Rappers Sorrow, or How Copyright’s Restriction on Digital Sampling Inhibits African-American Participation in Societal Discourse

Darrin Keith Henning
Rappers Sorrow, or
How Copyright’s Restriction on Digital Sampling Inhibits
African-American Participation in Societal Discourse

DARRIN KEITH HENNING
KEITH@COPYWRITE.ORG
PH: 501-240-5825
UCA Box 5153, Conway, AR 72035
I. INTRODUCTION

Copyright law’s continually-increased limitations on the use of digital music sampling in rap and hip-hop music has had a disparate racial impact, thereby eroding rap’s original purpose as a medium for critical social discourse. Rap music has always had a split-personality, serving as both pure entertainment and, to a lesser degree, as a vehicle for social commentary. While the former purpose has thrived, the consensus is that rap music has lost most of its relevance as a tool for critical discourse for the African-American community. The reasons for this are manifold, including the legal response to music sampling. This article will consider, from a critical race theorist perspective, only those legal aspects of music sampling in rap music.

First, the article will discuss the essential role of music sampling in rap music. Next, it will evaluate how the application of copyright law has had a disparate impact on rap music and how recent developments in copyright law have limited the use of music sampling. Finally, this paper will discuss what effect restrictions on sampling have had on the ability of this art form to perform one of its original functions—critical discourse.

II. RAP MUSIC’S DEVELOPMENT AS A TOOL FOR CRITICAL SPEECH

They said nothing good ever come outta Trenchtown. Well, hip-hop came out of Trenchtown!

A. Jamaican Dancehall and the Roots of Rap

Rap music and sampling developed in tandem as tools for critical speech in the African-American community. Rap has a heritage that includes 1970s Bronx house and block parties,

1 Digital music sampling is “the conversion of analog sound waves into digital code. The digital code that describes the sampled music or other sound can then be reused, manipulated, or combined with other digitized or recorded sounds using a machine with digital data processing capabilities, such as a computer or computerized synthesizer.” Judith Greenberg Finell, How a Musicologist Views Sampling Issues, 207 N.Y. L.J., 5, 7 n.3 (1992).

2 As these terms are difficult to define, and often overlap greatly, I will be referring to the entire musical art form as simply “rap.”

Disco, Funk, and Jamaican Soundsystem. This heritage supported the development of music sampling which became an essential component of rap music.

1. **Importing Kingston Dance-Hall: Kool Herc and Break-Beat**

In the early 1970s, Jamaican-born entertainer, Clive Campbell, going by the name DJ Kool Herc, imported Soundsystem music traditions he learned in Kingston to clubs and house parties in the South Bronx. Jamaican Soundsystem takes its name from the fact that entertainers would travel from town to town with large sound systems to entertain in large outdoor community “yard” parties. In the Soundsystem tradition, one person, the selector, would select music albums to play, and another, the disc jockey (DJ), would talk over them to entertain the crowd.

Soundsystem was characterized by a “toast and boast” tradition, through the use of “dub,” and the reuse of “riddims” [aka rhythms]. Dub is a style of music wherein the DJ “would manually mix sounds and segments from Jamaican and non-Jamaican records.” Once a particular beat, or “riddim,” dubbed from a record became popular with the crowds, other DJs would use the same ones. As explained by a veteran Jamaican DJ, “anybody can use anybody riddim, and if a guy do a song and it reach number one on a new riddim, . . . that is the sound that

---

5 The development of Soundsystem itself was as a response to state controlled radio under British rule. Self, *supra* note 4, at 349.
6 As the popularity of “talkover” spread in the 1960s, a division of labor eventually occurred, with selectors returning to their role as music programmers and vocalists coming to be known as DJs: disc jockeys who “ride the riddim.” *Id.*
7 In rap and hip-hop, the selector has become known as the DJ, and the lyricist is known as the Master of Ceremonies, or MC. Perkins, *supra* note 4, at 6.
10 Self, *supra* note 4, at 349.
11 Kartha, *supra* note 9, at 224.
12 Self, *supra* note 4, at 349.
is kicking now, everybody will try to use the same riddim to get their song to kick too.”

When DJ Kool Herc played South Bronx house parties the 1970s, he used the short instrumental rhythm portion, or “break,” replacing Jamaican riddims with breakbeats from funk and soul records. Herc developed a technique called the “Merry-Go-Round”, in which he used two copies of the same album on two turntables. By layering the instrumental breakbeats from the albums on top of one another again and again, he was able to “extend[] a five-second breakdown into a five-minute loop of fury.” This type of reuse of rhythmic elements in rap made audio sampling well suited to the musical form. Rap music’s recycling of distinct rhythms, with its “distinctive bass-heavy, enveloping sound does not rest outside of its musical and social power,” but is also rap’s “most powerful effect:”

Rap’s primary force is sonic, and the distinctive systematic use of rhythm and sound . . . [is] part of a rich history of the New World black traditions and practices. Rap music centers on the quality and nature of rhythm and sound, the lowest, “fattest beats” being the most significant and emotionally charged . . . The arrangement and selection of sounds rap musicians have invented via samples . . . are at once deconstructive (in that they actually take apart recorded musical compositions) and recuperative (because they recontextualise these elements creating new meanings for cultural sounds[]).

With the addition of sampling, the practice of recycling repetitive rhythms imported from Jamaica “clearly inform the prolific use of collage, intertextuality, boasting, [and] toasting [in rap].” In this collage of sounds, the three Soundsystem influences, toast and boast, dub, and

---

13 Id. at 349 (quoting BRIAN JAHN & TOM WEBER, REGGAE ISLAND: JAMAICAN MUSIC IN THE DIGITAL AGE 125 (1992)).
14 CHANG, supra note 3, at 79. These are also known by the terms getdown, breakbeats, and breakdowns. Id.
15 Self, supra note 4, at 350.
16 CHANG, supra note 3, at 79
17 Id.
18 Self, supra note 4, at 350.
20 Id.
21 Id.
riddims, can still be seen. Also, informing the use of collage and intertextuality\(^\text{22}\) are the black poetic and oral traditions,\(^\text{23}\) which fall beyond the scope of this paper.

2. *The Essential Role of Sampling in Rap Music*

DJ Cool Herc used two turntables and dual copies of albums, “‘juggling’ beats between the two.”\(^\text{24}\) Beginning in the early 1980s, rap DJs and producers used samplers to mechanically reproduce Herc’s “Merry-Go-Round” effect by endlessly looping samples.\(^\text{25}\) The person generally credited with developing digital sampling is Grandmaster Flash, who is also credited with the first political rap, “The Message.”\(^\text{26}\) This breakthrough did not make the DJ working in vinyl obsolete, but did allow DJs to utilize a far greater range of sources and cultural elements, including “advertising jingles, television sitcom themes, and movie soundtracks.”\(^\text{27}\)

In an interview for *Remix* magazine, Michael Schwartz, better known as Mix Master Mike from The Beastie Boys, explained where he found samples for an album, “The opening voice . . . came from when I was in London watching this UFO documentary . . . I hooked up my MiniDisc to the television and sampled it. A lot of little shit like that happened . . . I would be in a hotel room somewhere and just grab audio files from different sources.”\(^\text{28}\) Prince Be Softly of P.M. Dawn explained why he sampled in this way, “Sampling artistry is a very misunderstood form of music . . . [I]t can take more time to find the right sample that to make up a riff. I am a songwriter

\(^{22}\) Intertextuality is a concept “used in literary theory to explore and refer to the relationship between texts and the more general systems of language and social practice of which they are a part.” Richard Freeman, *The Work the Document Does: Research, Policy, and Equity in Health*, 31 J. HEALTH POL’Y & L. 51, 53 (2006); see also Self, *supra* note 4, at 354 (describing interretextuality in music such as rap as the “practice of drawing on existing melodic and textual elements and recombining those elements in ways that create a song that can range from a slightly modified version of an older song to a wholly new piece that contains echoes of familiar melodic or lyrical themes”).

\(^{23}\) See, generally, Rose, *supra* note 19.

\(^{24}\) *Id.* at 350.

\(^{25}\) *Id.* at 350.

\(^{26}\) PERKINS, *supra* note 4, at 7.

\(^{27}\) *Id.* at 6.

While the advent of digital sampling is generally credited to Bronx DJ, Grandmaster Flash, the first commercially successful rap album was “Rapper’s Delight” by the Bronx rap group the Sugar Hill Gang. Interestingly, at the time the song was recorded, electronic sampling was more difficult than simply hiring a band to play a sample of the original song—Chic’s “Good Times.” And from there, a new postmodern art form was born. Rap and sampling are interrelated such that they cannot be separated without damaging them both. Rap loses its power for both speech and entertainment without the ability to integrate culturally relevant samples.

III. THE APPLICATION OF COPYRIGHT LAW TO MUSIC SAMPLING

Pursuant to the copyright clause of the Constitution, Congress has the authority “promote the progress of Science and the Useful Arts” by granting authors protections and exclusive rights in their original work. Exercising this authority, Congress enacted the Copyright Act which granted authors a number of exclusive rights, such as the right to reproduce the work in copies and to make derivative works from their original work. The policy behind the copyright clause is to encourage the creation of new works through economic incentives and to balance the original creator’s right to profit from her work and “the public’s right of access.”

A. Prerequisites for Copyright Protection

29 Rose, supra note 19, at 70.
30 SUGAR HILL GANG, RAPPER’S DELIGHT, ON RAPPER’S DELIGHT: HIP-HOP REMIX (Sugar Hill 1980).
32 Jason H. Marcus, Note, Don’t Stop That Funky Beat: The Essentiality of Digital Sampling to Rap Music, 13 HASTINGS COMM. & ENT. L.J. 767, 772 (1991) (comparing sampling to Andy Warhol’s Campbell’s soup can paintings and other modern art forms that rely on deconstruction or recontextualization).
33 U.S. Const. art. I, § 8, cl. 8.
35 Id. at 106(2).
36 L. Ray Patterson & Craig Joyce, Copyright in 1791: An Essay Concerning the Founders’ View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution, 52 EMORY L.J. 909, 919, 923 (2003).
Section 102(a) of the Copyright Act grants copyright protection to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” The Act’s basic requirements are that the work be both an original work of the author and fixed in any tangible medium.

While the Copyright Act of 1909 granted copyright protection to “musical compositions,” the recordings of musical compositions were not afforded protection until the amendment of the act in 1972. For the purpose of discussing digital sampling, the difference between musical compositions and sound recordings is significant. A musical composition “consists of a work’s musical score and lyrics which produce a sound when played.” Sound recordings are “are works that result from the fixation of a series of musical, spoken, or other sounds . . . regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.” Unlike musical compositions, there is no compulsory license for sound recordings. As later discussed, the disparate treatment for compulsory licenses between compositions and recordings allowed white musicians to appropriate the music of blacks during the development of rock-and-roll, but protected the recordings of those same white musicians during the development of rap and hip-hop.

In order to claim copyright, the work must be an original work of authorship. The bar for meeting the originality requirement is very low: “[O]riginality entails independent creation of

---

38 Id. at § 102(b).
44 See Section IV.B
a work featuring a modicum of creativity. Independent creation required only that the author not have copied the work from some other source. The range of what is considered “original” may include the recording of a single note, or even of silence.

Under the Act, a sound recording copyright owner is granted the exclusive right: “(1) to reproduce the copyrighted work . . . ; (2) to prepare derivative works based upon the copyrighted work . . . ; (3) to distribute copies . . . ; [and,] (6) . . . to perform the copyrighted work publicly by means of a digital audio transmission.” This right is subject to a list of specific exceptions. The right to reproduce is particularly important when discussing sampling. This right is “limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording.”

For a copy to be infringing, it must be a copy of the original recording, such as “a store bought compact disc or recording a song played on the radio,” or a derivative of the original recording. Under the Act, it is the “exclusive right of the owner of copyright in a sound recording . . . to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.” Conversely, a copy is not

47 Marcus, supra note 32, at 774; see also NIMMER, supra note 43, at 1 § 2.10[A], at 2-146 (“it would seem that any instrumental performance, or vocal rendition, contains something which is irreducible, and thus may be the subject of copyright”).
48 Composer Johnathon Cage authored the musical work, 4’ 33” in 1952. Robert A. Heverly, Law as Intermediary, 1 MICH. ST. L. REV 107, 119 (2006). The composition consists of silence for four minutes and thirty-three seconds. Id. In playing the work, a musician “comes onto the stage, sits, and raises and lowers her instrument.” Id. “In 2002, Mike Batt . . . released a music compact disc . . . [which] included . . . sixty seconds of silence, titling it ‘A One Minute Silence’ and crediting John Cage as co-author.” Id. The John Cage Trust alleged infringement of Cage’s copyright on silence. Id. The two settled, with Batt making a large donation to the trust. Id. at 120.
49 17 U.S.C. § 106; “The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4).” Id. at § 114(a).
50 Id. at § 106–122.
51 Id. at § 114(b).
52 Somoano, supra note 41, at 291.
54 Id.
infringing if the copy is “another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.”

Therefore, an independently created sound recording that is intended to imitate, or even duplicate, the sounds of the original sound recording is not a derivative work of the original and is not infringing. Unfortunately, the very nature of sampling is to take sound recordings and rearrange, remix, or otherwise alter them, in violation of section 114(b).

B. When Sampling Becomes Infringement

The law’s posture toward digital audio sampling has always been hostile. The decision of one of the first cases to address sampling, *Grand Upright Music Ltd. v. Warner Brothers Records, Inc.* opened with the reprisal, “Thou shalt not steal.” Decided in 1991, nearly a decade after sampling originated, *Grand Upright Music* concerned the integration of a three-word sample into a song without license. The judge also recommended criminal prosecution for the artist and showed obvious disdain for rap by continually referring to “rap music” in quotations.

In order to prove infringement in a sampling case, the copyright owner must show (1) that he has a valid copyright in the sampled work, (2) copying of original constituent elements of the copyrighted work, and (3) that the copying constitutes unlawful appropriation of the copyrighted work, usually determined by showing that “the two works are substantially similar

---

55 *Id.*
56 Somoano, supra note 41, at 292.
57 17 U.S.C. § 114(b).
59 *Id.* at 185.
60 *Id.* The opinion stated: From all of the evidence produced in the hearing, it is clear that the defendants knew that they were violating the plaintiff’s rights as well as the rights of others. Their only aim was to sell thousands upon thousands of records. This callous disregard for the law and for the rights of others requires not only the preliminary injunction sought by the plaintiff but also sterner measures.
when taken as a whole.” Registration of copyright is prima facie evidence of ownership of a valid copyright, and also raises a presumption of originality. Thus, as a practical matter, in order to prove infringement, the owner must still show copying of the original work and unlawful appropriation through substantial similarity between the works.

1. **Showing Copying of the Original Work**

Copying may be proven either through admission of the defendant or by circumstantial evidence from which “copying can be reasonably inferred.” In most instances, defendants simply stipulate that they copied a snippet of another work as a sample. When the defendant does not admit copying, because direct evidence of copying is usually unavailable, copying may be inferred when the defendant had access to the copyrighted work and the sample is substantially similar to the copyrighted work. This use of the substantial similarity standard is distinct from that to prove infringement—the court is attempting only to determine “whether the defendant copied (as opposed to independently created), not whether he copied a sufficient amount to constitute infringement.”

To prove copying, the copyright owner may proffer testimony of experts to show that “the similarities are ‘probative’ of a finding of copying,” or waveform analysis to show sufficient similarity. The more the works are similar, the less important the element of access. If the

---

64 Mueller, *supra* note 62, at 442.
70 “As a practical matter, only where the sample is so distorted from its original fixation will the issue of copying arise. If a sample were so distorted as to require a detailed waveform comparison, it is unlikely that it would be
works are so similar “as to make it highly probable that the later one is a copy of the earlier one, proof of access need not be shown.”\textsuperscript{71} Independent recreation of a sound recording is allowed, however, the inference of copying created through proof of access and substantial similarity is rebuttable by the defendant on proof that the sample was independently created.\textsuperscript{72}

2. \textit{Showing Substantial Similarity Between the Works}

In most copyright infringement cases, where actual copying has been shown, the arguable element is whether the defendant copy was substantially similar enough to the protected expression in the copyrighted work to constitute unlawful appropriation.\textsuperscript{73} The determination of when similarity is substantial has been termed “one of the most difficult questions in copyright law.”\textsuperscript{74} Where to draw the line between an identical copy and slight similarities is so inexact that Judge Learned Hand wrote “wherever it is drawn, will seem arbitrary.”\textsuperscript{75} And, with sampling, the courts have drawn the line in a variety of places. However, a clear standard doesn’t exist, as no court has yet to adopt a test not criticized by at least one other court.

Where, as in sampling, there is a literal but fragmented similarity,\textsuperscript{76} the focus is “whether the similarity relates to matter that constitutes a substantial portion of plaintiff’s work – not whether such material constitutes a substantial portion of the defendant’s work.”\textsuperscript{77} In some instances though, as in sampling cases, courts have also turned to a qualitative test, looking to

\textsuperscript{72} Id. at 893–94.
\textsuperscript{74} \textit{See} NIMMER, \textit{supra} note 43, at 4 § 13.03[A], at 13-27. “[T]he determination of the extent of similarity that will constitute a substantial, and hence infringing, similarity presents one of the most difficult questions in copyright law, and one that is the least susceptible of helpful generalizations.” \textit{Id.} (emphasis removed).
\textsuperscript{75} Nichols v. Universal Pictures Co., 45 F.2d 119, 122 (2d Cir. 1930).
\textsuperscript{76} “[T]he similarity, although literal is not comprehensive – that is, the fundamental substance . . . of the plaintiff’s work has not been copied; no more than a line, or a paragraph, or a page . . . has been appropriated.” NIMMER, \textit{supra} note 43, at 4 § 13.03[A][2], at 13-53.
\textsuperscript{77} \textit{Id.} at 13-54.
whether the similar material, though a very small portion of the original work, is qualitatively important to the original work.\textsuperscript{78} In these cases, the courts have looked to “whether the sample has captured the ‘essence’ or ‘hook’ of the earlier work.”\textsuperscript{79}

While experts are used in the determination of whether the defendant has copied, they are not typically used in the tests to determine improper appropriation. The standard usually employed is that of an ordinary, or lay, listener. The lay listener standard is objective, but judged from a subjective viewpoint:

[T]he trier of fact . . . places itself in the position of the average lay listener to decide the ultimate issue of copyright infringement . . . . The use of the lay listener test results from the notion that general audience reactions are a gauge of whether the defendant has taken from the plaintiff’s work that which is aurally recognizable and pleasing to those listeners who comprise the plaintiff’s target audience.\textsuperscript{80}

While not originating with \textit{Arnstein v. Porter}, it is the case most often cited for the lay listener standard.\textsuperscript{81} Under \textit{Arnstein}, “the test is the response of the ordinary lay hearer; accordingly, on that issue, ‘dissection’ and expert testimony are irrelevant.”\textsuperscript{82} It is also important to remember that, as one court noted, “[t]he \textit{sine qua non} of the [lay listener] test . . . is the overall similarities rather than the minute differences between the two works”\textsuperscript{83}

Other tests sometimes employed in sampling cases to gauge substantial similarity to determine improper appropriation is the subtractive test, the abstractions test, and to a lesser

\textsuperscript{78} Id. at 13-55.
\textsuperscript{79} Brown, supra note 68, at 1964 (explaining that “the sampler may copy only a small portion of the plaintiff’s work and then loop it so that the small portion repeats throughout the course of the song”).
\textsuperscript{81} In \textit{Arnstein}, songwriter Ira B. Arnstein alleged that a number of Cole Porter’s songs infringed on ones he had written, including the Porter’s hits songs “Begin the Beguine,” “I Love You,” “Night and Day,” and “You’d Be So Nice to Come Home To.” Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946). Some of Arnstein’s songs had been published modestly, but others had never been exposed to the public. \textit{Id.} at 47 (reversing grant of summary judgment and remanding for findings on remaining question of fact regarding copying).
\textsuperscript{82} Arnstein, 154 F.2d at 468.
extent, the total concept and feel test.\textsuperscript{84} Under the subtractive approach, the alleged infringed work is analyzed to determine which of its elements are protected and which are not.\textsuperscript{85} After removing, or subtracting, the unprotected items, the remaining material is then analyzed to determine if the alleged infringing work is significantly similar.\textsuperscript{86} Copying unprotected portions of the original work is permissible,\textsuperscript{87} while copying the arrangement of those portions is not.

Formulated by Judge Learned Hand in \textit{Nichols v. Universal Pictures Corp.}, the abstractions test is premised on the ability to describe a work in increasingly generalized and abstract terms.\textsuperscript{88} Using the test, the description of the work becomes more generalized until “there is a point in this series of abstractions where the [original expressions] are no longer protected.” This test proves useful in analyzing samples that have been altered before being included in the alleged infringing work.\textsuperscript{89}

The “total concept and feel test” utilizes a bifurcated method, the first part being an extrinsic analysis of the similarities in general ideas, and the second an intrinsic analysis of the similarities in the particular expression used.\textsuperscript{90} The former is subject to expert testimony, while the latter employs a standard based “on the response of the ordinary reasonable person” with the intended audience in mind.\textsuperscript{91} This method is highly criticized as being applicable only for

\begin{itemize}
  \item \textsuperscript{84} See Brown, \textit{supra} note 68, at 1964–65.
  \item \textsuperscript{85} The subtractive test was first adopted in \textit{Alexander v. Haley}, where it was used to reject writer Margaret Walker Alexander’s claim that her novel recounting a personal history of slavery, “Jubilee,” was infringed by Alex Haley’s similar novel, “Roots.” 460 F. Supp. 40, 46 (S.D.N. Y. 1978) (explaining that, after removing those items that are not protected, such as historical or contemporary facts, nothing of what remained of the two were similar).
  \item \textsuperscript{87} Arnstein, 154 F.2d at 468.
  \item \textsuperscript{88} 45 F.2d at 121 (2d Cir. 1930).
  \item \textsuperscript{89} See Brown, \textit{supra} note 68, at 1965.
  \item \textsuperscript{90} \textit{Nimmer}, \textit{supra} note 43, at 4 § 13.03[A][1][c], at 13-44 (2006).
  \item \textsuperscript{91} Sid & Marty Krofft Television Prods. v. McDonalds Corp., 562 F.2d 1157, 1169 (9th Cir. 1977) (explaining that “while any one similarity taken by itself, seem[ed] trivial . . . it [was] proper for [the] jury to find that the over-all impact and effect indicated substantial appropriation” (quoting \textit{Malkin v. Dubinsky}, 146 F.Supp. 111, 114 (S.D.N.Y. 1956)); \textit{see also} \textit{Nimmer}, \textit{supra} note 43, at 4 § 13.03[A][1][c], at 13-43 to 48.
\end{itemize}
“simplistic works that require only a highly intrinsic (i.e., unanalytic) evaluation.”

C. Applicable Defenses to Copyright Infringement in Music Sampling

Copyright infringement is a strict-liability offense. Once the court finds a valid copyright in a work and infringement, there are only three applicable defenses in sampling cases—either that the use falls under one of the statutory exceptions, that the use was a fair use, or that it was not an infringement due to de minimis use. This article will look at the affirmative defense of fair use and the de minimis use argument.

1. The Fair Use Doctrine

First formulated by Justice Joseph Story in a decision regarding infringement of the private letters of George Washington, the application of the Fair Use Doctrine has troubled the courts ever since; a century later, Judge Learned Hard characterized the doctrine “the most troublesome in copyright law.” Section 107 of the Copyright Act provides that, notwithstanding other sections of the Copyright Act, “the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, . . . scholarship, or research, is not an infringement of copyright.” The United States Supreme Court has held that parody is a non-infringing form of criticism, while satire is not. The Copyright Act also provides that, in determining whether a use was a fair use, courts shall consider the following nonexclusive factors:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;

92 Id. at 13-43.
94 Dellar v. Samuel Goldwyn, Inc. 104 F.2d 661, 662 (2d. Cir. 1939).
97 Dr. Seuss Enterprises v. Penguin Books, 109 F.3d 1394 (9th Cir. 1997) (finding that book The Cat NOT in the Hat, based on the Dr. Seuss book, The Cat in the Hat, written to lambaste the O.J. Simpson murder trial a satire of the original work and, thus, not a fair use).
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work. 98

Examples of the application of the fair-use doctrine include the Sony Betamax case, where the United States Supreme Court found that use of video cassette recorders by home users a fair use. 99 The home users recorded shows for later viewing; this time-shifting was a legitimate fair use when the purpose and character of the use was personal and temporary, and this personal use did not effect the market for the works. 100

2. The De Minimis Use Doctrine 101

In upholding the policy behind copyright, creating economic encouragement for the creation of new works, the requirement of substantial similarity assures that the author’s exclusive rights and market are maintained without hindering development in works that may be similar, but not substantially so. 102 In protecting the market for the work, the copyright owner’s incentive is likewise protected. Where the use is so dissimilar from the original that it “does not interfere with the plaintiff’s market,” then the use is not infringing. 103 This use is considered to be de minimis. 104

Both the majority and dissent of the Court of Appeals decision in the 2 Live Crew Case, Campbell v. Acuff-Rose Music, Inc. (Acuff-Rose II), discussed the application of the de minimis

---

100 Sony, 464 U.S. at 442.
101 Generally translated as “the law does not concern itself with trifles.” BLACK’S LAW DICTIONARY 443 (7th ed. 1999); see also BOUVIER’S LAW DICTIONARY 2031 (Rawles 3d Rev. 1914) (“The law does not notice or concern itself with trifling matters”); THOMAS BRANCH, PRINCIPIA LEGIS ET AEOQUATATIS 36 (William Waller Henning ed., T.H. White, 1st Am. from 4th London ed. 1824) (“The law doth not regard trifles”).
102 Brown, supra note 68, at 1963.
103 Id.
104 Ringgold v. Black Entm’t Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997) (explaining three ways in which the de minimis doctrine can be applied to copyright law, including to mean that “that copying has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity, . . . a required element of actionable copying”); United States v. Taxe, 380 F. Supp. 1010, 1015 (C.D. Cal. 1974), aff’d in relevant part, 540 F.2d 961 (9th Cir. 1976) (requiring “more than a trivial part” be copied to find infringement).
The majority stated that “[a] de minimis use, one that is meager and fragmentary, by definition fails to conjure up the original and does not constitute an infringement,”\textsuperscript{106} while the dissent likewise argued that “a sampling of no more than a few notes should be governed by the maxim de minimis non curat lex.”\textsuperscript{107} The maxim was most recently articulated by the United States Court of Appeals for the Second Circuit in \textit{Ringgold v. Black Entm’t Television, Inc.}\textsuperscript{108} Applying the doctrine, the \textit{Ringgold} court held that if the copy of the original work is de minimis, meaning the amount copied is not sufficient to be substantially similar, then the work using the copy will not be infringing.\textsuperscript{109}

The de minimis use doctrine has been applied to copyright cases in three distinct approaches: (1) in a substantial similarity analysis after a determination of actual copying, (2) as a factor in a fair use analysis, and (3) in its classic legal usage as an affirmative defense.\textsuperscript{110} The third method is the one most often employed in sampling cases, as it is asserted by defendants after a finding of infringement,\textsuperscript{111} and because courts have been disinclined to allow de minimis use as a factor in determining substantial similarity or fair use.\textsuperscript{112}

\textbf{IV. Silencing Speech: The Clash Between Copyright Law’s Policy and Purpose}

\textit{Our freedom of speech is freedom or death. We got to fight the powers that be.}\textsuperscript{113}

The rise of the practice of digital sampling has led to surprisingly few cases. While a number of albums based primarily on sampling have been released to critical acclaim, including

\begin{footnotes}
\item 105 \textit{Acuff-Rose II}, 510 U.S. at 573.
\item 107 \textit{Id.} at 1444 n. 5 (Nelson, J., dissenting) (citing Bruce J. McGiverin, \textit{Comment, Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds}, 87 COLUM.L.REV. 1723, 1735 (1987)).
\item 108 126 F.3d 70, 74 (2d Cir, 1997).
\item 110 Andrew Inesi, \textit{A Theory of De Minimis and a Proposal for its Application in Copyright}, 21 BERKELEY TECH. L.J. 945, 947 (2006).
\item 111 \textit{See, e.g.}, Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 398 (6th Cir. 2004).
\item 113 \textit{PUBLIC ENEMY, Fight the Power, on FEAR OF THE BLACK PLANET} (Def Jam Records, 1990).
\end{footnotes}
De La Soul’s “3 Feet High and Rising,” Public Enemy’s “It Takes a Nation of Millions to Hold Us Back,” Beastie Boys’ “Paul’s Boutique,” and “Endtroducing” by DJ Shadow, sampling as a legal issue first entered the public consciousness with Vanilla Ice’s number one single “Ice Ice Baby.” In the song, Vanilla Ice sampled the bass line and melody from David Bowie’s song “Under Pressure” as performed jointly by Queen and David Bowie. The parties settled before going to court. The outcome is not publicly known, with some accounts claiming that the settlement amount was in the six-figures, and others that Vanilla Ice surrendered 100 percent of the royalties from the song. Because most sampling disputes are settled out-of-court, there are few cases involving sampling relative to the prevalence of the practice. The following section will look first at the application of copyright law and how it conflicts with the policy of the copyright clause of the United States Constitution, and then analyze this application from a critical race perspective, discussing how the disparate impact of the application of copyright law silences African-American speech.

114 De La Soul, 3 FEET HIGH AND RISING (Tommy Boy, 1989).
115 Public Enemy, IT TAKES A NATION OF MILLIONS TO HOLD US BACK (Def Jam Records, 1995).
116 Beastie Boys, PAUL’S BOUTIQUE (Capital Records, 1989).
117 DJ Shadow, ENDTRODUCING (Mo’ Wax/FFRR, 1996).
118 These four albums are generally regarded as groundbreaking for their use of large numbers of samples, and are respectively listed as numbers seven, two, twelve, and sixty-nine on Spin Magazine’s list of 100 Greatest Albums. 100 Greatest Albums, 1985-2005, SPIN, June 20, 2005, available at http://www.spin.com/features/magazine/covers/2005/06/0507_cover_greatest_albums/ (last visited Nov. 10, 2006). “Three Feet High and Rising,” “It Takes a Nation of Millions to Hold Us Back,” and “Paul’s Boutique” are also listed on Rolling Stone magazines list of 500 Best Albums of all time, numbers 346, 300, and 156, respectively. The RS 500 Greatest Albums of All Time, ROLLING STONE MAGAZINE, Iss.937, p. 134, 159, Dec 11, 2003, available at http://www.rollingstone.com/news/story/5938174/the_rs_500_greatest_albums_of_all_time/ (last visited Nov. 10, 2006).
119 Vanilla Ice, Ice Ice Baby, on To THE EXTREME, (Capitol Records, 1990).
120 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, 2405 n.38 (2004).
122 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, 269 n.69, 274 (2000) (attributing the lack of sampling lawsuits to unpredictability in the courts due to the lack of bright-line rules and the unwillingness of music publishers and record companies to get into legal battles with one another) (footnotes omitted).
A. How the Policy Behind the Application of Copyright Law Conflicts with its Purpose

Courts attempt to “strike a balance between protecting original works and stifling further creativity” in the application of copyright law.\(^{123}\) The fair use and *de minimis* use doctrines were developed to help the courts maintain that balance, a central purpose of copyright law. Justice Souter, writing for the United States Supreme Court in *Acuff-Rose II* explained that, from the inception of modern copyright, some fair use of copyrighted works was needed to uphold copyright’s constitutional purpose, to “promote the Progress of Science and useful Arts . . . . “\(^{124}\) As Justice Souter pointed out in *Acuff-Rose II*, Justice Story rationalized that “in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.”\(^{125}\)

The balance between protecting original works to promote their creation and stifling further creativity has been lost on a number of courts. The *Bridgeport Music* court found the issue to be one of commerce that would best be resolved in the marketplace,\(^{126}\) and that musicians could sample from “a large body of pre-1972 sound recordings . . . not subject to federal copyright protection.”\(^{127}\) Likewise, in *Acuff-Rose II*, the court found the use to be a non-infringing parody, but concentrated most of their analysis on the fourth statutory factor for fair-use, the effect of the infringing work on the market.\(^{128}\) The following cases illustrate the application of copyright law to sampling in a manner contravening the copyright clause’s original purpose and

\(^{123}\) *Bridgeport Music*, 383 F.3d at 398.


\(^{125}\) *Acuff-Rose II*, 510 U.S. at 572 (quoting Emerson v. Davies, 8 F.Cas. 615, 619 (No. 4,436) (CCD Mass. 1845)).

\(^{126}\) “[T]he market will control the license price and keep it within bounds. The sound recording copyright holder cannot exact a license fee greater than what it would cost the person seeking the license to just duplicate the sample in the course of making the new recording.” *Bridgeport Music*, 383 F.3d at 399.

\(^{127}\) *Bridgeport Music*, Inc. v. Dimension Films (Bridgeport Music III), 410 F.3d 792, 804 (6th Cir. 2005).

with disparate racial impact.


   Opening with the reprisal “Thou shalt not steal,” *Grand Upright Music* was one of the first cases to address sampling. The case concerned the integration of a three word sample of Gilbert O’Sullivan’s 1972 hit, “Alone Again (Naturally),” into a song by the clown prince of rap, Biz Markie, without a license. As previously noted, Judge Kevin Thomas Duffy also recommended criminal prosecution for the artist and showed disdain for the art form of rap by continually referring to “rap music” in quotations, which can be interpreted as racially biased. While the case was brought to clear up who owned the copyright in the original sound recording and composition, and not an issue regarding sampling, the court took the opportunity to delve into the issue. Because Biz Markie had previously inquired about obtaining a license for the alleged infringed material, the court assumed that a license was required to sample. Finding for the plaintiff, the court also issued a preliminary injunction which, according to the court, was warranted because of Markie’s “callous disregard for the law and for the rights of others.”

2. **1993 - Jarvis v. A & M Records**

   The *Jarvis* court stated, “There can be no more brazen stealing of music than digital

---

130 780 F. Supp. at 183 (quoting Exodus, Chapter 20: Verse 15.).
133 *Id.* “[The judge’s use of quotations] can easily be interpreted as racist bias; however, for constructive purposes, it could also be interpreted as a colorblind view that rap is novelty.” Kartha, *supra* note 9, at 230.
134 780 F. Supp. 184–85. “One would not agree to pay to use the material of another unless there was a valid copyright! What more persuasive evidence can there be! Each defendant who testified knew that it is necessary to obtain a license.” *Id.*
135 *See Grand Upright Music*, 780 F. Supp. 185. After this ruling, the parties reached a settlement outside of court, the terms of which are confidential. Brown, *supra* note 68, at 1968 (citing Richard Harrington, *The Groove Robbers’ Judgment; Order on “Sampling” Songs May Be Rap Landmark*, WASH POST., Dec. 25, 1991, at D1). Statutory fines for willful infringement can be as much as $150,000.00. 17 U.S.C. § 504(c)(2). Because the decision was made without reference to law, it did not therefore, did not address the questions of fair use, *de minimis* use, or substantial similarity. *Id.*
Boyd Jarvis brought suit against A & M Records, claiming that artists Robert Clivilles and David Cole infringed his copyright on the song, “The Music’s Got Me,” by incorporating a sample from the original into their song titled “Get Dumb! (Free Your Body).” At issue was whether the phrases “ooh,” “moves,” and “free your body” were significant to plaintiff’s original musical composition. To analyze the similarity between the works, the Jarvis court adopted a “fragmented literal similarity test” for substantial similarity: “whether the defendant appropriated, either quantitatively or qualitatively, constituent elements of the work that are original.” Under the fragmented literal similarity test, no matter how small the sample, the works are sufficiently similar to constitute infringement when the sampled portions are so unique as to be qualitatively important to the original. Applied to the facts of the case, the court concluded that the phrases alone were not unique, but together they were “sufficiently original and unique in their particular arrangement to be considered substantially similar to the copyrighted work.”


This seminal case established a parody defense to copyright infringement for unauthorized sampling. The United States Supreme Court unanimously held that the “commercial character” of 2 Live Crew’s song, “Pretty Woman,” which parodied the Roy Orbison song “Oh, Pretty Woman,” did not create presumption against fair use. 2 Live Crew’s song utilized a repeating sample of the original, a use the defendant’s defended as a parody, which they explained

---

137 Jarvis, 827 F. Supp. at 285.
141 The Court rebuked opinion of the Court of Appeals for the Sixth Circuit, which concluded that the “blatantly commercial purpose” of 2 Live Crew’s song “prevents this parody from being a fair use.” Id. at 574 (quoting Acuff-Rose I, 972 F.2d at 1439).
“quickly degenerates into a play on words, substituting predictable lyrics with shocking ones” to show Orbinson’s song to be “bland and banal.” The Court agreed, and held 2 Live Crew’s use of the sample to be a non-infringing fair use. Unfortunately for future rap artists seeking to use sampling as a tool for critical discourse, the opinion also contained what was likely a throw away line contained in dicta, “[The] distinction between potentially remediable displacement and unremediable disparagement is reflected in the rule that there is no protectible derivative market for criticism.”

4. **1997 - Tuff ‘N’ Rumble Management v. Profile Records**

Tuff ‘N’ Rumble Management brought an infringement action against rap group Run-DMC for using a sample of a drum break of the Honey Dripper’s song “Impeach the President” in their songs “Back from Hell” and “Dana Dane with Fame.” The court granted summary judgment for the defendants based on the plaintiff’s failure to meet all three elements of copyright infringement, prove that the plaintiff it owned valid copyright in the sampled work; evidence establishing the access or similarity needed for a finding of actual copying; and demonstrating substantial similarity between the alleged infringing works and the original work to make the sample an unlawful appropriation.

District Judge Sidney Stein also announced the rules he would adopt in judging future sampling cases. To establish infringement, a plaintiff “must show ownership of a valid copyright

---

142 Acuff-Rose II, 510 U.S. at 573.
143 Id. at 594. In making their determination, the Court examined the four fair-use factors given in Section 107 of the Copyright Act. Id.
144 Id. The language of the opinion also set out that, absent parody, “2 Live Crew’s song would have been an infringement of Acuff-Rose’s rights.” Id. at 574.
145 Id. at 592.
147 Tuff ‘N’ Rumble Management, 42 U.S.P.Q.2d at 1398.
148 Id. at 1399.
and the defendant's infringement by unauthorized copying.”

The unauthorized copying, or unlawful appropriation, is established by showing substantial similarity between the two works. The issue of substantial similarity would rely on a lay listener standard, “whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.” Additionally, Judge Stein rejected the subtraction and abstractions methods, stating that “in assessing substantial similarity, [the court would] look at the works as a whole, as opposed to dissecting a work into its constituent elements or features.” Under this standard, Judge Steins’ assessment it was likely that Run-DMC’s songs would noninfringing uses of the sample, as the songs were not “substantially similar” to the original.


In Williams v. Broadus, rap artist Marlon Williams, known as Marley Marl, sued rap artist Calvin Broadus, known as Snoop Dogg, for copyright infringement. Williams alleged that Broadus’ song “Ghetto Symphony” infringed a song titled Williams’ song “The Symphony” by sampling a portion of the alleged infringed work, as well as used some of its lyrics. Although the defendant stipulated that he copied the plaintiff’s alleged infringed work, incorporating that sample into his own song, he moved for summary judgment asserting that the plaintiff’s did not have a valid copyright in “The Symphony” because it was also created using an

149 Id. (quoting Laureysens v. Idea Group, Inc., 964 F.2d 131, 139 (2d Cir. 1992)).
150 Id.
151 Id. at 1400.
152 Id. at 1400; See also Brodin, supra note 139, at 843.
153 Id.
156 SNOOP DOGGY DOG, Ghetto Symphony, on NO LIMIT TOP DOGG (Priority Records, 1999).
157 MARLEY MARL, The Symphony, on IN CONTROL, VOLUME I (Warner Bros. 1988).
158 Williams, 60 U.S.P.Q.2d at 1056.
Unauthorized sample. The portion of “The Symphony” included in “Ghetto Symphony” included an unlicensed sample of the Otis Redding song, “Hard to Handle.”

The district court dismissed the motion for summary judgment, stating that a work is not derivative simply because it borrows from a pre-existing work. Additionally, citing to Arnstein’s objective lay listener test, “a reasonable finder of fact could . . . conclude that the copied measures of ‘Hard to Handle’ — two measures that appear only in the opening of that composition — are not a substantial portion of the work.” The court concluded that a “genuine issue of material fact exist[ed] as to whether the portion of ‘Hard to Handle’ copied by plaintiffs is a substantial portion of that pre-existing work.” Therefore, the question of whether the alleged infringed work had a valid copyright was a question of fact, making a summary judgment improper.

6. 2003 - Newton v. Diamond

The Beastie Boys song, “Pass the Mic,” contains a looped six-second sample of James W. Newton’s song “Choir.” A license for the sample was obtained for a one time fee of $1,000 from ECM Records, which owned the rights to the recording, but did not own the rights to the underlying composition. In adopting the substantial similarity requirement from Ringgold, that for “an unauthorized use of a copyrighted work to be actionable, there must be substantial similarity between the plaintiff’s and the defendant’s works,” the court acknowledged that in

159 Id. at 1052.
160 Id. at 1055. OTIS REDDING, Hard to Handle, on THE IMMORTAL OTIS REDDING (Atlantic Records, 1968).
161 Williams, 60 U.S.P.Q.2d at 1055.
162 Id. at 1063–64. “The question, therefore, is whether the defendant took from plaintiff’s work so much of what is pleasing to the ears of lay listeners . . . that the defendant wrongfully appropriated something which belongs to the plaintiff.” Id. at 1067 (quoting Arnstein, 154 F.2d at 473).
163 Id. at 1069.
164 Id. at 1070.
165 Newton v. Diamond, 349 F.3d 591 (9th Cir. 2003), amended, 388 F.3d 1189 (9th Cir. 2004), aff’g Newton v. Diamond, 204 F. Supp. 2d 1244 (C.D. Cal. 2002).
166 Newton, 349 F.3d at 593.
167 Id.
sampling cases the general similarity will be high, therefore, the finder of fact should only determine similarity to the essential elements of the original work.\(^{168}\) In applying the *de minimis* doctrine, the court first determined that, while the recording itself was distinctive, the score did not contain instructions for playing that corresponded to the distinctive features of the playing.\(^{169}\) By limiting the scope of Newton’s musical work to what was rendered in the score, the court found that the sampled portion of the alleged infringed work was “neither quantitatively nor qualitatively significant,” therefore, the similarities in the works were not substantial and “the average [or lay] audience would [not] recognize the appropriation.”\(^{170}\) The court held that, because the portion of the composition sampled was so minimal, or *de minimis*, no actionable infringement existed and a license for the composition was not needed.\(^{171}\)

7. 2005 - *Bridgeport Music, Inc. v. Dimension Films*\(^{172}\)

In *Bridgeport Music, Inc. v. Dimension Films*, the Court of Appeals for the Sixth Circuit considered the use of an altered two-second sample of a single chord from George Clinton’s “Get Off Your Ass and Jam,” used in NWA’s song “100 Miles and Runnin’” used in the soundtrack to the movie “I Got the Hook Up.”\(^{173}\) The district court held the use of the sample to be a *de minimis* use and, therefore, non-infringing. On appeal, the Sixth Circuit interpreted section 114(b) of the Copyright Act to mean that a “sound recording owner has the exclusive right to ‘sample’ his own

\(^{168}\) *Id.* at 595, 597.

\(^{169}\) The court quoted Judge Learned Hand in invoking the *de minimis* doctrine: “Even where there is some copying, that fact is not conclusive of infringement. Some copying is permitted. In addition to copying, it must be shown that this has been done to an unfair extent.” *Id.* at 594 (quoting West Pub’g Co. v. Edward Thompson Co., 169 F. 833, 861 (E.D.N.Y. 1909)).

\(^{170}\) *Newton*, 349 F.3d at 597–98. While the Newton decision applied the *de minimis* doctrine to sound compositions, it did not address whether the doctrine would apply to sound recordings. See *id*.

\(^{171}\) *Id*.

\(^{172}\) *Bridgeport Music*, 383 F.3d at 393.

\(^{173}\) The owner of the copyright of the sound recording sued the film company for its inclusion of the song on its soundtrack. *Id*.
recording.” Limiting its decision to the sound recording, the court announced a new bright-line rule unsupported by precedent, any sampling constitutes per se infringement. On rehearing, the court restated the earlier decision in order to clarify its new bright-line rule: “Get a license or do not sample. We do not see this as stifling creativity in any significant way.”

B. The Application of Copyright Law to Sampling from a Critical Race Perspective

To view copyright law from the perspective of critical race theorist, it is necessary to look at both the historical use of copyright protection for musical recordings and the courts’ over-emphasis of economic factors when looking at issues of sampling. Critical race theorists attempt to formulate new readings of subjects with the objective of “effectuat[ing] racial equality” through a “more critical approach to the law.” Central to this goal is the concept of subordination, or determining “whether a . . . legal doctrine, practice, or custom subordinates important interest and concerns of racial minorities.” In music sampling, the subordination of African-American musicians is most easily seen as a manifestation of institutional racism and bias in the creation and application of copyright law. “Institutional racism occurs where an institution adopts a policy, practice, or procedure that . . . has a disproportionately negative

---

174 Id. at 398. Section 114(b) of the Copyright Act states that the “exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.” 17 U.S.C. § 114(a). Because the court constrained its analysis to the text of the statute, it categorically rejected any need to make a determination of substantial similarity or de minimis use in infringement claims based on sampling. Bridgeport II, 383 F.3d at 399.

175 The decision specifically did not address the underlying composition. Bridgeport II, 383 F.3d at 400 n.13.

176 Bridgeport Music, Inc. v. Dimension Films (Bridgeport III), 410 F.3d 792, 801 (6th Cir. 2005), consolidating and amending, 383 F.3d 390 (6th Cir. 2004) and 401 F.3d 647 (6th Cir. 2004). The rehearing opinion also made it clear that it considered Grand Upright Music to be non-precedential because it only concerned sound compositions and was a decision of a district court. Id. at 804 n.16.

177 ROY L. BROOKS, Critical Race Theory: A Proposed Structure and Application to Federal Pleading, in CRITICAL RACE THEORY: CASES, MATERIALS AND PROBLEMS 2, 3 (Dorothy A. Brown ed., 2003). “The central assumption of [critical race theory is that] . . . American society and its institutions, including its legal institutions, are fundamentally racist, and that racism is not a deviation from the normal operation of American society.” Id.

178 Id.

impact on members of a racial or ethnic minority group.\textsuperscript{180} Intent is irrelevant in determining institutional racism.\textsuperscript{181}

Unfortunately, there is a paucity of cases from which to judge institutional racism in how copyright law is applied to sampling.\textsuperscript{182} Indeed, although sampling has been around for over 25 years, the citable cases that are on point among all circuits number less than twenty.\textsuperscript{183} However, the fact that most of the citable sampling cases have involved black rap artists, while the technique of sampling has become pervasive throughout the music industry, is strong evidence of an instructional racial bias.\textsuperscript{184}

The economic case for institutional racism is a fairly easy one to make due to disparate licensing provisions.\textsuperscript{185} Compulsory licenses for musical compositions were added to copyright law in 1909.\textsuperscript{186} The owner of a copyright for a composition is entitled to remuneration, the license is compulsory and the fee a fixed statutory amount.\textsuperscript{187} The licensee may not “change the basic melody or fundamental character of the work,” and the license does not extend to derivative works, such as in sampling.\textsuperscript{188}

The history of American music is a history where the “compulsory license [has] made it

\textsuperscript{181} Id. at 109.
\textsuperscript{182} One commenter believes that there is an “absence of litigation [regarding sampling] because parties’ bargaining power is often not on equal terms, and the filed action ends in settlement.” Kartha, \textit{supra} note 9, at 224.
\textsuperscript{183} Based on a survey of case law taken Nov. 3, 2006 (on file with the author).
\textsuperscript{184} “[Although] digital sampling pervades all of rock music, much of the attention and controversy is focused on rap musicians. . . [however] rap musicians are the target of the . . . sampling controversy . . . There is some evidence that racial . . . biases could be the reason for all of the attention.” Sherry Carl Hempel, Note, \textit{Are Samplers Getting a Bum Rap?: Copyright Infringement or Technological Creativity?}, 1992 U. ILL. L. REV. 559, 589 (1992).
\textsuperscript{185} There are compulsory licenses for compositions and not for sound recordings. See 17 U.S.C \S 115.
\textsuperscript{186} H.R. REP. NO. 2222, 60th Cong., 2d Sess. 9 (1909). “The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant . . . is intended to motivate the creative activity of authors and inventors . . . and to allow the public access . . . after the limited period of exclusive control has expired.” \textit{Sony}. 464 U.S. at 429.
\textsuperscript{187} See 17 U.S.C. \S 115.
\textsuperscript{188} Id. at \S 115(a)(2).
possible for white artists to shanghai the African-American songbook.” For example, Pat Boone was famous for covering songs originally written and performed by black entertainers, such as Little Richard’s “Tutti Frutti.” Likewise, Elvis Presley’s first big hit, “Hound Dog,” was a cover of a song recorded by blues artist Big Mama Thornton three years earlier, and Chuck Berry has been covered by The Beatles and the Beach Boys, among others. It was not until 1949 that the subordinating term “race records” was replaced by the term “rhythm and blues” by Billboard magazine. According to Randall Kennedy, the privileging of whites in American music is still as pervasive. He points out that:

‘[r]hythm and blues’ played a major role in transforming the sensibilities of many young whites, [but] the color bar prevented black musicians from capitalizing fully on the popularity of the genre they had done much to establish; instead white cultural entrepreneurs typically reaped the largest commercial rewards—a pattern still visible today.

Given the richly detailed history of black music being appropriated by whites without remitiation, it is easy to surmise that the “protection accorded to intellectual property in American society [has] frequently depended on the racial . . . status of the individual.”

---

189 Kartha, supra note 9, at 232 (citing examples of white artists who covered songs by black authors under compulsory licensing, including Pat Boone, Elvis Presley, Eric Clapton’s, Led Zeppelin and Stevie Ray Vaughn); see also Candace G. Hines, Note, Black Musical Traditions and Copyright Law: Historical Tensions, 10 Mich. J. Race & L. 463, 486-91 (2005) (chronicling different forms of black music).
192 The Beatles, Rock and Roll Music, on Rock ‘N’ Roll Music (Capital Records 1976); The Beach Boys, Rock and Roll Music, on Sights and Sounds of Summer (Capital Records 2004). Rare instances exist of black artists having more success that the original when covering songs of white artists, such as Jimi Hendrix’s cover of the Bob Dylan song, “All Along the Watchtower.” Albin J. Zak III, Bob Dylan and Jimi Hendrix: Juxtaposition and Transformation “All Along the Watchtower,” 57 J. Am. Musicological Soc’y 599, 600-01 (2004).
195 Id. see also K.J. Greene, Copyright, Culture & Black Music: A Legacy of Unequal Protection, 21 Hastings Comm. & Ent. L.J. 339 (1999) (discussing how black musicians have been deprived of legal protection under the U.S. copyright law).
196 Greene, supra note 195, at 359.
law being ostensibly race neutral, it has still led to disparate treatment. Viewed through the lens of critical race theory, the history of appropriation of black music by whites is an example of classic economic discrimination—“Economic discrimination is defined to occur when equivalent factors of production receive different payments for equal contributions to output.”

Even those cases having positive outcomes for the defendants, such as Newton, carry racial overtones. In a Washington Post article discussing the Newton decision, jazz pianist and composer Billy Taylor said: “It sounds racist to me. Pure English. Here’s a [white judge] who’s saying if it’s not written in the old European form that I may have heard about from someone who studied Mozart,” [then it’s not a legitimate composition]. It is not surprising that a jazz composer would see conscious or institutional racism in the decision. Jazz music has “traditionally [been] denigrated through racist lens as a ‘primitive’ artistic expression of African American artists.” It is also important to note that all three members of the Beastie Boys, the defendant’s in Newton, are white.

V. CONCLUSION

In sampling cases, the economic outcomes are likely no better for minority artists today than they were a century ago. Unlike the compulsory license for the composition, the owner of a copyright for a sound recording is granted “discretion as to whether the music may be sampled

---

197 Id.
201 Rose, supra note 19, at 2. “Rap music is a Black cultural expression that prioritizes black voices from margins of urban America.” Id.
and how it should be priced." Ambiguity in the enforcement of the grant has stifled the use of sampling. As seen in the previous cases, courts lack a clear legal standard for infringement for music sampling and the varied and ever-narrowing tests, based on economic factors, subverts the intent of the copyright clause of the Constitution and inhibits African-American speech.

203 Kartha, supra note 9, at 229 (explaining that, while any performer may record a song written by another by paying a statutory fee, no similar provision of compulsory sampling license exists). As of January 1, 2006, the rate for each unit sold is 9.1 cents, or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger. 37 C.F.R. §255.3(m).

204 This is not isolated to copyright law. Derrick Bell also finds a general retrogression in the area of civil rights during the nineties. Derrick Bell, et. al., Racial Reflections: Dialogues in the Direction of Liberation, 37 UCLA L. REV. 1037, 1037–38 (1990).

205 Astride Howell, Sample This! A Ninth Circuit Decision Seems to be in Harmony with the Sixth Circuit’s Bright-Line Rule on what Constitutes Infringement in Digital Sampling, 28 L.A. LAW. 24, 26, Sept. 2005.

206 “The overall assessment of intellectual property’s instrumental goal . . . has been dominated of late by the assumption that pure wealth or utility-maximization serves adequately to evaluate social welfare . . . . Over-reliance on utility-maximization ignores distributional consequences.” Margaret Chon, Intellectual Property and the Development Divide, 27 CARDOZO L. REV. 2821, 2831–32 (2006).