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Toward a “New School” Licensing Regime for Digital Sampling: Disclosure, Coding, and Click-Through

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INTRODUCTION

¶1 Under most circumstances, music writer Johnny Oxbridge would be exhilarated to open his MySpace inbox and find a message from DJ Showtime, a Los Angeles-based producer-rapper whose off-kilter beats—built on some of music’s most obscure sonic scraps—are the object of envy, scrutiny, and emulation by legions of independent hip-hop fans.¹ A hip-hop enthusiast with a particular interest in production techniques and digital sampling, Oxbridge was the founder, editor-in-chief, and staff of Oxbeats.com, a website dedicated to cataloging, analyzing, and discussing the work of the genre’s leading producers. In addition to regular blog entries, Oxbridge’s site featured a wide variety of “sample sets”—compilations of digital versions of the songs sampled by his favorite producers to build their beats. In early March 2008, Oxbridge posted one of his more difficult-to-compile sets, which contained the samples from 2004’s *Showbiz*. The critically acclaimed product of a collaboration between Showtime and rapper Big Biz, *Showbiz* was different from many of the other albums Oxbridge had researched before; while the album’s liner notes featured elaborate artwork and extensive lyric sheets, they did not reveal its samples. So, Oxbridge had to start digging, resorting to his own knowledge and hints from his fellow fans to piece together the album’s sources.

¶2 In his March 18, 2008 message to Oxbridge, sent shortly after the *Showbiz* sample set went live, Showtime did not commend his crate-digging disciple for his work; instead, he requested that Oxbridge remove the link to the sample set and cease sharing its accompanying list of samples with Oxbeats.com readers. As he wrote to Oxbridge, “[P]ages like this on the internet are no help at all to people like Biz, Showtime, and those that work with them.” Oxbridge agreed with Showtime’s case; within a few hours, the link and list disappeared. Shortly thereafter, the Wikipedia page bearing similar information was wiped clean. Order had been restored to the hip-hop blogosphere.

¶3 Showtime had legitimate reasons to be concerned about fans creating an electronic trail of his samples, most of which he had not licensed from their creators. His work, like that of many other sample-based producers spread across the musical spectrum, has historically operated in the shadow of a copyright regime that has erected substantial legal barriers to—and placed significant financial burdens on—contemporary producers’ appropriations of older musical works. In the face of progressively eroding de minimis and fair use exceptions for sampling, musicians like Showtime have been compelled to choose between securing licenses to their samples, often at great expense, or foregoing licenses and risking prosecution for copyright infringement, with the threat of harsh judicial remedies if infringement is found.

¶4 The plight of sampling musicians has formed a focal concern for a voluminous body of legal scholarship that has accreted gradually over the past twenty years.² Uniting this scholarship is a

¹ The names of the parties have been changed to shield them from potential copyright actions.

² For a representative sample of this literature, see Michael L. Baroni, *A Pirate’s Palette: The Dilemmas of Digital Sound Sampling and a Proposed Compulsory License Solution*, 11 U. MIAMI ENT. & SPORTS L. REV. 65 (1993); David S. Blessing, *Who Speaks Latin Anymore? Translating De Minimis Use for Application to Music Copyright Infringement and Sampling*, 45 WM. & MARY L. REV. 2399 (2004); David Sanjek, “Don’t Have to DJ No More”: *Sampling and the “Autonomous” Creator*, 10 CARDOZO ARTS & ENT. L.J. 607 (1992); Eric Shimanoff, *The Odd Couple: Postmodern Culture and Copyright Law*, 11 MEDIA L. & POL’Y 12 (2002); Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271 (1996); Stephen R. Wilson, *Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense?*, 1 J. HIGH TECH. L. 179 (2002); Jeffrey H. Brown, Comment, “They Don’t Make Music the Way They Used To”: *The Legal Implications of “Sampling” in Contemporary Music*, 1992 WIS. L. REV. 1941 (1992); Carl A. Falstrom, Note, *Thou Shalt Not Steal: Grand Upright Music Ltd. v. Warner Bros. Records, Inc. and the Future of Digital Sound Sampling in Popular Music*, 45 HASTINGS L.J. 359 (1994); Jeffrey R. Houle, Note, *Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just a Bad “Rap”?*, 37 LOY. L. REV. 879 (1992); A. Dean Johnson, Comment, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits*, 21 FLA. ST. U. L. REV. 135 (1993); Brett I. Kaplicer, Note, *Rap Music and De Minimis Copying: Applying the Ringgold and Sandoval Approach to Digital Samples*, 18 CARDOZO ARTS & ENT. L.J. 227 (2000); Randy S. Kravis, Comment, *Does a Song by Any Other Name Still Sound As Sweet?: Digital Sampling and Its Copyright Implications*, 43 AM. U. L. REV. 231 (1993); Susan J. Latham, Comment, *Newton v. Diamond: Measuring the Legitimacy of Unauthorized Compositional Sampling—A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J. 119 (2003); Charles E. Maier, Note, *A Sample for Pay Keeps the Lawyers Away: A Proposed Solution for Artists Who Sample and Artists Who Are Sampled*, 5 VAND. J. ENT. L. & PRAC. 100 (2003); Rebecca Morris, Note, *When is a CD Factory Not Like a Dance Hall?: The Difficulty of Establishing Third-Party Liability for Infringing Digital Music Samples*, 18 CARDOZO ARTS & ENT. L.J. 257 (2000); Josh Norek, Comment, “You Can’t Sing Without the Bling”: *The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System*, 11 UCLA ENT. L. REV. 83 (2004); Matthew G. Passmore, Note, *A Brief Return to the Digital Sampling Debate*, 20 HASTINGS COMM. & ENT. L.J. 833 (1998).

common concern with what could be termed the “sampling conundrum,” or the need to balance a sampling artist’s interest in appropriating preexisting musical materials (and profiting from that appropriation) with the property rights that the owners of those materials enjoy under the Copyright Act. Inasmuch as the body of sampling commentary is linked by a common conceptual concern, it is also defined by relatively narrow conceptual bounds, offering a cramped understanding of sampling as a practice and a correspondingly limited range of proposals for easing the legal and financial burdens that extant law and licensing schemes place on sampling. The conceptual limits of this body of commentary, while long clear, have been thrown into extreme relief by a new layer of scholarship prompted by the Sixth Circuit’s 2005 decision in *Bridgeport Music, Inc. v. Dimension Films*.³ Despite significant changes in the nature of musical production, distribution, and consumption that have occurred since sampling first surfaced as an object of legal commentary in 1987, the solutions to the sampling conundrum offered in the wake of *Bridgeport* differ little from earlier proposals. For a field of law concerned with cutting-edge technologies, emergent cultural phenomena, and the newest of the “new school,” existing solutions to the sampling conundrum seem markedly—and inappropriately—old school.

¶5

Consider this to be the first attempt to devise a “new school” sampling regime, one that seeks to outline and respond to the manner in which digital technology has altered, and can alter, the relationships between sampling and sampled parties, potentially to the benefit of both. At the core of this vision for reforming sampling practice rests a concept of music as an informational good, according to which a digital music file is seen not simply as an audio recording of a prior performance, but also as a vector of information that listeners and music vendors can exploit insofar as the file links a given recording to many others (in ways both conceptual and actual). Music’s informational status is neither new, nor a creation of digital technology; indeed, music presented in physical formats (from analog media to digital media) has traditionally been packaged with liner notes detailing significant amounts of information relating to the enclosed music. Somewhat paradoxically, the migration of music sales and distribution to the internet has not heightened the informational content of song files themselves; in the transition digital distribution, significant amounts of information are no longer communicated to consumers. New web-based sources of information, including websites and aggregators, have emerged to fill this vacuum; however, even these relatively robust sources are not currently configured to display or exploit sampling information.

³ 410 F.3d 792 (6th Cir. 2005) (holding all instances of sampling to constitute per se infringement). For a representative cross section of this literature, see Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547 (2006); Robert P. Merges, *Locke Remixed?*, 40 U.C. DAVIS L. REV. 1259 (2007) [hereinafter Merges, *Locke*]; David M. Morrison, *Bridgeport Redux: Digital Sampling and Audience Recording*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 75 (2008); Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515 (2006); Tracy L. Reilly, *Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court’s Attempt to Afford “Sound” Copyright Protection to Sound Recordings*, 31 COLUM. J.L. & ARTS 355 (2008); Mike Suppapol, *Confusion in the Digital Age: Why the De Minimis Use Test Should Be Applied to Digital Samples of Copyrighted Sound Recordings*, 14 TEX. INTELL. PROP. L.J. 93 (2006); Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535 (2005); Kenneth M. Achenbach, Comment, *Grey Area: How Recent Developments in Digital Music Production Have Necessitated the Reexamination of Compulsory Licensing for Sample-Based Works*, 6 N.C. J.L. & TECH. 187 (2004); Jeremy Beck, Note, *Music Composition, Sound Recordings and Digital Sampling in the 21st Century: A Legislative and Legal Framework to Balance Competing Interests*, 13 UCLA ENT. L. REV. 1 (2005); Bryan Bergman, Note, *Into the Grey: The Unclear Laws of Digital Sampling*, 27 HASTINGS COMM. & ENT. L.J. 619 (2005); Joshua Crum, Comment, *The Day the (Digital) Music Died: Bridgeport, Sampling Infringement, and a Proposed Middle Ground*, 2008 BYU L. REV. 943 (2008); William Y. Durbin, Note, *Recognizing the Grey: Toward a New View of the Law Governing Digital Music Sampling Informed by the First Amendment*, 15 WM. & MARY BILL RTS. J. 1021 (2007); Matthew S. Garnett, Comment, *The Downhill Battle to Copyright Sonic Ideas in Bridgeport Music*, 7 VAND. J. ENT. L. & PRAC. 509 (2005); Chris Johnstone, Note, *Underground Appeal: A Sample of the Chronic Questions in Copyright Law Pertaining to the Transformative Use of Digital Music in a Civil Society*, 77 S. CAL. L. REV. 397 (2004); Steven D. Kim, Casenote, *Taking De Minimis out of the Mix: The Sixth Circuit Threatens to Pull the Plug on Digital Sampling in Bridgeport Music, Inc. v. Dimension Films*, 13 VILL. SPORTS & ENT. L.J. 103 (2006); Nicholas B. Lewis, Comment, *Shades of Grey: Can the Copyright Fair Use Defense Adapt to New Re-contextualized Forms of Music and Art?*, 55 AM. U. L. REV. 267 (2005); Lisa B. Minc, Comment, *Clarity to Litigation Concerning Digitally Sampling Sound Recordings: Get a License or Do Not Sample—The Bridgeport Music Decision*, 15 DEPAUL-LCA J. ART & ENT. L. 329 (2005); Jennifer R.R. Mueller, Note, *All Mixed Up: Bridgeport Music v. Dimension Films and De Minimis Digital Sampling*, 81 IND. L.J. 435 (2006); Rahmiel David Rothenberg, Note, *Sampling: Musical Authorship out of Tune with the Purpose of the Copyright Regime*, 20 ST. THOMAS L. REV. 233 (2008); John Schietinger, Comment, *Bridgeport Music, Inc. v. Dimension Films: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209 (2005); M. Leah Somoano, Note, *Bridgeport Music, Inc. v. Dimension Films: Has Unlicensed Digital Sampling of Copyrighted Sound Recordings Come to an End?*, 21 BERKELEY TECH. L.J. 289 (2006); Amanda Webber, Note, *Digital Sampling and the Legal Implications of Its Use After Bridgeport*, 22 ST. JOHN’S J. LEGAL COMMENT. 373 (2007).

¶6 As I argue, developments in MP3 technology and digital music aggregators—such as iTunes and Last.fm—may allow us to visualize the contributions of samplers to the music they sample not in sociologically and economically vague terms of “buzz” or “recognition,” but rather, in terms of monetizable linkages, provided that both song files and aggregators are coded to take advantage of the informational content of sample-based music. Such a visualization abandons the image of the sampling relationship that currently informs both the literature on sampling and existing licensing regimes—namely, a two-party relationship defined principally by a unilateral taking of source material by a sampler from the owner of that source material.⁴ Instead, I suggest the sampling relationship can be viewed as an exchange of source material in return for audiences (and potential buyers), mediated by the digital musical environment; this relationship is, in its most basic form, a four-party relationship involving sampling artists, source material owners, digital aggregators/vendors, and listeners.

¶7 Within the context of this four-party relationship, new possibilities for sample licensing emerge. While a variety of specific arrangements are conceivable, I propose a new sampling regime based on the following three elements: first, full disclosure of the source materials incorporated into sampled songs; second, comprehensive coding of links to that source material into song files and aggregators; and third, “click-through” credits, which would allow sampling artists to earn credits proportionate to the traffic their music drives to source material. These credits, in turn, could be deducted from the licensing fees and royalties that sampling artists would otherwise owe to source material owners under traditional licensing arrangements. These innovations would facilitate the creation of a dynamic, market-based licensing regime that may potentially lower musicians’ sampling costs by using digital means to shift those costs to listeners. In other words, this reformed licensing arrangement would seek to solve the copyright conundrum by restructuring the sampling relationship, overcoming the “adversarial” interests of sampling artists and source material owners by using digital intermediaries to introduce new parties into that relationship.⁵

¶8 For purposes of clarity and consistency, Part I of this Note will define sampling and other terms central to both copyright analysis and music licensing. Part II will construe and critique recent attempts to reform the extant sampling regime. While the literature on sampling contains a wide variety of proposals developed to varying degrees of specificity, these proposals have traditionally clustered around one of two broad types of reform, specifically, refining doctrinal standards for assessing actionable copying⁶ and grafting compulsory licensing provisions onto the Copyright Act.⁷ While each of these broad types of reform possesses its own internal logic, recent expansions in the scope and substantive reach of copyright regulation, combined with the unpredictability of courts and the harshness of judicial remedies, have rendered both infeasible. Creating a licensing regime that is appealing to the source material owners and manageable by administrators will require stepping outside the boundaries of the contemporary sampling debate. As a first step, Part III will offer a new concept of sampling, one that trades true, but inapposite, postmodern and First Amendment characterizations of sampling for more basic concept of sampling as an act of filtering and recommending music (from sampler to listener). Viewed in this way, music files emerge as informational goods, with informational content that is both exploitable and currently underexploited. Part IV will provide a detailed recommendation for a new licensing arrangement built on disclosure, coding, and click-through. Finally, Part V will explore the cultural policy implications of licensing reform of the type proposed herein.

⁴ This visualization of sampling as a form of taking abounds in sampling-specific legal commentary, as well as copyright studies more generally. See LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 70 (2008) [hereinafter LESSIG, REMIX]; NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 3, 43, 58-59 (2008) [hereinafter NETANEL, COPYRIGHT’S PARADOX].

⁵ See Achenbach, *supra* note 3, at 193-94.

⁶ Beck, *supra* note 3, at 3-4; Van Houweling, *supra* note 3, at 1567-71; Morrison, *supra* note 3, at 137-41; Mueller, *supra* note 3, at 459; Rothenberg, *supra* note 3, at 248-53.

⁷ Achenbach, *supra* note 3, at 191; Arewa, *supra* note 3, at 637-38, 641-43; Baroni, *supra* note 2, at 95-97; Bergman, *supra* note 3, at 649-51; Durbin, *supra* note 3, at 1046-52; Johnstone, *supra* note 3, at 427-30; Kravis, *supra* note 2, at 271-73; Norek, *supra* note 2, at 93-101; Webber, *supra* note 3, at 410-14.

¶9 While this Note largely brackets the expressive and cultural arguments that typically organize arguments for sampling reform (and copyright reform more generally),⁸ it does so only to expose previously underexplored aspects of sampling and the sampling relationship. As I suggest, far from a capitulation to “clearance culture,”⁹ the licensing reform presented herein is a means, first, of increasing the leverage of samplers vis-à-vis the owners of source materials, and, second, of expanding the responsiveness of the extant copyright and licensing regime to matters of personal expression, cultural access and continuity, and distributive justice (along both generational and racial dimensions).

¶10 Indeed, at the core of this Note is an attempt to overcome the culturally perverse situation in which law has placed sampling artists and aspiring sampling artists, a situation nowhere better evidenced than in Showtime’s exchange with Oxbridge. Undoubtedly, most producers’ attempts to hide their sources are at least partially reflective of the competitive streak that runs not just through hip hop, but most music: in order to retain his position of mastery, an artist has to keep some of his techniques to himself. The Showtime-Oxbridge exchange, however, also suggests the odd position currently occupied by members of the sampling vanguard: in much the same way that they have dedicated themselves to a highly self-reflexive, almost militant, resistance to derivative music-making techniques and a matching project of deep musical education for a new generation of listeners, they must actively maintain their fans’ ignorance of their sources and techniques, *for the sake of the music itself*. This is so even as the internet has greatly expanded both the audience for that information and that audience’s ability to act on it.

¶11 Inasmuch as this Note seeks to free sampling from the constraints enforced upon it by extant law and current industry practices, it simultaneously seeks to liberate source material owners from the perverse economic effects of the contemporary sampling regime. Indeed, as the Showtime-Oxbridge exchange suggests, although heightened legal restrictions on sampling and increased litigation to enforce those restrictions have provided source material owners with avenues to collect revenues from sampling artists, law and litigation simultaneously encourage popular sampling artists to *hide* samples that they cannot otherwise afford to clear. Thus, for every sample that is cleared and for every copyright claim that is successfully litigated, many more acts of sampling go undetected. A licensing regime that incentivizes sampling artists to disclose their source material might thus expand opportunities for source material owners to receive credit and compensation. Licensing reform, in this respect, responds to constraints the law has placed on the logic of culture and the logic of rights enforcement by offering new ways to organize the sampling relationship to the benefit all the parties involved.

PART I: DEFINITION OF TERMS

A. Musical Compositions and Sound Recordings

¶12 Central to discussions of the legal relationship between a sample and the song from which it has been sampled is the distinction between a “musical composition” and a “sound recording.” “Musical composition” refers to a fixed sequence of words, notes, and rhythms (which can be captured in written form and which structures the “generic” sound of any given performance of a piece).¹⁰ “Sound recording,” meanwhile, refers to a specific performance of a composition, as affixed in a recording medium (such as tape, vinyl, or a digital media file), that serves as the “raw audio source

⁸ See ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW 7-8, 68-69, 259 (1998); LAWRENCE LESSIG, FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY 119-20, 130 (2004) [hereinafter LESSIG, FREE CULTURE]; NETANEL, COPYRIGHT’S PARADOX, *supra* note 4, at vii, 10; Achenbach, *supra* note 3, at 191; Van Houweling, *supra* note 3, at 1548, 1566; Johnstone, *supra* note 3, at 415, 424; Morrison, *supra* note 3, at 78-79, 82, 119, 123; Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 538, 586 (2004).

⁹ NETANEL, COPYRIGHT’S PARADOX, *supra* note 4, at 7.

¹⁰ Ponte, *supra* note 3, at 524.

used by the sampling musician.”¹¹ This distinction, in turn, controls two forms of ownership relevant to sampling, namely, a copyright in the musical composition and a copyright in the sound recording. Over the course of this Note, I shall frequently refer to “source material owners,” an umbrella term meant to encompass both sound recording and musical composition copyright holders; in reality, these owners may be different entities or one in the same.

B. Sampling

¶13 In its most elemental sense, “sampling” refers to a process whereby a producer excises a portion of an existing sound recording for use in a different musical context. The specific tools producers have used to create samples and the compositional ends to which those samples have been put have varied both from producer to producer and across time, influenced by an interaction between available sampling technologies and the particular aesthetic preferences of producers.¹² Hip-hop producers working from the late-1980s onward have relied heavily upon equipment engineered specifically for sampling, most famously the E-mu SP and Akai MPC line of samplers and drum machines.¹³ Although samplers allow producers to capture sounds produced by live instruments, producers primarily employ them to isolate fragments of sound recordings from analog sources (particularly vinyl records) for digital manipulation. More recently, computer-based applications, such as Fruity Loops (a popular, freeware sampling program), Reason, and Garage Band have entered into common use, each of which allow producers to sample directly from digital song files without the support of additional hardware or reference to analog sources.

¶14 While many producers have developed signature sampling styles, producers largely rely on three basic sampling techniques to create their compositions, namely, looping, chopping, and collaging. “Looping” refers to the process by which a sampled fragment is laid end-to-end with itself; a song built on a three-second, sampled loop, for instance, is comprised of a single three-second segment that repeats itself over the duration of the song.¹⁴ Notably, anything that can be sampled can be looped, albeit with varying aesthetic success. While extensive repetition of a single sound fragment produces a new recording with obvious and immediate aural similarities to the source song, producers routinely supplement these loops with other original and sampled musical material.

¶15 In addition to looping, producers often employ a sampling technique known as “chopping.” When chopping, a producer will (first) reduce a source song to a set of fragments, then (second) reorganize those fragments to produce a new song that, although comprised almost entirely of sampled material, presents that material in an order different from that offered in the underlying recording.¹⁵ Working in this way, producers can produce beats that, while clearly relying on existing material, evidence a degree of structural complexity significantly higher than that of a basic looped beat. Chopped beats can and do feature material from more than one original recording; nonetheless, for copyright and licensing purposes, the key feature of a chopped beat is its incorporation of multiple samples from a single source (rather than, in a basic loop, a single sample from a single source).

¶16 Whereas both looping and chopping employ relatively long segments of preexisting recordings as their basic components, the third major type of sampling, “collaging,” seeks to create new compositions through combinations of significantly shorter samples from significantly more

¹¹ Achenbach, *supra* note 3, at 197; Morrison, *supra* note 3, at 97.

¹² DAVID TOOP, *RAP ATTACK #3* 191 (2000).

¹³ See NELSON GEORGE, *HIP HOP AMERICA* 92 (1998). Use of these samplers remains widespread, inasmuch as they are favored by “purist” producers seeking to maintain fidelity to the “true” or “real” methods for building hip-hop beats pioneered by early producers, older producers whose earliest productions were undertaken using samplers and whose sense of craft remains tightly connected to their hardware, and producers (more generally) seeking to capture the unique aural textures and structural effects that mark music produced with such equipment. See JOSEPH J. SCHLOSS, *MAKING BEATS: THE ART OF SAMPLE-BASED HIP-HOP* 63-78 (2004).

¹⁴ SCHLOSS, *supra* note 13, at 136-38.

¹⁵ *Id.* at 151.

sources.¹⁶ A fully architected collage, for instance, may feature percussion sections comprised of individual notes from several different underlying drum tracks. A collage beat may not be organized around a single, prominent, identifiable sample. What the beat’s aural identity gains in freedom from any single underlying recording is counterbalanced by the sheer volume of preexisting recordings to which its rights structure is tied; while a beat featuring a single loop implicates one set of composition and recording rights, a collage can implicate many such sets.

C. Aggregators

¶17 As employed throughout this Note, “aggregator” is an umbrella term used to refer to web-based media platforms that serve any combination of the following functions: vending digital music, recommending music, cataloging information about recorded music, or analyzing the contents of users’ digital music collections.

PART II: CONTEXTUALIZING, CONSTRUING, AND
CRITIQUING THE LITERATURE ON SAMPLING

¶18 The plight of sampling musicians arises from the intersection between distinct, but related, developments in federal copyright legislation, judicial enforcement of that legislation, and commercial licensing practices. The reforms promoted by legal commentators, in turn, largely cluster around two general types of policy proposals: (on one side) more clearly articulated doctrinal standards for assessing sampling claims in the courts and (on the other) new statutory provisions designed to regularize and constrain the need for, and terms of, commercial licenses. Although each of these clusters of reforms has some logical appeal, neither is sufficiently responsive to the stakes of sampling or to the opportunities facing sampling artists and source material owners. Indeed, reforms targeted toward the courts fail to address the underlying characteristics of contemporary courts that make doctrinal clarification necessary; meanwhile, the various families of statutory reform fail to accommodate the economic and political logic that has driven the evolution of American copyright. In light of these strong institutional constraints, reforming the existing licensing regime within the industry context itself seems to represent the path of least resistance and most dynamic possibility.

A. The Overarching Constraint: Copyright Expansion

¶19 The heightened attractiveness of licensing reform is at least partially attributable to the belief, prevalent in the scholarly community and actively promoted by copyright critics, that recent developments in copyright legislation have effectively (albeit not conclusively) foreclosed the possibility of legal, statutorily protected sampling. According to this line of analysis, the protections granted to copyright holders in early versions of federal legislation have slowly expanded both their temporal and their substantive reaches. The end result of these expansions has been the “enclosure” of what theorists such as Lessig refer to as the “cultural commons,” or, cultural material that is available for appropriation, critique, and comment by actors other than the creators of those materials.¹⁷ The beneficiaries of enclosure, as Benkler has noted, have primarily been corporate holders of large cultural portfolios, such as the major record labels.¹⁸

¶20 In an attempt to create a sufficiently substantial theoretical counterweight to the overwhelmingly economic interests of corporate source material owners, commentators have attacked the extant regime at the level of constitutional value and existential principle.¹⁹ Corporate source material owners, however, have proven remarkably, if insidiously, adept at manipulating legislation to protect

¹⁶ Morrison, *supra* note 3, at 85.

¹⁷ YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 278, 380-81, 439, 440-43 (2008); LESSIG, FREE CULTURE, *supra* note 8, at 130-39.

¹⁸ BENKLER, *supra* note 17, at 278.

¹⁹ See *supra* note 6.

and expand their rights over their portfolios, securing copyright term extensions despite sophisticated, trenchant resistance from their opponents. In other words, the present statutory regime provides an archetypal example of legislative capture.²⁰

B. The Second Constraint: Doctrinal Inconsistency, Judicial Unpredictability

¶21 Congress’ resistance to high-level, rights-based argumentation is matched only by the limited capacity and willingness of courts to assess sampling claims. Sampling artists currently face a doctrinal configuration that, when not explicitly and unambiguously preclusive of sampling, is both internally inconsistent and of minimal predictive value.²¹ Of particular recent concern for sampling-sympathetic legal analysts and sampling artists alike has been the Sixth Circuit’s opinion in *Bridgeport Music, Inc. v. Dimension Films*. In a unanimous decision, the court held that the sampling of a sound recording constituted a per se copyright infringement.²² Subsequently, in order to produce a legally defensible sample, an artist would have to acquire licenses for each and every sampled fragment included in a finished song.²³ The implications of *Bridgeport* for sampling, as scholars have outlined elsewhere, are both manifold and serious. *Bridgeport*’s bright-line rule creates a judicial standard unable to account for a class of highly context-specific cases with unique equities and constantly evolving technological considerations;²⁴ meanwhile, by establishing a per se infringement standard, *Bridgeport* appears to contravene the fair use defense contained within the Copyright Act.²⁵ As a consequence, *Bridgeport*, if generalized into a nationally applicable standard for sampling, will dramatically increase the transaction costs associated with sampling, forcing artists to acquire both musical composition and sound recording licenses for all their samples, regardless of whether or not such samples would have previously been held to constitute non-infringing uses.²⁶

¶22 Insofar as the heightened cost of sampling under the *Bridgeport* regime would affect the frequency with which artists sampled, it would also affect the nature of those sample-based songs that artists would in fact produce. Specifically, *Bridgeport* would heighten the costs associated with complicated, multi-fragment chopping and/or collage work, while doing little to alter the costs associated with more derivative, single-sample compositions. While perhaps a victory for advocates of easily justiciable standards, *Bridgeport* represents perverse cultural policy. At its most extreme, *Bridgeport* threatens to introduce a sampling anti-commons in which only the most rudimentary applications of sampling technology and most basic compositional strategies are economically feasible.²⁷

¶23 Although by no means a positive development for sampling, *Bridgeport* is objectionable not only as a self-contained ruling on sampling’s legal status, but also, and perhaps more fundamentally, as a further complication to an already convoluted and unpredictable body of sampling doctrine. As Ponte notes, “Courts have handed down inconsistent opinions in digital sampling cases applying different legal standards with findings ranging from per se infringement in some instances to exemptions from copyright infringement under the fair use doctrine and de minimis use in others.”²⁸ The basic elements of a claim for copyright infringement are themselves relatively straightforward: plaintiffs must demonstrate ownership of valid copyright, factual copying by the defendant, and actionable copying by the defendant.²⁹ Insofar as ownership is relatively easily demonstrable and defendants typically admit to factual copying, the majority of sampling cases hinge on actionable

²⁰ NETANEL, COPYRIGHT’S PARADOX, *supra* note 4, at 6-7. *See generally id.* at 54-80.

²¹ LESSIG, REMIX, *supra* note 4, at 104; Achenbach, *supra* note 3, at 190; Johnstone, *supra* note 3, at 416; Ponte, *supra* note 3, at 519-20.

²² 410 F.3d at 798, 801-02.

²³ *See* Achenbach, *supra* note 3, at 199; Ponte, *supra* note 3, at 541.

²⁴ Achenbach, *supra* note 3, at 200.

²⁵ BENKLER, *supra* note 17, at 443-44; Morrison, *supra* note 3, at 107-09.

²⁶ Morrison, *supra* note 3, at 80-81.

²⁷ *Id.* at 84-86.

²⁸ Ponte, *supra* note 3, at 519-20; *see also* Achenbach, *supra* note 3, at 190.

²⁹ Morrison, *supra* note 3, at 97.

copying analysis. The lack of doctrinal clarity, in turn, arises primarily from conflicting judicial interpretations of the proper standard for determining whether a given instance of sampling possesses the sort of “substantial similarity” to the underlying work that would trigger a finding of actionable copying.

¶24 Traditionally, courts have evaluated the substantial similarity of samples under a “total concept and feel” standard, according to which the trier of fact compares the “total concept and feel” of the sampling work to its source materials to determine whether there are “[substantial] similarities in their overall ideas and expressions” that could be detected by the average listener.³⁰ In cases where sampling represents a literal copying of sounds rather than a borrowing of structures or arrangements, and/or when the sampled fragments are so short as to reflect none of the underlying composition’s structure, courts have applied a “fragmented literal similarity” test.³¹ Under this test, the trier of fact’s inquiry focuses on whether the sampled fragment is sufficiently “qualitatively significant or quantitatively important” to the underlying work so as to render the sampling work substantially similar.³² As a cursory review of landmark sampling cases suggests, however, courts have failed to articulate a clear relationship between these two tests or to delineate unambiguous, categorical rules for their application. For instance, faced with similar facts—three-note samples that were looped and altered in pitch—courts have applied different standards, with the majority in *Newton* applying a substantial similarity test (resulting in a sample being vindicated)³³ and the *Bridgeport* court rejecting both fragmented literal similarity and substantial similarity for the per se infringement standard outlined above.³⁴

¶25 The conflict between *Newton* and *Bridgeport* is emblematic of systemic flaws in sampling doctrine, flaws which have, over time, compromised the ability of doctrine to direct and limit the inquiry into actionable copying. Even *should* a given test emerge as predominant, any of the existing doctrinal paradigms (save for the per se standard) render the legality or illegality of a sample heavily contingent upon subjective, aesthetic judgments rendered by juries and judges. The sheer legal uncertainty involved in commercially releasing uncleared samples (under which sampling parties have assurance neither of the standard for assessing substantial similarity that will be applied, nor of the particular aesthetic sensitivities of juries and judges) and the severe legal penalties associated with failure to obtain licenses (an injunction on sales and distribution, requiring a hold on thousands, if not millions of units distributed to retailers throughout the world) render licensing an apparent necessity for risk-averse parties.³⁵ In this sense, doctrinal inconsistency has produced what Netanel has termed a “clearance culture”³⁶ (or, alternatively, a “clear it or delete it culture”³⁷), where artists are effectively goaded into obtaining licenses even in those instances where licenses would likely not be required under more liberal interpretations of the Copyright Act as written.

C. The Third Constraint: Existing Licensing Regimes

¶26 The emergence of a clearance culture has seen the attendant emergence of a clearance industry. Presently, sample licensing is administered through an ad hoc network of sampling artists, music attorneys, sample clearinghouses (entities that operate outside the formal corporate structure of record labels and that coordinate bargaining between sampling artists and holders of rights in sampled music), and record labels (which have developed departments dedicated to managing their

³⁰ See Ponte, *supra* note 3, at 527-28; see also Achenbach, *supra* note 3, at 197.

³¹ *Jarvis v. A&M Records*, 27 F. Supp. 282, 289 (D.N.J. 1993); see Johnstone, *supra* note 3, at 407-08.

³² Ponte, *supra* note 3, at 529-30; Morrison, *supra* note 3, at 99-100.

³³ *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1256-60 (C.D. Cal. 2002).

³⁴ 410 F.3d at 798, 801-02.

³⁵ Baroni, *supra* note 2, at 103. See generally Johnstone, *supra* note 3, at 417.

³⁶ NETANEL, COPYRIGHT’S PARADOX, *supra* note 4, at 66.

³⁷ Tushnet, *supra* note 8, at 582-83.

rights in their catalogs).³⁸ At its core, this sprawling, incompletely formalized network is oriented toward facilitating song-by-song, and sample-by-sample, negotiations for the rights to source materials. These ad hoc relationships between the concerned parties, combined with the case-by-case nature of licensing, have yet to produce a standardized sampling agreement.³⁹

¶27 As presently constituted, licensing poses two primary obstacles to sampling, both of which ultimately manifest themselves in the form of elevated costs to the sampling musician. First, sampling artists face the administrative burden of locating the source material owners. Whether the artist chooses to undertake this search himself, or delegates it to an attorney or clearinghouse, the artist must frequently locate multiple rights holders, any one of which—given the property rule that currently governs sampling—possesses unilateral veto power over clearance.⁴⁰ Degrees of ease aside, the administrative search for source owners ultimately imposes monetary costs upon sampling musicians.⁴¹

¶28 Once the source owners have been located, sampling artists must negotiate licenses for their samples. The standard sound recording license involves a flat-fee license; such licenses can cost the artist anywhere from one-hundred dollars to tens of thousands of dollars.⁴² Alongside the sound recording license, the sampler must also obtain the musical composition license from the source song’s music publisher. A typical composition license grants the publisher a percentage of ownership in the new work’s musical composition copyright, as well as an advance calculated at the full eight-percent statutory rate for a 100,000-unit base. Under this formula, Norek explains, “a new major label act would likely pay a \$4000 advance for the musical composition license if the sampled work’s author possessed 50% of the publishing in the new work.”⁴³

¶29 In light of the administrative burdens mentioned above, two salient features of existing licensing regimes emerge. First, and most directly, are the prohibitive overhead costs associated with employing even a moderate number of samples. Under present licensing practices, sampling artists are unlikely to be able to recoup the costs of any given sample unless they sell a minimum of 10,000 records per sample.⁴⁴ Second, the panoply of costs associated with sampling are, under industry conventions, loaded directly upon the artist, with sampling expenses being deducted not only from the artist’s own royalties,⁴⁵ but also from the artist’s future publishing and licensing revenues. Insofar as major labels expect to sample the catalogs of their competitors and be sampled in turn, and insofar as they thus acquiesce to license requests from their competitors, sampling rests on a business model that loads costs and risk on artists, while transferring profits to labels.

³⁸ Johnstone, *supra* note 3, at 402; Morris, *supra* note 2, at 260; Morrison, *supra* note 3, at 134; Szymanski, *supra* note 2, at 289-90.

³⁹ Szymanski, *supra* note 2, at 289-90. Despite the lack of an industry standard, licenses typically fall into one of the five following categories: first, free licenses, which permit the sampling artist to appropriate a sample without charge; second, flat-fee buyouts, in which the sampling artist pays a one-time, lump-sum payment to appropriate a sample; third, adjusted mechanical license fees, in which the sampled artist is awarded a fee for each unit sold containing the sampled song; fourth, income share deals, in which the sampled artist receives a percentage of the sampling artist’s royalties from the song featuring the sample; and fifth, co-publishing or co-ownership agreements, in which the sampled artist receives equity in the work containing his sample. Brown, *supra* note 2, at 1956; Szymanski, *supra* note 2, at 292-93.

⁴⁰ NETANEL, COPYRIGHT’S PARADOX, *supra* note 4, at 21-22.

⁴¹ Achenbach, *supra* note 3, at 199-200; *see also* NETANEL, COPYRIGHT’S PARADOX, *supra* note 4, at 21.

⁴² Norek, *supra* note 2, at 89. As Norek relates, “A sound recording license fee for a three-second sample used only once in a new major label work may cost \$1500 as an advance on future royalties from album sales. For a looped sample of three seconds or less, the fee varies from \$1500 to \$5000, while a looped sample greater than three seconds can run into the tens of thousands of dollars.” *Id.*; *see also* Brown, *supra* note 2, at 1957; Szymanski, *supra* note 2, at 292-93.

⁴³ Norek, *supra* note 2, at 90; *see also* Szymanski, *supra* note 2, at 292.

⁴⁴ Norek, *supra* note 2, at 91; *see also* LESSIG, REMIX, *supra* note 4, at 105; NETANEL, COPYRIGHT’S PARADOX, *supra* note 4, at 21-22.

⁴⁵ Morrison, *supra* note 3, at 91, 133.

D. Proposed Solutions to the Sampling Conundrum

¶30 In the face of eroding statutory protections, rampant doctrinal inconsistency, and the high costs associated with existing licensing schemes, analysts seeking to establish greater latitude for sampling have clustered into one of two camps. Occupying a distinct, but sizeable, minority are those legal commentators who advocate primarily for revising judicial standards for sampling cases.⁴⁶ Typical of this line of commentary, Morrison has urged doctrinal revisions that would extend the reach of the *de minimis* defense and entrench the substantial similarity test as the controlling standard of review.⁴⁷ Crucially, doctrinal reformers are concerned not with altering the text of the Copyright Act itself, but rather, with altering the standards that frame the court’s assessment of the legality of sampling. The fundamental agents of change in this line of commentary are not legislators or industry actors, but rather, judges, who, through careful application of doctrine, would carve out spaces for sampling within an otherwise restrictive statutory scheme and protect sampling artists from overly litigious corporate interests.

¶31 Undoubtedly, doctrinal reform represents a logical response to legislative capture and rampant meritless litigation; nevertheless, it loads responsibility for protecting sampling on a class of institutional actors who have proven repeatedly incapable of adhering to established doctrine or applying available doctrine in consistent, predictable ways.⁴⁸ The flaws of proposed doctrinal reforms, in this sense, extend not so much from their details or overarching theoretical justifications, but rather, from their higher-order reliance on a demonstrably unreliable institutional enforcement mechanism. As the above discussion of the current state of sampling doctrine suggests, doctrinal inconsistency arises not just from myriad factually similar cases being adjudicated by myriad, uncoordinated courts—a problem that could potentially be solved by a clear mandate to follow one, and only one, standard for assessing the legality of samples. Inconsistency, rather, arises from a combination of ingrained judicial bias against sampling as a valid form of expression or creation⁴⁹ (which frames judicial analysis and screens-out minor “factual” problems) and the inherent slipperiness of aesthetic concepts of “substantiality,” “similarity,” and “feel” that extant standards ask juries to apply in evaluating actionable copying.

¶32 Standing slightly apart from the doctrinal reformers are those analysts who primarily seek statutory reforms that would regularize and streamline industry licensing practices. Linking this diverse constellation of proposals is the concept of compulsory licensing, whereby the ability of a producer to secure a license to a given sample would rely solely on his willingness and ability to pay a licensing fee.⁵⁰ The compulsory license *qua* compulsory license is recommended not as a “best practice” for the corporate owners of source materials, but rather, as an addition to the Copyright Act itself; in other words, source material owners would, under this line of commentary, be legally required to provide licenses to sampling artists capable of paying a statutorily set fee. While a common starting point for reformers, the compulsory license has been inserted into a wide variety of licensing schemes.

¶33 In a scheme closely tailored to the mechanical licensing provisions of Section 115 of the Copyright Act, Achenbach has urged treating samples like cover songs. Just as musicians can obtain compulsory licenses from the Copyright Office to create cover recordings that emulate the basic melody and fundamental character of preexisting songs, so should producers, according to Achenbach, be able to acquire the rights to appropriate portions of existing sound recordings.⁵¹ Unlike existing licensing practices, which rely on case-by-case negotiations of licensing terms,

⁴⁶ Beck, *supra* note 3, at 3-4; Mueller, *supra* note 3, at 459; Rothenberg, *supra* note 3, at 249-53.

⁴⁷ Morrison, *supra* note 3, at 138.

⁴⁸ Ponte, *supra* note 3, at 555.

⁴⁹ See, for instance, the Court’s characterization of sampling as a time and cost-saving mechanism rather than a self-sufficient aesthetic technique in *Bridgeport Music v. Dimension Films*, 410 F.3d 792, 802 (6th Cir. 2005).

⁵⁰ Achenbach, *supra* note 3, at 191, 216; Johnstone, *supra* note 3, at 423; Kravis, *supra* note 2, at 273-74.

⁵¹ Achenbach, *supra* note 3, at 191, 210-11.

Achenbach’s would impose a flat-rate royalty tied to the number of units sold.⁵² The benefits of Achenbach’s scheme would accrue most immediately to sampling artists, insofar as it would eliminate the search and negotiation costs associated with case-by-case licensing and eliminate upfront licensing fees. While each sample added to the final, commercially released recording would reduce the sampling artist’s share in the revenues from his album’s sales, this reduction in revenue would be accompanied by a shifting of the economic risk of sampling from the sampling artist to the original source material owner.

¶34 Whereas Achenbach’s compulsory licensing scheme attempts to reduce the costs of sampling to sampling artists by introducing a standardized, risk-shifting royalty structure, Johnstone has proposed a scheme that hinges payouts on the relative popularity of sampled source vis-à-vis all other sampled sources. As Johnstone explains, any scheme that relies on apportioning artist’s royalties to pay for samples places a practical limit on the number of samples that a producer can employ in any given song or album; this is doubly true insofar as any given sample usually requires at least two licenses (if not more).⁵³ As such, Johnstone proposes a “sampling tax,” wherein producers would pay a fee to the Copyright Office for the “general privilege to sample.”⁵⁴ The fee owed by any given producer would be pegged to the total number of records containing at least one sample that the producer sold over the preceding year. Then, as Johnstone explains, “This money [the aggregate of all the sampling taxes paid into the Copyright Office that year] would be distributed according to the number of times the sample is used in relation to the number of total instances of sampling by producers nationwide.”⁵⁵

¶35 Both Achenbach and Johnstone’s schemes exhibit, at the level of technical detail, shortcomings typical of compulsory licensing schemes that have been roundly and repeatedly criticized by other legal commentators. Achenbach’s flat-rate pricing scheme, for instance, lacks the capacity to distinguish between samples of differing quantitative size and qualitative importance.⁵⁶ Meanwhile, as Johnstone himself admits, what his plan gains in administrative simplicity (to the extent that a system requiring the Copyright Office to keep a running tally of sampling by thousands of artists can be considered “simple”), it loses in nuance. Insofar as one sample is considered fungible with another for purposes of calculating revenues, this scheme lacks the capacity to reward catchy or particularly well-produced samples that have a disproportionate commercial impact.⁵⁷

¶36 The technical aspects of these various reforms could be subjected to more thorough critiques than those sketched above; more relevant for our present purposes are the overarching similarities that link licensing reforms. First, although these reforms differ in their details, they each postulate a unilateral decrease in the rights and revenues of source material owners as a means of increasing the rights and revenues of sampling artists; in other words, they seek to solve the sampling conundrum simply by ignoring it. Much like the doctrinal reformers seem largely oblivious to the basic institutional factors that have made doctrinal reform appear so necessary—namely, rampant inconsistency fueled by limited judicial willingness to adjudicate sampling cases and the slipperiness of any doctrine that would require juries or judges to make aesthetic judgments—so the licensing reformers seem to be attempting to solve problems of legislative capture through initiatives that assume a legislative environment free from aggressive, organized corporate lobbying. Given the recent history of copyright reform recited above, any reform program that unilaterally—and unapologetically—reduces the economic benefits enjoyed by corporate source material owners is likely to meet with stiff corporate resistance.

⁵² *Id.* at 211-12, 220-21.

⁵³ Johnstone, *supra* note 3, at 425.

⁵⁴ *Id.* at 427.

⁵⁵ *Id.*

⁵⁶ See, e.g., Ponte, *supra* note 3, at 551.

⁵⁷ See generally Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Transactions and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1311 (1996) [hereinafter Merges, *Contracting into Liability Rules*]; Ponte, *supra* note 3, at 550-51.

¶37 Second, for all their diversity, the above outlined reforms operate within a relatively fixed and limited interpretation of the nature of music and sampling, as well as of the relationships between sampling artists and source material owners. Indeed, despite substantial changes in digital technology that have occurred since the earliest sampling cases, the statutory and licensing reforms set forth by commentators writing in the wake of *Bridgeport* differ from recommendations set forth in 1993 only by degree of detail.⁵⁸ Even in 2008, analysts can little account for the ways in which digital technology has altered and continues to alter the relationship between source material owners and samplers, beyond the relatively obvious fact that intervening technological advances have made it easier to create and distribute samples. Similarly, implicit in each of the above models is a conceptualization of commercial sampling as a two-party relationship comprised of samplers and source material owners. Undoubtedly, royalty-based licenses assume the existence of an audience; this audience, however, is an invisible third-party whose only involvement in the sampling relationship is the purchase—presumably from bricks-and-mortar record stores—of sample-based music. The albums they purchase, in turn, are discrete consumer products, “units” in the most elemental sense of the word. Thus, although the conflicts inherent in current sampling practices have arisen from digital innovations and occur within a digitally mediated environment, the solutions commentators offer to these conflicts are still largely tailored to an analog world.

PART III: A NEW PARADIGM: SAMPLING AS AN INFORMATIONAL PRACTICE, MUSIC AS AN INFORMATIONAL GOOD

¶38 Establishing a licensing regime that addresses the sampling conundrum in a manner responsive to industry pressures and to changes in the context of musical production and distribution requires slightly altered notions of sampling, music, and music-buying. Rather than conceive sampling as an expressive act, sampling should be seen as an informational act, involving a transfer of information from sampling artists to their listeners. Music, in turn, insofar as it embodies this informational practice, should be seen as an informational good. Whereas physical media have traditionally been somewhat successful in signaling the informational content of sample-based music to listeners, the shift to digital music delivery has, somewhat paradoxically, decreased the informational flow to listeners. Nevertheless, properly constructed, both digital song files and the digital aggregators and vendors that mediate between musicians and listeners provide opportunities, if coded properly, not only to restore and increase the flow of information to listeners, but also—and more importantly—to exploit that information for the benefit of sampling musicians and source material owners alike.

A. Sampling as an Informational Art

¶39 Scholars have analyzed hip-hop from a wide variety of disciplinary perspectives. Most helpful for legal analysts have been several forms of postmodern hip-hop criticism that present sampling and hip hop as, alternatively, a form of identity-creation/expression and a form of historical commentary.⁵⁹ Under the identity-creation/expression thesis, producers gather and rearrange cultural fragments as a means of signifying their identity as active, subjective agents. Relatedly, under the historical commentary thesis, producers employ sampled material as a way of asserting their place within a greater musical tradition (whether narrowly conceived as an African-American tradition or more broadly as the world musical tradition) or upending that tradition.⁶⁰ These postmodern lines of

⁵⁸ Compare Achenbach, *supra* note 3, at 211-12, 218-21 (proposing a compulsory licensing regime that would impose a “small” flat rate royalty for each sample used), with Baroni, *supra* note 2, at 94-100 (presenting a compulsory license proposal that would impose a flat rate royalty of 0.25 cents per distributed phonorecord plus an additional cent for each second of the sample’s playing time in the original work).

⁵⁹ See Szymanski, *supra* note 2, at 281-89.

⁶⁰ See MURRAY FORMAN, *THE ‘HOOD COMES FIRST: RACE, SPACE, AND PLACE IN RAP AND HIP-HOP* 3, 11 (2002); CHERYL KEYES, *RAP MUSIC AND STREET CONSCIOUSNESS* 21, 104, 145 (2002); IMANI PERRY, *PROPHETS OF THE HOOD: POLITICS AND POETICS IN HIP HOP* 2, 47, 102 (2004); TRICIA ROSE, *BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA* 21-22, 59-60, 79 (1994); Andrea Queeley, *Hip Hop and the Aesthetics of Criminalization*, 5 *SOULS* 1, 2 (2003); Sanjek, *supra* note 2, at 609, 623 (1992); Shimanoff, *supra* note 2, at 24.

analysis are particularly fitting for a copyright regime that extends protection to transformative appropriations of existing cultural materials; conceived in these ways, sampling becomes a means not simply of recycling these materials, but also—or rather—of repurposing these materials for expressive, existentially charged ends unique to producers and their listeners.⁶¹

¶40 While “true” to a certain, albeit indeterminate, extent, postmodern analyses of sampling tend to elevate the expressive meaning or objectives of sampling over its more direct and arguably more prominent goal, namely, creating music with an appealing sound.⁶² Producers are engaged primarily in the practice of finding fragments of past recordings that can be made appealing to present-day audiences. Subsequently, in sampling, the producer undertakes two interrelated tasks, both of which are informational in nature. Specifically, the producer notes to listeners the value of the sample as an appealing musical building-block vis-à-vis other possible samples and notifies listeners of the existence of the underlying composition. Samplers thus function as aural filters, archivers, and advertisers, identifying past recordings and providing new contexts within which present-day listeners can encounter them.⁶³

¶41 Insofar as hip hop is regarded as a “producer’s genre” (where production styles, rather than the styles or lyrics of vocalists, are the key to commercial success), producers’ sampling decisions have an outsize impact on the overall direction of the music; a particularly appealing sample will routinely spawn a wave of similar-sounding beats built from similar source material. A particular act of sampling, in this sense, expands the market for older music not only by heightening the visibility of one particular sampled recording, but also, potentially, for the sampled artist’s entire discography, a sampled label’s back catalog, or an entire time-slice of a given genre of music. In a production culture where prohibitions on “biting” (using a sample made popular by another producer except in instances of clear homage) place already-used samples in a form of creative quarantine, producers experience pressure to uncover long-forgotten recordings by obscure counterparts to major genre figures, to expand into different genres, and to extend their search into the musical output of other nations.⁶⁴ To the extent that producers communicate the sources of their samples to listeners—or, alternatively, to the extent that these sources are discoverable by knowledgeable listeners with the capacity to communicate with other listeners—taste-making samplers can play a significant role in the cycling of cultural materials through the stream of popular consumption.

B. The Nature and Evolution of Music as an Informational Good

¶42 The informational aspects of sampling are relatively transparent in physical musical formats. Liner notes typically accompany music sold in physical formats (vinyl, tape, compact disc). While the sophistication and detail of these notes vary from album to album and from genre to genre, standard liner notes for hip-hop albums provide purchasers with a wide variety of information regarding the individual tracks comprising the album as well as the album as a whole. Included in this information are sampling notices, which indicate not only the performer and song sampled, but also the publishing information for the sampled composition and source of the license for the sampled recording. Beyond signaling the legality of the sample, sampling credits serve two important informational functions. First, sampling credits disaggregate songwriting responsibilities for recordings.⁶⁵ Second, and more straightforwardly, sampling credits direct listeners to source

⁶¹ Merges, *Locke*, *supra* note 3, at 1261.

⁶² See ROBIN D.G. KELLEY, RACE REBELS: CULTURE, POLITICS, AND THE BLACK WORKING CLASS 226 (1994); ADAM KRIMS, RAP MUSIC AND THE POETICS OF IDENTITY 39-40 (2000); Robin D.G. Kelley, *Looking for the ‘Real’ Nigga: Social Scientists Construct the Ghetto*, in THAT’S THE JOINT! THE HIP-HOP STUDIES READER 124, 129, 132 (Murray Forman & Mark Anthony Neal eds., 2004).

⁶³ For a similar interpretation of acts of cultural appropriation more generally, see LESSIG, REMIX, *supra* note 4, at 93.

⁶⁴ SCHLOSS, *supra* note 13, at 105-09. Beat-making brothers Madlib and Oh No have been at forefront of producers seeking to incorporate non-American music into hip-hop beats. See MADLIB, *Beat Konducta in India* (Stones Throw 2007) (containing beats built entirely from Bollywood soundtrack samples); OH NO, *Dr. No’s Oexperiment* (Stones Throw 2007) (containing beats constructed from Greek, Italian, Lebanese, and Turkish records).

⁶⁵ Under industry standard licensing agreements, the owners of the underlying musical composition receive songwriting credit

materials. While certain aural qualities of songs built from samples (for instance, the inclusion of recognizable musical phrases, a mixture of textures, prominent looping of small musical units, or the presence of additional voices beyond the main performer’s) might alert listeners to the presence of samples in a song, musicians rarely engage in explicit, in-song attribution of those samples.⁶⁶ References to sampled songs are contained entirely within the liner notes, requiring curious listeners to engage in a form of active, simultaneous reading and listening.

¶43 The transition from physical media to digital media has, in many respects, led to a decrease, rather than an increase, in the informational content of music. Unlike their physical counterparts, albums prepared specially for digital release include liner notes only rarely. When liner notes are included (in the form of e-booklets), they are typically only viewable while sitting at a computer console. Undoubtedly, compact discs possess metadata that applications such as Gracenote can read, and, subsequently, use to tag the contents of the disc for archiving on a computer in MP3 form (or other associated formats). The information provided to listeners via Gracenote, however, is minimal in comparison to that provided in the liner notes for physical editions of albums. Whereas, as noted above, the liner notes for Jay-Z’s *The Blueprint* offer songwriting, production, recoding, mixing, mastering, and sampling information for his “Heart of the City,” Gracenote provides only the names of the lead vocalist (Jay-Z) and the song’s producer (Kanye West, listed as the “Composer”), the album title, year of the album’s release, the song’s track number, and a genre tag (“Hip-Hop/Rap”). Such information allows for several different methods of organizing and listening to ripped or downloaded music; however, as this comparison suggests, significant information regarding the contents of the song—particularly, sampling credits—are lost.

¶44 Information that listeners previously accessed through official liner notes packaged with physical recordings has now migrated to scattered, Web-based databases maintained by music fans.⁶⁷ Wikipedia, in turn, has emerged as the most accurate, comprehensive substitute for notes, with Wikipedia editors uploading songwriting, production, performance, and sampling credits to web pages dedicated to specific albums.⁶⁸ While Wikipedia pages do not include all of the information contained within liner notes and are prone to user-generated errors, these pages nonetheless contain those pieces of information most relevant for listeners seeking other appealing music (songwriters, producers, featured guests), formatted in a way that facilitates user-directed browsing. For instance, listeners who enjoyed Kanye West’s production work on Jay-Z’s “Takeover” can access West’s artist page (which, in turn, contains an extensive biography, a discography, etc.), as well as individual pages for the songs West sampled to construct the “Takeover” beat (The Doors’ “Five to One” and KRS-One’s “Sound of da Police”).⁶⁹ Listeners can even access a page dedicated solely to the “Takeover,” which provides a key for deciphering its virtually endless stream of references to other rappers and events preceding its recording.⁷⁰ The hyperlinking capacities built into web-based platforms, in this sense, provide listeners with a comparatively dynamic means for acquiring knowledge about the music they hear, allowing them, potentially, to browse through thousands of interlinked songs, albums, and performers spanning genres and musical generations. A contemporary song that samples an underlying composition, within this digital environment, becomes a gateway to other, perhaps more obscure, nodes in the ever-ramifying musical network.

for the present recording. For example, the notes for Jay-Z’s “Heart of the City (Ain’t No Love)” (2001) list as songwriters “S. Carter, K. West, M. Price, D. Walsh.” As the sampling notice indicates, however, “M.Price” and “D. Walsh” were the songwriters for the sampled composition “Ain’t No Love in the Heart of the City”; this leaves “S. Carter” and “K. West” as the songwriters for the non-sampled aspects of the present song. JAY-Z, *The Blueprint* (Roc-a-Fella 2001).

⁶⁶ A favorite technique of producers who produce primarily for fellow vinyl enthusiasts is to “reveal” the sampled song at the end of a beat, allowing a snippet of the underlying composition to be heard free of any filters, looping, or chopping. See, for instance, BLACK MILK, *MUSIC FROM THE COLOR PURPLE* (2008). This form of in-song attribution, however, relies on listeners having previously heard the underlying song.

⁶⁷ For example, see SAMPLESDB, <http://www.samplesdb.com> (last visited Apr. 20, 2009) and WHOSAMPLED, <http://www.whosampled.com> (last visited Apr. 20, 2009).

⁶⁸ *The Blueprint*, WIKIPEDIA, http://en.wikipedia.org/wiki/The_Blueprint (last visited Apr. 2, 2009).

⁶⁹ *Kanye West*, WIKIPEDIA, http://en.wikipedia.org/wiki/Kanye_West (last visited Apr. 2, 2009).

⁷⁰ *Takeover (song)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Takeover_\(song\)](http://en.wikipedia.org/wiki/Takeover_(song)) (last visited Apr. 2, 2009).

C. The Informational Deficits of Digital Aggregators

¶45 Just as digital song files are currently under-informationalized, the major web-based aggregators (both filters and vendors) also currently fail to exploit sampling information. As a review of two major aggregators—iTunes and Last.fm—suggests, however, these platforms could be optimized to do what physical liner notes have never succeeded in doing, namely, placing listeners in a position to purchase music directly from networked, dynamically browsable catalogs in a trackable and monetizable way.

(1) iTunes

¶46 As noted above, the range of information that iTunes provides listeners is relatively scant vis-à-vis the total informational content of the music. Listeners relying on Gracenote to supply them with track information will typically only receive artist, track, and album names, running times, and label information. Listeners have access to slightly more information through the iTunes Store. Within the Store, the basic unit of which is the album page, Apple presents listeners with the following: graphical, clickable lists of all in-stock albums filed under the artist’s name and those albums most commonly purchased by purchasers of a given album; text-based, clickable lists of the most downloaded songs by the artist; ringtones derived from the artist’s songs; and a clickable list of mixes created by iTunes users.

¶47 The iTunes Store is a relatively passive marketing device, relying on listeners to login and search the site in a relatively unstructured way. Apple, however, has also devised a more-active, directed aggregating/recommendation mechanism referred to as “Genius.” In exchange for granting Apple access to the music catalogs contained on their hard-drives and the metadata attached to those catalogs (ratings, play counts, purchase histories, etc.), Genius users receive custom playlists that mix music users already own with songs from the iTunes Store that—given the preferences and buying habits of other Genius users with similar catalogs—Apple predicts listeners will enjoy (and be likely to buy). The particular “genius” of Apple’s digital music aggregation and distribution mechanism is the variety of ways in which it places music with a high probability of personal relevance and appeal within a single click of listeners; the desire of music fans to explore new music is relatively tightly integrated with simple, clear purchasing opportunities.

¶48 Provided both that artists provide fair notice of the samples contained in their songs and that the iTunes code is appropriately modified, the iTunes “Get Info” function, Genius application, and Store could each be employed to promote sampled music. At the most basic level, the multi-page information box that accompanies each song in a listener’s library (accessible through the “Get Info” function) could be encoded to include a listing of the samples contained within a given song, with direct links to the iTunes store where the source songs could be purchased. Similarly, the album pages in the iTunes store could be encoded to display a clickable list of the album’s source songs. Most dramatically, and perhaps most effectively, however, Genius could be reformulated to provide users with automatically generated lists of album samples, which could then be included in mixes containing both the source songs and the songs that sample them. Insofar as Genius is a relatively elaborate advertising mechanism, it is also a highly “naturalistic” one. Rather than relying on pop-up ads (like those currently being employed by record labels on YouTube) or other frame-breaking techniques to alert listeners to the presence of buying opportunities, Genius tightly melds the act of listening to one’s personal library with the act of shopping for new music. Instead of waiting for listeners to seek out samples, Genius could present sampled music directly to listeners. In the process, it would alert less sophisticated audiences to the presence of samples, perhaps then expanding the market for sampled music from hardcore crate-diggers (who make up a distinct minority of the listening population) to casual listeners.⁷¹

⁷¹ While differing slightly from the iTunes Store in terms of the information it offers users, Amazon displays both similar functionalities and potentialities as its Apple-maintained counterpart. With minor changes in coding and properly provided album information, Amazon could conceivably pair its scrolling, graphical “Customers Who Bought This Item Also Bought” lists with a “Songs This Album Samples” list. *See, e.g., The Blueprint: Jay-Z: Music*, AMAZON.COM,

(2) *Last.fm*

¶49

At the core of the most inventive services provided by Last.fm—a web-based music aggregator—is the “scrobbling” function, which allows users to upload to the web information about the songs they play on their personal devices. Last.fm uses scrobbled data to, among other things, generate statistics that illustrate the listening habits of a given user and link users to other users with similar listening patterns. In addition to providing users with information about their listening, Last.fm simultaneously presents them with significant amounts of information about the music to which they listen. As a user plays songs through iTunes, Last.fm, by means of a pop-up window, provides the following: a capsule biography of the artist, a link to the artist’s Last.fm page (which in turn features links to videos, streamable audio, events, and news, as well as listener-produced tags, listeners who are particularly interested in the artist, metadata about the volume and variety of the artist’s songs played by users, and links to similar artists—determined primarily through analysis of the listening habits of the artist’s most frequent listeners), and links to the Last.fm pages of similar artists. Most importantly, however, Last.fm features prominent links directing listeners either to iTunes to purchase the current selection or to Amazon to purchase the CD on which the current selection appears.

¶50

While in many respects more immersive and browsable than the iTunes environment, Last.fm also reveals, perhaps more strongly than iTunes, the conceptual limits within which most web-based aggregators work. Last.fm, like iMeem and Pandora, aggregates music primarily “horizontally”; if users were to follow the links to other music and artists provided by these sites (or, in the case of Pandora, the music streamed in web-radio format), one would be moving freely through a relatively thin time slice of music. For instance, despite the evident soul influences in Jay-Z’s *Blueprint*, Last.fm directs users only to other hip-hop acts, and, within hip hop, largely to either East Coast rappers that recorded the bulk of their significant output from the mid-1990s onward (when Jay-Z first debuted as a solo act on a major label) or major label rappers popular from the late-1990s onward (when Jay-Z solidified his commercial standing).⁷² Undoubtedly, these aggregation patterns are driven in part by listeners’ habits (which, in turn, reflect clear genre-clustering) and in part by the qualities of artists’ recorded output. Nonetheless, taken together, these tendencies reveal the extent to which the “vertical” links between songs in different musical generations are effectively invisible to aggregators as presently coded.

¶51

Properly coded, Last.fm could perform the same function as iTunes’ “Get Info” or Genius function, presenting listeners with links to purchase the digital singles of the songs sampled by their favorite sampling musicians. Crucially, Last.fm is able to parse music at the song level; in other words, links followed while listening to “Ain’t No Love,” can be interpreted as distinct from links followed while listening to “The Takeover.” This allows for tracking of purchases in ways that establish a causal link between hearing a new song and purchasing songs that it samples. Much like the Genius function, Last.fm allows for direct advertising to the listener, alerting listeners to the presence of samples and presenting source songs directly to them, rather than relying on them to assume the initiative to hunt down the sources through other means.

http://www.amazon.com/gp/product/B00005O54T/ref=dm_dp_cdp?ie=UTF8&s=music&qid=1295895361&sr=8-1 (last visited Jan. 24, 2011) (providing an example of Amazon’s “Customers Who Bought This Item Also Bought” functionality). Amazon currently offers an analogous display for many of the books it sells, in the form of its hyperlinked “Citations” lists, which link users not only to works a given book cites, but also to the subsequently published works that cite that given book. Through code, Amazon effectively extracts and hyperlinks the footnotes, endnotes, and bibliographies of books, and then uses these notes to build constantly evolving networks between books. See, e.g., *Rosenzweig and Heidegger: Between Judaism and German Philosophy*: Peter Eli Gordon: Books, AMAZON.COM, http://www.amazon.com/Rosenzweig-Heidegger-Philosophy-Cultural-Criticism/dp/0520246365/ref=ntt_at_ep_dpi_3 (last visited Jan. 24, 2011) (providing an example of Amazon’s Citation functionality).

⁷² *Similar Artists to Jay-Z*, LAST.FM, <http://www.last.fm/music/Jay-Z/+similar> (last visited May 22, 2009).

PART IV: A NEW SCHOOL LICENSING REGIME

¶52 While a wide variety of licensing regimes could conceivably be devised to exploit the status of music as an informational good, the regime outlined here is specifically developed, first, to integrate relatively easily within existing industry practices, and second, to provide a degree of flexibility and scalability that would allow the specific quantitative details and administrative relationships intrinsic to the new licensing regime to evolve in response to market forces. This new regime takes as its starting point and basic structuring principal the possibility of using source disclosure, coding, digital aggregation, and click-through to alter the equities and revenue flows of the sampling relationship.

A. Principal Parties

¶53 The new sample-licensing regime assumes the existence of four parties, specifically, sampling artists and their record companies, source material owners, on-line music vendors and aggregators, and music buyers. It also premises the creation of a fifth party: a centralized sample clearinghouse, designed specifically to administer and manage sampling licenses. Precedent for such an institution can be located both in current industry practices as well as in extant performing rights organizations, such as ASCAP and BMI.⁷³ A centralized sampling clearinghouse would consolidate and coordinate the work currently undertaken in an uncoordinated way by music attorneys, private sample clearance agents, and label-based rights management divisions. When carried out at high volumes (as it currently is), sampling is a process that affects broad swaths of the industry, with labels sampling from their competitors’ catalogs and being sampled in turn.⁷⁴ Under these conditions, case-by-case negotiations extended over a long period of time lead to replicative paperwork, which heightens transaction costs for source owners and sampling artists alike. Through its centralizing and standardizing functions, the clearinghouse would seek both to limit transaction costs involved in licensing as currently practiced and to streamline the licensing and revenue-sharing processes for all parties.

¶54 The clearinghouse would serve simultaneously as a comprehensive music registry and as an administrative body, maintaining records of the rights held in each piece of music made commercially available in the U.S., setting fees and royalty rates for samples, and distributing revenue generated by the sale of music containing samples.⁷⁵ To participate, source material owners—both large corporate record companies and independent musicians—would submit records of their ownership stakes in sound recordings and musical compositions to the clearinghouse. For record companies, this would effectively represent an outsourcing of their rights management to a third-party. Furthermore, while the owners of rights to musical compositions are not always identical with the owners of rights in sound recordings, the current functioning of the record label as the unit for distributing revenue to rights holders would likely mean that a porting of record company rights information to the clearinghouse would significantly ease the search for source material owners (as companies would already have this information on file in order to administer royalties). In addition to providing rights information, a participating label would pay an annual fee to fund the clearinghouse’s work, proportionate to the company’s total share of existing songs that the clearinghouse administers. The clearinghouse would be directed by a board, comprised of representatives both of source owners and samplers (presumably, a mix of attorneys, financial consultants, producers, and performers), which would set and periodically revise the terms under which samples are valued.

⁷³ See Merges, *Contracting into Liability Rules*, *supra* note 57, at 1328-40.

⁷⁴ Johnstone, *supra* note 3, at 402-03.

⁷⁵ Fisher and Netanel have proposed similar institutional arrangements to manage internet-based music sharing. See WILLIAM W. FISHER, PROMISES TO KEEP 199-258 (2004); Neil Netanel, *Impose a Noncommercial Use Levy To Allow Free Peer-to-Peer File Sharing*, 17 HARVARD J.L. & TECH. 1 (2003).

B. Background Condition

¶55 Under this licensing regime, the record companies involved in licensing samples would have to establish a basic coding standard that could be used to tag sample-based music with metadata which would, first, indicate the samples contained within any song and, second, be interpretable by the major aggregators. As opposed to much of the sampling process, establishing this coding standard would be relatively easy; the first workable standard could simply be communicated by the aggregators to other record companies seeking to exploit sampling information. More complicated would perhaps be securing an agreement by the digital aggregators to alter their displays; for instance, whereas Amazon and Last.fm’s looser presentational formats could accommodate special display requests (as Amazon does widely with books), iTunes has traditionally proven more rigid. On this front, the major record labels, which together account for eighty percent of the market for recorded music, are engaged with on-going negotiations with Apple over a variety of issues (including digital rights management and pricing policies);⁷⁶ given this reciprocal (albeit occasionally contentious) relationship and the significant leverage an allied consortium of labels would possess vis-à-vis Apple, coding for samples could conceivably be included as an additional condition for future licensing agreements between the industry and Apple.

C. The Sampling Process

¶56 Once this background condition is satisfied, the sampling process would take the following steps and adhere to the following protocol:

(1) Creation

¶57 The sampling artist produces a preliminary master, representing a rough cut of the album that will ultimately become commercially available and containing all the samples that will appear on the commercially available version.

(2) First Notice—Intention to Sample

¶58 The sampling artist’s record company provides the clearinghouse with a preliminary master and a list of all samples contained in the master, detailing all the source song information available at hand (presumably, at least, artist name, song title, record label, and date of release), the type of each sample (drum track, instrumental, vocal, instrumental-vocal mix), the length of each sample, and the location of each sample in the song (by time stamp or, if looped throughout song, noted as such).

(3) Fee and Royalty Assessment

¶59 In the sample clearance phase, the clearinghouse receives schedules of samples from the sampling artist, completes any missing rights information, and assesses fees and royalties. Crucially, these rates would not be statutorily set, but rather, dynamically adjustable by the clearinghouse’s board. Under the cooperative logic that would have promoted the clearinghouse’s establishment in the first instance, fees and royalties would be assessed under a standardized schedule designed to achieve the optimal level of sampling and return for source material owners.

¶60 A standardized schedule that could be easily implemented by the clearinghouse would resemble the following:

- (a) Purely instrumental samples will be assessed a base instrumental royalty with an additional fractional fee for each second of running time over one second (where seconds are measured in terms of running time in the source song, not the new, sampling song). This shall inhere in cases where the artist takes one or more than one sample from the same song, provided that the total taking not exceed 20 seconds of the source material.

⁷⁶ See Brad Stone, *Want to Copy iTunes Music? Go Ahead, Apple Says*, N.Y. TIMES, Jan. 7, 2009, at B1.

- (b) Purely vocal samples will be subject to a two-tiered fee system.
 - i. Samples of non-chorus vocals will be assessed a base “non-chorus vocal” royalty plus a fractional fee for each word sampled beyond one word.
 - ii. Samples of pre-chorus or chorus vocals will be assessed a base “chorus vocal” royalty plus a fractional fee for each word sampled beyond one word.
- (c) Samples containing a mix of instrumental and vocal sounds will be assessed a base “mix” royalty plus either the fractional instrumental fee for each second of running time over one second or the fractional vocal fee for each word sampled (whichever formulation results in a higher royalty).

¶61 Although the specific royalty rate for each type of sample will be established by the clearinghouse board, it is assumed that when set, the rates will ascend in this order: instrumental rate, non-chorus vocal rate, chorus vocal royalty, and mix royalty. In the initial, experimental phases of this scheme, the board may also choose to assess relatively small advances on royalties as a means of shifting some of the risk associated with sampling back onto the sampling artists.

¶62 Critics of compulsory licensing regimes have repeatedly noted the difficulty involved in assessing the value of a given sample, pointing to marked differences, for instance, in the prominence of the artists sampled, the length and nature of the sounds sampled, and the qualitative significance of the sounds sampled.⁷⁷ The above scheme attempts to manage these difficulties in the following ways: first, by grouping samples into a set of major, easily distinguishable types; second, by providing an opportunity, albeit limited, for higher value samples to receive higher rates of return for source owners; and third, providing a scalable return through royalties. Under certain conditions, requiring standardization may result in higher sampling costs for artists as record companies seek to inflate prices for more obscure samples to offset potential losses from more coveted or prominent samples. It is assumed, however, that the added value labels will gain from click-through source music purchases will induce labels to cap the rates they seek as a means of encourage higher visibility for their back catalogs.

(4) Second Notice—Intention to Release

¶63 Once the clearinghouse has set the rates for the preliminary master, it supplies the sampling artist with the finished fee schedule. The sampling artist then has the opportunity to delete samples from the master. Once the final sample line-up has been set, this line-up is supplied to the clearinghouse, which then notifies those record companies that own source recordings that have been sampled.

(5) Post-Up

¶64 Companies that own source recordings ensure that their recordings are available for purchase on the major digital aggregators. Any recordings that are not available are mastered for digital distribution and playback and supplied to the aggregators.

(6) Coding, Release, and Distribution

¶65 Once post-up is completed, the sampling artist is free to release his recording for commercial distribution. The finished release must be encoded with metadata that is readable by the major aggregators and that details each of the songs sampled in the recording.

¶66 Consumers purchase copies of the new sound recording—and potentially its source recordings—by clicking through links provided by the aggregators.

(7) Revenue Distribution

¶67 Data on song and album sales from on-line and off-line retailers is provided to the clearinghouse on a scheduled basis. This data includes not only the total number of the sampling artist’s units sold,

⁷⁷ Morris, *supra* note 2, at 259; Ponte, *supra* note 3, at 550-51.

but also the total units of each source recording sold on the basis of click-through from the sampling artist’s digital aggregator links. A more radical version of this compensation scheme could also reward sampling artists based on the number of *plays* of source material (as distinct from *purchases*) that their song generated. The clearinghouse calculates the royalties owed to source rights holders by multiplying the total number of applicable units sold by the royalty rate established in step 3 and subtracting the net click-through revenue the sampling song generated for the source song. The sampling artist submits the required royalty payment to the clearinghouse, which then manages the division of revenues between the holders of the musical composition and sound recording copyrights.

D. Underlying Assumptions

¶68 The above discussion assumes that reforming the existing licensing regime along the lines suggested will not only be *technically* feasible, but also, and more fundamentally for questions of political feasibility, *economically* feasible. Information-embedding, code-sharing, and click-through credits provide means for reapportioning surpluses currently produced by commercial sampling and to create new revenue streams extending directly from commercial sampling. While the extensive empirical data necessary to substantiate these claims is not readily available, it is possible at this juncture to outline a general theory of the economic gains that would arise under an optimized licensing regime.

(1) Gains for Source Material Owners

¶69 Under this regime, music containing samples would function as a source of relatively aggressive and pervasive advertising for source songs. Some small percentage of the audience for music containing samples is comprised of “diggers” (short for “crate diggers,” a reference to the practice of hunting through crates of vinyl records to locate albums to sample)—obsessive listeners who not only have an active interest in the sources of samples, but also an awareness of when samples are being employed, a knowledge of where to locate those samples, and a habit of spending money to acquire sampled songs. The proposed sampling regime would likely do little to alter the buying patterns of this hard core of listeners and instead would likely redirect some of their expenditures from used music to digital downloads.⁷⁸ Increasing the informational content of songs and aggregators would instead most likely be effective in changing the buying habits of a larger contingent of active listeners with a lower tolerance for the search costs associated with locating physical copies of source songs. While likely larger than the digging contingent, these active listeners would still represent only a subset of the greater market for contemporary music, which is likely dominated by “passive” listeners with minimal awareness of when samples are being deployed. The particular strength of the coding and aggregation required by the new licensing regime, however, lies in the “naturalistic” advertising it promotes; indeed, particularly as deployed through iTunes and Genius, coding and aggregation allows for “old” songs to be integrated directly into “new” songs.

¶70 Coding and aggregation would allow industry actors not only to present listeners with new music in a more naturalistic way, but also in a way that would permit a heretofore impossible form of price discrimination. Coding of the sort envisioned above would allow new songs to be “packaged” with source materials. Such packaging is indeed possible using physical media; for instance, Jay-Z’s *Blueprint* could be sold as a double-disc set, with one disc containing the new sound recording, the

⁷⁸ While the catalog of music available for digital download from the major aggregators is extensive and continuously expanding, not all source songs are in fact commercially available in digital formats (either MP3 or CD). Listeners seeking copies of these songs must instead turn to used vinyl vendors; proceeds from used vinyl purchases, however, are conveyed neither to the sampling artist who generated interest in the source material, nor toward the source song rights holders.

The new licensing regime, however, would likely not redirect the *entire* surplus currently residing in the used music market, as a certain degree of the demand for vinyl records is vinyl-specific. Some listeners prefer the “warmth” of vinyl recordings to the “coldness” of digital media, while others prefer the sound of music that has not been remastered for digital presentation, and still others prefer to work with vinyl in producing their own samples. While perhaps small, the redirected revenue could nonetheless combine with new revenue streams to produce appreciable overall gains in revenue for source material owners.

other disc containing the songs sampled in the new recording. Doing so, however, would not only add a new layer of administrative costs extending from the exigencies of compiling the sources, but would also allow for only the crudest form of price discrimination: listeners could purchase either the new recording as a single, stand-alone disc, or a “deluxe” double-disc version at an additional cost (which would likely fluctuate from album to album, depending on the number and nature of the samples the album used). Coding and aggregation, meanwhile, allows purchasers of a new recording to buy just as many, or as few, of the source songs as they desire at little added cost to the source material owners or the sampling artist. The concept of a scalable or flexible “bonus disc” of samples reveals the extent to which properly developed digital technologies allow multiple, distinct corporate entities to engage a loosely collaborative expansion of the overall market for their source materials. Songs bearing information regarding the samples they contain become a sort of locus or portal for subsequent purchases of other songs in which the owner of the sampling song has no ownership interest. Although the entities controlling the source recording receive the direct monetary benefits of this informationalization, they do nothing to promote their music other than to consent to its use in a transparent, actionable way by another industry actor.

¶71 The cooperative logic that underwrites the concept of a “scalable” bonus disc points to one aspect of the industry-wide gains that may inhere in an aggressive, universal implementation of the licensing approach this Note proposes. Indeed, while coding one song file and linking it to a few other sampled source songs might increase the revenue (on an advertising model) generated by those select few source songs, systematic, universal coding and aggregation might alter general sales patterns resulting in distributed revenue increases for the owners of musical back catalogs. As writer Chris Anderson has famously argued, part of the promise of the emergence of online merchandisers and digital distribution is a destabilization of what marketers term the “80/20 rule,” whereby twenty percent of a vendor’s products account for eighty percent of its profits.⁷⁹ According to Anderson, “Bringing niches within reach reveals latent demand for non-commercial content [i.e., content—such as songs—not otherwise commercially available]. Then, as demand shifts toward the niches, the economics of providing them improve further, and so on, creating a positive feedback loop...”⁸⁰ Specifically, an increase in the number of goods for sale, a decrease in the costs of storing and distributing them, and an increase in their “findability” can produce a “long tail” market in which demand does not cluster solely around a small number of hit songs at the “head” of a sales curve, but also extends to songs arranged along the “tail” of that curve. Although, in a long tail market, hits remain the most consumed products, products significantly further down the demand curve are still purchased a few times yearly; the aggregation of many small sets of sales far down the demand curve can result in substantial increases in revenue.⁸¹

¶72 Anderson’s version of the Long Tail theory has not received universal assent as an accurate description of the current functioning of online music markets. Most notably, in a recent presentation at the Fifth Annual Telco 2.0 Executive Brainstorm, British economist Will Page unveiled research that directly controverted the Long Tail hypothesis for music markets; as Page related, only twenty percent of the songs available from an undisclosed on-line retailer sold even a single copy, with eighty percent of sales revenue arising from three percent of the retailer’s catalog.⁸² While Page’s research sheds doubt on the descriptive accuracy of Anderson’s theory, it does not conclusively rule out the potential for the ultimate emergence of a digital music long tail. The existence of a long tail in other online product sectors has been established and confirmed by the work of economists Erik Brynjolfsson, Yu (Jeffrey) Hu, and Duncan Simester.⁸³ The sector that

⁷⁹ CHRISTOPHER ANDERSON, *THE LONG TAIL – THE REVISED AND UPDATED EDITION: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* 7 (2008).

⁸⁰ *Id.* at 26; *see also id.* at 8.

⁸¹ *Id.* at 10, 22, 53; *see also* LESSIG, *REMIX*, *supra* note 4, at 129.

⁸² *Exclusive Interview: The Long Tail Interrogated (Part 2)*, TELCO 2.0 (Nov. 12, 2008, 2:13 PM), http://www.telco2.net/blog/2008/11/exclusive_interview_will_page.html.

⁸³ Erik Brynjolfsson, Yu (Jeffrey) Hu, & Duncan Simester, *Consumer Surplus in the Digital Economy: Estimating the Value of Increased Product Variety at Online Booksellers*, (MIT Sloan Working Paper No. 4305-03, 2003), *available at*

these economists have tracked—books—is more thoroughly aggregated, filtered, and networked than digital music.⁸⁴ To the extent that Page’s research challenges the present descriptive accuracy of Anderson’s work, it is possible that a musical long tail could depend on the emergence of filters and aggregators that would, by lowering listeners’ search costs, drive demand further down the sales curve, from more popular (and generally, more recently produced songs) to less popular (and generally, older) songs.⁸⁵

¶73 Insofar as implementing the coding and aggregation recommended in this Note would produce a more densely and logically networked digital music environment, it may contribute to the emergence of a sales distribution that more closely matches the long tail. Under this theory, record labels would effectively seize upon the work of sampling artists to add a new layer of filtering and recommendation to a musical environment that currently relies almost wholly on user-generated data to draw new music to listeners’ attention. This new layer of recommendation would operate under the same basic principle as other recommendation systems, namely, that word of mouth from popular/trusted sources is most valuable to heightening the relevance of certain cultural products to listeners⁸⁶; however, it would both introduce a new set of actors (sampling artists as “super-recommenders” or “privileged tastemakers”) and a new set of links that would not so much connect contemporary music to other contemporary music as they would connect contemporary music to past music. Insofar as coding would drive listeners to purchase source materials, this “drive” would be quantifiable, and, in turn, monetizable.

(2) *Gains for Sampling Artists*

¶74 A system built on linking credits would allow sampling artists to transfer some (or all) of the costs of sampling to listeners. Under current industry practice, the costs of sampling (clearance and royalties) are paid from the sampling artist’s share in the new sound recording.⁸⁷ Linking credits, however, provide listeners with the opportunity to defray the sampling artist’s license fees and royalties by purchasing source materials directly from their owners. As this model suggests, changes in the way digital music is coded and aggregated provide ways to raise revenues for both sampling artists and original rights holders by changing the party structure of the sampling transaction. To the extent that linking credits provide a means for shifting the costs of sampling to third-party listeners, they also undercut the basic assumption that has informed prior efforts to reform sample licensing, namely, that the economic interests of sampling and sampled parties are ineluctably diametrically opposed.

¶75 Under a reformed licensing regime oriented toward *facilitating*, rather than *limiting*, sampling, moreover, sampling artists not only would be able to shift the costs of sampling onto listeners, but also might experience an across-the-board decline in the upfront and downstream costs of sampling. Inasmuch as music industry actors sought to saturate the musical environment with new sets of linkages, prices would be standardized and calibrated to permit maximal sampling. With a drop in the cost of sampling would come increased freedom to engage in more complicated, sample-heavy production (particularly chopping and collaging), which would otherwise be prohibitively expensive.

¶76 The mechanics of the new licensing regime will inflict some not-unappreciable costs upon sampling artists. Most directly, a regime built on full disclosure, coding, and click-through would undercut master samplers’ ability to maintain the secrecy of their sources. Inasmuch as producers’ decisions to hide the sources of their samples are motivated by legal considerations, such decisions

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=400940 [hereinafter Brynjolfsson, Hu, & Simester, *Consumer Surplus*]; Erik Brynjolfsson, Yu (Jeffrey) Hu, & Duncan Simester, *Goodbye Pareto Principle, Hello Long Tail: The Effect of Search Costs on the Concentration of Product Sales* (MIT Sloan Working Paper, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=953587 [hereinafter Brynjolfsson, Hu, & Simester, *Goodbye Pareto Principle*].

⁸⁴ ANDERSON, *supra* note 80, at 162.

⁸⁵ *Id.* at 52-53; see also Brynjolfsson, Hu, & Simester, *Goodbye Pareto Principle*, *supra* note 84, at 1-2, 13.

⁸⁶ ANDERSON, *supra* note 80, at 34, 57, 101, 107.

⁸⁷ Morrison, *supra* note 3, at 80.

are also integral to producers’ attempts to cultivate an aura of mystery and maintain a competitive advantage over other producers. While producers can gain renown for their technical ability to manipulate samples, their reputation simultaneously relies on their ability to locate and extract new and interesting samples; masking the source of samples increases a listener’s sense that the producer has knowledge of and access to a wide range of music and a strong ear for catchy fragments (particularly in those cases where a producer is manipulating a widely used sample in a way that renders it unrecognizable). In other words, sampling involves not just a sharing of interesting bits of music with listeners, but also a kind of aural one-upmanship in which the producer suggests to listeners that he knows something they do not.⁸⁸ Obscuring source materials, in turn, allows producers to hide not only the raw materials of their music, but also their technical tricks: if a listener cannot identify the source, it is nearly impossible to determine what the producer did to that source.

¶77 The new licensing regime would not only force producers to expose their “trade secrets,” but would also undercut the autonomy of their finished works. As noted above, the effect of the new coding provisions would be to convert music files containing samples into advertisements for other music. While such provisions would not prevent listeners from experiencing new, sample-based music as a *unified* artistic creation, they would undercut the aesthetic sense of the music as a *standalone* or *self-sufficient* creation.

¶78 While notable, neither the loss of secrecy nor the loss of autonomy would likely dissuade sampling artists from participating in the new licensing regime. First, sampling artists would be compensated for such losses with an increased ability to sample commercially, since the new regime would simplify the process of clearing samples and reduce the costs associated with sampling. Any losses of secrecy would likely compel sampling artists to focus more intensely on the technical aspects of sampling, pushing them to develop more complicated ways of manipulating and combining samples.

¶79 Second, while sample-based artists perceive their work as having autonomous artistic merit, prevailing notions of creation and autonomy in the sampling community— particularly among artists that produce within the hip-hop setting—are not anathema to the kind of advertising that the new regime would require. Indeed, while hip hop is a self-reflexively expressive medium, it is also a self-reflexively commercial medium; a rapper will construct rhymes with frequent references to himself (by name), his collaborators, and his latest project not simply as incidents to his self-expression, but also to ensure that listeners are aware of the specific identity of the person expressing himself, his credibility as an artist in the eyes of the greater community, and the product that he is offering for sale.⁸⁹ Producers engage in similar in-song advertising. Indeed, while the work of many producers can be identified by signature production elements (such as certain types of drums or particular styles of samples), producers routinely add elements to their productions that identify them as the beat’s producer; these tags may take the form of catchphrases that the producer layers onto each track (such as Jazze Pha’s “This is a Jazze Phizzle Produc-shizzle!”⁹⁰ or Diddy’s “We won’t stop, ‘cuz we can’t stop”⁹¹), signature sound effects or vocal accents that producers add to songs (such as Dilla’s air

⁸⁸ See SCHLOSS, *supra* note 13, at 82.

⁸⁹ While virtually all hip-hop artists engage in in-song advertising to some extent or another, some do so in particularly blatant or elaborate ways. For example, to promote their second album, the double-disc *Wu-Tang Forever*, Staten Island’s Wu-Tang Clan released three singles, each of which engaged in some form of advertising for the group. The first, “Triumph,” features a twenty-second long, non-rhyming opening rant from group member O.D.B. asserting “Wu-Tang is here forever!”, a second rant midway through the song (“As the saga continues, Wu-Tang! Wu-Tang!”), verses from each of the group’s other eight members in which five of the eight refer to themselves by one of their nicknames, and nine total mentions of “Wu-Tang” (including “This is a gathering of the masses / That come to pay respects to the Wu-Tang Clan”). The opening bars to their second single, “Reunited” (“Reunited / Double LP / World excited / Struck a match to the underground / Industry ignited”) manages to advertise both the single and the album, while also proclaiming *Forever’s* (anticipated) critical and popular acclaim. Finally, the chorus to their third single, “It’s Yourz,” includes the following lines: “It’s yours! The world in the palm of your hand! It’s yours! . . . Double LP from Wu-Tang Clan! It’s yours!” WU-TANG CLAN, *It’s Yourz*, on FOREVER (RCA 1997); WU-TANG CLAN, *Reunited*, on FOREVER (RCA 1997); WU-TANG CLAN, *Triumph*, on FOREVER (RCA 1997).

⁹⁰ UGK, *Tell Me How Ya Feel*, on UNDERGROUND KINGZ (Disc Two) (Rap-A-Lot 2007).

⁹¹ KRS-ONE, *Step Into a World (Rapture’s Delight) (Remix)*, on I GOT NEXT (Jive 1997).

horn sound effect,⁹² Pete Rock’s rhythmic “uhs” inserted into the instrumentation⁹³), or simply direct recitations of their name at beginning or end of tracks (a distorted “Bangladesh!”).⁹⁴ Rappers, moreover, will frequently include references to a given song’s producer in the song’s lyrics. Rappers and producers, in this respect, are engaged in a highly self-conscious maximization of their products’ recognizability. As the particular manner in which they undertake this maximization suggests, artistic creation is not categorically distinct from advertising; indeed, it is widely recognized and accepted that artistic creation (particularly for songs that operate almost entirely in the first-person) is a form of advertisement, and, in turn, that a certain degree of advertisement is necessary to sustain creation. To this extent, requiring artists to attribute their samples in a clickable way is not only consistent with advertising impulses intrinsic to the genre, but also a significantly less explicit form of advertising than artists currently undertake without any legal prompting. Indeed, the particular interest of coding, aggregation, and click-through as a regime is its consistency with the norms of the sampling community.

PART V: THE CULTURAL POLICY IMPLICATIONS OF SAMPLE LICENSING REFORM

¶80 To the extent that the proposed licensing regime would decrease the costs associated with sampling and/or increase the willingness of original rights holders to license their source material for sampling purposes, it would contribute directly to the pursuit of higher order cultural policy objectives. Specifically, in the process of altering the dynamics of the relationship between individual samplers and source material owners, the proposed licensing regime would preserve (if not expand) the economic benefits that presently accrue to acts of original creation, respond to the moral rights concerns of original rights holders, expand the access of both samplers and listeners to cultural materials, decrease corporate influence over the content and development of cultural forms, ensure the cultural continuity of sampled-based or sample-heavy genres, and correct distributional inequalities intrinsic both to historic and extant intellectual property regimes.

A. Preserving the Economic Benefits of Original Creation

¶81 This Note assumes that the resistance to sampling on behalf of source material owners (and the complexity of existing licensing regimes) is primarily attributable to the desire of source owners to ensure some measure of fair economic return on their cultural materials. While bothersome for samplers, the economic demands of rights holders are not entirely illegitimate. Many sustained acts of artistic creation require significant investments of time and money (both by individual artists and media companies) to be feasible; further, in the face of a drastic, industry-wide decline in record sales, licensing songs from back catalogs remains one of the few reliable sources of revenue for source material owners.

¶82 Although many legal commentators concerned with sampling acknowledge the need to ensure fair economic return to rights holders,⁹⁵ they largely take for granted the “adversarial” relationship between samplers and source owners and, in turn, assume that increased freedom for samplers must come at the expense of source owners’ revenue. Insofar as the licensing regime proposed in this Note alters the structure of the sampling relationship by introducing an additional party (listeners) capable of sharing the costs of sampling, it suggests that samplers and rights holders are not locked in a strictly zero-sum game. Instead, it may be possible, given sufficiently high levels of click-through purchases of source material, to compensate source owners at present levels while decreasing the costs of sampling for artists. Such a dynamic, market-based regime would offer the increased access

⁹² J DILLA, *The Difference*, on DONUTS (Stones Throw 2006); J Dilla, *One for Ghost*, on DONUTS (Stones Throw 2006).

⁹³ MIC GERONIMO, *Unstoppable*, on VENDETTA (TVT 1997).

⁹⁴ LIL’ WAYNE, *A Milli*, on THA CARTER III (Cash Money 2008); 8BALL & MJG, *You Don’t Want Drama*, on LIVING LEGENDS (Bad Boy 2004).

⁹⁵ NETANEL, COPYRIGHT’S PARADOX, *supra* note 4, at 88; Achenbach, *supra* note 3, at 191; Johnstone, *supra* note 3, at 424.

promised by compulsory licenses, while simultaneously avoiding the loss to source owners that are likely inevitable under a compulsory license with statutorily set licensing fees.⁹⁶

B. Responding to the Moral Rights Concerns of Original Rights Holders

¶83 Although the economic interests of rights holders are perhaps principally responsible for the overly restrictive nature of the extant copyright and sample licensing regimes, resistance to sampling is also at least partly underwritten by source owners’ interests in guarding their moral rights in their source materials. Undoubtedly, American law lacks the sort of strong moral rights doctrine promulgated and protected by European courts;⁹⁷ nevertheless, source material owners frequently refer to their interest in protecting their works from “mutilation” by samplers. The mutilation argument passes beyond economic considerations to express a concern with maintaining the artistic integrity of the musical work and, in cases where vocal samples are used, the integrity of one’s voice and identity.⁹⁸

¶84 The licensing regime proposed above offers one means for responding to moral rights objections, namely by actively presenting the original recording for listeners’ consideration. While this new regime would not change the technical nature of sampling (the appropriation and manipulation of found sounds), it would alter the context within which sampling occurs. The original artist’s performance would travel closely with the sampled recording in a manner that would permit listeners to encounter it on its own terms, as an independent, valuable work of art. In this sense, just as licenses structured to account for click-through credits can potentially alleviate the economic tension between sampling and sampled parties, so can coding provide a means to transform a presumptively antagonistic artistic/moral relationship into a cooperative one.

C. Expanding Access to Cultural Materials

¶85 The proposed licensing regime would expand the access of sampling artists and listeners alike to the accumulated cultural stock, with positive ramifications for expressive freedom, aesthetic enjoyment, cultural knowledge, and collective identity. Most directly, a cheaper, simpler licensing regime would expand both the pool of potential samplers and the aesthetic possibilities associated with sampling, lowering the economic barrier of entry for younger, less capitalized artists and reducing the costs associated with more complex, multi-sample compositional techniques.⁹⁹ Insofar as such a regime would both increase the number of participants in sampling practices and expand the range of source material that could be incorporated into new recordings, it would likely produce more interesting, daring music for listeners and also enhance the expressive content of sampling as a collective practice. As legal theorist Rosemary Coombe has argued, and Morrison and Netanel have echoed, inhabitants of the contemporary world find themselves immersed in a cultural sphere that is saturated with the propertized creations of others—sounds, words, images, products, and logos.¹⁰⁰ The particular insidiousness of this cultural order comes from its asymmetry, which is backed by law and ruthlessly enforced; as Coombe notes, “These legal frameworks enable the reproduction and repetition of cultural forms as ever the same marks of authorial proprietorship, while paradoxically prohibiting and inviting their interpretative appropriation in the service of other interests and alternative agendas.”¹⁰¹ Under the existing order, in other words, intellectual property both structures

⁹⁶ Merges, *Contracting into Liability Rules*, *supra* note 57, at 1310-11.

⁹⁷ NETANEL, COPYRIGHT’S PARADOX, *supra* note 4, at 215; Aurele Danoff, Note, *The Moral Rights Act of 2007: Finding the Melody in the Music*, 1 J. BUS. ENTREPRENEURSHIP & L. 181, 182, 186–87 (2007); Lucille M. Ponte, *Preserving Creativity from Endless Digital Exploitation: Has the Time Come for the New Concept of Copyright Dilution?*, 15 B.U. J. SCI. & TECH. L. 34, 38, 47-49 (2009) [hereinafter Ponte, *Preserving Creativity*].

⁹⁸ LESSIG, REMIX, *supra* note 4, at 15-17; Ponte, *Preserving Creativity*, *supra* note 99, at 66-68. *See generally* Reily, *supra* note 3, at 403.

⁹⁹ Achenbach, *supra* note 3, at 193.

¹⁰⁰ COOMBE, *supra* note 8, at 6; NETANEL, COPYRIGHT’S PARADOX, *supra* note 4, at 43; Morrison, *supra* note 3, at 113, 115.

¹⁰¹ COOMBE, *supra* note 8, at 6; *see also id.* at 26, 269; NETANEL, COPYRIGHT’S PARADOX, *supra* note 4, at 43; Van Houweling,

one’s consciousness and sense of self while simultaneously restricting one from expressing oneself through that same property. A licensing regime that loosens property limitations on appropriation, in turn, increases the “malleability” of culture by broadening the range of materials that can be appropriated, commented upon, criticized, and recontextualized.¹⁰²

¶86 While this Note has attempted to downplay the expressive components of sampling in its opening sections as a means of illuminating other aspects of sampling as a practice, sampling nonetheless has historically served, and continues to serve, the expressive needs of artists. Through sampling, artists do not just provide music to listeners, but also transition old idioms into new idioms, cut up dominant cultural and musical types and redeploy them, and manipulate known sounds to express different moods.¹⁰³ More liberal sampling regimes effectively transform culture from a closed field to one open to the individual’s expressive purposes. To the extent that greater numbers of samplers are empowered to undertake more complex appropriations, the expressive potential of the art form would rise accordingly.

¶87 At the same time that the proposed licensing regime would increase samplers’ access to source materials, it would expand the public’s access to those same source materials by incentivizing record companies to digitize the relevant portions of their catalogs. Through immersion in a more expansive and thoroughly networked musical environment, listeners would gain a heightened sense of the traditions and idioms upon which contemporary music is built. Simultaneously, listeners would develop a stronger sense of the complexities, convergences, and continuities of both national and international musical traditions. Such expanded access would be both educational and constitutive, thickening the individual’s sense of his or her location within a collective artistic heritage. This awareness might manifest itself not only in changed styles of making music, but also in changed ways of conceptualizing oneself vis-à-vis one’s community, with consequent benefits for community solidarity.

D. Minimizing Corporate Control Over Culture

¶88 To the extent that a new licensing regime would expand individuals’ access to source materials, and thus augment expressive autonomy, it would correspondingly work to minimize corporate control over the evolution of musical styles. Licensing reform would achieve this end both by encouraging corporations to license and by enforcing a certain degree of expressive parity between samplers and rights holders. Most immediately, as Achenbach has noted, extant copyright doctrine has granted holders of diverse musical portfolios disproportionate control over the market for sampling licenses.¹⁰⁴ Through their ability to approve or withhold sample clearances, in turn, these rights holders can affect the final composition of new recordings.¹⁰⁵ Market control, in this respect, potentially becomes a form of aesthetic control. To the extent that licensing reform can respond to the economic and moral interests that motivate corporate licensing decisions, it can modulate corporations’ willingness to manipulate aesthetics.

¶89 A liberalized sampling regime would also provide samplers with a more effective platform for lodging expressive critiques of corporate culture. “The modern ideal of intentional authors appealing to the rational deliberation of readers is an embarrassingly inadequate formulation for communication in a promotional culture,” Coombe writes. “Messages conveyed by quickly circulating evanescent signifiers on a multitude of shifting surfaces cannot be effectively countered

supra note 3, at 1576.

¹⁰² BENKLER, *supra* note 17, at 15.

¹⁰³ SCHLOSS, *supra* note 13, at 25, 33, 82-83.

¹⁰⁴ See Achenbach, *supra* note 3, at 200.

¹⁰⁵ “When a remedy such as injunctive relief is available to copyright holders, they have the ability to serve as de facto gatekeepers, constructively barring access to those with unconventional expressions that may run counter to the copyright holder’s beliefs. Consequently, private individuals have a strong say in what types of messages will be expressed in the transformative use of their music in the secondary market. This level of control is undesirable in a free society, where expressive diversity should be fostered, rather than hindered.” Johnstone, *supra* note 3, at 415.

with written treatises that lie on library and bookstore shelves.”¹⁰⁶ In a liberalized sampling regime, artists can work in the same register as the objects they critique or comment upon, responding to sounds with sounds, aesthetics with new aesthetics, public pronouncements with public pronouncements.

E. Increasing Cultural Continuity

¶90 A liberalized licensing regime would also increase cultural continuity by shoring up the legal status of sampling itself as a legitimate artistic practice. Although courts and commentators are still prone to treat sampling as a fad, it has been more than twenty years since hip hop’s landmark sample-based recordings saw commercial release.¹⁰⁷ In the interim, sampling has emerged as a routine compositional tool not only for hip-hop artists, but also for electronic, rock, and pop producers. Despite the pervasiveness of sampling, and its particular centrality to dominant African-American musical idioms, its continued viability as a practicable art form relies almost entirely on the will of original rights holders. Insofar as a licensing regime that would alleviate economic and moral concerns of rights holders would, in turn, reduce the legal precariousness of sampling, it would allow sampling to function as a full-fledged aesthetic. In turn, sampling’s continued deployment would hinge not on its economic or moral ramifications, but rather, purely on its aesthetic merit.

¶91 Under such conditions, post-sampling musical idioms (which will most likely arise in any event) would emerge not out of legal necessity, but rather, out of aesthetic necessity, ensuring that sample-based musical traditions maintain a degree of internal integrity and “logical” evolution. This particular aspect of continuity may not matter as much to listeners as it does to musicians operating within sample-based mediums. New modes of music making are nurtured by and extend from older modes: artists develop their techniques and sounds by working within and innovating from existing techniques and sounds. Sealing off certain techniques from the list of practicable techniques—either through a legal ban on sampling or a denial of licenses—threatens to transform avenues of exchange between generations of musicians into cultural cul-de-sacs.

F. Enforcing Distributive Justice

¶92 Although, as Netanel has noted, copyright has the general distributional effect of “doling out speech entitlements to well-heeled organized interests at the expense of the speech of the citizenry at large,”¹⁰⁸ the existing copyright and sample licensing regimes do not spread this expense equally across the population.¹⁰⁹ Sampling is not universally practiced and consumed, but rather clustered within certain identifiable communities, communities that are disproportionately populated by young people and minorities. Copyright scholar Lawrence Lessig has done much to illuminate the generational ramifications of the extant regime, pointing to the extent to which sampling has become a pervasive, “natural” mode of cultural consumption and self-expression for younger people.¹¹⁰ Legal controls on appropriation, in turn, tend to implicate larger swaths of this younger generation’s basic methods of communication, expression, and consumption. In this sense, while facially neutral, legal or contractual limits on appropriation, given the very ecology of contemporary digital technology, tend to place particularly heavy burdens on youth who, for their part, are simply behaving in ways which technology permits and which the vendors of that technology, in many instances, actively encourage. This generational bias manifests itself particularly strongly in the realm of musical production; while sampling may have originated in the American context in the work of Steve Reich and John Cage, two artists operating to some extent or another in dialogue with the Western classical

¹⁰⁶ COOMBE, *supra* note 8, at 261; *see also id.* at 265-66.

¹⁰⁷ GEORGE, *supra* note 13, at 93-94.

¹⁰⁸ NETANEL, COPYRIGHT’S PARADOX, *supra* note 4, at 182-83; *see also* Van Houweling, *supra* note 3, at 1540.

¹⁰⁹ Van Houweling, *supra* note 3, at 1540, 1568.

¹¹⁰ LESSIG, REMIX, *supra* note 4, at xvii, 248-49.

tradition,¹¹¹ sampling is particularly, and most noticeably, prevalent in hip hop, electronic, and pop production, genres whose performers and audiences skew markedly young.

¶93 To the extent that rights holders and samplers occupy different generations, the young are beholden to the old. As discussed above, this “natural” consequence of appropriation (which relies on the old to make the new) produces a cultural situation in which older artists, operating in potentially alien idioms, have the opportunity not only to shape directly the details and development of emerging idioms, but also, if they so choose, to halt the development of those idioms. A liberalized sampling regime would allow younger generations to be influenced by, and even (economically) supportive of, older generations, without being beholden to them for their chosen modes of expression and their personal or generational aesthetic visions.

¶94 The extant copyright regime also promotes heavily racialized distributive effects. While sampling as a basic compositional technique was pioneered by white, classical/experimental musicians and is deployed across many contemporary genres, it is principally identified and largely culled from the work of black artists operating within a hip-hop tradition that is widely coded as “black.”¹¹² That hip-hop has flourished both culturally and economically despite these distributional effects is undeniable; nevertheless, the genre and its practitioners operate constantly in the shadow of the law and at the mercy of predominantly white corporate rights holders.¹¹³ By creating conditions that would lower copyright’s tax on predominantly black production techniques, licensing reform would not only alleviate present racial distributional imbalances, but also atone partly for earlier iterations of legal regulation that disproportionately burdened black musicians and black musical styles.¹¹⁴

CONCLUSION

¶95 While existing statutory, doctrinal, and licensing configurations have severely constrained the freedom of musicians to appropriate and recontextualize the works of past creators, evolutions in the nature of digital technology have created new opportunities for contemporary samplers and source material owners. Creatively deployed, digital aggregating mechanisms such as iTunes and Last.fm introduce possibilities for reimagining and restructuring the relationship between samplers and source owners, offering a means of shifting from a two-party model premised on an idea of sampling as a unilateral taking to a multi-party model premised on an idea of exchange. Under this “exchange,” source material owners trade rights to use their materials to sampling artists in exchange for audiences primed to purchase source materials themselves. In this restructured relationship, enabled by digital technologies capable of processing and exploiting the information embedded in sample-based music, the costs of sampling are not borne entirely by the sampling artist, but rather shared (to some extent or another) by the artist and his listeners. The licensing scheme proposed in this Note—premiered on concepts of disclosure, coding, and click-through—has been devised specifically both to exploit these restructured relationships and to encourage further restructuring. While perhaps incapable of entirely dispelling the sampling conundrum, licensing regimes similar to that outlined here provide the basis for a more cooperative relationship between sampling artists and source material owners, one in which both parties are engaged in a common process of enhancing the revenues from digital music sales.

¹¹¹ In 1952, Cage composed *Williams Mix*, which combined fragments of more than 500 fragments of found sounds; thirteen years later, Reich produced *It's Gonna Rain* and *Come Out*, which he constructed through the use of tape recorders. *Chronology*, in *AUDIO CULTURE: READINGS IN MODERN MUSIC* 399, 400-02 (Christoph Cox & Daniel Warner eds., 2006).

¹¹² PERRY, *supra* note 60, at 2, 10, 26-30; SCHLOSS, *supra* note 13, at 3, 10.

¹¹³ As Nelson George observes, “It was only when progressive groups such as [Public Enemy] and De La Soul began expanding beyond black music for samples that the form truly attracted negative attention. When rock or pop musicians found that—horror of horrors!—a rap group was using their music, they tended to go after the offense with an outrage that spoke to their contempt for the form. Old R&B performers on the whole were not aggressive enough, or maybe they were just more used to being ripped off.” GEORGE, *supra* note 13, at 94-95.

¹¹⁴ See Arewa, *supra* note 3, at 624-26; K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 *HASTINGS COMM. & ENT. L.J.* 339, 353-57, 372-3 (1999); David Hesmondhalgh, *Digital Sampling and Cultural Inequality*, 15 *SOC. L. STUDIES* 53, 54, 68, 70 (2006).

¶96

Although most immediately targeted toward the economic aspects of the sampling relationship, these proposed licensing reforms are ultimately oriented toward establishing broader, non-economic policy goals. Insofar as reimagined licensing processes free up legal space for sampling, they provide an opportunity to expand the range of cultural materials that can be appropriated for creative and communicative purposes, to heighten popular access to our collective cultural tradition, reduce corporate control over the shape of culture, foster cultural continuity, and correct some of the distributional wrongs associated with the extant copyright regime. In other words, licensing reform is “bigger than hip hop”; it provides a template for reform to the structures that control appropriation more generally, at a time when explosions in digital tools and an attendant decline in their cost has transformed appropriation into a basic mode of contemporary creation, communication, and self-conceptualization. Optimally executed, licensing reform is a bid for a culture that is richer, more networked, and more free.