DIGITAL MUSIC SAMPLING AND COPYRIGHT POLICY—A BITTERSWEET SYMPHONY? Assessing the Continued Legality of Music Sampling in the United Kingdom, the Netherlands, and the United States

Melissa Hahn*

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* J.D., University of Georgia School of Law, 2006; B.A., University of Southern California, 2001; MSc, London School of Economics, 2002.

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"Return to Innocence," a song by the German pop music group Enigma, was the theme song for the 1996 Atlanta Olympics. Unknown to the millions of people who heard the song and bought the CD, however, more than half of the song consists solely of the Kuos, a Taiwanese aboriginal couple, singing and chanting. Though by most accounts it was the Kuos’ singing that gave the song its unique hook, the Kuos were never asked permission to use the sample and were not, at least initially, given recognition for their contribution. Instead, Enigma singer, Michael Cretu, claimed complete songwriting credit and omitted any mention of the Kuos in the notes accompanying the album.

All of this changed in March of 1998 when lawyers for the Kuos filed a copyright infringement lawsuit against Enigma, the record companies involved, and the International Olympic Committee for the illegal use of the sample. Ultimately, the case was settled out of court, and the Kuos were finally given recognition for their contributions, which included the receipt of platinum albums for the song, songwriting credit on all future CD liner notes, and a settlement sum that made it possible for the Kuos to establish a scholarship foundation for their Amis culture. Though the couple was reportedly satisfied with the ultimate outcome, Mr. Kuo Ying-Nan expressed his anger with the affair: “Everyone in the world knows my voice, but no one knows it’s mine.”

Admittedly, the Enigma case is an extreme instance of music sampling done in bad faith. While there are plenty of cases like this one, where large portions of a song are taken and credit is not given to the artists contributing to the underlying work, these cases do not capture the complete picture of the world.

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2 Enigma, Return to Innocence, on The Cross of Changes (Virgin Records 1994).
4 Id.; see also Nancy Guy, Trafficking in Taiwan Aboriginal Voices, in Handle with Care: Ownership and Control of Ethnographic Materials 195-209 (Sjoerd R. Jaarsma ed., 2002) (providing a detailed account of the Kuos’ legal battle and the cultural implications of Enigma’s uncredited use of the Kuos’ music).
5 Guy, supra note 4, at 197.
6 Id. at 195-207.
7 Id. at 195.
of music sampling. Indeed, there are many instances where minuscule and hardly recognizable pieces of music are sampled in a new recording. Likewise, there have been instances where the sampling artist secured permission or obtained a license prior to sampling a work to ensure that no action for copyright infringement would be filed. In addition, there are many instances where the use of a sampled song can be instrumental to the success of both artists—the artist creating the new work, as well as the original artist. For example, when Eminem sampled Dido’s song “Thank You” on his single “Stan,” both artists’ albums topped the music charts, and Dido credited Eminem for introducing her album to a much broader audience. Similarly, in 1997, Sean “Puffy” Combs sampled the Police song “Every Breath You Take” on his track “I’ll Be Missing You,” and had remarkable popular success that also met with the approval of the Police’s lead singer, Sting.

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9 Bridgeport Music, Inc. v. Dimension Films, 401 F.3d 792, 804 (6th Cir. 2005) (stating that, “[although] one cannot come up with precise figures, . . . it is clear that a significant number of persons and companies have elected to go the licensing route”).


12 Eminem Timeline, http://rockonthenet.com/artists-e/eminem_main.htm (last visited Mar. 18, 2006) (noting that soon after the album was released in 2000, the album was certified five-times platinum); Shaggy and Dido Lead Album Sales, BBC NEWS ONLINE, Dec. 21, 2001, http://news.bbc.co.uk/l/hi/entertainment/music/1723348.stm (stating that, in 2001, Dido’s “No Angel” was the highest selling album in the United Kingdom).


16 See Craig Marine, *Hip-Hop King Sweeps into Town, Attitude and Entourage in Tow*, S.F. GATE, Aug. 24, 1999, at C (noting that the album was released in 1997 and sold more than seven million copies in the same year).

17 Austin Scaggs, *The Book on Sting: On Stevie Wonder, P. Diddy and the Dead*, ROLLING
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Whether it be Enigma's or Michael Cretu's initial failure to fully credit the Kuos, or Dido's recognition of the crucial role that sampling played in her success, the aforementioned cases hint at both the wide variety of artists who utilize sampling and, likewise, suggest the growing controversy over the continued legality of the practice that is emerging worldwide. On one hand, there are those who claim that sampling is an art form in itself and that nearly all forms of art borrow from materials of the past. Supporters of this position make the argument that requiring a license for every use of a sample would be prohibitively expensive to many artists and would therefore hamper the artistic process. Alternatively, others contend that sampling is a form of stealing that violates an author's right in his pre-existing work. Moreover, it is argued that the failure to adequately protect copyrights may have a chilling effect on the


20 See Naomi Abe Voegtli, Rethinking Derivative Rights, 63 BROOK. L. REV. 1213, 1214 (1997) (proposing that appropriation has long been an integral part of the creative process and that the Copyright Act should be revised to fully promote the creation of new works); see also Bruce, supra note 18 (noting that, to varying extents, all music is derived from previous works and stating that "musicologists have shown that a number of . . . Handel's compositions owe a great debt (often 'literal') to his Italian contemporaries and, perhaps, were he to be alive and composing now, he may have had several writs launched against him for infringement of copyright under today's laws").

21 See A. Dean Johnson, Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits, 21 FLA. ST. U. L. REV. 135, 135 (1993) (stating that "artists who use samples . . . believe that this fertile source of music inspiration will become prohibitively expensive if they must license each use of previously recorded music").

22 See VAIDHYANATHAN, supra note 19, at 134 (quoting Juan Carlos Thom, a Los Angeles lawyer, musician, playwright, and actor: "digital sampling is a pirate's dream come true and a nightmare for all of the artists, musicians, engineers and record manufacturers"); see also Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 182 (S.D.N.Y. 1991) (citing the Seventh Commandment, "Thou Shalt Not Steal," in the opening lines of the opinion, and holding that Biz Markie's use of three words from a master recording constituted copyright infringement and a form of theft, and referring the case to the U.S. Attorney's Office for criminal prosecution).
further production of creative works.\textsuperscript{23} Adding to this complexity is the fact that courts around the world have offered minimal guidance on the issue. Few cases have been decided in American courts,\textsuperscript{24} and even fewer cases have been decided internationally, as international courts have been reluctant to set precedent on this difficult issue.\textsuperscript{25}

This Note will examine the problem of music sampling from a global level by providing a comparison of copyright laws from three different jurisdictions—the United Kingdom, the Netherlands, and the United States. This comparison will reveal the policies underlying the current debate on sampling. By illustrating the unsettled nature of global music sampling law, this Note will assess the competing policies and will offer a suggestion for balancing them. The Background section will provide a brief explanation of music sampling and its emergence in popular music, it will also discuss the moral rights considerations that are inherent in the practice. The Analysis section will then explore the legality of music sampling under British, Dutch, and American law by considering how the facts in the Enigma case would likely be treated in each of those jurisdictions. The section will conclude with a consideration of the effects of the recent American court decisions on the continued legality of sampling worldwide. Lastly, the Conclusion section will detail the policy issues involved in the sampling debate and will conclude with a policy suggestion.

This Note takes the view that courts should continue to decide sampling cases on the basis of case-by-case adjudication and should continue to allow a de minimis defense to samplers who only sample small portions of an

\textsuperscript{23} See Teresa Wilz, The Flute Case That Fell Apart; Ruling on Sampling Has Composers Rattled, WASH. POST, Aug. 22, 2002, at C-01 (quoting Richard Kessler, executive director of the American Music Center, a New York-based service organization that represents music composers, in response to a court’s refusal to find the Beastie Boys’ use of a sample to constitute infringement: “[this] will have a chilling effect on creative artists... , the idea that the judge in this case would take a look at these six notes and determine that they are not original and didn’t warrant protection, it’s something that musical artists will and should fear”).

\textsuperscript{24} See Bridgeport Music, Inc. v. Dimension Films, 401 F.3d 792, 804 (6th Cir. 2005) (stating that “[t]he incidence of ‘live and let live’ has been relatively high, which explains why so many instances of sampling go unprotected and why so many sampling controversies have been settled”).

\textsuperscript{25} See Stan Soocher, As Sampling Suits Proliferate, Legal Guidelines Are Emerging, N.Y. L.J., May 1, 1992, at 5 (stating that “much of the sampling ... litigation gets settled largely because record companies would rather decide industry practices for themselves”); see also Bruce, \textit{supra} note 18 (noting that, in the United Kingdom, record companies prefer to settle sampling cases out of court because they do not want to make sampling cheaper or more expensive by having a formal ruling that would clarify matters of substance on the issue).
underlying work. For uses of an underlying work that the court deems to be more significant, this Note argues that a licensing scheme could be more appropriate, and, in the most egregious cases, that the courts should consider allowing original copyright holders to make an additional unfair competition claim to protect their interests in the underlying work. By more clearly articulating the factors that should be considered when deciding sampling cases, there will be more certainty surrounding the legality of sampling and courts around the world will be better able to balance the artistic value of sampling with the original artists' interests in a way that will secure existing copyrights, while also encouraging the creative art form that is digital music sampling.

II. BACKGROUND: THE RISE OF DIGITAL MUSIC SAMPLING AND ITS LEGAL RAMIFICATIONS

A. The Emergence of Digital Music Sampling in Popular Music and in Copyright Litigation

Digital music sampling refers to the process whereby segments of a pre-existing recording are incorporated into a new composition. Thus, sampling can include a portion or the entirety of the original recording's melody and/or lyrics. Originally, in the 1970s, sampling entailed the use of analog tape machines and turntables and its use was largely confined to underground musicians. The advent of digital technology during the 1980s and 1990s, however, greatly simplified the process of sampling and, as a result, the process of making music has become increasingly accessible to musicians and the general public alike. Likewise, as prices for the equipment have declined, more people have been able to take advantage of the technology, thus making

26 Challis, supra note 1; see also VAIDHYANATHAN, supra note 19, at 137 (discussing the technical aspects of digital music sampling); Morris, supra note 8, at 263 (noting that digital technology allows a sampler to manipulate the sounds of the underlying musical work).


28 Id. (noting that digital technology enables people, even those without music composition backgrounds, to create new music through cut-and-paste technology on personal computers); see also VAIDHYANATHAN, supra note 19, at 132-37 (providing a detailed discussion on the history and emergence of music sampling in the United States).
a sampling more widespread. These forces have combined with the surge in popularity of rap and hip-hop music to push sampling to the forefront of the music industry. Consequently, sampling in mainstream popular music has become more common, and as a result, litigation surrounding the unauthorized use of samples has increased.

Despite the increased prevalence of sampling in mainstream music and the copyright considerations that the practice raises, little has been done to clarify the legality of sampling worldwide. Instead, record companies have chosen to self-regulate. They carefully screen new albums to make sure that all samples are properly cleared. In addition, in many artist contracts, artists are

29 See David Sanjek, "Don’t Have to DJ No More": Sampling and the “Autonomous Creator,” 10 CARDOZO ARTS & ENT. L.J. 607, 612 (1992) (stating that Roland and Yamaha began marketing their digital samplers in 1983 for as much as $20,000; today, similar machines sell for as little as $2,000).

30 See VAIDHYANATHAN, supra note 19, at 133 (citing Theresa Moore & Torri Minton, Music of Rage, S.F. CHRONICLE, May 18, 1992, at 1 (indicating that rap records constituted nearly 12% of all music samples in the United States in 1987, but that by 1990, they represented nearly 18% of the U.S. music market)).

31 In addition to Sean “Puffy” Combs and Eminem, other popular acts that are widely known for their use of sampling include Beck, the Beastie Boys, De La Soul, Dr. Dre, and Massive Attack, among others. For a further discussion of other artists who use sampling in their works, see David Blessing, Note, Who Speaks Latin Anymore?: Translating De Minimis Use for Application to Music Copyright Infringement and Sampling, 45 WM. & MARY L. REV. 2399, 2403 (2004).


33 See supra note 25 and accompanying text.

34 Bruce, supra note 18 (noting that record labels have been increasingly reluctant to publish albums containing samples unless they have been properly cleared, which usually entails gaining permission from the copyright holder and, often, paying a license fee).
held individually liable for any potential lawsuits stemming from sampling-related copyright infringement claims. Artists who have neither the backing of a major record company, nor the financial resources that such a relationship entails, are forced either to cease their use of sampling or to internalize the risk of an adverse judgment in the event that a legal body finds their use to constitute infringement. This current state of uncertainty, therefore, disadvantages all of the actors in the system—current copyright holders cannot be assured that their copyrights will be protected and new artists are chilled from using samples due to a fear of ensuing litigation. Given this uncertainty and the adverse incentives inherent in such a system, a more cohesive framework is needed on the international level to ensure that a more adequate balance is reached between the competing interests to encourage the use of sampling, while also providing sufficient protection to copyright holders so that their moral rights are protected and that they are encouraged to create more musical works.

B. The Berne Convention and Moral Rights

Because sampling involves the copying and manipulation of an underlying work, usually a sound recording, copyright law is implicated. Though this practice has an increasingly global component, copyright law is largely a matter of national, rather than international, law. The Berne Convention for the Protection of Literary and Artistic Rights, however, does offer some international guidance on copyright issues. The Convention’s central purpose is to create a body of international law to promote the rights of an author with respect to the works that he or she produces. Accordingly, the Berne Convention requires member states to enact laws to guarantee a minimal level of protection for authors.

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35 *Id.* (noting that another common clause in record contracts gives the record company the right to reject ‘unsatisfactory’ master recordings and that a master recording can be considered as such if the record company fears that there could be possible copyright infringement claims).

36 J.A.L. STERLING, WORLD COPYRIGHT LAW 100 (1998) (noting that rights granted under national copyright laws are largely territorial in nature, and that there is no international copyright law in the sense that there is no uniform set of guaranteed rights recognized in all countries).


38 MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS, AND THE THREE STEP TEST: AN ANALYSIS OF THE THREE STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW 43 (2001)
A central feature of the Berne Convention is its explicit protection of moral rights. The concept of moral rights embodies the idea that the artist has a natural right to the fruits of her creativity and that this natural right exists independently of her economic rights. Though there is a fundamental distinction between the treatment of moral rights in common law and civil law jurisdictions, the concept gives rise to two major protections that are similarly recognized in both jurisdictions: the right of attribution and the right of integrity. The right of attribution, or paternity, refers to the author’s right to claim credit for his or her work or to have his work published anonymously or under a pseudonym. Likewise, the right of integrity gives an author the right to object to any distortion or modification of his work or any other use of the work that the author may deem objectionable.

Because sampling involves the use of an underlying piece of work that is subsequently interpreted and in many cases modified by a later user, the twin protections under the Berne Convention, the rights of attribution and integrity, are implicated by the practice. While the argument can be made that the sampling musician should be accorded a moral right in his or her new creation,

9 Zabatta, supra note 38, at 1102 (noting that the “Berne Convention expressly provides that moral rights are independent of ‘economic rights’ in the works created by an author”); see also STERLING, supra note 36, at 469 (explaining that the Berne Convention declares moral rights to be independent of economic rights, and that it clarifies that “moral rights remain with the author even after [s]he has assigned or [otherwise] licensed” away her economic rights).

40 SENFTLEBEN, supra note 38, at 6 (clarifying the distinction between civil law and common law treatment of moral rights. In European civil law countries, natural law is used to explain the rights afforded to authors and, therefore, legislators are called on to enact very broad protections to safeguard these rights in an effort to allow the authors to profit from their creation. Thus, limitations and defenses to moral rights are strictly limited and construed. In contrast, in common law jurisdictions, such as in the United States and in the United Kingdom, there is a much greater emphasis on utilitarian considerations, rather than on moral rights, such that the rights afforded to authors are carefully limited to those rights which are essential to creating proper incentives. Consequently, exceptions and defenses to these rights are broadly defined and construed).

41 STERLING, supra note 36, at 469-70.

42 Id.

43 Id. (explaining the right of attribution and integrity under Article 6 of the Berne Convention).
in most cases, particularly in civil law jurisdictions, which place a greater emphasis on moral rights, it is likely that the rights of the original author will trump the rights of the new creator. Ultimately, however, few sweeping generalizations can be drawn about the global treatment of sampling from a moral rights perspective as these issues are largely decided on a case by-case basis and are subject to value judgments that are highly nation-specific. Hence, to better assess the current treatment of digital music sampling, an assessment of three individual nations follows.

III. ANALYSIS: A GLOBAL CONSIDERATION OF THE CURRENT LEGALITY OF DIGITAL MUSIC SAMPLING

A. The Legality of Sampling Under U.K. Law

In the United Kingdom, the legislation governing sampling is the Copyright, Designs and Patents Act of 1988 (CDPA). Under this Act, an artist may have a copyright in the underlying sound recording and in the music and lyrics to a song pursuant to section 1(1). In addition, section 16(1) provides that the owner of this copyright has five economic rights, which include: the right to copy the work; to issue copies of the work or to lend or rent copies of the work to the public; to perform, show, or play the work in public; to broadcast the work or include it in a cable program; and to make an adaptation of the work and do any of the above in relation to such adaptation.

Since sampling can implicate an artist's copyright in sound recording and/or musical composition, under British law, an infringement will not be deemed to have occurred unless there is a substantial infringement of the underlying work. Although British law does provide for a fair dealing defense, in the United Kingdom, most sampling cases turn on substantiality.

45 Id. § 1(1).
46 Id. § 16(1); see also Bruce, supra note 18 (citing section 3(2) of the CDPA to note that, under English law, these copyright protections are deemed to come into existence automatically as long as the work is preserved in a tangible medium); Challis, supra note 1 (providing an overview of the relevant portions of the CDPA).
47 SENFTLEBEN, supra note 38, at 69 (citing section 49(1) of the 1956 Copyright Act and noting that, in deciding this issue, courts will consider "the nature... of the selections made, the quantity and value of the materials used, and the degree [to] which the use may prejudice the sale, or diminish the profits, direct or indirect, or supersede the objects of the original work").
48 Id. (citing Articles 6 and 9 of the 1956 Copyright Act and stating that, under British law, the fair dealing defense deals mainly with the use of a copyrighted work for the purposes of
and the courts will only weigh the merits of a fair use defense after
determining that a use is substantial.50 Since there has been no statutory
definition of what constitutes a substantial infringement, sampling cases
require case-by-case adjudication.51

Despite this lack of legal certainty, a survey of British sampling case law
does provide a helpful framework for understanding how sampling cases are
decided and, more specifically, what uses will be deemed to be substantial by
British courts. In 1954, in Hawkes & Son v. Paramount Film Service,52 the
British Court of Appeals held that a musician’s use (without permission) of
twenty seconds of a musical work was substantial and constituted an
infringement because the eight bars of the sampled musical piece were so
recognizable.53 Similarly, in Produce Records Ltd. v. BMG Entertainment,54
British courts considered the substantial use defense. At issue in that case was
the British group Los Del Rio's use of a seven and a half second sample of
"Higher and Higher,"55 on its hit track, "Macarena."56 Although the case was
ultimately settled out of court, preventing the establishment of a formal
precedent, commentators see this case as being significant for abolishing the
so-called “three-second rule,” which had become custom in British law.57 The
“rule” previously provided that if three seconds or less of a work was sampled,
then an infringement claim would not be actionable.58 Lastly, in Ludlow Music

49 Id.; see also Bruce, supra note 18 (noting that issues of substance and recognizability are
particularly applicable to music sampling disputes).
50 SENFTLEBEN, supra note 38, at 69.
51 Bruce, supra note 18.
52 Hawkes & Son v. Paramount Film Svc., [1934] Ch. 593 (H.L. 1933), available at 1934
WL 7427.
53 Challis, supra note 1 (stating that “[i]nfringement would take place when, on hearing a
bar of music, a listener can easily identify a similar sounding piece of music”); see also Scots
hm (last visited Mar. 18, 2006) (explaining that the case involved “a news broadcast [which]
contained footage of a . . . band playing the main melody of a well-known march ‘Colonel
Bogey,’ ” and that, while the portion shown was only twenty seconds long, it constituted an
infringement because the piece was so recognizable).
54 Cited in Challis, supra note 1.
56 LOS DEL RIO, Macarena, on MACARENA NON STOP (RCA Int’l 1996).
57 Challis, supra note 1.
58 Although the sample in question in the Produce Records case is seven seconds long,
because Justice Parker refused to apply a per se rule in this case (such as considering anything
Inc. v. Williams,\textsuperscript{59} the court held that Williams' use of one of four verses of the claimant's song in combination with his embodiment of the central theme of the song constituted an infringement, thus suggesting to would-be samplers that a copyright clearance must be obtained before using even short samples of song lyrics.

Applying the facts from the Enigma case to British law, it does not appear that Enigma would have a winning case. Instead, because the sample from the Kuos constituted over half of the final song, "Return to Innocence," and was highly recognizable in the finished product, British courts would likely rule that the use was substantial and proper clearance would have to be obtained.

It is likewise doubtful that there could be a moral rights argument under the facts. Although British law has a requirement that an act of infringement be prejudicial to the author's reputation before a violation of the author's moral right of integrity can be found,\textsuperscript{60} the British courts would likely side with the Kuos and find such a showing in this case. At the very least, because such a large portion was sampled and no credit was given, the British courts would likely find that the Kuos' moral rights trump those of Enigma and Michael Cretu.

The facts of the Enigma case, however, represent the most extreme form of sampling. Upon consideration of different facts, it does appear that British law could allow for sampling, especially where the use of the sampled material is relatively short and non-distinctive. For example, in the recent U.S. case, Bridgeport Music, Inc. v. Dimension Films,\textsuperscript{61} a two-second guitar riff was sampled. Because the sample was relatively short, it is likely that British courts would consider this use insubstantial, especially if the original work was not recognizable in the new track. Likewise, making a moral rights claim would be more difficult under these facts because of the short length of the sample. In short, under the Bridgeport facts, British courts might find that the

above three-seconds invalid) and, instead, ruled that judges could evaluate expert evidence and extrinsic factual evidence to evaluate the substantiality of the work sampled, at least one commentator has suggested that the three-second rule can no longer be relied upon by would-be samplers, as courts will decide sampling cases by considering more than just the length or amount of the sample used. For a further explanation of the three-second rule following the Produce Records decision, see \textit{id}.


\textsuperscript{60} STERLING, \textit{supra} note 36, at 470 (citing the CDPA).

\textsuperscript{61} 410 F.3d 792 (6th Cir. 2005).
author of the new work has a moral right in his or her own work that is at least equal to the moral rights of the author of the original work. Though this Note does not consider the potential legal effect of the European Community (E.C.) Copyright Directive, this analysis suggests use of a short sample could be legal in the United Kingdom. As in the United Kingdom, the current legality of sampling in the Netherlands is similarly uncertain and will be explored in the following section.

B. The Legality of Sampling Under Dutch Law

Music sampling in the Netherlands is governed by the Dutch Copyright Act of 1912. Under Article 10(2) of the Act, "every production in the domain of literature, science or art, whatever may be the mode or form of its expression" is protected as long as preserved in a tangible form. Although the statute does not specify that the work be original to merit protection, the Dutch Supreme Court has insisted that a work be original to be eligible for legal protection.

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63 At this time, there has not been a sampling or copyright infringement case that has been litigated under the Directive.

64 For the full text of the Dutch Copyright Act of 1912 in English, see Institute for Information Law, Legislation: Copyright Act 1912 (Netherlands), http://www.ivir.nl/legislation/nl/copyrightact.html (last visited Mar. 18, 2006); see also P. Bernt Hugenholtz, Chronicle of the Netherlands, Dutch Copyright Law, 1995-2000, 1 REVUE INTERNATIONALE DU DROIT D'AUTEUR (Jan. 2001), http://www.ivir.nl/publications/hugenholtz/PHBH-RIDA2000.doc (indicating that the Dutch Copyright Act was adopted the same year that the Netherlands acceded to the Berne Convention, and that it has since undergone several amendments, but never an extensive revision) [hereinafter Hugenholtz, Netherlands Chronicle].

65 Hugenholtz, Netherlands Chronicle, supra note 64, at 2 (citing the Dutch Copyright Act of 1912).


67 Id.; see also Hugenholtz, Netherlands Chronicle, supra note 64, at 2 (stating that,
Under the Dutch Copyright Act, copyright holders are entitled to two forms of protection: the right of reproduction (verveelvoudiging) and the right of communication (openbaarmaking).\textsuperscript{6} Under Dutch law, the right of reproduction includes the right to translate and to adapt the original work.\textsuperscript{6}\textsuperscript{9} The right of communication likewise encompasses acts of publication, distribution and performance, and other means of making a work available to the public.\textsuperscript{7}\textsuperscript{0} In addition, the Dutch Copyright Act, under Article 25, provides for the protection of an author’s moral rights, which includes both the right of attribution and integrity.\textsuperscript{7}\textsuperscript{1}

Unlike the United Kingdom, under Dutch law, moral rights play a more prominent role in shaping copyright policy and in determining the available defenses to allegations of copyright infringement. Because the Netherlands is a civil law country, an author’s rights are grounded in natural law principles, rather than in the more utilitarian basis of common law countries.\textsuperscript{7}\textsuperscript{2} With this natural law foundation, a copyright regime that construes an author’s protections as broadly as possible, while providing narrowly defined limitations and defenses to copyright infringement, has developed in the Netherlands.\textsuperscript{7}\textsuperscript{3} Consequently, many of the defenses to copyright infringement available under common law regimes, such as the fair use doctrine, are not available under Dutch law.\textsuperscript{7}\textsuperscript{4} Instead, litigants are often forced to rely on

according to the Dutch Supreme Court, to be eligible for copyright protection, “a work must have an individual character and bear the personal imprint of its creator”).

\textsuperscript{6} See Hugenholtz, Netherlands Chronicle, supra note 64, at 2 (stating that the right of reproduction is codified in Articles 13 and 14 of the Dutch Copyright Act, while the right of communication is located in Article 12).

\textsuperscript{6}\textsuperscript{9} Id.

\textsuperscript{7}\textsuperscript{0} Id.

\textsuperscript{7}\textsuperscript{1} Id.

\textsuperscript{7}\textsuperscript{2} See supra note 40 and accompanying text.

\textsuperscript{7}\textsuperscript{3} Id.; see also P. Bernt Hugenholtz, Copyright and Freedom of Expression in Europe, in INNOVATION POLICY IN AN INFORMATION AGE, 2, 8 (Rochelle Cooper Dreyfuss et al. eds., 2000), available at www.ivir.nl/publications/hugenholtz/PBH-Engelberg.doc (proposing that the different conception of moral rights in civil law countries implicates copyright provisions—including available claims and defenses) [hereinafter Hugenholtz, Freedom of Expression].

\textsuperscript{7}\textsuperscript{4} Hugenholtz, Freedom of Expression, supra note 73, at 8, 11 (noting that there is no fair use defense under Dutch copyright law, but suggesting that the Dutch Supreme Court’s recent ruling in Dior v. Evora may indicate the Court’s willingness to embrace such a defense). Compare F. Willem Grosheide, Copyright Issues and the Information Society: Dutch Perspectives, 6 ELECTRONIC J. COMP. L. 4, 14 (Dec. 2002), www.ejcl.org/64/art64-13.pdf (noting that the Dutch Copyright Commission and Supreme Court considered and rejected an approach to copyright law that would allow a broader interpretation of infringement defenses).
freedom of expression defenses that are codified in Article 10 of the European Convention on Human Rights.\textsuperscript{75}

When applied to the sampling context, the differences in the available defenses to copyright infringement become less material. For as with British law, Dutch courts will also recognize a de minimis defense if a short portion of an original work is used without prior permission. Thus, if a sample is sufficiently short and non-distinctive, a claim for copyright infringement will not win.\textsuperscript{76} Likewise, though the defense is likely to be more narrow than that provided for under a common law claim of fair use or fair dealing, a claim for infringement will not succeed if someone samples a copyrighted work for purely personal use.\textsuperscript{77} Unauthorized uses of longer and more distinctive segments, however, are considered to be a violation of the original copyright holder’s rights; thus, an unauthorized use of such a segment would likely be found to violate an author’s moral rights to attribution and integrity.\textsuperscript{78}

Additionally, the copyright holder of an original work may have an unfair competition claim against the sampling artist. To pursue an unfair competition claim, the copyright holder would have to show that the defendant (the would-be sampler) greatly profited from the original work.\textsuperscript{79} Indeed, following the Dutch Supreme Court’s ruling in \textit{Rascal Decca v. Holland Nautic},\textsuperscript{80} to establish unfair competition, the copyright holder would have to show both that the sampler profited from the original work and that the infringing artist’s achievement in the new work rose to the same level as the existing artist’s

\textsuperscript{75} See Hugenholtz, \textit{Freedom of Expression}, supra note 73, at 1 (citing Article 10 of the European Convention on Human Rights, which includes in part the “freedom to hold opinions and to receive and to impart information and ideas,” and suggesting that there is a potential conflict between the freedom of expression ideals represented in the Convention and the protections afforded to authors under copyright law); but see Hugenholtz, \textit{Netherlands Chronicle}, supra note 64, at 9 (reporting that, in the Anne Frank Diary case, the Amsterdam Court of Appeals “held that the freedom of expression and information guaranteed under Article 10 of the European Convention on Human Rights did not override the copyright claims of the right holder, the Anne Frank Foundation”).

\textsuperscript{76} See Verkerke, \textit{supra} note 66, at 171 (citing Heertje/Hollebrand, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 5 januari 1979, NJ 1979, to argue that non-characteristic parts of a work cannot receive copyright protection).

\textsuperscript{77} \textit{Id.}; see also \textit{Senftleben}, supra note 38, at 62 (noting that Article 16(b) of the Dutch Copyright Act provides for a “personal privilege” exception to copyright protection).

\textsuperscript{78} Verkerke, \textit{supra} note 66, at 171.

\textsuperscript{79} Hyster/Harry Krane, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands] 26 juni 1952, NJ 54, 90, \textit{cited and discussed in} Verkerke, \textit{supra} note 66, at 173.

\textsuperscript{80} Rascal Decca/Holland Nautic, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands] 27 juni 1986, NJ 87, 191, \textit{cited and discussed in} Verkerke, \textit{supra} note 66, at 173.
Because it could be argued that the sampling artist’s creation deserves a similar level of protection as that given to the underlying work, there is a risk that Dutch courts would side with the sampling artist and afford the new work protection rather than recognizing an unfair competition claim. This line of argumentation, however, has not yet been tested in the sampling context in the Dutch courts.

Considering the facts of the Enigma case under the current state of Dutch law, it appears that the Dutch courts, like the British courts, would rule in favor of the Kuos. For the Dutch courts, it would likely be dispositive that large and distinctive portions of the original work were used. That the Kuos’ underlying work was not preserved in a tangible form, however, would likely weigh heavily in favor of Enigma because the work would not be considered copyrightable under Dutch law. Nevertheless, because the case represents such an egregious violation of the Kuos’ moral rights, the courts would likely rule in their favor. At the very least, the court would be hesitant to recognize a moral right in Enigma’s creation.

Similarly, under the reasoning in Racal Decca, the Kuos could raise a claim for unfair competition, arguing that their song deserved protection similar to that given to Enigma’s creation. As with the infringement issue, for the unfair competition claim to be actionable, the Kuos would need to establish that they had a vested intellectual property right in the infringed song. Moreover, in order to win on this claim, the Kuos would have to argue that Enigma’s creation rose to a similar level of creativity and distinction. Because Enigma’s song did attain a high level of critical acclaim, as well as popular success, this element would likely be met.

Predicting the Dutch courts’ treatment of a more subtle case of sampling would be more difficult. Unlike their British and American counterparts, Dutch courts have yet to decide a major sampling case under Dutch copyright law. Thus, an artist may have greater leeway to sample copyrighted works under Dutch law, especially in a case where the sampled portion of the work is relatively short and non-distinctive. Nevertheless, a would-be sampler might face claims for unfair competition and moral rights violations. Thus, even if a sampler could show that the use of a copyrighted portion of a song was legally insignificant, it is likely that the existing author’s moral rights would...
trump the moral rights of the new creator and potentially compromise the sampled work's legality because authors occupy a privileged status in Dutch law. Moreover, if the new creation containing the sample reached a high level of critical acclaim, it may be more likely that the underlying copyright holder would win on an unfair competition claim, even if the sample used was found to be legally insignificant.

Notwithstanding the potential implications of the recent Copyright Directive, the lack of precedent under Dutch law may present an opportunity to set precedent such that would-be samplers in the Netherlands would have a greater measure of legal protection than that found in either the United Kingdom or the United States.

C. The Legality of Sampling Under U.S. Law

The United States Constitution provides the framework for copyright protection in the United States. The most recent codification of this law is found in the Copyright Act of 1976. Pursuant to this Act, the rights of a copyright holder include: the right of reproduction, distribution, performance, and the right to publicly display the work. Moreover, under U.S. copyright law, there are two possible copyrights that a musician or a performer can hold: a sound recording and a musical composition. Either of these two copyrights may be implicated by the practice of digital music sampling.

To make a claim for infringement, the claimant must first establish which right is at issue. She must then show that the portion taken from the

84 Verkerke, supra note 66, at 177.
85 Grosheide, supra note 74, at 13-14 (stating that “the prevailing view concerning the concept of an author in the Netherlands favours the author as an individual creator of works”).
87 U.S. CONST. art. I, § 8, cl. 8.
90 Id. § 102; see also Johnson, supra note 21, at 141 (highlighting the distinction between the rights retained by the owner of a composition versus those held by the owner of a sound recording copyright).
91 Johnson, supra note 21, at 141.
underlying work was copyrightable and that a substantial violation occurred. If the court finds that the sampled portion is legally insignificant or de minimis, then the sampler will have no legal liability. Likewise, upon a finding that the use is legally significant, the fair use defense, which acts as an affirmative defense to copyright infringement upon a successful weighing of the factors laid out in the Copyright Act, is available to defendants. Despite its availability, most of the recent sampling cases have not been decided on the basis of fair use. Instead, most litigants rely on the de minimis defense.

As with British law, the U.S. copyright statute does not provide a statutory definition of what constitutes an infringement. Therefore, in order to determine whether an infringement has taken place or whether a particular use is de minimis, sampling cases must be decided on the basis of case-by-case adjudication. Importantly, U.S. courts have decided the majority of the world’s sampling cases. Thus, these cases provide crucial guidance to artists and performers, both inside the United States and around the world. For the purposes of this Note, only two of the most recent sampling cases, Newton v. Diamond and Bridgeport Music, Inc. v. Dimension Films will be considered to assess the current legality of music sampling in the United States.

Prior to the Sixth Circuit Court of Appeals’ decision in Bridgeport Music, the Ninth Circuit held in Newton v. Diamond that sampling small portions of a copyrighted work could be legal under the de minimis doctrine. At issue

92 Id.
93 See Newton v. Diamond, 349 F.3d 591, 594 (9th Cir. 2003) (noting that some level of copying is permitted under American copyright law, and citing West Publ’g Co. v. Edward Thompson Co., 169 F. 833, 861 (E.D.N.Y. 1909) to emphasize that “[t]he principle that trivial copying does not constitute actionable infringement has long been a part of copyright law. Indeed, as Judge Learned Hand observed over 80 years ago: ‘Even where there is some copying, that fact is not conclusive of infringement’ ”).
94 When considering a fair use claim, the court will weigh the four “factors laid out by the copyright act: ‘the purpose and character of the use,’ ‘the nature of the copyrighted work,’ ‘the amount and substantiality of the portion used,’ and ‘the effect of the use on the potential market for or value of the copyrighted work,’ ” and upon a favorable outcome, an infringing act will be found to be non-actionable. Blessing, supra note 31, at 2410 (citing 17 U.S.C. § 107 (2002) and explaining the operation of the fair use defense in the digital music sampling context).
95 In the first sampling case to go before the Supreme Court, the court held that fair use was an available defense for the defendants and that the commercial character of the song did not create a presumption against the claim. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).
96 Newton, 349 F.3d 591 (9th Cir. 2003).
97 410 F.3d 792 (6th Cir. 2005).
98 Newton, 349 F.3d 591.
in Newton was the Beastie Boys' use of a six-second, three-note performance from Jazz musician James Newton's 1982 recording, "Choir." In deciding this case, the court considered the Beastie Boys' sound recording in relation to Newton's composition and assessed the degree of similarity between the two works with regards to distinctiveness of the sample in the newly created work. Using this method, the court found that "the sampled portion [was] neither quantitatively nor qualitatively significant," and that "an average audience would not discern Newton's hand as a composer." With this, the court concluded that the Beastie Boys' use was de minimis and therefore non-actionable.

Following the Newton decision, the U.S. Court of Appeals for the Sixth Circuit reached an opposite result and, in doing so, articulated a new rule for assessing the legality of digital music sampling in Bridgeport Music, Inc. v. Dimension Films. At issue in Bridgeport was the use of the musical composition and sound recording "Get Off Your Ass and Jam," which was sampled in the rap song "100 Miles and Runnin'" and included on the soundtrack for the movie I Got the Hook Up. As in Newton, the sample was small and cumulatively lasted for approximately seven seconds. While the Newton court found the short length of the sample to be dispositive in its ruling that the sample was de minimis, the Bridgeport court was not similarly

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99 JAMES NEWTON, Choir, on AXUM (EMC Records 1982). Newton, 349 F.3d at 593 (stating "the portion of the composition at issue consists of three notes, C-D flat—C, sung over a background C note played on the flute. When played on the sound recording licensed by the Beastie Boys, the segment lasts for approximately six seconds.").
100 Newton, 349 F.3d 591, at 593-98.
101 Id. at 597.
102 Id. at 598.
103 Id. (holding that "Beastie Boys' use of a brief segment of that composition . . . is not sufficient to sustain a claim for copyright infringement. We affirm the district court's grant of summary judgment on the ground that Beastie Boys' use of the composition was de minimis and therefore not actionable.").
104 410 F.3d 792 (6th Cir. 2005).
105 FUNKADELIC, Get Off Your Ass and Jam, on LET'S TAKE IT TO THE STAGE (Westbound Records 1992).
106 N.W.A., 100 Miles and Runnin', on I GOT THE HOOKUP, ORIGINAL MOTION PICTURE SOUNDTRACK (No Limits Films 1998).
107 Id.
108 Bridgeport Music, Inc., 410 F.3d at 796 (stating that "a two-second sample from the guitar solo was copied, the pitch was lowered, and the copied piece was 'looped' and extended to 16 beats . . . By the district court's estimation, each looped segment lasted approximately 7 seconds").
Although the court noted that the original song was so unrecognizable in the new work that "no reasonable juror, even one familiar with the works of George Clinton, would recognize the source of the sample without having been told of its source," the court still found that the use of the sample constituted copyright infringement. Thus seemingly abandoning the de minimis approach favored by *Newton* and by court systems around the world, the *Bridgeport* court held that any sampling of an underlying work, no matter how short or insignificant, counts as an infringement, stating that: "a sound recording owner has the exclusive right to 'sample' his own recording." Thus, with its ruling, the *Bridgeport* court seemingly outlawed the practice of sampling without first obtaining a license from the original copyright holder.

Applying the current state of American law to the facts of the Enigma case, several important points emerge. Given the egregious facts of the Enigma case, American courts would likely find an infringement under either the *Newton* or *Bridgeport* holdings. Under the *Bridgeport* rule, the only important fact pertains to the taking of the underlying work (the Kuos' song) without first obtaining consent and/or a license. In contrast, under the *Newton* rule, the court would consider the two works in relation to each other, the degree of similarity between the two works, and the distinctiveness of the sample in the new work. Because the Kuos' song remained a prominent, if not central feature of the song "Return to Innocence," the *Newton* court would likely conclude that the rights of the original copyright holder were infringed. Moreover, under either framework, the Kuos' case would no doubt be buoyed by the bad faith character of Enigma's actions in taking large portions of music from another source without attempting to provide any credit to the original source.

Though the Kuos' case is rather straightforward, a more subtle case of sampling illustrates the large disparity between the *Newton* and *Bridgeport* holdings. For example, the *Newton* court, by allowing the Beastie Boys to sample a small sound segment that was not recognizable in the new recording, opened the way for future musical performers to sample music, without first obtaining a license, as long as the sample remains relatively short and nondistinctive in the new work. In contrast, under the *Bridgeport* framework, the use of a similarly short and unrecognizable segment would be considered

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109 Id. at 801-02.
110 Id. at 798.
111 Id.
to be an infringement absent the attainment of permission and/or a license, because under the Bridgeport court's ruling, the holder of the sound recording copyright has the exclusive right to sample. Thus, under this last framework, no matter how small or unremarkable the portion of sound taken from an underlying work, a performer must first obtain permission or a license, or else face the threat of copyright infringement litigation.

It remains to be seen whether the Newton or the Bridgeport interpretation will ultimately prevail. Regardless, given the number of sampling cases that get litigated in U.S. courts and the dominance of the American music industry, it is likely that the ultimate fate of music sampling in the United States will have a considerable impact on the continued legality of the practice throughout the world.

As a means to remedy this current state of legal uncertainty surrounding sampling, this Note takes the view that judges in the United States and in courts around the world should better protect the creative interests of the sampler by considering those artists' rights on par with that of the existing copyright holders, so as to ensure that there will be at least a minimal level of protection for would-be samplers using small and nondistinctive portions of copyrighted works. The next section of this Note will provide a more detailed consideration of the policy interests involved and will conclude with a policy suggestion aimed at achieving this goal and maintaining the legality of digital music sampling worldwide.

112 See supra note 111 and accompanying text.
113 See Bridgeport Music, Inc., 410 F.3d at 802 (stating that "[w]hen one considers that he has hundreds of other cases all involving different samples from different songs, the value of a principled bright-line rule becomes apparent").
114 See Global Music Machine: Dominating the Music Industry, BBC WORLDSERVICE.COM, http://www.bbc.co.uk/worldservice/specials/1042_globalmusic/page3.shtml (last visited Mar. 18, 2006) (indicating that over 90% of the world's music market is represented by five corporations: EMI Records, Sony, Vivendi Universal, AOL Time Warner, and BMG, and that all of these are headquartered in the United States, which is the world's largest music market).
IV. CONCLUSION: A DELICATE BALANCING ACT—PROTECTING COPYRIGHT HOLDERS AND PROMOTING MUSICAL CREATIVITY

A. Creativity v. Economics: Competing Policy Considerations Shaping the Sampling Debate

As one critic characterized the sampling debate, "At its best, sampling benefits society by creating a valuable new contribution to modern music literature. At its worst, sampling is vandalism and stealing."\(^{115}\)

On one side of the debate are the interests of the current copyright holders, both musicians and record companies, that hold rights to the music that is being sampled and have the expectation of not only being credited for their work, but also of deriving an economic benefit from their creation and current copyright protection. For them, sampling represents a direct threat. For not only does the smallest amount of sampling represent an actual taking\(^{116}\) of a protected right (either a sound recording or a musical composition copyright), but also there is the threat that the musician will not be properly credited in the new work for his or her contribution to the new creation. While some authors suggest that sampling will have a chilling effect on the production of new music,\(^{117}\) at the very least, sampling, without first obtaining a license, could represent a major loss in income to the record companies that derive a large source of their income from exploiting their collection of copyrights.\(^{118}\) As an indication of the seriousness of these considerations, in 1987, in what was arguably the very beginning of the emergence of digital music sampling, a noted British music producer, Pete Waterman, warned that sampling was a threatening trend and that guidelines on the practice were needed.\(^{119}\) More recently, in 2005, the Bridgeport court similarly acknowledged the threat that

\(^{115}\) See Bruce, supra note 18 (citing G. Victoroff, Sampling: Legal Overview and Practical Guidelines, in THE MUSICIAN'S BUSINESS AND LEGAL GUIDE 82-83 (M. Halloran ed., 1996)).

\(^{116}\) See Bridgeport Music, Inc., 418 F.3d at 801-02 (stating that "even when a small part of a sound recording is sampled, the part taken is something of value... When those sounds are sampled they are taken directly from that fixed medium. It is a physical taking rather than an intellectual one.").

\(^{117}\) See supra note 23 and accompanying text.

\(^{118}\) See Bruce, supra note 18 (stating that: "phonographic copyrights are identified as being the 'non-tangible assets' of [a] record label as they usually own the copyright in the sound recordings produced by their artists... and generate income from their exploitation (through routes such as sales, licensing, compilations, synchronization fees, and broadcasting)").

\(^{119}\) Id. (citing Sampling Faces Legal Test, MUSIC WEEK 4, Sept. 26, 1987).
sampling poses when it stated, "[i]f any consideration of economy is involved it is that of the music industry."\(^{120}\)

Although there is no question that sampling raises serious copyright concerns that cannot be ignored, the practice implicates equally weighty issues of creativity that should not be discounted. First, nearly all forms of art, music included, borrow from the past, and this element of borrowing or copying has been an essential element of the creative process for centuries.\(^{121}\) This element can be seen in a broad range of artists' works, from Handel\(^{122}\) to more modern artists, such as Elvis, Eric Clapton, and the Rolling Stones, whose work borrowed heavily from the blues musicians that preceded them.\(^{123}\) The extent of this "borrowing" not only illustrates its importance to the creative process, but it also indicates that a restrictive copyright regime is not conducive to encouraging future creation.\(^{124}\) It could be argued that a more restrictive regime, such as that articulated by the Bridgeport court, could have the counter-productive effect of curtailing creativity and the production of new works.\(^{125}\)

In addition to the creativity issue, any discussion of sampling must consider the issues raised by licensing. In law review articles and court opinions alike, licensing has been advocated as a potential solution to the dilemma posed by the practice of sampling.\(^{126}\) In short, though the mechanisms vary with the

\(^{120}\) Bridgeport Music, Inc., 410 F.3d at 802.

\(^{121}\) See supra note 20 and accompanying text.

\(^{122}\) See Bruce, supra note 18.

\(^{123}\) See VAIDHYANATHAN, supra note 19, at 114-26 (noting that the borrowing from blues was prominent in rock music throughout the 1960s and 1970s).

\(^{124}\) See A. Michael Warnecke, The Art of Applying the Fair Use Doctrine: The Postmodern-Art Challenge to the Copyright Law, 13 REV. LITIG. 685 (1994) (arguing that current copyright policies restrict expression, especially in the context of post-modern art which relies on appropriation).

\(^{125}\) See Susan Butler, Court Ruling Could Chill Sample Use: Judges: Two-Second Lick Infringes, BILLBOARD, Sept. 18, 2004 (noting that the economic implications of the ruling could discourage the use of sampling, as hip-hop artists and producers would have to share royalties with more people); see also Gary Young, Hip-Hop in Spin over Copyright Ruling in Sampling Case, 50 PALM BEACH DAILY BUS. REV. 278 (Sept. 29, 2004) (quoting music representative, Lawrence Feldman: "the decision will kill off the art form of hip-hop").

particular plan, for a would-be sampler, licensing would mean obtaining permission and paying the necessary sum to sample a portion of the underlying work. Although such a scheme would necessarily compensate the holder of the original copyright, for a would-be sampler, the risk remains that the original copyright holder will not approve of such a use or that the license will be prohibitively expensive.\footnote{This scheme would likely have a direct, negative impact on creativity, as only the most established and wealthy artists would be able to afford to sample at will.} Today, even such established acts as the Beastie Boys are forced to sample from non-mainstream, more affordable works,\footnote{and there are others who have been forced to abandon the practice of sampling altogether.} and there are others who have been forced to abandon the practice of sampling altogether.\footnote{Given these outcomes, it seems evident that a pure licensing scheme is not capable of providing a workable solution to the challenges posed by sampling. Moreover, such a scheme does not give sufficient weight to the fact that a sampler who takes only a small, unrecognizable portion of an underlying work should not have to bear any legal liability under the de minimis doctrine. A better solution, therefore, would be to place society’s and the would-be sampler’s interest in the new creation on equal footing with the existing copyright holder’s interest in deriving an economic benefit and receiving the proposed standardization of licensing fees). But see Christopher A. Abramson, Digital Sampling and the Recording Musician: A Proposal for Legislative Protection, 74 N.Y.U. L. REV. 1660, 1660-95 (1999) (arguing that the U.S. Congress should create a property right in the original copyright holder whose work is sampled by other musicians).} \footnote{\textit{See Johnson, supra} note 21, at n.4 (citing Richard Harrington, The Groove Robbers’ Judgement; Order on ‘Sampling’ Songs May Be Rap Landmark, WASH. POST, Dec. 25, 1991, at D1, D7: “[A]rtists often ask ridiculous prices for permission to sample their works. Fees can range from $500 to $50,000, and some albums have been delayed, and tracks removed, when clearances proved either too expensive or were simply not negotiable.”).} 

proposes a standardization of licensing fees). But see Christopher A. Abramson, Digital Sampling and the Recording Musician: A Proposal for Legislative Protection, 74 N.Y.U. L. REV. 1660, 1660-95 (1999) (arguing that the U.S. Congress should create a property right in the original copyright holder whose work is sampled by other musicians). \footnote{\textit{See Johnson, supra} note 21, at n.4 (citing Richard Harrington, The Groove Robbers’ Judgement; Order on ‘Sampling’ Songs May Be Rap Landmark, WASH. POST, Dec. 25, 1991, at D1, D7: “[A]rtists often ask ridiculous prices for permission to sample their works. Fees can range from $500 to $50,000, and some albums have been delayed, and tracks removed, when clearances proved either too expensive or were simply not negotiable.”).} 

\footnote{\textit{See Thor Christensen, Rock ‘n’ Rehash: Whether It’s Rappers Sampling Classic Tunes or Rock Bands Lifting Ancient Riffs, Fresh Ideas Seen Sparse Among Today’s Pop Musicians, PEORIA J. STAR, June 25, 1998, at C1, available at 1998 WL 5769399 (citing a New York-based sample clearance specialist who works with Sean “Puffy” Combs: “Puff Daddy’s got enough money that he can sample anything he wants . . . [b]ut I tell a lot of my young bands not to sample. They just can’t afford it.”).}
necessary recognition from the original work. In the next section, this Note provides a policy proposal to guide courts and lawmakers who are attempting to balance the interests of would-be samplers and copyright holders.


In order to best balance the creative interests of would-be samplers and society as a whole against the interests of current copyright holders and musicians, the rule of the Newton court should be adopted worldwide. In other words, instead of adopting a per se rule of invalidity, such as that announced in Bridgeport, or a scheme that would require licensing in all cases, courts should be required to assess the legality of sampling on a case-by-case basis and allow for a de minimis or substantiality defense. As with the court in Newton, courts worldwide should compare the new work containing a sample to the original work, and as long as the sample is relatively short and unrecognizable, they should allow the use as one that is legally insignificant or de minimis. Alternatively, for the use of a longer or more distinctive piece, a licensing scheme would be appropriate to credit and compensate the copyright holder for his or her contribution to the new creation. As a final means to protect the interest of the original copyright holder, courts could allow for an unfair competition claim similar to that allowed by Dutch courts.\textsuperscript{131}

Despite the uncertainty inherent in this plan and the possible contention that this approach leaves the fate of new artists and existing copyright holders subject to the vagaries of case-by-case adjudication, there are several advantages to this approach for all of the actors involved. At the outset, such a plan would limit the current uncertainty in copyright law around the world. By articulating some contours and parameters, actors could estimate the extent of their rights: would-be samplers would be more empowered to sample music knowing that such practices would be legal within limits and, likewise, existing copyright holders would feel more secure knowing that their rights would be better protected around the world. Thus, neither their incentive to create, nor the protection of their moral rights would be circumscribed.

From the perspective of record companies, this rule of law could pave the way for a more generous policy toward sampling. For example, if record companies know that courts will likely allow for a certain level of sampling, then they may be more likely to allow their artists to sample music and less

\textsuperscript{131} See supra note 79 and accompanying text.
likely to force them to accept personal liability for copyright infringement lawsuits deriving from sampling in their recording contracts. This change could allow for a greater presence of sampling on albums, at least from those artists that are presently represented by major record companies and who are currently constrained by the threat of personal liability.

From the perspective of artists, this plan is also advantageous. It would ensure that sampling, at least to a limited extent, would remain legal. Even if the plan did not provide for the broadest possible scope for sampling by the would-be sampler, it would provide far more room for creativity than what would be allowed under the *Bridgeport* decision. At a minimum, this plan would be especially encouraging to would-be samplers who are presently deterred by the current state of uncertainty caused by recent court decisions that appear to impose limits on the practice of sampling. For other artists, such a plan would not only encourage the further use of sampling in their work, but it could also pave the way for more innovation in the field of digital music sampling. Thus, this plan also presents a net benefit to society by encouraging creativity in the field of music.

The promotion of creativity is not limited to new artists. Instead, because this plan balances the interests of the new artist/would-be sampler with the interests of the existing copyright holders, both actors benefit. Though the plan does curtail some of the original copyright holder's rights in that it allows for some limited copying, the original copyright holder's rights are more clearly protected under this scheme than under the current law in most jurisdictions because it provides for more defined limits. In addition to providing more certainty, such a plan would have the further advantage of providing an additional unfair competition claim in the event that a court finds that a sampler’s use was de minimis. Likewise, where a use is found to be legally significant, the copyright holder would also be entitled to licensing fees. Had such a scheme been available in the Enigma case, the Kuos would have likely had a much stronger claim for infringement that could have helped them to settle earlier in the process and, potentially, for a greater sum.

Though the argument could be made that the de minimis defense would not be sufficiently broad, such a position would be misguided. For, although sampling is an art form, in most cases the fact remains that it is a practice that does take from an existing work that is protected by copyright law. Thus, a defense that is too broad would not provide sufficient protection to existing copyright holders’ moral rights and to their rights to economic exploitation.

\[132\] See *supra* note 116 and accompanying text.
At the most basic level, an overly permissive sampling scheme would prevent copyright holders from deriving benefit from their limited monopoly right through licensing or royalties and could potentially discourage further innovation. At a more extreme level, however, it could allow for an Enigma-type situation where large portions of music could be taken from less-empowered artists with relative impunity. Therefore, at some point, sampling must be restricted to appropriately respect the original copyright holder's rights. While far from being perfect, a plan such as this one, which provides for the continuing legality of sampling within limits, should be the model throughout the world to ensure both that the interests of all actors are protected and that sufficient incentives remain to encourage creativity on a worldwide scale.

C. Concluding Comments

When the Bridgeport decision first came out in September 2004, members of the press from around the world reported that the decision would spell the end of the use of unauthorized sampling. More recently, in June of 2005, the Sixth Circuit Court of Appeals issued another ruling, clarifying the reasoning of its initial opinion. While it is too early to tell what the long term implications of the Bridgeport decision will be, what is more certain is that the continued legality of sampling is at a critical juncture.

Although sampling, at least with regards to relatively small portions of copyrighted works, remains legal in the United Kingdom and in the Netherlands, and, arguably, in some jurisdictions in the United States, the current legality of the practice is marked with a great degree of uncertainty. This unsettled situation is aggravated by the fact that there have been relatively few sampling cases litigated around the world. Moreover, in the United States, where most sampling cases have been litigated, the appellate courts have reached differing outcomes. This lack of certainty is a disadvantage to all actors involved in the practice of sampling. It discourages innovation as both would-be samplers and copyright holders alike are currently unsure of the

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protection that their respective rights will be accorded in court systems around the world.

Operating from the assumption that some sampling should be encouraged and valued as an innovative art form, this uncertainty can best be remedied if courts around the world adopt the analysis articulated by the *Newton* court. In short, a narrow exception to the copyright protection scheme needs to be maintained and enforced so that a limited level of unlicensed sampling can continue. In doing so, the creative interests of both would-be samplers and current copyright holders can be advanced, while society’s broader interest in creativity and innovation would also be promoted.