Fair Use and an Attribution-Oriented Approach to Music Sampling

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Introduction

The explosive growth of the Internet and the widespread availability of professional-grade editing tools have democratized and decentralized the music production landscape. Economic transformations have preceded shifts in intellectual property (IP) law, leaving courts and policymakers playing catch-up and creating a climate of professional uncertainty. Within this uncertainty, certain questions are proving to be persistently problematic. For example, even as questions regarding its scope become more and more critical, "fair use" remains one of the most underdeveloped concepts in IP law.[1] The lack of commonsense interpretive principles to guide this doctrine has created a

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1. *See, e.g.*, Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090 (2007) ("[Fair use doctrine] offers precious little guidance about its scope to artists, educators, journalists, Internet users, and others who require use of another's copyrighted expression in order to communicate effectively.").

patchwork of conflicting precedents across circuits[2] that risks chilling innovation in the music industry and in similar creative professions.

One crucial issue in music law revolves around the appropriate legal approach to *music sampling*—"repurposing a snippet of another artist's music"[3]—in creative projects. Since sampling always involves the reuse of another individual's intellectual property in one's own production, the practice necessarily triggers questions of copyright, transformation, and ownership. So far, however, no distinct statutory regime exists that specifically addresses the sampling question. Moreover, the issue fits uneasily within the bounds of current case law, which is divided across circuits, resulting in persistent uncertainty about the applicability of the various doctrines involved.[4] Accordingly, in the following analysis, I offer a novel proposal for moving the legal framework for music sampling closer to the appropriate-use standards that exist in other professions. My argument proceeds by first emphasizing the significance of this issue in the music-production context (particularly given current industry trends), and subsequently sketching corrective suggestions in the realms of both *commercial norms* and *legislative reform*.

I. Music Sampling and the Fair Use Problem

Music sampling is by no means a new phenomenon.[5] Access to digital technology, however, has dramatically facilitated the growth of sample-heavy musical compositions that draw upon multiple artists' works in the course of producing a finished product.[6] In the words of British disc jockey Mark Ronson, the producer behind the global mega-smash "Uptown Funk!,"[7] "I think you'd be really hard-pressed to listen to something today and not be able to at least find four bars of it that's completely derivative of something else. And that's why I think it's through playing with technology and sounds and atmospheres that original stuff comes."[8]

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2. *See infra* note 13 and accompanying text.

3. *Digital Music Sampling: Creativity or Criminality?*, NPR (Jan. 28, 2011), http://www.npr.org/2011/01/28/133306353/Digital-Music-Sampling-Creativity-Or-Criminality.

4. *See* Peter S. Menell, *Adapting Copyright for the Mashup Generation*, 164 U. PA. L. REV. 441, 489 (2016) ("[W]ithout a clear resolution of this interpretive issue, everyone bears the costs of legal uncertainty.").

5. *See* Jeremy Beck, *Music Composition, Sound Recordings and Digital Sampling in the 21st Century: A Legislative and Legal Framework to Balance Competing Interests*, 13 UCLA ENT. L. REV. 1, 30 (2005) ("[U]nderlying concepts and aesthetics of sampling have long been a part of [Western music] history.").

6. *See, e.g.*, Menell, *supra* note 4, at 483-84.

7. Ryan Faughnder, *Taylor Swift's "1989," Mark Ronson's "Uptown Funk" Top Midyear Charts*, L.A. TIMES (July 3, 2015), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-big-surprise-taylor-swift-1989-sales-chart-20150702-story.html ("["Uptown Funk!"] sold 4.88 million units and was streamed 368 million times in the first half of the year.").

8. *Why Would More than 500 Artists Sample the Same Song?*, NPR (June 27, 2014), http://www.npr.org/2014/06/27/322721353/why-would-more-than-500-artists-sample-the-same-song.

Currently, paid content licenses are oftentimes required before musicians may permissibly employ samples from other artists in their own creative works.[9] While the Supreme Court has not formally ruled on the issue, *Bridgeport Music, Inc. v. Dimension Films*[10] was the first federal circuit court case to consider digital music sampling, and one that has been widely influential.[11] *Bridgeport Music* hinged on "the use of a sample from the composition and sound recording 'Get Off Your Ass and Jam' ('Get Off') in the rap song '100 Miles and Runnin'' ('100 Miles'), which was included in the sound track of the movie *I Got the Hook Up* (*Hook Up*)."[12] At the appellate stage, the producers of the original recording challenged the district court's ruling that the film producers' use of the sample had been de minimis, and therefore permissible.[13] In ruling for the plaintiff, the Sixth Circuit issued an imperative both simple and blunt: "Get a license or do not sample."[14] Three distinct principles informed the court's holding:

1. Statutory Requirement: The Sixth Circuit admitted that its ruling was constrained by a statute predating the digital era, but the court nonetheless adopted a "'literal reading' approach" to the Copyright Act's relevant provisions.[15] Specifically, the Sixth Circuit's rejection of the permissibility of any de minimis sampling was—in the court's own words—a " result . . . dictated by the applicable statute."[16]

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9. *See* A. Dean Johnson, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits*, 21 FLA. ST. U. L. REV. 135, 164 (1993) ("[T]he music industry is heading in the direction of *pro forma* licensing of samples before they are used in any new composition.").

10. 410 F.3d 792 (6th Cir. 2005).

11. A Westlaw search demonstrates that at least seventy federal court cases, both inside and outside the Sixth Circuit, have since cited or discussed *Bridgeport Music.* The logic of *Bridgeport Music* has been explicitly espoused by the Tenth Circuit, which cited *Bridgeport Music* in ruling that "[i]n order for a party in [plaintiff's] position to lawfully use preexisting, copyrighted musical works to create and sell its sound recordings, it must first secure the appropriate licensing from the copyright owners of those musical works." Palladium Music, Inc. v. EatSleepMusic, Inc., 398 F.3d 1193, 1199 (10th Cir. 2005). Moreover, *Bridgeport Music* has even been cited as persuasive authority by the Federal Court of Justice of Germany in grappling with a similar question. *See* Neil Conley & Tom Braegelmann, *English Translation: Metall Auf Metall (Kraftwerk, et al. v. Moses Pelham, et al.), Decision of the German Federal Supreme Court No. I Zr 112/06, Dated November 20, 2008*, 56 J. COPYRIGHT SOC'Y U.S.A. 1017, 1028 (2009) (providing an English translation of the German court's ruling). *See generally* Tracy Reilly*, Good Fences Make Good Neighboring Rights: The German Federal Supreme Court Rules on the Digital Sampling of Sound Recordings in Metall auf Metall*, 13 MINN. J.L. SCI. & TECH. 153 (2012) (further contextualizing these cases and issues).

12. *Bridgeport Music*, 410 F.3d at 795.

13. Bridgeport Music, Inc. v. Dimension Films, 230 F. Supp. 2d 830, 841 (M.D. Tenn. 2002), *rev'd*, 383 F.3d 390 (6th Cir. 2004), *republished as modified on reh'g*, 401 F.3d 647 (6th Cir. 2004), *amended on reh'g*, 410 F.3d 792 (6th Cir. 2005), *rev'd*, 401 F.3d 647 (6th Cir. 2004), *amended on reh'g*, 410 F.3d 792 (6th Cir. 2005).

14. *Bridgeport Music*, 410 F.3d at 801; *cf.* 17 U.S.C. § 114 (2012) (setting out the controlling law).

15. *Bridgeport Music,* 410 F.3d at 805.

16. *Id.* at 801. The rejection of de minimis sampling in this way placed the Sixth Circuit's ruling at odds with a previous decision of the Ninth Circuit allowing for "simple, minimal and insignificant" sampling. *See* Newton v. Diamond, 388 F.3d 1189, 1196 (9th Cir. 2004).

2. Sufficiency of Licenses: Citing free-market principles, the court argued that "[t]he sound recording copyright holder cannot exact a license fee greater than what it would cost the person seeking the license to just duplicate the sample in the course of making the new recording."[17] In other words, the court believed that copyright holders possessed a sufficient financial incentive to set the price for content licenses at a rate lower than what it would cost a music producer to simply replicate—in their own studio, ostensibly using similar instruments and techniques, and without fearing accusations of copyright infringement—the sound pattern for which a sampling license might be sought. Accordingly, in the court's view, the current licensing system acceptably balanced the interests involved.[18]

3. Physical Taking: The court alleged that "[f]or the sound recording copyright holder, it is not the 'song' but the sounds that are fixed in the medium of his choice. When those sounds are sampled they are taken directly from that fixed medium. It is a physical taking rather than an intellectual one."[19] Since a sample takes an actual snippet of material from a finished product, rather than simply replicating a string of musical notes,[20] licensing is required.[21]

Due to cost, inconvenience, and other ongoing challenges in licensing, an extensive literature has already discussed many of the problems with the current copyright regime governing music sampling, and a diverse array of solutions has been introduced.[22] Many of these solutions rely on broader invocation of abstracted legal standards—"substantial," "substantive," etc.—for

17. *Bridgeport Music*, 410 F.3d at 801.

18. *Id.* at 801.

19. *Id.* at 802.

20. *Cf.* Christopher D. Abramson, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection,* 74 N.Y.U. L. REV. 1660, 1667-78 (1999) ("[S]ampling from [commercially released records or CDs] goes a step further than either synthesizers, one-note synthesizer-like sampling, or self-sampling. It allows a producer of music to save money (by not hiring a musician) without sacrificing the sound and phrasing of a live musician in the song.").

21. *Bridgeport Music*, 410 F.3d at 801.

22. Christopher C. Collie & Eric D. Gorman, *Digital Sampling of Music and Copyrights: Is It Infringement, Fair Use, or Should We Just Flip a Coin?*, 2011 B.C. INTELL. PROP. & TECH. F. 1, 7 (proposing a statutory scheme in which "the original author would no longer be able to deny others from using his copyrighted work, but once the sampler 'turns a profit' from their copied work, the copyright owner would then begin to collect his portion of the profits."); Menell, *supra* note 4, at 489 (arguing for "the establishment of a proportional compulsory license for mashup music"); Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 555 (2006) ("In the digital sampling context, a revised definition of fair use would primarily focus on whether or not the digital samples substantively add to or create a new expression based upon the existing score or recording without necessarily applying all four factors of fair use."); Margaret E. Watson, *Unauthorized Digital Sampling in Musical Parody: A Haven in the Fair Use Doctrine?*, 21 W. NEW ENG. L. REV. 469, 511 (1999) (advocating for the protection of some music sampling under existing parody doctrine); John S. Pelletier, Note, *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, 1194 (2012) (proposing a legislative scheme in which "[s]ampling shall be an infringing use if the unlicensed use of a sample constitutes a sufficiently substantial use of the underlying musical composition or sound recording").

what constitutes permissible and impermissible use of music samples.[23] Such standards, however, quickly encounter the same problems of indeterminacy present in the status quo: who is best situated to judge whether or not a use is "substantial"? The regime I propose here is thus unique: it draws upon the norms of proper citation and attribution common to creative professions outside the music industry.

II. An Attribution-Oriented Approach to Reforming the Music Sampling Doctrine

The legislative regime surrounding music sampling is particularly ripe for reform, and the idea of adopting "a more sociological approach to exceptions in the copyright law, particularly with respect to digital music sampling,"[24] is not unprecedented in the extant literature. In keeping with this overarching sensibility, my proposal begins with the advance of a new commercial norm of *attribution* where sampling is concerned, and proceeds to recommend codification of this norm through a sampling-focused amendment to the Copyright Act. I conclude by presenting a draft of a possible Copyright Act amendment that encompasses the suggestions presented throughout this discussion—an amendment under which the *Bridgeport Music* court would likely have reached a substantially different result.

A. Embracing an Attribution-Oriented Commercial Norm

I propose a fundamentally simple commercial norm, which undergirds my suggested legal reform: if one uses an *unlicensed* sample from another artist, up-front attribution must be provided in the metadata of the song that incorporates the sample; conversely, if one chooses to *license* a desired sample, no overt attribution within the song's metadata need be required (though artists whose work is sampled ought to still be credited in any material accompanying the song that highlights those who participated in its creation).

Suppose that artist DJ Alito produces an electronic dance music song, which he titles "Sounds Like Textualism." As part of his song's hook, DJ Alito decides to use a sample from a punk-rock song—"Incorporation Station"—by the band The Jurists. DJ Alito now faces a choice: whether or not to pursue a formal licensing arrangement with The Jurists for the use of the "Incorporation Station" sample. Under the norm I outline, if DJ Alito elects not to pursue a license, in order to avoid legal sanction the song *must be marketed publicly, and distributed for radio and streaming airplay,* as "Sounds Like Textualism

23. *See, e.g.*, Ponte, *supra* note 22; Pelletier, *supra* note 22.

24. William Y. Durbin, Note, *Recognizing the Grey: Toward a New View of the Law Governing Digital Music Sampling Informed by the First Amendment*, 15 WM. & MARY BILL RTS. J. 1021, 1048 (2007).

(samp. The Jurists),[25] by DJ Alito."[26] Otherwise, DJ Alito can pay for a license and market the song as "Sounds Like Textualism, by DJ Alito." In both cases, DJ Alito would be required to provide an acknowledgement of The Jurists's contribution in the production credits associated with the song, but only in the latter case would DJ Alito be required to pay a separate fee.

This shift would bring the music sampling regime into conformity with the best practices of other professions. Across academic, legal, scientific, and literary domains, the substance of the work produced in the course of business—written products—in most cases includes some replication of other creators' content: what matters is *proper attribution*, and where the use of such content is reasonably limited, researchers are not required to obtain licenses from the individual authors of such written works.[27] Consider the academic and legal domains as examples. When users pay for a license for a research service such as JSTOR or Westlaw,[28] they are paying for ease of access to content, not the right to use the content itself. It is permissible to incorporate a block quotation from an article accessed via JSTOR into one's own work product and then disseminate that work product under one's own name, insofar as proper attribution to the original author is provided. The *Bridgeport Music* court noted that "[w]hen you sample a sound recording you know you are taking another's work product,"[29] yet such a principle is *not* understood to block properly attributed quotation in other creative fields.

Two counterarguments may be raised against the proposal outlined here: first, that a fundamental difference exists between work that necessarily builds on its predecessors (e.g. academic research) and work that is strictly creative; second, that a fundamental difference exists between use of the attribution norm in a not-for-profit environment and the use of this norm in a for-profit environment. Each warrants consideration in turn.

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25. Note that a similar formulation—"Sounds Like Textualism, by DJ Alito & The Jurists"—would *not* be an appropriate alternative: the association of DJ Alito and The Jurists as co-authors implies that the song was a collaborative project in which both artists willingly and actively participated, a scenario which would not be the case here. *Cf.* Menell, *supra* note 4, at 506 ("It is not difficult to imagine that Rick Springfield might not appreciate Girl Talk's weaving a rap song about oral sex between verses of his hit recording 'Jessie's Girl.'"). Similarly, the formulation "Sounds Like Textualism (feat. The Jurists), by DJ Alito" suggests to listeners that The Jurists's contribution to the song was both *collaborative* and *novel* (as in, performing new music rather than sampling old material).

26. While the use of samples from multiple artists might cause the proposed song title to become unwieldy, this is no automatic bar to commercial viability: established artists have successfully released songs crediting a long list of contributors. *See, e.g.*, *All I Do Is Win (Remix) [feat. T-Pain, Diddy, Nicki Minaj, Rick Ross, Busta Rhymes, Fabolous, Jadakiss, Fat Joe & Swizz Beatz] - Single by DJ Khaled*, (June 8, 2010) (downloaded using iTunes).

27. *See Copyright Crash Course: Building on Others' Creative Expression*, U. TEX. LIBR. (2012) ("When we create materials in an educational setting, fair use is part of a web of authority we rely on to use others' works . . . . We rely on implied licenses to make reasonable academic uses of the works we find freely available on the open Web.").

28. *See, e.g.*, *Westlaw Subscriber Agreement*, THOMSON REUTERS (2016), https://lawschool.westlaw.com/marketing/display/mi/75 (describing how subscribers receive "a non-exclusive, non- transferable, limited license to access Westlaw").

29. Bridgeport Music, Inc., v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005).

First, the sampling of creative work, such as fiction writing, is held to a similar standard as those enterprises designed to build on predecessors' contributions, where the use of other authors' content is concerned. As copyright attorney Howard Zaharoff explains, "quoting fiction for purposes of criticism or review is generally found to be fair use, provided the amount taken is reasonable. But beware: quoting previously unpublished material of any kind, fact or fiction, is rarely considered fair use."[30] The model proposed in this Comment accords with the framework Zaharoff identifies: material *once published* may be properly sampled, and this material must be *quoted* (i.e. properly attributed). Music sampling should be treated no differently.

Second, the fact that many attribution-oriented norms presently exist in a *nonprofit* context does not make the use of these norms inappropriate in a *commercial* context. Consider the example of attorney work product. Work product is generated for commercial purposes: attorneys are paid by their clients to produce motions, briefs, and other filings. Quotations from other works—works for which the attorney presumably does not hold the copyright—are both commonplace and expected, insofar as the attorney properly cites the sources. For example, attorneys who cite this Comment in their brief must provide proper attribution of any quotes from the Comment they use,[31] but the attorneys may still receive payment from their clients for producing the brief in question. A commercial transaction thus occurs in which a work containing quotes from external sources is exchanged for money; the author of the quotations does not receive a portion of the gains from this transaction, yet this is understood to be permissible if proper attribution is provided. The music sampling regime I propose parallels this commonly accepted practice.

Accordingly, the existence of "another's work product" logically should not be the dispositive element: instead, the question should be framed around whether or not "another's work product" is *held out as one's own*.[32] The creator need not *independently* license the content they quote or cite, but the failure to provide attribution is a legally actionable wrong under current copyright laws. The current range of damages for copyright violation might thus be levied upon noncompliant samplers. This framework also addresses the *Bridgeport Music* court's concern over whether sampling constitutes a physical or intellectual "taking": it correctly reframes the matter as one of intellectual property, the use of which must only occur within a framework of proper attribution.[33]

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30. Howard G. Zaharoff, *A Writer's Guide to Fair Use*, WRITER'S DIGEST (Jan. 18, 2001), http://www.mbbp.com/uploads/1437/doc/A_Writers_Guide_to_Fair_Use.pdf.

31. *See* Thomas J. Stueber, *Due Diligence in Drafting: Copyrights in Legal Documents*, 64 BENCH & B. OF MINN. 18, 22 (2007) ("If you are relying on the fair use doctrine, the simplest way to avoid infringement is to put quotation marks around the material and give attribution to the original author.").

32. *Bridgeport Music*, 410 F.3d at 801.

33. *Id.* at 802.

Adopting this attribution-oriented model produces three significant advantages to the industry over the current approach:

B. Attribution-Oriented Music Sampling Promotes Artistic Innovation

This attribution-oriented approach to the music sampling regime would allow artists to produce remixes, reinterpretations, and other transformative musical works without the imminent fear of litigation. Under the current license-heavy landscape—or under any other proposed regime that still mandates licenses in most cases involving limited sampling[34]—"up-and-coming artists, who sample numerous fragments of copyrighted material to create a truly innovative musical composition, may not be able to afford the numerous licensing fees the artists would be subject to; thus stifling creativity."[35]

C. Attribution-Oriented Music Sampling Improves Artists' Market Exposure

Promoting this attribution-oriented mechanism facilitates exposure for the artists whose work is sampled, including little-known artists who might otherwise not reach a diverse audience. For instance, an independent musician whose work is sampled or featured in a popular Billboard Hot 100[36] song (and credited accordingly) can gain instant name recognition and reap associated financial gains.[37] This advantage, which empirical research has already borne out, naturally aligns with the common-sense notion that "a sample does not usually detract from the original song's market; indeed, it may actually enhance

34. For examples of proposed regimes increasing licensing requirements, see Collie & Gorman, *supra* note 22; Menell, *supra* note 4.

35. Rahmiel David Rothenberg, *Sampling: Musical Authorship out of Tune with the Purpose of the Copyright Regime*, 20 ST. THOMAS L. REV. 233, 248 (2008); *see also* Lauren Fontein Brandes, *From Mozart to Hip-Hop: The Impact of* Bridgeport v. Dimension Films *on Musical Creativity*, 14 UCLA ENT. L. REV. 93, 124 (2007) ("Sample licenses typically cost between $1,000 and $5,000, but samples for popular recordings can cost several times those amounts.").

36. *See The Hot 100*, BILLBOARD, http://www.billboard.com/charts/hot-100 (last visited Nov. 4, 2015).

37. *See* W. Michael Schuster, *Fair Use, Girl Talk, and Digital Sampling: An Empirical Study of Music Sampling's Effect on the Market for Copyrighted Works*, 67 OKLA. L. REV. 443 (2013) (finding a positive correlation between the use of hip-hop samples in derivative work and purchases of the songs from which the samples came). For an example of how one performer's being credited as a "featured artist" on a mainstream artist's popular song led to a dramatic increase in professional exposure, see Bobby Olivier, *How an N.J. Singer's Simple Hook Became the No. 1 Song in the World*, NJ.COM (Apr. 23, 2015), http://www.nj.com/entertainment/music/index.ssf/2015/04/how_an_nj_singers_simple_hook_became_the_no_1_song.html. It bears mention that while under the current paradigm, artists whose work is sampled could in theory negotiate for "featured artist" credit in lieu of charging licensing fees, this is not a prevailing commercial norm. *See, e.g.*, Johnson, *supra* note 9, at 164. The two-pronged legal framework proposed here streamlines this process, thereby reducing the transaction costs associated with contract negotiation. Among other advantages, this framework facilitates the efficient bargaining that allows artists' and samplers' relative valuations of *attribution credit* versus *cash* to reach Pareto-optimal outcomes. *Cf.* R.H. Coase, *The Problem of Social Cost* 3 J. L. & ECON. 8 (1960) (predicating the attainment of efficient economic results on costless bargaining).

it by renewing interest in a previous 'hit.'"[38] Therefore, both rising and established artists can reap *long-term* financial gains by embracing the attribution-oriented model.

D. Attribution-Oriented Music Sampling Facilitates Access to Orphan Works

The problem of orphan works arises where a recording exists, but no license holder can be identified.[39] A situation where license holders cannot be identified produces one of two outcomes: either a creative work will go unproduced or un-supplemented, or artists will simply adopt a laissez-faire approach to copyright law, as even the *Bridgeport Music* court recognized: "[J]ust as many artists and companies choose to sample and take their chances, it is likely that will continue to be the case."[40] Assuming that such extralegal behavior is normatively undesirable, this proposed attribution-oriented regime resolves this dilemma. Under this proposed regime, a given orphan work can be sampled by another artist if proper identification and contribution credit is provided, without the need to track down an unknown license holder (or, alternatively, pursue extensive negotiation with the companies to which artists were previously signed—a process that could potentially demand burdensome payments). Allowing an attribution-oriented sampling mechanism to exist alongside traditional licensing channels would prevent orphan works (or older works that exist in the interstices of current federal copyright law)[41] from falling into a totally unusable "limbo" state. This benefit constitutes a significant net advantage over the current system and encourages the development of creatively reinterpretive projects.

E. Legislatively Clarifying Music Sampling Fair Use in § 114

Due to the failure of the judicial system to produce a coherent legal framework governing music sampling, legislative reform likely offers the best

38. Nancy L. McCullough, *Making the Case Against Illicit Sampling*, 26 BEVERLY HILLS B. ASS'N J. 130, 133 (1992).

39. *See* Olive Huang, *U.S. Copyright Office Orphan Works Inquiry: Finding Homes for the Orphans*, 21 BERKELEY TECH. L.J. 265, 265 (2006) ("Orphan works, then, are those whose rights holders cannot be located."); *see also* Pamela Samuelson et al., *Solving the Orphan Works Problem for the United States*, 37 COLUM. J.L. & ARTS 1, 8 (2013) ("Researchers with the HathiTrust digital library have derived estimates for the number of orphan works in their collection (five million volumes at the time of the study, but now over ten million), indicating that large portions—up to 50%, perhaps—could be considered orphan works.").

40. Bridgeport Music, Inc., v. Dimension Films, 410 F.3d 792, 804 (6th Cir. 2005).

41. *See* John Schietinger, Bridgeport Music, Inc. v. Dimension Films*: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 238-39 (2005) ("Though not protected by the Copyright Act, pre-1972 sound recordings are protected by state statutes and common law. Additionally, the Copyright Act does provide protection for pre-1972 sound recordings from outside the United States.").

pathway forward.[42] The Sixth Circuit acknowledged this overtly in *Bridgeport Music*: "[I]t is easy enough for the record industry, as they have done in the past, to go back to Congress for a clarification or change in the law. This is the best place for the change to be made, rather than in the courts . . . ."[43] To halt a potentially endless cycle of circuit splits, prevent judicial reinterpretation as court bench compositions change over time,[44] and reflect cultural changes that have systematically upended the utility of the current regime, the law should be carefully adjusted.[45] Accordingly, I offer here a possible pathway by which such reform might occur.

As a preliminary consideration, any reform to § 114(b) of the Copyright Act to liberalize music sampling must include a way to thwart the problem of wholesale reproduction and resale at a lower price point. For example, if The Jurists are selling "Incorporation Station" for $1.29 through digital music vendors, something must prevent DJ Alito from "sampling" the song wholesale and making it available for $0.69. Here, *attribution* is not the concern, but explicit *appropriation*.[46] Accordingly, some limiting principles must bound the permissive sampling regime I have sketched above.[47]

To address this, I tentatively suggest that, where music sampling is concerned, § 114(b) be amended to allow for an attribution-oriented sampling regime where *small percentages* of songs are concerned (one might conceivably envision a cutoff at 5-7% of a given song).[48] Admittedly, the notion of "percentage" is facially ambiguous: for example, one might be

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42. *Cf.* Ponte, *supra* note 22, at 521 ("Congress needs to revise current copyright statutes to specifically address digital sampling, thereby providing clear guidance for the music industry and the courts."); 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, 271 (1993) ("A revision of the [Copyright] Act may thus be the only solution to the sampling dilemma.").

43. *Bridgeport Music*, 410 F.3d at 805.

44. *Cf.* William N. Eskridge & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 81 (1994) (describing the problems of a scenario in which "neither private parties nor Congress can rely on settled law").

45. Legislative action as a response to these prevailing trends is by no means unprecedented. *See* ALLEN BARGFREDE & CECILY MAK, MUSIC LAW IN THE DIGITAL AGE 87-88 (2009) (observing that "copyright law has been particularly challenged by the Internet . . . in a particularly painful way in the music industry" and that "updates to copyright law are commonly considered as a response to a specific technology").

46. *Cf.* Laureyssens v. Idea Grp., Inc., 964 F.2d 131, 140 (2d Cir. 1992), *as amended* (June 24, 1992) ("Copying may be established either by direct evidence of copying or by indirect evidence, including access to the copyrighted work, similarities that are probative of copying between the works, and expert testimony. If actual copying is established, a plaintiff must then show that the copying amounts to an improper appropriation by demonstrating that substantial similarity to protected material exists between the two works.").

47. *Cf.* Zaharoff, *supra* note 30 ("If you don't get permission: [l]imit your borrowing . . . . [R]arely should borrowing a couplet from a long poem or song for noncompetitive purposes, or 250 non-essential words from a book-length work, be deemed infringing.").

48. Other reform proposals based on sample length do not specifically parse this vagueness. *See, e.g.*, Kenneth M. Achenbach, Comment, *Grey Area: How Recent Developments in Digital Music Production Have Necessitated the Reexamination of Compulsory Licensing for Sample-Based Works*, 6 N.C. J.L. & TECH. 187, 214 (2004).

required to decide whether this concept refers to the percentage of *notes* sampled, or the percentage of *song time* sampled.[49] Determining such details would likely be an appropriate task for the relevant Congressional subcommittees working in conjunction with industry stakeholders.

Notably, the attribution-oriented approach differs from proposals to expand the scope of de minimis fair use.[50] In the regime I propose, even de minimis fair use would require either attribution or the payment of license fees. The de minimis principle would not operate to preclude proper acknowledgement of the original artist.

In view of these ideas, I accordingly present a draft of a fifth subsection for inclusion under § 114(d):

> (5) Music sampling —
> (A) Notwithstanding the provisions above, the exclusive right of the owner of copyright in a sound recording shall not be understood to preclude the ability of other individuals to include sample portions of a sound recording in derivative works.
> (B) Any sampling which occurs within the scope of section 114(d)(5)(A) shall be:
> (i) Limited in duration to 15 seconds or less, or 5% of the originally sampled work, whichever is shorter, unless otherwise authorized or permitted by the owner of copyright.
> (ii) Denoted by identification of the original performing artist, or the owner of copyright, as determined by the owner of copyright, within the metadata of the recording that includes such sampling.
> (C) The ability of individuals to sample limited portions of a sound recording, with proper attribution, shall not be understood to preclude extant legislation respecting the licensing of sound recordings in their totality, or in amounts greater than the portions authorized by section 114(d)(5)(B)(i).[51]

Adjusting the statutory framework of music copyright law in this way sets up a two-pronged regime that balances the interests of creators and rights holders. This reform offers two options—each with its own potential advantages and disadvantages—to artists wishing to use samples. For instance, the attribution-oriented approach might appeal mainly to independent artists and those seeking to use samples for which license holders cannot be found. Conversely, the traditional "paid sample license" approach could be attractive to established artists who would might prefer their songs not be viewed as mashups, but as cohesive productions that just happen to use a stray sample or two (such artists might also plan to release a remix of the original track, featuring more famous contributors, at some subsequent point).

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49. This distinction is significant and warrants further analysis in subsequent work. A "percentage of notes sampled" rule might mean that a significantly larger portion of a slow-tempo song could be sampled than, for instance, one could obtain by sampling a fast-paced electronica song. A "percentage of song time sampled" rule might mean that a significantly larger portion of a particularly long song could be sampled than, for instance, one could obtain by sampling a shorter song.

50. *See* 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, 317 (2009) ("[A] sample that has been altered so drastically or is so minute that an average lay audience member would not recognize it, qualifies as non-infringing de minimis use and thus requires no license."); Fontein Brandes, *supra* note 35, at 127 (arguing along similar lines).

51. Section 114(d)(5)(B)(i) outlines a purely hypothetical bright-line standard, and the numbers therein are used for demonstrative purposes only.

Conclusion

However the United States chooses to address this issue, the position adopted will likely have a ripple effect throughout both the music industry and the international community.[52] Embracing a future-minded approach to music sampling—one that reconciles artists' financial interests with the freedom to innovate—requires that a delicate balance be struck. Reframing the music sampling debate around the principle of *attribution* constitutes an effective step forward, and reforming the Copyright Act to allow for greater sampling freedom is a critical part of that process.

52. *See* John W. Gregory, *A Necessary Global Discussion for Improvements to U.S. Copyright Law on Music Sampling*, 15 GONZ. J. INT'L L. 72 (2011) (identifying the international stakes of this issue).