

**GET A LICENSE OR DON'T SAMPLE: USING EXAMPLES  
FROM POPULAR MUSIC TO RAISE NEW QUESTIONS ABOUT  
THE *BRIDGEPORT V. DIMENSION FILMS* HOLDING**

*Daniel Esannason\**

TABLE OF CONTENTS

I. INTRODUCTION.....	551
II. PROTECTING THE CREATORS OF MUSIC.....	552
III: EARLY ATTITUDES TOWARDS SOUND RECORDINGS .....	554
IV. CHANGE IN TECHNOLOGY, CHANGE IN ATTITUDE .....	555
V. THE ADVENT OF SAMPLING AS A MUSIC PRODUCTION TECHNIQUE .....	557
VI. THE SIGNIFICANCE OF THE <i>BRIDGEPORT</i> HOLDING .....	558
VII. HOW MUSIC IS MADE TODAY .....	561
VIII. CONCLUSION.....	565

I. INTRODUCTION

In the 1900s, advancements in music reproduction technology gave rise to two major copyright questions: (1) should sound recordings be protected and (2) if so, to what degree? These questions stemmed from two considerations: (1) what promotes the progress of the useful arts and (2) what decisions need to be made in light of technological advancements that facilitate the reproduction of music?

Today, new techniques of producing music present novel variations on these questions. Specifically, how do music software programs alter our conception of how sound recordings are produced, and to what extent, if any, should music producers be able to sample sound recordings constructed from pre-made loops? This Note is an attempt to answer these questions. Part II outlines the purpose of copyright law and how it applies to music. Part III discusses how the 1909 Copyright Act and early 20th century cases reflected initial attitudes asserting that sound recordings should not be protected. Part IV

---

\* Harvard Law School, J.D. 2016; Yale College, B.A. 2011. I would like to thank Professor Christopher Bavitz and the editors of the *Harvard Journal of Law & Technology* for their comments, guidance, and support. I would also like to extend special thanks to my family and friends who have fostered my interest in music. This Note draws on my several years of experience as a music producer.

highlights the technological developments that shifted attitudes towards protecting sound recordings, leading to the 1971 Sound Recording Act and the 1976 Copyright Act. Part V explores how the 1976 Copyright Act shaped the legality of sampling as a music production technique, and Part VI further expands this discussion through an analysis of *Bridgeport v. Dimension Films*, which held that sampling three notes of a sound recording without a license violated copyright law. Finally, Part VII examines how music production developments may raise questions about the over-inclusiveness of the *Bridgeport* holding, using examples from popular music, such as Rihanna's "Umbrella," to suggest instances where producers should be able to sample sound recordings.

## II. PROTECTING THE CREATORS OF MUSIC

In the United States, longstanding goals to protect and incentivize creation have spurred constant developments in copyright law. One of the first challenges that the nation faced, in fact, was how to administer copyrights. When the United States gained independence in 1776, twelve of the thirteen colonies had copyright laws,<sup>1</sup> and each of those colonies had a different copyright regime.<sup>2</sup> This administrative challenge was addressed when the Constitution replaced the Articles of Confederation.<sup>3</sup> Article I, Section 8, clause 8 of the Constitution, known as the Copyright Clause,<sup>4</sup> placed copyright law under the domain of Congress: "The Congress shall have power to . . . [p]romote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries[.]"<sup>5</sup> In granting such exclusivity, the Copyright Clause primarily sought to spur more innovation and creativity rather than to reward the labor of an author or inventor.<sup>6</sup> The Supreme Court reaffirmed the relative value of incentivizing creation in two different cases. In *Fox Film Corporation v. Doyal*, the Court stated, "The sole interest of the United State[s] and the primary objective in conferring the monopoly lie in the general benefits derived by the public from the labors of authors."<sup>7</sup> Similarly, in *United States v. Paramount Pic-*

---

1. SIMON FITZPATRICK, DIGITAL MUSIC AND THE DEATH OF COPYRIGHT 6 (2002) (citing ALAN LATMAN ET AL., COPYRIGHT FOR THE EIGHTIES 4 (1985)).

2. *Id.* at 7 (citing DAVID LANGE ET AL., INTELLECTUAL PROPERTY 645-46 (1998)).

3. *Id.* at 6 (citing EARL W. KINTNER & JACK LAHR, AN INTELLECTUAL PROPERTY LAW PRIMER 2-3 (1982)).

4. *Copyright Clause*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Copyright\\_Clause](https://en.wikipedia.org/wiki/Copyright_Clause) [<https://perma.cc/XP7J-EJEE>] (last modified Mar. 25, 2016, 10:39 PM).

5. U.S. CONST. art. I, § 8, cl. 8.

6. See DAVID J. MOSER & CHERYL L. SLAY, MUSIC COPYRIGHT LAW 907 (2013).

7. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

tures, the majority opinion asserted that “copyright law . . . makes reward to the owner a secondary consideration.”<sup>8</sup>

The first federal copyright law to recognize music was the Copyright Act of 1831.<sup>9</sup> The 1831 Act protected the reproduction of musical compositions in print form but did not protect sound recordings. For definitional purposes, a sound recording is traditionally referred to as a creative work that embodies the contributions of musical performers and the contributions of record producers, such as sound engineers and other personnel involved in capturing, editing, and mixing sound.<sup>10</sup> One reason that sound recordings were not mentioned in the Copyright Act of 1831 is that sound recording duplication technology was not yet available and thus was not a conceivable threat to copyright holders.<sup>11</sup> By contrast, sheet music printing via the printing press had grown considerably in popularity, with an estimated ten thousand musical compositions being published in the United States during the first twenty-five years of the 19th century.<sup>12</sup> Although an amendment was made to the Copyright Act twenty years after the phonograph<sup>13</sup> was invented, the amendment did not address sound recordings, suggesting that sound duplication technology was still not perceived as any kind of threat.<sup>14</sup> This 1897 amendment applied only to public performances.<sup>15</sup> The amendment gave composers and songwriters the right to be compensated for the public performance of their works.<sup>16</sup> Thus, when a public phonograph parlor played a sound recording without compensating an artist, it was not violating any law with respect to the sound recording itself.

---

8. *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948).

9. See KEVIN PARKS, *MUSIC & COPYRIGHT IN AMERICA: TOWARD THE CELESTIAL JUKEBOX* 9 (2012).

10. Stanislava N. Staykova, Note, *Sound Record Producers' Rights and the Problem of Sound Recording Piracy*, U. OF GEORGIA SCH. L.: LLM THESES AND ESSAYS 2 (2004), [http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1050&context=stu\\_llm](http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1050&context=stu_llm) [<https://perma.cc/8KNS-EPPA>].

11. Callie Taintor, *Chronology: Technology and the Music Industry*, FRONTLINE (May 27, 2004), <http://www.pbs.org/wgbh/pages/frontline/shows/music/inside/cron.html> [<https://perma.cc/KT4W-HZ2A>].

12. AL KOHN & BOB KOHN, *Print Licenses*, in KOHN ON MUSIC LICENSING 673 (1996).

13. The phonograph, invented in 1877 by Thomas Edison, was a device capable of recording and reproducing sound. See, e.g., *Phonograph*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Phonograph> [<https://perma.cc/W3KP-5693>] (last modified Apr. 15, 2016, 11:38 PM).

14. ALEX SAYF CUMMINGS, *DEMOCRACY OF SOUND: MUSIC PIRACY AND THE REMAKING OF AMERICAN COPYRIGHT IN THE TWENTIETH CENTURY* 41 (2013).

15. Benjamin W. Rudd, *Notable Dates in American Copyright, 1783–1969*, 28 Q.J. LIBR. CONGRESS 140 (1971), <http://copyright.gov/history/dates.pdf> [<https://perma.cc/P7ZA-J56V>].

16. CUMMINGS, *supra* note 14, at 16.

## III: EARLY ATTITUDES TOWARDS SOUND RECORDINGS

By 1906, the phonograph and the piano roll, two methods of recording sound, gained commercial traction.<sup>17</sup> The phonograph allowed individuals to record and play back musical performances.<sup>18</sup> Horace Pettit of the Victor Talking Machine Company described a phonograph recording of a specific performance as “a unique artistic work worthy of the protection of the federal government.”<sup>19</sup> Similarly, the piano roll recorded the performance of a pianist and could play back that performance on a piano.<sup>20</sup> As such, the phonograph and piano roll became items of interest during the 1905–1908 copyright reform hearings.<sup>21</sup> However, the interest in protecting sound recordings was not sufficient to enact a law; the concept of sound recordings was too unfamiliar to Congress.<sup>22</sup> The 1908 Supreme Court decision in *White-Smith Music Publishing Co. v. Apollo Co.* demonstrated that the Court had a limited understanding of sound recordings when they held that the piano roll, which represented a sound recording, was not a “copy” within the meaning of the Copyright Act.<sup>23</sup> A copy, the Court asserted, was something rather more tangible to the average human, something that people could “see and read,” such as a piece of sheet music.<sup>24</sup> After the verdict, Congress rejected proposals to grant protections to sound recordings in the Copyright Act of 1909.<sup>25</sup> The 1909 Copyright Act, nonetheless, did require those who wished to record a composition to pay a composer or producer mechanical royalties.<sup>26</sup> Thus, composers were entitled to a composition copyright and received compensation if an entity wanted to mechanically record their work, but did not enjoy any similar copyright protection with respect to the mechanical reproduction itself.

---

17. *See id.* at 23.

18. Randall Stoss, *The Incredible Talking Machine*, TIME (June 23, 2010), [http://content.time.com/time/specials/packages/article/0,28804,1999143\\_1999210\\_1999211,00.html](http://content.time.com/time/specials/packages/article/0,28804,1999143_1999210_1999211,00.html) [<https://perma.cc/ZW2A-JN86>].

19. CUMMINGS, *supra* note 14, at 23.

20. *See* JOANNA DEMERS, STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY 20 (2006).

21. *See* CUMMINGS, *supra* note 14, at 23–24.

22. *Id.* at 24, 27.

23. *White-Smith Music Publ. Co. v. Apollo Co.*, 209 U.S. 1, 18 (1908).

24. *Id.* at 17.

25. John E. Mason, Jr., *Performers' Rights and Copyright: The Protection of Sound Recordings from Modern Pirates*, 59 CALIF. L. REV. 548, 549 (1971).

26. Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075, 1075–76, *repealed by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in 17 U.S.C.). At this time, a mechanical royalty was a payment made to a songwriter when the songwriter's composition was captured in a physical medium.

## IV. CHANGE IN TECHNOLOGY, CHANGE IN ATTITUDE

Advancements in sound recording reproduction and the rise of radio caused popular attitude to shift in favor of increased protections for sound recordings. To appreciate this shift, a brief description of the sound production process is necessary. Generally, sound recordings are produced in a four-step process.<sup>27</sup> The first step is to record the musician's performance.<sup>28</sup> The second step is to edit the recording of the performance as needed.<sup>29</sup> The third step is to reproduce the edited recording onto a playable medium.<sup>30</sup> The final step is to distribute the sound recording to the market.<sup>31</sup> Prior to 1920, the music industry viewed sound recordings as "products of the moment, aimed at contemporary markets and abandoned as consumer tastes shifted."<sup>32</sup> In the 1930s, individuals started "dubbing"<sup>33</sup> (commercially duplicating recordings without consent for profit), thereby skipping directly to step three of the sound recording production process.<sup>34</sup> These actions, which we would now likely call piracy, "showed the labels that their back catalog might be worth something — that recorded music retained meaning and significance in which the public had an interest long after it stopped being worthwhile for companies to keep it in circulation."<sup>35</sup> Radio stations broadcast sound recordings to the general public, and some stations sold copies of the recordings that they aired without remunerating the original composer or publisher.<sup>36</sup> Even in this period of time, there were still doubts as to whether sound recordings should be protected.<sup>37</sup> In *RCA Manufacturing Company, Inc. v. Whiteman*, Judge Learned Hand stated that it was doubtful that "the skill and art by which a phonographic record maker makes possible the proper recording of those performances" was worthy of protection.<sup>38</sup> Although judges create common law and can encourage Congress to make changes to existing law through their rulings, Judge Learned Hand stated that Congress consciously chose not to include sound recordings as a protectable expression and that he would not create a property right in sound recordings.<sup>39</sup>

---

27. Staykova, *supra* note 10, at 2.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. CUMMINGS, *supra* note 14, at 38.

33. *See id.* at 41.

34. Staykova, *supra* note 10, at 2.

35. CUMMINGS, *supra* note 14, at 61.

36. *See id.* at 46–47.

37. *See id.*

38. *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86, 88 (2d Cir. 1940); *see also* CUMMINGS, *supra* note 14, at 47.

39. *RCA*, 114 F.2d at 90; *see also* CUMMINGS *supra* note 14, at 46.

In the 1960s, the recording industry's desire to have sound recordings protected grew. The industry had spent time and money producing sound recordings, which were not protected under copyright law. Advancements such as the cassette player made reproducing sound recordings easier. The cassette player was portable,<sup>40</sup> and it allowed sound to be recorded, erased, and re-recorded. Thus, "tape pirates," as they were then called, could record sound performances more discretely. This process allowed sound recordings to become more mobile for consumers and was described to the House of Representatives as follows:

Becoming a tape pirate is relatively simple. Small record stores — "mom and pop" retailers — can purchase an inexpensive duplicating machine for \$200 or so. Blank tape cartridges are available for as little as 75¢ each in quantities of a few hundred. "A guy can hire school kids at \$1.25 an hour to knock out copies in the back of the store," says Alan Bayley, president of GRT Corp., which makes tape albums for 67 different record companies. "He sells them at \$3 or \$4 each to customers. GRT, on the other hand, sells its tapes for \$3.50 each to a distributor, who resells them for \$4.25 to retailers, who charge the public \$6.95 each." "A store can order half-a-dozen tapes of a hit album from us and use them to duplicate a hundred copies." Bayley says, "and then try to return the originals for credit because they didn't sell."<sup>41</sup>

Tape pirates made it more difficult for record companies to recoup their investments in artists.<sup>42</sup> According to the Recording Industry Association of America's ("RIAA") Stanley Gortikov, record companies at the time would spend at least \$55,000 recording an album.<sup>43</sup> By the time the typical album reached stores, the record company would have spent between \$180,000 and \$200,000.<sup>44</sup> Meanwhile, pirates and bootleggers could establish a viable business of duplicating sound recordings for as little as \$500.<sup>45</sup> Record companies were concerned that they would not be able to continue investing

---

40. CUMMINGS, *supra* note 14, at 46.

41. *Prohibiting the Piracy of Sound Recordings: Hearing on S. 646 and H.R. 6927 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 92d Cong. 45 ex. B (1971).

42. See CUMMINGS, *supra* note 14, at 131.

43. *Id.*

44. *Id.*

45. *Id.*

in creative acts.<sup>46</sup> By the 1970s, the RIAA claimed that the recording industry lost \$200 million a year due to piracy.<sup>47</sup> In 1971, Barbara Ringer, then-assistant Register of Copyrights, attributed the growth in piracy to both the ease of tape duplication and a lack of clarity in the law, stating, “Anyone working with this on a day-to-day basis cannot fail to be impressed with the enormous growth in [piracy] over the last 5 years or so.”<sup>48</sup> In that same year, New York House Representative Emanuel Celler claimed that “[t]he widespread availability and use of phonograph record and tape-playing machines . . . give added impetus to piracy of sound recordings. This trend is certain to continue and grow unless effective legal methods to combat and reverse it are provided.”<sup>49</sup>

Congress addressed these piracy concerns in the enactment of the first federal statutory copyright protection for sound recordings<sup>50</sup> — the Sound Recording Act of 1971 (“1971 Act”).<sup>51</sup> The 1971 Act granted a monopoly over sound recordings to encourage record labels to invest in creative acts. The 1971 Act did not ban the imitation of performances, but it did prohibit the duplication of recorded performances.<sup>52</sup> The 1976 Copyright Act (“1976 Act”) adopted the same protections for sound recordings.<sup>53</sup> Specifically, the 1976 Act granted the owner of a sound recording the exclusive right to reproduce that sound recording and to prepare derivative works.<sup>54</sup> The extent of these protections ended up playing a critical role in the advent of sampling as a music production technique in the 1980s.

## V. THE ADVENT OF SAMPLING AS A MUSIC PRODUCTION TECHNIQUE

Sampling is a music production technique that grew in popularity during the 1980s.<sup>55</sup> A music producer samples when he or she uses a portion of another’s sound recording in his or her own musical production. In the 1980s, hip-hop artists saw sampling as an art.<sup>56</sup>

---

46. See *Prohibiting the Piracy of Sound Recordings: Hearing on S. 646 and H.R. 6927 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 92d Cong. 52 (1971).

47. CUMMINGS, *supra* note 14, at 154.

48. *Id.* at 130.

49. H.R. REP. NO. 92-487, at 11 (1971).

50. Melvin L. Halpern, *The Sound Recording Act of 1971: An End to Piracy on the High Seas?*, 40 GEO. WASH. L. REV. 964, 965 (1972).

51. Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971) (codified at 17 U.S.C. § 114 (2012)).

52. *Id.* at 391; see also Halpern, *supra* note 50, at 980 n.100.

53. 17 U.S.C. § 114 (2012).

54. *Id.*

55. See KEMBREW MCLEOD & PETER DICOLA, *CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING* 19 (2011).

56. *Id.* at 20.

Whereas musicians working in other music genres in the early 1900s supported sound recording protections,<sup>57</sup> hip-hop producers often felt that such protections stifled their creativity.<sup>58</sup> For instance, Chuck D of Public Enemy described his perception of the sampling process as “just a way of arranging sounds. Just like a musician would take the sounds off of an instrument and arrange it their own particular way. We thought we was quite crafty with it.”<sup>59</sup>

In the early 1990s, the judicial system clamped down on sampling.<sup>60</sup> In 1991, Grand Upright Music sued hip-hop artist Biz Markie for sampling the piano accompaniment of Gilbert O’Sullivan’s “Alone Again (Naturally)” on the former’s album, *I Need a Haircut*.<sup>61</sup> The United States District Court for the Southern District of New York ruled for Grand Upright Music and stated that Biz Markie’s use of O’Sullivan’s song was a violation of copyright law and also commented that the sampling violated the Bible’s 7th Commandment disallowing theft.<sup>62</sup> It further mandated that *I Need a Haircut* be removed from stores and radio playlists until the album was reproduced without the infringing work.<sup>63</sup>

## VI. THE SIGNIFICANCE OF THE *BRIDGEPORT* HOLDING

In a more recent case, Bridgeport Music sued Public Enemy for sampling a two-second guitar chord from Funkadelic’s “Get Off Your Ass and Jam.”<sup>64</sup> Public Enemy altered the guitar riff by lowering the pitch.<sup>65</sup> They then looped the altered sample five times.<sup>66</sup> The court held that Public Enemy’s sampling violated copyright law, proclaiming, “Get a license or do not sample.”<sup>67</sup> In essence, the court was telling artists that if they wanted to sample from another song, they needed to first obtain a license from the copyright holder of the master sound recording. A master sound recording is the final version of a sound recording that is usually distributed to the public<sup>68</sup> and is often

---

57. See CUMMINGS, *supra* note 14, at 16–17.

58. Cf. DEMERS, *supra* note 20, at 135.

59. KEMBREW MCLEOD, FREEDOM OF EXPRESSION: OVERZEALOUS COPYRIGHT BOZOS AND OTHER ENEMIES OF CREATIVITY 81 (2005).

60. See DEMERS, *supra* note 20, at 94.

61. *Id.* at 93.

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

63. DEMERS, *supra* note 20, at 94.

64. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 796 (6th Cir. 2005).

65. *Id.*

66. *Id.*

67. *Id.* at 801.

68. Amanda Williams, What is a Sound Recording Copyright, Songpreneur (Apr. 4, 2013), [http://songwritingandmusicbusiness.com/articles/what\\_is\\_a\\_sound\\_recording\\_copyright](http://songwritingandmusicbusiness.com/articles/what_is_a_sound_recording_copyright) [<https://perma.cc/TA5F-Z3HQ>].



owned by a record label.<sup>69</sup> The Sixth Circuit's decision indicated that, at least within its circuit, there was no *de minimis* doctrine for sampling.<sup>70</sup>

The court gave three major reasons for its decision. First, its directive "get a license or do not sample" created a bright-line rule that would facilitate the enforcement of copyright law.<sup>71</sup> Second, under this rule, the price for licensing a sample would likely remain reasonable.<sup>72</sup> The court stated that the market would control the license price and that the holder of the copyright to the master sound recording "cannot exact a license fee greater than what it would cost the person seeking the license to just duplicate the sample in the course of making a new recording."<sup>73</sup> Third, the court stated simply that samplers do not sample accidentally.<sup>74</sup> Thus, given the fact that there is no such thing as an unintentional sampler, no innocent party would be deemed an infringer under the "get a license or do not sample" rule.<sup>75</sup>

The court's decision can be questioned in several respects. First, the court based its decision on a strict reading of § 114 of the 1976 Copyright Act. Although the 1976 Act grants the owner of a sound recording the exclusive right to reproduce and prepare derivative works, the statute does not speak to digital sampling, given that digital sampling did not exist at the time. There are reasons to think that Congress, in passing the 1976 Copyright Act, would not support the *per se* infringement stance taken by the Sixth Circuit. Although discussions in Congress about the 1976 Copyright Act were a response to piracy, the 1976 House Report on the scope of exclusive rights on sound recordings did state that an infringement occurs when "all or any substantial portion of the actual sounds that go to make up a copyrighted sound recording are reproduced."<sup>76</sup> This suggests that if a music pirate or any other individual reproduced a non-substantial portion of a sound recording, he or she would not be liable for infringement. Second, courts have allowed a *de minimis* defense for musical composition copyright infringement cases.<sup>77</sup> A court that adopts a *per se* infringement standard for sound recordings, without a clear directive from Congress, essentially grants sound recordings stronger protec-

---

69. *What Are Master Rights and Publishing Rights?*, RIGHTCLEARING, <https://rightclearing.uservoice.com/knowledgebase/articles/90129-what-are-master-rights-and-publishing-rights> [<https://perma.cc/2K2F-5L8U>].

70. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801–02 (6th Cir. 2005).

71. *See id.* at 801.

72. *Id.*

73. *Id.*

74. *Id.*

75. *See id.*

76. H.R. REP. NO. 94-1476, at 106 (1976).

77. *See, e.g., Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 77 (2d. Cir. 1997).

tion than musical compositions.<sup>78</sup> Historically, as described above, musical compositions have had stronger copyright protections than sound recordings. Additionally, the 1976 Copyright Act was passed to further the Copyright Clause's primary goal of incentivizing creativity and innovation.<sup>79</sup> The *Bridgeport* court's per se infringement decision seems to preference protecting the labor of a musician ahead of incentivizing the creative works that sampling engenders. Dr. Ferrara, a musicologist from New York University, described the *Bridgeport* decision as "extremely chilling, because it basically says that whatever you sample has to be licensed, in its most extreme interpretation."<sup>80</sup> To take the *Bridgeport* holding to its logical end, if an individual sampled a half second or one note from a sound recording, he would be in violation of copyright law in the Sixth Circuit.

In thinking more broadly about incentives and the viability of the music industry, having some protection for master sound recordings does encourage a label to invest in creative acts. Still, the emergence of mashup music,<sup>81</sup> in which disc jockeys sample sound recordings, suggests that sampling a few seconds from a sound recording is not going to deter record labels from investing in creative acts or deter musicians from creating music.<sup>82</sup> Record labels are still signing artists,<sup>83</sup> and musicians who have been sampled in mashup music are still creating music.<sup>84</sup> A per se infringement standard is not likely needed to protect the viability of musicians and the music industry.

Finally, the *Bridgeport* per se infringement decision can be questioned in light of how music is produced today. At the time of *Bridgeport*, sound recordings were understood as the product of recorded musicians playing instruments. The sound recording captured their technique, style, and virtuosity. Today, there is a new way of producing sound recordings, to which we turn next.

---

78. Leah Somoano, *Bridgeport Music, Inc. v. Dimension Films: Has Unlicensed Digital Sampling of Copyrighted Sound Recordings Come to an End?*, BERKELEY TECH. L.J. 289, 304 (2006).

79. Cf. HALPERN, *supra* note 50, at 966.

80. MCLEOD & DICOLA, *supra* note 55, at 143.

81. A mashup is formed by combining two or more preexisting songs.

82. See, e.g., Joe Mullin, *Why the Music Industry Isn't Suing Mashup Star "Girl Talk"*, GIGAOM (Nov. 16, 2010, 7:24 PM), <https://gigaom.com/2010/11/16/419-why-the-music-industry-isnt-suing-mashup-star-girl-talk/> [<https://perma.cc/2XLC-GEHE>].

83. See, e.g., Ashley Monaé, *Bryson Tiller Inks Creative Partnership with RCA and Announces Release for Debut LP, TRAPSOUL*, VIBE (Aug. 25, 2015), <http://www.vibe.com/2015/08/bryson-tiller-debut-lp-trapsoul/> [<https://perma.cc/9ZVM-7DUK>].

84. See, e.g., *Night Ripper*, ILLEGAL TRACKLIST, <http://www.illegal-tracklist.net/Tracklists/NightRipper> [<https://perma.cc/P2QJ-HFP3>]; *Ciara Reveals Cover and Tracklist of New Album "Jackie," Releases "I Bet" Remixes with T.I. and R3hab*, HYPETRAK (2015), <http://hypetrak.com/2015/04/ciara-drops-jackie-tracklist-and-i-bet-remix-with-t-i/> [<https://perma.cc/5KM4-5F6W>].

## VII. HOW MUSIC IS MADE TODAY

Music is often produced on computer software programs, such as GarageBand.<sup>85</sup> GarageBand is a program that has been preinstalled on Apple personal computers since 2004.<sup>86</sup> GarageBand, like other computer music software, has technology that has lent itself to a new way of creating music. Through Musical Instrument Digital Interface (“MIDI”) technology, GarageBand users can create compositions without playing an instrument.<sup>87</sup> Music producers can use a cursor to click notes on a visual piano roll and compose an entire arrangement.<sup>88</sup> Further, GarageBand and other similar music production programs come with pre-constructed loops.<sup>89</sup> Thus, users can drag and drop pre-made arrangements into their own compositions.<sup>90</sup> A 2004 advertisement for GarageBand went as follows:

You don't have to play the piano. You don't have to read music. You don't even have to have rhythm. If you know what you like when you hear it, you can make your own kind of music. With GarageBand. The easiest way for anyone — pro or novice alike — to perform, record and create music, GarageBand turns your Mac into a digital recording studio — complete with instruments, pre-recorded loops, amps, effects and editing tools.<sup>91</sup>

When determining their standard for the permissibility of sampling, courts should take into account the fact that there are new ways of producing music. Specifically, in a sampling lawsuit between a record label and a music producer accused of sampling impermissibly, courts should first ask whether the sampled component is from a pre-constructed loop that can be found in software programs, such as GarageBand. GarageBand users have a license to use the pre-constructed

---

85. Art Tavana, *Democracy of Sound: Is Garageband Good for Music?*, PITCHFORK (Sept. 30, 2015), <http://pitchfork.com/features/article/9728-democracy-of-sound-is-garageband-good-for-music/> [https://perma.cc/T6V8-ZM3B].

86. Future Music, *A Brief History of GarageBand*, MUSICRADAR (Mar. 17, 2011), <http://www.musicradar.com/us/tuition/tech/a-brief-history-of-GarageBand-400471> [https://perma.cc/VM7N-QRE2].

87. *Id.*

88. Sonic Journey, *Making Electronic Music Using Piano Roll in GarageBand*, YOUTUBE (Aug. 12, 2013), <https://www.youtube.com/watch?v=0OASd4byDDA> [https://perma.cc/XD7C-WHNY].

89. See Future Music, *supra* note 86.

90. See Sonic Journey, *supra* note 88.

91. Peter Gouzouasis, *Fluency in General Music and Arts Technologies*, ACTION, CRITICISM & THEORY FOR MUSIC EDUC. 4 (Sept. 2005), [http://act.maydaygroup.org/articles/Gouzouasis4\\_2.pdf](http://act.maydaygroup.org/articles/Gouzouasis4_2.pdf) [https://perma.cc/CWA8-E3Z7].

loops found in the program. If the part sampled is from a pre-constructed loop, the court should then ask whether transformative engineering effects have been added to the loop heard in the master sound recording — in other words, whether a sample of the loop in the master sound recording is noticeably different from the original loop. If no transformative engineering effects have been added, sampling the master sound recording, which the record label owns (and to which the GarageBand user has a license), should be permitted.

For example, in 2007, Def Jam Recording artist Rihanna released the first single from her album, *Good Girl Gone Bad*, called “Umbrella.”<sup>92</sup> The song sold over 6.6 million records globally and won the 2008 Grammy for “Best Rap/Sung Collaboration.”<sup>93</sup> The producer of the song did not hire a drummer to play the drum beat. The drum beat of the song is a pre-constructed drum pattern that comes preinstalled with GarageBand. In essence, the producer of “Umbrella” copied and pasted the “Vintage Funk Kit 03” pattern into his GarageBand session and reduced the tempo from 90 beats per minute (“BPM”) to approximately 87 BPM.<sup>94</sup> The first thirteen seconds of the instrumental, before the synths<sup>95</sup> are introduced, highlight the “Vintage Funk Kit 03” loop.<sup>96</sup>

Under *Bridgeport*’s per se infringement standard, a GarageBand-using music producer would not be able to sample any part of this thirteen-second drum pattern in the master sound recording. However, a GarageBand music producer should be able to sample the “Umbrella” master sound recording without a license from the owner. The discussion in Part VI of this Note suggests that the *Bridgeport* court wanted to protect the labor and virtuosity of the musician. In the instant case, the producer of “Umbrella” did not play the drums with a certain technique or style, nor did the producer instruct a hired drummer to do so. The drums were pasted into the “Umbrella” recording session. Additionally, sound recordings received protection under the 1976 Copyright Act in order to incentivize record labels to produce sound recordings and invest in creative acts. Sampling a pre-constructed loop that is accessible to GarageBand users does not thwart this goal.

---

92. *Good Girl Gone Bad*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Good\\_Girl\\_Gone\\_Bad](https://en.wikipedia.org/wiki/Good_Girl_Gone_Bad) [<https://perma.cc/62NC-4GMY>] (last modified Feb. 21, 2016, 11:43 PM).

93. *Umbrella (Song)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Umbrella\\_\(song\)](https://en.wikipedia.org/wiki/Umbrella_(song)) [<https://perma.cc/Q5TV-S4PA>] (last modified Feb. 20, 2016, 10:23 AM)

94. These and all subsequent technical assessments are my own and based on my experience as a music producer unless otherwise indicated. I have access to GarageBand and all the pre-constructed loops referenced.

95. A synth sound is produced by the combination of electrical signals rather than acoustic vibrations.

96. MentalInstrus, *Rihanna — Umbrella (Instrumental)*, YOUTUBE (July 23, 2013), [https://www.youtube.com/watch?v=WaF5PR\\_gnI](https://www.youtube.com/watch?v=WaF5PR_gnI) [<https://perma.cc/2YS7-RB8S>].

Nonetheless, pre-constructed loops in a master sound recording could be worthy of protection if they are transformed with engineering effects such that a sample of the loop in the master sound recording contains noticeable elements that are not in the original pre-constructed loop. However, in all likelihood, no such transformative effects exist in the “Umbrella” case. Engineers (1) pan,<sup>97</sup> (2) edit, (3) equalize,<sup>98</sup> and (4) add echo<sup>99</sup> to sound recordings before they are commercially released.<sup>100</sup> In a student note published in the *Harvard Journal of Law & Technology*, former audio engineer Phil Hill states that some engineering decisions are so commonplace that they do not deserve creative protection.<sup>101</sup> For instance, in reference to panning drums, Hill states:

Although someone must decide whether the drums should be panned to resemble the audience’s perspective when viewing the drummer or the drummer’s perspective when playing, there are only two options and thus the merger or *scènes à faire* doctrine should preclude finding sufficient creativity in this decision.<sup>102</sup>

The “Vintage Funk Kit 03” is manufactured at 90 BPM, and “Umbrella” features the loop at approximately 87 BPM. The slight tempo change did not notably alter the pitch of the drums, and from a labor perspective, a GarageBand user can instantly change the tempo of the song by typing in a value. In short, no transformative engineering effects were added to the Vintage Funk Kit drums. Sampling the master sound recording of “Umbrella” would allow a music producer to create a new sound recording that benefits from both the volume of a commercial recording and non-transformative engineering effects, such as panning.

Adding an engineering analysis to determine whether sampling violates copyright does eliminate the bright line rule established in the Sixth Circuit and would force courts to make some technical judgments. However, this change would also be more consistent with the way music now comes into being, and given that the primary goal of copyright law is to spur new creative works, there should be instances where an individual can sample in this manner.

---

97. To pan is to position a sound in a stereo field in order to affect where the listener perceives the sound is coming from.

98. To equalize is to increase or decrease the existence of certain frequencies in a sound.

99. To add echo is to cause a sound to repeat itself over a given time period.

100. Phil Hill, *Fix It in the Mix: Disaggregating the Record Producer’s Copyright*, 26 HARV. J.L. & TECH. 325, 344 (2012).

101. *Id.* at 350.

102. *Id.*

Similarly, in 2012, recording artist Eve released the song “She Bad Bad,”<sup>103</sup> which features a pre-constructed vocal sample called “Africa Mist Voice 12.” The first five seconds of the master sound recording, before the drums are introduced, highlight the “Africa Mist Voice 12” loop.<sup>104</sup> The changes made to the loop are not transformative. As in the “Umbrella” example, the tempo of the loop was reduced. The native loop comes at 102 BPM, while in “She Bad Bad” the loop comes at roughly 83.5 BPM. The loop is also pitch shifted 3 semitones,<sup>105</sup> a technique that is common in music and can be executed instantly through GarageBand plugins. Thus, “She Bad Bad” provides another example of where sampling should be permissible.

To provide a contrary example, in 2013, Atlantic Records recording artist Bobby Ray Simmons, Jr. (better known by his stage name “B.o.B”) released “Throwback,” the sixth single from his album, *Underground Luxury*.<sup>106</sup> The vocal sample in “Throwback” is a pre-constructed vocal sample that GarageBand users can purchase and license as part of a “Jam Pack.”<sup>107</sup> In essence, the producer of “Throwback” copied and pasted the “Irish Lore Voice 02” pattern into a recording session. The first ten seconds of the instrumental, before the strings are introduced, highlight the “Irish Lore Voice 02” loop.<sup>108</sup> Like in “She Bad Bad,” the producer increased the tempo and pitch of the sample; however, here, the producer also added a repeating echo, or delay, to the loop. Delays are significant for two reasons: (1) they create more sounds during a given period of time, and (2) they can affect the groove of a song or create the impression that a sound is moving in a certain pattern. The modified “Irish Lore Voice 02” loop featured in the master sound recording of “Throwback” contains elements that notably differentiate it from the original GarageBand Jam Pack loop. Therefore, “Throwback” provides an example of when a producer or engineer’s work transforms a pre-constructed loop such that it deserves creative protection.

As a final example, in 2012, LaFace Records recording artist Usher released the first single from his album *Here I Stand*: “Love in

---

103. *Lip Lock*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Lip\\_Lock](https://en.wikipedia.org/wiki/Lip_Lock) [https://perma.cc/ET2E-A98S] (last modified Jan. 4, 2016, 5:59 AM).

104. EveVEVO, *Eve — She Bad Bad (Official Music Video)*, YOUTUBE (Jan. 8, 2013), <https://www.youtube.com/watch?v=DEqRByKWeA> [https://perma.cc/B5HQ-EJWM].

105. A semitone is also called a half step. It is the smallest interval used in Western music.

106. *Underground Luxury*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Underground\\_Luxury](https://en.wikipedia.org/wiki/Underground_Luxury) [https://perma.cc/2QQW-Y9EG] (last modified Feb. 24, 2016, 8:48 AM).

107. A Jam Pack is a collection of additional sounds that can be purchased (unlike the tools already discussed, which come with the GarageBand software).

108. B.o.B, *B.o.B — Throwback ft. Chris Brown [Official Audio]*, YOUTUBE (Nov. 26, 2013), <https://www.youtube.com/watch?v=DHc1trOISA> [https://perma.cc/XGN7-ZPMJ].

This Club.”<sup>109</sup> The song sold over five million downloads and was rated the best music single of 2008 by *Entertainment Weekly*.<sup>110</sup> The synth sounds of “Love in This Club” are pre-constructed synths from a Jam Pack. In essence, the producer of “Love in This Club” copied and pasted the “Euro Hero” patterns into a recording session and layered them over each other.<sup>111</sup> The first six seconds of the instrumental, before the drums are introduced, highlight the “Euro Hero 2” loop.<sup>112</sup> No noticeable delays or other engineering effects are added to this intro. Thus, sampling in this manner should be permissible.

During the course of the song, there are short snippets of time between drum kicks and snare hits in which multiple “Euro Hero” synths are layered over each other. In these short snippets of time, when the pre-constructed layered loops are isolated, one should also be permitted to sample the master sound recording. No transformative engineering effects were added to these layered synths. Though a work may be entitled to copyright protection when non-protectable elements are selected, coordinated, or arranged in such a way that the resulting work as whole constitutes an original work of authorship,<sup>113</sup> this decision to layer the loops lacks the “creative spark”<sup>114</sup> to make the arrangement worthy of protection. The “Euro Hero” synths appear one after another in a list of pre-constructed loops in GarageBand. Further, as a matter of policy, GarageBand provides users with these loops to inspire creativity,<sup>115</sup> and a user should not be precluded from sampling two pre-constructed loops that are overlaid merely because they are overlaid.

## VIII. CONCLUSION

Today, there is a new way of producing music, and this new method needs to be taken into account when courts determine to what extent sampling is permissible. In musical composition copyright lawsuits, courts often apply a *de minimis* test to determine whether there is infringement. In the Second Circuit, for example, if the alleged infringing material is not recognizable by the average listener, there is

---

109. *Love in This Club*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Love\\_in\\_This\\_Club](https://en.wikipedia.org/wiki/Love_in_This_Club) [<https://perma.cc/JHP5-XA63>] (last modified Mar. 3, 2016, 10:33 AM).

110. *Id.*

111. browniiiiiiiiiiii's channel, *LOVE IN THIS CLUB EXPOSED!! GARAGEBAND (NOT ME IN THE VIDEO)*, YOUTUBE (Apr. 6, 2008), <https://www.youtube.com/watch?v=NvHvnpovVTGY> [<https://perma.cc/37YX-ALKM>].

112. UsherVEVO, *Usher — Love in This Club ft. Young Jeezy*, YOUTUBE (Oct. 24, 2009), <https://www.youtube.com/watch?v=cB5e0zHRzHc> [<https://perma.cc/A4XL-3J7H>].

113. *Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.*, 499 U.S. 340 (1991).

114. *Id.* at 345.

115. *GarageBand for Mac*, APPLE, <http://www.apple.com/mac/garageband/> [<https://perma.cc/VU6F-TBD4>].

no copyright infringement.<sup>116</sup> A different standard is needed when sampling pre-constructed loops because sampling should be permitted as long as the pre-constructed loop is isolated on a master track and there are no transformative engineering effects applied to the loop. For example, producers should be able to sample the recognizable “Umbrella” drum instrumental intro for approximately thirteen seconds. Although I highlight examples from popular music, these arguments for a sampling standard that is more lenient than the *Bridgeport* standard can be applied to all genres of music. This is especially true given that Apple, among other companies, produces pre-constructed loops for multiple genres. The law should reflect changes in technology and the way music is now produced when deciding the permissibility of sampling sound recordings.

---

116. See, e.g., *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 77 (2d. Cir. 1997).