Another Cog in the Machine: Digital Music Sampling and an Evaluation of Its Existing Regulatory Mechanisms in Light of the Case Act

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"Art is anything you can get away with."

—Marshall McLuhan

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I. INTRODUCTION

Although the primal days of the avant-garde pop art movement and its leading figures, such as Andy Warhol and Roy Lichtenstein, were generations ago, the techniques and theories employed during the era remain culturally pervasive to this day. Andy Warhol once said "I want to be a machine."[1] This statement tested the notion that "every drip and brush stroke [made by an artist] must [be an] express[ion of an] artist's inner self."[2] Warhol and other artists of this era sought "not to fabricate something new but to cast the already fabricated in a new light."[3] Much like the Warhols and Lichtensteins of yesterday, many contemporary music artists making the hits of today continue the practice of refabrication and act as a "machine." This "machine" nature of artistry is commonly perpetuated through the practice of digital music sampling.

Digital music sampling has become a commonplace practice and technique in the production of music and other media.[4] Its use may be heard in hit radio music, a DJ set at a music festival, or even in the latest viral TikTok video. Some music artists have even built their entire stylistic brand through the practice.[5] With digital production being a primary source for the digital production of new music, digital sampling will not become obsolete.

The existing interpretations of copyright law that regulate digital sampling are conflicting and vary by jurisdiction.[6] Some jurisdictions take less rigid approaches and evaluate claims relating to the practice by a fair use analysis, while others impose strict licensing requirements for all digital sampling.[7] A middle ground approach that refines the fair use analysis is also adopted by some jurisdictions.[8] Regardless of

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1. Tony Scherman, *MUSIC; Warhol: The Herald of Sampling*, N.Y. TIMES (Nov. 7, 1999), http://www.nytimes.com/1999/11/07/arts/music-warhol-the-herald-of-sampling.html.

2. *Id.*

3. *Id.*

4. *See* A.E, *Is Sampling Art or Theft?*, MEDIUM (Apr. 2, 2020), http://medium.com/shufflequest/is-sampling-art-or-theft-90d91f67dac.

5. *See generally* Kat Bein, *Girl Talk on How He Avoided Getting Sued for Sampling: 'We Believed in What We Were Doing,'* BILLBOARD (Apr. 29, 2020), http://www.billboard.com/articles/news/dance/9367418/girl-talk-interview-2020.

6. *Cf.* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (applying a fair use analysis), *with* Newton v. Diamond, 388 F.3d 1189, 1192-93 (9th Cir. 2004) (applying the substantial similarity or "de minimis" use test), *and* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005) (applying a strict license requirement for any sample used).

7. *Cf. Campbell*, 510 U.S. at 577, *and Bridgeport*, 410 F.3d at 801.

8. *Newton*, 388 F.3d at 1192.

contradictory jurisprudence, many artists do not pursue copyright infringement claims in federal court because of its expensive, tedious, and time consuming nature.[9]

Alongside judicial redress are other legal and non-legal regulation mechanisms. Mechanisms include licensing, the sale and trade of digital samples through marketplaces and applications, and the governance of digital platforms through corporate policy and federal law.[10] These additional mechanisms also contain limitations that prevent the practice from efficient regulation.

In December, 2020, Congress enacted the Copyright Alternative in Small-Claims Enforcement Act (CASE Act).[11] The CASE Act effectively constructed the Copyright Claims Board (Board).[12] The Board will be a remote, small claims court that will seek to address issues of copyright infringement in a cost- and time-effective manner, with limited recovery.[13]

This Comment analyzes the existing jurisprudence and legal procedure that surrounds the practice of digital music sampling, as well as the legal and non-legal mechanisms that supplement existing law. Additionally, it will analyze the CASE Act, the Board, and their implications on the practice of digital music sampling. With this new legislation, the practice itself will face uncertainties as it may either be more strictly regulated or more fairly facilitated between music artists. Because of inadequacies in this new legislation, Congress needs to consider amending the Act so that it may be (1) amenable to different copyright issues, including digital music sampling, and (2) provide more flexibility in judicial approach. Nonetheless, this Comment shall serve as notice of the corresponding change in copyright law to copyright scholars, attorneys, and digital music samplers.

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9. *See* Amir Said, *Hip Hop & Copyright Part 2: You Can Be Sued for Samples on Free Mixtapes*, HIPHOP DX (Jan. 26, 2016, 7:00 AM), http://hiphopdx.com/editorials/id.3197/title.hip-hop-copyright-part-2-you-can-be-sued-for-samples-on-free-mixtapes# (explaining that many smaller artists choose to forego copyright litigation due to cost and time barriers); *see also* Scott Alan Burroughs, *Copyright Litigation: Now More Expensive and with More Delay Than Ever Before!*, ABOVE L. (Mar. 13, 2019, 11:14 AM), http://abovethelaw.com/2019/03/copyright-litigation-now-more-expensive-and-with-more-delay-than-ever-before/ (explaining the significant costs and time constraints required by updates in procedural Copyright law).

10. *See* Said, *supra* note 9.

11. Copyright Alternative in Small-Claims Enforcement Act of 2020, Pub. L. No. 116-260, § 212, 134 Stat. 1182, 2176 (2020).

12. 17 U.S.C. § 1502(a).

13. *See* 17 U.S.C. § 1506.

II. RECYCLED EUPHONIES: CONTEMPORARY POP CULTURE DEFINED BY DIGITAL SAMPLING

Sampling is the practice of extracting portions of sound from other musical compositions and using those portions in a new production.[14] Alternatively, it can be viewed as if the producer is copying or cutting beats, vocals, or melodies from another song and pasting them into her or his own work.[15] The practice at first glance seems at odds with the general goal of copyright law, that being to protect a creator's work from unfair copying.[16] But, despite copyright law's intended purpose, sampling has occurred for decades and is viewed as a standard practice within the music industry—especially as the production of music shifts primarily to digital formats.[17] Samples are simply viewed as "creative materials," according to hip-hop producer Chuck D. of Public Enemy.[18] "We thought sampling was just a way of arranging sounds, . . . to blend sound. Just as visual artists take yellow and blue and come up with green, we wanted to be able to do that with sound."[19]

To the disappointment of some, sampling is actually attributable to the success of a vast collection of hit music.[20] For example, the familiar beat you may have assumed Dr. Dre artfully designed playing in the background of Eminem's "My Name Is," is actually a sample (and one almost entirely unmodified) from Labi Siffre's "I Got The . . . "[21] Also, consider one of the only songs that club DJs seemed to play during summer of 2016, "Hotline Bling" by Drake.[22] Yes, that nostalgia-inducing track is too derived from sampling.[23] Similarly, fans of The Weeknd and his dizzying and electric performance during the 2021 Superbowl Halftime Show may be disappointed when they find the Spotify playlist that is dedicated entirely to music he sampled to produce

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14. A.E., *supra* note 4.
15. *See id.*
16. Newton v. Diamond, 388 F.3d 1189, 1193 (9th Cir. 2004).
17. *See* Ryan Bassil, *The Ten Best Songs You Didn't Know Were Based on Samples*, VICE (July 31, 2017, 4:30 AM), http://www.vice.com/en/article/zmvay8/10-best-songs-obscure-samples-beyonce-eminem.
18. KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW & CULTURE OF DIGITAL SAMPLING 24 (2011).
19. *Id.*
20. *See* Bassil, *supra* note 17.
21. *See id.*
22. *Id.*
23. *Id.*

his tracks.[24] The view that sampling is just copying should be reconciled with the reality that without its practice, many great songs may have never been created.

Although sampling is frequently used in moderation, some prominent artists in the electronic and bass music genres have built their careers entirely on sampling other's works. One notable artist that can attribute his success to the practice of sampling is Gregg Gillis, who goes by the stage name "Girl Talk."[25] Referred to by music journalists as the "King of the Mash-up," Gillis' creative process leads him to hear a song and immediately consider the ways in which he might manipulate it.[26] Fans attending Girl Talk's shows experience "slam danc[e] to Black Sabbath riffs mixed with Jay-Z rhymes" and simultaneously hear songs, and portions thereof, they might have never otherwise heard.[27]

Another contemporary context in which sampling frequently occurs is in the creation of TikTok videos. TikTok users often overlay whole, unedited segments of songs onto their uploaded content.[28] The practice prompted TikTok to engage in a licensing agreement with Sony Music to curb infringement liabilities resulting from its users who sample.[29] Provided the intersectional nature of social media, TikTok videos often end up on other platforms such as Instagram and Facebook.[30] This practice is predominant in the music industry, in both popular and unpopular genres, creating vast potential for copyright infringement claims.

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24. *See* yvngvo, *The Weeknd Samples—COMPLETE*, SPOTIFY http://open.spotify.com/playlist/524SHSpbzZ7vK0SGAzXweU?si=qBpuGeAjSI6HBzQQxs0M8Q&nd=1.

25. *See* Bein, *supra* note 5.

26. Laura Buckman, *Girl Talk's Gregg Gillis on His New Album, Making Listeners Puke, and Why He's Pretty Sure He Won't Get Sued*, VULTURE (July 23, 2008), http://www.vulture.com/2008/07/girl_talks_greg_gillis_on_his.html; *see* Bein, *supra* note 5. "Mash-ups" are generally a blend of two more songs where the producer either samples or takes the song in its entirety and manipulates it so that it harmonizes with other songs.

27. Bein, *supra* note 5.

28. Asha Saluja, *The Curse of TikTok Brain*, SLATE (Sept. 17, 2020, 12:39 PM), http://slate.com/technology/2020/09/tiktok-brain-send-help.html.

29. Jacob Kastrenakes, *TikTok and Sony Reach a Long-Awaited Licensing Deal*, VERGE (Nov. 2, 2020, 3:18 PM), http://www.theverge.com/2020/11/2/21546323/tiktok-sony-music-licensing-deal-labels-app.

30. Andrew R. Chow, *TikTok Is Turning New Artists into Viral Sensations. But Who Actually Benefits?*, TIME (May 31, 2019, 12:57 PM), http://time.com/5594374/tiktok-artists-money/.

III. A CACOPHONY OF JURISPRUDENCE AND ITS APPLICATION

Article I, Section 8, Clause 8 of the United States Constitution authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[31] In exercising its power, Congress enacted a federal Copyright Act to ensure national protections for artistic creation.[32] Though the concept of copyright protection is enshrined in the Constitution, the United States was not the first nation to recognize the exclusive right in creative works.[33] The idea of copyright protection in America is actually derived from the British, who created the Statute of Anne in response to the invention of the printing press.[34] The goal of the statute was to develop laws that would decide who had the right to print books and how long that right would last.[35] Today, the United States' copyright legislation values the same core goals, but is more applicable to and focused on modern technologies.[36]

The most recent revision to the United States' Copyright Act is the Copyright Act of 1976.[37] The revision was supplemented by the Digital Millennium Copyright Act (DMCA) in 1998.[38] As it stands, the Copyright Act of 1976 [hereinafter the Act] provides protection to "original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[39] With sampling in mind, the Act provides protections for "musical works, including accompanying words" and "sound recordings."[40] To illustrate, an artist that records or digitally produces a musical composition automatically obtains copyright protection as soon as it is "fixed" or, put simply, created.[41] The creator of the work need not

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31. U.S. CONST. art. I, § 8, cl. 8.
32. *See generally* Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2012).
33. 1 ELIZABETH TOWNSEND GARD & RICARDO ABRAHAM GONZALEZ, INTELLECTUAL PROPERTY: DOCTRINE 230 (2020).
34. *Id.*
35. *Id.* at 232.
36. *See id.* at 230-31.
37. *See* 17 U.S.C. §§ 101-1332.
38. *Id.*
39. *Id.* § 102(a).
40. *Id.* §§ 102(a)(2), (7); *see* Said, *supra* note 9.
41. 17 U.S.C § 102(a).

register the work in order to have copyright protection.[42] However, the creator must register the work before they are able to bring any claims of copyright infringement against an alleged infringer.[43]

The Act grants copyright owners the exclusive right "to reproduce the copyrighted work," "prepare derivative works," "distribute copies . . . of the copyrighted work to the public," "perform the copyrighted work publicly," "display the copyrighted work publicly," and "in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."[44] In the context of music and digital sampling, "there are two . . . distinct sets of copyright," including (1) "rights to the musical composition (the written lyrics and the accompanying music)" and (2) "rights to the sound recording of the musical composition."[45] Any person who does not obtain permission from the copyright holder to use the musical composition or sound recording in a manner granted under the Act may be liable to the holder for infringement.[46] However, there are some limitations to the exclusive rights granted by the Act that impact the practice of sampling, both within the act itself and developed through common law.

A. All is Fair in Love & Sampling: Fair Use Defense

"[F]air use of a copyrighted work . . . is not an infringement of copyright."[47] Fair use is the idea that certain uses are either "fair" or would be unreasonable, or against public policy, to construe as infringement.[48] Section 107 of the Copyright Act states four factors to consider when evaluating whether a use is fair.[49] First, "the purpose and character of the use [-] including whether such use is of a commercial nature or is for nonprofit educational purposes[.]"[50] Second, "the nature of the copyrighted work."[51] Third, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole[.]"[52] Fourth,

42. 17 U.S.C. § 408(a).
43. 17 U.S.C. § 411(a).
44. 17 U.S.C. § 106.
45. James A. Johnson, *Thou Shalt Not Steal: A Primer on Music Licensing*, 80 N.Y. ST. B. ASS'N J., 23 (2008).
46. 17 U.S.C. § 501(a).
47. 17 U.S.C. § 107.
48. *See* Harper & Row, Pub., Inc. v. Nation Enters., Inc., 471 U.S. 539, 549-51 (1985).
49. 17 U.S.C. § 107.
50. *Id.*
51. *Id.*
52. *Id.*

"the effect of the use upon the potential market for or value of the copyrighted work."[53] Section 107 also notes that use "for purposes . . . [of] criticism, comment, news reporting, teaching, . . . scholarship, or research, is not an infringement of copyright."[54] Moreover, a finding that an allegedly infringed work "is unpublished shall not itself bar a finding of fair use."[55]

When evaluating the first factor in the fair use analysis, "the purpose and character of the use," the United States Supreme Court noted that courts may consider "the examples given in the preamble to § 107, looking to whether the use is for criticism, or comment, or news reporting, and the like."[56] Courts should ask whether the new work merely 'supersede[s] the objects' of the original creation, . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message; in other words, courts should ask whether and to what extent the new work is 'transformative.'[57]

A finding of "transformative use is not absolutely necessary for a finding of fair use," however.[58] In the context of sampling, analysis would likely require consideration of whether the sample has been sufficiently manipulated by the producer to be deemed transformative.[59] To illustrate, in "Big For Your Boots," the music artist Stormzy "takes a miniscule vocal sample from a 1986 Chicago house track and subtly repeats it throughout the song."[60] Effectively, Stormzy manipulated a small segment of vocals into a new beat.[61] If this use was challenged and evaluated for fair use, it is likely that a court would determine the use was transformative because Stormzy turned the vocal into a beat, rather than reused it for a lyrical verse.[62]

The Supreme Court concluded that "[t]he second statutory factor [in the fair use analysis], 'the nature of the copyrighted work,' . . . draws on Justice Story's expression, the 'value of the materials used'" from an

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53. *Id.*
54. *Id.*
55. *Id.*
56. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578-79 (1994).
57. *Id.* at 578-79 (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (D. Mass. 1841)).
58. *Id.* at 579 (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 455 (1984)).
59. *See id.* at 574.
60. Bassil, *supra* note 17 (emphasis omitted).
61. *See id.*
62. *See Campbell*, 510 U.S. at 579.

early copyright decision.[63] This factor's central focus is deciding whether the nature of the work is one that is derived from widely and publicly disseminated information, or more creative—aligning with the central purpose of copyright law.[64] For example, a drum-pack is widely disseminated and used by many artists.[65] A drum-pack therefore has less creative value and would likely lean in favor of fair use. Contrarily, the sampling of a lyricist rapping original rhymes might lean away from fair use, as those original rhymes required more creative input and thus have more creative value.[66]

"[T]he amount and substantiality of the portion used in relation to the copyrighted work as a whole" is, intuitively, of utmost relevance to sampling.[67] This factor requires an evaluation of the quantity and value of the materials used, and asks whether "a substantial portion of the infringing work was copied verbatim . . . ?"[68] "[A] work composed primarily of an original, particularly [at] its heart, with little added or changed, is more likely to" lean away from fair use.[69] For example, a sample of an entire set of lyrics from a song would likely lean further away from fair use than would sampling a three-second synthesizer beat layered quietly in the background, because it is both less in amount and in substantiality.[70]

The fourth and final factor when considering fair use evaluates "the effect of the use upon the potential market for or value of the copyrighted work."[71] This factor asks "'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original."[72] In the context of sampling, this too likely depends on what and how much of something is being sampled.[73] For example, if Callum Scott were to bring an

63. *Id.* at 586 (quoting Folsom v. Marsh, 9 F.Cas. 342, 348 (D. Mass. 1841)).

64. *See id.* at 586.

65. A drum pack is a collection of different samples of drum sounds that are used in the production and performance of music. *See What Are Sample Packs? The Complete Guide to HipHop Sample Packs*, RUDEMUZIK (Jan. 2021), http://rudemuzik.com/blogs/resources/what-are-sample-packs-the-complete-guide-to-hiphop-sample-packs.

66. *See Campbell*, 510 U.S. at 586.

67. *Id.*

68. *Id.* at 587 (quoting Harper & Row, Pub., Inc. v. Nation Enters., Inc., 471 U.S. 539, 565 (1985)) (noting that the amount and what is being sampled varies greatly).

69. *Id.* at 587-88.

70. *See id.* at 587-88.

71. *Id.* at 590.

72. *Id.*

73. *See id.*

infringement claim against Robyn for her use of his lyrics to "Dancing on my Own" (assuming she did not obtain a license) and the court applies a fair use analysis, it might consider whether listeners started streaming Robyn's song and stopped listening to Callum Scott's song and whether that replacement resulted in financial loss to Scott.[74]

Although the fluidity of the fair use analysis is both ideal and practical for a "copying" practice of such broad range like sampling, many courts have instead relied on the substantially similar test.[75] However, it is plausible to see how such an in-depth analysis for miniscule uses may be viewed as inefficient. Perhaps for that reason, courts often take the more expeditious approach by simply asking whether "the use [is] significant enough to constitute infringement."[76]

B. Substantially Similar Sampling: De Minimis Use

Another rule that courts may apply to claims of unfair sampling is the "de minimis" or substantial similarity test.[77] In the context of sampling, the U.S. Court of Appeals for the Ninth Circuit concluded that "a use is de minimis only if the average audience would not recognize the appropriation."[78] Because the fundamental question is whether the value of the original work is sensibly diminished, the court required measure of "the qualitative and quantitative significance of the copied portion in relation to the plaintiff's work as a whole."[79] The de minimis test mirrors the third and fourth prongs of the fair use analysis codified in Section 107 of the Copyright Act of 1976.[80]

As contemporary music arrives at a place where genre-bending and blurring has become normative and old music categories have started to lose their meaning, what exactly is the "average audience" today? The most popular artists of 2020, such as Lil Nas X, Kasey Musgraves, Post Malone, and Billie Eilish, are known for intersecting genres and

74. *See id.* at 591.
75. *See* Newton v. Diamond, 388 F.3d 1189, 1193 (9th Cir. 2004).
76. *Id.* at 1192-93 (citing Ringgold v. Black Ent. Television, Inc., 126 F.3d 70, 74-75 (2d Cir. 1997)).
77. *See* De Minimis Definition, *Black's Law Dictionary* (9th ed. 2009), *available at* Westlaw.
78. *Newton*, 388 F.3d at 1193.
79. *Id.* at 1195.
80. 17 U.S.C. § 107(3), (4).

combining sounds in a way that may have offended listeners years ago.[81] So, if a claim against an alleged sample infringer makes it to court—does the average audience standard survive in a world where listeners may be desensitized from vast exposure to stylistic blending?[82] Moreover, the de minimis approach to sampling may be oversimplified as the sampling of lyrics or vocals from popular songs would likely be recognized, unless they were manipulated to the point of being ineligible.[83] This does not account for whether those vocals or lyrics were sufficiently transformed.[84] This refined analysis is adequate for the dynamic nature and broad variation of the practice of digital sampling.

C. License to Sample: "Get a License or Don't"

Finally, the Sixth Circuit has taken a more rigid approach in addressing digital sampling.[85] In *Bridgeport Music v. Dimension Films*, the court relied on a textualist reading of the Copyright Act and concluded that those who digitally sample music should "[g]et a license or do not sample."[86]

> Section 114(b) provides that '[t]he 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.' Further, the rights of sound recording copyright holders under clauses (1) and (2) of section 106 'do not extend to the making or duplication of 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.' 17 U.S.C. § 114(b) (emphasis added). The significance of this provision is amplified by the fact that the Copyright Act of 1976 added the word 'entirely' to this language.[87]

Essentially, the Sixth Circuit concluded that samples were inherently derivative works unless the sample was an interpolation and created

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81. *See* Neil Shah, *The Year Genre-Bending Artists Took over Pop Music*, WALL ST. J. (Dec. 28, 2019, 9:00 AM), http://www.wsj.com/articles/the-future-of-music-is-blending-rap-rock-pop-and-country-11577541601.

82. *See id.*

83. *See Newton*, 388 F.3d at 1198 (Graber, J., dissenting).

84. *Id.*

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

86. *Id.*

87. *Id.* at 800-01.

entirely independently from the one it mirrored.[88] Moreover, an artist was free "to take three notes from a musical composition," so long as it was not "by way of sampling from a sound recording."[89] The court argued that the imposition would not stifle creativity, without giving a clear justification as to why it held that view.[90]

This more rigid approach contains obvious flaws, failing to consider artists who may not have the resources to obtain licensing for every trivial use of someone else's riff.[91] Moreover, to find infringement for every unlicensed use is draconian and counterintuitive to the underlying idea of fair use codified in the Copyright Act.[92] Finally, this rule does not actualize the goal of promoting progress of science per Article I, Section 8, Clause 8 of the Constitution, as it effectively restricts artists with less financial resources from exercising their creativity.[93]

D. Traditional Copyright Litigation and Digital Sampling

The current administration of federal copyright law is not accessible to all music artists.[94] Specifically, it is out of reach for struggling and new artists with limited financial and temporal resources.[95] In the context of sampling, where a third party might have only copied a short or insignificant portion of an artist's work, it is a major risk to pursue traditional litigation and accrue its burdensome costs.[96] Therefore, smaller artists often forego litigating infringement claims, out of fear that it will become a wasted effort and a detrimental financial burden.[97]

Although artists need not seek registration to hold copyright ownership of a work, in *Fourth Estate Public Benefit Corp. v. Wall-Street.com*, "[t]he Supreme Court held that an artist cannot file suit until the U.S. Copyright Office approves the artist's copyright registration."[98] This ruling added further time constraints to the already slow moving

88. *Id.* An interpolation is a sample that replays a piece of music to sound exactly like the old song without cutting from the recording.
89. *Id.* at 801.
90. *Id.* at 801-82.
91. *See* Burroughs, *supra* note 9.
92. *See* Said, *supra* note 9.
93. U.S. CONST. art. I, § 8, cl. 8.; *see also* Burroughs, *supra* note 9.
94. *See* Burroughs, *supra* note 9.
95. *See id.*
96. Howell, *supra* note 14, at 26.
97. *See* Said, *supra* note 9.
98. Burroughs, *supra* note 9; *see* Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, 139 S. Ct. 881 (2019).

administration of copyright law.[99] To mitigate the added time constraint, the artist may pay "an $800.00 fee to expedite the Copyright Office review process."[100] The standard registration fee costs $35 and an infringement filing fee costs $400.[101] Thus, the expedited review process, wherein an artist may enjoin another from infringing a work, has a startling price tag of $1200.[102]

For small time artists who produce music entirely on their own, with little to no revenue from their early productions, that cost is significant. It is no surprise that many small and upcoming music artists do not pursue copyright litigation against those who infringe their works.[103]

IV. THE MASTER CONTROLLERS: ALTERNATIVE REGULATIONS AND REAL WORLD RESOLUTIONS

There is recognizable trouble in both the practice of digital sampling and the application of law to the unique factual circumstances that digital sampling necessitates. There are several mechanisms in place to help regulate the practice of digital sampling, which do not infringe on the rights of creators. These mechanisms include a mix of legal practice, technological innovation, and algo-cratic governance by digital platforms.[104] Specifically, some popular and potential resolutions include the use of licensing, sale and trading through marketplaces and user applications, and platform policy and regulation.[105]

A. Licensing in Utopia

Licensing is a preventative tool that can be used to protect the digital sampler from copyright infringement actions, while preserving some of the exclusive rights of the copyright holder.[106] The intended use of a song will determine what type of license is required to avoid

99. Burroughs, *supra* note 9.
100. *Id.*
101. *Id.*
102. *Id.*
103. *See* Said, *supra* note 9; *see also* Howell, *supra* note 14, at 29.
104. *See* Howell, *supra* note 14.
105. Dani Deahl, *Grimes Posted the Music Stems and Video Files for Her Single so Anyone Can Remix It*, VERGE (Apr. 2, 2020, 4:26 PM), http://www.theverge.com/2020/4/2/21205769/grimes-music-stems-video-files-wetransfer-youll-miss-me-when-im-not-around-remix-coronavirus.
106. *See* Johnson, *supra* note 14, at 24.

copyright infringement.[107] Almost all licenses granted for the use of a song will be non-exclusive and provide the licensor with termination rights.[108] A digital sampler following the rigid *Bridgeport* rule must "obtain a license for [both] the sound recording and the underlying musical composition[,]" depending on what is being sampled from the song.[109] This process may also be referred to as obtaining a "clearance."[110]

If the sampler performs a live show and uses samples from other artists' work, much like the standard practice of Girl Talk, the sampler must obtain a performance license.[111] Hosts of live, online performances should be mindful if they choose to sample a third party's work because the license requirement extends to digital performances.[112] In order to obtain a clearance, artists may choose "to contact the recording company, the owner of the song, and its performers," or "administrative rights agencies," such as the American Society of Composers, Authors and Publishers (ASCAP), or Broadcast Music Inc. (BMI).[113] These organizations "grant licenses, collect the license fees, and pay the royalties" to the copyright owner.[114]

Obtaining a license still requires that licensees be mindful of infringement litigation, keeping administrative records, and ensuring payment to the correct parties.[115] Though the concept of licensing is efficient and practical in theory, that is not always the case. The cost of obtaining clearances, and the wait time therefor, can be burdensome because multiple parties often hold the copyright to different elements of a work.[116] Moreover, the costs of obtaining licenses are strenuous—regularly upwards of $15,000 or a fee fixated on the number of sales generated by the work using the sample.[117]

Although artists *can* obtain a license, that does not guarantee they *will*. For example, an artist who sampled part of a track may be denied

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107. *Id.* at 23.
108. *Id.*
109. *Id.* at 24.
110. Howell, *supra* note 14, at 29.
111. Johnson, *supra* note 14, at 25; *see also* Bein, *supra* note 5.
112. Johnson, *supra* note 14, at 25.
113. Howell, *supra* note 14, at 29.
114. Johnson, *supra* note 14, at 25.
115. *Id.* at 27; *see also* Howell, *supra* note 14, at 29.
116. Howell, *supra* note 14, at 30.
117. *See* DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 215 (8th ed. 2013).

licensure and have to rework or scratch the track. Alternatively, if they are granted a license to sample, the timeliness of that grant will depend on the copyright holder and their affiliates. In the context of licensing, the balance of bargaining power tilts in favor of the copyright holder.[118] With these considerations in mind, it is difficult to see how a licensing requirement for every sample promotes the progress of science and the useful arts, especially when the burden of obtaining such license requires intensive financial and temporal resources. Thus, it is no surprise why so many artists forego licensing and rely on their knowledge of fair use or de minimis sampling.[119]

B. Sharing is Caring, But Selling Works Too

Another mechanism by which digital sampling is efficiently regulated is the use of music marketplaces and file sharing through user applications.[120] Various marketplaces such as Reverb create a digital platform where artists can exchange digital samples for a small fee, or sometimes for free.[121] Similarly, artists will use file sharing applications, such as WeTransfer, to share samples created for their own music with the general public.[122] This sort of conduct has prevailed among artists in response to the COVID-19 pandemic, as a means facilitate collaboration within the music community.[123]

The use of file sharing and music marketplaces is practical, efficient, and certainly promotes creativity—so long as the prices remain feasible. However, these platforms require that the original copyright holder upload the samples in order to make them available for use.[124] Therefore, unless the holders seek to enable a sense of community amongst their fanbase or hope to see their samples used in others' music,

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118. *Id.* at 294.

119. *See* Bein, *supra* note 5.

120. *See* Dani Deahl, *Here Are a Bunch of Free Music Apps and Sample Packs While We're All Stuck Inside*, VERGE (Apr. 3, 2020, 12:11 PM), http://www.theverge.com/2020/3/26/21195631/free-music-apps-plugins-sample-packs-fender-avid-moog-korg-roland-coronavirus.

121. Marc Hogan, *Reverb, Marketplace for Musicians, Cranks Up with $25 Million in Funding*, BILLBOARD (Dec. 4, 2015), http://www.billboard.com/articles/business/6785664/reverb-series-b-funding-25-million-summit-partners.

122. Deahl, *supra* note 120.

123. Deahl, *supra* note 105.

124. *See id.*; *see also* Dani Deahl, *Metadata Is the Biggest Little Problem Plaguing the Music Industry*, VERGE (May 29, 2019, 9:00 AM), http://www.theverge.com/2019/5/29/18531476/music-industry-song-royalties-metadata-credit-problems.

many will not reach the public domain.[125] Musicians must also be cautious because certain less-reputable libraries and marketplaces do not always clear their samples.[126]

C. Platform Agents and Algorithms as Jurists

The world of music shifted almost entirely from purchasing and downloading entire songs to the streaming of music for a monthly subscription fee.[127] For the past several years, "[p]hysical album sales, digital album sales, and digital track sales have all decreased year-over-year for the past several years," while on-demand streaming has risen steadily.[128] Music streaming platforms are an efficient way for listeners to access thousands of artists' songs. Moreover, they allow smaller artists to make their music easily accessible, while not necessarily accruing the costs of record labels and agencies to assist them.[129]

Throughout the process of placing artists' work on the market, platforms must regulate uploaded content to avoid potential liability.[130] Specifically, Spotify has a prohibition against infringing content, which requires users who upload music containing samples to obtain clearance.[131] "Any content [that is uploaded] . . . without a rightsholder['s] permission may be removed."[132] Additionally, smaller artists typically use third party distributors to do upload tracks to Spotify, and those distributors generally use algorithms to vet the track for uncleared samples.[133] These algorithms are not always accurate and either miss uncleared samples or misidentify a part of a song as an uncleared sample.[134]

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125. *See* Deahl, *supra* note 105.

126. *The Rights and Wrongs of Sampling*, ATTACK MAG. (June 6, 2020), http://www.attackmagazine.com/technique/tutorials/the-rights-and-wrongs-of-sampling/.

127. *See* Rob Marvin, *Streaming Has Taken over the Music Industry*, PCMAG (July 12, 2018), http://www.pcmag.com/news/streaming-has-taken-over-the-music-industry.

128. *Id.*

129. *See* Eric R. Danton, *Streaming Success? How Some Artists Are Building Their Careers Through Spotify Playlists*, FORTUNE (Dec. 12, 2019, 11:30 AM), http://fortune.com/2019/12/12/spotify-artists-success-streaming-playlists/.

130. *See* SPOTIFY, http://artists.spotify.com/help/article/prohibited-content (last visited Feb. 20, 2021).

131. *Id.*

132. *Id.*

133. Noah Yoo, *How Artist Imposters and Fake Songs Sneak onto Streaming Services*, PITCHFORK (Aug. 21, 2019), http://pitchfork.com/features/article/how-artist-imposters-and-fake-songs-sneak-onto-streaming-services/.

134. *See id.*

Similarly, YouTube allows users to submit copyright takedown requests, which presumably include music file uploads that contain uncleared samples.[135] In YouTube's FAQ regarding regulation of copyright, YouTube notes that users with copyright infringement allegations should first do a fair use analysis before submitting a takedown request.[136] Once YouTube has made its own extrajudicial determination that a video infringes a person's copyright, the video will be taken down and the name of the copyright holder will be placed in lieu of the video.[137]

Section 512 of the Digital Millennium Copyright Act of 1998 also supports the extrajudicial mechanism for which sampling may be regulated by platforms.[138] The legislation provides safe harbors for service providers against liabilities for infringing materials if the platform creates a takedown notice mechanism allowing purported copyright holders to request a takedown of allegedly infringing works.[139] Moreover, it imposes liability against those who send bogus takedown notices.[140] The copyright holder must first consider whether the use of the uploaded work is fair to satisfy the statute's good faith requirement.[141] By way of Section 512, platforms are required to regulate sampling by determining whether something is fair use before it finalizes a takedown.[142]

However, Section 512(m) provides that such safe harbors are not conditioned upon on the "service provider monitoring its service[s] or affirmatively seeking facts indicating infringing activity . . . ."[143] Although this mechanism provides a sort of preamble to litigation, platforms are free to remove materials without determining whether something is actually infringing.[144] In theory, the agent handling the takedown requests for the platform is then acting as a judge—with no

135. *Submit a Copyright Takedown Request*, YOUTUBE HELP, http://support.google.com/youtube/answer/2807622?hl=en (last visited Feb. 20, 2021).

136. *Id.*

137. *Id.*

138. *See generally* 17 U.S.C. § 512.

139. *Id.* § 512(a), (b).

140. *Id.* § 512(f).

141. Lenz v. Universal Music Corp., 801 F.3d 1126, 1131-32 (9th Cir. 2015) (cert. denied, 2017).

142. *Submit a Copyright Takedown Request*, *supra* note 135.

143. 17 U.S.C. § 512(m)(1).

144. *Id.* § 512(l).

repercussion for failing to evaluate all relevant facts and law.[145] Effectively, artists may be banned from sharing their work if an unknowing agent or algorithm decides that the work infringes another's copyright.

V. THE COPYRIGHT ALTERNATIVE IN SMALL-CLAIMS ENFORCEMENT ACT: ANOTHER COG IN THE DIGITAL SAMPLING REGULATORY MACHINE

On December 27, 2020, Congress enacted the CASE Act.[146] The Act will establish a small-claims tribunal for copyright claims brought in the U.S.[147] The Board will consist of three full-time claims officers "appointed by the Librarian of Congress . . . after consultation with the Register of Copyrights."[148] The Register of Copyrights must then hire at least two full-time "Copyright Claims Attorneys [that will] assist with the administration of the Copyright Claims Board."[149] Both the officers and attorneys assigned to the Board shall have considerable experience in copyright law.[150] The Board is required to render determinations in accordance with judicial precedent.[151] If there is conflicting precedent on an issue of substantive copyright law that cannot be reconciled, the Board shall follow the law of the federal jurisdiction in which the action could have been brought if filed in a U.S. district court.[152]

The tribunal will hear claims that include copyright infringement, declarations of noninfringement, and false DMCA Section 512 takedown or counter-notifications, counterclaims, and defenses.[153] Proceedings before the Board will be conducted entirely remote.[154] After a claimant files with the Copyright Claims Board, one of the Copyright Claims Attorneys assigned to the Board will review the claim and determine whether it meets the requirements of the Act.[155] Once the claims attorney

145. *See id.*
146. *See* Copyright Alternative in Small-Claims Enforcement Act of 2020, Pub. L. No. 116-260, § 212, 134 Stat. 1182, 2176 (2020).
147. 17 U.S.C. § 1502(a).
148. *Id.* § 1502(b).
149. *Id.*
150. *Id.*
151. 17 U.S.C. § 1503(b)(1).
152. 17 U.S.C. § 1506(a)(2).
153. 17 U.S.C § 1504.
154. 17 U.S.C. § 1506(c).
155. *Id.* § 1506(f).

determines the requirements are met, the claimant may proceed "with service of the claim."[156]

In accordance with bringing a traditional copyright claim, the claimant must also register their work with the United States Copyright Office.[157] Participation in the proceedings is entirely voluntary, and the right to instead pursue action in a U.S. district court is preserved by the Act.[158] The discovery process within proceedings brought before the tribunal is limited to "documents, written interrogatories, and written requests for admission . . . ."[159] Upon request, with a showing of good cause, the process may be expanded in limited ways.[160]

Unique to claims brought before the Board is the ability to commence the claims while the copyright application is still pending and a copyright has not been issued.[161] However, the Board shall not render any judgment until after the registration certificate has been issued.[162] Further, if the Board receives notice that the Office denied issuance, the proceeding shall be dismissed without prejudice.[163] But like traditional claims, the parties "shall bear their own attorneys' fees and costs."[164] Remedies include "actual damages, profits, or statutory damages" of no more than $30,000 for all claims brought within a single proceeding.[165] Works that were not registered in a timely manner may not recover more than $15,000 in a single proceeding.[166] If the infringing party agrees during the proceeding to cease infringing activity, the Board may take such acknowledgement into consideration when awarding damages to the complainant.[167]

The parties to a proceeding have a limited ability to seek review of the judgment.[168] A party may file a request for review from the Board itself, for "clear error of law or fact to the outcome, or for a technical

156. *Id.*
157. 17 U.S.C. § 1505(a).
158. 17 U.S.C. § 1504(a).
159. 17 U.S.C. § 1506(n).
160. *Id.*
161. 17 U.S.C. § 1505(b).
162. *Id.*
163. *Id.*
164. 17 U.S.C. § 1504(e)(3).
165. *Id.* § 1504(e)(1).
166. *Id.*
167. *Id.*
168. *See* 17 U.S.C. § 1506(w).

mistake."[169] The request must be filed within thirty days of the Board issuing a final determination.[170] The Board "shall either deny the request or issue an amended final determination."[171] Review by a district court may be granted only in limited circumstances, such as "the determination [being] issued as a result of fraud, corruption, misrepresentation, or other misconduct."[172] "[A]ny determination of the Copyright Claims Board may not be cited or relied upon as legal precedent in any other action or proceeding before any court or tribunal, including the Copyright Claims Board" itself, except in seeking review of the determination.[173]

As noted, traditional federal copyright litigation gives an unfair advantage to artists who have the requisite funding and resources to pursue claims expeditiously. Meaning, the most well-known and high-paid artists are best positioned to wield influence in the practice of digital sampling.[174] This advantage has the potential to be reduced significantly by the small claims court constructed by the CASE Act. Although the schedule of fees has yet to be established by the Register of Copyrights, Section 1510 of the Act states that the Register "shall provide for the efficient administration of the Copyright Claims Board, and for the ability of the Copyright Claims Board to timely complete proceedings . . . ."[175] The intention of the court's formation is to provide a streamlined and less expensive forum for smaller copyright disputes.[176]

By limiting the scope of discovery, the additional costs accrued in traditional litigation will be stunted.[177] Additionally, the remote nature of the Boards proceedings will result in little to no travel costs associated with traditional litigation, and thereby increase accessibility to litigants who may have otherwise accrued significant travel and lodging costs to access a federal court.[178] Finally, the new court will allow litigants to pursue a claim of copyright infringement prior to the Copyright Office

169. *Id.*
170. *Id.*
171. *Id.*
172. 17 U.S.C. § 1508(c).
173. 17 U.S.C. § 1507(a)(3).
174. *See* Said, *supra* note 9.
175. 17 U.S.C. § 1510(a).
176. Kerry Maeve Sheehan, *Copyright Law Has a Small Claims Problem. The CASE Act Won't Solve It*, AUTHORS ALL. (June 4, 2019), http://www.authorsalliance.org/2019/06/04/copyright-law-has-a-small-claims-problem-the-case-act-wont-solve-it%EF%BB%BF/.
177. *See* 17 U.S.C. § 1506(n).
178. *See id.* § 1506(c).

granting the litigant-artist's registration.[179] However, because the statute requires that the copyright be granted registration before the court renders a final determination, litigants who seek quick relief would likely still incur the $800 fee to expedite the registration process.[180]

Following implementation of the Board, smaller artists with limited financial and temporal resources, who would not have otherwise pursued infringement claims, will have a more accessible venue to do so.[181] In conjunction, it is likely that larger artists will be less zealous in their practice of digital sampling, because they can no longer presume that smaller artists with limited resources will forego infringement claims.[182]

The most pressing challenge for smaller artists seeking to take advantage of this new forum is the voluntary nature of participation in the proceedings brought before it.[183] To illustrate, suppose one of the small artists that The Weeknd samples from brings a claim against him for infringement. The Weeknd and his counsel may learn either immediately, or through investigation, that the claimant has very limited resources.[184] If The Weeknd's counsel finds the claimant has limited resources, then The Weeknd may simply choose to opt-out of the proceedings in hopes that the claimant will forego the claim. In this case, the claimant's only alternative is to pursue traditional copyright infringement litigation.[185] Given the noted costs of traditional litigation, it is not likely the small artist will want to take on such risk, unless they have a really strong case.[186]

The voluntary nature of the Board entirely contradicts the intended purpose of increasing judicial accessibility and efficiency. However, large artists who are defendants to a claim, like The Weeknd, may find that a claimant's recovery of $30,000 or less is a more desirable alternative to risking damages awards of potentially millions of dollars in traditional court.[187] In essence, the risk of high damages in federal court may deter artists from opting out.[188] If the Act does not happen to result

179. 17 U.S.C. § 1505(b).
180. *See id.*
181. Sheehan, *supra* note 176.
182. *See id.*
183. *See* 17 U.S.C. § 1504(a); *see also* Sheehan, *supra* note 176 (arguing that the opt-out provision doesn't provide independent authors enough protection).
184. *See* 17 U.S.C. § 1504.
185. *See id.*
186. Burroughs, *supra* note 9.
187. *See* 17 U.S.C. § 1504.
188. *See id.*; *see* Burroughs, *supra* note 9.

in the latter effect, Congress should amend it to remove the opt-in requirement. Doing so would guarantee judicial accessibility for small artists, with limited resources, who seek redress for misappropriation of their work. Furthermore, amending the act to require participation would promote judicial efficiency because the effort put into filing a claim before the Board would not be wasted should the defendant opt out.[189]

Another significant problem posed by the new legislation is the Board's proposed inconsistent application of law. Given that the court will not be creating its own system of precedent, and instead adhering to the law of the jurisdiction in which the claim would have been brought in federal court, the Board will apply varied rules and afford varied relief to claimants in different jurisdictions.[190] For example, a digital sampling claim brought before the Board that would have otherwise been brought in the Sixth Circuit, will be subject to the strict licensing rule that the court formulated in *Bridgeport*.[191] Alternatively, the same claim brought before the Board that would have otherwise been brought in the Ninth Circuit, will be subject to a fair use analysis as seen in *Campbell*.[192] Although the Act might have the effect of increasing judicial accessibility, it does not increase access to equal recoveries for all artists.

Though there is much uncertainty as to how these legislative inadequacies will actualize in the context of digital sampling disputes, digital samplers, copyright scholars, and attorneys are on notice of the Act's establishment of the new, remote venue that music artists will soon be able to pursue copyright claims in against one another. Therefore, the practice of digital sampling itself will likely see a transformation and possible detriment, depending on how these uncertainties unfold.

VI. CONCLUSION

In a world where the avant-garde pop technique of refabrication remains commonplace, the CASE Act will most likely not address the issues posed by digital music sampling adequately. The existing law and regulations of digital music sampling are incongruent, inefficient, and fail to address the scheme of issues presented by the practice. The law itself is inconsistent across jurisdictions and sometimes fails to be amenable to the fluidity of digital sampling. Traditional federal copyright

189. *See* 17 U.S.C. § 1504.
190. 17 U.S.C. § 1506(a)(2).
191. *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005).
192. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577-78 (1994).

litigation is timely, tedious, and expensive and is thus inaccessible to all artists that may have a viable copyright infringement claim against a digital sampler. The regulatory mechanisms in place, through both legal and non-legal means, are inefficient and do not fairly balance the practice between artists.

The CASE Act, and the Copyright Claims Board created by the Act, has the potential to be a powerful tool to address the issues presented by digital music sampling. Issues brought before the Board face considerable uncertainty in light of its procedures for application of law and the ability for parties to opt-out. Although it is likely that smaller artists will pursue claims against digital samplers of their work(s) in this new venue, the effectiveness and efficiency of the venue faces considerable uncertainty opposite existing inadequacies found within the Act. Congress should amend the CASE Act so that sophisticated artists may not escape liability, leaving artists with limited resources without redress. Additionally, Congress should amend the Act so that there is consistent application of existing law, creating a fair forum for all music artists pursuing claims against misappropriation by digital sampling. Until then, the implementation of the CASE Act will be the implementation of just another cog in the digital sampling regulatory machine.