancing with Girl Talk, Sasha and John Digweed, supra* note 4.
- 120 *Campbell*, 510 U.S. at 579.
- 121 *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).
- 122 4 PATRY ON COPYRIGHT, *supra* note 19, § 10:16 (discussing *Sony Corp.*); see *Sony Corp.*, 464 U.S. at 448–49.
- 123 464 U.S. 417 (1984).
- 124 *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) (discussing how the distinction between commercial and non-commercial use is “whether the user stands to profit from exploitation of the copyrighted material without paying the customary price”).
- 125 510 U.S. 569, 584–85 (1994).
- 126 D.J. *Girl Talk* has come out with five compact discs. D.J. *GIRL TALK*, *All Day* (Illegal Art 2010); D.J. *GIRL TALK*, *Feed the Animals* (Illegal Art 2008); D.J. *GIRL TALK*, *Night Ripper* (Illegal Art 2006); D.J. *GIRL TALK*, *Unstoppable* (Illegal Art 2004); D.J. *GIRL TALK*, *Secret Diary* (Illegal Art 2002).
- 127 *Campbell*, 510 U.S. at 584–85; see *Harper & Row*, 471 U.S. at 562.
- 128 4 PATRY ON COPYRIGHT, *supra* note 19, § 10:16.
- 129 *Harper & Row*, 471 U.S. at 562 (discussing how monetary gain does not have to be the sole intent of the user, but actually whether the user will profit from exploiting the copyrighted work); see *Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989).
- 130 See 4 PATRY ON COPYRIGHT, *supra* note 19, § 10:16.
- 131 See *Campbell*, 510 U.S. at 579.
- 132 See *Campbell*, 510 U.S. at 579; 4 PATRY ON COPYRIGHT, *supra* note 19, § 10:16.
- 133 See *Campbell*, 510 U.S. at 579; 4 PATRY ON COPYRIGHT, *supra* note 19, § 10:16.
- 134 17 U.S.C. § 107(2) (2006). See generally *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C. Mass. 1841) (according to Justice Story the “value of the materials used” is the foundation for the second factor of the fair use doctrine); 4 PATRY ON COPYRIGHT, *supra* note 19, § 10:6 (discussing how the second factor of the fair use doctrine was adopted from *Folsom v. Marsh*).
- 135 *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 972 (9th Cir. 1981), rev’d on other grounds, 464 U.S. 417 (1984); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PENN. L. REV. 549, 610 (2008); see, e.g., *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 80 (2d Cir. 1997) (glancing over the second factor of fair use). But see *Harper & Row*, 471 U.S. at 563–64 (discussing how critical unpublished works are to the second factor of fair use).
- 136 4 PATRY ON COPYRIGHT, *supra* note 19, § 10:138; Percifull, *supra* note 3, at 1279; see *Campbell*, 510 U.S. at 586 (discussing how some works are closer to the intended purpose of copyright protection compared to others typically in situations of creative works against factual works); *Harper & Row*, 471 U.S. at 563 (discussing how factual works have a greater need to be widely circulated compared to more creative works of “fiction or fantasy”); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003). Original works that are published are more likely to fall under fair use because the original artist’s work has already made an appearance. *Id.*
- 137 4 PATRY ON COPYRIGHT, *supra* note 19, § 10:138.
- 138 *Id.*
- 139 Beebe, *supra* note 134, at 610. Of the 306 opinions discussing fair use since 2008, only 17.7% of the opinions included the second factor of the Fair Use Doctrine, while only 6.5% of the opinions included the second factor to state that it was irrelevant. *Id.* Further, the outcome of the second factor typically has no significant impact on the overall outcome of the fair use analysis. *Id.*
- 140 17 U.S.C. § 107(3). See generally *Folsom*, 9 F. Cas. at 348 (according to Justice Story the “the quantity and value of the materials used” is the foundation for the third factor of the fair use doctrine).
- 141 See *Campbell*, 510 U.S. at 588 (discussing how in order for a parody to succeed it must ‘conjure up’ some of the original, possibly the heart of the song, in order for the humor in the original work to be recognizable); *Sony Corp.*,

- 464 U.S. at 449–50 (discussing how copying an entire television program onto a videotape did not have the ordinary effect of weighing against the defendant); *Harper & Row*, 471 U.S. at 564–65 (discussing how the defendant took the “heart of the book” and held qualitative significance); *Ringgold*, 126 F.3d at 76 (discussing how a slight quantity of copying of the work as a whole may not be in the defendant’s favor if the defendant’s quantitative use is substantial); Percifull, *supra* note 3, at 1280 (discussing how sampling only a few seconds of a work will be to the defendant’s advantage).
- 142 *Ringgold*, 126 F.3d at 76; *Bramwell v. Halcomb*, 3 My & Cr. (Ch.) 737, 738 (1838); see *Harper & Row*, 471 U.S. at 564–65 (discussing how defendant took a significant qualitative portion that was described to be the “heart of the book”).
- 143 See *Harper & Row*, 471 U.S. at 564–65. *But see Campbell*, 510 U.S. at 588 (holding that a parody may go to the heart of a work in order for the humor in the original work to be recognizable). See generally *Ringgold*, 126 F.3d at 80 (stating that courts should not give this factor too much weight when assessing fair use).
- 144 *Campbell*, 510 U.S. at 579, 587–89 (finding that no more was taken than necessary from the original work).
- 145 *Id.*
- 146 17 U.S.C. § 107(4). See generally *Folsom*, 9 F. Cas. at 348 (according to Justice Story the “degree in which the use may prejudice the sale, or diminish the profits” is the foundation for the fourth factor of the fair use doctrine); 4 PATRY ON COPYRIGHT, *supra* note 19, § 10:7 (discussing how the fourth factor of the fair use doctrine was adopted from *Folsom v. Marsh*).
- 147 *Sony Corp.*, 464 U.S. at 451.
- 148 *Campbell*, 510 U.S. at 584–85.
- 149 *Harper & Row*, 471 U.S. at 568; *Sony Corp.*, 464 U.S. at 451; see *Ringgold*, 126 F.3d at 80 (discussing how defendant contends there is a potential market for her story quilts and that she earned income from licensing her work).
- 150 *Harper & Row*, 471 U.S. at 568.
- 151 *Id.*
- 152 See *Campbell*, 510 U.S. at 591; *Harper & Row*, 471 U.S. at 568; *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C. Mass. 1841).
- 153 *Campbell*, 510 U.S. at 591; *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821 (9th Cir. 2003) (citing *Campbell*, 510 U.S. at 591) (stating that “[a] transformative work is less likely to have an adverse impact on the market of the original than a work that merely supersedes the copyrighted work”).
- 154 See *Campbell*, 510 U.S. at 591; *Kelly*, 336 F.3d at 821 (citing *Campbell*, 510 U.S. at 591).
- 155 See *Campbell*, 510 U.S. at 592.
- 156 See *id.*
- 157 See *supra* Part II.A.1.
- 158 See *supra* Part II.A.2.
- 159 See *supra* Part II.A.3.
- 160 See *supra* Part II.A.4.
- 161 Amanda Webber, Note, *Digital Sampling and the Legal Implications of its Use After Bridgeport*, 22 ST. JOHN’S J. LEGAL COMMENT. 373 (2007); Ponte, *supra* note 12; Mike Suppappola, *Confusion in the Digital Age: Why the De Minimis Use Test Should be Applied to Digital Samples of Copyrighted Sound Recordings*, 14 TEX. INTELL. PROP. L.J. 93 (2006); Jeremy Beck, *Music Composition, Sound Recordings and Digital Sampling in the 21st Century: A Legislative and Legal Framework to Balance Competing Interests*, 13 UCLA ENT. L. REV. 1 (2005); Bryan Bergman, Comment, *Into the Grey: The Unclear Laws of Digital Sampling*, 27 HASTINGS COMM. & ENT. L.J. 619 (2005); Schietinger, *supra* note 3; Percifull, *supra* note 3.
- 162 U.S. CONST. art. I, § 8, cl. 8; see NIMMER ON COPYRIGHT, *supra* note 15, § 1.03[A] (citing U.S. CONST., art. I, § 8, cl. 18, the Necessary and Proper Clause to show that the Copyright Clause could have been created at a later time for copyrights and patents); Bergman, *supra* note 151, at 643; Schietinger, *supra* note 3, at 216; Percifull, *supra* note 3, at 1270.
- 163 NIMMER ON COPYRIGHT, *supra* note 15, § 1.03[A] (2008) (citing *New York Times Co. v. Tasini*, 533 U.S. 483, 519 (2001) (Stevens, J., dissenting); see *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (discussing how the Copyright Clause encourages individuals by rewarding them through economic personal gain, which then advances the public welfare)); see also *Feist Publ’ns, Inc. v. Rural Tel. Serv., Co.*, 499 U.S. 340, 359–60 (1991) (holding that “sweat of the brow” from one’s labor does not provide copyright protection); Ponte, *supra* note 12, at 521 (discussing how Congress enacted the Copyright Amendment to promote creativity and reward artists for their labor by granting them copyright ownership); Bergman, *supra* note 151, at 643; Schietinger, *supra* note 3, at 216 (discussing how the two main purposes of Copyright law are to encourage people to create art for society and to protect the artist’s work from theft); Percifull, *supra* note 3, at 1270 (discussing how the primary benefit of a copyright owner obtaining a copyright are for economic reasons because artists are granted a limited monopoly for their work, which leads to artists continuing their creativity to create a public good).
- 164 See *Newton v. Diamond*, 349 F.3d 591, 593 (9th Cir. 2003) (defining sampling as the “incorporation of short segments of prior sound recordings into new recordings.”); Schietinger, *supra* note 3, at 211 (defining sampling as “the incorporation of portions of an existing song into a new song”); Levine, *supra* note 2; see also Percifull, *supra* note 3, at 1265 (defining sampling as “making a short digital recording of sound”).
- 165 Bergman, *supra* note 151, at 644.
- 166 Bergman, *supra* note 161, at 644.
- 167 17 U.S.C. § 102(a) (2006).
- 168 Bergman, *supra* note 151, at 644.
- 169 Bergman, *supra* note 161, at 644. Many record companies look to the stature of the artist whose sample was used, the stature of sampling artist, how much success the sampled song had, and the length of time of the sample. Bergman, *supra* note 161, at 644. Another factor includes

- the content of the sample, or whether there is a distinctive hook or merely a drum beat. Bergman, *supra* note 161, at 645. Also, the context of the sample is looked at to see whether the new work relies heavily on the copied work. Bergman, *supra* note 161, at 645. Last, record companies will see whether the new work will appear in videos, commercials, or other profit producing ventures. Bergman, *supra* note 161, at 645.
- 170 Bergman, *supra* note 161, at 645.
- 171 Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 393 (6th Cir. 2004) (holding that the copyright was infringed and created a bright line rule against copyright infringement); Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 186 (S.D.N.Y. 1991) (holding that Biz Markie infringed the copyright by using any part of the sampled work without a license).
- 172 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 594 (1994) (holding that hip-hop group 2 Live Crew's song "Pretty Woman" was a parody that did not infringe upon the copyright of Roy Orbison's song, "Oh Pretty Woman" according to the fair use doctrine); Newton v. Diamond, 349 F.3d 591, 593 (9th Cir. 2003) (holding that the Beastie Boys use of the song fell under the fair use exception).
- 173 See 17 U.S.C. §§ 101–1332 (2006).
- 174 See *supra* Part I.E.
- 175 NIMMER ON COPYRIGHT, *supra* note 15, § 1.03[A] (citing New York Times Co. v. Tasini, 533 U.S. 483, 519 (2001) (Stevens, J., dissenting); see Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984); Mazer v. Stein, 347 U.S. 201, 219 (1954) (discussing how the Copyright Clause encourages individuals by rewarding them through economic personal gain, which then advances the public welfare)); see also Feist Publ'ns, Inc. v. Rural Tel. Serv., Co., 499 U.S. 340, 359–60 (1991) (holding that "sweat of the brow" from one's labor does not provide copyright protection); Ponte, *supra* note 12, at 521 (discussing how Congress enacted the Copyright Amendment to promote creativity and reward artists for their labor by granting them copyright ownership); Bergman, *supra* note 151, at 643; Schietinger, *supra* note 3, at 216 (discussing how the two main purposes of Copyright law are to encourage people to create art for society and to protect the artist's work from theft); Percifull, *supra* note 3, at 1270 (discussing how the primary benefit of a copyright owner obtaining a copyright are for economic reasons because artists are granted a limited monopoly for their work, which leads to artists continuing their creativity to create a good that benefits the public).
- 176 U.S. CONST. art. I, § 8, cl. 8; see NIMMER ON COPYRIGHT, *supra* note 15, § 1.03[A]; Bergman, *supra* note 151, at 643; Schietinger, *supra* note 3, at 216; Percifull, *supra* note 3, at 1270.
- 177 Bergman, *supra* note 151, at 644.
- 178 Bergman, *supra* note 161, at 644.
- 179 Bergman, *supra* note 161, at 644.
- 180 Bergman, *supra* note 161, at 644.
- 181 Bergman, *supra* note 161, at 644.
- 182 Bergman, *supra* note 151, at 649; see Ponte, *supra* note 12, at 547–52. Section 115 of the Copyright Act now provides for compulsory licensing for performing or recording another artist's cover song. *Id.* at 547. Section 115 also requires that proper notice be given and that royalties be paid to the Library of Congress. *Id.* at 547–48. Many proponents believe Congress should amend Section 115 to include compulsory licensing for digital sampling or enact another statute for digital sampling. *Id.* at 548. Proponents like this idea of compulsory licensing because it grants access to copyrighted material at a low cost. *Id.* at 548–49.
- 183 Bergman, *supra* note 151, at 649.
- 184 Bergman, *supra* note 161, at 649.
- 185 Bergman, *supra* note 161, at 644. Many record companies look to the stature of the artist whose sample was used, the stature of sampling artist, how much success the sampled song had, and the length of time of the sample. Bergman, *supra* note 161, at 644. Another factor includes the content of the sample, or whether there is a distinctive hook or merely a drum beat. Bergman, *supra* note 161, at 645. Also, the context of the sample is looked at to see whether the new work relies heavily on the copied work. Bergman, *supra* note 161, at 645. Last, record companies will see whether the new work will appear in videos, commercials, or other profit producing ventures. Bergman, *supra* note 161, at 645.



Mission Statement Information Technology Law Section, State Bar of Michigan

The purposes of the Section are to review, comment upon, and appraise members of the State Bar of Michigan and others of developments in the law relating to information technology, including:

- (a) the protection of intellectual and other proprietary rights;
- (b) sale, leasing, distribution, provision, and use of, hardware, software, services, and technology, including computer and data processing equipment, computer software and services, games and gaming, information processing, programming, and computer networks;
- (c) electronic commerce
- (d) electronic implementation of governmental and other non-commercial functions;
- (e) the Internet and other networks; and
- (f) associated contract and tort liabilities, and related civil and criminal legal consequences.

Recent Developments in Information Technology Law

By David R. Syrowik, Brooks Kushman P.C.

PATENTS – Case Law – U.S. Courts of Appeal

As reported at 83 BNA's PTCJ 608, on February 27, 2012, the U.S. Court of Appeals for the Federal Circuit ruled that patent claims on buying and selling real estate properties with a computer without incurring a tax liability are not patent eligible under 35 U.S.C. § 101, likening the invention to the claims rejected by the U.S. Supreme Court in its *Bilski* decision. *Fort Properties Inc. v. American Master Lease L.L.C.*

As reported at 83 BNA's PTCJ 648 on March 2, 2012, the U.S. Court of Appeals for the Federal Circuit ruled that GraphOn Corp.'s patents asserted against Myspace and Craigslist are affirmed invalid as anticipated or obvious. GraphOn has sued many internet companies and purportedly has succeeded in obtaining patent licensing agreements worth nearly \$10 million for use of its claimed system. *MySpace Inc. v. GraphOn Corp.*

As reported at 83 BNA's PTCJ 694, on March 7, 2012, the U.S. Court of Appeals for the Federal Circuit ruled that while the architecture claims for several patents directed to regulating access to content delivered through a computer network specifically required that a registration server be free of managed content, the method claims of the patents contained no such restrictive language, and therefore it was an error to construe all of the claims similarly. *Digital-Vending Services International LLC v University of Phoenix Inc.*

As reported at 83 BNA's PTCJ 767, on March 21, 2012, the U.S. Court of Appeals for the Federal Circuit ruled, with certain exceptions, that "control means" as it relates to computer processing must be described by an algorithm. Consequently, computer-based, means-plus-function patent claims may be at greater risk today. *Ergo Licensing LLC v. Carefusion 303 Inc.*

As reported at 83 BNA's PTCJ 872, on April 9, 2012, the U.S. Court of Appeals for the Federal Circuit ruled that a patent specification must include the supporting algorithm for each and every functional limitation in a computer system claim, affirming a lower court ruling that patents asserted against Intuit Inc.'s popular Quicken and QuickBooks personal finance software products were invalid for indefiniteness. *Noah Systems Inc. v. Intuit Inc.*

As reported at 84 BNA's PTCJ 57, on May 4, 2012, the U.S. Court of Appeals for the Federal Court ruled that the

lower court must apply a more stringent standard in deciding whether a cloud storage patent owner can join 18 defendants. The ruling only applies to those cases filed prior to September 16, 2011, the enactment date of the AIA. *In re EMC Corp.*

As reported at 84 BNA's PTCJ 62, on May 8, 2012, the U.S. Court of Appeals for the Federal Court ruled that Facebook had successfully showed that a software patent was invalid under the On-Sale bar. *Leader Technologies, Inc. v. Facebook, Inc.*

As reported at 84 BNA's PTCJ 95, on May 14, 2012, the U.S. Court of Appeals for the Federal Court upheld a district court's denial of Apple Inc.'s request for a preliminary injunction against Samsung's Android-based smart phones but the possibility of an injunction against the Galaxy Tab 10.1 tablet computer remains. *Apple Inc. v. Samsung Electronics Co.*

COPYRIGHTS/DMCA – Case Law – U.S. Courts of Appeal

As reported at 83 BNA's PTCJ 864, on April 5, 2012, the U.S. Court of Appeals for the Second Circuit ruled that "Red flag" knowledge of infringement under Section 512(c) of the Digital Millennium Copyright Act is determined by a subjective reasonableness standard, affirming the district court's interpretation that general awareness of infringement cannot trigger an internet service provider's duty to remove content. *Viacom International Inc. v. YouTube Inc.*

TRADEMARKS – Case Law – U.S. Courts of Appeal

As reported at 83 BNA's PTCJ 861, on April 9, 2012, the U.S. Court of Appeals for the Fourth Circuit ruled that Google Inc. may have intended to create confusion by selling trademarks as advertising keywords, based on the record in the AdWords infringement litigation, so a federal trial court should not have granted the search giant's motion for summary judgment. *Rosetta Stone Ltd. v. Google Inc.*

TRADE SECRETS – Case Law – U.S. Courts of Appeal

As reported at 83 BNA's PTCJ 910, on April 11, 2012, the U.S. Court of Appeals for the Second Circuit ruled that theft of source code to create a competing program does not

violate the federal Economic Espionage Act. *United States v. Aleynikov*.

PATENTS – Case Law – U.S. District Courts

As reported at 83 BNA's PTCJ 811, on March 30, 2012, the U.S. District Court for the District of Columbia ruled that a computer-based method of presenting expert medical knowledge is not patent eligible under 35 U.S.C. § 101. *SmartGene Inc. v. Advanced Biological Laboratories SA*.

As reported at 84 BNA's PTCJ 175, on May 27, 2012, a jury in the U.S. District Court for the Northern District of California determined that Oracle failed to prove Google Inc.'s infringement of patents on the Java operating system by Android-based cell phones. *Oracle America Inc. v. Google Inc.*

As reported at 84 BNA's PTCJ 252, on June 7, 2012, a judge in the U.S. District Court for the Northern District of Illinois stopped proceedings in the cell phone patent battle between Apple Inc. and Motorola Mobility Inc. on the eve of a scheduled trial. "I have tentatively decided that the case should be dismissed with prejudice because neither party can establish a right to relief," Judge Richard A. Posner says. *Apple Inc. v. Motorola Inc.*

COPYRIGHTS – Case Law – U.S. District Courts

As reported at 84 BNA's PTCJ 53, on May 7, 2012, a jury in the U.S. District Court for the Northern District of California returns a split verdict in Oracle America Inc.'s lawsuit, finding that Google infringed Oracle's copyrights in the Android wireless operating system, yet not answering the key question of whether there is a fair use. *Oracle America Inc. v. Google Inc.*

As reported at 84 BNA's PTCJ 138, on May 11, 2012, the U.S. District Court for the Northern District of Georgia ruled that to the extent that the copyright owners of scholarly works had not made digital excerpts available for licensing to students conveniently and at reasonable costs, unauthorized online access to such excerpts constituted fair use. *Cambridge University Press v. Becker*.

As reported at 84 BNA's PTCJ 218, on May 31, 2012, the U.S. District Court for the Northern District of California ruled that Java application programming interfaces are not eligible for copyright protection. *Oracle America Inc. v. Google*.

As reported at 84 BNA's PTCJ 237, on May 23, 2012, the U.S. District Court for the Eastern District of Kentucky ruled that a conversion claim over website data is not necessarily preempted by Copyright Act. *Budsgunshop.com LLC v. Security Safe Outlet Inc.*

As reported at 101 USPQ2d 1869, on August 15, 2011, the U.S. District Court for the Northern District of Texas ruled that Plaintiff software developer's claims for tortious interference with contract and conversion are preempted by federal copyright law in action alleging that defendants misused plaintiff's copyrighted software, and claim for civil conspiracy, which is "derivative tort," is also dismissed. *GlobeRanger Corp. v. Software AG*.

TRADEMARKS – Case Law – U.S. District Courts

As reported at 84 BNA's PTCJ 67, on April 30, 2012, the U.S. District Court for the District of Oregon ruled that a business (non-consumer) cannot prove an unfair trade practices claim for use of mark on website, in metatags. *L&A Designs LLC v. Xtreme ATVs Inc.*

As reported at 84 BNA's PTCJ 150, on May 8, 2012, the U.S. District Court for the Northern District of California ruled that Groupon software customers are not likely to be confused by Groupon daily deals. *Groupon LLC v. Groupon Inc.*

TRADE SECRETS – Case Law – U.S. District Courts

As reported at 84 BNA's PTCJ 118, on May 9, 2012, the U.S. District Court for the Western District of Virginia ruled that lack of code "use" defeats trade secrets claim. *Dracon Wireless Solutions Inc. v. Garmin International Inc.*

As reported at 102 USPQ2d 1602, on April 26, 2012, the U.S. District Court for the District of Colorado denied Plaintiff preliminary injunction in action for trade secret misappropriation against defendant sales representative, who worked for plaintiff under confidentiality agreement but resigned to work for competitor; defendant e-mailed customer lists to her husband while she was still working for plaintiff, but lists have been removed from husband's computer, and there is little evidence that defendant is using plaintiff's trade secret information in making customer contacts on behalf of her current employer. *Mentor Worldwide LLC v. Craigo*.

TRADEMARKS – U.S. Patent and Trademark Office

As reported at 102 USPQ2d 1187, on February 27, 2012, the Trademark Trial and Appeal Board ruled that assertion of parody as defense to dilution claim does not place "increased burden" on trademark opposer to demonstrate that distinctiveness of its famous mark is likely to be impaired by parody; applicants' alleged parody use of applied-for "CrackBerry" mark does not insulate applicants from opposer's claim for dilution of its "BlackBerry" marks by blurring, since public itself, not applicants, adopted and popularized

“CrackBerry” as nickname for opposer’s “BlackBerry” wireless handheld communication devices. *Research in Motion Limited v. Defining Presence Marketing Group Inc.*

PATENTS – International Trade Commission (ITC)

As reported at 84 BNA’s PTCJ 1421, on May 18, 2012, the International Trade Commission issued an order barring imports of Motorola Android-based phones that infringe a Microsoft patent. *In re Certain Mobile Devices, Associated Software, and Components Thereof.*

Foreign Courts – France

As reported at 83 BNA’s PTCJ 704, on March 6, 2012, the Paris Court of Appeals ruled that eBay is liable for the sale of counterfeit luxury goods and fined it 200,000 euros. *eBay International A.G. v. Burberry Ltd.*

As reported at 84 BNA’s PTCJ 118, on May 3, 2012, a French high court found eBay liable for counterfeit sales. *eBay Inc. v. LVMH.*

As reported at 84 BNA’s PTCJ 238, on May 29, 2012, the Paris First Instance Court found that YouTube prevails against French TV group seeking \$180 million for video uploads. *YouTube LLC v. Television Francaise S.A.*

Foreign Courts - European Union

As reported at 84 BNA’s PTCJ 72, on May 2, 2012, the EU high court (*i.e.* European Court of Justice) restricts copyright protection for software programming by stating that functionality of the software cannot be protected by copyright. *SAS Institute Inc. v. World Programming Ltd.*



2013 Edward F. Langs Writing Award

Essay Competition Rules

1. Awards will be given to up to three student essays, which in the opinion of the judges make the most significant contribution to the knowledge and understanding of information technology law. Factors to be taken into consideration include: originality; timeliness of the subject; depth of research; accuracy; readability; and the potential for impact on the law.
2. Essay must be original, deemed to be of publishing quality, and must not have been submitted to any other contest within the previous 12 months.
3. Essay must be typed, double spaced, at least ten pages in length, must contain proper citations listed as either endnotes or footnotes, and must have left, right, top, and bottom margins of one inch.
4. Essay must include the submitter’s name, email address, mailing address, telephone number, and school attended.
5. A total of \$1,500 in US dollars shall be divided between the award winning essays, and all rights to award winning essays shall become the property of the State Bar of Michigan.
6. The Information Technology Section of the State Bar of Michigan reserves the right to make editorial changes, and to publish award winning essays in the Section’s newsletter, the *Michigan IT Lawyer*.
7. Essay must be submitted as a Microsoft Word document, postmarked by June 30, 2013, and emailed to dsyrowik@brookskushman.com. ■

Meet a Section Member: Susanna Brennan



Susanna C. Brennan

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- **What is the name of your firm/corporation/employer?**
Kelly Law Registry
- **What is your area of practice?**
I'm a legal recruiter, but before that I practiced bankruptcy law and litigation for firms in Seattle and in the Detroit area. When I decided to leave the practice of law, I worked in HR/Operations for a web design / IT company and learned the art of recruiting and found I had a real knack for it.
- **When did you first become involved with the Section?**
When I was researching an issue for my employer, I came across the Section newsletter. I was thrilled to find an active community of lawyers involved in IT law and I reached out to them about joining the Section.
- **Where did you grow up?**
Jackson, Michigan
- **Where else have you lived?**
East Lansing, Michigan, Eugene, Oregon, Seattle, Washington, Ferndale and Oak Park, Michigan...and brief stint in Paris during a long distance relationship. I like to say my love affair continues with the city, but not the guy.
- **Where did you attend undergraduate and law school?**
Michigan State University (Go Spartans!) for undergraduate and University of Oregon for law school (Go Ducks!) I'm torn when they play each other in football every few years or so, but it's been great seeing Oregon doing so well.
- **What was your undergraduate major?**
Political Theory and Constitutional Democracy within the James Madison College. I transferred into the College when I was a junior and it was the best decision I ever made. The curriculum and instruction were excellent.
- **What are your hobbies, other interests?**
Reading, bicycling, exercising, walking my dog, going to museums, watching movies, cooking, trying out good restaurants, and spending lots of time with family.
- **Favorite restaurant?**
Bastone in Royal Oak - it's a big noisy place with a good mix of modern cuisine and traditional Belgian food.
- **A recent book you read?**
Class Action: The Story of Lois Jenson and the Landmark Case that Changed Sexual Harassment Law by Clara Bingham and Laura Leedy Gansler.
- **Last vacation?**
A road trip to St. Louis and Kansas City with my boyfriend to visit friends. I loved Kansas City, I naively expected a boring Midwestern city, so I was pleasantly surprised to find a vibrant, diverse city with lots of fun things to do.
- **Who is your hero? (a parent, a celebrity, an influential person in one's life)**
My parents are my heroes. They worked hard to raise a family of five children and provide a good education and instill strong principles in us.
- **What is your favorite movie of the past ten years?**
The Hangover.
- **What do you like to do most with a free hour?**
Have a coffee or tea and read.
- **What is the most significant event of the last three months?**
Helping a friend through a challenging time in their life, personally and legally.

Continued on the next page

Meet a Section Member *Continued*

- **What one word would you put on your gravestone?**
Live!
- **What email can Section members use to contact you?**
susanna_brennan@yahoo.com
- **A short comment on why you became involved with the Information Law Technology Section:**
I wanted to learn more about IT law and discuss IT legal

issues with other attorneys. As I met some of the Section members, I found that I really connected with them, so I decided to get more involved and was elected to the Council. I've since changed professions out of the IT industry, but I still enjoy learning about the legal issues and networking with my colleagues. ■



Publicly Available Websites for IT Lawyers

Following are some publicly available websites relating to varying aspects of information technology law practice. Some of these websites may require payment for certain services. Neither the State Bar of Michigan nor the IT Law Section endorses these websites, the providers of the website, or the goods or services offered in connection therewith. Rather these websites are provided for information purposes only and as possible useful tools for your law practice.

Please provide any feedback or recommendations for additional websites to michael@gallo.us.com

Legal Blogs

- <http://blog.ericgoldman.org> – Technology and Marketing law blog.
- <http://www.tabletlegal.com> – Pushing the Apple iPad to the limit.
- <http://futurelawyer.typepad.com/futurelawyer> - Future technology for the lawyer of today.
- <http://ridethelighting.senseient.com> – Investigates the latest issues in computer forensics and e-discovery.
- <http://www.prismlegal.com/wordpress/index.php> - Covers project management, legal outsourcing and legal innovation.
- <http://www.ediscoverycalifornia.com> – e-Discovery insights. ■



Save the Date for Our Fall Seminar!

September 27, 2012
St. John's Inn in Plymouth
Details to come.