

# “IN COURT ‘CAUSE I STOLE A BEAT’<sup>1</sup>: THE DIGITAL MUSIC SAMPLING DEBATE’S DISCOURSE ON RACE AND CULTURE, AND THE NEED FOR TEST CASE LITIGATION

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“He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening mine.”

–Thomas Jefferson<sup>2</sup>

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1. PUBLIC ENEMY, *Caught, Can We Get a Witness?, on IT TAKES A NATION OF MILLIONS TO HOLD US BACK* (Def Jam Records 1988).

2. THOMAS JEFFERSON, THE JEFFERSONIAN CYCLOPEDIA 433 (John P. Foley ed., 1900), available at

## I. INTRODUCTION

For twenty years, the technology of digital music sampling has existed in legal purgatory. As the debate over sampling continues, the stakes have never been higher. While the production of art forms utilizing sampling technology continues to expand,<sup>3</sup> the criminal and civil sanctions for those caught “stealing a beat”<sup>4</sup> are increasingly harsh. Statutory damages run as high as \$30,000 for a single act of infringement while compensatory damages can reach \$150,000, and there are punitive damages, attorney fees, and recommendations for criminal charges as well.<sup>5</sup> Criminal liability is a significant threat to those artists who utilize digital sampling technologies, as demonstrated by the FBI raid on the Atlanta office of hip-hop music executive DJ Drama in 2007.<sup>6</sup>

Understanding how and why modern artists are constrained in their ability to utilize digital sampling technologies depends on a proper appreciation of the historical inequalities perpetuated by the copyright regime against minority artists.<sup>7</sup> In this context, it is unfortunately of little surprise that DJs of color are adversely affected by the prosecution of digital sampling technology use.<sup>8</sup> What is surprising, however, is the lack of litigation between sampling artists, record labels, and the Recording Industry Association of

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[http://books.google.com/books?id=icGh3NxREIIC&printsec=frontcover&source=gbs\\_ge\\_summary\\_r&cad=0#v=snippet&q=He%20who%20receives%20an%20idea&f=false](http://books.google.com/books?id=icGh3NxREIIC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=snippet&q=He%20who%20receives%20an%20idea&f=false).

3. In spite of a slumping environment for CD sales, the industry of selling mixtapes on the street continues to thrive. Shaheem Reid, *Mixtapes: The Other Music Industry*, MTV, at 2 (2007), [http://www.mtv.com/bands/m/mixtape/news\\_feature\\_021003/index.jhtml](http://www.mtv.com/bands/m/mixtape/news_feature_021003/index.jhtml). Not only are mixtapes cheaper than regular albums sold at retail outlets, but to discerning listeners the quality is noticeably higher. *Id.*

4. PUBLIC ENEMY, *supra* note 1.

5. 17 U.S.C. §§ 502(a), 504–506(a) (2006).

6. Kelefa Sanneh, *With Arrest of DJ Drama, the Law Takes Aim at Mixtapes*, N.Y. TIMES, Jan. 19, 2007, <http://www.nytimes.com/2007/01/19/technology/19iht-web.0119mixtapes.html>. DJ Drama (Tyree Simmons) and an associate were charged with a felony violation of Georgia’s Racketeering Influenced Corrupt Organization (“RICO”) statute for allegedly heading a criminal ring of copyright infringement through the production of mix tapes. K. Matthew Dames, *Mix Tapes Compared to Cocaine?*, COPYCENSE (Feb. 7, 2007, 9:00 AM), [http://www.copycense.com/2007/02/mix\\_tapes\\_compa.html](http://www.copycense.com/2007/02/mix_tapes_compa.html). The Fulton County Sheriff’s Department confiscated 81,000 mixtape CDs along with computers, recording equipment, financial statements, and “other assets that are proceeds of a pattern of illegal activity.” Hillary Crosley, *DJ Drama Arrested In Mixtape Raid*, BILLBOARD (Jan. 17, 2007), [http://www.billboard.com/bbcom/news/article\\_display.jsp?vnu\\_content\\_id=1003533767#bbcom/news/article\\_display.jsp?vnu\\_content\\_id=1003533767](http://www.billboard.com/bbcom/news/article_display.jsp?vnu_content_id=1003533767#bbcom/news/article_display.jsp?vnu_content_id=1003533767); Sanneh, *supra*. For a detailed discussion of DJ Drama’s arrest, see *infra* Part III.A.3.

7. For a detailed discussion of how American copyright has failed African-American artists, see K.J. Greene, “*Copynorms*,” *Black Cultural Production, And The Debate Over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1181 (2008) [hereinafter Greene, *Copynorms*] (noting the copyright system’s long history of appropriation of African-American music without compensation). See also K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 340 (1999) [hereinafter Greene, *Unequal Protection*] (arguing that the American copyright regime has systematically failed African-American artists).

8. See Sanneh, *supra* note 6 (describing the arrest of DJ Drama in 2007). Other notable examples include the decisions of the Southern District of New York and the Sixth Circuit Court of Appeals finding African-American rap artists Biz Markie and N.W.A., respectively, liable for copyright infringement. See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 793 (6th Cir. 2005); *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 182 (S.D.N.Y. 1991). For a detailed discussion of the prosecution of black artists who use digital sampling, see *infra* Parts III.A.1-3.

America (“RIAA”).<sup>9</sup> Given the unequal distributional effects of the copyright system, a realistic solution is therefore needed that challenges the dominant ways courts think about what constitutes “valid” culture.

Some commentators, especially those in the “copy left,” have already stressed the need for copyright to take into account the culture of reinvention and recontextualization (loosely termed “borrowing”) prevalent in non-Western art forms specifically, and digital sampling generally.<sup>10</sup> But while most commentators focus on amending the Copyright Act, this Note proposes that samplers and their advocates grasp the opportunity to introduce their own norms of cultural production into the court system via new litigation strategies. Such efforts may follow the lead of the NAACP test cases, as well as proponents of the “cultural defense” who challenge American courts’ unwillingness to admit cultural evidence and defenses in criminal and civil cases.<sup>11</sup> By doing so, those advocates seek to demonstrate how judicial interpretations of culture inform determinations of guilt and innocence.<sup>12</sup> As copyright law is an “ongoing social negotiation”<sup>13</sup> charged with regulating the boundaries of what society considers appropriate artistic and cultural expression, so should it account for culture in forming its regulations. Only by doing so can the American copyright regime attain legitimacy among those groups who have been traditionally denied its fruits,<sup>14</sup> as well as strike the proper balance between promoting creative production and compensating artists for original work.

Such a discussion is increasingly important because legal treatment of sampling extends far beyond the hip-hop community.<sup>15</sup> To the extent that

9. See Daphne Keller, *The Musician as Thief: Digital Culture & Copyright Law*, in SOUND UNBOUND: SAMPLING DIGITAL MUSIC AND CULTURE 144 (Paul D. Miller ed., 2008) (commenting that given the unbalanced precedent for sampling, most samplers choose to settle out of court rather than risk an unfavorable decision); 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, 221 (2005) (“Most music sampling cases are settled before reaching the trial level.”).

10. See, e.g., Jonathan Lethem, *The Ecstasy of Influence: A Plagiarism Mosaic*, in SOUND UNBOUND: SAMPLING DIGITAL MUSIC AND CULTURE, *supra* note 9, at 33 (explaining the “open source culture” prevalent in black cultural forms and artistic production in general); Olufunmilayo B. Arewa, *Copyright and Borrowing*, in 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH 33, 40 (Peter K. Yu, ed., 2007) [hereinafter Arewa, *Borrowing*] (“Borrowing is a norm in much cultural production that should be better incorporated into copyright doctrine.”); Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright, and Cultural Context*, 84 N.C. L. REV. 547, 550–51 (2006) [hereinafter Arewa, *Bach to Hip Hop*] (advocating the need for copyright frameworks to take into account cultural norms such as borrowing).

For a broader discussion of digital sampling law, history and culture than is possible here, see KEMBLEW MCLEOD & PETER DiCOLA, *CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING* (2011) [hereinafter MCLEOD, *CREATIVE LICENSE*].

11. See ALISON RENTELN, *THE CULTURAL DEFENSE* 5–7 (2004) (advocating a formal defense that, if offered by the defendant or litigant, would require a judge to consider as relevant evidence how a defendant or litigant’s cultural background contributed to the actions at issue).

12. See *id.* (describing how the cultural defense operates to challenge dominant cultural and legal norms).

13. Lethem, *supra* note 10, at 33.

14. See Greene, *Copynorms*, *supra* note 7, at 1221 (asserting that by atoning for past inequities to musicians of color, the copyright system can attain legitimacy in its attempts to quell music piracy).

15. Reuven Ashtar, *Theft, Transformation, and the Need of the Immaterial: A Proposal for a Fair Use Digital Sampling Regime*, 19 ALB. L.J. SCI. & TECH. 261, 284–86 (2009); David Sanjek, “Don’t Have To DJ No More”: *Sampling and the “Autonomous” Creator*, 10 CARDOZO ARTS & ENT. L.J. 607, 616 (1992).

copyright laws restrict the social flow of images, text, and music generally, such legal determinations set the bar for the optimal cultural conditions for dialogic practice in society as a whole.<sup>16</sup> And it must not be forgotten that the consequences are quite real for artists challenging the established cultural paradigm—one need look no further than the RIAA-initiated raid and arrest of DJ Drama.<sup>17</sup>

Furthermore, overlying the debate over digital sampling is an ever-evolving discourse on the relationship between technology, race, and copyright. As African-American cultural production has historically influenced, and been influenced by, technological developments, so has the copyright system both adapted (and failed to adapt) to such advances.<sup>18</sup> Placing the digital sampling debate in the proper context is necessary to prepare our legal system for the next technological and cultural development that fails to conform to judicial norms.

Much literature has been generated on digital sampling technology, and in an effort to avoid undue repetition of common knowledge this Article will assume the reader's familiarity with the structure of copyright law and terms such as "fair use"<sup>19</sup> and "de minimis"<sup>20</sup> sampling. Part II will provide relevant background on "borrowing" within art and culture generally. It will then discuss the origin of digital sampling technology and the benefits it provides for artists. Part III will take a close look at the rhetoric used by courts and law enforcement in restricting certain groups' use of sampling. Doing so helps locate the digital sampling debate within the context of ever-shifting determinations of what forms of cultural production are valued by American society and jurisprudence. Part IV provides possible solutions to the inequities caused by the copyright regime, in particular the necessity of challenging the dominant legal structure through assertions of cultural values in the court system. As this Note explores the seemingly disparate effects of legal treatment of digital sampling, it hopes to highlight how utility maximization by copyright holders can have significant distributional consequences that should be addressed.

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16. Michael F. Brown, *Can Culture Be Copyrighted?*, 39 CURRENT ANTHROPOLOGY 196 (1998) (citing Rosemary Coombe's critique of intellectual property law).

17. Jem Aswad, *RIAA Speaks on DJ Drama Raid: 'We Enforce Our Rights,'* MTV (Jan. 17, 2007, 6:08 PM), [http://www.mtv.com/news/articles/1550169/20070117/dj\\_drama.jhtml](http://www.mtv.com/news/articles/1550169/20070117/dj_drama.jhtml).

18. See Arewa, *Bach to Hip Hop*, *supra* note 10, at 552 ("The application of copyright to music has been tested historically by the introduction of new technologies in musical performance and practice."); Greene, *Copynorms*, *supra* note 7, at 1191–92 (commenting on the mutually reinforcing relationship between technological advances and the development of black musical forms, and the copyright regime's failure to provide compensation for black artists).

19. Fair use operates as a defense to copyright infringement where the original work sampled is for purposes such as criticism, comment, parody, or news reporting. In these cases, the fair use doctrine effectively overrules the interests of the author in favor of the benefit to the public that results from encouraging creativity. Sherri Carl Hampel, Note, *Are Samplers Getting a Bum Rap? Copyright Infringement or Technological Creativity?*, 1992 U. ILL. L. REV. 559, 567 (1992).

20. De minimis derives from *de minimis non curat lex*: "The law does not concern itself with trifles." BLACK'S LAW DICTIONARY 464 (8th ed. 2004). A taking qualifies as de minimis if the sample is so small that even someone familiar with the original could not recognize the appropriation. Hampel, *supra* note 19, at 575.

## II. BACKGROUND

### A. *What Digital Music Sampling is—And is Not*

While the product of recent technological developments, sampling is but one example in a long history of artists recontextualizing preexisting compositions, ranging from jazz to cable television.<sup>21</sup> By permitting consumers and artists to reshape music, digital sampling expands and democratizes traditions of reinvention and renegotiation of cultural forms.<sup>22</sup> Unfortunately, legal responses to digital music sampling have failed to place it in its proper historical and social context.<sup>23</sup>

#### 1. *Kicking it Old School: A Brief History of Borrowing*

“Borrowing,” which for our purposes includes transformative imitation, quotation, allusion, homage, recomposition, and reinvention of existing forms, is common to artistic creation across genres and time periods.<sup>24</sup> Traditions of reworking preexisting melodic fragments are well-documented within the musical genre. Medieval religious music referenced existing songs to pay tribute to, or compete with, prior works.<sup>25</sup> Borrowing was an integral part of the classical cannon, where composers such as Handel, Bach, Haydn, and Mozart reshaped existing compositions and were “sampled” themselves by other artists.<sup>26</sup> In another case, Igor Stravinsky’s 1920 ballet *Pulcinella* was composed entirely of reworked phrases of 18th century composer Pergolesi.<sup>27</sup>

American popular music continued within this tradition in the nineteenth century, borrowing from opera and adopting ragtime from African melodic structures descended from spirituals.<sup>28</sup> Ragtime’s popularity set the stage for the rise of jazz and blues, musical forms that relied heavily on appropriation (and which also promulgated disparate treatment of African-American artists by the copyright system).<sup>29</sup> The “open source culture” of blues artists is reflected in an encounter between bluesman Muddy Waters and folklorist Alan Lomax, where in the same breath Waters offered five conflicting accounts for the authorship of a song.<sup>30</sup> Waters openly stated that he had “made” the song on a specific date after being mistreated by a girl; that the song came to him; that he heard a version recorded by Robert Johnson; that Waters’ mentor Son

21. *Sampling: An Overview*, INDEPENDENT LENS: COPYRIGHT CRIMINALS (Jan. 12, 2010), <http://www.pbs.org/independentlens/copyright-criminals/sampling.html> (“Sampling has existed almost as long as music has been played.”).

22. Keller, *supra* note 9, at 135; Lethem, *supra* note 10, at 28; Sanjek, *supra* note 15, at 608.

23. See Arewa, *Bach to Hip Hop*, *supra* note 10, at 550 (“Current copyright doctrine does not adequately reflect the reality of musical borrowing.”).

24. Arewa, *Borrowing*, *supra* note 10, at 34.

25. Lauren Fontein Brandes, Comment, *From Mozart to Hip-Hop: The Impact of Bridgeport v. Dimension Films on Musical Creativity*, 14 UCLA ENT. L. REV. 93, 100 (2007).

26. Arewa, *Borrowing*, *supra* note 10, at 34.

27. *Sampling: An Overview*, *supra* note 21.

28. Arewa, *Bach to Hip Hop*, *supra* note 10, at 614.

29. Arewa, *Borrowing*, *supra* note 10, at 35–36; Greene, *Copynorms*, *supra* note 7, at 1180–81.

30. Lethem, *supra* note 10, at 28.

House taught it to him; and that the song “comes from the cotton field.”<sup>31</sup> The subsequent reliance on rhythm and blues and rockabilly by rock and roll artists such as Little Richard, Buddy Holly, the Beatles, the Rolling Stones, and Led Zeppelin has likewise received extensive commentary.<sup>32</sup>

This culture of borrowing is not specific to the musical genre, but rather is prevalent in most, if not all, artistic productions.<sup>33</sup> From Shakespeare to pop art, appropriation “cut[s] across all forms and genres in the realm of cultural production”<sup>34</sup> and reveals commonly-held assumptions about the optimal conditions for creativity. The prevalence in the arts of what some label “theft”<sup>35</sup> demonstrates two critical points: first, that borrowing is not specific to our time or to certain socio-economic groups; and second, that the ideal conditions for cultural dialogue include the freedom to create not “out of a void, but out of chaos.”<sup>36</sup>

## 2. *Contemporary Sampling: From the Caribbean to the Bronx*

For much of human history, musical artists have repeated what they have heard. But beyond mere imitation or allusion to past sounds, artists in the mid-twentieth century began to *manually* alter those sounds themselves. Members of the *musique concrete* movement of 1950s Paris cut, looped, and manipulated existing recordings.<sup>37</sup> Artist William Burroughs used a “cut-up technique” on tape recordings to rearrange compositions, and the Beatles used a similar method to create works such as “Revolution 9” on *The White Album*.<sup>38</sup> According to John Lennon, the labor-intensive process involved “ten machines with people holding pencils on the loops—some only inches long and some a yard long.”<sup>39</sup>

Sampling as we know it is largely attributed to the “dub” movement that arose out of Jamaica in the 1960s through the ingenious deconstruction of recorded music by King Tubby and Lee “Scratch” Perry.<sup>40</sup> Using portable sound systems, Jamaican DJs mixed reggae albums with other music, rapping over them in live concerts and challenging each other with improvised lyrics.<sup>41</sup> Records were manipulated to create a variety of forms, the result being “versioning,” in which “[e]verybody ha[d] a chance to make a contribution.

31. *Id.*

32. Arewa, *Bach to Hip Hop*, *supra* note 10, at 616–17.

33. Arewa, *Borrowing*, *supra* note 10, at 37–38; Lethem, *supra* note 10, at 28–29.

34. Lethem, *supra* note 10, at 28–29.

35. *See Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 182 (S.D.N.Y. 1991) (“Thou shalt not steal.”).

36. Lethem, *supra* note 10, at 29. *See also* Brown, *supra* note 16, at 196 (citing Coombe’s criticism that the copyright regime places unnecessary restraints upon cultural communication, free speech, and political dialogue).

37. FRANCIS PREVE, *POWER TOOLS: SOFTWARE FOR LOOP MUSIC: ESSENTIAL DESKTOP PRODUCTION TECHNIQUES 1–2* (2004).

38. *Sampling: An Overview*, *supra* note 21.

39. PREVE, *supra* note 37, at 1–2.

40. Lethem, *supra* note 10, at 28; *Sampling: An Overview*, *supra* note 21. “Dub” derives from the French *adober*, “to arrange or repair.” JOHN AYTO, *ARCADE DICTIONARY OF WORD ORIGINS 187* (1990).

41. DICK HEBDIGE, *CUT ‘N’ MIX: CULTURE, IDENTITY, AND CARIBBEAN MUSIC 83–85* (1987).

And no one's version [was] treated as Holy Writ."<sup>42</sup>

Dub soon made its way to the United States, where it was infused into the hip-hop movement developing in the South Bronx.<sup>43</sup> In no time, DJs were remixing records on a massive scale, using two turntables and a stereo mixer to sample records while a Master of Ceremonies ("MC") rapped over the beat.<sup>44</sup> As Public Enemy front man Chuck D commented, "Sampling basically comes from the fact that rap music is not music. It's rap over music. . . . [Y]ou had synthesizers and samplers, which would take sounds that would then get arranged or looped, so rappers can still do their thing over it."<sup>45</sup>

However, as DJing was a manual technology, its scope was limited to the ability of the individual to "crate dig" (i.e., pull records from crates of records kept by the turntables). This all changed with the advent of Musical Instrument Digital Interface ("MIDI") technology.<sup>46</sup>

### 3. *MIDI-Me*

MIDI technology revolutionized musical production by making sampling easier and more affordable.<sup>47</sup> Unlike past eras in which artists labored to create analog cut-ups with razor blades and tape,<sup>48</sup> digital recording works by recording the original analog sound onto a computer system, thereby converting the sound wave into digital information.<sup>49</sup> What was once an analog recording is transformed into a combination of ones and zeros, permitting the sampler to rearrange the binary values in a variety of ways, such as adjusting pitch and echo or combining the original source with other sounds.<sup>50</sup> In order to hear the sample, the process is reversed and the digital information is converted back into sound waves that the ear can hear.<sup>51</sup>

MIDI technology has allowed artists to connect via online studios, enabling musical creation between musicians who have never met in person.<sup>52</sup> Perhaps even more common is the use of MIDI to retool existing compositions, creating "collaborations" between artists who may not be aware such co-authorship is taking place.<sup>53</sup> Examples of digital sampling, from Kanye West's

42. *Id.* at 141.

43. It is likely that dub was brought to America by Jamaican-born Kool DJ Herc, who emigrated in 1967 and purchased a sound system in 1973. DAVID TOOP, *THE RAP ATTACK: AFRICAN JIVE TO NEW YORK HIP-HOP* 19 (1984).

44. Schietinger, *supra* note 9, at 211.

45. Kembrew McLeod, *How Copyright Law Changed Hip Hop*, 20 *STAY FREE!* (Fall 2002), available at [http://www.stayfreemagazine.org/archives/20/public\\_enemy.html](http://www.stayfreemagazine.org/archives/20/public_enemy.html).

46. Sanjek, *supra* note 15, at 612.

47. Keller, *supra* note 9, at 135; Ashtar, *supra* note 15, at 284; *Sampling: An Overview*, *supra* note 21.

48. Keller, *supra* note 9, at 135.

49. PAUL WHITE, *CREATIVE RECORDING EFFECTS AND PROCESSORS* 57 (1989). See also Stephen R. Wilson, *Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense?*, 1 J. HIGH TECH. L. 179, 181 (2002) (discussing how a sampler transfers analog waves into binary code).

50. Molly McGraw, *Sound Sampling Protection and Infringement in Today's Music Industry*, 4 HIGH TECH. L.J. 147, 148-51 (1989).

51. Craig Anderton, *Digital Audio Basics*, in *SYNTHESIZERS AND COMPUTERS* 16 (1985).

52. Ken Jordan & Paul D. Miller, *Freeze Frame: Audio, Aesthetics, Sampling and Contemporary Multimedia*, in *SOUND UNBOUND: SAMPLING DIGITAL MUSIC AND CULTURE*, *supra* note 9, at 101.

53. *Id.*

use of Marvin Gaye's music<sup>54</sup> to the Beatles's recording of random AM radio broadcasts on "I am the Walrus,"<sup>55</sup> "bring[] back the idea of a shared folk culture, where creative expression is the property of the community at large and can be shared for everyone's benefit."<sup>56</sup> Thus, while digital sampling is often framed as a "new" technological advancement, it in fact relies on methods of dissimulation of cultural knowledge that "reconnect[] us to aspects of our tribal roots."<sup>57</sup>

Scholars have commented that such communal and informal modes of cultural production are exemplified in African culture, in which the musician "does not reserve his extraordinary talents for his immediate circle, but shares them with anyone who is willing to listen."<sup>58</sup> However, the "open source culture" facilitated by MIDI technology extends far beyond the African-American community, to open lines of cultural dialogue among artists of all segments of society.<sup>59</sup>

#### 4. "Straight from [the] Heart"—Why Contemporary Artists Sample<sup>60</sup>

Lack of instrumental proficiency is not the driving force behind artists' use of sampling technology.<sup>61</sup> Rather, sampling grants aesthetic and economic autonomy to groups that have been traditionally denied the benefits of intellectual property protection.<sup>62</sup> Many of the fruits of sampling technology are realized through the (largely underground) mixtape economy.

Perhaps above and beyond any other rationale for its use, digital sampling and mixtape production encourages the artistic integrity of artists working in an increasingly stifling music industry.<sup>63</sup> Rapper Fabolous commented on the difference between making a mixtape and an album: "Some stuff I can't say on the album. . . . But I can put out a mixtape and just say what I really feel."<sup>64</sup> Musical "purity" is reflected in packaging and marketing, which on traditional commercial albums are often controlled by record labels.<sup>65</sup> Rapper 50 Cent commented on the major labels' refusal to allow gun imagery on CD cover art: "[W]hen I did the marketing for some of my street projects, I used things that were a little edgier than what they would use at the majors right now. I got a

54. KANYE WEST, *Spaceship*, on THE COLLEGE DROPOUT (Roc-A-Fella Records 2004).

55. KEMBREW MCLEOD, FREEDOM OF EXPRESSION: RESISTANCE AND REPRESSION IN THE AGE OF INTELLECTUAL PROPERTY 152 (2007).

56. Jordan & Miller, *supra* note 52, at 101.

57. *Id.*

58. FRANCIS BEBEY, AFRICAN MUSIC: A PEOPLE'S ART 33 (1975).

59. See Lethem, *supra* note 10, at 28–29 (listing notable instances of cultural borrowing).

60. Reid, *supra* note 3, at 1 ("Mixtapes are incredible because they're straight from a brother's heart.").

61. Sanjek, *supra* note 15, at 615–16.

62. See Greene, *Copynorms*, *supra* note 7, at 1181 (noting the copyright system's long history of appropriation of African-American music without compensation); Greene, *Unequal Protection*, *supra* note 7, at 340 (arguing that the American copyright regime has systematically failed black artists).

63. Reid, *supra* note 3, at 3. For another helpful overview of the mixtape economy, see Horace A. Anderson, Jr., "Criminal Minded?": *Mixtape DJs, the Piracy Paradox, and Lessons for the Recording Industry*, 76 TENN. L. REV. 111, 141–144 (2008).

64. Reid, *supra* note 3, at 3.

65. *Id.*



chance to express myself in a different way. The mixtapes are like me speaking directly to my neighborhood.”<sup>66</sup>

Digital sampling also permits artists to create a product that simply cannot be made without borrowing preexisting sounds. Hank Shocklee, the architect behind Public Enemy’s unprecedented use of sampling technology to create rich collages of sound, commented on the restrictions placed on sampling artists by changes in copyright enforcement:

We were forced to start using different organic instruments, but you can’t really get the right kind of compression that way. A guitar sampled off a record is going to hit differently than a guitar sampled in the studio. . . . It’s going to hit the tape harder. . . . If you notice that by the early 1990s, the sound has gotten a lot softer.<sup>67</sup>

Given the autonomy granted to artists to craft their own message and distinct sound, it is unsurprising that mixtapes are increasingly popular with fans despite a deflating “real” music industry.<sup>68</sup>

Mixtape production, and digital sampling in general, also create economic opportunities for young artists trying to break into the music industry.<sup>69</sup> As labels are reluctant to sponsor new musicians, mixtapes are both cheaper and more effective at introducing up-and-coming artists to the public.<sup>70</sup> The benefits of mixtape production, however, are not merely monetary, as “[n]obody can get rich off a mixtape because it’s an illegal business.”<sup>71</sup> Rather, sampling is a promotional tool that creates economic opportunities in related fields of musical promotion such as web design, DVD production, and concert advertising.<sup>72</sup>

Thus, digital sampling as an art form serves the parallel function of promoting entrepreneurship in spite of the music industry’s “post-modern form of colonialism,” in which capital resources are largely consolidated in the hands of an elite few.<sup>73</sup> Some scholars have gone so far as to compare the record industry to the sharecropping system, in which white businessmen control the means of production and expertise needed to secure legal protection.<sup>74</sup> More than a few have noted that “[w]hile Black-created music is omnipresent, the flow of dollars has only occasionally created Black millionaires.”<sup>75</sup>

These concerns must be balanced against the benefits provided by the copyright system to artists who create original work. But the non-

66. *Id.*

67. McLeod, *supra* note 45.

68. Reid, *supra* note 3, at 2.

69. *Id.*

70. Rappers such as 50 Cent and Lil Wayne largely attribute their success to their start on mixtapes. *Id.* at 5.

71. *Id.*

72. *See id.* (comments of Whoopie Kaboo on the economic advantages of working in the mixtape industry).

73. Norman Kelly, *The Political Economy of Black Music*, BLACK RENAISSANCE/ RENAISSANCE NOIRE (1999), <http://www.hartfordhwp.com/archives/45a/358.html>.

74. Greene, *Unequal Protection*, *supra* note 7, at 376–77.

75. *Id.*

commoditized nature of what is produced by digital sampling technology goes further to establish sampling as an artistic, not monetary, enterprise. In spite of how the dominant legal system interprets sampling efforts (especially mixtape production),<sup>76</sup> the products of sampling are largely exchanged with little to no value.<sup>77</sup> Said one DJ of his mixtapes: “I’ve never made a mixtape and sold it. Every mixtape I made is given away.”<sup>78</sup> Digital sampling thus largely exists in a “gift economy” that operates parallel to the market economy, in which the value of a product derives not from the price paid but from its inherent aesthetic worth.<sup>79</sup> By constantly producing and exchanging works in a non-monetized system, digital samplers demonstrate their commitment to extra-market values.<sup>80</sup> Unfortunately, the nature and goals of digital sampling have yet to be formally recognized by the American legal establishment.

### III. ANALYSIS

#### A. *Legal Treatment of Digital Sampling*

In spite of the rich tradition of borrowing exemplified in a wide variety of art forms, and the benefits of sampling within hip-hop specifically, the copyright system continues to misinterpret the nature and goals of using digital technology to reinterpret existing sources.<sup>81</sup> As a result, American courts create legally binding hierarchies of cultural forms that marginalize artists who borrow openly.<sup>82</sup> Such cultural regulation is made even more troubling by the racial undertones underlying the copyright system’s failure to recognize digital sampling as a “valid” art form.

##### 1. “*Thou Shalt Not Steal*”—*Grand Upright Ltd. v. Warner Bros. Records, Inc.*

One of the few cases to directly address digital sampling, *Grand Upright Music Ltd. v. Warner Bros. Records Inc.* set what is likely the most important,

76. See *Bridgeport Music, Inc. v. Dimension Films (Bridgeport I)*, 410 F.3d 792, 800 (6th Cir. 2005) (stating that any use of copyrighted sound recordings without prior permission is *per se* infringement and theft); *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (stating that Markie was “stealing” only in order to sell “thousands upon thousands of records”); Sanneh, *supra* note 6 (describing raid and arrest of DJ Drama).

77. See Reid, *supra* note 3, at 5 (quoting a DJ who explained that making a profit off of mixtapes is virtually impossible due to their illegal nature); Shaheem Reid, ‘*Play The Game Fair*’: Lil Wayne Responds To DJ Drama’s Mixtape Bust, MTV (Jan. 18, 2007, 8:09 AM), [http://www.mtv.com/news/articles/1550185/20070118/lil\\_wayne.jhtml](http://www.mtv.com/news/articles/1550185/20070118/lil_wayne.jhtml) (discussing how mixtapes are commonly given away, not sold).

78. Reid, *supra* note 77.

79. Lethem, *supra* note 10, at 38.

80. *Id.*

81. See generally *Bridgeport I*, 410 F.3d at 800 (imposing a bright-line rule against digital samples without prior clearance, and refusing to apply a *de minimis* analysis); *Grand Upright Music*, 780 F. Supp. at 183 (comparing digital sampling to theft); Arewa, *Bach to Hip Hop*, *supra* note 10, at 550 (“Current copyright doctrine does not adequately reflect the reality of musical borrowing. Existing copyright structures are based on a vision of musical authorship that is both historically and culturally specific.”).

82. Arewa, *Bach to Hip Hop*, *supra* note 10, at 582.

and perhaps the most troubling, precedent for such cases.<sup>83</sup> In 1991, artist Biz Markie recorded the track “Alone Again” for his album *I Need a Haircut*, which included a ten-second digital sample of the first eight bars of Gilbert O’Sullivan’s “Alone Again (Naturally).”<sup>84</sup> While Markie attempted to obtain permission to use the sample, Warner Brothers Records released the album before O’Sullivan responded.<sup>85</sup> Following O’Sullivan’s subsequent efforts to have the album removed from the market, Grand Upright Music (the alleged copyright owner of “Alone Again (Naturally)”) brought a copyright infringement action against Markie.<sup>86</sup> O’Sullivan’s attorney framed the issue in black and white terms: “You can’t use somebody else’s property without their consent. . . . [Digital sampling] is a euphemism . . . for what anybody else would call pickpocketing.”<sup>87</sup>

Judge Kevin Duffy of the Southern District of New York agreed.<sup>88</sup> Quoting the only authority cited in his decision, Duffy admonished Markie with perhaps the four most notorious words within the digital sampling community: “Thou shalt not steal.”<sup>89</sup> Turning neither to *de minimis* nor fair use doctrine, the court cited Markie’s “callous disregard for the law” and infringement upon O’Sullivan’s rights in an effort “to sell thousands upon thousands of records.”<sup>90</sup> The court granted injunctive relief for Grand Upright Music and referred the case to the United States Attorney for possible criminal prosecution.<sup>91</sup>

*Grand Upright* provided little guidance for future sampling cases,<sup>92</sup> and created an environment of uncertainty that has made it too risky for artists to contest claims of copyright infringement.<sup>93</sup> Furthermore, in relying on assumptions that equate digital sampling with outright theft—whether of sound, personality, or money<sup>94</sup>—*Grand Upright* explicitly rejected Markie’s

83. *Grand Upright Music*, 780 F. Supp. at 183.

84. Richard Harrington, *The Groove Robbers’ Judgment: Order on ‘Sampling’ Songs May Be Rap Landmark*, WASH. POST., Dec. 25, 1991, at D7.

85. *Id.*

86. *Grand Upright Music*, 780 F. Supp. at 183; Robert J. Sugarman & Joseph P. Salvo, *Sampling Litigation in the Limelight*, 207 N.Y. L.J. 1, 1 (1992).

87. Harrington, *supra* note 84, at D7 (quoting Jody Pope) (internal quotation marks omitted).

88. *Grand Upright Music*, 780 F. Supp. at 183.

89. *Id.* (quoting *Exodus* 20:15).

90. *Id.* at 185.

91. *Id.*

92. Christopher D. Abramson, Note, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection*, 74 N.Y.U. L. REV. 1660, 1670 (1999).

93. See Carl A. Falstrom, Note, *Thou Shalt Not Steal: Grand Upright Music Ltd. v. Warner Bros. Records, Inc. and the Future of Digital Sound Sampling in Popular Music*, 45 HASTINGS L.J. 359, 367 (1994) (“One effect of the ruling has been a noticeably more hostile climate for samplers.”); Chris Johnstone, Note, *Underground Appeal: A Sample of the Chronic Questions in Copyright Law Pertaining to the Transformative Use of Digital Music in a Civil Society*, 77 S. CAL. L. REV. 397, 407 (2004) (commenting that *Grand Upright* caused “a chilling effect throughout the recording industry” out of “fear of adverse and inconsistent judicial treatment”). The chilling effect caused by *Grand Upright* has been particularly strong in light of the number of copyright and entertainment law cases handled by the Southern District of New York. Harriette K. Dorsen, *Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies Without Wrongs*, 65 B.U. L. REV. 923, 955 n.152 (1985) (analyzing Second Circuit data).

94. See Falstrom, *supra* note 93, at 370–75 (providing possible rationales for *Grand Upright*’s assertion that digital sampling is comparable to theft).

justification that digital sampling is widely used in the production of hip-hop music.<sup>95</sup> In response to Markie's invocation of what amounts to a cultural defense<sup>96</sup>—that borrowing is socially acceptable within the hip-hop community—the court in effect held that “attempts to excuse lawlessness by noting a common disregard for the law are always destined for abject failure.”<sup>97</sup> The court cryptically stated that the argument was “totally specious. The mere statement . . . is its own refutation.”<sup>98</sup>

In rejecting Markie's culture-based argument, the court in *Grand Upright* effectively legitimized a hierarchy of cultural production in which digital sampling (within hip-hop specifically) is on the bottom.<sup>99</sup> The court reasoned that Markie, in sampling O'Sullivan's work, had one objective in mind: economic gain.<sup>100</sup> Instead of sampling “Alone Again (Naturally)” for aesthetic reasons, Markie's “only aim was to sell thousands upon thousands of records.”<sup>101</sup> Such a view does not square with competing, well-reasoned analyses of borrowing and transformative imitation.

*Grand Upright* has been roundly criticized, and justifiably so.<sup>102</sup> Unfortunately, the case's “theft-based” analysis equating digital sampling to stealing of property has taken hold in other courts.

## 2. “Get a License or Do Not Sample”—*Bridgeport Music Inc. v. Dimension Films*

*Bridgeport Music Inc. v. Dimension Films* addressed a sample used by the hip-hop group N.W.A. on their song “100 Miles and Runnin’.”<sup>103</sup> N.W.A. sampled a three-note, arpeggiated guitar chord that lasted two seconds, taken from the song “Get Off Your Ass and Jam” by George Clinton Jr. and the Funkadelics.<sup>104</sup> The guitar riff was lowered in pitch, looped to repeat, extended for sixteen beats, and was used at five different points in the song.<sup>105</sup> Because the N.W.A. track was used in the film *I Got the Hook Up*, the owners of “Get Off Your Ass and Jam” brought suit against the film's producers.<sup>106</sup>

95. *Grand Upright Music*, 780 F. Supp. at 185 n.2.

96. See RENTELN, *supra* note 11, at 5 (“Cultural defenses are . . . raised in civil cases . . . [where] courts are asked to take the cultural background of the litigant into account.”).

97. Falstrom, *supra* note 93, at 365.

98. *Grand Upright*, 780 F. Supp. at 185 n.2.

99. See Arewa, *Bach to Hip Hop*, *supra* note 10, at 582–83 (“Discussions of hip hop at times include a series of explicit dichotomies by which hip hop practices are marked and evaluated, including . . . artistic and pirated.”).

100. *Grand Upright*, 780 F. Supp. at 185 n.2.

101. *Id.* at 185.

102. Arewa, *Bach to Hip Hop*, *supra* note 10, at 582–83; Falstrom, *supra* note 93, at 365; Randy S. Kravis, Comment, *Does a Song by Any Other Name Still Sound as Sweet?: Digital Sampling and its Copyright Implications*, 43 AM. U. L. REV. 231, 266–69 (1993).

103. *Bridgeport Music, Inc. v. Dimension Films (Bridgeport II)*, 383 F.3d 390, 393 (6th Cir. 2004), *aff'd on reh'g*, (*Bridgeport I*), 410 F.3d 792, 796 (6th Cir. 2005).

104. *Bridgeport I*, 410 F.3d at 796. An arpeggiated chord in this case consisted of “three notes that, if struck together, comprise a chord but instead are played one at a time in very quick succession. . . .” *Id.*

105. *Id.*

106. *Bridgeport Music, Inc. v. Dimension Films (Bridgeport III)*, 230 F. Supp.2d 830, 830 n.1 (M.D. Tenn. 2002).

The Court of Appeals for the Sixth Circuit sided with Bridgeport Music, holding that the de minimis doctrine can *never* act as a defense to the sampling of a copyrighted sound recording.<sup>107</sup> As many samples contain only a small portion of the original work, artists have “long relied on the de minimis doctrine to sustain this creative process.”<sup>108</sup> However, the court found that Section 114(b) of the Copyright Act (which concerns copyrights of sound recordings)<sup>109</sup> grants sound recording owners the exclusive right to sample their own recordings.<sup>110</sup> Because one may not “pirate the whole sound recording,” the court reasoned, one may likewise not “‘lift’ or ‘sample’ something less than the whole.”<sup>111</sup> In the court’s own words, either “[g]et a license or do not sample”—anything less would constitute per se infringement.<sup>112</sup>

The various justifications offered by the Sixth Circuit for its ruling have received substantial criticism.<sup>113</sup> First, the court cited the need for a bright-line rule to promote judicial efficiency.<sup>114</sup> In the face of hundreds of sampling cases, the court reasoned that conducting de minimis tests on a case-by-case basis would be impractical.<sup>115</sup> However, it appears that the opposite is true: by stating that sampling even three notes (as in this case) is infringement, the court “open[ed] the floodgates to more lawsuits.”<sup>116</sup> Further, as de minimis is no longer a viable defense for sampling artists, defendants are more likely to turn to the complex, fact-specific affirmative defense of fair use.<sup>117</sup> Thus, it appears that *Bridgeport*’s elimination of de minimis will “increase not only the *number* of copyright infringement suits, but also the *complexity* of those suits.”<sup>118</sup> Furthermore, a bright-line rule is inappropriate to deal with the “widely ranging fact patterns and . . . continually evolving technological

107. *Bridgeport I*, 410 F.3d at 800. For a brief description of the de minimis doctrine, see *supra* note 20.

108. Jennifer R. R. Mueller, Note, *All Mixed Up: Bridgeport Music v. Dimension Films and De Minimis Digital Sampling*, 81 IND. L.J. 435, 435 (2006).

109. 17 U.S.C. § 114(b) (2006) provides:

The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.

110. *Bridgeport I*, 410 F.3d at 801.

111. *Id.* at 800.

112. *Id.* at 801.

113. See Matthew R. Brodin, Note and Comment, *Bridgeport Music, Inc. v. Dimension Films: The Death of the Substantial Similarity Test in Digital Sampling Copyright Infringement Claims—The Sixth Circuit’s Flawed Attempt at a Bright-Line Rule*, 6 MINN. J. L. SCI. & TECH. 821, 823 (2005) (contending that *Bridgeport* is inconsistent with the language and purpose of the Copyright Act); Mueller, *supra* note 108, at 438 (asserting that *Bridgeport*’s “bright-line” rule is “short-sighted and misguided”); Schietinger, *supra* note 9, at 229–242 (arguing that the Sixth Circuit should have permitted a de minimis analysis, and that its policy considerations are not persuasive).

114. *Bridgeport*, 410 F.3d at 802.

115. *Id.*

116. Mueller, *supra* note 108, at 456.

117. *Id.*

118. *Id.* (emphasis in original).

landscape” that characterize digital sampling cases.<sup>119</sup>

The *Bridgeport* court gave particular consideration to the economic interests of the music industry, reasoning that its rule would limit the ability of samplers to benefit from another artist’s “work product.”<sup>120</sup> Such a conclusion ignores the significant costs imposed on artists to clear samples, even if using only one note. Clearing samples is not as simple as sending a check to the original source’s owner, but rather is “time-consuming, expensive, unpredictable, and ‘a legal and administrative hassle.’”<sup>121</sup> One DJ described the problems with sample clearance: “Lawyers make it totally impossible to clear more than one sample per song, because they all want 75%, no matter how big or how small the use is.”<sup>122</sup> Furthermore, the court’s rule ensured that the cost of obtaining a license would increase even further, as sound recording owners can name the price which artists must pay, no matter how brief the sample.<sup>123</sup> Such a burden upon independent artists of limited resources actually works to encourage illegal sampling rather than compliance.<sup>124</sup>

The court rationalized the cost of obtaining clearance by stating that “if an artist wants to incorporate a ‘riff’ from another work in his or her recording, he is free to duplicate the sound of that ‘riff’ in the studio.”<sup>125</sup> Such an assumption does not square with reality. Studio recording is prohibitively expensive, especially for artists lacking the backing of a major studio.<sup>126</sup> While one may purchase sampling software for \$500, a studio demo can easily run over \$4,000.<sup>127</sup> Furthermore, attempts at re-recording the original source will invariably fail; as artist Jan Hammer noted, “There’s no way to recreate what [original artists] sound like—the nuances they bring to music.”<sup>128</sup>

In some ways, the court’s mistaken assumptions about studio recording versus sampling belie nostalgia for the “good old days” when music was made in studios, not on laptops.<sup>129</sup> Such cultural preferences are reinforced by the court’s description of sampling as physical, not intellectual, taking.<sup>130</sup> In the

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119. Kenneth M. Achenbach, *Grey Area: How Recent Development in Digital Music Production Have Necessitated The Reexamination Of Compulsory Licensing For Sample-Based Works*, 6 N.C. J. L. & TECH. 187, 200 (2004).

120. *Bridgeport I*, 410 F.3d at 801–02.

121. Schietinger, *supra* note 9, at 238 (quoting Michael L. Baroni, *A Pirate’s Palette: The Dilemmas of Digital Sound Sampling and a Proposed Compulsory Licensing Solution*, 11 U. MIAMI ENT. & SPORTS L. REV. 65, 93 (1993)).

122. Kylee Swensen, *Collage Constructionist*, REMIX (July 2002) (quoting DJ Shadow), available at <http://www.solesides.com/winblad/shadowremix0702.html>.

123. Mueller, *supra* note 108, at 456.

124. Schietinger, *supra* note 9, at 238.

125. *Bridgeport I*, 410 F.3d at 801.

126. Schietinger, *supra* note 9, at 236.

127. Mueller, *supra* note 108, at 458.

128. Baroni, *supra* note 121, at 80 (citing Tom Moon, *Music Sampling or Stealing: Who Owns the Sounds of Music?*, ST. LOUIS POST DISPATCH, Jan. 24, 1988, at 3E). See also McLeod, *supra* note 45 (noting how recreating a sound in studio does not contain the same musical effect as sampling the original source).

129. See Brodin, *supra* note 113, at 863 (“The court of appeals seems to lament the fact that the old ways of creating music are, in some modern music genres, being replaced with new technology that eliminates much of the need for live musicians.”).

130. *Bridgeport I*, 410 F.3d at 802 (“When . . . sounds are sampled they are taken directly from [a] fixed medium. It is a physical taking rather than an intellectual one.”).

eyes of the court, *any* sampling, for *any* reason, without clearance, is a per se violation of federal statute.<sup>131</sup> In the same vein as *Grand Upright, Bridgeport* thus functions as a legally binding decree of what sort of art, and what sort of technology, society is willing to accept as valid. Moreover, by threatening any sampling artist with litigation, the case has had a distinct chilling effect on creativity within the sampling community.<sup>132</sup>

### 3. “They Gonna Make an Example”<sup>133</sup>: The Arrest of DJ Drama

The legal consequences for artists breaking the cultural mold are real. By participating in methods of cultural production that do not conform with what American jurisprudence views as legitimate, artists risk their finances and freedom. To see the results in action, one needs look no further than the arrest of DJ Drama in 2007.<sup>134</sup>

DJ Drama (Tyree Simmons), an Atlanta-based music executive, is one of the foremost mixtape producers in the country.<sup>135</sup> Just as his *Gangsta Grillz* compilations have launched him into the elite of mixtape MCs, so has his influence boosted the careers of rappers T.I., Lil Wayne, and Young Jeezy.<sup>136</sup> In 2007, Atlanta police, working with the Recording Industry Association of America’s anti-piracy division, arrested Drama, protégé DJ Don Cannon, and seventeen associates following a multi-week investigation into Drama’s music production business.<sup>137</sup> Drama and Cannon were charged with felony violations of Georgia’s RICO statute on allegations of heading an extensive ring of copyright infringement through the production of mixtapes.<sup>138</sup> Authorities also seized over 50,000 mixtapes along with other assets as “proceeds of a pattern of illegal activity.”<sup>139</sup>

The fallout among the hip-hop community was immense. Said George “DukeDaGod” Moore, head of Artists and Repertoire with Diplomat Records: “This is like D-Day in hip-hop.”<sup>140</sup> Artists questioned the rationale behind the raid: “Nobody is dying, nobody is killing nobody. It’s just music being made.”<sup>141</sup> One DJ noted that the majority of the 50,000 CDs confiscated were up-and-coming artists, and that the mixtapes were a purely promotional

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131. *Id.* at 801.

132. See Brodin, *supra* note 113, at 860 (“[M]any hip-hop artists will be forced to abandon sampling or reduce the number of samples used in a new song.”); Renee Graham, *An Anti-Sampling Court Ruling Limits the Options of Hip-Hop’s Best*, BOSTON GLOBE, Sept. 16, 2004, at D1 (assessing the effect of *Bridgeport* on the hip-hop community).

133. Reid, *supra* note 77 (quoting comments of rapper Lil Wayne in response to the arrest of DJ Drama in 2007).

134. Sanneh, *supra* note 6.

135. Dames, *supra* note 6. Drama recently took home four trophies at the Justo’s 10th Annual Mixtape Awards. Crosley, *supra* note 6.

136. Dames, *supra* note 6; Reid, *supra* note 77.

137. Aswad, *supra* note 17.

138. Sanneh, *supra* note 6.

139. *Id.* (quoting Chief Jeffrey C. Baker from the Morrow, Ga. Police Department).

140. Reid, *supra* note 77.

141. *Id.*

marketing tool that were “looked at the wrong way” by the authorities.<sup>142</sup> Said another: “I think they’re trying to make hip-hop illegal or something.”<sup>143</sup>

The RIAA denied such motives. Brad Buckles, executive vice president of the RIAA’s Anti-Piracy Division in Washington, D.C., made the following statement regarding the raid and arrests:

We don’t consider this being against mixtapes as some sort of class of product. We enforce our rights civilly or work with police against those who violate state law. Whether it’s a mixtape or a compilation or whatever it’s called, it doesn’t really matter: If it’s a product that’s violating the law, it becomes a target.<sup>144</sup>

Even some DJs and rappers admit that the mixtape industry was violating norms of the business. Lil Wayne warned mixtape DJs to “smarten up,” and look to DJs who release mixtapes through record labels.<sup>145</sup> Said Lil Wayne: “It’s a bad thing . . . but you gotta play the game fair. If you don’t play fair, all kinds of things can happen.”<sup>146</sup> He directed DJs to “watch people like DJ Clue, watch people like DJ Khaled. They do it right.”<sup>147</sup> While those DJs built careers on mixtapes sold on the street, “they have also been successful at releasing official mixtapes through record labels.”<sup>148</sup> Another rapper-producer even suggested holding mixtape seminars, in which the RIAA could educate artists as to what forms of mixtape production are permissible.<sup>149</sup>

Such pragmatism is laudable, and hopefully the music industry and mixtape DJs will find common ground in which mixtape production can thrive. But for the moment, authorities view sampling as a zero-sum game<sup>150</sup> in which a “sound recording is either copyrighted or it’s not,”<sup>151</sup> and continue to misinterpret the technology as a tool used by artists for the sole purpose of securing monetary gain.<sup>152</sup> The truth is quite to the contrary. Said a DJ who wished to remain anonymous in the wake of Drama’s arrest: “I’ve never made a mixtape and sold it. Every mixtape I made is given away.”<sup>153</sup> Such a mentality exemplifies the nature of a gift economy, in which artistic expression

142. *Id.* (quoting a DJ who wished to remain anonymous).

143. *Id.* (quoting George “DukeDaGod” Moore).

144. Aswad, *supra* note 17.

145. Reid, *supra* note 77.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. See Lethem, *supra* note 10, at 34 (“[I]ndustries of cultural capital, who profit not from creating but from distributing, see the sale of culture as a zero sum game.”).

151. Sanneh, *supra* note 6 (discussing comments of Brad Buckles, executive vice president of the RIAA’s Anti-Piracy Division).

152. See Reid, *supra* note 77 (quoting a DJ who noted that DJ Drama’s mixtapes were purely promotional, and were “looked at the wrong way” by the RIAA). See also *Bridgeport Music, Inc. v. Dimension Films LLC (Bridgeport I)*, 410 F.3d 792, 800 (6th Cir. 2005) (making an actual copy of a copyrighted sound recordings without prior permission is *per se* infringement); *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 185 (S.D.N.Y. 1991) (holding that Biz Markie was “stealing” only in order to sell “thousands upon thousands of records”).

153. Reid, *supra* note 77. The DJ asserted that the norms against selling mixtapes were so strong that “when we find dudes who’s [sic] selling . . . [mixtapes], we do our own raiding.” *Id.*



is freely exchanged without the restraints of commoditization.<sup>154</sup>

DJ Drama himself was surprised and disturbed by the raid.<sup>155</sup> In light of the role mixtapes have played within the hip-hop community, as well as his own status as an “artist,” “businessman,” and proud mixtape DJ, Drama called the events of the day a “travesty.”<sup>156</sup> Said Drama: “I saw cops jump out, M16s drawn, and they put me directly on the ground, . . . basically asking, ‘Where are the guns and drugs?’”<sup>157</sup>

This dangerous rhetoric comparing mixtape production to drug trafficking was echoed in statements made by the RIAA itself. Following the raid, the RIAA’s Matthew Kilgo was quoted as saying: “Statistics prove that you can make a 400 percent markup on a kilo of heroine [sic] or cocaine, and statistics also show you can make up to a 900 percent profit just on the resale of counterfeit CDs.”<sup>158</sup> Artists noticed the comparison as well. One noted that, despite the fact that the CDs confiscated in the raid were not for profit, authorities “treated . . . [Drama and Cannon] like they was [sic] . . . drug kingpins.”<sup>159</sup> Such equation of digital sampling to the illicit drug trade echoes the race-laden calls for “law and order” of the Nixon era and conflates a stereotype of black crime and lawlessness with what is one of the largest African-American art forms.

That said, query whether some hip-hop artists have invited this comparison. Rap moguls have long analogized their musical entrepreneurialism to drug dealing; whether they themselves are former dealers or simply exaggerators is often unclear.<sup>160</sup> Jay-Z’s unprecedented success, like Biggie Smalls’ before him, was intertwined with his past as a drug-dealer. As Jay-Z once bragged, “I sold kilos of coke, I’m guessing I can sell CDs.”<sup>161</sup> Rapper Rick Ross, interestingly enough, brags about extensive work in the drug trade (and luxuries resulting there from) but his claims likely amount to little more than puffery.<sup>162</sup> In any event, the language used by the RIAA, while incredibly troublesome, should be placed in the proper context.

But the RIAA’s hypocrisy is exposed in other ways. According to the RIAA, sampling is aimed at profit, even more profit than can be made through the lucrative drug trade.<sup>163</sup> But whose profit is the RIAA really worried about? Clearly, not DJ Drama’s—most mixtapes do not actually make much

154. Lethem, *supra* note 10, at 37.

155. Shaheem Reid, *DJ Drama Speaks Out About Arrest: ‘I Took The Fall For Hip-Hop*, MTV (Mar. 30, 2007, 1:21 PM), [www.mtv.com/news/articles/1556017/20070330/dj\\_drama.jhtml](http://www.mtv.com/news/articles/1556017/20070330/dj_drama.jhtml).

156. *Id.*

157. *Id.*

158. Dames, *supra* note 6.

159. Reid, *supra* note 77.

160. Sasha Frere-Jones, *The Sound of Success*, NEW YORKER, Feb. 13 & 20, 2012, at 102.

161. Kanye West, *Diamonds from Sierra Leone (Remix) (feat. Jay-Z)*, on LATE REGISTRATION (Roc-A-Fella 2005). For a thorough analysis of Jay-Z’s lyrics, background, and outlook on the drug trade and the music business, see JAY-Z, DECODED (Spiegel and Grau 2010).

162. Frere-Jones, *supra* note 160, at 102. A Smoking Gun report in 2008 revealed that Ross had at one point been a corrections officer in Florida with a perfect attendance record. See *Screw Rick Ross*, SMOKING GUN (July 21, 2008), <http://www.thesmokinggun.com/documents/crime/screw-rick-ross>.

163. Dames, *supra* note 6.

money.<sup>164</sup> The record industry tends to frame its anti-piracy efforts in terms of artists' rights, yet "most of DJ Drama's mixtapes begin with enthusiastic endorsements from the [sampled] artists themselves."<sup>165</sup> While the RIAA claims that illegal mixtape regulation takes money from rich musical pirates and compensates artists, the rights to original work are often held by corporations rather than the artists themselves. The truth is that digital sampling enables black artists, both DJs and otherwise, to produce their own cultural and economic capital in the face a monopolistic music industry.<sup>166</sup>

The raid on DJ Drama's studio was not the first of its kind, but rather followed a series of raids on small music retailers. In raids in Virginia, Indiana, Rhode Island, and New York between 2003 and 2007, police cracked down on independent record stores selling mixtapes, resulting in large fines, criminal liability, and even business closings.<sup>167</sup> Such crackdowns on small operators are particularly alarming considering that large chains such as Best Buy have been known to sell mixtapes, yet face little intimidation by law enforcement.<sup>168</sup>

The treatment of DJ Drama and others by the recording industry and law enforcement, taken on its own, is troubling enough. But prior court decisions and police actions become particularly distressing when compared with white artists who utilized digital sampling technology and who receive comparably favorable treatment by the legal system.

#### 4. *Girl Talk*

Girl Talk, whose real name is Gregg Gillis, is a Pittsburgh-based former biomedical engineer whose recent rise to prominence, and distinct lack of legal troubles, has raised questions about how the copyright regime treats artists according to race and socioeconomic status.<sup>169</sup> Gillis specializes in creating "mash-ups," a blend of two or more samples usually taken from contrasting musical styles.<sup>170</sup> Examples of Gillis' product include layering "Juicy" by the

164. Reid, *supra* note 77.

165. Sanneh, *supra* note 6.

166. Kelly, *supra* note 73. See also Greene, *Unequal Protection*, *supra* note 7, at 376–77 (comparing the record industry's treatment of African-American artists to the sharecropping system).

167. See Alan Berry, *The Tale of the Tapes*, N.Y. TIMES, May 12, 2006, <http://www.nytimes.com/2006/05/11/opinion/11iht-edberry.html> (describing a raid on a record store in Norfolk, Virginia as part of a nationwide crackdown on mixtape sellers, and mentioning the author's own run-in with the law that resulted in losing his business in Indianapolis following a raid); Hillary Crosley & Ed Christman, *Mixed Messages*, BILLBOARD (Jan. 27, 2007), <http://www.billboard.biz/bbbiz/others/mixed-messages-1003534999.story> (discussing a Rhode Island retailer who received five years' probation and \$14,500 in legal fees and fines after a raid); Kalefa Sanneh, *Mixtape Crackdown Sends a Mixed Message*, N.Y. TIMES, June 16, 2005, <http://www.nytimes.com/2005/06/16/arts/music/16sann.html?th&emc=th> (discussing a raid on Mondo Kim's video store in the East Village in 2005).

168. Crosley & Christman, *supra* note 167.

169. *Girl Talk as Fair Use Martyr*, COPYCENSE (Mar. 12, 2009, 4:40 PM), [http://www.copyright.com/2009/03/girl\\_talk\\_as\\_fair\\_use\\_martyr.html](http://www.copyright.com/2009/03/girl_talk_as_fair_use_martyr.html) [hereinafter *Fair Use Martyr*]; Robert Levine, *Steal This Hook? D.J. Skirts Copyright Law*, N.Y. TIMES, Aug. 7, 2008, <http://www.nytimes.com/2008/08/07/arts/music/07girl.html>.

170. *Mashup*, THEFREEDICTIONARY.COM, <http://www.thefreedictionary.com/mashup> (last visited Mar. 12, 2012).

Notorious B.I.G. over Elton John's "Tiny Dancer,"<sup>171</sup> or combining Kraftwerk with Lil Wayne.<sup>172</sup> While Gillis' work is largely pop-centered and party-friendly, he views his music as a reinvention and reinterpretation of widely known sources that transcends the mixings of a party DJ.<sup>173</sup> Gillis locates his work within hip-hop's history of recontextualizing existing sources,<sup>174</sup> and has stated: "[O]ne of my favorite things about Girl Talk is just how far it's pushed people to think, 'What is original music and what's not?'"<sup>175</sup>

And yet, while Gillis focuses on sampling mainstream artists ranging from Aerosmith to OutKast, he has to date received not one cease and desist letter from a major record label nor been the subject of any civil or criminal investigation for infringement.<sup>176</sup> Rather, his mainstream popularity continues to rise<sup>177</sup> and his legitimacy as an artist has been lauded on the floor of Congress by his own representative.<sup>178</sup> In contrast to the minority DJs and

171. GIRL TALK, *Smash Your Head*, on NIGHT RIPPER (Illegal Art 2006).

172. GIRL TALK, *Triple Double*, on ALL DAY (Illegal Art 2008). Like any musical composition, Gillis' work is best experienced aurally rather than on paper.

173. Ryan Dombal, *Girl Talk Interview*, PITCHFORK (Aug. 30, 2006), <http://pitchfork.com/features/interviews/6415-girl-talk/>; Levine, *supra* note 169; Mark Richardson, *Girl Talk Interview*, PITCHFORK (Oct. 6, 2008), <http://pitchfork.com/features/interviews/7522-girl-talk/>.

174. See Dombal, *supra* note 173 ("Throughout hip-hop people have been putting different elements with different types of music. It's not about who created this source originally, it's about recontextualizing—creating new music.")

175. Michael Allan Goldberg, *Riot Act*, BOSTON PHOENIX (Nov. 17, 2008), <http://thephoenix.com/Boston/Music/71796-Riot-act/?page=2#TOPCONTENT>.

176. Dombal, *supra* note 173; *Fair Use Martyr*, *supra* note 169.

177. See Levine, *supra* note 169 (noting Girl Talk's positive reviews and popularity for using pay-as-you-want pricing); Josh Tyrangiel, *The Top 10 Everything of 2008*, TIME (Nov. 3, 2008), [http://www.time.com/time/specials/packages/article/0,28804,1855948\\_1864324\\_1864335,00.html](http://www.time.com/time/specials/packages/article/0,28804,1855948_1864324_1864335,00.html) (naming *Feed the Animals* the fourth best album of 2008, ahead of Kanye West's *808s and Heartbreak* and Lucinda Williams's *Little Honey*).

178. *The Digital Future of the United States: Hearings Before the Subcommittee on Telecommunications and the Internet of the Committee on Energy and Commerce*, 110th Cong. 45–46 (2007) [hereinafter *Hearings*] (statement of Rep. Mike Doyle). Rep. Doyle brought attention to the value of digital sampling as well as the arrest of DJ Drama, and his comments are worth reading in their entirety:

Mr. Doyle. Thank you, Mr. Chairman, and welcome to our witnesses. Mr. Chairman, I want to tell you a little story of a local guy done good. His name is Greg Gillis, and by day, he is a biomedical engineer in Pittsburgh. At night, he deejays under the name Girl Talk. His latest mash-up record made the top albums of 2006 list from Rolling Stone, Pitchfork, and Spin Magazine amongst others. His shtick, as the Chicago Tribune wrote about him, is "based on the notion that some sampling of copyrighted material, especially when manipulated and recontextualized into a new art form, is legit and deserves to be heard."

In one example, Mr. Chairman, he blended Elton John, Notorious BIG, and Destiny's Child all in the span of 30 seconds. And while the legal indy music download site, Emusic.com, took his stuff down for possible copyright violations, he's now flying all over the world to open concerts and remix for artists like Beck.

The same cannot be said, however, for Atlanta-based hip-hop mix tape king DJ Drama. Mix tapes, actually made on CDs, are sold at Best Buy and local record shops across the country. And they are seen as crucial to make or break new acts in hip-hop. But even though artists on major labels are paying DJ Drama and others to get their next mix tape, the major record labels are leading raids and sending people like him to jail.

I hope that everyone involved will take a step back and ask themselves if mashups and mix tapes are really different, or if it is the same as Paul McCartney admitting that he nicked a Chuck Berry base riff and used it on the Beatles' hit "I Saw Her Standing There." Maybe it is, and maybe Drama violated some clear, bright lines. Or maybe mix tapes are a powerful promotional tool, and maybe mashups are transformative new art that expands the listener's experience and doesn't compete with artists as made available on iTunes or at a CD store. And I don't think Sir Paul asked permission to borrow that baseline, but every time I listen to that

producers facing harsh sanctions for working in the grey area of the law, Gillis' sampling efforts have yet to be condemned or even threatened.<sup>179</sup>

Such a disparity demonstrates how, in the context of digital sampling, technological usage and cultural production receive unequal treatment by the dominant legal system. One commentator has suggested that Gillis had avoided legal trouble because, as an educated middle-class white male, "his socioeconomic status fits what the mainstream wants to see when it talks about this issue."<sup>180</sup> As opposed to the "criminal piracy" of artists like DJ Drama, "Gillis' story presents a squeaky clean image of American innovation" and a model for how fair use should grant artists (or at least *some* artists) the autonomy to borrow and reinvent.<sup>181</sup> Posit the editors of Copycense: "Why hasn't Gregg Gillis been forced to post bail yet? . . . If Biz Markie cannot 'steal,' why can Girl Talk?"<sup>182</sup>

Such a query is especially puzzling in light of the sources Gillis draws from. In some ways, Gillis' work reflects what Professor K.J. Greene has called a "pattern of creation by Black artists, followed by imitation and distortion by white performers."<sup>183</sup> In what Greene labels the "Minstrel Show" pattern, white performers "water[] down the vitality of Black music to make it more palatable for white audiences . . ."<sup>184</sup> This could arguably be applied to Gillis, whose music is significantly tamer and more mainstream than much of the hardcore rap exhibited on compilations by DJ Drama and others. It could be argued that Gillis' mainstream success is in large part attributable to his use of pop music sources readily known by white, middle-to-upper class audiences. The fact that Gillis samples more from well-known pop sources, but has received *less* scrutiny than DJs such as Drama who sample from lesser-known artists, is both intriguing and worrisome.

Lastly, the extensive media coverage of Gillis' work and his status as a "fair use martyr" echo the sentiments of jazz musician T.S. Monk, who noted that just as the drug problem was not recognized until it moved from African-American neighborhoods to white communities, so did the sampling debate only become a mainstream concern once it affected white artists.<sup>185</sup> If positive treatment of Gillis has a silver lining, perhaps it is to draw attention to the original samplers whose work has not yet been legitimized by mainstream legal institutions.

song, I am a little better off for him having done so.

Until our questions about the future of music get answered, we first have to look at the future of radio. I want to look at whether Webcasters saddled with new royalty fees, whether just one satellite radio company, whether low-power FM radio stations can really help artists break through the clutter and be heard by enough people to be successful.

And I want to look at how consumers experience music and how radio shapes that. I look forward to the witnesses talking about these issues and more. And, Mr. Chairman, with that, I yield back my time.

179. Dombal, *supra* note 173; *Fair Use Martyr*, *supra* note 169.

180. *Fair Use Martyr*, *supra* note 169.

181. *Id.*

182. *Id.*

183. Greene, *Unequal Protection*, *supra* note 7, at 373.

184. *Id.*

185. *Fair Use Martyr*, *supra* note 169.

### 5. *Utility Maximization and Distributional Consequences*

This inherent tension in the copyright regime's treatment of sampling artists is surely not Gillis' fault.<sup>186</sup> As the maxim goes, "Don't hate the player, hate the game,"<sup>187</sup> and Gillis is but one actor in a long history of the interaction of race, culture, and copyright.<sup>188</sup> Copyright has always been tested "by the introduction of new technologies in musical performance and practice."<sup>189</sup> Furthermore, those actors bringing suit to enforce assertions of copyright violations (i.e., "rent seeking") are merely playing by the established rules of the system and acting within their own self-interest—few would likely claim that Grand Upright or Bridgeport Music *themselves* are biased entities.

That said, the current trends in copyright enforcement are troubling. Viewed in isolation, perhaps DJ Drama's prosecution, the suit against Markie, or Gillis' newfound fame is not worrisome, but they are merely examples of the winners and losers in a competitive environment. Yet such a perspective takes an exceedingly narrow view of history, and fails to give adequate consideration to the possibility that the legal environment is biased towards sampling artists of color. Such evidence includes the American copyright system's mistreatment of African-American artists, the record industry's consolidation of creative capital, and general societal mistrust of many black art forms.<sup>190</sup> The truth is that while copyright purports to be neutral, it is in fact "a culturally, politically, economically, and socially constructed category rather than a real or natural one."<sup>191</sup>

The copyright system may not be guided by an "invisible hand" directing who litigates and who pays the cost for sampling. Still, it is hard to ignore the distributional impacts of the intellectual property regime.<sup>192</sup> At the very least, courts should be aware of the disparate legal treatment of artists utilizing digital sampling. Going further, a solution is needed to "smoke out"<sup>193</sup> how and why cultural production receives either sanction or praise depending on the race of the artist.

186. See *id.* (noting that Gillis is not to blame for the "overheated copyright environment").

187. See *Don't Hate The Playa/Playette Hate The Game*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=Don%27t+Hate+The+Playa%2FPlayette+Hate+The+Game> (last visited Mar. 6, 2012).

188. See Greene, *Copynorms*, *supra* note 7, at 1191–92 (commenting on the mutually reinforcing relationship between technological advances and the development of black musical forms, and the copyright regime's failure to provide compensation for black artists); Mueller, *supra* note 108, at 438 (commenting on how the *Bridgeport* decision reflected how technological changes impact copyright and societal attitudes about what is considered art).

189. Arewa, *Bach to Hip Hop*, *supra* note 10, at 552.

190. See, e.g., Jerry Adler, *The Rap Attitude*, NEWSWEEK, Mar. 19, 1990, at 56–59 (characterizing the "attitude" of much African-American hip-hop as debasing civilized standards).

191. Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, DUKE L.J. 455, 459 (1991).

192. For a general discussion of the unequal distributional consequences of the intellectual property regime, see Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2831–32 (2006).

193. "The purpose of strict scrutiny is to 'smoke out' illegitimate uses of race . . ." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

## IV. RECOMMENDATION

The law of digital sampling is unclear, and the precedent that does exist (particularly *Grand Upright* and *Bridgeport*) does not bode well for sampling artists. Not surprisingly, few samplers who are challenged by record labels and the RIAA dare take their cases to court, thus creating an environment in which out-of-court settlements, rather than well-reasoned judicial decisions, is the norm.<sup>194</sup> Efforts to improve the creative environment for artists who sample have focused on reforming the Copyright Act to include a compulsory licensing scheme<sup>195</sup> or expanding the fair use doctrine.<sup>196</sup> Unfortunately, congressional action throughout the past century has largely protected the interests of the recording industry,<sup>197</sup> and it is debatable whether Congress itself is equipped to successfully balance the competing interests involved in sampling.<sup>198</sup>

Given the unlikelihood of congressional involvement, as well as the prohibitive costs of licensing for smaller artists, working within the court system presents an untapped (albeit risky) option for artists to gradually influence the legal environment to better reflect cultural understandings of sampling. A test case approach could introduce cultural norms into the judicial system, establish positive precedent, and hopefully introduce the proper balance between the benefits of expanded sample access and the costs of denying copyright protection to authors.<sup>199</sup>

## A. A “Cultural Offense”: A Test Case Litigation Strategy

Much has changed in the way of cultural attitudes toward digital sampling since Biz Markie was famously admonished “Thou shalt not steal.”<sup>200</sup> Yet samplers fail to challenge claims of copyright infringement in court, permitting copyright owners to free-ride off the uncertainty generated by the potential for enormous civil and criminal sanctions.<sup>201</sup> In the absence of congressional action, it seems that the solution is quite simple: get more samplers into court. Such an approach to law reform litigation would seek to set positive precedent for sampling by introducing cultural evidence in the style of the “culture defense” advocated by legal anthropologists.<sup>202</sup> The result would hopefully be a “cultural offense” of cases that would ask courts to adapt the law to reflect

194. Keller, *supra* note 9, at 144.

195. See Arewa, *Bach to Hip Hop*, *supra* note 10, at 641 (advocating amendments to the Copyright Act to account for norms of borrowing); Kravis, *supra* note 102, at 271–75 (1993) (advocating that Congress amend the Copyright Act and institute a compulsory licensing scheme). Other authors have drawn attention to racial disparities in sampling, but have failed to propose concrete solutions. See, e.g., Neela Kartha, *Digital Sampling and Copyright Law in a Social Context: No More Colorblindness!!*, 14 U. MIAMI ENT. & SPORTS L. REV. 218 (1997).

196. See Ashtar, *supra* note 15, at 316–318 (proposing a transformative fair use doctrine).

197. Keller, *supra* note 9, at 145.

198. MCLEOD, CREATIVE LICENSE, *supra* note 10, at 217.

199. For a detailed discussion of the competing interests involved in sampling law, see *id.* at 76–127.

200. *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

201. Keller, *supra* note 9, at 144.

202. See generally RENTELN, *supra* note 11 (discussing the cultural defense).

changing cultural attitudes toward sampling.

A law reform litigation strategy could mirror the NAACP's extensive use of test cases to find (or at times manufacture) a legal controversy to establish positive precedent.<sup>203</sup> From its inception, the NAACP relied on "testers" who would manufacture the conditions necessary to bring a successful challenge to a discriminatory law, such as by sending black members out to New York City theaters to test those theaters' compliance with anti-discrimination laws.<sup>204</sup> This approach, of course, was modeled off circumstances which produced the *Plessy v. Ferguson* case.<sup>205</sup> There, African-American lawyer Louis Andre Martinet created a set-up to present the most beneficial facts to challenge Louisiana's "separate car" law. Martinet strategized for Plessy, who had only one black great-grandparent and appeared "white," to violate the law, and coordinated with the railroad for his arrest.<sup>206</sup> The result was a carefully executed confrontation designed to test the discriminatory law's application to an individual who was 7/8 white.<sup>207</sup> While the case ultimately failed, the approach was successfully adopted by the NAACP and later civil rights activists, such as in the *Lawrence v. Texas* case.<sup>208</sup>

Litigants seeking to challenge dominant judicial norms about sampling could adopt these strategies by finding a DJ who resembles Gregg Gillis in all aspects except for race. Let's call this DJ "Paul." Paul would be of minority status, but would sample the same kinds of music as Gillis, be of the same educational and socioeconomic background, achieve the same level of fame and income, and generally conduct his sampling and musical production in as similar a manner as possible. Given the number of DJs working today, finding a DJ like Paul would not be difficult.

The real trick would be to find a copyright holder to bring suit against Paul, thus create the test case itself. This may not prove difficult, as copyright owners are usually happy to enforce their rights, but at the same time we can see from Gillis' case that owners at times choose not to exercise their rights. What would likely be needed would be cooperation between litigants, where both the copyright owner and the DJ share a common interest in bringing litigation to clarify the law (in *Plessy*, the railroad company assisted in planning Plessy's arrest because they opposed the business costs imposed by

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203. See generally Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910-1920)*, 20 LAW & HIST. REV. 97, 99-102 (Spring 2002), available at <http://www.historycooperative.org/journals/lhr/20.1/carle.html#REF9> (discussing the early history of the NAACP and its reliance on test cases); BURTON A. WEISBROD ET AL., PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 44 (1978) ("From its inception, the NAACP relied heavily on test case (law reform) litigation.").

204. Carle, *supra* note 203, at 116.

205. *Id.* at 117. See also *Plessy v. Ferguson*, 163 U.S. 537 (1896).

206. Carle, *supra* note 203, at 101.

207. *Id.*

208. See Dahlia Lithwick, *Extreme Makeover: The Story Behind The Story Of Lawrence v. Texas*, NEW YORKER, March 12, 2012 (discussing how *Lawrence v. Texas* was a product of gay rights activists' use of a favorable factual scenario to successfully challenge Texas' anti-sodomy law, in spite of the fact that the defendants in the original case were likely not engaged in homosexual activity at the time of their arrest). See also *Lawrence v. Texas*, 539 U.S. 558 (2003).

the separate car law<sup>209</sup>).

In the test case itself, the goal would be to present evidence of cultural and artistic attitudes toward sampling, balanced against the purposes and goals of copyright protection. Sampling artists and their advocates, by flooding the courts with cases refuting claims of copyright infringement, could thus challenge “lawmakers’ empirical assumptions about how to promote progress [and] how culture gets made.”<sup>210</sup> By doing so, artists can likewise assert their own norms of cultural production and ensure that legal decisions at least consider those values. By failing to advertise their forms of culture as valid, sampling artists tacitly comply with the “presumption of assimilation” that all artists should comport with one “monolithic standard.”<sup>211</sup>

The goal of such test case litigation would be not only to influence judicial decisions, but to improve the bargaining environment in which negotiations for sample licensing take place. *Grand Upright* and *Bridgeport*, while only two cases in separate jurisdictions, have cast an enormous shadow over such negotiation. The threat of litigation, as well as the significant transaction costs involved in sample clearance, act as prohibitive agents on Coasian bargaining among samplers and copyright owners, resulting in both economic and creative inefficiencies.<sup>212</sup> Law reform litigation would thus attempt to expose the “man behind the curtain” of the *Bridgeport* and *Grand Upright* decisions, to demonstrate how overly applying copyright protection in the face of prevalent cultural attitudes works to not only stifle creativity, but to promulgate economic externalities.

Ultimately, success of such a strategy depends on scale. NAACP test case litigation relied on a constant stream of contested cases, and so too should sampling litigation seek to increase judicial awareness of these issues through consistent infringement challenges, coordinated publicity, and a coherent legal strategy.

### B. Complications and Questions

In promoting law reform litigation that seeks to introduce cultural values into the courtroom, perhaps most problematic is defining what “sampling culture” itself consists of, particularly in terms of race. Few would dispute that Biz Markie, N.W.A., and DJ Drama are members of the hip-hop sampling community, but many would take issue with the assertion that the sampling club’s membership is defined by skin tone. Such a limited definition of sampling culture is contrary to its democratic and open nature. Rather, perhaps sampling culture should be defined by a commitment to shared values

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209. Carle, *supra* note 203, at 101.

210. Keller, *supra* note 9, at 140.

211. RENTELN, *supra* note 11, at 6.

212. MCLEOD, CREATIVE LICENSE, *supra* note 10, at 10–14, 165–168. McLeod and DiCola’s economic analysis of sample clearance provides a valuable insight into why artists are often both unable or unwilling to clear samples.



including the willingness to participate in an “open source culture.”

Furthermore, presenting the culture of sampling as specific to hip-hop diminishes the force of asserting that borrowing is common to artistic creation in all genres and time periods.<sup>213</sup> Advocating for hip-hop-specific norms could be counterproductive by promulgating the myth that sampling artists attempt to “excuse lawlessness by noting a common disregard for the law” among their own members.<sup>214</sup> Given present judicial attitudes toward sampling as “theft,” hip-hop would do well to emphasize its place within a rich, centuries-old tradition of borrowing rather than present sampling as particular to one community.

Needless to say, such a litigation-based strategy would require immense resources, both in terms of legal counsel willing to take cases and donors willing to foot the bill if the artist should lose (not to mention artists willing to face criminal liability). Given the harsh penalties, both civil and criminal, for copyright violations, samplers take an enormous gamble by going to court. Yet incentives already exist to provide the resources for litigation, as record labels are well aware of the enormous promotional power to mixtapes to “whet consumers’ appetite” for forthcoming official label releases.<sup>215</sup> The problem is that individual retailers and DJs themselves face punishment under the law—not record labels, even if they do condone mixtape production.

A potential avenue for litigants to explore is the doctrine of copyright misuse. Copyright misuse, still an evolving doctrine, operates as an affirmative defense to infringement by allowing a defendant to claim that the plaintiff “misused” their copyright privileges.<sup>216</sup> Derived from the equitable doctrine of “unclean hands,” the defense effectively precludes a party seeking relief from asking for more protection than is granted under copyright law.<sup>217</sup> While a full discussion of copyright misuse is beyond the scope of this work, it is worth mentioning in terms of the aligned interests of mixtape producers, artists, and record labels. Given these groups’ combined interests in a (relatively) unimpeded mixtape market, one could speculate that their collective weight, as exercised through a copyright misuse framework, could be enough to dislodge the RIAA’s focus on raiding and arresting mixtape makers.

Ultimately, the worst-case scenario of a test case litigation strategy would be that samplers would lose and copyright holders’ rights would be upheld and expanded. But this leaves sampling artists little worse off than they are now. In fact, such a result would have a silver lining of clarifying property rights and promoting transparency in the negotiating environment. If copyright owners’ property rights are better defined, market actors can bargain more effectively

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213. Arewa, *Copyright and Borrowing*, *supra* note 10, at 34.

214. Falstrom, *supra* note 93, at 365.

215. Berry, *supra* note 167.

216. Ramsey Hanna, Note, *Misusing Antitrust: The Search for Functional Copyright Misuse Standards*, 46 STAN. L. REV. 401, 410 (1994).

217. Brett Frischmann & Dan Moylan, *The Evolving Common Law Doctrine of Copyright Misuse: A Unified Theory and its Application to Software*, 15 BERKELEY TECH. L.J. 865, 867 (2000).

without the transactions costs imposed by uncertainty as to who owns what.<sup>218</sup> Enhancing property rights could, if applied equally to all parties (which is a big “if”), maximize the size of the economic pie and increase compensation for all.<sup>219</sup> It is important to note, however, that the *Bridgeport* decision relied on such speculation, and the result was increased copyright protection for some to the detriment of many.<sup>220</sup>

Artists and mixtape producers may well be wary of the increased risks inherent in more aggressive litigation strategies. But as the arrest of DJ Drama demonstrates, the risks are already present for sampling composers. As these artists presently work extensively and proudly within the grey area of the law, so should they be willing to accept the risks necessary to defend their form of culture as valid.

## V. CONCLUSION

If lawmakers and courts are to truly fulfill the Constitutional mandate of promoting the progress of the arts,<sup>221</sup> they must take a hard look at *whose* art is to be embraced by the American legal system. If the history of the copyright regime is any indicator, special attention must be paid to how legal treatment of cultural production is accorded on the basis of race or class. The stakes are high, both for those individuals caught “stealing a beat” and for the free exchange of ideas and art throughout society. It is therefore of the utmost importance that artists challenge pervasive legal attitudes toward digital sampling by working within the court system itself. Hopefully a proper balance can be reached, one that enforces ownership rights and rewards creative production while legitimizing modes of transformative imitation and recontextualization.

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218. MCLEOD, CREATIVE LICENSE, *supra* note 10, at 218–224 (discussing how proposals for enhancing property rights could promote efficiency in the sample clearance system).

219. *Id.* at 223.

220. *Id.* at 224.

221. U.S. CONST. art. I, § 8, cl. 8.