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Revisiting digital musical sampling
cases through a democratic
experimentalist perspective with a
particular focus on Grand Upright Music
Limited v. Warner Brothers Records, Inc.

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BOSTON UNIVERSITY
GRADUATE SCHOOL OF ARTS AND SCIENCES

Thesis

**REVISITING DIGITAL MUSICAL SAMPLING CASES THROUGH A
DEMOCRATIC EXPERIMENTALIST PERSPECTIVE WITH A PARTICULAR
FOCUS ON *GRAND UPRIGHT MUSIC LIMITED V. WARNER BROTHERS
RECORDS, INC.***

by

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ABSTRACT

Digital sampling, wherein excerpts from pre-existing recordings are incorporated into a new recording, has been a vibrant and innovative manner of artistic creation since the 1960s. However, this practice has engendered complex infringement litigation, blurring the commonly understood lines that separate the musical “composition” from the “recording.” This has been exacerbated by conflicting articulations as to the status of these entities as “works” within musicological discourse and conceptions of copyright law such that they would warrant protection from infringement. Furthermore, sampling has complicated the application of previously utilized principles of copyright law, such as *de minimis* and substantial similarity, and has not occasioned much, if any, consideration in litigation as to the artistic or creative purposes for which samples were used.

This thesis considers *Grand Upright Music Limited v. Warner Brothers Records, Inc.*, the first notable case involving digital sampling. The first two chapters offer an historical overview of the development of American copyright law and its musical purview, and proceeds to the facts and ultimate judicial ruling in this case. Through the interpretive lens of “democratic experimentalism,” the remainder of the thesis proposes

an alternative method for handling digital sampling cases than that of the *Grand Upright* court and other courts in subsequent cases. This is offered with a view to taking a more comprehensive account of the materially quantitative and artistically qualitative aspects of particular acts of sampling.

PREFACE

Philosophical considerations on music in their various operations, whether aesthetic, metaphysical, phenomenological, or ontological, frequently and extensively focus upon the concept of the “musical work.” Similar to the attempt to proffer a uniformly applicable and unanimously acceptable definition of “artworks,” generally construed, given their inherently nebulous, or, as one writer has put it, “deviant” ontology, the immense difficulty in satisfactorily defining the “work” of music is evident in both theoretical and practical parameters.¹ The aim of determining what a “musical work” *is*, or what its defining features *are*, is a matter that has occupied the attention of philosophers, musicians, musicologists, and theorists of the arts to an insatiable degree given the potential impossibility of ever concocting a singularly agreeable and authoritative definition of the concept. This difficulty has led some, even if anecdotally, to nonetheless question the general utility of such an enterprise while insisting that our very intellectual nature as being immersed in a perpetual musical soundscape compels the continuation of this inquiry.²

But the very need to continue an attempt to define the “musical work,” to say nothing of the nearly insurmountable quantity of literature already available in which those attempts are presented, underlines how susceptible the concept is to multiple definitions or understanding as to its nature and existence. It is, therefore, not surprising that the entry on “Ontology” for the *Routledge Companion to Philosophy and Music*

¹ Joseph Margolis, “The Deviant Ontology of Artworks,” in *Theories of Art Today*, edited by Noël Carroll, (Madison, Wisconsin: The University of Wisconsin Press, 2000): 109.

² Ken Okubo, “On the Musical Work Game: An Essay on the Concept of the Musical Work,” *International Review of the Aesthetics and Sociology of Music* 32 (June 2001): 66.

opens with a litany of questions that must be jointly and severally considered in order to adequately deal with the larger issue: “Are there musical works? If there are musical works, what are they like? [...] What ontological category or categories do musical works belong to? Where are musical works located in time? How are musical works individuated?”³ While this might seem to be a purely theoretical matter confined solely to academic contexts without a significant possibility for being applied to “real-world” situations, it does have some significant implications in terms of its practical application to the area of musical copyright law, which is the general subject on which this thesis focuses, and its relevance for the propriety, practice, legality/illegality, and regulation of digital sampling, upon which this thesis more specifically focuses.

A tentative and by no means exhaustive series of questions regarding the identity of the “musical work” in terms of copyright law and digital sampling, which is defined as “process in which a sound is taken directly from a recorded medium and transposed into a new recording”⁴ and is, in this thesis, referred to in the context of hip-hop composition and recording, can be distilled as follows: which particular elements of a musical composition can be protected by copyright? Does the recording of a composition qualify as a “work” in the same manner as the composition it contains? If so, what implications for copyright law does this phenomenon have? Are we to impose the same qualitative and

³ Carl Matheson and Ben Caplan, “Ontology,” in *The Routledge Companion to Philosophy and Music*, edited by Andrew Kania and Theodore Gracyk, (Florence, Kentucky: Routledge, 2011): 38.

⁴ Will Fulford-Jones, “Sampling,” in *The New Grove Dictionary of Music and Musicians*, edited by Stanley Sadie (London: Macmillan Publishers Limited, 2001), 219.

quantitative restrictions on sampling from recordings *of* compositions as we are on the compositions themselves?

These questions, and many others that occupy the purview of both the philosophy of music and the copyright law surrounding it, will be addressed throughout this thesis with particular attention devoted to how they are implicated in *Grand Upright Music Limited v. Warner Bros. Records, Inc.*,⁵ the first major case to confront the practice of digital sampling from a legal perspective.

The facts and procedural history of this case are presented in Chapter Three. For now, it would suffice to state that the decision of the Court in this case, which essentially criminalized digital sampling—at least without the appropriate licensing—has been roundly criticized for its hasty and inadequately substantiated conclusions. The blanket condemnation of the practice of digital sampling, which presumably would have been tempered considerably if the Court had engaged in the “empirical” tests set forth in prior case law with respect to the particular circumstances of *Grand Upright*, might reasonably be attributed to the novelty of the sampling practice in itself and to its manifest novelty in being entertained in the context of musical copyright litigation. This would be because the multitude of its predecessors dealt with borrowing of musical material from compositions *as written* and not *as recorded*—a distinction which will be addressed throughout this thesis. But it also can be attributed to an insufficient consideration of the various artistic purposes for which the sampling could have been performed and that may

⁵ *Grand Upright Music Limited v Warner Bros. Records, Inc.* 780 F. Supp 182, 183 (S.D.N.Y. 1991)

have rendered it “fair use” or otherwise permissible under copyright law. Finally, other than the expectation that the appropriate license be acquired in order to legally sample, which was essentially the sole issue considered by the Court and which led to its finding of the illegality of the practice,⁶ the decision is made further unfortunate by the lack of any “objective” standards in the previous statutory or case law that could have guided the Court’s determination as to whether the sampling done in that case transgressed various legal boundaries.

As I shall argue, the inherently ambiguous and nebulous nature of making such determinations requires a more comprehensive consideration of various aspects of the sampling process undertaken in a particular case, such as the quantity and significance of the material used, the artistic purposes for which the sampling was done, the degree to which the original material is transformed, and other factors. In so doing, I retrospectively apply these principles to *Grand Upright* in order to demonstrate how the case might have been more adequately and thoughtfully decided, providing in turn an overall interpretive platform for contemporary musical infringement litigation. As philosophical, musicological, and legal considerations of the practice of digital sampling is a manifestly interdisciplinary enterprise, I base my proposition of this more comprehensive strategy on a perspective known as “democratic experimentalism,” which is defined as the ability to “either...act in conformity to a rule, *or to provide a compelling account (as gauged by the experience of peers in similar situations) of why it is reasonable to deviate from the prescribed practice locally and perhaps more generally*”

⁶ This is one of several reasons for why it has been so sharply criticized.

in the course of deliberations on particular legal matters.⁷ For my purposes, it is this perspective through which my interdisciplinary focus is directed, insofar as I am proposing a new and better method of evaluating instances of musical copyright infringement especially through digital sampling where an “objective,” uniformly required method does not currently exist.

Chapter One presents a chronological overview of the development of copyright law in the United States, including how, when, and for what reasons it expanded to accommodate works of the visual arts as well as musical compositions and recordings. Additionally, the chapter discusses how copyright law developed to accommodate various technological developments in the processes of recording and distributing musical compositions as the twentieth-century progressed.

Chapter Two presents a brief history of the practice of digital sampling, including the various technological mechanisms used to execute it, as well as various political, philosophical, ethical, and legal issues that the practice engenders. In addition, some of the legal challenges to musical borrowing before the advent of digital sampling are presented, indicating the relative conceptual and practical ease with which such matter were resolved, and after the practice became widespread with all the complications attendant to the distinction between compositions and the recordings that contain them.

Chapter Three presents the major facts and procedural history of *Grand Upright*, the ultimate decision, and some preliminary critique from a musicological and legal perspective pertaining to the hasty and short-sighted nature of the decision. Some

⁷ Emphasis added. Charles Sabel, “Dewey, Democracy, and Democratic Experimentalism,” *Contemporary Pragmatism* 9 (December, 2012): 37.

attention is paid to the role of musicologists in the process of determining musical infringement, given their unique expertise on various kinds of musical borrowing, whether in a digital context or otherwise.

Chapter Four provides additional critique of the Court's decision through the perspective of previously established and validated tests set forth for determining musical infringement which the Court did *not* consider. One of these tests entails considering the various artistic purposes for which the sampler in this case could have performed the sampling, and, to this end, a variety of purposes for sampling are considered in terms of potential reflection in the techniques of the sampler in *Grand Upright*. The chapter concludes by proposing a set of results that might have emerged had the Court employed a more comprehensive approach to this case and considered the various factors previously mentioned.

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CHAPTER ONE

U.S. COPYRIGHT LAW AND THE PROTECTION OF MUSICAL COMPOSITIONS AND SOUND RECORDINGS

This chapter will present a brief history of copyright legislation in the United States, including its legal and philosophical foundations, and also its expansion to accommodate musical works in both their written and recorded manifestations. It will be summarily explained how figures in the artistic, legislative, and legal fields have engaged in the application of copyright law to both of these entities, and how this application was adapted to the developments of technological media for musical creation.

The most notable precursor to early American copyright legislation is the Statute of Anne, passed by the British Parliament in 1710. Prior to its passage, British book publishers had submitted to Parliament a bill on February 26, 1706, which would have granted property rights to authors in connection with their own literary works and indirectly encouraged them to produce new materials that were publicly accessible. This legislation was offered in the hopes of securing not only these rights for authors, but with the goal of creating a “public domain” so these materials would be more easily available. Alina Ng explains the circumstances and the underlying motivating philosophical and conceptual factors behind the passage of this legislation in ample detail.

In terms of its social utility, the most important thing about the Statute of Anne was that it transformed the stationer’s copyright from a monopoly into a limited right that was designed to promote learning by making books and literary

materials more accessible even as it recognised the publisher's right to be paid. It also created the public domain as the repository for creative materials to be available to society after the expiration of the copyright, serving the public interest by allowing users greater access to materials that allow the development of learning, education, and advances in knowledge. The historical circumstances leading up to the passing of the Statute indicate that Parliament intended to build a normative social order that would make literary and artistic works more available to everyone by transforming the stationer's copyright, originally a device for censorship and an instrument to maintain the stationer's monopoly, into a right that would honour an entitlement to be justly rewarded for making works available to society.¹

Ng also discusses some of the litigation that occurred subsequent to the passage of the Statute of Anne, and explains how rulings from various courts that were favorable to authors "were based on the notion that persons have natural rights in that which they create, and by extension, authors have natural rights in their literary works. Thus...if the author had copyright in his work before publication, he should have copyright in his work after publication."² The notion of an inherent property right held by a creator of an artistic or literary work in the very product itself is a theme that would appear in deliberations over various measures of copyright legislation that were advanced in the early years of the United States. This idea was significant for the development of the modern notion of "intellectual property," as explained by Martin Kretschmer.

The modern history of intellectual property start[ed] with the Renaissance when several factors combined to turn copyright into a politico-legal issue. The first factor was the emergence of a sense of individualism (first realized in the art of Italian painters and sculptors) that [was] closely linked to an increasing awareness of the cultural context of ideas...and scientific curiosity. The second factor was a period of rapid economic expansion carried by a new class of international merchants. Commerce became organized around tradefairs which created an efficient distribution structure for new ideas[.] [...]The third factor was the

¹ Alina Ng, *Copyright Law and the Progress of Science and the Useful Arts* (Cheltenham: Edward Elgar, 2011): 76-77.

² *Ibid.*, 79.

invention of a technology enabling the fast and efficient reproduction of ideas: Gutenberg's printing press.³

On the subject of the phrase and general concept of "intellectual property," Alex Cummings has noted that the phrase "intellectual property," while appearing only once in federal court proceedings prior to 1900 and in no instances at all from the period of 1900 to 1930, appeared in such documents over 800 times during the 1990s, thus demonstrating the development and refined understanding of this concept over the course of American legal history.⁴

The Constitution of the United States (hereinafter "the Constitution") provides, in Article 1, Section 1, Clause 8, that the United States Congress (hereinafter "Congress") shall have the power to "promote the progress of Science and [the] useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁵ The legislative intent for securing this right on the part of the framers of the Constitution most likely stems, at least in part, from that which attended the passage of the earlier legislation in Britain. The matter is by no means clear cut. Indeed, as Irah Donner observed, "there was no recorded debate in the Constitutional Convention on September 5, 1787 when the proposed copyright clause was presented, [yet] the clause was approved unanimously."⁶ While acknowledging the absence of

³ Martin Kretschmer, "Intellectual Property in Music: A Historical Analysis of Rhetoric and Institutional Practices," *Studies in Cultures, Organizations, and Societies* 6 (2000): 205.

⁴ Alex S. Cummings, "From Monopoly to Intellectual Property: Music Piracy and the Remaking of American Copyright, 1909-1971," *The Journal of American History* 97 (December 2010): 677-678. Cited from Christopher May and Susan K. Sell, *Intellectual Property Rights: A Critical History* (Boulder, 2006), 18.

⁵ Cited in Ng, *Copyright Law*, 84.

⁶ Irah Donner, "The Copyright Clause of the U.S. Constitution: Why Did the Framers Include it with Unanimous Approval?" *The American Journal of Legal History* 36 (July 1992): 361.

written records that could confirm the legislative intent, Donner proposes that one possible reason for its passage was that

because the states were influenced by the development of the copyright laws of England. [...] [Another is] that the framers of the Constitution were very anxious for the United States to be culturally competitive with the other countries of the world. There was a great feeling that the copyright laws would encourage authors to write and would be one avenue of attaining this goal of cultural competitiveness. [Of larger significance for the perspective of rights within the new nation], the states felt a strong need for national copyright laws to secure for authors their property rights in their works. [...] This emphasis on protecting the author's property rights is harmonious with the larger theme of republicanism [which the framers were advancing.]”⁷

Subsequent to the ratification of the Constitution in 1788, containing the powers to bestow copyright protection to the literary and artistic works through Article 1, Section 8, Clause 8, the Copyright Act of 1790 was passed. Among other benefits, restrictions, and penalties, this Act provided that

from and after the passing of this act, the author and authors of any map, chart, book or books already printed within these United States, being a citizen or citizens thereof...and any other person or persons, being a citizen or citizens of these United States...who hath or have purchased or legally required the copyright of any such map, chart, book or books, in order to print, reprint, publish or vend the same, shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the term of fourteen years from the recording of the title thereof.⁸

Proceeding to the next important stage in the history of American copyright, we find the amendment of 1802 to the original Act of 1790. While the range of media for artistic or literary production and reproduction at this time was still quite limited, it is important to consider how the 1802 amendment affords protection for the “designing,

⁷ Ibid., 361-362.

⁸ An Act for the Encouragement of Learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies, during the times therein mentioned, 1 Stat. 124 (1790) at 124.

engraving, and etching [of] historical prints” in addition to the media already protected.⁹ This is clearly an exercise in the expansion of a previously granted right through the power of Congress to promote the “*Progress of Science and the Useful Arts*,”¹⁰ and is a clear indication of the framers’ original intent to allow for subsequently developed media of production and reproduction to be afforded the necessary legal protection.

Returning to the notion that writers and other artistic creators have an inherent property right in their work, which continued to resonate through the literary and political spheres of the United States, it is important to consider the efforts of Noah Webster who, through his “crusade for copyright,”¹¹ attempted to secure a copyright for an English language textbook he had written. Webster’s views as to this supposed right are poignantly conveyed in a letter to Daniel Webster, at the time a member of the United States House of Representatives, on September 30, 1826.

Among all the modes of acquiring property, or exclusive ownership, the act of operation of creating or making seems to have the first claim. If anything can justly give a man an exclusive right to the occupancy and enjoyment of a thing, it must be the fact that he has made it. The right of the farmer and mechanic to the exclusive enjoyment and right of disposal of what they make or produce, is never questioned. What then can make a difference between the produce of muscular strength and the produce of the intellect? [...]

Upon what principle, let me ask, can my fellow-citizens declare that the productions of the farmer and the artisan shall be protected by common law or the principles or natural or social right, without a special statute, and without paying a premium for the enjoyment of their property; while they declare that I have only a temporary right to the fruits of my labor [as indicated by Article 1, Section 8, Clause 8] and even this cannot be enjoyed without a premium? Are such

⁹ An Act supplementary to an act, entitled “An Act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies during the time therein mentioned,” and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints, 2 Stat. 171 (1802) at 171.

¹⁰ U.S. Const. art. I, §8, cl. 8.

¹¹ Donner, “The Copyright Clause of the U.S. Constitution, ” 370.

principles as these consistent with the established doctrines of property and moral right and wrong among an enlightened people? Are such principles consistent with the high and honorable notions of justice and equal privileges, which our citizens claim to entertain and to cherish, as characteristic of modern improvements in civil society?¹²

After appealing to a commonly understood natural right to strict control over the products of one's own manual and creative labors, Noah Webster makes an entreaty for the stricter copyright protection to be made available by improvements to previously passed legislation.

I sincerely wish our legislators would come at once to the line of right and justice on this subject, and pass a new act, the preamble to which shall admit the principle that an author has, by common law, or natural justice, the sole and permanent right to make profits by his own labors, and that his heirs and assigns, shall enjoy the right, unlogged with conditions.¹³

What resulted was an additional amendment to the original Act of 1790 that was passed on February 3, 1831. Among the various benefits, restrictions, and penalties conferred by this amendment are the following provisions which still further expand the range of applicable media and their resultant creative content under copyright protection:

From the passing of this act, any person or persons, being a citizen or citizens of the United States, or resident therein, who shall be the author or authors of any book or books, map, chart, *or musical composition*, which may be now made or composed, and not printed or published, [...] or who shall invent, design, etch, engrave, work, or cause to be engraved, etched, or worked from his own design, any print or engraving...shall have the sole right and liberty of printing, reprinting, publishing, and vending such book or books, map, chart, *musical composition*, print, cut, or engraving...for the term of twenty-eight years from the time of recording the title thereof.¹⁴

¹² Horace E. Scudder, *American Men of Letters: Noah Webster* (Boston: Houghton, Mifflin and Company, 1890), 58-59.

¹³ *Ibid.*, 61.

¹⁴ Emphasis added. An Act to amend the several acts respecting copy rights, 4 Stat. 436 (1831) at 436.

On March 3, 1865, a supplemental act to this amendment was passed which provided for the inclusion of photographic materials under copyright protection. It provides

that the provisions of said act shall extend to and include photographs and the negatives thereof which shall hereafter be made, and shall enure to the benefit of the authors of the same in the same manner, and to the same extent, and upon the same conditions as to the authors of prints and engravings.¹⁵

It is important to make reference to the Third Circuit ruling in *Edison v Lubin* from 1903, which illustrates, once again and even more clearly, the unambiguous intention of the framers to include subsequently developed media of production and reproduction within copyright protection. This was so even for those they could not possibly have foreseen, and even “in the same manner, and to the same extent, and upon the same conditions”¹⁶ as those with which they already were familiar. As the Court wrote,

When Congress, in recognition of the photographic art, saw fit in 1865 to amend the act of 1831 and extend copyright protection to a photograph or negative, *it is not to be presumed it thought such art could not progress, and that no protection was to be afforded such progress.* [...] While such advance has resulted in a different type of photograph, yet it is none the less a photograph—a picture produced by photographic process.¹⁷

¹⁵ An Act entitled “An Act to amend the several acts respecting copyright,” approved February third, eighteen hundred and thirty-one, and to the Acts in addition thereto and Amendment thereof, 13 Stat. 540 (1865) at 540.

¹⁶ This phrase was, of course, *not* used in Article 1, Section 8, Clause 8 of the Constitution. However, the “spirit” behind it was already postulated within the text of Article 1, Section 8, Clause 8 as it makes specific reference to the ability of Congress to promote the “*Progress of Science and the Useful Arts.*” I do not wish to be erroneously construed as attributing the phrase footnoted above to the framers, since it clearly was not their phrase. However, given their permission for the “progress” of the arts, it is reasonable to propose that the inclusion of photographic elements, had they known of them, would have met with their approval.

¹⁷ Emphasis added. *Edison v. Lubin*, 122 F. 240, 242 (1903).

As public performances of musical compositions for profit increased, the belief that compositions were worthy of more stringent copyright protections strengthened. In sentiments somewhat similar to those of Noah Webster more than 80 years before, a man named Mr. J. L. Tinsdale,¹⁸ identified as representative of the G. Schirmer Music Publishing Company, presented his concerns about this issue before the House of Representatives Committee on Patents in May of 1906. The exchange below, between Mr. Tinsdale and the Chairman of the Committee, is instructive not only for the particular concerns raised by Mr. Tinsdale, but also for the conceptual distinctions between musical compositions and the products of other artistic media such that additional or special copyright protections for the former are warranted. In Mr. Tinsdale's remarks, we have an insistence that the protection afforded by copyright should be extended to the execution of performances as well as the material reproduction of those musical compositions.

Mr. Tinsdale: A musical composition is something which is intangible, the creation of a composer's brain, reduced to paper by certain symbols or characters forming what we call a book, or, technically speaking, when applied to larger works, a...score. Such a book, containing the symbols or characters referred to, merely represents certain musical sounds and is incomplete until those musical sounds are reproduced by a combination of human voices or voices and musical instruments. For this reason we claim that the copyright issued to the author, composer, or his assigns must and should include the right of performance; that the author's control is not limited to the physical and tangible book of symbols but extends through the completed performance. This was plainly the intent of the statute when it was enacted, and we should consider it a reversal of the spirit and intention of the law to have any part of his copyright privileges removed.

Mr. Chairman: In other words, the property itself does not carry with it the right to use it.

Mr. Tinsdale: That is the point. [...] It is the product of his brain, and it is not completed until you have given a public performance of it.

¹⁸ Or in some places in the report, "Tinsdale."

Mr. Goldfogle: Would not the same rule practically apply to a very fine painting? You would not shut off the right of anybody looking at it, would you, or of its being exhibited at any place?

Mr. Tinsdale: No sir; that is different.¹⁹

With both concerns in mind, and with a cognizance of the changing nature of artistic and literary production and reproduction, a pivotal development in the history of American copyright law was the passage of the Copyright Act of 1909. As the range of media for producing and reproducing artistic and literary works expanded due to considerable technological advancements in the preceding decades, Congress expressed its opinion that the existing copyright legislation required extensive modifications. As a Mr. Currier from the Committee on Patents stated in the House Report no. 1 on the Copyright Act of 1909, “for years men familiar with the copyright laws of this country have urged the necessity of a complete revision.”²⁰ Mr. Currier then quotes from statements made by the Honorable Samuel J. Elder before the Maine State Bar Association in which he attests to this necessity in greater detail. In this particular address, Mr. Elder stated that

the whole system, in the light of an interpretation by the courts, call[s] for a revision. The courts are more and more called upon to consider these questions. And besides this, the reproduction of various things which are the subject of copyright has enormously increased. The wealth and business of the country and

¹⁹ “Argument on H. R. 11943, to Amend Title 60, Chapter 3, of Revised Statutes of the United States, Relating to Copyrights,” in *Arguments Before the Committee on Patents of the House of Representatives on H. R. 11943, To Amend Title 60, Chapter 3, of the Revised Statutes of the United States Relating to Copyrights*, author or editor not indicated (Washington, D.C. Government Printing Office, 1906), 15-16.

²⁰ Author not indicated, Statement of Mr. Currier of the House of Representatives Committee on Patents in “The House Report 1 on the Copyright Act of 1909: To Amend and Consolidate the Acts Respecting Copyright,” page 1. Accessed November 1, 2013, http://ipmall.info/hosted_resources/lipa/copyrights/The%20House%20Report%201%20on%20the%20Copyright%20Act%20of%201909.pdf. (University of New Hampshire School of Law, “IP Mall” (Intellectual Property library)) (Hereinafter “The House Report”)

the methods and means of duplication have increased immeasurably. The law requires adaptation to these modern conditions.²¹

Among other benefits, restrictions, and penalties, this Act provided that any person entitled [hereto], upon complying with the provisions of this Act, shall have the exclusive right [...] e) to perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of a public performance for profit; and for the purposes set forth...to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced. Provided, that the provisions of this Act, so far as they secure copyright *controlling the parts of instruments serving to reproduce mechanically the musical work*, shall include only compositions published and copyrighted after this Act goes into effect.²²

References to the mechanical “reproduction” of musical works occur again in the Act. One such passage is the following, which demonstrates the willingness of Congress to consider the means of the “mechanical reproduction” of the musical works, as well as the musical works themselves, as potentially subject to copyright legislation.

Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in the case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, [...] an injunction may be granted upon such terms as the court may impose.²³

The language of the paragraph above is ambiguous. On the one hand, the phrase “musical instruments serving to reproduce mechanically the musical work,” may be understood to mean those instruments used for the purpose of actually performing the written composition—that *this*, perhaps, is subject to the copyright legislation and perhaps to various associated procedures and expenses. On the other hand, the paragraph includes the phrase “disks, rolls, bands, or cylinders for use in mechanical music-

²¹ Ibid., 1.

²² Emphasis added. An Act to amend and consolidate the acts respecting copyright, 35 Stat. 1075 (1909) at 1081. (Hereafter “Amend and Consolidate”).

²³ Ibid.

producing machines adapted to reproduce copyrighted music,” which most likely refers to objects made for the purpose of playing mechanically inscribed recordings of the music on the early radios or phonographs. If this is the case, then it would seem to indirectly state that unauthorized commercial use of a presumably lawful (“authorized”) *recording* of the musical composition would be actionable under the existing copyright legislation. Does this mean that a copyright could actually be placed upon a recording so as to prevent or at least punish its unauthorized commercial usage? Or does it merely mean that an injunction could be placed against the perpetrator of such conduct as a matter of law while there would be no official copyright placed on the recording itself? A definitive understanding of what the statute provides is not as clear-cut as one would like. It is reasonable to propose, for instance, that the imposition of penalties for the unauthorized commercial use of an otherwise authorized recording (the mechanical reproduction mentioned at the beginning of the above referenced paragraph) might presuppose the existence of a copyright on the recording, but this is not unambiguously stated. Complicating things even further, Ronald Mark Wells has stated that

special interest groups successfully lobbied Congress to exclude sound recordings from federal copyright protection under the Copyright Act of 1909. Congress based their early exclusion of sound recordings in large part on the copyright clause of the Constitution.²⁴ [...] Therefore, Congress only extended copyright protection to creations which shared similar characteristics with books or writings. Consequently, Congress denied copyright protection to sound recordings because they were recorded on record discs and could not be seen or perceived[,] [but did include musical compositions.]²⁵

²⁴ Such a reading is obviously a very literal reading of “Writings,” but perhaps ignores other significant words in the clause such as “Progress” and “Discoveries.”

²⁵ Ronald Mark Wells, “You Can’t Always Get What You Want, But Digital Sampling Can Get You What You Need!” *Akron Law Review* 22 (1988-1989): 696-697.

While it is clear that the performances of musical compositions became the subject of this new Copyright Act, the status of recordings, presumably identified as “mechanical reproductions” is harder to determine given the interpretative issues associated with the terms of the statute as well as Wells’ contentions for the exclusion of sound recordings under the terms of the Act. This confusion is not at all surprising. It seems to be a reflection of the difficulties faced by the Congress during the time of the drafting of this Act because of the conceptual complications that arose by the introduction of technologies for “mechanical reproduction” and how that might have affected the range of media protectable under copyright legislation. As Mr. Currier stated later in the House Report 1 on the Copyright Act of 1909,

[the] section[s] of the bill which [deal] with the reproduction of music by mechanical means ha[ve] been the subject[s] of more discussion and [have] taken more of the time of the committee than any other provision[s] in the bill. Many propositions looking to a solution of this question have been submitted and discussed, and much difficulty has been experienced in reaching an agreement. [...] No legislative body in the world has as yet taken such advanced ground in the line of securing the rights of composers in the matter of reproduction by mechanical means of their music as is contemplated by this bill. [...] The main object to be desired in expanding copyright protection accorded to music has been

The fact that musical compositions were included under the terms of the Act of 1909 means that, according to the perspective of Congress referred to by Wells, Congress considered musical compositions to be sufficiently similar to literary books so as to warrant their inclusion under the Act. Interestingly, the late 18th-century courts in Britain were of a similar persuasion, as relayed by Martin Kretschmer. Kretschmer makes reference to the matter of *Bach v Longmann* of 1773, which is reported, in part, as follows:

“Lord Mansfield called on Mr. Wood [attorney for the defendant] to begin; and without hearing Mr. Robinson [attorney for the plaintiff] in answer, said, the case was so clear and the arguments such, that it was difficult to speak seriously upon it. The words of the Act of Parliament [the Statute of Anne] are very large: ‘books and other writings.’ It is not confined to language or letters. Music is a science; it may be written; and the mode of conveying the ideas, is by signs and marks. [...] There is no colour for saying that music is not within the Act. Afterwards, [...] the Court certified in these words, ‘Having heard counsel and considered the case, we are of the opinion, that a musical composition is a writing within the Statute of the 8th Queen of Anne.’” Kretschmer, “Intellectual Property in Music,” 209.

to give the composer an adequate return for the value of his composition, and it has been a serious and a difficult task to combine the protection of the composer with the protection of the public, and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his compositions and at the same time prevent the formation of oppressive monopolies.²⁶

Nevertheless, considering “mechanical reproduction” of music under copyright legislation, to whatever extent that can be definitively ascertained, was prescient of the developments that would eventually obtain with respect to recordings of musical compositions, such as those that occur in the next two copyright acts under consideration.

The Sound Recordings Act of 1971, applicable to recordings “fixed” on or after February 15, 1972, and addressing the rights to engage in certain commercial conduct with respect to *recordings of* musical compositions, and not merely musical compositions themselves, provides the right to

reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending, reproductions of the copyrighted work if it be a sound recording: *Provided*, that the exclusive right of the owner of a copyright in a sound recording to reproduce it is limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording: *Provided* further, That this right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.²⁷

The Copyright Act of 1976 is another pivotal development in American copyright legislation, as it expressly clarifies the protectability of musical compositions as “musical works, including any accompanying sounds,” as well as “sound recordings” as separate items protected by copyright legislation. Sound recordings are defined in the Act as

²⁶ The House Report, 5.

²⁷ An Act to amend Title 17 of the United States Code to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recordings, and for other purposes, 85 Stat. 391 (1971) at 391.

works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual works, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.²⁸

Cummings explains that “the copyrighting of recorded sound validated a rationale for ownership that had evolved in courts and stage legislatures over several decades.”²⁹

The House Report on the Copyright Act of 1976 contains the following statements in support of the need to expand it so as to accommodate the increasingly disseminated technological media for producing and reproducing musical compositions which warranted their own special copyright protections.

The history of copyright law has been one of gradual expansion in the types of works accorded protection, and the subject matter affected by this expansion has fallen into two general categories. In the first, scientific discoveries and technological developments have made possible new forms of creative expression that never existed before. In some of these cases the new expressive forms—electronic music, film-strips, and computer programs, for example—could be regarded as an extension of copyrightable subject matter Congress had already intended to protect, and were thus considered copyrightable from the outset without the need of new legislation. In other cases, such as photographs, *sound recordings*, and motion pictures, statutory enactment was deemed necessary to give them full recognition as copyrightable *works*.³⁰

This Act is significant for its inclusion of sound recordings as “works” as well as the musical compositions that they contain. The Act defines “works” in the following way: “a work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of

²⁸ Copyrights, 17 U.S.C. §101 (1976) at p. 1033 (hereafter “Copyrights”)

²⁹ Cummings, “From Monopoly to Intellectual Property,” 680.

³⁰ “House Report on Chapter 1, Section 102 of the Copyright Act of 1976,” in *U.S. Copyright Documents: An Annotated Collection for Use by Educators and Librarians*, edited by Jerome K. Miller (Littleton, Colorado: Libraries Unlimited, Inc., 1981), 69.

more than transitory duration.”³¹ A strictly grammatical reading of this sentence may reasonably lead one to believe that the musical composition *itself* is the “work” which is to be subsequently “fixed” to a another medium, since the opening clause reads not “a work is a ‘fixed’ tangible medium of expression,” but rather “a work *is ‘fixed’ in a tangible medium of expression.*” However, the Act goes on to provide that “a work consisting of sounds, images, or both [as a sound recording clearly is] that are being transmitted [for which purpose a sound recording clearly exists] is ‘fixed’ for purposes of this title.”³² In this manner, the Congress contemplated copyright protection for both musical compositions and the sound recordings that contain them. The independent and interdependent nature of these two entities, and the copyrights granted to them, will be considered throughout the duration of this thesis.

³¹ “Copyrights,” p. 1032.

³² *Ibid.*

CHAPTER TWO

A BRIEF HISTORY OF DIGITAL SAMPLING, INCLUDING LITIGATION THAT IT HAS INSPIRED

This chapter will address the history of digital sampling, beginning first with a discussion of its compositional antecedents in purely written notation and progressing, chronologically, to the advent of the technologically based practice of sampling in both musical composition and recording. An array of lawsuits that have been initiated as a result of the sampling process will be presented, and will also proceed from cases which entailed instances of sampling in the purely written sense, prior to the advent of recording and sampling technology, and progressing, chronologically, through various cases involving this technology. The often pernicious ontological and functional distinction between musical compositions and the recordings that contain them will also be addressed as it stands as a complicating factor in not only the litigation that has ensued due to digital sampling, but also in the very conceptualization of the practice.

Will Fulford-Jones defines sampling as a “process in which a sound is taken directly from a recorded medium and transposed into a new recording.”¹ While the available mechanisms and procedures for accomplishing the goal of appropriating pre-existing musical materials into one’s own, new composition have changed considerably even over the course of the last few decades Mark Katz observes that the practice of “sampling,” understood as a simpler practice of pen and paper and in the absence of

¹ Will Fulford-Jones, “Sampling,” in *The New Grove Dictionary of Music and Musicians*, edited by Stanley Sadie (London: Macmillan Publishers Limited, 2001), 219.

advanced technology, had been conducted for more than a thousand years *prior to* the present era. According to Katz,

Medieval chants freely incorporated and adapted melodic patterns from earlier chants; dozens of Renaissance masses were based on the melody of the secular song ‘L’homme armé;’ a similar craze raged centuries later when composers such as Berlioz, Liszt, Rachmaninoff, Saint-Saëns, and Ysaÿe sampled the chant *Dies Irae* (“*The Day of Wrath*”) in their instrumental works; Bach reworked Vivaldi’s music, and more than a century later Gounod returned the favor, adding a new melody to Bach’s Prelude in C Major and calling it “Ave Maria;” Mahler cannibalized his own earlier vocal works in several of his symphonies; Ives quoted George M. Cohan’s “Over There” in his song “Tom Sails Away;” Bartok parodied Shostakovich’s *Leningrad* symphony in his Concerto for Orchestra; and so on and so on.²

Katz also summarizes the computational and other technological mechanisms by

which digital sampling has been performed. Katz’s summary is worth quoting at length.

Digital sampling is a type of computer synthesis in which sound is rendered into data, data that in turn comprise instructions for reconstructing that sound. [...] Regardless of the gear, on the simplest level sampling works like a jigsaw puzzle: a sound is cut up into pieces and then put back together to form a digitized “picture” of that sound. When a sound wave is digitized, using what is called an analog-to-digital converter (ADC), it is not reproduced in its entirety; rather, select “samples” of the wave are assigned binary numbers. Each of these numbers represents the amplitude, or height, of a wave at a given point. When a sound is reconstructed, a digital-to-analog (DAC) converter emits voltages corresponding to each of these binary numbers. When all of these various voltages are emitted in a particular order, the result very closely approximates the original. [...] The advantage of digitization is that sound, once rendered into data, can be manipulated in a variety of ways down to the smallest details. Tempo and pitch can be increased or decreased in any increment, and the two can be manipulated independently. [...] Sounds can be reversed, cut, looped, and layered; reverberation can be added; certain frequencies within a sound can be boosted or de-emphasized. [...] All of these manipulations can be performed on any sound, musical or otherwise, and on any length of sound that can be recorded.³ Modern sampling was first practiced by Jamaican disc jockeys who combined

excerpts of pre-existing recordings, thereby creating “new” ones upon which additional

² Mark Katz, *Capturing Sound: How Technology Has Changed Music* (Berkeley, California: The University of California Press, 2010), 148-149.

³ *Ibid.*, 147-148.

vocals were then layered.⁴ The first instance of digital sampling to attain *international* prominence was in the song “Rapper’s Delight” by the Sugarhill Gang in 1979. Subsequently, Grandmaster Flash engaged in sampling by appropriating passages from the works of Chic, Queen, Blondie, Spoonie Gee, and the Sugarhill Gang in his “Adventures of Grandmaster Flash on the Wheels of Steel.”⁵ It should be noted that through these and other more recent examples, the sampling process is not merely an act of exact reproduction of material from a previously composed piece. The techniques of reversing, cutting, looping, and layering referred to above by Katz are tantamount to “transformative...recontextualization[s]” of the original material.⁶ Additionally, I will examine the various legal and ethical complexities surrounding the sampling process and discuss several instances of litigation that have implicated them. For now, it is enough to call attention to a curious complication that has disrupted established conceptions of music and recording that sampling has engendered.

In addition to the technological innovations that make digital sampling possible in the first place, the significance of sampling for contemporary compositions is that the process entails a critical re-examination of one of the fundamental conceptual dichotomies of American copyright law—that between ideas, which are *not* protectable, and the manner of the expression of those ideas, which *are*.⁷ The Copyright Act of 1976 provides that “in no case does copyright protection for an original work of authorship

⁴Jeremy Scott Sykes, “Copyright—The De Minimis Defense in Copyright Infringement Actions Involving Musical Sampling,” *University of Memphis Law Review* 36 (Spring 2006): 757.

⁵Colin Larkin, “Sampling,” in *The Encyclopedia of Popular Music*, edited by Colin Larkin (New York: Oxford University Press, 2009), 237-238.

⁶Katz, *Capturing Sound*, 174-175.

⁷*Ibid.*, 175.

extend to any *idea*, procedure, process, system, method of operation, *concept*, *principle*, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such [a] work.”⁸ However, Mark Katz identifies how the sampling process fundamentally disrupts the stability of this distinction as it would relate to musical compositions and the sound recordings that contain them.

The dichotomy is not always so clear-cut, but digital sampling muddies the distinction almost beyond recognition. [Considering one example], Trouble Funk’s 1982 song “Pump Me UP” is obviously not an abstract idea but a concrete expression. But does the passage sampled in Public Enemy’s “Fight the Power” remain Trouble Funk’s expression when it no longer bears any resemblance to its unaltered state? Isn’t Public Enemy’s use of that sound an expression distinct from Trouble Funk’s? And if so, doesn’t that make the Trouble Funk song the raw material of an idea for Public Enemy? [...] The potential collapse of the idea-expression dichotomy would have considerable ramifications for copyright law because expressions are legally protected but ideas are not.⁹

In this context, it is instructive to consider the underlying philosophical and cultural shifts that occurred concurrently to the development and ascendancy of the sampling process. Simon Waters has identified seven such trends, four of which are of particular relevance to this thesis. The first is the new technologies of sampling themselves. Waters explains how the rapid digitization of information and the resulting changes in communications, work environments, and disciplinary languages and practices have the potential to “radically restructure activities like composing and listening.”¹⁰ The second is the idea of cultural pluralism with particular application to musical practice. Waters explains how the manifestation of cultural pluralism, particularly by way of an “incredible hybridisation” of musical styles from various

⁸ “Copyrights,” p. 1039

⁹ Katz, *Capturing Sound*, 175.

¹⁰ Simon Waters, “Beyond the Acousmatic: hybrid tendencies in electroacoustic music,” in *Music, Electronic Media and Culture*, edited by Simon Emmerson (Aldershot: Ashgate, 2000), 58.

cultures in contemporary composition has allowed for the “recontextualization[...], easy manipulation, transformation and juxtaposition” of the musical conventions of the wider cultural array by the technological means of sampling.¹¹ The third is modifications of previously held beliefs as to the proper “authority” of an artistic creator over his work and the concomitant marginalization of people or groups from musical practice that did not share the same views. Waters explains how the technological mechanisms associated with the sampling process have allowed for the pursuit of artistic activities for people previously marginalized from such participation. Waters clarifies the cultural ramifications of these tendencies as “threat[ening] to those power elites who have justif[ied] their [own] privileged status.”¹² The fourth and final shift is in the shifts in both philosophical and professional perspectives on musical practice. Waters explains how the advent of postmodernism in its various conceptual appearances has changed our perception of the meaning of what is communicated by the newer methods of dissemination. He identifies the fundamental contrast between postmodernism’s emphasis on the context of communication and modernism’s emphasis on the innovation itself and the potentially endless improvement of the methods of communication, and argues that the former is a philosophical undercurrent to the sampling process.

As a result, the artefacts of the past reappear in new permutations and all historical periods are regarded as potential contemporary material. New methods of dissemination...tend to stress this simultaneous availability of times and cultures while also drawing attention to the principle of recontextualization: Madonna in a Cathedral; William Byrd on an aeroplane; Sarajevo in your sitting room.¹³

¹¹ Ibid., 63-64.

¹² Ibid., 67.

¹³ Ibid., 70.

In addition to such philosophical considerations, it is important to highlight a significant political aspect of the sampling process—political insofar as it relates to issues of class and culturally specific consciousness and empowerment. As Adam Haupt has pointed out,

one key difference between the rise of the mp3 revolution and the use of digital sampling in hip-hop is that hip-hop artists make informed artistic/political choices when using samples during the construction of a new music text, whereas audio piracy on the Internet offers consumers a new means of [purely] consuming commodities. [...] Sampling in rap is [often] a process of cultural literacy and intertextual reference that celebrates black artistic achievement and challenges audiences to “know these sounds,” [...] thereby affirming “black musical history.”¹⁴

As can be expected, the practice of digital sampling raises a variety of ethical and legal issues, since it involves the appropriation of the musical material of works by one composer, frequently without their consent, for a new work by another composer. Before proceeding to a presentation of the case upon which this thesis is mostly focused, *Grand Upright Music Limited v Warner Brothers Records, Inc.*, it is instructive to present a small survey of musical infringement suits throughout American legal history. Through this survey of cases, and whether in terms of exact replication or of a modification of other material that is still deemed sufficiently “substantially similar” to warrant litigation, one can discern how courts have addressed this practice and resolved the disputes involved prior to our major case and even prior to the advent of digital sampling.

The first in our survey is the matter of *Boosey et al v. Empire Music, Inc.*, decided by the United States District Court for the Southern District of New York on February 11,

¹⁴ Adam Haupt, “The Technology of Subversion: From Digital Sampling in Hip-Hop to the MP3 Revolution,” in *Cybersounds: Essays on Virtual Musical Culture*, edited by Michael D. Ayers (New York: Peter Lang, 2006), 108-109.

1915. In this case, Boosey filed suit against Empire because the latter had published a composition entitled “Tennessee, I Hear You Calling Me,” which was said to infringe the copyright that was placed, through the terms of the Copyright Act of 1909, on the work “I Hear You Calling Me,” published by the former. Infringement was said to exist by virtue of the latter’s title which includes one of the most significant lines of text in the former’s composition and also because the same music which accompanies that line in the former is also used in the corresponding portions of the latter. Judge Mayer made clear in his decision that while the “dignified character” of the former and the “ragtime [character]” of the latter, as well as the corresponding differences in the overall theme of either work, render them “considerably different in theme and execution,” “it is enough to warrant the charge of piracy and infringement of copyright that the words ‘I Hear You Calling Me,’ *with practically identical music accompanying them, appear in the two songs, and are the main thing that impresses one technically untutored.*”¹⁵

The comments by the Judge highlight two fundamental principles that would prove significant for future cases. First, the sheer quantity of the appropriated material is not *the* dispositive factor in determining whether infringement of the copyright that protected it had occurred. Rather, of greater importance is the significance of the used material for the composition as a whole. “I Hear You Calling Me,” while arguably a quantitatively inconsequential amount of material, is nevertheless especially crucial to the overall “tone” of the composition, as illustrated clearly by its presence within the very title of the work. Therefore, Empire’s use of this material “warrants the charge of piracy

¹⁵ Emphasis added. *Boosey et al v. Empire Music, Inc.*, 224 F. 646 (1915)

and infringement of copyright.” Second the use of material of such contextual significance can be discerned even by one “technically untutored,” since its use, and the importance of the material to the whole composition, is so obvious as to not require any specialized musical knowledge for its detection.

However, the matter was not *so* swiftly resolved. Judge Mayer, after rightly emphasizing the legal actionability of Empire’s actions, went on to explain how extraneous commercial concerns could disrupt the ability to proceed with the imposition of penalties against them. Notwithstanding the legal basis for such penalties, “these cases must be viewed and dealt with from a practical standpoint. Songs of this character usually have a temporary vogue, and, if the sale is stopped just at the time that the public is keen, serious injury may be done, even though a plaintiff gives a bond or undertaking to respond.”¹⁶ Further proceedings on this matter were deferred to a later period, demonstrating that some courts, during the nascent period of the implementation of the Copyright Act of 1909—an Act whose construction was heavily motivated by the need to afford greater protection for musical compositions—were not entirely clear as to how to properly address circumstances such as those which arose in the Boosey case. Subsequent cases would present courts with the opportunity to clarify their strategies of determining whether particular instances of infringement would be punishable under the governing copyright statutes and how they were to be remedied.

Nearly ten years after the Boosey case, there appeared *Fred Fisher, Inc., v. Dillingham, et al*, also decided by the United States District Court for the Southern

¹⁶ *Ibid.*, at p. 647.

District of New York on January 26, 1924. This case presented an instance of alleged musical copyright infringement under curious circumstances. The plaintiff brought suit against the others for the allegedly deliberate infringement by Joe Kern, in the scene called “Kalua” from his light opera “Good Morning, Dearie,” of a previously composed work by another composer entitled “Dardanella.” The reason for this claim was that both works contained the same eight-note ostinato, even though Kern insisted that he did not intentionally appropriate the plaintiff’s musical material, but rather concocted it independently through his own artistic ingenuity. Judge Learned Hand expressed skepticism over such a proposition.

Not only is the figure in each piece exactly alike, but it is used in the same way; that is, as an “ostinato” accompaniment. Further, the defendant [Kern] [has] been able to discover in earlier popular music neither this figure, nor even any “ostinato” accompaniment whatever. The fact that “Kalua” appeared shortly after “Dardanella” had faded out, and was written by one who had necessarily known it, as a musician knew it, makes it still more hard to assume any independent provenience for “Kalua.” Can I suppose that such parallelism could be the result of coincidence only?¹⁷

Nevertheless, Judge Hand emphasized the scope of the Copyright Act of 1909 to encompass instances of infringement, even when unintentional, as pure matters of law.

On the issue of infringement this conclusion is enough. The point is a new one, but I think it is plain. The author’s copyright is an absolute right to prevent others from copying his original collocation of words or notes, and does not depend upon the infringer’s good faith. Once it appears that another has in fact used the copyright[ed material] as the source of his production, he has invaded the author’s rights. It is no excuse that in so doing his memory has played him a trick. In an indictment under [the] Copyright Act...the excuse might be a defense, since the infringement would not be willful; but it is seldom that a tort, as this is, depends on the purpose of the wrongdoer. Therefore I find with the plaintiff on the issue of infringement.¹⁸

¹⁷ *Fred Fisher, Inc. v Dillingham et al*, 298 F. 145, 147 (1924).

¹⁸ *Ibid.*, at p. 148

After opining that a matter such as this was “a mere point of honor, or scarcely more than irritation, [and] involving no substantial interest,”¹⁹ Judge Hand once again asserts the actionability of Kern’s conduct, whether intentional or otherwise, and accordingly awarded the plaintiff the statutorily prescribed monetary award. In contrast to Judge Mayer in the case previously presented, Judge Hand did not allow for extraneous commercial considerations to hinder the resolution of this matter, even expressly rejecting their significance to the ability for judgment to be entered against Kern, and thereby also asserted the applicability of copyright legislation to issues that trigger it.

One additional and highly unusual case is relevant here: namely, *Bridgeport Music, Inc., v. Dimension Films*, decided by the Sixth Circuit on September 7, 2004. In this matter, Bridgeport Music, Inc. and other plaintiffs filed suit against Dimension Films for the latter’s digital sampling of one of the songs whose copyrights are owned by Bridgeport, called “Get Off Your Ass and Jam” by George Clinton, Jr. and the Funkadelics, for the soundtrack of the movie *I Got the Hook Up*. Of particular significance for the history of musical copyright legislation and litigation is that Judge Guy of the Sixth Circuit identified the ownership by Bridgeport of both “musical composition *and* sound recording copyrights”²⁰ that were allegedly infringed, thus demonstrating that the composition and the recording that contains it, as postulated under the Copyright Act of 1976 and in litigation that is executed under its terms, are two separate “works” that are entitled to two distinct copyrights.

¹⁹ *Ibid.*, at p. 152

²⁰ Emphasis added. *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 393 (6th Cir. 2004) (hereinafter *Bridgeport 2004*)

It might be argued that an act of digital sampling such as was addressed in this case is not qualitatively different from the appropriation of musical material addressed in the previous cases that we examined, and that, therefore, the fact that the copying in *Bridgeport* was accomplished through technological means and that that accomplished in the earlier cases was done through pen and paper does not warrant some kind of additional arbitrate mechanism tailored specifically to it. However, it is important to recognize that in *Bridgeport*, and similar cases, we are dealing with two copyrights—one placed on the musical composition and the other placed on the recording that contains it. Indeed, the need for extra scrutiny of such situations, made evident by virtue of the various legal questions that digital sampling is uniquely capable of posing, was acknowledged by Judge Guy during his procedural summary of the prior litigation: “In granting summary judgment to defendant, the district court...*emphasized the paucity of case law* on the issue of whether digital sampling amounts to copyright infringement.”²¹

Later in the decision, Judge Guy clearly and, for our purposes, significantly clarifies the procedural distinction that these two entities warrant.

At the outset it is important to make clear the precise nature of our decision. [...]

1. The analysis that is appropriate for determining infringement of a musical composition copyright *is not* the analysis that is to be applied to determine infringement of a sound recording. We address the issue only as it pertains to sound recording copyrights.²² [...]
3. [...] Having concluded that the statute requires a different analysis for sound recording copyrights...we also find that the requirement of originality is met

²¹ *Bridgeport 2004*, at page 395.

²² At the corresponding position in the decision itself, Judge Guy includes this footnote: “We...exercise our discretion to entertain this argument due to the dearth of legal authority on this issue and the importance of the resolution of this issue to the music industry.”
Ibid., footnote #4.

by the fixation of sounds in the master recording. Only an actual physical copy of a master recording will be exactly the same as the copyrighted sound recording.²³

Judge Guy then makes reference to subsection 2 of Section 106 of the Copyright Act of 1976, providing “the owner of copyright...the exclusive rights to do and to authorize any of the following: [including] prepar[ing] derivative works based upon the copyrighted work,” which digital sampling clearly entails. He then further clarifies the distinction between the nature of a musical composition and a recording that contains it for purposes of copyright law.

If one were to analogize to a book, it is not the book, i.e., the paper and binding, that is copyrightable, but its contents. There are probably any number of reasons why the decision was made by Congress to treat a sound recording differently from a book even though both are the medium in which an original work is fixed rather than the creation itself. None the least of them certainly were advances in technology which made the “pirating” of sound recordings an easy task.²⁴

Finally, and of great import in the present context, Judge Guy identified the distinction in the methods of analysis that must be performed by a court in determining matters of infringement on a musical composition copyright and a sound recording copyright.

While the question [of] whether an unauthorized use of a digital sample infringes a musical composition may require a full substantial similarity analysis, the question [of] whether the use of a sample constitutes infringement of a sound recording could end upon a determination that the sampler physically copied the copyrighted sound recordings of another. If the sampler physically copied *any* portion of author’s copyrighted sound recording, then infringement should be found.²⁵

That infringement would be found in appropriating *any* portion of a previously produced *recording* of a composition, even irrespective of the quantitative or qualitative

²³ Ibid., at page 396.

²⁴ Ibid., at page 398.

²⁵ Emphasis added, Ibid.

significance of this portion for the entire *composition as written*, is an unusual aspect of contemporary musical copyright law and will be broached again in Chapter Four.

CHAPTER THREE

A HISTORY OF GRAND UPRIGHT MUSIC LIMITED V. WARNER BROTHERS RECORDS, INC. AND SOME PRELIMINARY CRITIQUE

The case of *Grand Upright Music Limited V. Warner Brothers Records, Inc.* can be summarized as follows. The rap personality Marcel Theo Hall (b. 1964), known as “Biz Markie,” recorded a song entitled “Alone Again” for his album *I Need a Haircut* in 1991. Biz Markie’s recording consisted of the harmonic progression featured in the opening bars of the 1972 composition “Alone Again (Naturally)” by Gilbert O’Sullivan.¹ This harmonic progression was “looped,” or repeated multiple times consecutively, throughout Biz Markie’s work. The latter even includes repetitions of the phrase “Alone Again (Naturally)” from the original O’Sullivan version. An attorney for Biz Markie provided a recording of this version to Terry O’Sullivan, Gilbert’s brother and agent, and inquired for permissions to use the sample of this pivotal excerpt and the title phrase. However,

¹ The YouTube video, “Gilbert O’Sullivan-Alone Again (Naturally)-45 RPM Original Mono Mix” by user WABCRADIO77 consists of a video recording of the playing of this record, *the version of which begins with the unaccompanied opening harmonic progression which we have focused upon so intently for good reason*, on a record player. Prior to placing the record in the record player and activating it, the person displays the record up close for the camera. Very clearly visible and legible to a viewer are the following identifying labels: “Alone Again (Naturally) (O’Sullivan) Gilbert O’Sullivan,” “Pub: Management Agency and Publishing Inc., BMI,” and “1972” (the year of its creation and recording.)

“Gilbert O’Sullivan-Alone Again (Naturally)-45 RPM Original Mono Mix,”
<http://www.youtube.com/watch?v=o41IHnDIPRg> (Accessed November 7, 2013)

The above mentioned information also matches that provided for the 1972 American released recording as indicated on discogs.com, and, accordingly, I can conclude that the recording featured in the YouTube video mentioned above, *which commences directly with the unaccompanied opening harmonic progression at issue*, is the original recording to which listeners would have been exposed, and from which they would be able to discern Biz Markie’s appropriations in his own version.

“Gilbert O’Sullivan-Alone Again (Naturally),” <http://www.discogs.com/Gilbert-O'Sullivan-Alone-Again-Naturally/release/1721448> (Accessed November 7, 2013)

Warner Brothers Records released *I Need a Haircut*, complete with “Alone Again,” before Biz Markie could receive a response, from Terry and Gilbert O’Sullivan. Once Gilbert had learned that the recording had been released, he brought suit against Biz Markie. Gilbert explained the circumstances leading to this legal action during a live interview at Branchage Film Festival in Jersey, United Kingdom in 2010.

Biz Markie and they [Cold Chillin’ Records] approached us and said, this was in 1990, that we would like to sample your song and use it on a track. So we said okay, and if we like it we’ll see where we go from there. They sent it over and what they had done was sampled the intro and then he [Biz] rapped over it. [...]But then we discovered that he was a comic, a comic rapper, and the one thing I am very guarded about is protecting songs and in particular I’ll go to my grave in defending the song to make sure it is never used in the comic scenario which is offensive to those people who bought it for the right reasons. And so therefore we refused. But being the kind of people that they were, they decided to use it anyway [without permission] so we had to go to court.²

The matter was heard in the United States District Court for the Southern District of New York, presided over by Judge Kevin Thomas Duffy. His decision is immediately evident from its four opening words: “Thou shalt not steal.”³ As will be explored in more detail later, this hasty and ostensibly “blanket” condemnation of the digital sampling process is one of the main reasons why this decision has been criticized within the legal-academic literature. It should be conceded that the judge, as a matter of principle and as a matter of statutory law, was right to express his discontent of unauthorized appropriation

² “Gilbert O’Sullivan Tells His Side of the Story in Landmark Sampling Court Case Against Biz Markie that Changed the Direction of Hip-Hop,” Amoeba Music Blog, <http://www.amoeba.com/blog/2010/09/jamoeblog/gilbert-o-sullivan-tells-his-side-of-the-story-in-landmark-sampling-court-case-against-biz-markie-that-changed-the-direction-of-hip-hop.html> (Accessed November 7, 2013) (cited below as “O’Sullivan Tells His Side.”)

³ *Grand Upright Music Limited v Warner Bros. Records, Inc.* 780 F. Supp 182, 183 (S.D.N.Y. 1991) (Hereinafter *Grand Upright*).

of other musicians' materials. However, he excluded much that would have perhaps clarified his findings in a way that would *necessarily involve a method* for determining instances of infringement or what I shall call "impermissibly excessive borrowing."⁴ The principal matter that the Court considered was not whether an excessive *amount* of O'Sullivan's material was sampled, or whether the particular musical materials that were used were of a pivotal importance to O'Sullivan's composition as a whole, or whether a reasonable listener familiar with O'Sullivan's work would be able to identify it readily in Biz's version. Rather, the very fact that a copyright was placed on O'Sullivan's work, and *something* was borrowed without his explicit consent, was at issue. Accordingly, the sampling of presumably *any* amount of previously copyrighted material at all without prior consent was, in the opinion of the Court, tantamount to copyright infringement. However, a rather tantalizing complication surrounding the release of Gilbert O'Sullivan's work must be addressed insofar as it raises the question as to which of the various statutory copyright mechanisms could be involved in a determination of infringement.

Title 17 of the United States Code entails a codified version of the Copyright Act of 1976. Section 102 provides that both "musical works, including any accompanying works" and "sound recordings" are protected by copyright by virtue of this Congressional enactment. "Phonorecords" are those objects in which the sounds of a musical

⁴ "The *Grand Upright* decision *completely bypassed* [various applicable tests for determining infringement] thus providing little guidance to ascertain the quantitative and qualitative threshold level for future sampling cases."

Stephen R. Wilson, "Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense?" *Journal of High Technology Law* 1 (2002): 188.

composition are “fixed,” warranting copyright protection for both. For the purpose of presenting an adequate definition, the relevant explanatory passages will be quoted here.

Phonorecords are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “phonorecords” includes the material object in which the sounds are first fixed.⁵

The operative word, “fixed,” is defined as follows.

A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission.⁶

As clarified by Ronald Mark Wells, recordings that were released on or after February 15, 1972 were to be covered under the Sound Recordings Act of 1971, which was eventually codified into the Copyright Act of 1976 and Title 17.⁷ The rather curious circumstance attending the release of O’Sullivan’s recording is as follows: according to his website, it was released in February of 1972.⁸ Employing a hypothetical application of American copyright law to a recording released in Europe, Biz Markie’s actions could pose a justiciable matter for an American court, as it obviously did, on one or two grounds (perhaps both.) First, if O’Sullivan’s recording was released prior to February

⁵ “Copyrights,” at p. 1032.

⁶ Ibid.

⁷ Wells 1988-1989: 696-697.

⁸ “Song Index,” *The Official Gilbert O’Sullivan Website: A Friend of Mine*, <http://www.gilbertosullivan.net/songs/list5.htm>, (Accessed November 7, 2013).

An exact date is not specified, and inquiries that I have posed to his current agent as to the exact date of its release have been unanswered. Obviously, O’Sullivan’s recording was either released before February 15, 1972, or on or after that date.

15, 1972, then it may still have been protected insofar as Biz's infringement of the *musical composition* would have been unlawful under the Copyright Act of 1909 which prohibits such infringement, since, in this scenario, the recording itself would *not* have been protected under the Sound Recordings Act of 1971. Of course, the proposition that American copyright statutes could punish an American artist's infringement on the copyright placed on a musical composition of an artist from outside of the United States might appear problematic. Nevertheless, the Copyright Act of 1909, under which the composition itself may, in this hypothetical scenario, have been protected, and/or under which Biz's actions were justiciable, provides, in pertinent part, that

the copyright secured by this Act shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation, only... (b) when the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens... or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.⁹

But which entity did Judge Duffy refer to? Was it the composition, or the recording of the composition? As we observed in the *Bridgeport* decision discussed earlier, a Court can consider infringements of the copyright placed on the sound recording of a musical composition irrespective of the composition itself for, among other reasons, the reason that determination of the infringement of the composition itself is a more difficult process than that with respect to recordings, as the former requires the

⁹ Emphasis added. "Amend and Consolidate," at p. 1077.

application of various tests such as *de minimis*¹⁰ and substantial similarity analysis that the same consideration of sound recordings *does not*. While the judge does make reference to the infringements on the “song” and “composition,” and since Biz Markie had sampled directly from O’Sullivan’s recording as well, thereby involving the recording itself, wouldn’t some kind of consideration of potential infringement of the copyright placed on the sound recording be warranted?

It appears that Judge Duffy does shed light on this matter. It might be argued that the following passage indicates that the infringements on the copyrights of *both* are being considered.

This proceeding was instituted by [an] Order to Show Cause to obtain a preliminary injunction against the defendants [primarily Biz Markie] for the improper and unlicensed use of a *composition* “Alone Again (Naturally)” written and performed on records by Raymond “Gilbert” O’Sullivan. Defendants admit “that the Biz Markie album ‘I Need a Haircut’ embodies the rap recording ‘Alone Again’ which uses three words from ‘Alone Again (Naturally)’ composed by Gilbert O’Sullivan and a portion of the music taken from the O’Sullivan *recording*.” [The statement in quotation marks comes from the Defendants’ Post-Hearing Memorandum at line 2, as cited in the judge’s decision.] The only issue, therefore, seems to be who owns the copyright to the *song* “Alone Again (Naturally)” *and the master recording thereof* made by Gilbert O’Sullivan. [Various] categories of proof lead me to the conclusion that the plaintiff [O’Sullivan] is the true owner of these *copyrights*.¹¹

Two statutory provisions from the United States Code, *relative to the ability of the*

Defendants to face criminal prosecution for their actions,¹² were cited in the decision.

¹⁰ In applying this test, a court must consider whether the copying “occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity.”

Ringgold v Black Entertainment Television, Inc., 126 F. 3d 70 (2d Cir. 1997)

¹¹ Emphasis added, *Grand Upright* at page 183.

¹² Recall my observation above that no such statutes that actually explained which of the two possible entities at issue were to be considered were cited that might have substantiated his assertion in the passage above to the effect that copyrights for both the song *and* the recording were at issue.

One, 18 U.S.C. sec. 2319, provides the penalties for “criminal infringement of a copyright.” The other, 17 U.S.C. section 506(a), provides a definition of “criminal infringement,” which includes “the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works,” the latter being defined as “a computer program, *a musical work*, a motion picture or other audiovisual work, *or a sound recording*.”¹³

Thus, under the copyright statute that actually was referenced by Judge Duffy, infringements of copyrights on musical compositions as well as on their sound recordings are legally problematic, and the relevant passage from his decision, cited above, indicates that he may have been considering infringement on both. To refer to *Bridgeport* yet again, the determination of an infringement on a musical composition is not as simple as that for a recording. And it is in this regard, and in the terse manner in which Judge Duffy found an infringement of an ultimately indefinite item or items,¹⁴ that his decision in *Grand Upright* has been criticized for the following reasons.

First, Judge Duffy was rightly concerned over the infringement of the copyright(s), whether in the form of that which covered the musical composition by O’Sullivan, or the sound recording that contains it. However, insofar as his deliberations included matters relating to the former, his decision was hasty and inadequately justified

¹³ Emphasis added, 17 U.S.C. 506(a) (1976)

¹⁴ I refer to the judge’s designation, in the passage above, as “indefinitive” insofar as no statutes that may have substantiated his inclusion of both entities were cited. It must be reiterated that the only copyright statute cited in the ruling was the one pertaining to penalties for “criminal infringement of a copyright” on items that include both musical works and sound recordings. For the foregoing reason of the lack of corroborating statutory citations, I deem it appropriate to refer to the matter of which entity was appealed to as “ultimately indefinite.”

or substantiated. This is because, while once again conceding the importance of an ideally inviolate copyright protection on sound recordings, the recordings would not exist were it not for the compositions that are on them in the first place. Therefore, consideration of copyright infringement on compositions, described as inherently more difficult and uncertain, is necessary, too. As Ronald Thomas lamented,

the court did not attempt to analyze digital sampling with regard to any possible allowable uses [of the musical material] or defense; in the court's view digital sampling was clearly considered theft. [...] The discussion of the opinion was devoid of any application of copyright law to the practice of digital sampling.¹⁵ Theft was assumed. Therefore, no boundaries were drawn which [could] allow for flexibility between the copyright holders of samples songs and the sampling musicians.¹⁶

The inherent difficulty and uncertainty of determining infringements of the compositions themselves is further explained by A. Dean Johnson.

While a sample may infringe upon the sound recording by appropriating a small or distinctive part of the recording, it may *not* infringe upon the *underlying musical work* as the portion sampled may qualify as *de minimis*. [...] Although some believe that sampling even one note or chord of someone's trademark sound constitutes infringement, no infringement occurs in this situation under present copyright law. [...] Accordingly, unless a plaintiff can prove that the defendant has sampled a *copyrightable portion of either the underlying composition or the sound recording*, the court may not find the defendant liable for copyright infringement.¹⁷

Johnson provides a long list of "other factors in the analysis [of infringement] that are available" and by which "judicial discretion can play a significant role in [such] cases if [they] choose to consider various factors that are better suited for an

¹⁵ Except, possibly, for the application of the statute from Title 17, which pertains to the penalties for copyright infringement in the concluding paragraph of the decision.

¹⁶ Ronald W. Thomas Jr., "Digital Sampling in the Music Industry: Evolution in an Unfriendly Legal Environment," *Loyola Intellectual Property and High Technology Law Quarterly* 2 (1997): 20.

¹⁷ Emphasis added. A. Dean Johnson, "Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits," *Florida State University Law Review* 21 (1993-1994): 141-142.

accurate...determination,” particularly as they relate to the underlying musical composition.¹⁸ These factors include: whether the sampling has been performed for commercial or non-profit use,¹⁹ whether any appreciable degree of “transformation” of the original material has been performed,²⁰ “the amount and sustainability of the portion used in relation to the copyrighted work as a whole,”²¹ considerations of the quantity and quality of the material used,²² “the effect of the use [of that material] upon the potential market for or value of the copyrighted work,”²³ “the frequency with which the sample is used in the allegedly infringing work,”²⁴ and even “attempts by the user to negotiate a license with the sampled artist for the use of a sample.”²⁵ Two other methods for making such determinations, which clearly were not employed by the court in *Grand Upright*, include the reception of the Biz Markie work (and whether it is reasonable to propose that the average listener would recognize O’Sullivan’s work within it,) and the inclusion of “expert testimony” that would postulate some kind of empirical method for determining if the sampled material was of a character, be it in terms of length, frequency of appearance, or significance to the composition overall, that a designation of copyright infringement was appropriate. As for the first, Austin Padgett²⁶ makes reference to *Harold Lloyd Corp v. Witwer*, a case heard by the Ninth Circuit in 1933, in which such an

¹⁸ Ibid., 144.

¹⁹ Ibid., 144.

²⁰ Ibid., 147.

²¹ Ibid., 151.

²² Ibid., 153.

²³ Ibid., 154.

²⁴ Ibid., 157.

²⁵ Ibid., 160.

²⁶ Austin Padgett, “The Rhetoric of Predictability: Reclaiming the Lay Ear in Music Copyright Infringement Litigation,” *Franklin Pierce Law Review* 7 (2008): 128.

“audience test” was proposed. As the Court observed with respect to a dramatic play, but which can be applied to musical works as well,

the question really involved in such comparison is to ascertain the effect of the alleged infringing play upon the public, that is, upon the average reasonable man. If an ordinary person [is acquainted with the original work]...he should detect that fact without any aid or suggestion or critical analysis by others.²⁷

Second, the expert testimony that musicologists are uniquely qualified to deliver can be used to more empirically, and therefore more tenably and defensibly, determine matters of copyright infringements on musical works. Some scholars, such as Padgett, have expressed concern over the “fear” of “trusting a jury with such an ‘ineffable’ subject as music.”²⁸ This is because of the need to “[include] expert testimony, [create] specialized courts, or [engage in] mechanical analysis” to facilitate the conception and application of infringement tests that are arguably more substantive and rigorous than the response of an average listener.²⁹ However, others are less concerned and have expressly supported the need for experts—for our purposes, musicologists—in copyright infringement cases. This is because of their vast knowledge of the stylistic conventions of music, the history of recording technology, and their rigorously explicable understanding of the concept of context in music as it relates to the significance of certain features or sections of a composition relative to others and which is informed by an extensive study of musical form. Miah Rosenberg points out that unlike the products of other artistic media, “music is not so easily compartmentalized. [...] Consequently, courts might choose to analyze [musical] works without a set formula. The type of work at issue thus

²⁷ *Harold Lloyd Corp. v Witwer*, 65 F. 2d 1, 18 (9th Cir. 1933).

²⁸ Padgett, “The Rhetoric of Predictability,” 125.

²⁹ *Ibid.*, 125.

helps dictate the type of analysis the court will employ for [such a] test.”³⁰ And, as M. Fletcher Reynolds has pointed out, the inclusion of expert testimony in these kinds of infringement cases, given the inherent conceptual complexities as far as the musical compositions themselves are concerned, can not only be quite important in itself, but also in terms of how future adjudication can be better performed.

Although a judge is usually a layman in the expert’s field, he often knows something about the expert’s methodology. [...] In music plagiarism cases, however, even an otherwise well-educated judge usually has little understanding of what music theorists do, and he will find no legal authority to steer his evidentiary decisions in the right direction. Quite the contrary, the sparse legal writings on music are filled with truly astonishing misinformation.³¹ Such expert testimony can indeed improve the findings of courts in terms of

musical infringement suits by providing a crucial focus on the contextual situation of the material being sampled, how it is being sampled, how or if any substantial changes are made to the original material in the sampling process, etc. that would *not* be present in a “dead letter” application of the rules of adjudicating such matters. David S. Blessing, for instance, is right to point out that as it relates to *de minimis* considerations, for example,

a completely quantitative definition...may suggest that whenever there is a sampling of more than five musical notes, it constitutes copyright infringement. This approach would completely [ignore] the significance of the originality in the samples, the use in the earlier work, the use in the later work, and many other *qualitative* factors. Courts...have consistently looked at these qualitative factors to determine whether the use is *de minimis*.³²

³⁰ Miah Rosenberg, “Do You Hear What I Hear? Expert Testimony in Music Infringement Cases in the Ninth Circuit,” *U.C. Davis Law Review* 39 (2005-2006): 1675.

³¹ Cited in Rosenberg, “Do You Hear What I Hear?,” 1685.

³² Emphasis added. David S. Blessing, “Who Speaks Latin Anymore? Translating *De Minimis* Use for Application to Music Copyright Infringement and Sampling,” *William and Mary Law Review* Volume 45 (2004): 2408.

Neither these factors nor the expert testimony that would corroborate their usefulness were considered by Judge Duffy. Arguably, they should have been at least acknowledged. Since something like a satirical, transformative, or other generally creative purpose could have been attributed to or discerned in Biz's actions, these possibilities might have been entertained some stage in the litigation. Musicologists have repeatedly asserted the validity of such intentions as they relate to sampling, or copying of previously written musical material generally understood. For instance, as far back as 1927, Hugh Arthur Scott proposed that such copying would be "inevitable" given that all future musical progress must "inevitably build upon the foundations provided by [our] predecessors"³³ which, presumably being *so* ingrained within compositional procedure, can even occur by way of "unconscious cerebration"³⁴ (such as was disregarded in *Fred Fisher*.) Constantin von Sternberg emphasized the need to assess "the difference between a master's *purposed alteration* of his own theme and a dodged or *disguised plagiarism* [of it by himself or another.]"³⁵ Subsequently, Charles Carroll identifies a manner of "socially acceptable" borrowing, defined as "a borrowing which constitutes a kind of implied honor, and [which] indeed in many cases has served to rescue the original composer or his work from later anonymity," citing, among other examples, the composition by Benjamin Britten of variations on a theme by his teacher, Frank Bridge.³⁶ More recently and among other possibilities, J. Peter Burkholder mentions "allusion" and

³³ Hugh Arthur Scott, "Indebtedness in Music," *The Musical Quarterly* 13 (October, 1927): 497.

³⁴ *Ibid.*, 499.

³⁵ Emphasis original. Constantin von Sternberg, "On Plagiarism," *The Musical Quarterly* 5 (July, 1919): 391.

³⁶ Charles Michael Carroll, "Musical Borrowing—Grand Larceny or Great Art?" *College Music Symposium* 18 (Spring, 1978): 13.

“collage” as two manners in which permissible or otherwise respectable copying could be performed, the former including “pay[ing] homage to its source, comment[ing] upon or suggest[ing] parallels to its source, exemplif[y]ing competition between the composer of the new work and the composer of the existing work, [or] critiq[ui]ng or negat[ing] its source,”³⁷ and the latter including “creat[ing] a stream of consciousness effect.”³⁸

³⁷ Robert Hatten would refer to such a practice as instigating a “dialogue or confrontation with the earlier work.”

Robert Hatten, “The Place of Intertextuality in Music Studies,” *The American Journal of Semiotics* 3 (1985): 70.

³⁸ J. Peter Burkholder, “The Uses of Existing Music: Musical Borrowing as a Field,” *Notes: The Quarterly Journal of the Music Library Association* 50 (March, 1994): 869.

CHAPTER FOUR

ADDITIONAL CRITIQUE OF THE *GRAND UPRIGHT* COURT'S DECISION THROUGH TESTS PREVIOUSLY AND SUBSEQUENTLY POSTULATED FOR DETERMINING MUSICAL INFRINGEMENT

SECTION ONE

In the preceding chapters, I have examined the history and development of copyright legislation in the United States particularly as it has been expanded to provide protection to musical compositions, the sound recordings that contain them, and the history of digital sampling technology. I also explored the circumstances of *Grand Upright Music Limited v Warner Bros. Records, Inc* including some of the conceptual shortcomings of the Court's decision and the resulting criticism among experts of intellectual property and copyright law. In the first of the two sections of this chapter, I consider two tests that courts prior to *Grand Upright* have postulated as appropriate methods for determining if infringement, or what I have referred to in slightly different terms as impermissibly excessive borrowing (IEB), have occurred in a particular case. These tests are identified as *de minimis* and "substantial similarity" tests. Superficially, IEB is similar to "substantial similarity" and therefore is already implicated within matters of potential copyright infringement. However, insofar as a distinction exists between the definition that legal authorities have assigned to "substantial similarity" and that which I proffer as IEB, I begin this section by defining the relevant terms. I then emphasize the appropriateness and applicability of IEB with respect to a critique of the *Grand Upright* decision. (I therefore provide a definition of *de minimis* and "substantial similarity" as applied in previous cases.) I then re-consider the decision of the *Grand Upright* court

through the theoretical lens of “democratic experimentalism,” a principle of legal interpretation. I argue for its relevance for considering cases of potential copyright infringement wherein, as with the two tests previously mentioned, there are no precisely quantifiable criteria for determining infringement. Subsequently, I address various artistic purposes for which recording artists, including Biz Markie, could claim to be engaging in the sampling process and the implications that these purposes may have for the rules of intellectual property and copyright law under which they operate. I also argue that considering each one of these issues—the individual tests and even the individual artistic purposes—by themselves to the exclusion of others, is an inadequate method for assessing claims of musical copyright infringement, and, as explained in the conclusion, and in accordance with the experimentalist perspective, how they must be considered more or less concurrently and in a slightly modified fashion.

Three terms must be defined in order to adequately understand how matters of potential infringement, be they of compositions or sound recordings that contain them (or for other media for that matter), are determined: infringement, *de minimis* and “substantial similarity.”

The Dictionary of Terms and Phrases Used in American or English Jurisprudence by Benjamin Vaughan Abbott from 1879 provides the following explanation of infringement of copyright.

To show that one literary work may have been suggested by another, or that some parts or pages of it have resemblances, either in method, details, or illustrations, is not sufficient to establish infringement; the complainant must further show that such resemblances are so close, full, uniform, and striking, as to lead to the conclusion that the one is a substantial copy of the other, or mainly borrowed

from it. [...] And the mere colorable variations intended to evade liability for infringement will not destroy the identity of the two books. If a material part of the copyrighted publication is used, the alleged piratical work, though it may be in some respects an improvement, is [still] an infringement.¹

Abbott goes on to state, in terms quite prescient of Judge Hand in *Fred Fisher*, that

the question of the motive of [the] defendant has not much to do with the question of infringement, except in balanced cases. If a comparison of the two works indicates clearly that the defendant, in the preparation of his work, has in fact made use of the plaintiff's to an extent unwarranted by law, the absence of an intent to violate the law will not relieve him from the consequences of his acts.² The inclusion of musical compositions within the purview of Abbott's definition

of copyright infringement is not evident within this particular entry—insofar as musical compositions are not explicitly addressed or included. Abbott refers to “books such as dictionaries, gazetteers, grammars, maps, arithmetics, almanacs, concordances, [en]cyclopedias, itineraries, guide-books, and similar publications,”³ the last of these not plausibly inclusive of musical compositions. (This is to say nothing of the sound recordings that contain them, given the year of this dictionary's assembly and publications—1879.) However, since Abbott also makes clear that “the determination of the question of infringement varies somewhat with the nature of the work under consideration,”⁴ the implicit principle is that these definitions can be applied in the consideration of works and media theretofore unknown and only subsequently developed. Accordingly, it is instructive to examine the definitions of a later source to see if or how

¹ Benjamin Vaughan Abbott, *Dictionary of Terms and Phrases Used in American or English Jurisprudence Vol. 1* (Boston: Little, Brown, and Company, 1879): 606.

² *Ibid.*, 606-607.

³ *Ibid.*, 606.

⁴ *Ibid.*, 606.

the notion of infringement has changed, whether by expansion or by limitation of definition.

The 2009 edition of *Black's Law Dictionary*, one of the most widely used and authoritative legal sources still in use, provides nearly two full pages that feature various permutations of the general concept of infringement, including “contributory, domain-name, and trademark” infringements.⁵ This illustrates how the concept of infringement has developed over the intervening 130 years, in part, because of the expansion of technological means for artistic creation. Since the definition of the general concept is “an act that interferes with one of the exclusive rights of a patent, copyright, or trademark owner,” this definition, as well as the more refined definitions of the practice of infringing the above-mentioned and several other characteristics of a created product, indeed indicates the expansion in the manners of the manifestation of infringement to accommodate the advances in technology over the intervening period that allowed for different media of artistic and literary creation.

The second term that must be defined is *de minimis*, which refers to one of the two tests mentioned above for determining infringements on musical compositions and/or sound recordings. The 1879 *Dictionary* provides the full Latin phrase, “de minimis non curat lex,” translated therein as “the law does not concern itself with trifles,” and, in the course of explaining the implications of this doctrine for the general practice of accepting and adjudicating various cases and complaints, makes clear its relevance to quantitative/quantifiable facets of potentially justiciable matters to be considered by a

⁵ *Black's Law Dictionary*, edited by Bryan A. Garner et al., (St. Paul, Minnesota: Thomson Reuters, 2009): 851-852 (Hereafter *Black's*).

court which can include, as will be demonstrated below, the *amount* of musical material “sampled” or otherwise appropriated in cases of potential musical infringement. As the *Dictionary* says,

as a general rule, the law does take cognizance of matters of small pecuniary value or trivial importance; and does not refuse to regard matters otherwise properly within its cognizance, merely because the question raised on the amount involved is of small consequence. [...] For example, every felonious taking of property is criminal, whatever may be the value of the property. [...] But as to mere technical defects, trifling irregularities, or omissions of established forms not affecting substantial rights, the maxim fully applies; and the courts do not take notice of trifling deviations in matters of practice.⁶

As interpreted or construed in terms of a potential relation to the sheer quantity of material in any manner affected, such as tangible or intellectual property, and with particular reference to the phrase “trifling irregularities,” this definition indicates that there is an inadequately identified, but perhaps intuitively recognized, minimum threshold below which a court may deem it inappropriate or unnecessary to intervene. This is further clarified by the definition of this doctrine in the 2009 edition of *Black’s* under which a matter may be “so insignificant that a court may overlook it in deciding an issue or case.”⁷

The third and final term that concerns us is “substantial similarity.” The term “similarity” does not appear in its own individual entry in the 1879 *Dictionary*, but “substantial,” as it relates to its parent term, “substance,” does. Yet another indication of the ability, and even necessity, of certain legal principles to be adapted to changing forms of literary and artistic creation comes in the form of Abbott’s admonition that “what is meant by the ‘substance,’ in a given connection, is a matter of construction varying with

⁶ Abbott, *Dictionary of Terms and Phrases*, 345.

⁷ *Black’s*, 496.

the nature of the subject-matter. The decisions involving these words will be found to turn, not upon any peculiar significance of substance as a law term [in itself], but on the question, what is the substance of a given affair or transaction.”⁸

The 2009 *Black’s*, however, both mentions and defines “substantial similarity.” As it relates to both copyright and intellectual property, it is defined as “a strong resemblance between a copyrighted work and an alleged infringement, thereby creating an inference of unauthorized copying.”⁹ *Black’s* then provides a concise explanation of the test to be executed in making such a determination. “The standard for substantial similarity is whether an ordinary person would conclude that the alleged infringement has appropriated *nontrivial* amounts of the copyrighted works’ expressions.”¹⁰

Let us briefly consider a few prior cases in which both the *de minimis* and “substantial similarity” standards were employed before discussing how they could and perhaps should have been considered by the *Grand Upright* court.

Beginning with cases involving *de minimis* considerations, *Marks v Leo Feist, Inc.* stands out as one in which the sheer quantity of the musical material appropriated, external to the potential significance it possessed for the original composition as a whole, was considered by that court. In this matter, Edward B. Marks brought suit against Leo Feist, Inc. for the latter’s supposed infringement on the copyright of the former’s “Wedding Dance Waltz” through the latter’s “Swanee River Moon,” which contained six measures of the former’s “Wedding Dance Waltz.” Significantly, “the composer of the

⁸ Abbott, *Dictionary of Terms and Phrases*, 513.

⁹ *Black’s*, 1509.

¹⁰ *Ibid.*, 1509. Emphasis added to differentiate this principle from *de minimis*.

‘Swanee River Moon’ [swore] he never knew of the composition entitled ‘Wedding Dance Waltz’ and never heard it played” until long after it was initially copyrighted. Finding against the plaintiff in this case, Judge Manton, apparently taking no heed of the potential significance of these six measures for the entire 450 measure composition, simply declared that

to constitute an infringement of the appellant’s composition, it would be necessary to find a substantial copying of a substantial and material part of it. [...] The exclusive right granted to the appellant by his copyright to print, reprint, publish, copy, and vend does not exclude the appellee from the use of 6 similar bars, when used in a composition of 450 bars.¹¹

A second and much more recent case entailed a similarly justified dismissal on grounds of *de minimis*, but this time in a case that was complicated by consideration of copyrights placed on both the musical composition and the recording that contained it as well as an appeal to the distinction between the musical composition at issue *as written* and the composition *as recorded* being used to find in favor of the defendant. In *Newton v Diamond*, a professional flautist, James Newton, sued the Beastie Boys for their alleged infringement of one of his compositions, entitled “Choir,” for their work, “Pass the Mic.” The latter contained a digital sample of six seconds of the former looped over forty consecutive times for the background of the latter. The pernicious distinction between the copyright placed on a musical composition and a separate one placed on a recording that contains it was central to this case insofar as Newton contended that while the Beastie Boys secured a license to sample from the recording company, no such license was secured for the use of the actual composition. As the *Bridgeport* court would hold in 2004, the *Newton* court held only that a license was needed for the use of the recording

¹¹ *Marks v Leo Feist, Inc.*, 290 F. 959, 960 (1923).

itself since the composition *as written* was significantly different from the composition *as recorded*, insofar as the former did *not* contain various performance techniques that were executed for the latter.¹² Judge Manella, writing for the Court, explained not only this distinction *per se*, but also how it necessarily implicates what *features* of the *composition* are being appealed to for Newton's purported right to initiate an infringement action with respect to the composition.

Plaintiff [Newton] argues that analytic dissection is not required, because copyright law automatically protects copyrightable expression reduced to a musical score *or* phonorecord. Plaintiff's argument begs the question as to what is protected by his copyright over the musical composition, as opposed to ECM's [the record company] copyright over the sound recording. [...] [The] Court must first determine precisely what is protected by Plaintiff's copyright over his *musical composition*.¹³

Blessing's summary is substantiated by a lengthier explanation from the Court.

Judge Manella provides this in a subsection entitled "The *Sample* of Plaintiff's *Musical Composition* is Unprotectable."¹⁴

The protectability of elements of a copyrighted work is a question of law for the court. [...] Although the musical composition of *Choir* is protected as a complete work, not every element of a song is *per se* protected. [...] Copyright protection extends only to those components of the work that are original and non-trivial.

¹² Blessing, "Who Speaks Latin Anymore?," 2399-2400.

In addition, the commentary of Eric Leventhal on this ontological distinction and its application to *Bridgeport* in particular would be helpful here: "Perhaps the most obvious reason why music is worthy of different treatment [in copyright litigation] is implicitly codified in the statute via the inclusion of two separate types of works in the form of sound recordings and musical compositions. These two works are treated as entirely separate in the United States Copyright Act and often, as *Bridgeport* demonstrated, in the judiciary. This separation belies a complexity that sets the musical copyrights apart from the other copyrightable forms of art...[and] demonstrates why music's statutory formulation exists in its present dichotomy and why it necessitates, by virtue of its complexity, different treatment in the judiciary." Eric Leventhal, "Would You Want William Hung as Your Trier of Fact? The Case for a Specialized Musicology Tribunal," *Texas Law Review* 90 (2012): 1570-1571.

¹³ Emphasis added. *Newton v Diamond*, 204 F. Supp 2d 1244, 1249 (C.D. Cal 2002) (hereinafter *Newton*).

¹⁴ Emphasis added. *Ibid.*, at page 1252.

[...] In the instant case, Plaintiff’s three-note sequence (C—D-flat—C) with one background note (C), segregated from the entire piece, cannot be protected, as it is not original as a matter of law. Many courts have found that nearly identical *or more substantial* samples are not susceptible to copyright protection.¹⁵

The Court accordingly found that the sampling was a *de minimis* question. Defendants appropriate a six-second sample consisting of a three-note sequence from a musical composition that takes approximately four and half minutes to play. [...] *Quantitatively*, this sample is thus approximately 2% of the piece. [...] Moreover, Plaintiff identifies no factors—separate and apart from those attributable to the unique performance techniques—that would render the three-note sequence *qualitatively* important to Plaintiff’s entire composition of *Choir*.¹⁶ Cases such as this illustrate the conceptual complexities attendant to such

disputes, as they necessarily require considering both the musical compositions and the sound recordings that contain them as ontologically and functionally distinct yet interdependent entities.

Returning to the question of musical copyright infringement involving tests of “substantial similarity,” Ronald Thomas explains that substantial similarity tests can include *either a de minimis, or purely quantitative approach, or a “quantitative/qualitative analysis.”*¹⁷ (Hence my previous distinction between *de minimis* and “substantial similarity.” Here a second option under the general heading of substantial similarity is available.) One such particularly tantalizing case was *Seth Swirsky v Mariah Carey* from 2004.

This action was brought by Seth Swirsky against Mariah Carey for her alleged infringement of the former’s composition entitled “One of Those Love Songs” in her work “Thank God I Found You.” This case is particularly noteworthy for its inclusion of the expert testimony of a distinguished musicologist, Robert Walser, then at the

¹⁵ Emphasis added. *Ibid.*, at page 1253.

¹⁶ Emphasis added. *Ibid.*, at page 1258.

¹⁷ Thomas Jr., “Digital Sampling in the Music Industry,” 19.

University of California at Los Angeles. The Ninth Circuit, which presided over this case, employed a “substantial similarity” test informed by Walser’s expert testimony.

Curiously, the Court imposed an “extrinsic” and “intrinsic” test to determine whether Carey’s work was substantially similar to Swirsky’s. While the “intrinsic test” was deemed unnecessary for summary judgment, it is nonetheless defined by the Court as “[a] subjective question whether works are intrinsically similar [that] must be left to the jury.”¹⁸ However, the

‘extrinsic test’ considers whether two works share a similarity of ideas and expression as measured by external, objective criteria. [...] The extrinsic test requires ‘analytical dissection of a work and expert testimony.’¹⁹ [...] ‘Analytical dissection’ requires breaking the works ‘down into their constituent elements, and comparing those elements for proof of copying as measured by ‘substantial similarity.’²⁰

Writing for the Court, Judge Canby described Walser’s comparisons of the two works at issue and the resulting conclusions as follows.

Dr. Walser admitted that the lyrics and verse melodies of the two songs differed ‘clearly and significantly,’ but stated that the two songs’ choruses shared a ‘basic shape and pitch emphasis’ in their melodies which were played over ‘highly similar basslines and chord changes[.]’ [...] Dr. Walser also noted that it was a ‘suspicious coincidence’ that that two songs’ choruses were both sung in B-flat. Dr. Walser further testified that the choruses in both [these works] shared a similar structure in that measures five through seven of each chorus were ‘almost exactly’ the same as the first three measures of each chorus. [...] [Notwithstanding some significant distinctions], Dr. Walser ultimately concluded...that these differences were *not* enough to differentiate the songs because the overall emphasis on musical notes was the same, which ‘contribute[d] to the impression of similarity one hears when comparing the two songs.’²¹ The actions of the Ninth Circuit in reversing key facets of the lower district

court’s handling of this matter are quite instructive in terms of their justifications. It is

¹⁸ *Seth Swirsky v Mariah Carey*, 376 F. 3d 841, 845 (9th Cir. 2004) (hereinafter *Seth Swirsky*).

¹⁹ As cited from a previous case.

²⁰ *Seth Swirsky*, at page 845.

²¹ Emphasis added, *Ibid.*, at page 845-846. Internal quotations are from Walser.

clear that the Ninth Circuit considered this evaluation as more complicated than terms such as “extrinsic” and “objective” might indicate. For instance, the lower district court had apparently compared the two works by performing a “measure-by-measure comparison of [the] melodic note sequences from the full transcriptions of the choruses.”²² This might seem to be the epitome of an empirical, objective comparison of the two works, eminently appropriate for determining matters of potential musical copyright infringement. The Court, however, expanded the parameters of what could accurately be considered under this objective, extrinsic test in a way that led Miah Rosenberg to accuse the Court of not actually implementing such a test insofar as “subjective” opinions of Walser as to the musical items to be compared and/or deemed significant for potential infringement were considered.²³ The Court explained that

objective analysis of music under the extrinsic test cannot mean that a court may simply compare the numerical representations of pitch sequences and the visual representation of notes to determine that two choruses are not substantially similar, *without regard to other elements of the composition*. [...] No approach can completely divorce pitch sequences and rhythm from harmonic chord progression, tempo, and key, and thereby support a conclusion that compositions are dissimilar as a matter of law.²⁴

The Court ultimately found that the “substantial similarity” standard was met. The fact that the Ninth Circuit had overturned the lower court’s discounting of Walser’s expert testimony clearly indicates the vital role that musicologists can play, given their unique expertise, in musical infringement cases. The Court expressly endorsed the necessity of expert musicological assistance in such issues by stating that

²² *Ibid.*, at page 847.

²³ Rosenberg, “Do You Hear What I Hear?,” 1690.

²⁴ Emphasis added, *Seth Swirsky*, at page 847-848.

in analyzing musical compositions under the [applicable] test[s], we have never announced a uniform set of factors to be used. [...] There is no one magical combination of factors that will automatically substantiate a musical infringement suit; each allegation of infringement will be unique. So long as the plaintiff can demonstrate, *through expert testimony* that addresses some or all of these elements and supports its employment of them, that the similarity was ‘substantial’ and to ‘protected elements’ of the copyrighted works, the [applicable] test is satisfied.²⁵

Opinions such as this demonstrate the benefits that expert testimony by musicologists can provide for musical copyright infringement litigation. Furthermore, it attests to the pragmatic necessity of considering the unique circumstances of each individual instance of digital sampling to determine if, how, and to what extent various statutory copyright protections were violated. Finally, it recognizes, even if only by implication, that quantitative and qualitative characteristics of both the original composition and the new one contained in a new recording are not the only factors that can or even should be considered in copyright infringement cases. Others may be just as relevant to the inquiry. They shall be considered in the second section of this chapter.

SECTION TWO

THE NEED TO CONSIDER BOTH QUANTITY AND SIGNIFICANCE OF SAMPLED MATERIAL TOGETHER AS WELL AS ARTISTIC PURPOSES PREFERRED FOR ITS USE, AND THE ROLE THAT “DEMOCRATIC EXPERIMENTALISM” CAN PLAY IN FACILITATING THIS

My formulation of “impermissibly excessive borrowing” differs from “substantial similarity,” particularly as defined in *Black’s* in ways that render it particularly appropriate for a reconsideration of *Grand Upright* and other sampling cases. The definition of “substantial similarity” as found in *Black’s* is helpful, but is ultimately incomplete. In the first portion of the definition quoted above, the actual *quantity* of the

²⁵ Emphasis added, *Ibid.*, at page 849.

material that is appropriated is not mentioned. While the material being used can be very significant, the sheer quantity itself could at the same time be so miniscule as to be “trivial” and, therefore, perhaps not an amount that the second portion of the definition indicates is constitutive of substantial similarity. Accordingly, questions of IEB which entail quantity *as well as* significance and are not considered in either *Newton* or *Swirsky*, should jointly and severally be considered.²⁶ In addition, the various artistic purposes for which the sampling is being undertaken should also be weighed, particularly in light of the broad range of such ends that could grant artistic “cover” to the sampling process. A relaxation of penalization—even if not outright immunity—towards those who are doing the sampling might result under such circumstances.²⁷

The need to consider both of these factors *together* in matters of potential musical copyright infringement is motivated and even endorsed by a conceptual framework known in legal scholarship as “democratic experimentalism.” The literature on “democratic experimentalism” has grown considerably over the past fifteen years, the apparent “cornerstone-laying ceremony” for the public promulgation of this method

²⁶ Notice Justice Story’s admonition in the 1841 case of *Folsom v Marsh* that “the nature and objects of the selections made, *the quantity and value* of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work” should be considered. -Emphasis added. *Folsom v Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841), as cited in Johnson 1993-1994: 143.

²⁷ These would include “borrowing, selfborrowing, transformative imitation, quotation, allusion, homage, modeling, emulation, recompositions, influence, paraphrase and indebtedness.” Attributed to Howard Mayer Brown and cited in Wellett Potter and Heather A. Forrest, “Musicological and legal perspectives on music borrowing: Past, present and future,” *Australian Intellectual Property Journal* 22 (2011): 139.

Implied within such options is the consideration of, among other factors, the degree to which the musical material being sampled was altered, the significance of the sampled material not only for the original composition from which it was extracted but also for the new one, and whether the sampling is occurring in a new composition for some kind of critical or satirical purpose. Burkholder, “The Uses of Existing Music,” 868-869.

coming in the form of the publication of a monograph-length article entitled “A Constitution of Democratic Experimentalism” by Michael C. Dorf and Charles F. Sabel.²⁸ While this document is eminently useful for its exhaustive presentation of this method, the conditions antecedent to its development (which rendered it necessary), and its application to various social, governmental, and juridical issues, I deem it more appropriate and less complicated to promote the use of “democratic experimentalism” in cases of digital sampling as expounded in Sabel’s subsequent article, “Dewey, Democracy and Democratic Experimentalism.”²⁹ In this article, Sabel credits “democratic experimentalism” as facilitating “that form of self-government which, *under ever new circumstances*, affords the greatest possible scope to the social intelligence of problem solving and the flourishing of individual character as its condition and product,” as well as the means “either to act in conformity to a rule, *or to provide a compelling account (as gauged by the experience of peers in similar situations) of why it is reasonable to deviate from the prescribed practice locally and perhaps more generally*” in the course of deliberations on particular legal matters.³⁰

Since “substantial similarity” and *de minimis* are principles that do not entail an exact, or even somewhat empirically calculable, formulation for their application to digital sampling cases, what interests me here is the possibility of a more cogent method and more broadly applicable criteria by which instances of infringement or IEB could be

²⁸ Michael C. Dorf and Charles F. Sabel, “A Constitution of Democratic Experimentalism,” *Columbia Law Review* 98 (March 1998): 267-473. (This is the pagination of the entire article.)

²⁹ Charles Sabel, “Dewey, Democracy, and Democratic Experimentalism,” *Contemporary Pragmatism* 9 (December, 2012).

³⁰ Emphasis added. *Ibid.*, 37.

assessed. This would imply the determination of the incident “boundary of permissibility,” traversal *beyond* which a judge could reasonably conclude is constitutive of infringement or impermissibly excessive borrowing. If it is the case that “experimentalist arrangements are found in...areas of environmental protection...[,] regulation of telecommunications, energy, drug authorization, occupational health and safety, food, maritime, and rail safety, data privacy, employment promotion, social inclusion[,]...pension reform, and more recently in health care, anti-discrimination policy, and competition policy,”³¹ then I cannot discern any intrinsic methodological or ethical barrier to its use in the legal and musicological investigations of musical recordings and the attendant claims of infringement or impermissibly excessive borrowing—especially in cases where no criteria have been explicitly set forth by a particular court. (I can even safely justify its use on the grounds of its at least vague relevance to the “regulation of telecommunications.”) In addition, since Justin London has observed that contemporary musicology incorporates the methods and concerns of “reception history, feminist theory and gender studies, Marxist theory, post-colonial theory, and other forms of textual criticism,”³² there does not seem to be any inherent barrier to employing the methods and concerns of *legal studies*, yet *another* disciplinary framework. Even more to the point, the incorporation of the expert advice and testimony that musicologists are uniquely capable of providing in such matters would be essential to the overall empirical method of determining instances of infringement. “[P]rofessionals

³¹ *Ibid*, 46-47.

³² Justin London, “Musicology,” in *The Routledge Companion to Philosophy and Music*, edited by Theodore Gracyk and Andrew Kania (New York: Routledge, 2011), 497.

who understand the larger body of recorded popular music are better able to view songs objectively and may therefore be less susceptible to the subjective whims of humanity's emotional connection or lack thereof," thus avoiding the "subjectivity [which] plagues the infringement analysis and leads to undesirable verdicts, diminished creativity, and unnecessary licensing brought on by fear of litigation."³³

The use of a "democratic experimentalist" perspective, as generally construed above, will require the establishment of a more cogent method and more broadly applicable criteria for determining whether instances of infringement or impermissibly excessive borrowing have occurred. The criteria will include those that were mentioned above: the *quantity* of the material sampled, the *qualitative significance* of the material sampled to the original composition as well as to the new one, and *various artistic purposes* for which the sampling was executed. The use of this method, and the criteria developed under it, will provide a supplement to the opinion of Judge Kevin Thomas Duffy, in the case of *Grand Upright Music Limited v. Warner Brothers Records, Inc.*, in which Judge Duffy basically determined that impermissible "sampling" in a musical recording of Biz Markie had occurred by virtue of the fact that *some* kind of borrowing, no matter how small, had occurred on Biz Markie's recording. Such supplementation is necessary in light of the practical shortcomings in applying only one of these tests, as some of the cases mentioned above, including *Grand Upright*, have done. As Carl Falstrom has commented, "the decision rendered all unauthorized sampling legally suspect; no distinction seemingly could be made between small bites and large cuts,

³³ Leventhal, "William Hung," 1577.

between instantly recognizable ‘trademarks’ and impossibly obscure and mundane banalities.”³⁴ It is my hope that through such an experimentalist perspective, courts will expand their entertainment of musicological considerations, ideally through the expertise of musicologists themselves, for the determination of infringements—even if they may initially appear as “analytic dissection[s]”³⁵ which a judge may not feel he or she is especially qualified to perform. As Potter and Forrest have argued,

inviting the expertise of musicologists into copyright law helps to tailor what is otherwise a rather generally articulated statute...and to take into consideration the special characteristics of music. Just as genetic biologists and chemists may assist a court in determining a case of patent infringement, expert testimony of musicologists has a place in determinations of copyright infringement.³⁶

We begin with considering the sampling in *Grand Upright* as it relates to potential infraction of the standard of “substantial similarity.” Given Judge Duffy’s rather hasty and dispositive opinion, it may appear that the material used was so substantially similar as to immediately warrant a finding of this offense. Indeed, the material that Biz Markie had sampled was directly from, and therefore identical to, the material on Gilbert O’Sullivan’s original recording. However, as the cases mentioned below will illustrate, the discernment of previously composed material, and thus of an instance of substantial similarity, is not as easy as one may think from the terms of a written decision.

The circumstances of *Grand Upright* are such that it would be reasonable for one to assume that, if presented to a jury, they would immediately conclude that Biz Markie’s

³⁴ Carl A. Falstrom, “Thou Shalt Not Steal: Grand Upright Music Ltd. V. Warner Bros. Records, Inc., and that Future of Digital Sound Sampling in Popular Music,” *Hastings Law Journal* 45 (1994): 368.

³⁵ *Newton*, at 1249.

³⁶ Wellett Potter and Heather A. Forrest, “Musicological and legal perspectives on music borrowing: Past, present and future,” *Australian Intellectual Property Journal* 22 (2011): 155.

work was sufficiently similar to the original by O’Sullivan to warrant a judgment of copyright infringement. This is because upon hearing and comparing both O’Sullivan’s original and Biz Markie’s subsequent composition, the presence of the pivotal material of the former within the latter, particularly with the frequency of its use and the indispensable contextual significance it affords, would be so obvious that it might be difficult to argue otherwise. Determining copyright infringement by virtue of substantial similarity between musical compositions has sometimes been accomplished with remarkable facility. For instance, the opinion of Judge Learned Hand in *Hein et al. v. Harris* occupied less than two full pages in the *Federal Reporter* and clearly indicated the ease of deciding that matter under its rather unproblematic circumstances.

I have no difficulty in finding that the defendant’s song is an infringement of the complainant’s. [...] [O]ut of a total of 17 bars, the first 13 are substantially the same in each song; and whether or not the defendant, as he alleges, had never heard the complainant’s song, when he wrote his [song]...[it] is certainly an infringement, and the complainant under his copyright is entitled to protection.³⁷ Jeffrey Sherman would later remark that the circumstances of this particular case

were so simple and clear that no empirical method of determining substantial similarity was necessary. “The two songs [at issue] sound so much alike, even to the untrained ear, that it is difficult to understand why it was felt necessary [by Judge Hand] to resort to...pseudo-scientific devices to determine that there was substantial similarity.”³⁸

However, not all cases are as clear-cut as *Hein et al. v. Harris*—perhaps not even *Grand*

³⁷ *Hein et al v Harris*, 175 F. 875, 876 (1910).

³⁸ Jeffrey G. Sherman, “Musical Copyright Infringement: The Requirement of Substantial Similarity,” *Copyright Law Symposium* 22 (New York: Columbia University Press, 1977), 131-132.

Upright despite Judge Duffy’s minimally engaged opinion.³⁹) The primary reason for this does not stem so much from disagreement as to the degree of similarity between compositions so much as it relies on the necessary antecedent to such a consideration: arriving at an understanding of “substantial similarity” in the first place to be used which has been frustrated by the differences among courts as to the constituent elements of such a test. For instance, the United States District Court for the Eastern District of Louisiana in *Positive Black Talk, Inc. v. Cash Money Records* presented a jury instruction which entailed a rather nebulous concept to be considered in determining substantial similarity.

Two works are substantially similar if the expression of ideas in the plaintiff’s copyrighted work and the expression of ideas in the defendant’s work that are shared are substantially similar. The test for expression of ideas is whether the intended audience would find *the total concept and feel* of the two songs to be substantially similar.⁴⁰

The principle of the “total concept and feel,” in light of its inadequate qualification by the trial court, was accordingly subsequently deemed impermissible and rejected. This was by no means the first instance of a superior court overruling an ill-defined concept of infringement in jury instructions. In *Harper House, Inc. v. Thomas Nelson, Inc.*, the Ninth Circuit held to a very similarly worded principle from the jury instruction of a lower court to be contextually vague and inappropriate. “The highly subjective ‘total impact and feel’ test of Instruction No. 9 was insufficient, particularly in

³⁹As Eric Leventhal has observed, “any test for musical infringement that analyzes potentially illicit activity solely based on a lay, subjective understanding of music is inherently problematic.” Leventhal, “William Hung,” 1558-1559.

⁴⁰Emphasis added. *Positive Black Talk, Inc. v. Cash Money Records* 394 F. 3d 357, 373 (5th Cir. 2004) This was the jury instruction given by the lower court.

light of the district court's refusal to give the Defendants' proposed instructions regarding unprotectable elements."⁴¹

Additional complications associated with determining substantial similarity stem from that circumstance which naturally dovetails with the often nebulous definitions afforded to the criteria for substantial similarity: the insufficient familiarity with the mechanics of music frequently possessed by jurors. As Jamie Lund, professor of intellectual property law at St. Mary's University School of Law, points out,

a review of actual jury instructions suggests that no court has ever included language that singled out specific musical elements [such as melody, rhythm, and harmony.] [...] One reason for their absence might be a doctrinal split about whether a jury should be looking at infringing expressions analytically or holistically. Another more practical argument is that some jurors would not understand what was meant by the terms melody, rhythm, and harmony. If they were not within a juror's everyday experience, it would be difficult to effectively instruct the jury as to their meaning without the investment of substantial time and resources.⁴²

Furthermore, empirical research into musical perception, even that executed with respect to the experiences of jurors in musical infringement cases where a determination of substantial similarity was entailed, illustrates the difficulties associated with discerning the degree of similarity under the particular performative circumstances. According to the experimental research of Jamie Lund, the "manner of *performance* of musical compositions significantly affects listener *perception* of similarity between them."⁴³ For her research, Lund prepared electronic transcriptions with Sibelius notation software of pieces that had been featured in previous musical infringement litigation. One set of

⁴¹ *Harper House Nelson, Inc. v. Thomas Nelson, Inc.*, 889 F. 2d 197, 207 (9th Cir. 1989).

⁴² Jamie Lund, "An Empirical Examination of the Lay Listener Test in Music Composition Copyright Litigation," *Virginia Sports and Entertainment Law Journal* 2012, 25.

⁴³ Emphasis original. *Ibid.*, 19.

participants heard versions rather faithfully transcribed, and another set heard the same works, but with considerable differences in tempo, orchestration, key, and style. The participants perceived a significantly lower degree of similarity between compositions performed with such alterations than they did in more “similar” transcriptions.⁴⁴ This research indicates that opposing matters of *performance*—here meaning various circumstances of tempo, orchestration, key, and style between two or more versions of a work—demonstrably affect the degree to which an audience could perceive substantial similarity. Accordingly, transplanting such observations into *Grand Upright* and noticing how O’Sullivan’s underlying harmonic progression is obscured and/or contextually distanced from immediate perceptibility by Biz Markie’s lyrics, a jury *may* have difficulty determining substantial similarity.⁴⁵ This would still be unlikely given that transcriptions could be made of the original and the offending works and their substantial similarity would be immediately visually ascertained, thus perhaps facilitating the aural perception of the similarity. In other words, the imposition of a new voice and set of lyrics to previously composed material might render the determination of substantial similarity more difficult to accomplish than it was in a matter such as *Hein et al. v. Harris.*, particularly since, in Biz’s case, the lyrics are rapped instead of sung. Therefore, to the extent that substantial similarity was tacitly or implicitly considered by the *Grand Upright* court, it should *not* have been the sole factor. The “experimentalist” impulse

⁴⁴ Results summarized on pages 28-33 of Lund’s article.

⁴⁵ On this point, Leventhal has stated that “chord progressions demonstrate the extent to which music’s mathematical origins cause unique problems for is dual copyrights. [...] [They] only [scratch] the surface of the immense degree to which music as an art form is capable of academic comparison from an impartial, purely fact-based perspective.” Leventhal, “William Hung,” 1569.

requires the innovative consideration of multiple factors involving such a problem in circumstances, such as in digital sampling and musical infringement, where various standards are or were utilized, often not even uniformly within the same judicial jurisdiction—thus demonstrating the relative lack of stability in the employment of such methods and the need to proffer alternative or additional strategies.

I now address the applicability of the *de minimis* doctrine to *Grand Upright*. As with substantial similarity, this test was not expressly applied or appealed to by the *Grand Upright* court, since the very fact that *any* material from the original recording by O’Sullivan was used by Biz Markie without prior consent, and irrespective of any artistic purposes for which Biz sought to use the material, was constitutive of infringement.⁴⁶ However, implied within the hasty constraint against unlicensed sampling of *any* quantity is the development of a rather odd form of *de minimis* consideration.⁴⁷

Essentially, under the *Grand Upright* decision, *de minimis* could no longer be asserted to protect sampling from *sound recordings* even if not for notated musical compositions as written. Of course, in *Grand Upright*, the material at issue was the sample from O’Sullivan’s original recording, particularly, and understandably, in light of the unapproved manner of its use. Even here, however, one is not precluded from theoretically applying a *de minimis* consideration with respect to a sound recording

⁴⁶ Footnote 11 in *Bridgeport Music Inc. v. Dimension Films* identifies *Grand Upright* as a case in which “infringement [was] found without any substantial similarity analysis.” *Bridgeport Music Inc. v. Dimension Films*, 230 F. Supp. 2d 830 (M. D. Tenn 2002) (hereinafter *Bridgeport 2002*)

⁴⁷ Recall Carl Falstrom’s comment that “the decision rendered all unauthorized sampling legally suspect; no distinction seemingly could be made between small bites and large cuts, between instantly recognizable ‘trademarks’ and impossibly obscure and mundane banalities.” Falstrom, “Thou Shalt Not Steal,” page five of full text printout.

insofar as a recording is the very bearer of the musical composition.⁴⁸ It is a receptacle of the manifestations, through technologically advanced means, of the original notated composition. Therefore, it is logical and plausible for one to apply a test of *de minimis* towards excerpts of recordings sampled from previously existing recordings similar to those applied in earlier cases involving compositions themselves, since these excerpts contain the performed realization of the composition as written. The musicologist Albin Zak summarizes the simultaneously ontologically distinct yet in(ter)dependent nature of sound recordings and the compositions they contain.

It [is] useful to think of a recording as containing three distinct compositional layers: the song, the musical arrangement, and the track. The song is what can be represented on a lead sheet; it usually includes words, melody, chord changes, and some degree of formal design. The arrangement is a particular musical setting of the song. [...] The track is the recording itself. As the layer that represents the finished musical work, it subsumes the other two. [...] While the song and the arrangement are integral aspects of the finished work, both retain and *ontological independence*. They have modes of representation—lead sheets, scores, performances—*other than the recording*.⁴⁹

Indeed, the ontological distinction between musical compositions and the sound recordings that contain them, as well as the distinctions in the respective copyrights, were expressly postulated in *Bridgeport*, decided thirteen years after *Grand Upright* with that court's comparatively unusually and surprisingly cursory consideration of these two entities. However, one can excuse the *Grand Upright* court for such coverage insofar as it was the first notable case involving the phenomenon of digital sampling, and the process

⁴⁸ “[A]n infringer can violate one or both of a composer’s copyrights in her or her musical work. [...] The distinction between the composition copyright and the recording copyright does not provide an avenue to discard an established copyright infringement rule.”

Sykes, “Copyright,” 755-779.

⁴⁹ Emphasis added. Albin Zak, *The Poetics of Rock Composition: Multitrack Recording as Compositional Practice* (Berkeley, California: The University of California Press, 2001), 24.

of elucidating the implications for sound recordings within copyright jurisprudence was also still a recently opened line of inquiry. First such case or not, it does not appear that the development of digital recording and sampling technologies would have necessarily required the preclusion of *de minimis* considerations *just because* a new digital method of recording and format of storage are involved. The novelty of the sampling and recording processes, in other words, do not warrant either the complete exclusion of underlying compositions as written and recorded from *de minimis* considerations or the suspension of their inclusion in cases where a copyright also exists and extends to the recording that contains it. Nothing in the Copyright Act of 1976, which expressly identifies sound recordings as “works,” mandates that a *de minimis* test could only be performed upon the recording itself and not on the underlying composition, or vice versa. In fact, the Sixth Circuit, as far back as 1925, has maintained the necessity of including, within considerations of potential triggering of copyright legislation, various artistic media developed *subsequent* to the initial adoption of the relevant statute(s). That Court held, in *Jerome H. Remick and Co. v. American Automobile Accessories Co.*, that

the question presented [in that case] is whether, under the circumstances stated, the broadcasting of a copyrighted musical composition is an infringement of the statutory copyright. [...] While the fact that the radio was not developed at the time of the Copyright Act [of 1909] was enacted may raise some question as to whether it properly comes within the purview of the statute, it is not by that fact alone excluded from the statute. [...] While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries.⁵⁰

In fact, courts after *Grand Upright* have applied *de minimis* tests to the musical compositions as composed and contained on a recording rather than just to the collective

⁵⁰ *Jerome H. Remick and Co. v. American Automobile Accessories Co.*, 5 F. 2d 411 (1925)

aggregate known as “the recording” with inseparable characteristics of length, content, and manner of creation. Approximately two years prior to being considered by the Sixth Circuit, *Bridgeport Music, Inc. v. Dimension Films*, involving N.W.A.’s sampling of George Clinton’s “Get Off Your Ass and Jam” within the former’s “100 Miles,” was heard by the United States District Court for the Middle District of Tennessee (MDTN). Before being ultimately reversed by the Sixth Circuit, which essentially overruled the practice of applying *de minimis* tests to samples of *sound recordings* without a clear explanation, and thereby logically and hypothetically “requir[ing] a finding of infringement where a sampler incorporates a one-half section, single note sample from a copyright holder’s sound recording into the sampler’s new work,”⁵¹ MDTN actually did subject recordings and their underlying materials as composed and recorded to a *de minimis* test. The MDTN explained its prior reasoning for finding that the sampled materials was *de minimis* as follows, beginning with an acknowledgement of the inherent conceptual and practical challenges of such a case and the requisite caution with which the Court must handle it.

[A] Court’s role in making a *de minimis* analysis is a tricky one. [...] This role becomes even more challenging when presented with works from two genres of music with which many jurists... are not familiar, and the paucity of case law on the issue of whether digital sampling amounts to copyright infringement. Further complicating the process is the lack of clear roadmaps for *de minimis* analysis from the circuit courts of the Supreme Court. Still, the case law does provide loosely-defined standards and quite a bit of legal commentary has been written on digital sampling. [...]

The plaintiffs emphasize the importance of the sampled chord to the overall effect of ‘Get Off [Your Ass and Jam,]’ and the Court does not disagree with that analysis. However, the Court finds that the copied segment [in this case the one

⁵¹ Sykes, “Copyright,” 777.

chord] is not even recognizable to a lay observer as being appropriated from the plaintiff's work. [...] This fact, combined with the minimal quantitative copying and the lack of qualitative similarity between the works, warrants dismissal of [the plaintiff's] claims arising from infringement of its sound recording.⁵²

This finding, and the approach of subjecting recordings and their underlying materials as written and recorded, was overturned by the Sixth Circuit in 2004. While acknowledging the “mental, musicological, and technological gymnastics that would have to be employed if one were to adapt a *de minimis* or substantial similarity analysis” towards such entities, they rather emphatically explained that

to begin with, there is ease of enforcement. Get a license or do not sample. [...] [S]ampling is never accidental. It is not like the case of a composer who has a melody in his head, perhaps not even realizing that the reason he hears this melody is that it is in the work of another which he had heard before. When you sample a sound recording you know you are taking another's work product.⁵³

The divergent conclusions reached by these two courts offers but one example of the unfortunate reality that “there is no Rosetta stone for the interpretation of [certain] copyright statute[s].”⁵⁴ Given this circumstance, as well as “the paucity of case law” on *de minimis* governing its application in various artistic, particularly musical, contexts, it would not be appropriate to subject Biz's actions in *Grand Upright* solely to this test *either*. Theoretically, of course, one could do so in terms of both the quantitative and qualitative considerations referred to by the MDTN for *de minimis* tests of digital sampling. *De minimis* just might actually be found in *Grand Upright* on purely quantitative grounds for Biz's sampling since only the opening four measures of

⁵² *Bridgeport 2002*, at page 842.

⁵³ *Bridgeport 2004*, at page 398-399.

⁵⁴ *Ibid.*, at page 401.

O’Sullivan’s original piece were used,⁵⁵ but might not be on qualitative grounds given that the phrase “Alone Again, Naturally” and its musical accompaniment are looped repeatedly throughout Biz’s work and are, of course, indispensably significant facets of the overall original composition (see Figure 1.)

Score

Alone Again

(Naturally) Raymond "Gilbert" O'Sullivan

Slow 4 (doubletime feel) ♩ = 120

Figure1. First four measures of “Alone Again (Naturally)” looped throughout Biz’s recording⁵⁶

This demonstrates that *de minimis*, by itself, as with substantial similarity, would not be adequate to consider the merits or demerits of Biz’s actions even if it was found to

⁵⁵ But then again, it might not be. While Sykes observes that “a musician who utters the phrase ‘Yo Jude’ as a deliberate reference to The Beatles’ song *Hey Jude* in the musician’s own new song would probably be a[n] [acceptable] case of a *de minimis* use,” Biz’s use of the phrase “Alone Again, Naturally” which very clearly uses the most pivotal works of O’Sullivan’s original composition without any textual alteration would manifestly *not* fall under this kind of *de minimis* classification. This circumstance further complicates the application of *de minimis* alone to *Grand Upright*, and warrants the application of several tests in tandem, as emphasized above. Sykes, “Copyright,” 759.

Furthermore, the Second Circuit observed in 1930 that “there is a point in this series... where they are no longer protected. [...] Nobody has ever been able to fix that boundary, and nobody ever can.” What exactly would that point be? How would it be determined? Again, a *de minimis* test should not be used to the exclusion of others. *Nichols v. Universal Pictures Corp.*, 45 F. 2d 119, 121 (2d Cir. 1930).

⁵⁶ Transcribed into the Finale notation software. This score is contained within Milton Okun, *The New York Times Great Songs of the 70s* (New York: Times Books, 1978): This excerpt is on page 7.

be adequate on both of the aforementioned grounds by the MDTN in that particular matter.

In the preceding pages, I have addressed the nature of the two tests through which courts have traditionally examined the appropriation of pre-existing musical material into a new composition and/or recording for the purpose of determining whether infringement had occurred. As has been noted, each of these tests, while reasonable and applicable to a variety of cases, possess inherent limitations that would render their exclusive application, without the concurrent use of others, inappropriate in those cases. Furthermore, they are inadequate to the aim of developing a more cogent method that would more comprehensively weigh the various facets of sampling engaged in for particular cases. One such consideration would be the various artistic purposes for which the sampling was performed. The purposes are numerous and frustratingly synonymous in the names given to them if not in their actual definition. They include those described by Howard Mayer Brown: “borrowing, selfborrowing, transformative imitation, quotation, allusion, homage, modeling, emulation, recomposition, influence, paraphrase, and indebtedness.”⁵⁷

In order to differentiate these practices at least to some extent, a distinction between the two that would be most relevant and apposite for considering the artistic purposes behind sampling should be presented. A work of “transformative imitation” might be perceived by a court as not *really* an infringement or IEB if the transformative nature of the appropriation of the original material renders it sufficiently different or

⁵⁷ Potter and Forrest, “Musicological and legal perspectives,” 139.

unrecognizable. An instance of digital sampling may also be perceived by a court as an “homage”—the second of these two—and perhaps not an instance of infringement or IEB if the actual quoted material is part of a larger composition which was itself expressly intended to be written as an homage to another composer and for which purpose the sampled material was indispensable. It can be readily appreciated that, while it is more intellectually demanding, it is also more judicially appropriate, under the experimentalist impulse, to factor in the various artistic purposes to determine if infringement and/or IEB have occurred.

With regard to the first of these two categories, the Supreme Court has provided some guidance for its identification. In the 1994 case of *Campbell v Acuff-Rose Music, Inc.*, the final act of litigation that was initially brought by Acuff-Rose against 2 Live Crew for their alleged infringement of the Roy Orbison classic “Oh, Pretty Woman,” the Court presented the principle of a “transformative imitation” by posing a new prong of the copyright infringement tests, namely, one which

focuses on whether the new work merely supersedes the objects of the original creation, or whether and to what extent it is ‘transformative,’ altering the original with new expression, meaning, or message. The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.⁵⁸

Notwithstanding the usefulness of this principle, it too is not without its practical limitations. Particularly in regard to this “transformative imitation” principle, Anjani Mandavia has commented that

the transformative use analysis is, by its very nature, subjective and amorphous, often leading courts...to...attempt their own version of art analysis to assess the ‘character, meaning, expression and message’ of the challenged works. The

⁵⁸ *Campbell v Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (hereinafter *Acuff-Rose*)

results of these analyses... generally fail to give clear guidance... *on where the lines between infringement and fair use should be drawn.*⁵⁹

The confusion as to where the proverbial lines are to be drawn is apparent from the contrast between the two *Bridgeport* decisions, and is especially compounded by the distinction forged by the second of these two decisions between infringement of a musical composition and that of a sound recording *of* that composition. The confusion is considerably exacerbated by the fact that no uniformly applicable qualitative or quantitative standard exists for the assessment of claims of musical infringement through digital sampling, and by the fact that the judicial branch is functionally incapable of creating such a uniform standard. Such a line, were it to be drawn, or standard, were it to be enacted, could only come about through legislative action. As was made abundantly clear as far back as 1834 by Justice McLean in *Wheaton and Donaldson v Peters and Grigg*, copyright provisions are “originated, if at all, under the acts of [C]ongress. [...] [W]hether they are important or not, is not for the [C]ourt to determine, but [for] the [L]egislature. [...] [W]e are not at liberty to say that they are unimportant and may be dispensed with.”⁶⁰

The complications of this facet of determining musical infringement or IEB through sampling warrants the concurrent consideration of it as well as the two tests previously mentioned. Nevertheless, with respect to *Grand Upright*, it is important to consider whether Biz Markie’s appropriation of Gilbert O’Sullivan’s material could be

⁵⁹ Emphasis added, Anjani Mandavia, “*Cariou v. Prince*—Still No Real Clarity Regarding ‘Transformative Use’ in Appropriation Art,” Weintraub Tobin: The IP Law Blog, May 5, 2013, accessed January 25, 2014, <http://www.theiplawblog.com/archives/-copyright-law-cariou-v-prince-still-no-real-clarity-regarding-transformative-use-in-appropriation-art.html>.

⁶⁰ *Wheaton v Peters*, 8 Pet. (33 U.S.) 591, 663-664 (1834).

considered a “transformative imitation” that could be evoked for purely artistic or creative purposes. With regard to the perceptual difficulties associated with determining whether an instance of digital sampling is properly designated a “transformative imitation,” particularly if a court is operating without the expertise of musicologists, the observations of the MDTN in the first round of *Bridgeport* litigation and those of Jamie Lund with regard to the difficulties of the “lay listener” test are applicable. Insofar as Lund found that alteration in tempo, orchestration, key, and general style complicated the ability of a jury to discern similarity between the samples as changed and the original material from which they are derived, it is quite reasonable to assert that the imposition of an entirely new set of lyrics, rapped instead of sung, over the O’Sullivan sample, may similarly complicate the procedure of determining whether “transformative imitation” had taken place. One may immediately state that “imitation” has not occurred, but rather a direct replication, since the O’Sullivan sample was reproduced from the original recording. However, one must recall that such a practice may nonetheless *not* be deemed infringement and/or IEB *if* the “transformative” qualification is sufficiently present within the sampling. And yet, the very phrase “transformative imitation” implicates two conditions of the process of appropriating pre-existing material that have been defined and considered separately. For instance, Collie and Gorman refer to the potentially justiciable digital sampling of DJ Girl Talk and discuss the likelihood of findings of infringement in his sampling practices. Referring to the 1841 case of *Folsom v Marsh*, they contend that in that era, the inclusion of pre-existing, original material into a subsequently created and derivative work, constituted piracy of the original work.

However, since that time, the latitude extended to artists to incorporate what would eventually be identified as “sampling” was expanded to permit those instance where “something new, with a further purpose or different character, [and which alters] the first [work] with new expression [and] meaning” is added.⁶¹

The operative statement in Collie and Gorman’s explanation of the distinction between these two practices is that “a court will find [a musician’s] work is transformative, or furthers the purpose of the work, *because it does not supplant the original work*,” clearly indicating that, in a case such as *Grand Upright* where direct borrowing *did* occur, it might be untenable to attribute a “transformative” nature to Biz’s sampling. Therefore, infringement and/or IEB may actually be found.⁶² This would potentially obviate, or even preclude outright, a court from considering alterations that still exist in relation to the original work, such as those considered initially in *Bridgeport* by the MDTN. Based on the foregoing, and on the conflicting impulses between identifying a “transformative imitation” in the intuitively understood and expressly defined sense of the term and the possible procedural barriers to identifying an instance of digital sampling *as such*, it appears that this test is *also* not, by itself, sufficiently inclusive of various artistic purposes for which sampling could have been performed. Therefore, I turn to the second of the two artistic purposes previously referenced—homage—which may more adequately factor in these ancillary objectives.

⁶¹ Christopher C. Collie and Eric D. Gorman, “Digital Sampling of Music and Copyrights: Is It Infringement, Fair Use, or Should We Just Flip a Coin?” *Boston College Intellectual Property and Technology Forum* (December 2011): 4. Quotation from *Ringgold v. Black Entertainment Television, Inc.*, 126 F. 3d 70 (2nd Cir. 1997)

⁶² *Ibid.*

Biz Markie may have justified his unlicensed appropriation of O'Sullivan's materials on the basis of wanting to create an "homage" to the original work. It would seem that, in order for an instance of sampling to be correctly designated as an homage, or a reverential allusion to a previous composer and his work, some kind of direct statement of this intention should be made by the sampler. However, this requirement does not appear to be uniformly agreed upon. For instance, Collie and Gorman state that "in classical music [for example] small pieces of another artist's work are frequently used in a piece to pay homage to the influential author," without specifying what is required of the composer utilizing this pre-existing material in order for his practice to be given the cover of an homage.⁶³ Furthermore, McLeod and DiCola similarly do not identify any requirements on the part of the sampler for an instance of sampling to be called an "homage," but *do* make a distinction between the purpose of sampling, namely "[to] pay homage to one's musical predecessors, *or it can mock them*," thus identifying the divergent purposes for which sampling could be performed, and thus, also, identifying the inherent difference between homage and parody/satire.⁶⁴

With this distinction in mind, and in the unfortunate absence of any documentation in which Biz could have manifested his intentions, the commentary of Reuven Ashtar about *Grand Upright* may permit a more cogent assessment of Biz's

⁶³ *Ibid.*, 5.

⁶⁴ Emphasis added. Kembrew McLeod and Peter DiCola, *Creative License: The Law and Culture of Digital Sampling* (Durham, North Carolina: Duke University Press, 2011): 109.

purpose(s).⁶⁵ Lamenting, as several legal scholars before him have done, on the impropriety and short-sightedness of the decision in “Grand Upwrong,” Ashtar states that

the formative condemnation in *Grand Upright* is particularly incongruous in light of the sampler’s motivations. Markie is a notorious ‘digger’ who searches for the most esoteric music. His choice of a white pop star’s most famous song was indicative of his tendency to jest, and *would likely* qualify for the subsequently-affirmed fair use allowance for ‘parodic’ sampling. The laconic decision, framing unauthorized sampling as automatic copyright infringement, had an immediate chilling effect.⁶⁶

However, in the absence of an explicit statement of intent by Biz Markie himself as to the artistic purposes for which he could have sampled this material, identifying potential reasons, and proposing the various artistic designations that may be assigned to them, become more difficult. Given the more or less interchangeable and synonymous nature of many of the musical borrowing practices identified above by Howard Mayer Brown, it appears appropriate to determine whether Biz Markie’s actions could reasonably be assessed as either “transformative imitation” or “homage,” and, if so, whether or not coverage from the triggering of various copyright provisions could be provided by virtue of this whichever designation. The primary reason for focusing upon these two practices is that, more than any of the others referred to by Brown, these two implicate a fundamental artistic intention or ultimate purpose on the part of the sampler

⁶⁵ Throughout the Fall 2013 semester, I made numerous attempts to obtain official documentation of the proceedings of this litigation. In particular, I was interested in obtaining copies of transcripts, depositions, and other materials in which Biz’s intentions may have been recorded. After contacting the Court, Judge Duffy’s judicial clerks, the main Clerk of the Court, and the attorneys who argued either side of the case, I have not been unable to obtain any such materials. In addition, I contacted the National Archives and Records Administration facility in Missouri to which, the Court informed me, the case files were transported many years ago. They too informed me that, since they had disposed of them several years ago, they also could not provide me with any records of this case.

⁶⁶ Emphasis added. Reuven Ashtar, “Theft, Transformation, and the Need of the Immaterial: A Proposal for a Fair Use Digital Sampling Regime,” *Albany Law Journal of Science and Technology* 19 (2009): 266-267.

which may or may not be relevant to an inquiry of the permissibility of the particular practice under copyright law. Recall the principle that was expounded by the Supreme Court in 1994 that “‘transformative’ [works] [alter] the original with new expression, meaning, or message,” thus demonstrating a very clear intent on the part of the sampler—such as the case might be—to so change the original material.⁶⁷ Recall, also, the definition-by-default that was presented by virtue of the distinction forged by McLeod and DiCola between homage and parody/satire.⁶⁸ This distinction is further reinforced by the subsuming of “parody” within “transformative imitation,” and thus by the maintaining of the distinction between “transformative imitation” and “homage,” as illustrated in *Black’s* which defines “parody” as “a *transformative use* of a well-known work for purposes of satirizing, ridiculing, critiquing, or commenting on the original work, *as opposed to* merely alluding to the original to draw attention to the later work.”⁶⁹ “Homage,” on the other hand, would not, in a conventional sense, entail such a satirical purpose or effect in the sampling process. We can therefore explore whether Biz’s sampling could be considered an “homage,” given the difficulties associated with determining it to be a “transformative imitation” referenced above. While it is true that “each case is different and therefore there is not a pre-determined answer to state what is or is not a[n]...homage,”⁷⁰ I rely on the intuitive understanding of the term “homage” presented above, as it is a long recognized principle of the interpretation and/or construction of legal texts that “it cannot be pretended that the natural sense of words is

⁶⁷ *Acuff-Rose*, at 569.

⁶⁸ McLeod and DiCola, *Creative License*, 109.

⁶⁹ Emphasis added. *Black’s*, 1226.

⁷⁰ Email message to writer, Christopher Collier, February 5, 2014.

to be disregarded, because that which they impart might have been better, or more directly expressed [in other terms.]”⁷¹ In addition, and for the sake of providing a more particularly formulated definition, I rely on the definition of “homage,” in the context of digitally appropriating pre-existing materials for new works, provided by Mathias Klang and Jan Nolin.

Klang and Nolin identify what has become obvious during the course of this exploration of copyright laws, particular cases in which those laws have been applied, and particular creative contexts or mechanisms that have allegedly triggered those laws. This is: the difficulty in determining a precise definition of artistic practices such as “parody,” “satire,” and others and their judicial consideration in matters of copyright infringement. They state that

the development of technology...[has] created a convention where it frequently be[comes] difficult to draw a line between [various] types of references to original works [such as] parody, plagiarism, and homage. From the vantage point of the creator [of such a derivative work], this makes legal risks unpredictable, and therefore may have a chilling effect on the development of culture. [...] It becomes difficult to draw a line between...clearly illegal practices, and [a] *more accepted [genre]* [such as] homage.⁷²

The concluding sentence of the quotation above is rather curiously phrased; rather than make evident a distinction between “clearly illegal practices” and “clearly legal practices,” or “arguably legal practices,” or some other description that would at least imply, if not express, the possibility of the inherent legality of “homage,” they identify it as a “more accepted genre.” While this designation does not unambiguously assert the potential legality of the practice, such a condition is alluded to later by Klang and Nolin

⁷¹ *Fisher v Blight*, 6 US 358, 387 (1805).

⁷² Emphasis added. Mathias Klang and Jan Nolin, “Tolerance is Law: Remixing Homage, Parodying Plagiarism,” *SCRIPTed* 9 (August 2012): 177.

themselves when they qualify the distinction presented above with the statement that “if a work of art signals that it is [an] homage, it...seems to beg exemption from the strictness of copyright,” while immediately going on to state that “it also serves to introduce more uncertainties into what is already and extremely complex legal area.”⁷³

Klang and Nolin define “homage” as “a form of reproduction that seems to exist as a norm somewhere between plagiarism and copyright. It constitutes a grey area between what is otherwise a strict and unforgiving dualism. Homage may be viewed as a mark of respect when a creator takes ideas of themes from earlier works and interprets them in an original way.”⁷⁴ While it may appear at first glance that Biz’s actions could be defined in this manner, Klang and Nolin subsequently provide two significant qualifications of this definition which render the attribution of “homage” to Biz’s actions less supportable. They state that an homage is typically “*upfront, polite, and reverent*” in its creative modification of the original material.⁷⁵ However, the deliberately comical nature of Biz’s use of O’Sullivan’s material is obvious not only upon hearing it, but also in terms of the assessment of it provided by O’Sullivan himself. Recall his comments during an interview on this subject.

⁷³ Ibid., 178.

⁷⁴ Ibid., 178.

⁷⁵ Emphasis added. Ibid., 179.

Joseph Schloss has added his own observation as to the difficulty of assessing an instance of an homage: namely, that such an intention is usually not on the minds of samplers to begin with. More pertinently, he says that while such a discussion “would seem to hold a great deal of interpretive promise for semioticians, producers are not particularly concerned with using samples to make social, political, or historical points [among other practices of an homage to the original material.] In fact, symbolic meaning...is almost universally overstated by scholars as a motive for sampling. [...] Generally speaking, producers value the meaning of a particular sample not primarily for its own sake, but more as a venue for ambiguity and manipulation.” Joseph G. Schloss, *Making Beats: The Art of Sample-Based Hip-Hop* (Middletown, Connecticut: Wesleyan University Press, 2004): 146.

Biz Markie and they [Cold Chillin' Records] approached us and said, this was in 1990, that we would like to sample your song and use it on a track. So we said okay, and if we like it we'll see where we go from there. They sent it over and what they had done was sampled the intro and then he [Biz] rapped over it. [...]But then we discovered that he was *a comic, a comic rapper*, and the one thing I am very guarded about is protecting songs and in particular I'll go to my grave in defending the song to make sure it is never used *in the comic scenario* which is *offensive* to those people who bought it for the right reasons. And so therefore we refused. But being the kind of people that they were, they decided to use it anyway [without permission] so we had to go to court.⁷⁶

Furthermore, they provide perhaps the clearest intimation that Biz's actions could not properly be assessed as an homage when they concede that while, in ordinary circumstances, homage may be considered "Legal/Tolerated...[insofar as] [it is] firmly accepted as a legitimate form of activity," such an impression "is understood from the socio-legal reactions to [its] distribution. One could argue that it is the inaction of the copyright holder that makes them legitimate."⁷⁷

Thus, it appears that, according to Klang and Nolin's formulation of the practice of homage, it consists of two characteristics—the first being the inherent tone or nature of the modification of the original material, and the second being the action of inaction of the holder of the copyright of the appropriated material rendering its use illegitimate or legitimate, respectively. As can be discerned from the transcript of the interview, as well as from the procedural history of the litigation presented in preceding chapters, it is clear that O'Sullivan took legal action in response to Biz's sampling *not only* because consent for its use was not properly obtained, but also because of the perceived, decidedly *not* "upfront, polite, and reverent" manner in which his original material was used. On the

⁷⁶ Emphasis added. "O'Sullivan Tells His Side."

⁷⁷ Klang and Nolin, "Tolerance is Law," 193.

subject of action vs. inaction, the immediate conclusion is that Biz's actions would not be considered the presentation of an homage to Gilbert O'Sullivan. Now, the test turns to whether Biz's modifications of the original material satisfy the characteristics of "upfront[ness,] polite[ness,] and reveren[ce]" required of an homage.⁷⁸

In order to determine this, it is useful to compare and contrast Biz's "Alone Again" with a work created through digital sampling that clearly satisfies the conditions of an homage—"Gangsta's Paradise" by the American rapper, Coolio."Gangsta's Paradise" was composed and recorded by Coolio in 1995 for the film *Dangerous Minds* and achieved immense success and notoriety in the world of popular, selling considerably better than the work from which it samples throughout—"Pastime Paradise" by Stevie Wonder. Wonder's composition, in keeping with his well-recognized ability to evoke "revolutionary social-protest" as a "musical world citizen [and] humanist," and to control the temptation to capitulate to "mass-market forces"⁷⁹ that contrived to commodify Black music as an easily enjoyable and comprehensible product devoid of more substantial significance, Wonder "embraced aesthetic brilliance over commercial acceptance" in "Pastime Paradise."⁸⁰ Steve Lodder provides an illuminating explanation of the themes of this work and the musical manner of their presentation.

Pitting a backward-referring/retro Afro-Caribbean percussion track against a forward-looking synth(etic) string track, the song examines the dichotomy

⁷⁸ Since, as it relates to this particular case, the issue of action vs. inaction is much easier and simpler to address, I have taken the liberty of addressing this and the other factors in reverse order from that presented by Klang and Nolin.

⁷⁹ William C. Banfield, *Cultural Codes: Makings of a Black Music and Philosophy, An Interpretive History from Spirituals to Hip Hop* (Lanham: The Scarecrow Press, Inc., 2010): 166.

⁸⁰ Mark Anthony Neal, *What the Music Said: Black Popular Music and Black Public Culture* (New York: Routledge, 1999): 102.

between the pervasive negativity of an imperfect past and the positivity of looking forward to an idealized future (not necessarily in this life.) An alternative interpretation might be that ‘pastime paradise’ refers to the materialistically obsessed ‘leisure-culture’ of modern times, which Stevie could be contrasting with the ethic of working hard and getting your reward in heaven.⁸¹

For “Gangsta’s Paradise,” Coolio samples the harmonic and rhythmic accompaniment to the original Stevie Wonder work and also entitles his own work in a similar fashion as did Biz Markie. Just as Biz Markie entitled his “Alone Again” based off the original’s “Alone Again (Naturally),” Coolio entitles his “Gangsta’s Paradise” based off the original’s “Pastime Paradise” and also performs this modified version of the titular phrase at the correspondingly appropriate places within the music just as Biz does. However, given the far more serious and “reverential” nature of Coolio’s sampling, not least as a result of the highly emotionally charged and introspective lyrics lamenting the self-destructive lifestyle of the “Gangsta” over the original harmonic and rhythmic accompaniment, in contrast to the patently absurd and satirical purpose for which Biz had rapped over the O’Sullivan sample, it is quite easy to identify the characteristics set forth by Klang and Nolin above for an “homage” by sampling.

These factors can reasonably yield the determination that “Gangsta’s Paradise” is an homage to Stevie Wonder’s “Pastime Paradise.”⁸² However, with respect to Biz’s actions, insofar as the circumstances mentioned above by which the creator of the

⁸¹ Steve Lodder, *Stevie Wonder: A Musical Guide to the Classic Albums* (London: Backbeat Books, 2005): 212-213.

⁸² Yet another demonstration of this is the fact that Stevie Wonder has even performed “Gangsta’s Paradise,” based upon his own composition, with Coolio. Surely he would not have done so if he had perceived in Coolio’s sampling any disrespectful nature or intentions that contravened the spirit or character of his original work. Thus, he did not satisfy the characteristic of the sampling NOT being an homage set forth by Klang and Nolin—namely, he did not take legal action against the sampler in response to the nature of the sampling.

original material may determine that the sampling is *not* an instance of homage due to his perception of a disrespectful or irreverent nature, and/or through his action or inaction with regard to that offending sampling, are *not* actually provided as the appropriate methods for this determination *within federal copyright law*,⁸³ and insofar as it is debatable whether or not Biz’s sampling renders the original material sufficiently “different” to warrant a finding of “fair use” pursuant to *Campbell v Acuff-Rose Music, Inc.*—which would be retroactively applied for the sake of demonstrating that such a standard has been developed in copyright jurisprudence—it appears that the test of whether Biz’s sampling (or anything else) definitively is an “homage” is also conceptually and functionally nebulous. Therefore, this test, *by itself*, along with the others previously addressed, is also inadequate to determine an infringement of the original material.

⁸³ Though, again, Klang and Nolin present them hypothetically and tentatively.

**CONCLUSION—AN EXAMPLE OF A MORE COMPREHENSIVE TEST FOR
DETERMINING MUSICAL INFRINGEMENT AS APPLIED TO *GRAND
UPRIGHT***

Over the course of the last four chapters, the conceptual and functional limitations of three manners of determining musical copyright infringement—*de minimis*, substantial similarity, and artistic purposes—when employed by themselves, have been demonstrated. To summarize: first, and with specific relevance to *Grand Upright*, we have observed how *de minimis* by itself is inadequate insofar as courts, such as MDTN, have construed this test to entail both quantitative and qualitative aspects of the sampling process in a particular case. Furthermore, while Biz Markie’s sampling may not have been sufficiently quantitatively great to warrant a sanction under this test, it may be found to be qualitatively significant. Second, with respect to substantial similarity, the sampling in this case may, by virtue of its use of the very material in O’Sullivan’s original composition, appear substantially similar were it not for the imposition of a new voice and set of lyrics which may complicate the apprehension of this similarity. Finally, with respect to various artistic purposes for which the sampling could have been performed, the implications that the response of the creator of the original material, in this case O’Sullivan, would have for the ability to determine if the sampling counted as an “homage” or “transformative imitation” for “fair use” are tentative propositions not codified into the existing legislation or judicial enactments on copyright.

The limitations of each of these tests do not necessarily warrant their dismissal from the determinations of musical copyright infringement. *De minimis* is highly valued for its ease of practical application in contrast to the “ambiguity of fair use...and the

number of factors involved.”¹⁸⁶ Substantial similarity, in certain cases, is also a valued method for determining infringement, since, as Judge Frank acknowledged in *Arnstein v. Porter*, “in some cases, the similarities between the plaintiff’s and defendant’s work are so extreme and striking as, without more, both to justify an inference of copying and to prove” that substantial similarity exists.¹⁸⁷ Artistic purposes, when exercised to transform the original material sufficiently so as to “introduce new ideas or concepts to the public” can also be considered, and have been carefully examined and applied to certain cases, especially after the holding of the Supreme Court in *Acuff-Rose*.¹⁸⁸

However, given the unique circumstances of *Grand Upright* and the other practical limitations previously mentioned, they are not, by themselves, dispositive mechanisms for resolving the question. It is rather telling that the *Grand Upright* court did not apply any of these tests in determining the outcome of that case, which may be attributable to the startling novelty of the sampling process and the theretofore insufficiently clarified distinction between copyrights that are placed upon musical compositions themselves and those upon the recordings that contain them.

To this end, it would be valuable to consider an attempt at determining the nature of Biz’s actions by concurrently applying all three of these tests. In so doing, one can extract and apply the most salient and unproblematic facets of each and apply them together to the facts of this case; a judge considering in this fashion could be said to be

¹⁸⁶ Andrew Inesi, “A Theory of De Minimis and a Proposal for its Application in Copyright,” *Berkeley Technology Law Journal* 21 (2006): 990.

¹⁸⁷ *Arnstein v. Porter*, 154 F. 2d 464, 468-469 (2nd Cir. 1946).

¹⁸⁸ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F. 3d 1257, 1262 (11th Cir. 2001).

“function[ing] less as a referee and more as a part of the problem-solving process.”¹⁸⁹

This entails modifying the overall test to include concurrent considerations of each of these three facets in light of the complications that music presents, particularly when the distinction between compositions and recordings are addressed. As observed by Tim Wu in the context of “intellectual property experimentalism,”

every law...every enactment, regulation or judicial opinion must be seen as that moment’s best guess as to what a rule should be, in light of imperfect information and human fallibility. [...] Given the imperfect nature of law-making, policy should be subject to revision when faced with new information or changed conditions.¹⁹⁰

What would these most salient facets be? In terms of the long-recognized definition of *de minimis*, this principle could be violated if the sheer quantitative amount of material used cross the threshold that, while not existing uniformly for every artistic creation, or even for those of one particular medium, can reasonably be determined for each unique situation whether by courts, legislators, or industry experts themselves.¹⁹¹

Given the holding of the Sixth Circuit in the second round of *Bridgeport* that *de minimis* would not be applicable to the *recording* of an underlying musical composition, the inclusion of the latter entity can be maintained with respect to *Grand Upright*, insofar

¹⁸⁹ Brian E. Butler, “Law as a Democratic *Means*: The Pragmatic Jurisprudence of Democratic Experimentalism” (paper presented at the Inland Northwest Philosophy Conference: Pragmatism, Law, and Language, March 23-24, 2012).

¹⁹⁰ Tim Wu, “Intellectual Property Experimentalism By Way of Competition Law,” *Competition Policy International* 9 (Autumn 2003): 31-32.

¹⁹¹ McLeod and DiCola propose the following: “The United States Congress could revise [the relevant copyright provisions] to clarify [their] meaning. One approach would involve setting a quantitative threshold for *de minimis* use, such as ‘one second’ or ‘1% of the length of the sampled recording.’ Another approach is to allow the federal courts to determine the *de minimis* threshold on a case-by-case basis. [...] Another alternative is to require some *de minimis* threshold, but to allow the music industry to determine the specifics.” Kembrew McLeod and Peter DiCola, “Non-Infringing Uses in Digital Sampling: The Role of Fair Use and the *De Minimis* Threshold in Sample Clearance Reform,” *Deakin Law Review* 17 (2012): 323.

as the composition itself is more easily susceptible to a *de minimis* examination; the composition can exist without the recording, but the recording cannot exist without the composition it contains.¹⁹²

With regard to substantial similarity, this mechanism can be complicated by the use of a new voice and set of lyrics, as previously discussed. What from this test can be retained, however, if a hypothetical notated manifestation of the material which Biz used—i.e., the music *as written*, even if not as recorded—which proves to be identical to that in the original O’Sullivan composition, as well as the pivotal line, “Alone Again, Naturally,” used in both of these works. While *Grand Upright* may not appear to be as easily resolvable a matter as, for instance, *Hein et al. v. Harris*, since the former involves compositions of a larger aggregate number of measures than the latter and fewer measures of the derivative work in the former are substantially similar to the corresponding measures of the original work than in the latter, comparing the written manifestations, if nothing else, of each would very easily yield a determination of substantial similarity.

Finally, with respect to various artistic purposes for which Biz could have engaged in this sampling, it would have been much more helpful, and much more pertinent guidance would have been afforded, if some explicit expression of Biz’s

¹⁹² I omit here the lengthy consideration of the dilemma, popular in some literature on musical aesthetics and the overall philosophy of music, as to whether or not music “exists,” or is, at least, given some kind of apparent manifestation, if it is not performed and/or recorded. This rather vexing question can, for my purposes, be resolved rather simply by posing the hypothetical, though by no means impossible, procedure of transcribing the opening measures of O’Sullivan’s original composition and the opening harmonic progression of Biz’s and seeing that, even if *not* performed and/or recorded, and therefore is distilled only to its notated representation, the two “exist” and are identical.

intentions was available. As I have previously explained, however, such a document ostensibly no longer exists, and, for the various logistical and practical reasons identified above, it would not be prudent to rely exclusively upon ultimately un-confirmable inferences as to whether or not Biz deliberately created an “homage” to O’Sullivan and his work. Accordingly, this “prong” must be considered with the other two.

Applying all three of these mutually complimentary considerations together, the following conclusions can be reached:

First, with respect to *de minimis*, a rather curious combination of circumstances must be considered. While Biz only uses the first four measures, and thus *only* four measures from O’Sullivan’s entire composition, they are *repeated throughout* Biz’s work. This state of affairs is quite similar to that which obtained in *Newton v. Diamond*, where the Beastie Boys sampled a quantitatively minimal portion of a pre-existing work, but repeated it over forty times. In that case, Judge Manella indicated that the brief, three-note motif from Newton’s original *composition* is not sufficiently long or original to warrant copyright protection, and that, furthermore, the original *as written* was substantially different from its recorded version. However, in *Grand Upright*, a sample that is significantly longer than a mere three-note, otherwise unoriginal and not unusual motif, was used. A motif of four measures, consisting of the opening harmonic progression unique to this composition and which, furthermore, underscores the title line, “Alone Again, Naturally,” is at issue. Accordingly, and also in consideration of the number of times that this progression is repeated throughout, one can find that Biz’s actions constituted infringement on *de minimis* grounds.

As for substantial similarity, it would be helpful to repeat my previous comment on the deceptive simplicity that such a test might entail with respect to *Grand Upright*:

The circumstances of *Grand Upright* are such that it would be reasonable for one to assume that, were that action to have been presented to a jury, they would immediately conclude that Biz Markie's work was sufficiently similar to the original by O'Sullivan to warrant a judgment of copyright infringement. This is because upon hearing and comparing both O'Sullivan's original and Biz Markie's subsequent composition, the presence of the pivotal material of the former within the latter, particularly with the frequency of its use and the indispensable contextual significance it affords, would be so obvious that it might be difficult to argue otherwise. Determining copyright infringement by virtue of substantial similarity between musical compositions has sometimes been accomplished with remarkable facility. [...] [However,] empirical research into musical perception, even that executed with respect to the experiences of jurors in musical infringement cases where a determination of substantial similarity was entailed, illustrates the difficulties associated with discerning the degree of similarity under particular performative circumstances.¹⁹³

Since it is by itself an inadequate method, it can be considered along with *de minimis*. This can be accomplished by considering the quantitative and qualitative aspects of the material sampled-in-fact, *even if* this material has been rendered aurally dissimilar, at least on first impression, through the imposition of a new voice and set of lyrics or whatever other modifications in conditions that Lund maintains would compromise the perception of similarities. The extrapolation of the original, sampled material from whatever superficial changes may have been made to it, coupled with the recognition of the length of the material and its significance to the composition overall, as proposed by the MDTN, would result in a finding of infringement on substantial similarity grounds.

Finally, as far as various artistic purposes, in the absence of any explicit expression by Biz of his intentions, they could be reasonably inferred precisely by virtue of the previous two tests, and not necessarily by virtue of any action or inaction taken in

¹⁹³ From pages 59 to 61 of this thesis.

response by O'Sullivan, as Klang and Nolin would have it. Relying upon that action or inaction to determine that the sampling was not an "homage," and hence not a "transformative imitation" that would be deemed "fair use," could hypothetically turn out to be erroneous. Biz could have honestly endeavored to create an "homage" and created his new work in such a way as to satisfy the conditions of an "homage," whether as generally understood or as conceived specifically by him according to his own unique specifications. We might even suppose that there was an authoritatively established and widely recognized set of qualities attendant to an "homage" which Biz actually satisfied in "Alone Again," but, nevertheless, O'Sullivan personally felt that this was an unacceptable usurpation of his original material. (He clearly stated his beliefs in this regard in the interview cited above.) In such a case, if Klang and Nolin were followed, subjective impressions of the wrongdoing could override the "true" definitional nature of the work. We must not indulge in such constructive fancy, where we call an owl the creature which looks, walks, and quacks like a duck. In any event, were Biz to have sought the satisfaction of this, or any other, artistic purpose, the appropriate procedures should have been followed. Their absence, which is evident in the record of the case, and, necessarily by O'Sullivan's legal action, would warrant Judge Duffy's initial decision. But, insofar as there *were* conditions that were unfulfilled in the first place, namely the appropriate clearance procedures to legally use the sample, their necessity would flow *from* a consideration of the *de minimis* and substantial similarity principles as applied, ideally antecedently, to what Biz was seeking to do.

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