

“CAN’T TOUCH THIS”: A COMPARATIVE ANALYSIS OF SAMPLING LAW IN THE UNITED STATES AND INTERNATIONALLY

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I. INTRODUCTION

Across the world a new economic and working class has formed - the creative class, a group of individuals who are involved in many areas, including art and music, and use this creativity to create original ideas.¹ Among other things, the creative class functions to create new ideas and technology.² With the rise in technology and creativity, many individuals are becoming composers, musicians, and artists. Beginning in the 1980’s individuals began “sampling,” the process of using pieces of already existing music along with music technology, known as digital samplers.³ A sampler is able to “capture[] pre-recorded sounds” and give the artist

1. RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS: AND HOW IT’S TRANSFORMING WORK, LEISURE, COMMUNITY AND EVERYDAY LIFE* 8 (2002).

2. *Id.*

3. Lauren Fontein Brandes, *From Mozart to Hip-Hop: The Impact of Bridgeport v. Dimension Films on Musical Creativity*, 14 *UCLA ENT. L. REV.* 93, 117 (2007).

or producer the ability to manipulate the sound since it allows the sound to be isolated.⁴ This allows an artist or producer to “effectively ‘change its sonic characteristics.’”⁵

Sampling is the re-working of a musical work into a new musical piece and can be anything from a couple of notes to a full lyrical chorus.⁶ Some believe that in order for the new work to achieve different effects, “the cultural object or recognizable elements of the object in a forum for third persons to achieve different effects than those generally achieved already by the object; the different results must affect the meaning of the original object in the social discourse.”⁷ Unlike the remixing culture, which uses existing music “in a new way,”⁸ the sampling culture is a creation of a new work by combining original works with previous pieces.⁹ Individuals are using websites, such as YouTube, to put up their creative works.¹⁰

4. Tonya M. Evans, *Sampling, Looping, and Mashing . . . Oh My!: How Hip Hop Music Is Scratching More Than the Surface of Copyright Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 843, 857 (2011).

5. *Id.* at 858 (quoting Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271, 276 (1996)).

6. John S. Pelletier, *Sampling the Circuits: The Case for A New Comprehensive Scheme for Determining Copyright Infringement As A Result of Music Sampling*, 89 WASH. U.L. REV. 1161, 1161 (2012).

7. Justin Hughes, “Recoding” *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 947 (1999).

8. Robert M. Vrana, *The Remix Artist’s Catch-22: A Proposal for Compulsory Licensing for Transformative, Sampling-Based Music*, 68 WASH. & LEE L. REV. 811, 822 (2011).

9. Jennifer R. R. Mueller, *All Mixed Up: Bridgeport Music v. Dimension Films and De Minimis Digital Sampling*, 81 IND. L.J. 435, 435 (2006) (stating “[m]any samples contain only a few notes from the original work. These samples are often altered in pitch, tone, and speed until they are virtually unrecognizable, and then woven into the fabric of the new song.”).

10. See David M. Morrison, *Bridgeport Redux: Digital Sampling and Audience Recoding*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 75, 79-80 (2008) (stating “[a]s is evident from the growth of individually recoded cultural products through websites like YouTube . . . and the intense, ongoing debate regarding the proper scope of intellectual property rights in a digital environment; the inclination to create and participate in the broader cultural discourse through criticism, commentary, and adaptation is there: digital technology has made doing so more possible and effective than ever before.”).

The increase in the use of the Internet led to Congress stepping in to create a law that would create more protection for copyright holders in enforcing online copyright infringement, and “create safe harbors for service providers.”¹¹ Therefore, in 1998, the Digital Millennium Copyright Act (hereinafter DMCA) was signed into law.¹² The DMCA included the “Online Copyright Infringement Liability Limitation Act.”¹³ This provision added Section 512 to the Copyright Act, which created four new limitations on liability for copyright infringement: “Transitory Digital Network Communications”; “System Caching”; “Information Residing on Systems or Networks at Direction of Users”; and “Information Location Tools.”¹⁴ This provision was set up as a safety net for online service providers against copyright infringement liability if they met the guidelines stated in the rule, regardless of whether any of their users might be liable of copyright infringement.¹⁵ While the DMCA amended the copyright laws, which had not been significantly updated since the 1970’s, the new laws still focused on copyright protection, rather than promoting creativity.¹⁶

While Congress is currently updating the Copyright Act,¹⁷ Congress should consider assessing sampling in order to discuss what constitutes a legal sample and define sampling infringement, which will thus encourage creativity. Article I of the Constitution contains a clause,

11. Annemarie Bridy, *Is Online Copyright Enforcement Scalable?*, 13 VAND. J. ENT. & TECH. L. 695, 712 (2011).

12. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

13. *Id.* § 201.

14. 17 U.S.C. § 512 (2012).

15. See U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998 (1998), available at <http://www.copyright.gov/legislation/dmca.pdf>.

16. David L. Hitchcock & Kathy E. Needleman, Current Status of Copyright Protection in the Digital Age and Related Topics, 8 TEX. WESLEYAN L. REV. 539, 581 (2002) (stating that “[t]he educational community asserts that the DMCA frustrates creativity and the transfer of knowledge.”).

17. See generally *The Register’s Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. On Courts, Intellectual Property and the Internet of the H. Comm. On the Judiciary*, 113th Cong. (2013) (statement of Maria A. Pallante, Register of Copyrights, United States Copyright Office), available at <http://copyright.gov/regstat/2013/regstat03202013.html>.

referred to as the “Copyright Clause,”¹⁸ that gives Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁹ The copyright Laws, as they stand, protect an original work, but also do not leave much room for sampling without copyright infringement.

In updating the Copyright Act Congress should consider looking at how international laws have changed and remained static as a reaction to sampling. This paper will explore the digital sampling realm in the United States, how it has been litigated, and what the future holds by exploring how other countries have updated their copyright laws. This paper will argue that there needs to be a change in current United States copyright law in order to allow for a more liberal use for sampling, thereby encouraging creativity.

II. ROADMAP

The continuance of this paper will discuss the laws both domestically and internationally and where the United States Copyright Act should reflect greater liberality in order to encourage creativity of the newer generation. Part C of this paper will discuss sampling law. Part C will first lay out the background of sampling law, which will speak to the history of sampling and what defines sampling. Second, this section will describe the copyright spectrum, or the various considerations courts use to consider whether a new work infringes upon the copyright protection of an older work. Third, this section will discuss current copyright law in the United States and sampling law as has been defined by the courts. Part D of this paper will focus on international copyright and sampling. This section will focus on Australian copyright law and United Kingdom

18. See generally L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. Copyright Soc’y U.S.A. 365, 365 (2000). This article examines the purpose of the copyright clause and the history behind it. It finds that there are three fundamental policies to the clause: “[c]opyright is to promote learning in order to preclude copyright censorship; copyright is to protect and enhance the public domain; and copyright is to ensure public access to copyrighted material.” *Id.* at 365.

19. U.S. CONST. art. I, § 8, cl. 8.

copyright law. I chose these two locations because both of them have updated, or are in the process of updating, their copyright laws in order to reflect the current trend in technology. Part E of this paper will assess how the United States should adapt their laws, in order to protect copyright holders, while allowing more creativity.

III. SAMPLING LAW

A. Background of Sampling

Sampling is a musical version of the collage artwork genre.²⁰ Many famous artists, literary and visual, have used other people's work in their own.²¹ While sampling is litigated and, by some, believed to be infringing upon another's work, in the art world it is common practice to take photographs and paint them, as exemplified by famous artist Andy Warhol.²² While musicians for centuries have repeated previous works, musicians in the "mid-twentieth century began to manually alter those sounds themselves."²³ Digital sampling became prevalent with the increasing sophistication of technology. Sampling is defined as:

The sound recording itself is being used, and it is usually taken from a vinyl, compact-disc, or MP3 copy of the recording. But the underlying notes, chords, melody, and rhythm of the song are also an inseparable part of the sample. Thus, sampling implicates *both* copyrights in the song being sampled. Sampling artists will sometimes infringe both the

20. KEMBREW MCLEOD & PETER DICOLA, *CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING*, 36 (2011).

21. *Id.*

22. *Id.* (Quoting DJ Spooky asserting "[s]ampling is usually viewed as a musician thing . . . but if you look at the art world, for example, you have Andy Warhol taking photographs and painting them. You have different photographers taking certain scenes and reconstructing them, digitally. It all implies a layer of collage and pulling together bits and pieces.").

23. Note, *Not in Court 'Cause I Stole a Beat: The Digital Music Sampling Debate's Discourse on Race and Culture, and the Need for Test Case Litigation*, 2012 U. ILL. J.L. TECH. & POL'Y 141, 146.

musical composition copyright and the sound recording copyright in the song being sampled.²⁴

Digital sampling is thought to have begun in the 1960's with a "dub" movement from Jamaica.²⁵ The dub movement consisted of live battles between disc jockeys who used sound systems to mix reggae albums and other albums.²⁶ When dub came to the United States, it was integrated into "the hip-hop movement developing in the South Bronx."²⁷ The culture of hip-hop and rap could be summed up by Public Enemy front man Chuck D, who stated, "[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."²⁸ Soon after, when technology became more affordable, sampling became easier for the mass market to use.²⁹

The mass public's desire for the sampling trend has led to newer works outselling older works.³⁰ For example, Rick James' hit *Super Freak* had \$3,000,000 in record sales, while MC Hammer's *U Can't Touch This*, which borrowed James' beat, had \$10,000,000 in sales.³¹ Similarly, Stevie Wonder's *Pastime Paradise* had \$1,000,000 in record sales, while Coolio's *Gangsta Paradise*, which borrowed Wonder's beat, had \$7,000,000 in record sales.³² Although the original artists, here James and Wonder, may have introduced the beat into the market, Hammer and Coolio were the ones who profited the most from it.³³

24. McLEOD & DiCOLA, *supra* note 20, at 77 (2011).

25. Note, *supra* note 23.

26. *Id.*

27. *Id.* at 147.

28. *Id.* (quoting Kembrew McLeod, *How Copyright Law Changed Hip-Hop: An Interview with Public Enemy's Chuck D and Hank Shocklee*, 20 STAY FREE! at 20 (2002)).

29. *Id.*

30. See COPYRIGHT CRIMINALS (Benjamin Frazen 2010), available at <https://www.youtube.com/watch?v=tIoR3PYpduo>.

31. *Id.*

32. *Id.*

33. *See id.*

A reason for sampling is creating a tribute by acknowledging the previous work in the new work.³⁴ For example, the Run D.M.C. hit *Walk This Way*, included Aerosmith, the original artist of *Walk This Way*.³⁵ This allowed Aerosmith to have the recognition, and arguably helped bring Aerosmith back to the charts.³⁶ Sampling has allowed artists' previous music that is no longer popular or available to be revived.³⁷ Famous funk artist George Clinton stated that sampling "really helped us a lot because . . . people heard it and got to know who it was and then they wanted to hear the long version of the sampled songs."³⁸

"[W]hile digital sampling is often framed as a 'new' technological advancement, it in fact relies on methods of dissimulation of cultural knowledge"³⁹ A new work is created by using prior works.⁴⁰

B. The Copyright Spectrum

Copyright is part of Intellectual Property rights, which gives an artist the exclusive right to their work and distribution of their work, which begins from the moment of creation.⁴¹ A copyright law protects an expressive idea in a tangible medium.⁴²

What can be termed the "copyright spectrum" is the consideration of various factors that a court considers when assessing copyright infringement in music. One thing a court considers is the commerciality of the new work.⁴³ The Supreme Court has stated that "every commercial use of copyrighted material is presumptively an unfair exploitation of the

34. See Vera Golosker, *The Transformative Tribute: How Mash-Up Music Constitutes Fair Use of Copyrights*, 34 HASTINGS COMM. & ENT L.J. 381, 384 (2012).

35. COPYRIGHT CRIMINALS, *supra* note 30.

36. Edwin F. McPherson, *Pick Me! Pick Me!: The New Copyright Lottery*, ENT. & SPORTS LAW, 1, 14 (2006) (stating that sampling use can make sense in the music industry and here "it gave Run D.M.C. instant credibility (and revitalized Aerosmith's career).").

37. COPYRIGHT CRIMINALS, *supra* note 30.

38. *Id.*

39. Note, *supra* note 23, at 148.

40. *See id.*

41. *See* 17 U.S.C. § 106 (2012).

42. *Id.* § 102(a) (2012).

43. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449 (1984).

monopoly privilege that belongs to the owner of the copyright.”⁴⁴ This is because the infringer profits from the “exploitation of the copyrighted material without paying the customary price.”⁴⁵ Although a copyright is an exclusive right, there are exceptions. One of the exceptions is the fair use defense, which is set forth in the Copyright Act and permits use of a copyrighted material without permission of the copyright holder.⁴⁶ The Copyright Act provides that one of the four fair use factors that the courts are to weigh is the “purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”⁴⁷ Therefore, non-commercial use weighs in favor of a fair use defense for an individual sampling.⁴⁸ If a non-commercial user is charged with infringement, the copyright owner must show that the “particular use is harmful” or that if the work were to “become widespread, it would adversely affect the potential market for the copyrighted work.”⁴⁹ This requires a showing by preponderance of the evidence that there would likely be future harm.⁵⁰ Even if the transformative use is commercial, however commercial use is only one of four factors and the courts still must balance out all of the other factors and interests.⁵¹

Another factor that a court can consider on the spectrum is whether the sampling is of a sound recording or a composition. According to the Copyright Act, sound recordings “are works that result from the fixation of a series of musical, spoken, or other sounds ... in which they are embodied.”⁵² The copyright owners are given the exclusive right to “duplicate the sound recordings in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording.”⁵³ They are also given the exclusive right to “prepare a

44. *Id.* at 451.

45. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

46. *See* 17 U.S.C. § 107 (2012).

47. *Id.* § 107(1).

48. *See id.*

49. *Sony*, 464 U.S. at 451.

50. *Id.*

51. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584-85 (1994).

52. 17 U.S.C. § 101.

53. *Id.* § 114(b) (2012).

derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.”⁵⁴ However, the rights of the copyright owner “do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.”⁵⁵ This means that even though a sound recording cannot be used without the possibility of infringement, an artist can re-create it without the possibility of litigation. On the other hand, “[a] musical composition consists of rhythm, harmony, and melody, and it is from these elements that originality is to be determined.”⁵⁶ This concept “captures an artist’s music in written form.”⁵⁷ The essence is that copyright protection of a music composition “protects the generic sound that would necessarily result from any performance of the piece.”⁵⁸ While a musical composition can be protected, courts still have to take into consideration that only so many patterns of chords and notes exist.⁵⁹

A third factor allows courts to balance the quantitative and qualitative analysis of the infringing work with the original work. According to the Second Circuit, the infringer has the burden of proof to show the copying is “so trivial as to fall below the quantitative threshold of substantial similarity” and is, therefore, *de minimis*.⁶⁰ The courts often will look at two elements to determine whether a substantial amount of infringement has occurred. Courts will look at the “amount of the copyrighted work that was copied, as well as . . . the observability of the copyrighted work

54. *Id.*

55. *Id.*

56. *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1249 (C.D. Cal. 2002) *aff’d*, 349 F.3d 591 (9th Cir. 2003) *opinion amended and superseded on denial of reh’g*, 388 F.3d 1189 (9th Cir. 2004) and *aff’d*, 388 F.3d 1189 (9th Cir. 2004).

57. *Id.*

58. *Id.*

59. *Id.* at 1253 (quoting *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988)).

60. *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217 (2d Cir. 1998) (quoting *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997) (citations omitted)).

in the allegedly infringing work.”⁶¹ “Observability is determined by the length of time the copyrighted work appears in the allegedly infringing work, and its prominence in that work as revealed by the lighting and positioning of the copyrighted work.”⁶² A de minimis claim is “on a case-by-case basis,” and does not involve “bright-line rules.”⁶³ The courts will also measure the quality of the work borrowed.⁶⁴ This is done by determining if the heart of the original was used as the heart of the new work.⁶⁵

A fourth consideration courts use is whether the new work transforms the old work.⁶⁶ A court measures whether the new work merely “supersede[s] the objects”⁶⁷ or if the new work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”⁶⁸ Since the goal of copyright is to promote science and the arts,⁶⁹ transformative works allow for “breathing space” to encourage creativity.⁷⁰

As stated above, the Copyright Act states that the copyright owner has the exclusive right to “rearrange[], remix [], or otherwise alter[] in sequence or quality.”⁷¹ However, with the popularity of sampling, musicians are altering prior works to create a new work. DJ Girl Talk is a prime example of a musician who profits from sampling, by creating new

61. *Id.* (citing Ringgold, 126 F.3d at 75).

62. *Id.* (citing Ringgold, 126 F.3d at 75).

63. *Id.*

64. *See* Campbell, 510 U.S. at 587 (stating the amount and substantiality used “calls for the thought not only about the quantity of the materials used, but about their quality and importance, too”).

65. *Id.* at 587 (stating that “taking the heart of the original and making it the heart of a new work was to purloin a substantial portion of the essence of the original.”).

66. *See id.* at 579. This states that while transformative is not “absolutely necessary . . . the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.” *Id.* (citing Sony, 463 U.S. at 455, 470-480 (Blackmun, J., dissenting)).

67. *Id.* (citing Folsom v. Marsh, 9 F.Cas 342, 348 (C.C.D. Mass. 1841)).

68. *Id.*

69. *See* U.S. Const. art. I, § 8, cl. 8.

70. Campbell, 510 U.S. at 589 (citing Sony, 463 U.S. at 455).

71. 17 U.S.C. § 114(b).

music from samples across genres and generations.⁷² For example, DJ Girl Talk's hit *Shut the Club Down* features such diverse artists as: Avril Lavigne, DJ Funk, Jay-Z featuring UGK, Dolla featuring T-Pain and Tay Dizm, Toni Basil, Rich Boy featuring Polow da Don, The J. Geils Band, Dem Franchize Boyz, Butthole Surfers, Michael Sembello, Ray J featuring Yung Berg, Rod Stewart, Ahmad, The Cool Kids, and YoungBloodZ.⁷³ In an effort to honor the artists, DJ Girl Talk puts all of the artists' names on the inside of the album both to give them credit, and to allow the listener to try and hunt down how many samples he or she can recognize and even allows the listener to search for artists they do not recognize.⁷⁴ While, DJ Girl Talk is a commercial sampler, he arguably also only uses brief parts of each sample, thereby creating a defense to any allegation of infringement.⁷⁵

C. Current Copyright and Sampling Law in the United States

While sampling has been around for centuries, and digital sampling has been around for decades, sampling continues to be a gray area of the law. The Copyright Act includes, among others rights and defenses, the rights of the copyright holder and the infringer's defense including the defense of fair use,⁷⁶ which allows those who infringe on a copyright to not be held liable if they meet certain requirements. The Copyright Act § 106 articulates that the owner of copyrighted works have the exclusive rights:

72. Christopher C. Collie & Eric D. Gorman, *Digital Sampling of Music and Copyrights: Is It Infringement, Fair Use, or Should We Just Flip A Coin?*, B.C. INTELL. PROP. & TECH. F. 1, 1 (2011).

73. Spongebobfan879, *Girl Talk Sample Guide - Shut the Club Down*, from *Feed the Animals*, YOUTUBE (Jan. 10, 2009), https://www.youtube.com/watch?v=pTDGlv_LGCQ.

74. GOOD COPY BAD COPY (Rosforth 2007), available at <http://www.goodcopybadcopy.net>.

75. See Collie & Gorman, *supra* note 72 (citing 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>).

76. 17 U.S.C. § 107.

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.⁷⁷

As stated above, the Copyright Act gives copyright owners the exclusive right to reproduce copyrighted work, prepare derivative work, and distribute copies of the work.⁷⁸ Furthermore, the Copyright Act gives the exclusive right for rearranging, remixing, or altering the sequence or quality of an original work to the copyright holder.⁷⁹ However, the fair use defense allows for an individual to use portions of a copyrighted work under certain circumstances without being liable for infringement.⁸⁰ Fair use is intended to limit exclusive rights if the following are met under § 107:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for

77. 117 U.S.C. § 106.

78. 17 U.S.C. § 114(b).

79. *See id.*

80. *See* 17 U.S.C. § 107.

purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.⁸¹

The Supreme Court described the fair test in 1994 in *Campbell v. Acuff-Rose Music, Inc.*⁸² In this case, the court had to decide whether 2 Live Crew's parody, *Pretty Woman*, was within the fair use meaning of the Copyright Act of Roy Orbison's *Oh Pretty Woman*.⁸³ "2 Live Crew copied the characteristic opening bass riff (or musical phrase) of the original, and true that the words of the first line copy the Orbison lyrics."⁸⁴ The Supreme Court used the four fair use factors to determine if 2 Live Crew would be liable for infringing on the Plaintiff's copyrighted work.⁸⁵

First, the Court assessed "the purpose and character" of the work.⁸⁶ The purpose of this first test is whether "the new work merely

81. *Id.*

82. *Campbell*, 510 U.S. at 577.

83. *Id.* at 571-72.

84. *Id.* at 588.

85. *Id.* at 577.

86. *Id.* at 578-85 (quoting 17 U.S.C. § 107(1)).

‘supersede[s] the objects’ of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message.’⁸⁷ The Court here noted that since the goal of copyright is to promote science and the arts a transformative characteristic is not necessarily required to find in favor of a fair use defense.⁸⁸

Second the Supreme Court measured “the nature of the copyrighted work.”⁸⁹ This measures “the value of the materials used.”⁹⁰ The Court found that this factor does not help in this case, but it is used to measure whether the work is close to the “core of the copyright’s protective purposes.”⁹¹

Third, the Court looked at the “amount and substantiality of the portion used” compared to the “copyrighted work as a whole.”⁹² This, unlike the previous prong, is used to measure the “quantity and value of the work used.”⁹³ Here, the Court found that although the quantity was important, so is the quality of the work taken was also important.⁹⁴ The Court measured whether the heart of the original was replicated in the new piece.⁹⁵ The Court held that although the heart of the original was taken in this case, the Defendant’s work was a parody and without the heart of the original the consumer market would not recognize the work for what it was intended.⁹⁶ The Court found that “no more was taken than necessary.”⁹⁷

Lastly, the Court measured “the effect of the use upon the potential market for or value of the copyrighted work.”⁹⁸ This test looks at the

87. *Id.* at 579 (quoting *Folsom*, 9 F.Cas. at 348).

88. *Id.*

89. *Id.* at 586 (quoting 17 U.S.C. § 107(2)).

90. *Id.* (quoting *Folsom*, 9 F. Cas, at 348).

91. *Id.*

92. *Id.* (quoting 17 U.S.C. § 107(3)).

93. *Id.* (quoting *Folsom*, 9 F. Cas, at 348).

94. *Id.* at 587.

95. *Id.*

96. *Id.* at 588-89.

97. *Id.* at 573 (quoting *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1438 (6th Cir. 1992) *rev’d*, 510 U.S. 569, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994)).

98. *Id.* at 590 (quoting U.S.C. 117 § 107(4)).

market harm caused by the infringer and if there would be a substantiality adverse effect on the original.⁹⁹ The Court acknowledged that there could potentially be harm, but that parodies generally do not serve as a substitute for the original work.¹⁰⁰ The Court's overall conclusion was that the Defendant's work constituted fair use.¹⁰¹

While the Copyright Act and the Supreme Court have not spoken directly to sampling, some courts have. First, in 1991, in *Grand Upright v. Warner Bros.*, the Southern District of New York stated that the Defendants knew that a license is necessary for each copyrighted piece.¹⁰² The opinion includes the famous line from the Bible, "[t]hou shalt not steal" to assert that copyright infringement is a form of stealing, no matter how short the sample may be.¹⁰³ In this case, Biz Markie's *I Need a Haircut* took ten seconds from *Alone Again (Naturally)*.¹⁰⁴ The court held that Biz Markie's knowledge of violating the law was a "callous disregard for the law."¹⁰⁵ Further, the court found that Biz Markie knew it was necessary to obtain a license, called a "clearance," and that his only reason for recreating the original piece was for financial gain.¹⁰⁶

Thirteen years later, in 2003, the 9th Circuit Court found that minimal sampling was de minimis.¹⁰⁷ In *Newton v. Diamond*, the court found that the Beastie Boy's hit *Pass the Mic* infringed on Newton's *Choir* but the

99. *Id.* (quoting 17 U.S.C. § 107(4)).

100. *Id.* at 591.

101. *Id.* at 594.

102. 780 F. Supp. 182, 184-85 (S.D.N.Y. 1991).

103. *Id.* at 183.

104. Tracy L. Reilly, *Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court's Attempt to Afford "Sound" Copyright Protection to Sound Recordings*, 31 COLUM. J.L. & ARTS 355, 396 (2008).

105. *Grand Upright*, 780 F. Supp. at 185.

106. *Id.* at 184-85. The court found that Biz Markie's only reason for sampling was to sell thousands upon thousands of record. *Id.* at 185. The court believed that the "callous disregard for the law and for the rights of others requires not only the preliminary injunction sought by the plaintiff but also sterner measures." *Id.*

107. *Newton*, 388 F.3d at 1196-97 (discussing whether the unlicensed part of *Choir* that *Pass the Mic* samples is indeed a significant amount of taking that a second license should have been sought).

infringement was so minimal that litigation was unnecessary.¹⁰⁸ The court held that the Beastie Boys did not change the overall essence or structure of the composition.¹⁰⁹ Since the sampling only borrowed what made up very little of the new work, the court held it was *de minimis* and, therefore, not infringing on the prior work.¹¹⁰

Two years later, the 6th Circuit litigated an important musical composition case. The court held in *Bridgeport Music, Inc. v. Dimension Films*, where N.W.A. sampled three notes¹¹¹ from George Clinton Jr.'s *Get Off Your Ass and Jam*, that the three notes sampled without a license is not *de minimis*.¹¹² The court stated “[g]et a license or do not sample.”¹¹³ The court believed that this structure would not impair creativity as artists were still able to recreate a sound in a recording studio, the market would keep license prices fair, and “sampling is never accidental” since “[w]hen you sample a sound recording you know you are taking another’s work product.”¹¹⁴ The court noted that it believed that copyright laws were to “strike a balance between protecting original works and stifling further creativity.”¹¹⁵ Also, the court stated that the Copyright Act gives “[t]he exclusive rights of the owner of copyright in a sound recording . . . do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.”¹¹⁶

The court stated “independent fixation” refers to sound recordings that “may imitate or simulate the sounds of another.”¹¹⁷ Therefore, it is

108. *Id.* at 1196-97.

109. *Id.* at 1195.

110. *Id.* at 1196-97 (finding that although three notes were lifted from *Choir* without permission, *Choir* and *Pass the Mic* are substantially different in feel and meaning and the three notes taken were not quantitatively or qualitatively significant to *Choir*).

111. 410 F.3d 792, 796 (6th Cir. 2005).

112. *Id.* 801-02. The court here stated that when a part of a composition is taken, even if it is minimal, it is still value from the original work. *Id.* at 802.

113. *Id.* at 801.

114. *Id.*

115. *Id.* at 800.

116. *Id.* at 799-800; 17 U.S.C. § 114 (b).

117. *Id.* 410 F.3d at 804 n.18.

reasoned that Congress may have intended to mean that a recording that contains use of a prior work would be unauthorized and, therefore, constitutes infringement.¹¹⁸

After cases like *Bridgeport*, infringers can only argue a fair use defense. However penalties for copyright infringement can be so severe that the monetary awards actually exceed what the cost of a license would have been.¹¹⁹ This is because in addition to permanent injunction, the defendant may have to pay sanctions including “statutory damages, disgorgement of profits, [and] attorney’s fees.”¹²⁰ Artists and private users who would have a compelling fair use defense may still feel inclined to get a license or not produce creative works, since the recording industry has instilled fear into the artists and created “a practice of demanding and paying for licenses even when they are not needed.”¹²¹ The uncertainty of fair use can be a “double-edged sword.”¹²² While it can be a great defense for those who like to have artistic creativity by sampling, it also requires application of the four factors, which can be complicated.¹²³ Also, there are “over 160 years of case law” making the defense both an “intimidating and expensive undertaking.”¹²⁴

IV. INTERNATIONAL COPYRIGHT AND SAMPLING

Many countries have experienced a rise in digital sampling and each has dealt with it in their own way. As some countries have updated their copyright laws in order to reflect the changes in digital sampling and technology use, other countries have struggled to update it and are affecting the creativity of private and non-commercial samplers. Two countries that will be discussed as to their handling of sampling and

118. *Id.*

119. James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 *YALE L.J.* 882, 887 (2007).

120. *Id.* at 890.

121. *Id.* at 892.

122. *Id.* at 889.

123. *Id.*

124. *Id.*

copyright laws is Australia and the United Kingdom. The United States should take into consideration these countries, both positively and negatively, in updating our Copyright Laws. Congress needs to reflect the essence of the Copyright Clause in furthering the arts and creativity in updating the Copyright Act.¹²⁵

A. Australian Copyright Law

In 1968, Australia passed the Copyright Act. The Copyright Act of 1968 Section 85 states that: “copyright, in relation to a sound recording, is the exclusive right to do all or any of the following acts:”¹²⁶ “to make a copy of the sound recording”; “to cause the recording to be heard in public”; “to communicate the recording to the public”; and “to enter into a commercial arrangement in respect of the recording.”¹²⁷ The Copyright Act also allows for some protection for copying of sound records for private and domestic use.¹²⁸ This section states that “the owner of a copy . . . of a sound recording makes another copy . . . of the sound recording using the earlier copy” can do so if: “the sole purpose for making the later copy is the owner’s own private and domestic use” and the later copy is made with a “device that can be used to cause sound records to be heard” and “he or she owns it.”¹²⁹ However, that section does not apply in some circumstances including if the earlier copy or the later copy is sold, distributed for the purpose of trade, or “used for causing the sound recording to be heard in public.”¹³⁰

Since 1968, the Australian Copyright Act has been amended numerous times, including in 2004, 2006, and 2013. In 2004, The Australian Federal Court held that the remixing and selling of sound recordings is copyright infringement.¹³¹ In this case five disc jockeys had

125. See U.S. Const. art. I, § 8, cl. 8.

126. Copyright Act 1968 § 85 (Austl.).

127. *Id.*

128. Copyright Act 1968 § 109A (Austl.).

129. *Id.*

130. *Id.*

131. MATTHEW RIMMER, DIGITAL COPYRIGHT AND THE CONSUMER REVOLUTION, 154 n. 51 (2007).

sampled from previous works and sold the new works.¹³² Also, two years prior the courts had held that remixing of works and making words available commercially without permission of the artist is copyright infringement.¹³³ While the Australian copyright laws were never favorable in fair dealing and creativity, many lobbyists pushed the government to adapt the laws to reflect changes in technology and society.¹³⁴ In 2006, Australia amended the Copyright Act, and not only expanded the private use exception; but it also gave artists a fair dealing defense,¹³⁵ even though it was very minimal.¹³⁶ While the Amendment allowed for time shifting, form shifting, and space shifting, as long as it was in private use and not sold or distributed,¹³⁷ the Amendment still did not speak to remixing or rearranging, like the United States Copyright Act does.¹³⁸

Also, the 2006 Amendment, for the first time, gave Australians a fair dealing defense.¹³⁹ The fair dealing defense was to be used exclusively for parody and satire, but neither term has been defined under the Act.¹⁴⁰ Since a parody is often thought of as an imitation of work, it could be argued that a sample would be a parody since it takes a previous work to make an imitation of it.¹⁴¹ However, a parody is also thought to have a sense of irony or ridicule relative to the previous work, so a sample would probably not fit.¹⁴² While the Act and cases have not spoken directly to whether this means a person is allowed to create remixes from

132. *Id.*

133. *Id.*

134. *Id.* at 85-86.

135. Copyright Act 1968 §§ 41A, 103AA, amended 2006 (Austl.).

136. AMENDMENTS: MAJOR REFORMS TO COPYRIGHT FROM 2006, Go96v07 at 1 (2012), available at <http://www.copyright.org.au/find-an-answer/browse-by-a-z/>, AUSTRALIAN COPYRIGHT COUNCIL.

137. *Id.*

138. See Copyright Act 1968 §§ 41A, 103AA, amended 2006; See 17 U.S.C. § 114(b).

139. See AMENDMENTS: MAJOR REFORMS TO COPYRIGHT FROM 2006, *supra* note 136.

140. *Id.*

141. See *id.*

142. See *id.*

the original pieces, it could be argued that if it was for private and domestic use it would not be infringing.

In 2010 the Australian courts used the Copyright Act of 1968 to find that there was an objective similarity between the Plaintiff's and Defendant's work.¹⁴³ In *Larrikin Music Publishing v. EMI Songs Australia*, the defendant was found to have sampled two bars from the Plaintiff's work.¹⁴⁴ The Plaintiff owned the rights to the Australian children's round, *Kookaburra Sits in the Old Gumtree*,¹⁴⁵ which was originally written by Marion Sinclair in 1934.¹⁴⁶ The song is very unique in that it only has four bars of music.¹⁴⁷ Two of the four bars were reproduced in 1981 by Men at Work in *Down Under*.¹⁴⁸ The bars were reproduced in a flute riff.¹⁴⁹ The court used a four-step test following the Copyright Act of 1968 to determine if the two bars constituted copyright infringement.¹⁵⁰ The test used was: first, whether there was an "objective similarity between the two works"; second, whether there was a "causal connection between the works"; third whether there was "a sufficient degree of objective similarity between the flute riff in *Down Under* and the two bars in *Kookaburra*"; and forth, an assessment of the "quantitative and qualitative consideration of the bars which are reproduced."¹⁵¹ The court found that even if the work was reproduced, there was an objective similarity that a person would recognize the two bars as coming from *Kookaburra Sits in the Old Gumtree*.¹⁵² Further, the court asserted that the qualitative analysis is more important than quantitative.¹⁵³ While only two bars were taken, quantitatively it was

143. *Larrikin Music Publishing v. EMI Songs Australia Pty Ltd* [2010] FCA 29 ¶ 8 (Austl.).

144. *Id.* ¶ 10.

145. *Id.* ¶ 3.

146. *Id.* ¶ 1.

147. *Id.*

148. *Id.* ¶ 2.

149. *Id.*

150. *Id.* ¶ 8-11.

151. *Id.*

152. *Id.* ¶ 157.

153. *Id.* ¶ 54.

fifty percent of the music.¹⁵⁴ The court further looked into defining “the hook” to determine if two bars were sufficient to cause copyright infringement.¹⁵⁵ The court defined the hook as “the attractive part of the song which identifies the song, sets it apart from others, and sometimes make it a popular and commercial success.”¹⁵⁶ “[A] hook is defined as that portion of the song that tends to stick in a listener’s mind or memory; it can be part of the music, a portion of the lyrics or both.”¹⁵⁷ The court ruled against Men at Work, which led to Men at Work musician Greg Ham committing suicide because after years of a successful career he stated, “I’m terribly disappointed that that’s the way I’m going to be remembered – for copying something.”¹⁵⁸

In November 2013, the Australian Government Law Reform Commission released a report regarding updating the Copyright Act.¹⁵⁹ In this report, the Australian Law Reform Commission (hereinafter ALRC) recommended that the fair use exception for quotations should cover a wide range of art including “‘sampling’, ‘mashups’, and ‘remixes’.”¹⁶⁰ The report states that to provide more room for artistic creativity, the government should look to practices of the artists, like in collages, “where images or objects are ‘borrowed’ and re-contextualized.”¹⁶¹ Factors were considered in weighing fair dealing were: “the purpose and character of the dealing”; “the nature of the copyright material”; “the possibility of obtaining the copyright material within a reasonable time at an ordinary commercial price”; “the effect of the dealing upon the potential market for, or value of, the copyrighted material”; and “in a case where only part of the copyright material is

154. *Id.* ¶ 229.

155. *Id.* ¶ 65-68.

156. *Id.* ¶ 66 (citing *Gringnon v. Roussel* (1991) 38 CPR (3d) 4 at 16).

157. *Id.* ¶ 67.

158. *Men at Work Musician Found Dead; Ridiculous Copyright Ruling Against Band Blamed*, TECHDIRT (Apr. 20, 2012), <https://www.techdirt.com/articles/20120420/02334518572/men-work-musician-found-dead-ridiculous-copyright-ruling-against-band-blamed.shtml>.

159. *Copyright and the Digital Economy* [2013] 122 ACLR 1, 1.

160. *Id.* at 211.

161. *Id.* at 212.

dealt with - the amount and substantiality of the part dealt with, considered in relation to the whole of the copyrighted material.”¹⁶²

Lastly, in discussing the changes that needed to be done to the Copyright Act in order to allow for a fair dealing defense, the court again raised the *Larrikin Music Publishing* case, as a “gap in the law.”¹⁶³ Here, Judge Emmett was displeased with the finding by stating, “the quotation or reproduction of the melody of Kookaburra appears by way of tribute to the iconicity of Kookaburra, and as one of a number of references made in *Down Under* to Australian icons.”¹⁶⁴ Since there was not a fair dealing defense at the time, the court did not raise one.¹⁶⁵ “The fact that part of work taken was found to be substantial was sufficient to show infringement.”¹⁶⁶

While Australia is worried about copyright pirates, they have recently updated their laws and continue to look into continuing to update the Act to keep up with growing technology. Former Attorney General Philip Ruddock, believed that:

Copyright is important and should be respected. That is why the government is updating our laws to keep up with technology. Everyday consumers shouldn't be treated like copyright pirates. Copyright pirates should be not treated like everyday consumers.¹⁶⁷

B. UK Copyright Law and Case Law

The United Kingdom, like Australia and the United States, has also been struggling with the increase in sampling. Similar to both other countries, the United Kingdom is trying to adapt a private copying exception.¹⁶⁸ In 2006, the *Gowers Review of Intellectual Property* recommended that copyright holders should include the price of the

162. *Id.* at 91-92.

163. *Id.* at 212.

164. *Id.*

165. *Id.*

166. *Id.*

167. RIMMER, *supra* note 131, at 86 (quoting Phillip Ruddock, Attorney General, *Time for Fair Use to Free Up Technology*, *The Sydney Morning Herald* (Jan. 28, 2006).

168. *Id.* at 86.

“economic cost” to account for the copies of work that would be made.¹⁶⁹ Andrew Gowers further recommended that the *European Community Information Society Directive* should include “creative, transformative, or derivative works.”¹⁷⁰ Many scholars have been making statements and researching the issue in the United Kingdom. Scholars Damien O’Brien and Brian Fitzgerald believe that “[t]here certainly appears to be a strong argument that non-commercial derivatives, which do not compete with the market for the original material, should be afforded some defence to copyright actions.”¹⁷¹

At the Edinburgh Television Festival of 2003, the Director General spoke of a new creation, BBC Creative Archive.¹⁷² The purpose of the BBC Creative Archive was to make available any of the programs for which BBC owns the rights in order to make them available for specifically non-commercial purposes and private use.¹⁷³ The purpose was to “establish a pool of high-quality content which can be legally drawn on by collectors, enthusiasts, artists, musicians, students, teachers, and many others, who can search and use this material non-

169. *Id.* The Gowers Review of Intellectual Property

recommended the introduction of a private copying exception without a levy: ‘[i]f rightholders know in advance of a sale of a particular work that limited copying of that work can take place, the economic cost of the right to copy can be included in the sale price. The ‘fair compensation’ required by the Directive can be included in the normal sale price. This means, however, that any private right to copy cannot be extended retrospectively as copies of works already sold would not include this ‘fair compensation’. Therefore, collecting societies may wish to consider making a single block license available to allow consumers to format shift their back catalogues legitimately.

Id. (citing Andrew Gowers, *Gowers Reviews of Intellectual Property* (Dec. 2006), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf).

170. *Id.* at 142.

171. *Id.* (quoting Damien O’Brien & Brian Fitzgerald, *Mashups, Remixes and Copyright Law*, *Internet Law Bulletin*, 9 (2), 17-19, at 18 (2006).

172. *Id.* at 279.

173. *Id.* at 279-80.

commercially.”¹⁷⁴ The reasoning behind having this new archive was to protect the commercial rights of the copyright holders, but to also allow for public access.¹⁷⁵ In order to increase what is in the archive, BBC met with public and commercial holders of audio and visual collections.¹⁷⁶ Their slogan that was used to encourage the Creative Archive was, “Find it, Rip it, Share it, Come and Get it.”¹⁷⁷ During the time of this pilot program, BBC had limited the content to UK residents who have paid a license fee in order to access the material.¹⁷⁸

Similar to the United States, the United Kingdom’s copyright laws can be interpreted to mean that even a small quantity of sampling can still constitute infringement. In *Morrison Leahy Limited v. Lightbond Limited*, George Michael and Morrison Leahy Music Limited sued the Defendant to prohibit releasing samples on the hit *Bad Boys Megamix*.¹⁷⁹ The court assessed “whether the sampling of parts of the music altered the character of the work.”¹⁸⁰ In doing so, the court weighed evidence the character was altered against letters from disc jockeys who stated that the “authenticity of the originals was faithfully preserved, even though only snatches had been taken from them.”¹⁸¹ The judge also looked into whether the lyrics had been modified or changed context.¹⁸² The judge ultimately found that the remix of the work “amounted to derogatory treatment,” and, therefore, granted an injunction against the Defendant.¹⁸³

Another case that gained attention in the United Kingdom that found that even a small amount of sampling constitutes infringement was *Ludlow Music Inc. v. Williams*, where the Defendant was ordered to pay

174. *Id.* at 280 (quoting *Building Public Value: Renewing the BBC for a Digital World*, BBC, 63 (June 2004)).

175. *Id.*

176. *Id.*

177. *Id.* (citing *BBC Creative Archive Pilot*, BBC (2005), <http://www.bbc.co.uk/creativearchive/>).

178. *Id.* at 282 (citing *BBC Creative Archive Pilot*, BBC (2005), <http://www.bbc.co.uk/creativearchive/>).

179. *Id.* at 148 (citing *Morrison Leahy Music Limited v. Lightbond Limited* [1993] EMLR 144).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

Loudon Wainwright III because of the similarities in lyrics between *Jesus in a Camper Van* and *I Am the Way (New York Town)*.¹⁸⁴ *I Am the Way (New York Town)* lines which were the source of the litigation were, “[e]very good man gets a little hard luck sometimes” and “every Son of G[]d gets a little hard luck sometime.”¹⁸⁵ This is followed by “[e]specially when he goes around saying he’s the way.”¹⁸⁶ The judge did find this to be substantial.¹⁸⁷ This is because the works are similar and the “central idea” is very similar, including “that the Son of G[]d attracts bad luck by going round saying ‘I am the way’, and embodies it in virtually identical words.”¹⁸⁸ However, this was a case of first impression so there was not much explanation beyond that.¹⁸⁹

In 2006, the Chancery Division of the High Court of Justice in *Confetti Records v. Warner Music*, held that “the mere fact that a work has been distorted or mutilated gives rise to no claim, unless the distortion or mutilation prejudices the author’s honour or reputation.”¹⁹⁰ In this case, the Plaintiff claimed that Andrew Alcee’s song *Burnin’* was made into a remix by garage band The Heartless Crew.¹⁹¹ The Plaintiff claimed that the song in question was a “rap containing references to violence and drugs.”¹⁹² However, there was no evidence that the Plaintiff’s honor or reputation had been distorted, therefore, the claim failed.¹⁹³

According to the United Kingdom Copyright Design and Patent Act of 1988, the owner of a work has “the exclusive right to”: “copy the work”; “issue copies of the work to the public”; “rent or lend the work to the public”; “perform, or show the work in public”; “communicate the

184. (No.1), 2000 WL 1421152.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. RIMMER, *supra* note 131, at 149 (citing *Confetti Records v. Warner Music* (2003) EWCH 1274 (CH)).

191. *Id.* at 148 (citing *Confetti Records v. Warner Music* (2003) EWCH 1274 (CH)).

192. *Id.*

193. *Id.* at 149.

work to the public”]; and “make an adaption of the work to do any of the above in relation to adaption.”¹⁹⁴ However, the laws do state that this section is in regards to copying another work if it is a substantial part.¹⁹⁵ According to the United Kingdom Intellectual Property Office, a substantial part is not defined, but has been interpreted by the courts to mean “a qualitatively significant part of a work even where this is not a large part of the work.”¹⁹⁶ This means that even a small portion could be deemed substantial.¹⁹⁷ In 1999, The Farm’s record label sued a defendant for sampling vocals from *Higher and Higher* and used on *Macarena*.¹⁹⁸ While this case was settled out of court, many think that it would have helped to determine whether the three second practice in the music industry, which allowed for less than three seconds to be copied without infringement, would be upheld in a court of law.¹⁹⁹

However, similar to the United States, the United Kingdom has a fair dealing defense. The United Kingdom Copyright, Design and Patents Act defines fair dealing through Research and Private study in s.29 states:

(1) Fair dealing with a literary, dramatic, musical or artistic work for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.

(1B) No acknowledgement is required in connection with fair dealing for the purposes mentioned in subsection (1) where this would be impossible for reasons of practicality or otherwise.

194. Copyright Design and Patent Act, 1988, § 16 (U.K.).

195. *Id.*

196. Intellectual Property Office, Substantial Part, (Feb. 23, 2014), <http://www.ipo.gov.uk/types/copy/c-manage/c-useenforce/c-enforce/c-enforce-subpart.htm>.

197. *Id.* (stating that “even a small portion of the whole work will still be a substantial part.”).

198. Justin Morey, Copyright Management and its Effect on the Sampling Practice of UK Dance Music Producers, *J. OF THE INT’L ASS’N. FOR THE STUDY OF POPULAR MUSIC*, 48, 53 (2012) (citing *Produce Records Ltd v MBG Entertainment International UK & Ireland LTD* [1999]).

199. *Id.*

(1C) Fair dealing with a literary, dramatic, musical or artistic work for the purposes of private study does not infringe any copyright in the work.

(2) Fair dealing with the typographical arrangement of a published edition for the purposes [of research or private study] does not infringe any copyright in the arrangement.

(3) Copying by a person other than the researcher or student himself is not fair dealing if—

(a) in the case of a librarian, or a person acting on behalf of a librarian, he does anything which regulations under section 40 would not permit to be done under section 38 or 39 (articles or parts of published works: restriction on multiple copies of same material), or

(b) in any other case, the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose.

(4) It is not fair dealing—

(a) to convert a computer program expressed in a low level language into a version expressed in a higher level language, or

(b) incidentally in the course of so converting the program, to copy it,

(these acts being permitted if done in accordance with section 50B (decompilation)).

(4A) It is not fair dealing to observe, study or test the functioning of a computer program in order to determine the ideas and principles which underlie any element of the program (these acts being permitted if done in accordance with section 50BA (observing, studying and testing)).²⁰⁰

Although the United Kingdom Intellectual Property Office stated that there is not a strict definition of what fair dealing means, the courts have interpreted it by assessing financial impact.²⁰¹ While research and private study are listed as a fair dealing exception, there is not much defined in case law to what private study means. However, the United Kingdom Intellectual Property Office has stated that fair dealing does apply if an infringer is infringing on a copyrighted work for non-commercial research and private study, which includes use in connection with a hobby.²⁰²

Further, fair dealing requires sufficient acknowledgement. This means “an acknowledgment identifying the work in question by its title or other description, and identifying the author unless[:]” if the work is published but “it is published anonymously” or “in the case of an unpublished work, it is not possible or a person to ascertain the identity of the author by reasonable inquiry.”²⁰³

As this articulates, copyright is not infringed provided it is a non-commercial basis and gives acknowledgement identifying the title of the work and author of the work from which it is borrowed.²⁰⁴ Further, in *Hubbard v. Vosper*, the defendant was an author for a book that contained extracts from a book written by the Plaintiff and from bulletins and letters to students.²⁰⁵ Lord Denning held that while fair dealing is difficult to define there are some questions that should be used including: “the number and extent of the quotations and extracts”; “the use made of them”; and “the proportions” that were taken.²⁰⁶ This is similar to the U.S. Copyright Act in determining if an infringing piece constituted an insubstantial part and would be upheld in a court of law.²⁰⁷

201. Intellectual Property Office, Fair Dealing, (Feb. 23, 2014), <http://www.ipo.gov.uk/types/copy/c-other/c-exception/c-exception-review/c-exception-fairdealing.htm>.

202. Intellectual Property Office, Exceptions to Copyright: Research (Oct. 2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/359251/Exceptions_to_copyright_-_Research.pdf.

203. Copyright Design and Patent Act, 1988, § 178 (U.K.).

204. *See id.*

205. *Hubbard v Vosper*, [1972] 2 Q.B. 84.

206. *Id.*

207. *See* 17 U.S.C. § 107(3).

V. WHERE THE UNITED STATES NEEDS TO GO FROM HERE

The United States would benefit from looking to Australia and the United Kingdom amending the current Copyright Act. In doing so, the United States can create safe-harbors in order to both protect copyright holders and allow for creativity. The United States should continue to update their act, promote sampling as a hobby, have a fixed price for licenses, require sufficient acknowledgment in commercial pieces, and allow *de minimis* and fair use to be defenses, as well as keep in place some laws that allow re-recording to not constitute copyright infringement.

First, the United States needs to continue to update their Copyright Act in order to reflect current trends in society. Congress would benefit from reflecting on “history, culture, [and] technology” in order to continue to update the laws.²⁰⁸ The last time any significant change to the Copyright Act took place regarding digital works was in 1995 with the DCMA.²⁰⁹ However, technology and creative trends have changed significantly since 1995. The United States would benefit from referring to how often Australia updates their act or considers updating their act. Australia amended their Copyright Act in 2006 to reflect technology changes,²¹⁰ but is already looking to update it again.²¹¹ As former Attorney General Ruddock stated, “[c]opyright is important and should be respected” and, therefore, “[t]hat is why the Government is updating our laws to keep pace with technology.”²¹² In a world where technology is constantly changing and the possibilities are endless for infringement and creativity, the United States should be updating the Copyright Act more frequently to stay up to date.

208. McLEOD & DICOLA, *supra* note 20, at 267.

209. See generally U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998 (1998), available at <http://www.copyright.gov/legislation/dmca.pdf>.

210. See Copyright Act 1968, amended 2006 (Austl.).

211. Copyright and the Digital Economy [2013] 122 ACLR 1, 1.

212. News Release, Attorney-General, The Hon. Philip Ruddock MP, 088/2006 (May 14, 2006), available at http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/WBNJ6/upload_binary/wbnj63.pdf;fileType=application%2Fpdf#search=%22media/pressrel/WBNJ6%22.

Second, Congress would benefit from reassessing safe-harbors, which allow individuals who are infringing to be protected from possible infringement claims. Specifically, Congress should mimic the United Kingdom's Act, which allows for research, which includes hobby.²¹³ While the United States is not as strict as the United Kingdom for copyright for fair dealing, the United Kingdom's government website regarding copyright and sampling provides that private study and non-commercial includes hobby.²¹⁴ Many samplers do not necessarily do it for commercial reasons, but rather sample for artistic and creative reasons. Congress should weigh this against the financial impact, like the United Kingdom does,²¹⁵ in updating the Copyright Act.

Third, Congress needs to assess having fixed priced licenses. One of the largest problems individuals face when creating a new piece using sampling, are the restrictions by being imposed to purchase licenses. The current system can be so "complicated, inefficient, and unpredictable that it inhibits the circulation and creation of new sample-based music."²¹⁶ There are high license fees and costs as well as royalty stacking.²¹⁷ Royalty stacking can hinder a sampling artist from being able to engage in the act, since a sampling artist can often take many different pieces to combine into one new musical piece.²¹⁸ Congress can also follow the *Gowers Review of Intellectual Property* to set a fixed price for the buying of a piece to account for the copying.²¹⁹ This would allow for a less expensive form of a license that would be affordable for the everyday consumer, but would also allow the copyright holder to profit. However, this may not be the best option as the copyright holder may be wary over

213. Intellectual Property Office, *Exceptions to Copyright: Research* (Oct. 2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/359251/Exceptions_to_copyright_-_Research.pdf.

214. *Id.*

215. Intellectual Property Office, *Fair Dealing*, (Feb. 23, 2014), <http://www.ipo.gov.uk/types/copy/c-other/c-exception/c-exception-review/c-exception-fairdealing.htm>.

216. McLEOD & DiCOLA, *supra* note 20, at 266-67.

217. *Id.* at 259.

218. *Id.*

219. Andrew Gowers, *supra* note 169.

a saturated use of the sample if everyone has the rights to it when buying the original work.

In implementing a fixed pricing system Congress can take into consideration the United Kingdom's BBC Creative Archive pilot.²²⁰ While the program no longer exists,²²¹ the essence of the program is the wave of the future and should be looked to by the United States. This program required a single license to download images, videos, or music and most importantly, it was governed by a very strict non-commercial use rule.²²² This allowed consumers to enjoy the freedom of creativity, while the copyright holders did not feel threatened in the market. The program had five rules the United States should consider: (1) everything had to be non-commercial; (2) share alike, meaning an individual could share the works with others as long as he or she followed the license program and gave credit; (3) give proper credit to the original artists; (4) no endorsement and no derogatory use; and lastly, (5) use only in the United Kingdom.²²³ Congress should follow this and create a controlled program allowing non-commercial and sharing of work as long as proper credit is given.

Fourth, Congress can consider adapting a sufficient acknowledgement requirement in commercial pieces. Currently, the United Kingdom has this in its fair dealing exception²²⁴ and its Act containing the sufficient acknowledgment definition.²²⁵ The sufficient acknowledgement exception would require a sampler to identify the "work in question" by title and author.²²⁶ This not only allows the original artist to gain proper recognition but also allows consumers to know where the samples are coming from. As Girl Talk stated above, he is a Disc Jockey who acknowledges each artist and song that he uses in his samples in order for the audience to see if they can find all of them and to provide proper

220. *BBC Creative Archive Pilot*, BBC (2005), <http://www.bbc.co.uk/creativearchive/>.

221. *See id.*

222. *See id.*

223. *Id.*

224. *See* Copyright Design and Patent Act, 1988, § 29 (U.K.).

225. *See id.* § 178.

226. *Id.*

acknowledgement.²²⁷ Also, as stated above in the *Walk this Way* example, providing acknowledgment of the previous piece can actually can help the copyright holder's market and reputation in the public eye as it did for Aerosmith.²²⁸

Fifth, Congress should allow for a de minimis and a fair use exception in regards to sampling. Currently, since Congress has not reacted to sampling, the only law is that which the courts have determined.²²⁹ As of now, the case interpretation suggests that any bit of sampling needs a license.²³⁰ Congress needs to adjust these laws to allow for a more liberal use of sampling with the right to use defenses, as is available in other forms of copyright. The ALRC has proposed to Australia to allow for remixing and sampling.²³¹ This allows for the argument to be made for fair use when sampling. Since the United States is not explicit, a sampler has to deal with confusion. The ALRC also recommends to Australia to include the possibility of obtaining the copyrighted work within a reasonable time or at an ordinary price.²³² While an exact amount of bars or lyrics borrowed has not be determined, if it is so little that litigation is unnecessary²³³ and encourages creativity, then the United States should adapt it as a safe-harbor. As stated above, licenses are difficult to get and can be very costly.²³⁴ Congress explicitly allowing for fair use and de minimis gives individuals an opportunity to argue. While previously it was a common practice in the United Kingdom that samples taken under three seconds were not infringing,²³⁵ the courts never had a chance to litigate the issue and, therefore, it is not clear.²³⁶ However, the United

227. GOOD COPY BAD COPY, *supra* note 74.

228. McPherson, *supra* note 36.

229. See generally Campbell, 510 U.S. at 569; *Bridgeport*, 410 F.3d 792; Newton, 388 F.3d at 1189; *Grand Upright*, 780 F. Supp. at 182.

230. *Grand Upright*, 780 F. Supp. at 184-85.

231. *Copyright and the Digital Economy* [2013] 122 ACLR 1, 211.

232. *Id.* at 91-92.

233. See Newton, 388 F.3d at 1196-97.

234. MCLEOD & DiCOLA, *supra* note 20, at 259 (stating “the harmful consequences that can result: exorbitant licensing fees, recalcitrant copyright holders, high transaction costs, royalty stacking that makes tracks with multiple samples nearly impossible to release, and so on.”).

235. Morey, *supra* note 198.

236. *Id.*

States would benefit from having an allowance, not necessarily a set number of seconds or bars, but enough to create a creative piece without infringing upon the copyright holder's copyright.

Lastly, the United States should continue to allow artists to re-create the music without infringement.²³⁷ However, some musicians do not prefer this option because sampling from the original allows for a pure sound.²³⁸ However, having this right in place is still important.

VI. CONCLUSION

As sampling is important to creativity, the arts, and promoting copyright, the laws need to encourage it. The United States would benefit from updating its laws more frequently to both protect the copyright holder's rights and to also keep up with technology to allow for creativity. Congress should take the above-described considerations in determining how to balance these two interests. Both Australia and the United Kingdom have flaws in their handling of sampling and copyright infringement, but they also have laws and recommendations for laws that could be beneficial to the United States in order to balance the interests of the copyright holder and the creative consumer.

A song tells an artist's interpretation of a story. A sample takes that story and retells it in another artist's point of view. Each interpretation is unique and should be treated as creative art. However, legally there needs to be a clear line of how to decide whether it is protected creativity or illegal infringement. While copyright laws lay a foundation for artist protection, current trends demonstrate that increasingly the Internet is how artists and their music are growing and their ideas are spread.²³⁹ As best stated in the documentary *Good Copy Bad Copy*:

You can either call them criminals or call them pirates, and use all the tools of the law and technology to block them from creativity, or we could begin to encourage them by making a wide range of material

237. See *Newton v. Diamond*, 388 F.3d at 801.

238. Evans, *supra* note 4, at 862.

239. *GOOD COPY BAD COPY*, *supra* note 74.

available, that gave them a much better understanding of their past and a much better opportunity to say something about the future.²⁴⁰

Each piece of music has a history to it, much of it telling the history of our past.²⁴¹ Music is a way to understand each generation, what is important at the time, and what was going on historically, and the laws should reflect that.²⁴²

VII. ADDENDUM

Since my research was completed, the United Kingdom updated their copyright laws to continue to reflect the trends in society. While the laws just went into effect, the laws allow for more private use in order to make personal copies.²⁴³ The purpose of this law is to allow for a more liberal use of “format shifting” or “back up” so those who own, for example, a song in one format, like a compact-disc, are able to put that version onto another format, like an mp3 player.²⁴⁴ Further, the law now also allows for a more liberal use of prior works, such as sound recordings, in research and private study.²⁴⁵ While the copying must still be within fair dealing, students have greater access to the resources.²⁴⁶ As evidenced by this, other countries are constantly changing their laws to try to reflect the current trends in society, which is why the United States needs to as well.

240. *Id.*

241. *See id.*

242. *See id.*

243. Intellectual Property Office, Exceptions to Copyright: Guidance for Consumers, (Oct. 2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/361788/Exceptions_to_copyright_-_Guidance_for_consumers.pdf.

244. Intellectual Property Office, Exceptions to Copyright: An Overview, (Oct. 2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/359246/Exceptions_to_copyright_-_An_Overview_Leaflet.pdf.

245. *Id.*

246. *See id.*