# FAIR USE AS REPARATIONS

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INTRODUCTION

United States jurisprudence has long recognized the central purpose of copyright law: to benefit the public welfare by giving copyright holders a monopoly over their work.1 Protecting artists has never been a central goal of copyright law.2 While artists receive some reward by having a copyrighted work—such as the ability to sell licenses to use such a work—that reward did not catalyze copyright law’s development.3 Rather, a young United States government appeared to be reacting against Great Britain in order to encourage innovation.4 Indeed, the Framers’ primary concern was not the copyright holder’s welfare, but rather public welfare.5 George Washington, addressing the first federal Congress during its second session, emphasized that “[t]here is nothing, which can better deserve your patronage, than the promotion of Science and Literature. Knowledge is in every Country the surest basis of public happiness.”6 Over 150 years later, the Supreme Court of the United States, in Mazer v. Stein, reaffirmed that the public welfare—not the copyright holder’s welfare—is central to U.S. copyright law.7

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1. Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) (“The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”).

2. See, e.g., Christopher Jon Sprigman, Copyright and Creative Incentives: What We Know (and Don’t), 55 Hous. L. Rev. 451, 478 (2017) (concluding that copyright’s economic incentives are relevant only sometimes to creativity); Erik Nielson, Did the Decline of Sampling Cause the Decline of Political Hip Hop?, ATLANTIC (Sept. 18, 2013), https://www.theatlantic.com/entertainment/archive/2013/09/did-the-decline-of-sampling-cause-the-decline-of-political-hip-hop/279791 (explaining that the prohibitive cost of licensing has led to a decrease in sampling, thus deterring creation using copyrighted work by artists).

3. See Marvin Ammori, The Uneasy Case for Copyright Extension, 16 Harv. J.L. & Tech. 287, 304–11 (2002) (discussing the Framers’ intent in drafting the copyright clause of the United States Constitution, and highlighting that “[o]f primary importance for understanding the Framers’ intent is that generations of Englishmen understood firsthand the crippling societal effects of royal monopolies which were issued not to encourage innovation but to control existing trades”) (emphasis added).

4. See id. at 310.


6. Id.

7. Mazer v. Stein, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that
Musical artists should and often do receive substantial compensation for their work due to U.S. copyright law. U.S. copyright law, however, has historically failed to protect Black musicians when compared to the protections afforded to their white counterparts. Specifically, Black rap artists and Black digital sampling artists have historically been regarded as “thieves,” while their white counterparts have been allowed to appropriate the creativity of Black artists.

Two popular extremes are American rock and roll artist Elvis Presley and electronic music artist Moby. On the one hand, Elvis Presley copied songs by Black artists, which excluded those artists from the encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”

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9. See Vincent R. Johnson, Comment, Sampling as Transformation: Re-Evaluating Copyright’s Treatment of Sampling to End Its Disproportionate Harm on Black Artists, 70 AM. UNIV. L. REV. 227, 260–61 (2021) (discussing the Southern District of New York’s microaggressions aimed at Black rap artists in a landmark digital sampling case, which included referring to rap music in quotes as “‘rap music,’” and “failing to articulate an understanding of [digital sampling] and its legal status” relative to fair use).

10. See, e.g., VMG Salsoul, LLC, v. Ciccone, 824 F.3d 871, 888 (9th Cir. 2016) (Silverman, J., dissenting) (“In any other context, [appropriating the plaintiff’s sound recording] would be called theft. It is no defense to theft that the thief made off with only a ‘de minimis’ part of the victim’s property.”); Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 185 n.2 (S.D.N.Y. 1991) (likening digital sampling to thievery and referencing the word “rap” in quotations); see also Johnson, supra note 9, at 260–61 (discussing how the court’s dismissive attitude regarding rap music in Grand Upright was a racist microagression implying that the court did not view hip hop, a Black art form, as a legitimate musical genre).

mainstream success. On the other hand, Moby sampled Black artists’ old recordings without paying the authors of the work he sampled. Copyright’s failure to protect Black musicians from white appropriation is worthy of reparation. Whether Elvis’s or Moby’s music benefitted the public welfare through their appropriation of Black blues music is a colorable argument; but the problem remains that Black artists have historically been excluded from the copyright protection afforded to white artists and have faced judicial prejudice while seeking copyright benefits.

12. See George Varga, Was Elvis a Thief? Yes! No! Maybe? Music Stars Weigh in on Presley’s Legacy, SAN DIEGO UNION TRIB. (Aug. 6, 2017, 6:05 AM), https://www.sandiegouniontribune.com/entertainment/music/sd-et-music-elvis-thief-20170805-story.html (listing an array of songs which Elvis covered leading to his own commercial success, including “That’s Alright Mama” by bluesman Arthur “Big Boy” Crudup). While Black artists preceding Elvis were paid for their work as musicians, their levels of fame did not reach that of Elvis’s; indeed, Black blues musicians often had to supplement their musical careers with other work because they were paid so little. See Candace G. Hines, Black Musical Traditions and Copyright Law: Historical Tensions, 10 MICH. J. RACE & L. 463, 486 (2005) (“[Arthur “Big Boy” Crudup] was paid so little for his recordings that he balanced his work as a rural laborer—sometimes selling sweet potatoes—with his recording sessions throughout his career.”).


14. Two clarifications are in order. First, both Elvis and Moby were heavily inspired by the Black artists that preceded them. Indeed, Elvis was so inspired by the Black culture of his era that he frequented segregated night clubs to listen to Black music, enjoying live music from behind the piano to avoid being seen. Varga, supra note 12. Similarly, Moby asserts a “profound love and appreciation” for the Black voices that he uses in his music. See The Newsroom, Cultural Appropriation Is Real but We also Live in an Intertwined, Complicated World, SCOTSMAN (Apr. 5, 2021, 7:00 AM), https://www.scotsman.com/whats-on/arts-and-entertainment/cultural-appropriation-is-real-but-we-also-live-in-an-inter-twined-complicated-world-moby-3186394 (“To some, including the artist himself, [Moby’s use of Black artists’ songs was] a mark of respect and helped bring [the songs] to new, much larger audiences.”). Second, even if the public benefits from Elvis’s and Moby’s music, the public should not benefit at the expense of Black artists and Black labor. Accordingly, copyright law should move towards a framework that benefits the public while simultaneously centering artists.

15. See Grand Upright Music Ltd., 780 F. Supp. at 185 n.2 (using quotations around the words “rap music,” and thus suggesting incredulity at the musical genre itself, which is dominated by Black artists); see also Johnson, supra note 9, at 252.
Reparations for Black musicians is timely and appropriate. First, created in 2020, California’s Reparations Task Force evidences current desire in California to seriously consider reparations for Black Americans.\footnote{AB 3121: Task Force to Study and Develop Reparation Proposals for African Americans, OFF. OF THE ATT’Y GEN., (May 3, 2021, 8:44 AM), https://oag.ca.gov/ab3121/members.} A 2022 interim report issued by the Reparations Task Force recommends that reparations can be issued to Black Californians by “[compensating] individuals who have been deprived of rightful profits for their artistic, creative, athletic, and intellectual work” and by “ensuring access to . . . royalties for cultural, intellectual, and artistic production . . . .”\footnote{CAL. TASK FORCE TO STUDY AND DEV. REPARATION PROPOSALS FOR AFR. AMS., INTERIM REP., 22 (2022), https://oag.ca.gov/system/files/media/ab3121-interim-report-preliminary-recommendations-2022.pdf. While this report addresses reparations for Black Californians, the recommendations for effecting reparations are broad enough such that they could apply nationwide.} Revising fair use the way this Comment suggests aligns with these recommendations.

Second, reparations for Black musicians is appropriate because copyright law’s failure to protect Black artists denied Black families the power to build generational wealth.\footnote{Hines, supra note 12, at 486 (“[S]uch circumstances were not individual occurrences . . . .’[O]ne of the saddest recurring stories in blues history is how many of the greatest stylists—men and women who had a profound influence on the course of popular music—remained neglected before they were “discovered” through the music of White blues bands.”).} For example, because the United States copyright system functions to protect the copyright holder, the people who produce the work are not necessarily protected.\footnote{Lei, supra note 13 (detailing a longstanding tradition of R&B pioneers who often signed the rights to their music over to promoters and corporations, leaving the artists with minimal payment for their work despite its success).} Further, the informal manner in which Black blues musicians in the mid-twentieth century created contracts covering the rights to their music was insufficient to withstand legal scrutiny.\footnote{Id. See also K.J. Greene, “Copynorms,” Black Cultural Production, and the Debate Over African-American Reparations, 25 CARDOZO ARTS & ENT. L. J. 1179, 1202 (2008) (“The creators of blues music typically did not have the literacy, savvy, legal representation or the wherewithal to navigate the complexities of the 1909 Copyright Act. The court in the Bessie Smith case assumed that artists would know (explaining that when the court in Grand Upright suggested imposing criminal sanctions against the defendant, the court perpetuated the myth of Back criminality).} As a result, Black blues
musicians like Bessie Jones and Vera Hall and their heirs never realized the financial benefit of Jones’s and Hall’s contributions to American music. Both Jones’s and Hall’s respective songs “Sometimes” and “Trouble So Hard” allowed Moby to achieve widespread commercial success with his album *Play*. This injustice deserves remedy, and copyright law’s fair use defense may have the power to provide reparations to today’s Black musicians.

Currently, certain artistic subgroups and cultures are reclaiming musical territory using musical techniques like digital sampling. These artists compose the burgeoning Bronx Drill Rap scene, a Black-dominated musical space. Bronx Drill Rap, often referred to as “Bronx Drill” or “Sample Drill,” is characterized by its “nostalgic-yet-modern sound.” Lyrically, Bronx Drill artists rap aggressively and incorporate regional slang. Stylistically, Bronx Drill relies heavily on digital sampling, and the samples are embellished with gliding basslines and emphatic snares. A standard practice among Bronx Drill producers is to forego licensing samples before using them. Without passing legal judgment on the implications of failing to license a sample, this Comment contends that the practice demonstrates an area which copyright law would normally fail to protect, despite the public benefit that arises from, and the artistic creativity required for, digital

the law, but imputing knowledge of complex law is just another form of white domination given the state of Black education and legal representation in the 1920’s.”).


22. *Id.* (explaining that Moby’s album *Play* sold more than three million copies worldwide and earned a Grammy nomination). Indeed, while Moby named Bessie Jones on *Play’s* album sleeve, Vera Hall’s name went unmentioned. See David Hesmondhalgh, *Digital Sampling and Cultural Inequality*, 15 SOC. & LEGAL STUD. 53, 61–62 (2006) (discussing Moby’s problematic taking of Jones’s and Hall’s work).


26. *Id.*
sampling. Emerging Bronx Drill artists may wish to assert the fair use defense as opposed to licensing a sample before use. Fair use, however, tends to fail to protect digital sampling.27

If fair use protects digital sampling, a fair use defense can provide reparations to Black digital sampling artists. While a range of solutions exist to arrive at the ideal fair use analysis including legislative action,28 general intervention,29 compulsory licenses,30 and complex fee arrangement schemes,31 the problem of what constitutes fair use can be solved through mere judicial interpretation.32 Digital sampling within Bronx Drill is a clear avenue to understand how courts can modify the fair use analysis to provide reparations to Black digital sampling artists.

Part I will begin by situating this Comment within the context of W.E.B. Du Bois’s final chapter of The Souls of Black Folk. This discussion will support the assertion that all American music is indeed Black music and that digital sampling is a Black art form. Next, Part I will discuss the Disc Jockey’s ("DJ") role in creating the foundation for modern digital sampling by focusing on three 1970s New York DJs and subsequent musical developments that led to modern digital sampling. Finally, Part I will conclude by explaining what Bronx Drill is and its importance relative to copyright’s fair use defense.

29. Barton Beebe, An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005, 156 UNIV. PA. L. REV. 549, 622 (2008) (“To be sure, the data reveal many popular practices that impair the doctrine: courts tend to apply the factors mechanically and they sometimes make opportunistic uses of the conflicting precedent available to them. These are systematic failures that require intervention.”).
32. A. Dean Johnson, Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits, 21 FLA. STATE UNIV.L. REV. 135, 156 (1993) (recognizing that the Fair Use analysis is flexible by statutory design and describing six additional factors that courts may consider in resolving whether an infringing use is fair use).
Part II will discuss generally the current state of the law surrounding digital sampling. This will include a discussion on copyright law in general, the fair use defense to copyright infringement claims, the process of licensing a sound recording for use as a sample, and relevant fair use cases discussing digital sampling.

Part III will conclude by suggesting an artist-centered framework for applying copyright’s fair use defense as one avenue for reparations. Specifically, a court considering fair use should reframe its understanding of both the first and second fair use factors to properly bring digital sampling within fair use’s scope. Reframing the analysis concerning these two factors the way that this Comment suggests may ultimately provide one form of reparations to Black digital sampling artists.

I. FROM SPIRITUALS TO SAMPLING

A. American Music is Black

Any discussion concerning musical trends or issues in the United States should begin with a discussion of Black centrality to American music in general. This is because Black contribution to, if not outright creation of, American music is indisputable. W.E.B. Du Bois expresses this sentiment in his book, *The Souls of Black Folk*:

Little of beauty has America given the world save the rude grandeur God himself stamped on her bosom; the human spirit in this new world has expressed itself in vigor and ingenuity rather than in beauty. And so by fateful chance the Negro folk-song—the rhythmic cry of the slave—stands to-day not simply as the sole American music, but as the most beautiful expression of human experience born this side the seas. It has been neglected, it has been, and is, half despised, and above all it has been persistently mistaken and misunderstood; but notwithstanding, it still remains as the singular spiritual heritage of the nation and the greatest gift of the Negro people.

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33. Greene, *supra* note 11, at 361–62 (“The contribution of African-Americans to the cultural landscape of art, literature, and especially music is indisputable.”). See also *Timeline of African American Music*, CARNEGIE HALL, https://www.carnegiehall.org/Explore/Articles/2022/01/11/Timeline-of-African-American-Music (last visited Sept. 19, 2023) (“A student of our music, if he goes back far enough, will find that the main source of our music is the music of Africa. The music of the Western Hemisphere . . . is primarily of African origin.”).

Driving his point home, W.E.B. Du Bois then implores readers: “would America have been America without her Negro people?”

Relative to music, the more pertinent question becomes whether American music would have become American music without the contributions of Black musicians. The answer is no. Indeed, Black musicians were always the creators of American music’s most important genres, including blues, jazz, rock and roll, rap, hip hop, and now Drill. Each subsequent genre appears to have emerged from the previous genre, changing in style in large part due to the changing social conditions present in each time period. Accordingly, this single, threadlike, historic path that connects each genre traces back to the slave spirituals of the American South.

Anjali Vats, Associate Professor of Law at the University of Pittsburgh, refers to Black musicians’ historical ability to create as “Black brilliance.” “Black brilliance” stands apart from “Black excellence,” a similar phrase used to describe “the audacity to look at the place where hundreds of years of being exploited and abused . . . has brought [the Black community] and say we can rise and prosper.” While “Black excellence” implies an already-existing standard at which a Black individual should be performing, “Black brilliance” assumes that a boundary has been broken, or a new space has been opened and created by the individual. Indeed, Black artists are brilliant, creative,
and continue to give America its many musical genres. Against this backdrop, the creation of hip hop and Bronx Drill is more holistically understood.

B. 1970s Bronx, New York

Between the 1970s and the 1980s, the Bronx, New York, was on fire. In addition to the metaphorically “fire” music (now known as hip hop) that came from the Bronx, parts of the Bronx were literally on fire. Eighty percent of housing in the South Bronx was lost to fire during the 1970s. Crooked landlords paid arsonists to kindle these fires to burn down the buildings so that the landlord could collect sometimes multi-million-dollar insurance payouts.

Amidst this chaos, not rising from the ashes but living amongst them, were South Bronx DJs, DJ Kool Herc, Afrikaa Bambaataa, and Grandmaster Flash. All three played a distinct role in the birth of hip hop in the 1970s and the technological evolution toward digital sampling. Each began as a party DJ, and all three used the same musical technique to make music. This technique worked by first taking two copies of the same vinyl record and setting the two record copies on

students are highly capable, rather than beginning with low expectations and forcing students to prove that they can meet higher standards.”).

42. EDS. OF ENCYC. BRITANNICA, BRONX, BOROUGH, NEW YORK CITY, NEW YORK, UNITED STATES, (last updated Oct. 11, 2023) https://www.britannica.com/place/Bronx-borough-New-York-City (last updated Oct. 11, 2023) (“Bronx, one of the five boroughs of New York City, southeastern New York, U.S., coextensive with Bronx county, formed in 1912. The Bronx is the northernmost of the city’s boroughs. It is separated from Manhattan (to the south and west) by the narrow Harlem River and is further bordered by Westchester county (north), the Hudson River (west), the East River (south), and Long Island Sound (east).”).


45. Id. (describing that following such fires, Bronx landlords had no responsibility to rebuild their buildings, and would accordingly collect their insurance payouts and walk away).

dual turn tables. The DJ would then play the short portion of one record that he wanted to repeat. This short portion was usually a percussion break called a “break beat,” during which only the percussion section would play, making a danceable portion of the song. Finally, the DJ would queue the second copy of the record on the second turn table, find exactly where the break beat began, and play the copied record from that point as soon as the first record finished playing through the break beat. This technique allowed for an infinite loop of the break beat.

DJ Kool Herc is one of the pioneers of the American DJ. DJ Kool Herc, born in Jamaica in 1955, left his home country for the Bronx in 1967. He brought with him the style of the Jamaican soundmen who played the sound systems and clashes in Jamaica, adding freestyle

47. Grandmaster Flash (Joseph Saddler), ASK HIP HOP (June 23, 2019), https://history.hiphop/grandmaster-flash-joseph-saddler/.
48. Id.
49. Id.
51. Grandmaster Flash (Joseph Saddler), supra note 47. For a demonstration on how DJ’s created an infinite loop of the break beat, see Hot 97, Grandmaster Flash Talks “The Theory” of Being a HipHop DJ & The Beginnings of Hip-Hop!!, YOUTUBE at 44:11 (Aug. 19, 2016), https://www.youtube.com/watch?v=m3YYxyKgWyc&t=1490s.
55. As used here, a sound system is both a thing and an event. The sound system is at once the equipment—speakers, microphones, and turn tables—through which music is played and the event during which the music is played. See NORMAN C. STOLZOFF, WAKE THE TOWN AND TELL THE PEOPLE: DANCEHALL CULTURE IN JAMAICA 42 (2000) (“[T]his is what they had; you just pay a sound system man about three or five pounds, as [was] the case in them day. Bring his equipment, stick it up on the sidewalk, or inna (sic) the yard, and bring in the boxes of beer and thing, and you have a dance and you make some money.”).
rhymes to his curated music. Moreover, DJ Kool Herc played on large sound systems outside in the Bronx just like the Jamaican soundmen in his home country. These events ran similarly to the sound systems in Jamaica, transforming South Bronx communities into “inner city dance floors, landscaped by chained-net basketball rims and graffiti decorated walls, that vibrated with the funk, soul, and dance hits of the era.” Thus, the South Bronx DJ was born: an expert in blending music using dual turntables to manipulate two copies of the same record to keep the beat going.

With DJ Kool Herc having set the scene for hip hop to explode, Grandmaster Flash and Afrika Bambaataa rose to prominence within the mid- to late 1970s underground DJ scene in the South Bronx. For example, while Afrika Bambaataa popularized the term hip hop, having named his mixes “hip-hop jams,” Grandmaster Flash exhibited never before seen technological prowess in his ability to “lock the beat.” Grandmaster Flash produced lively parties and musical performances that seamlessly blended rock, pop, blues, funk, alternative, and jazz music. Crowds loved the continuous percussion breaks because the breaks’ length allowed for uninterrupted partying and dancing. Grandmaster Flash noticed that during the percussion breaks of the then popular music, partygoers’ bodies would become more reactive, and played into this natural reaction when he would perform.

Grandmaster Flash continued to refine the techniques established by the Jamaican soundmen and his South Bronx predecessor, DJ Kool Herc.

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57. Id. at 699 n.3 (explaining that DJ Kool Herc is recognized as the first person to spin turn tables outside while switching between multiple records to keep a continuous beat at an outdoor party in the Bronx on August 11, 1973).
58. Id. at 699.
60. Perkins, supra note 46, at 5.
61. Id. at 7. The term “locking the beat” refers to taking two records and blending them on time so that they play continuously without missing a beat. Id.
62. Hot 97, supra note 51, at 3:35.
63. Id. at 14:13.
64. Id.
Herc. In fact, Grandmaster Flash studied his craft so thoroughly that he developed quasi-mathematical theories about how to properly play vinyl records on dual turntables. He even invented the slipmat, the felt disk upon which a vinyl record sits while on the turntable, enabling him to spin records faster and lock the beat quicker. Grandmaster Flash went on to achieve commercial success with his group, Grandmaster Flash and the Furious Five. With the break beat forming the foundation to the group’s music, Grandmaster Flash and the Furious Five used microphones to shout rhymes over the break beat foundation. The addition of rhyming was the next step in the evolution of the DJing and hip hop, and signified a growing musical taste for sampled works. These sampled works became the foundation of modern-day hip hop and rap, laying the first bricks in the path toward developing digital sampling. Grandmaster Flash is still active in the hip hop community today, and his music has been sampled in popular songs as recently as 2022.

C. Modern Digital Sampling Trends

Understanding the space that digital sampling occupies in today’s music industry requires understanding the social space from which hip hop and Grandmaster Flash’s original analog samples grew. As mentioned earlier, the Bronx was burning when Grandmaster Flash was birthing hip hop through his analog samples. The people who lived in the Bronx were neglected and, like Grandmaster Flash, grew up in

65. Id. at 29:03.
66. Id. at 17:20.
68. Id. at 5.
70. Id.
72. Ndiaye, supra note 44; see also discussion supra Part.I.B.
poverty. Consequently, those who grew up without the means for a musical education, like Grandmaster Flash, had to discover and learn musical techniques on their own.

With limited access to resources to learn to make or play music, Grandmaster Flash taught himself how stereo systems worked by rummaging through abandoned cars and areas of refuse within the Bronx to find old stereos. Grandmaster Flash recalls deconstructing and reconstructing these stereos, and various other electronic household items like hairdryers and radios. Ultimately, Grandmaster Flash’s self-teaching, propelled by the material conditions within the Bronx, empowered him to thoroughly understand the stereo system and master his craft. Such mastery allowed for digital sampling, and hip hop more broadly, to explode.

By the 1970s, other performers accompanied the DJ and would shout out short, catchy rhymes over the music. The person in this role became known as the emcee (“MC”). These rhymes consisted of phrases pulled from local slang and personal experience and even included some humorous lines to keep audiences intrigued. The DJ/MC combination evolved into rap groups, and in 1980, the Sugarhill Gang became the first of these groups to achieve commercial success.

Rap, hip hop, and sampling continued to take hold in mainstream culture in the 1980s. In the mid-1980s in Queens, New York, rap group

73. Hot 97, supra note 51, at 23:10.
74. Id. at 23:20.
75. Id. at 23:38.
76. See Vats, supra note 39, at 73 (“By the 1990s and 2000s, hip hop had established itself as Black and Brown music and culture, that emerged from material conditions intended to subordinate and oppress people of color.”).
77. Perkins, supra note 46, at 10.
78. Id.
79. Id. (explaining further that the MCs of this era followed the Jamaican soundmen tradition of “toasts and boasts,” which usually appeared as a preaching-styled lament, tone, or cadence).
81. EDS. OF ENCYC. BRITANNICA, QUEENS, BOROUGH, NEW YORK CITY, NEW YORK, UNITED STATES, https://www.britannica.com/place/Queens-New-York (last updated Sept. 30, 2023) (“Queens, largest of the five boroughs of New York City,
Run D.M.C. eclipsed the Sugarhill Gang’s success and brought rap into mainstream culture with their song “Walk This Way,” which peaked at number four on the Billboard Hot 100. Run D.M.C. continued in the tradition set by Grandmaster Flash by collaborating with popular rock groups of the era like Aerosmith. Spreading to the era’s mainstream culture signified that hip hop had major viability as a new art form. Hip hop and sampling were no longer niche interests held by self-proclaimed “nerds” like Grandmaster Flash; they became a cultural awakening.

Anjali Vats eloquently describes hip hop’s current place in the world:

To attempt to reduce hip hop into any simple definition is to miss important elements of it and diminish the experiential components that comprise it... Hip hop has become more than a set of musical and cultural practices. It is now a philosophical approach, a radical politic, and an emancipatory project that profoundly shapes global sounds...

Given the genre’s tendency to evolve, hip hop is currently composed of innumerable subgenres. Particularly important for a discussion relative to copyright law’s fair use defense is the hip hop subgenre, Bronx Drill.

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82. See Mulraine, supra note 53, at 701–02 n.18 (explaining that Run D.M.C. also influenced the direction of “rap music, street fashion, and popular culture in general.”).
83. See id. at 702 n.19.
84. See id. at 704.
85. Hot 97, supra note 51, at 5:30.
86. Vats, supra note 39, at 73.
D. Bronx Drill

Bronx Drill, sometimes referred to as Sample Drill, is a subgenre within a subgenre.\(^{88}\) Drill music itself is a subgenre of hip hop, while Bronx Drill is a subgenre of Drill.\(^{89}\) There are also numerous subgenres of Drill music itself, including Brooklyn Drill and the broader New York Drill.\(^{90}\) Each subgenre maintains similar elements: skittering snare drum patterns, deep sliding basslines, dark and punishing vocals, and a heavy dose of unlicensed digital sampling.\(^{91}\)

Just as hip hop is an “emancipatory project” with a “philosophical approach” and is ultimately a “radical politic,” Drill music generally reflects these same tendencies.\(^{92}\) Indeed, Drill vocals are often infused with the street culture of the area where the music is produced, which allows emerging Drill artists, like the late Pop Smoke, to assert their individual presence in the musical world.\(^{93}\) Despite its highly individualized nature, Drill music continues to grow in mainstream popularity. For example, the endorsement of mainstream artists like Cardi B and the emergence of “hip hop’s new Princess,” Ice Spice cemented Drill music’s place in the musical mainstream.\(^{94}\)

Bronx Drill producers are taking a familiar but unique step by freely and unapologetically incorporating unlicensed samples into their

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88. Rose, supra note 23.

89. Skelton, supra note 24 (explaining that Brooklyn Drill is a subset of Drill music, which originated in Chicago and was further developed by producers and rappers in London).

90. Rose, supra note 23.

91. Id. See also Skelton, supra note 24 (“The beats were dark and punishing, with moderate tempos that usually hovered around 70 beats per minute. And they were loaded with hi-hats, snares, and bells.”).

92. Skelton, supra note 24 (explaining that “Drill music came from gang culture . . . and is the soundtrack to violence that’s going on in the city.”).

93. Id. (“[T]here was something special about the hungry young rapper . . . because Pop Smoke had already gained a reputation on the streets of Brooklyn for reasons beyond music.”).

94. See, e.g., Rose, supra note 23 (noting that Cardi B was featured in Bronx Drill rapper Kay Flock’s song, “Shake It”); Andrew Matson, RIOTUSA on Ice Spice, Clearing Samples, and Influencing NY Drill, FINALS (June 24, 2022, 11:01 AM), https://finals.blog/posts/RIOTUSA-on-Ice-Spice-Clearing-Samples-and-Influencing-NY-Drill (discussing the rise of Bronx Drill artist Ice Spice, and her potential for “bringing drill to a bigger place”).
Bronx Drill producers include samples ranging from only a few seconds, encompassing only a previous melody or electronic riff, to minutes long, sometimes sampling an entire earlier song. This technique is familiar because using samples of earlier recorded music has been a fundamental characteristic of hip hop since its creation. This technique is unprecedented, however, because Bronx Drill producers like RIOTUSA, who produces for Ice Spice, are embracing not licensing samples before releasing their music.

Licensing or clearing a sample often depends on a producer’s ability to pay the licensing fees. Mainstream hip hop producers like Kanye West have frequently been the subject of lawsuits concerning unlicensed samples. Yet Kanye West is considered proactive when it comes to licensing samples, expressing a willingness to pay whatever


96. Compare Kay Flock, Shake It feat. Cardi B, Dougie B & Bory300 (Official Video), YOUTUBE (Apr. 14, 2022), https://www.youtube.com/watch?v=L7P68kJ8jWbI (Kay Flock’s “Shake It,” sampling approximately ten seconds of the original sound recording), with Ice Spice, No Clarity (Official Music Video), YOUTUBE (Nov. 6, 2021), https://www.youtube.com/watch?v=U77JyALAfK0 (Ice Spice’s “No Clarity,” sampling approximately over one minute of the original sound recording).

97. See A Brief History of Sampling in Music, supra note 69 (“It’s a widely accepted view that hip-hop was responsible for the creation of sampling. There were early examples of sampling being birthed in the early 70s at hip-hop parties in the Bronx, where DJs like Kool Herc would spin funk and soul records, while MCs rapped over sections of these records live.”).

98. See, e.g., Matson, supra note 94; Rose, supra note 23; Fay, supra note 95.

99. See discussion infra Part II.C.

fees necessary to license a sample. Bronx Drill producers differentiate themselves from producers like Kanye West because Bronx Drill producers center their music around purposefully using unlicensed samples, regardless of the consequences.

Incorporating unlicensed samples is an essential part of the Bronx Drill art form. Bronx Drill producers often see the process of licensing samples as secondary to making the music they want. For example, Drill producer Shawny Binladen touts that he is “not even worried about the sampling laws,” clarifying that he makes music “for the culture.” RIOTUSA expresses a similar sentiment, explaining that even if his songs are taken down due to copyright infringement, he still has the chance to make a cultural impact. The sentiment expressed by Shawny Binladen and RIOTUSA stands in stark contrast to Judge Duffy’s conclusion in Grand Upright that the defendants’ only goal was to “sell thousands upon thousands of records.” The court’s opinion in Grand Upright thus takes a myopic view of what drives Black hip hop artists to create.

Without a colorable defense to infringement claims based on digital sampling, Bronx Drill will lose its vitality as a Black art form. Indeed, Bronx Drill is a uniquely Black cultural phenomenon, and the musical genre will likely implicate copyright laws and fair use, if it has not already. Surely, a Black artist like Kanye West, whose net worth is nearly half a billion dollars, will have little trouble paying for sample

101. Brad Callas, Pusha-T on People Taking Advantage of Kanye’s Willingness to Get Samples Cleared: ‘Most Unfair Sh*t I’ve Ever Seen,’ COMPLEX (Apr. 25, 2022), https://www.complex.com/music/pusha-t-people-taking-advantage-kanye-west-willingness-to-clear-samples-unfair (commenting on Kanye’s willingness to license samples, Pusha-T explained hyperbolically that Kanye would share “97 percent of the record” in order to use the sample he wants).
102. Matson, supra note 94.
103. Callas, supra note 101.
104. Fay, supra note 95.
105. Matson, supra note 94.
clearances and litigating claims of infringement, even if his defenses prove to be without merit. In contrast, small, emerging, and historically marginalized artists like Bronx Drill producers likely do not and will not enjoy the same privileges. Protecting Bronx Drill by revising copyright’s fair use defense will ensure that Bronx Drill maintains its vitality as a Black art form and will repair past harms copyright law historically exacted on Black musicians.

II. CURRENT UNDERSTANDINGS OF COPYRIGHT, DIGITAL SAMPLING, AND FAIR USE

A. Copyright Basics

Among Congress’s enumerated powers is the power to “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.” Accordingly, Congress has the power to enact copyright legislation. Congress codified the current United States copyright law in 1976 by passing the Copyright Act of 1976 (“The Act”). The Act protects only original works that are fixed in a tangible medium of expression. Additionally, The Act protects six rights of a copyright owner, which are the rights to (1) reproduce the work, (2) make derivative works, (3) distribute copies of the work, (4) perform the work publicly, (5) display the work publicly, and (6) if the work is a sound recording, perform the work publicly via digital audio transmission. Copyright infringement thus occurs when a person distributes, reproduces, publicly displays, performs, or creates a derivative work of copyrighted material without the copyright owner’s permission.

107. Profile: Kanye West, FORBES (Feb. 22, 2023), https://www.forbes.com/profile/kanye-west/?sh=5234bcb56f16 (noting that Kanye West’s net worth as of April 21, 2023 is $400 million). Although neither from the Bronx nor a Drill producer, a comparison to Kanye West is still helpful for understanding the disparate ability between mainstream and emerging artists to clear samples.


110. Id.


112. Id.

113. Johnson, supra note 9, at 243.
B. Copyright in Sound Recordings

Copyright protection in sound recordings takes a narrower scope.\textsuperscript{114} Sound recordings are defined as “works that result from the fixation of a series of musical, spoken, or other sounds, but do not include the sounds accompanying a motion picture or other audiovisual work . . . .”\textsuperscript{115} A copyright owner’s only rights in a sound recording are the rights to (1) reproduce the work, (2) make derivative works, (3) distribute copies of the work, and (4) perform the work publicly.\textsuperscript{116}

Most important for a discussion about digital sampling is the limited right of a copyright owner in a sound recording to “prepare derivative works.” The Act defines a “derivative work” as follows:

\begin{quote}
[A] work based upon one or more preexisting works, such as a . . . sound recording, . . . or any other form in which a work may be recast, transformed, or adapted. A work consisting of . . . elaborations, or other modifications which, as a whole, represent an original work of authorship, is a derivative work.\textsuperscript{117}
\end{quote}

With this definition in mind, a digital sample is likely a derivative work of the original sound recording.\textsuperscript{118} This is because when creating or using a digital sample, digital sampling artists take the actual sounds of the original sound recording and alter the pitch, tempo, and sequence of a melody, or may even copy the original sound recording without changes.\textsuperscript{119}

\textsuperscript{114} Id. at 271 (“[S]ection 114(b) operates as a statutory fence that limits the parameters of [copyright owners’] rights.”).

\textsuperscript{115} Copyright Act of 1976, 17 U.S.C. § 101. These protections apply “regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.” Id.

\textsuperscript{116} 17 U.S.C. § 114(a).

\textsuperscript{117} 17 U.S.C. § 101.

\textsuperscript{118} Johnson, supra note 9, at 246.

\textsuperscript{119} For example, Havoc, the producer from the 1990s hip hop duo Mobb Deep, utilized all techniques apart from copying whole cloth. See generally Tracklib, Sample Breakdown: Mobb deep-Shook Ones Pt. II, YOUTUBE (July 16, 2022), https://www.youtube.com/watch?v=Eh0kdRVH9m8. The following citation is to a video that breaks down the various samples used to create hip hop’s arguably most iconic sample in the song “Shook Ones, Pt. II.” Tracklib, Sample Breakdown: Mobb deep-Shook Ones Pt. II, YOUTUBE (July 16, 2022), https://www.youtube.com/watch?v=Eh0kdRVH9m8. The video begins by showing the song and a portion of the song from which Havoc took the drum beat. Id. The video continues
Section 114(b) of The Act further narrows the scope of copyright in sound recordings through three important limitations. First, relative to a sound recording copyright owner’s reproduction right, the copyright owner has the right to duplicate the sound recording only “in the form of copies that directly or indirectly recapture the actual sounds fixed in the recording.”120 Second, concerning a sound recording copyright owner’s right to prepare derivative works, the copyright owner has the right to prepare a derivative work only “in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.”121 Third, a sound recording copyright owner’s right to reproduce and prepare derivative works “[does] 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.”122 Indeed, “mere imitation of a recorded performance would not constitute a copyright infringement even where one performer deliberately sets out to simulate another’s performance as exactly as possible.”123 In the context of the right to prepare derivative works, there would be no infringement of the right to prepare derivative works if a defendant did not “rearrange, remix or alter the actual sounds of the recording.”124

C. Digital Sampling and Clearing Digital Samples

Digital sampling is the “physical copying of sounds from an existing recording for use in a new recording, even if accomplished with slight modifications such as changes to pitch or tempo.”125 Digital sampling artists use digital technology to manipulate sound recordings in infinite ways.126 Digital sampling is generally accomplished by demonstrating how Havoc took Herbie Hancock’s “Jessica” and altered the tempo, pitch, and sequence of the recording to create a new melody. Id.

120. 17 U.S.C. § 114(b).
121. Id.
122. Id.
125. VMG Salsoul, LLC, v. Ciccone, 824 F.3d 871, 875 (9th Cir. 2016).
126. See Newton v. Diamond, 388 F.3d 1189, 1192 (9th Cir. 2004) (noting that analog artists, who were the precursor to digital sampling artists, were limited by the
recording the original sound with a computer and using that copy in a new sound recording.\textsuperscript{127} This practice involves rearranging, remixing, and altering the actual sounds of an original sound recording, sometimes to the extent that listeners cannot easily discern the origin of the original sound recording.\textsuperscript{128}

Because Section 114(b) likely incorporates digital sampling as a derivative work, The Act prohibits a digital sampling artist from using digital samples without first obtaining a license to use the sound recording from the copyright owner.\textsuperscript{129} Obtaining these licenses is a process commonly known as obtaining “clearance,” or “clearing samples.”\textsuperscript{130} A digital sampling artist must obtain two licenses to legally use the desired sample: one license for the underlying musical composition, and another for the sound recording.\textsuperscript{131}

Usually, the copyright owner of the sound recording is the music publishing company or record publishing company.\textsuperscript{132} Accordingly,
the artist wishing to use a copyrighted sound recording must usually negotiate with a music or record publishing company to obtain the rights to use the desired sound recording. The artist may engage a clearing house to negotiate on their behalf or simply negotiate on their own with the support of their record label.

Licensing musical compositions generally results in a co-publishing deal between the copyright owner and the artist wishing to sample the sound recording. Licensing sound recordings is usually accomplished by paying the copyright owner a flat fee. Alternatively, a sound recording copyright owner may prefer a royalty payment arrangement if they believe that the new song sampling the original recording will be successful.

No matter which fee arrangement parties agree upon, the licensing process can become prohibitively expensive, especially for emerging artists. For example, copyright holders regularly ask for flat fees ranging from $100 to $10,000. In addition to the economic expense of clearing samples, the artistic expense to sample sound recordings can impede, or even outweigh, an artist’s ability to make music altogether. While major artists supported by powerful record labels may be able to successfully negotiate sample clearance, emerging or independent artists unsupported by a powerful record label may have much more trouble obtaining clearance. The prohibitively high are often music or record publishing companies. This means that, at least in part, the music and record publishing companies own the copyright in sound recording rather than the artist.

133. Szymanski, supra note 130, at 291.
134. Id. at 290 n.59.
135. Id. at 292–93.
136. Id. at 294.
137. See A. Dean Johnson, supra note 32, at 135–36 n.4.
139. A. Dean Johnson, supra note 32, at 135–36 n.4.
140. Schietinger, supra note 138, at 237. Still, some Bronx Drill producers assert that they are either getting their samples cleared, are in the works of clearing their various samples, or optimistically presume that their samples will get cleared at some point in the future. For example, Bronx Drill producer Cash Cobain asserts that his “big [samples]” are getting cleared. Rose, supra note 23. Other Bronx Drill producers like RIOTUSA optimistically presume that their samples will get cleared, stating that “you can always clear [the sample] later.” Id.
expense of clearing samples may most disproportionately effect marginalized communities and independent artists, like those living in the Bronx who form the Bronx Drill scene. Accordingly, the fair use defense must appropriately capture digital sampling so that Bronx Drill artists can continue to make music.

D. The Fair Use Defense

A copyright owner’s rights are not inherently absolute. Fair use is a doctrine that seeks to limit a copyright owner’s rights. Fair use allows the public to “use copyrighted material without the owner’s permission when the benefits of the use to the public outweigh the private benefits to the copyright holder.” The question of how fair use should apply to digital sampling cases, however, has been contentious within legal scholarship. Fair use generally was also recently the subject of a circuit split in Andy Warhol Foundation for Visual Arts v. Goldsmith. Additionally, the lack of United States caselaw discussing the applicability of fair use to digital sampling cases

141. Johnson, supra note 9, at 259.
143. Id.
144. Compare Vats, supra note 39, at 78 (arguing that “[c]ontinuing to put faith in fair use to support artists of color diminishes the value of their artistic works as standalone products of brilliance, especially given that fair use still tends to disproportionately benefit corporate entities over individual ones”), with Neela Kartha, Digital Sampling and Copyright Law in a Social Context: No More Colorblindness, 14 Univ. Miami Ent. & Sports L. Rev. 218, 240 (1997) (arguing that a broader fair use interpretation would give the rap artist incentive to include “socially conscious lyrics and subject matter” into their music, allowing the artist to “speak[] to the ills of a racist society”).
145. Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith, 11 F.4th 26 (2nd Cir. 2021); see also Brief for Petitioner at *i, Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith, 11 F.4th 26 (2nd Cir. 2021) (No. 21-869), 2021 WL 5913520 (explaining that the Court should grant certiorari to resolve “[w]hether a work of art is ‘transformative’ when it conveys a different meaning or message from its source material [as the Supreme Court of the United States], the Ninth Circuit, and other courts of appeals have held, or whether a court is forbidden from considering the meaning of the accused work where it ‘recognizably deriv[es] from’ its source material (as the Second Circuit has held).”).
further complicates what fair use means in the digital sampling context and how far the defense extends.146

Section 107 of the Copyright Act codifies fair use, and provides four factors that courts must balance when addressing the fair use defense. These factors are:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.147

Courts consider a two-part test when addressing the first factor.148 First, courts consider whether the infringing use is “transformative” by determining whether the work adds something new to the original work, like scholarship, criticism, meaning, or message.149 Second, courts consider whether the infringing work has a commercial or a nonprofit educational purpose.150 Works that are more transformative and are noncommercial weigh in favor of a finding that the secondary work is a fair use of the copyrighted work.151

When addressing the second factor, courts consider whether the original work is more creative or more factual, with creative works

146. Peyton E. Miller, “Good Artists Borrow; Great Artists Steal”: How the Fair Use Doctrine Can Bring Harmony to the Federal Circuits on Digital Sampling, 96 N.C. L. Rev. 1085, 1098 (2018) (reasoning that following one of the earliest digital sampling cases, Grand Upright, few sampling cases made it to litigation, and the ones that did were usually settled out of court); see also Bill Donahue, Ninth Circuit Throws Down the Gauntlet on Music Sampling, LAW360 (June 4, 2016, 5:11 PM) (“If there’s ever going be any real clarity [on how to treat digital sampling], the Supreme Court needs to review the issue . . . Right now, we have two federal circuits with two very different rulings on the exact same kind of sampling.”).
148. Miller, supra note 146, at 1115.
150. Id. at 1219. See also Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994) (“[T]he mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness.”).
151. Campbell, 510 U.S. at 579.
being afforded more copyright protection. Fair use’s application throughout history, however, demonstrates that this inquiry has changed substantially since the original question addressed in *Folsom v. Marsh*. In *Folsom*, Justice Story opined that a fair use analysis requires inquiry into the relationship between the copyright owner and the work they produced. After fair use was codified in Section 107, the Supreme Court in *Harper & Row v. Nation Enterprises* limited the inquiry under the second factor to whether the work is (1) published or unpublished, and (2) creative or factual. Unpublished and creative original works have greater protection under fair use.

When addressing the third factor, courts consider the amount of the original work used in the infringing work relative to the copyrighted work as a whole. This inquiry requires qualitative and quantitative analysis. Courts consider not only the amount of the copyrighted work that was copied, but also its importance to the copyrighted work. If the infringing work copies the qualitative “heart” of the original, the infringing work is less likely to be a fair use.

152. Miller, *supra* note 146, at 1119.
153. Reed, *supra* note 142, at 1406. This 1841 case is regarded as fair use’s origin. *Id.*
154. *Id.* See also *Folsom v. Marsh*, 9 F. Cas. 342, 349 (C.C. D. Mass 1841) (No. 4,901).
156. *Campbell*, 510 U.S. at 586.
158. *Campbell*, 510 U.S. at 587.
159. *Id.*
160. *Id.* For example, the Court in *Harper & Row Publishers, Inc. v. Nation Enterprises* found that the taking involved in that case—purportedly “infintessimal” copies of quotes and excerpts from an unpublished book—was qualitatively substantial because of their overall importance to the unpublished book. 471 U.S. at 564–65 (1985). Similarly, in a case in the Southern District of New York, the court quoted the trial judge to clarify its findings that the copied portion of Charlie Chaplin films was qualitatively substantial: “I would think there would be a substantial taking of “Gone With the Wind” if somebody just took the burning of Atlanta . . . ten or fifteen minutes of a three or four hour movie.” *Roy Exp. Co. Establishment of Vaduz, Liechhenstein, Black Inc. v. Columbia Broad. Sys. Inc.*, 503 F. Supp 1137, 1145 (S.D.N.Y. 1980).
Finally, when addressing the fourth factor, courts consider whether the infringing work supplants the original as a market substitute. Particularly important for courts is whether the new work merely suppresses demand for the original or usurps it. Uses that usurp demand for the original weigh against a finding of fair use.

Notwithstanding the Supreme Court’s recent decision concerning fair use in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, United States courts should continue to reframe the understanding of fair use’s first and second factors. Concerning the first factor, courts should focus less on the transformative aspect of the use and more on the purpose of the use. That is, what end the use serves beyond the commercial/non-profit distinction. Concerning the second factor, courts should develop what has been called the “forgotten factor,” which is the nature of the copyrighted work. By refocusing the fair use analysis on the purpose of the use and the nature of the copyrighted work, courts can begin to make reparations for copyright law’s exclusion of Black artists. Such a framework may work toward a post-reparations United States. Ultimately, this revised fair use analysis will allow Black digital sampling artists like Bronx Drill artists to reclaim territory in a musical space from which they have historically been excluded.

E. The Courts’ Applications

Few cases have discussed the legal implications of digital sampling. Even fewer have squarely addressed fair use in the digital sampling context. Among the courts that have discussed digital sampling is a circuit split, and neither court addressed the applicability of fair use to digital sampling. Moreover, uncertainty remains as to whether fair

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161. Miller, supra note 146, at 1121–23.
162. *Campbell*, 510 U.S. at 592.
163. Id. at 590.
164. Reed, supra note 142, at 1380. The phrase “forgotten factor” was coined by the author of the source, Trevor Reed, an Associate Professor of Law at Sandra Day O’Connor College of Law. *Id.*
165. Compare VMG Salsoul, LLC, v. Ciccone, 824 F.3d 871, 887 (9th Cir. 2016) (allowing a de minimis defense against a copyright infringement claim in sound recording), *with* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 798 (6th
use is a viable defense amongst the courts that have discussed the fair use defense in the digital sampling context; these holdings make clear that fair use may be a meritorious defense in digital sampling cases, but remains an unpredictable legal doctrine at best, and at worst, a hopeless defense for digital sampling artists.166 This section will discuss the relevant cases in turn.

In Bridgeport Music, Inc. v. Dimension Films, the Sixth Circuit Court of Appeals considered whether using seven seconds of a sound recording without a license is actionable in a copyright infringement claim.167 Reversing the district court, the Sixth Circuit held that no de minimis defense applies to copyright infringement claims in sound recordings.168 The court there tellingly wrote, “[g]et a license or do not sample,” reasoning that (1) an artist could recreate the sound instead of sampling it, (2) sampling is always an intentional taking, and (3) obtaining a license would be cheaper than litigating the issue.169

In VMG Salsoul, LLC, v. Ciccone, the Ninth Circuit Court of Appeals considered whether the unlicensed use of .23-seconds of a sound recording was actionable in a copyright infringement claim.170 The court rested its reasoning on the well-established principle that “infringement occurs only when a substantial portion is copied.”171

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168. Id. at 802 (characterizing the de minimis test as applied to sound recording copyright infringement cases as requiring “mental, musicological, and technological gymnastics”); see also id. at 810 n.10 (“[I]t does not matter how much a digital sampler alters the actual sounds . . . [Section 114(b)] by its own terms precludes the use of a substantial similarity test.”).

169. Id. at 801–02.

170. VMG Salsoul, LLC, 824 F.3d at 874. The sound recording in question in this case was a trombone and trumpet horn hit. Id. at 876.

171. Id. at 880.
Recognizing a departure from the Sixth Circuit’s holding in *Bridgeport Music, Inc.*, the court held that a *de minimis* exception applies to copyright infringement claims concerning copyrighted sound recordings, such that sampling the .23-second horn hit without a license did not amount to infringement. 172

Neither *Bridgeport Music, Inc.*, nor *VMG Salsoul* addressed the fair use defense in the context of the claims in those cases. 173 *Estate of Barré v. Carter*, however, did address fair use as applied to digital sampling. 174 In this case, the District Court for the Eastern District of Louisiana considered whether the defendants could assert the fair use defense against a copyright infringement claim involving digital sampling. 175 The plaintiff was the heir of Anthony Barré, a “well-known performance comedian and music artist in New Orleans,” and the defendant was Beyoncé. 176 The digital sample in controversy involved Beyoncé’s unlicensed use of three phrases from two YouTube videos posted by Anthony Barré. 177 Beyoncé moved to dismiss the copyright infringement claim on the grounds that her unlicensed uses of the sound recordings from Barré’s videos were fair use. 178 Relying on *Bridgeport Music, Inc.*, the plaintiff asserted that fair use did not apply to digital sampling cases involving sound recordings. 179 The court rejected the plaintiff’s argument, but ultimately held that the fair use factors weighed against a finding of fair use. 180

172. *Id.* at 886–87.
173. Because the district court in *Bridgeport* found no infringement in the first instance, the district court did not consider the fair use and neither did the circuit court. The circuit court did acknowledge that the trial judge was free to address fair use on remand. *Bridgeport Music, Inc.*, 410 F.3d at 805.
175. *Id.* at 930.
176. *Id.* at 911–12.
177. *Id.*
178. *Id.* at 928.
179. *Id.* at 930.
180. *Id.* at 930, 940. Concerning the first factor, the court reasoned that the defendant did not “[add] something new, with a further purpose or different character,” to the sound recording. *Id.* at 932. Concerning the second factor, the court reasoned that while it was published, and therefore warranted less protection under fair use, the plaintiff’s copyrighted work was sufficiently creative for the second factor to weigh against fair use. *Id.* at 935. Concerning the third factor, the court reasoned that the defendant sampled the “heart” of the copyrighted sound recording, thus
Another case, Frisby v. Sony Music Entertainment, arises out of a set of unusual facts. Frisby, the plaintiff, created recorded beats which he sold to recording artists. In 2013, Frisby created a recorded beat titled “Shawty So Cold,” which contained an unlicensed sample of the sound recording from the song “Swing My Way.” In 2015, two artists who were members of Sony Music Entertainment (“Sony Music”) created a song that used a licensed sample of the same portion of the sound recording from “Swing My Way” that Frisby had used in “Shawty So Cold.” Frisby sued Sony Music for sound recording copyright infringement, and Sony Music moved for summary judgment asserting that Frisby had no valid copyright in the unlicensed sample that he used. Frisby then used the fair use doctrine to assert that his unlicensed use of the sound recording from “Swing My Way” was fair use, thus creating a derivative work that vested in him copyright protection. The court held that all four factors weighed against a finding of fair use, attributing particular importance to fair use’s transformative factor. Reasoning that the plaintiff’s sampling techniques were “commonplace” and not “particularly novel or unique,” the court held that the plaintiff’s unlicensed use of “Swing My Way” was not transformative. Yet, the court’s analysis on this point was misguided. Indeed, the transformative factor does not assess the

weighing against a finding of fair use. Id. at 937. The court did not analyze the fourth factor because the plaintiff did not raise the issue in the complaint but reasoned that since the other factors weighed against fair use, the plaintiff overcame the defendant’s fair use defense. Id. at 939.

182. Id.
183. Id.
184. Id. at *11.
185. Id. at *13. The court in this case was unpersuaded by such a procedural posture. Id. The court explained that other plaintiffs have attempted to use fair use as an “offensive strategy,” but Congress did not contemplate such a strategy in codifying fair use. Id. at *18.
186. Id. at *18.
188. Id. The plaintiff’s sampling techniques included speeding up tempo and pitch, and adding drums, bass, and hi-hats. Id.
techniques used to transform the copyrighted work, but rather considers whether the techniques used, whatever they may be, sufficiently transformed the copyrighted work. The court’s unwillingness to find digital sampling as transformative in Frisby emphasizes that fair use as currently applied by the courts fails to protect digital sampling. Moreover, a Black musician was once again harmed by copyright law as a result of a court’s decision. Such harm deserves reparation.

III. WORKING TOWARDS REPARATIONS

Dominant understandings of copyright law tend to render fair use an untenable defense in digital sampling cases. Anjali Vats asserts that fair use is not an adequate mechanism to further social justice through protecting Black artists’ digital sampling. Yet, another scholar’s suggestion—that courts should consider “what a copyrighted work is from the point of view of the community that creates it” to protect appropriations of indigenous works—solves in part fair use’s failure to provide “musical racial justice.” Reparations for the harm copyright has exacted on Black musicians requires recognizing Black musicians’ brilliance and contributions to American musical culture. This can be accomplished by giving Black digital sampling artists heightened protection via a revised fair use analysis. Because the “mass appropriation” of Black musical

189. Id. See also 17 U.S.C. § 107(1); Google, LLC v. Oracle America, Inc., 141 S. Ct. 1183, 1203 (2021) (noting that “purpose and character” addressed in section 107(1) must be closely scrutinized in order to conclude whether the new work is “transformative” or goes beyond replication, and adds new value, meaning, or purpose to the original work).

190. Vats, supra note 39, at 69–71 (criticizing copyright scholars’ overreliance on fair use relative to instances of “Black musical innovation”).

191. Id.

192. Reed, supra note 142, at 1381. Anjali Vats describes problems of “musical racial justice” due to white artists’ and music industry executives’ “mass appropriation” of Black musical creation. Vats, supra note 39, at 71. For a deeper discussion into the “mass appropriation” of Black musical creation, see Greene, supra note 11, at 1194–201.

193. Vats, supra note 39, at 89–92 (“Treating Black brilliance as axiomatic in copyright infringement cases is an approach to doing so, as is centering Black understandings of authorship.”).

194. Id. at 71 (citing Greene, supra note 20, at 1179–1227).
creation was anything but fair, use of copyrighted works by Black
digital sampling artists must be fair use.

A. Reparations, Briefly

This Comment does not intend to outline the history of the
reparations debate, nor its benefits or drawbacks. Rather, this
Comment presumes that an argument favoring reparations for Black
Americans is self-evident. Nonetheless, a brief explanation of
reparations is necessary to understand how revising copyright’s fair use
analysis constitutes one form of reparations.

The justification for reparations supports a broad definition of what
may constitute reparations. For example, the argument supporting
reparations for Black Americans generally focuses on compensation for
the historical appropriation of enslaved African labor. Reparations
are thus commonly understood as a monetary payment to Black
Americans. Such payments may take form as a direct payment to
individual Black Americans, or as a distribution of funds to the poorest
Black communities.

Reparations, however, need not be in the form of monetary
payments. Indeed, broadly understood, “[r]eparations as a norm seeks
to redress government-sanctioned persecution and oppression of a
group.” Therefore, any act that redresses such “government
sanctioned . . . oppression” may be considered reparations. For
purposes of this Comment, “government-sanctioned . . . oppression” is
the “harm” that copyright laws exact on Black musicians, and the
“group” is Black musicians. Accordingly, reparations in the
copyright context may take any form that redresses the harm caused by
copyright’s failure to protect Black musicians.

195. For a more in-depth discussion concerning the history of reparations, its
justifications, and its drawbacks, see Greene, supra note 11, at 1211–25.
196. See Adjoa A. Aiyetoro, The Development of the Movement for Reparations
for African Descendants, 3 J. L. in SOC’Y 133, 133 (2002).
197. Greene, supra note 11, at 1211.
198. Robert Westley, Many Billions Gone: Is It Time To Reconsider the Case
199. See discussion supra Part II.E.
Southwestern Law School Professor, Kevin J. Greene recognizes the viability of reparations in the copyright context. Greene proposes to solve the problem of reparations in the copyright context through an apparent economic approach. Greene’s proposal involves generating funds from two new tax sources: (1) internet music downloads, and (2) works extended by the Copyright Term Extension Act. Greene suggests that the funds generated from these two tax sources could be paid to artists individually, or to charitable groups that develop music and education. Therefore, Greene proposes to issue reparations through monetary payments, which appears to be a squarely economic approach.

This Comment, however, does not consider an economic approach to reparations. This Comment proposes that by revising the fair use analysis through judicial interpretation, digital sampling artists may be afforded bolstered fair use defense in copyright infringement cases involving digital sampling, thus serving as a form of reparations. Indeed, digital sampling is a Black art form, and Bronx Drill producers are predominantly, if not exclusively, Black. Accordingly, the suggested revisions to fair use outlined in this Comment would directly benefit Bronx Drill producers in copyright infringement cases by providing them with a more viable fair use defense. Ultimately, the result of this Comment’s proposals would redress in part the “government-sanctioned . . . oppression” of Black musicians.

B. Proposed Revisions to the Fair Use Analysis

To issue reparations, this Comment proposes that the first two fair use factors be revised through judicial interpretation. First, courts should reframe the first factor of a fair use analysis by focusing more on the greater social purpose an infringing digital sample serves. Second, a court’s analysis under the second factor should inquire into the extent that the digital sampling artist’s culture is responsible for creating the copyrighted original work. Each proposed revision will be discussed in turn.

200. See Greene, supra note 20, at 1226 (“The reparations debate focuses on measurable harms to the Black community, and [intellectual property] claims should be an appropriate focus within those broader claims.”).

201. Id. at 1223.

202. Id. at 1223–24.

203. Id. at 1223.

204. Westley, supra note 198, at 473.
1. First Factor: Broadening the Concept of “Purpose”

Courts’ current application of the first fair use factor is inadequate. The first fair use factor requires courts to consider the “purpose and character” of the infringing use.\(^{205}\) Courts focus the first factor’s analysis on whether the infringing work has a sufficiently transformative character and whether the infringing work serves a commercial or non-profit purpose.\(^{206}\) As discussed in Part II, cases that consider fair use in the digital sampling context routinely hold that fair use’s first factor weighs against a finding of fair use.\(^{207}\) Accordingly, copyright law continues to leave Black musicians without adequate protection for their creations.

The courts’ analyses of an infringing work’s “purpose” take too narrow a scope, while the transformative factor, as courts apply it, fails to adequately capture digital sampling. First, the analysis concerning “purpose” is plainly too narrow because it focuses on only the commercial/non-profit distinction. Second, although digital sampling is inherently transformative, courts tend to rule against digital sampling artists on the transformative factor, reasoning that if a digital sampling technique is not novel enough, the digital sample is not transformative.\(^{208}\) This analysis is inappropriate because it gives more protection to the first person using the sampling technique, thereby diminishing the value and brilliance of all subsequent digital samplers who use the same or similar techniques.

Courts should instead focus more heavily on the “purpose” of the infringing work when analyzing the first fair use factor. Specifically, the “purpose” of an infringing digital sample should be analyzed relative to the infringing digital sampler’s attempt to remake and thus reclaim an original copyrighted work. For example, Anjali Vats describes how hip hop emerged from a remaking of “‘white’ music, which was in truth a retooling of Black sonic cultures . . . .”\(^{209}\)

\(^{205}\) 17 U.S.C. § 107(1).


\(^{208}\) See Frisby, 2021 WL 2325646, at *17.

\(^{209}\) Vats, supra note 39, at 73.
emerged from Grandmaster Flash’s analog sampling, and the process of sampling essentially remade the “white music” that remade Black music. This remaking applies to current digital sampling trends. Simply put, digital sampling is a transformative technique that reclaims that which was originally appropriated from Black musicians in the early to mid-twentieth century.

Bronx Drill producers exemplify the remaking that Vats describes. As discussed in this Comment’s introduction, Bronx Drill producers create a “nostalgic-yet-modern sound.” Presumably, the genre’s nostalgia comes from the samples that the producers use. For example, Bronx Drill artists like Kayflock sampled the hit “Somebody That I Used to Know” by Gotye, while Ice Spice’s producer RIOTUSA sampled Zedd’s 2012 hit, “Clarity.” By remaking hits from a prior era, Bronx Drill producers reclaim what had been historically appropriated from Black musicians like them, namely American music’s most popular genres.

Accordingly, this Comment proposes that courts should broaden the meaning of “purpose” when considering the first fair use factor in digital sampling cases. A court can interpret the meaning of “purpose” by considering what greater social purpose the infringing work serves. For example, courts may consider whether the social purpose of a Black digital sampler’s infringing work is to engage in the act of remaking and reclaiming what has been described above. To do so, courts must situate the act of digital sampling within the historical-legal context of the appropriation of Black music by white musicians. As a result, courts can decide whether the Black digital sampling artist is reclaiming music that historically belongs to Black culture. If the answer to this question is yes, courts should find that fair use’s first factor weighs in

210. Rose, supra note 23.
212. This type of historical analysis leaves quite a bit of room for judicial interpretations. Perhaps the most helpful for judges to understand the historical nuances of music creation would be expert testimony on current musical trends and the origin of the musical genre from which any allegedly infringing samples are used.
favor of the digital sampler. If and when Bronx Drill producers face copyright infringement claims, such a finding will bolster their fair use defense if used. Bolstering fair use in these cases would ultimately serve as one form of reparations for the harm U.S. copyright law has exacted upon Black musicians.

2. Second Factor: Emphasizing Digital Samplings’ Cultural Foundation

The second fair use factor is as equally inadequate as the first. The second factor requires courts to consider the nature of the copyrighted work, which tends to be reduced to whether the copyrighted work is creative or factual. This inquiry as currently framed will always be resolved against a digital sampling artist because copyrighted musical works are indisputably creative works.

Courts should reframe how analysis under the second factor proceeds. This Comment suggests that for the second fair use factor, courts should consider the relationship between the copyrighted work and the infringing digital sampling artist’s connection to the culture that originally influenced the creation of the work. Trevor Reed’s suggestion, that courts should ground their analyses under the second factor in the copyrighted work’s ontology, provides guidance here.

213. 17 U.S.C. § 107(2); see e.g., Estate of Barré v. Carter, 272 F. Supp. 3d 906, 934–35 (E.D. La. 2017) (“Courts have typically looked to two considerations of the work when analyzing the second factor: (1) whether the work is more creative or factual in nature; and (2) whether the work is published or unpublished.”).


215. Reed, supra note 142, at 1429. Here, Trevor Reed describes some considerations a court should focus on to analyze the “ontological nature of the work.” Such considerations include: (1) the original work’s “inputs and mode of production, such as remixing existing cultural materials, adding new content to current cultural forms, or synthesizing abstract artistic motifs”; (2) “how the work functions within its creative networks and . . . whether the work is . . . an object to be contemplated by others, a means of communicating an idea, a mode of governmental proceeding, or an expressive tool meant to cause an effect”; and (3) “how the work’s creativity is valued within those networks, . . . [including] whether the work is an asset within a film
Addressing appropriations of indigenous works, Reed’s approach to the second factor appears to be forward-looking. That is, it attempts to prevent future unlicensed uses of indigenous artistic expression to the extent that the original indigenous work is sufficiently embedded within the indigenous culture. This Comment, however, proposes an approach that is backward-looking. That is, it attempts to approve of unlicensed uses of copyrighted music to the extent that the copyrighted music owes its existence to the culture that uses it without a license.

For Bronx Drill producers, the question courts should ask becomes: to what extent does the copyrighted work a Bronx Drill producer samples owe its existence to Black musical culture? Courts may resolve this question by recognizing the significant extent to which American music owes its existence to the white appropriation of Black music. For example, as discussed in Part I, this Comment contends that American music is, at its core, Black music. This is due to the fact that Black musicians have contributed more to American music than any other racial or ethnic group. Indeed, relative to jazz music, “[a]ll the White [musicians] did was bring jazz to the mainstream.” The same can be said about any subsequent development of popular American music.

Accordingly, when a Black digital sampling artist samples a white artist’s music, analysis under fair use’s second factor should recognize

216. Reed, supra note 142, at 1381 (“This argues that [fair use’s second factor] has the potential to play a pivotal role in providing more robust protections to copyrightable Indigenous works.”); see also id. at 1373 (characterizing fair use as a “gatekeeping” mechanism to prevent “unauthorized uses of culture, particularly that of Indigenous peoples.”).

217. See, e.g., Greene, supra note 11, at 361; Greene, supra note 20, at 1188 (“[T]he early [American] music industry was built largely on the creativity and innovation of black composers and artists. Black composers and performers created virtually every original American musical genre and profoundly influenced the development of popular music and culture.”) (emphasis added).

218. Greene, supra note 20, at 1188–89 (quoting JAMES LINCOLN COLLIER, THE MAKING OF JAZZ: A COMPREHENSIVE HISTORY 139 (1978)).

219. See Vats, supra note 39, at 73 (recognizing that popular music that came just before the advent of hip hop was “white” music, which was really retooled Black music, like “ragtime, blues jazz, and rock”).
that the digital sampling artist is essentially sampling music that owes its very existence to the digital sampling artist’s culture. In analyzing fair use’s second factor, a court should consider the chain linking Black music to white music, and back to Black music, giving special attention to whether the copyrighted work’s existence depends on the Black digital sampling artist’s cultural contributions to American music. If courts determine that the link connecting the Black digital sampling artist’s culture to the copyrighted work’s foundation for existing is more than tenuous, courts should resolve the second factor in favor of the digital sampler. Such a result would allow emerging Bronx Drill producers to capitalize on their cultural heritage’s responsibility for creating American music. Further, this result may be a form of reparations for copyright’s historic failure to protect Black musicians.

CONCLUSION

Using the proposals this Comment promotes fair use as a viable legal option to issue reparations to Black Americans. Additionally, Bronx Drill provides fertile grounds for courts to implement this Comment’s proposals to issue such reparations. Implementing this Comment’s proposals would be a daunting and undoubtedly controversial task; yet U.S. courts have the authority to take the first step toward making meaningful reparations without any legislative action. Indeed, fair use gives U.S. courts leeway to reframe the analysis under the first two factors in accordance with this Comment’s suggestions. Legal scholarship should continue to discuss viable options for reparations in the copyright context to lessen the courts’ burden of deciding how to adequately proceed.

“Reparations” provokes intensely conflicting viewpoints. Understanding how a revised fair use analysis provides a sufficient form of reparations, however, may stimulate more receptivity to reparations amongst its opponents. For example, economic reparations may seem untimely, result in compensating disagreeing recipients, or place the blame for slavery on truly blameless parties. Alternatively,}

220. See Jerry K. Frye, The “Black Manifesto” and the Tactic of Objectification, 5 J. BLACK STUD. 65, 69 (1974) (noting that Black activist Bayard Rustin vehemently opposed reparations, with Rustin himself having explained that “[t]he idea of reparations is a ridiculous idea. If my great-grandfather picked cotton for [fifty] years,
the form of reparations this Comment suggests requires mere concession of greater legal protection to Black digital sampling artists who defend against copyright infringement claims. This proposal, moreover, is narrow because it applies only to digital sampling. Fair use would also still have to be assessed as a whole, which means this Comment’s proposals for revising fair use are tempered by the fact that fair use itself is a balancing test.

Ultimately, copyright’s failure to protect Black musicians is worthy of reparation. Black musicians have indisputably contributed overwhelming benefits to American culture, including the creation of many of America’s most popular musical genres. Hip hop and the proliferation of digital sampling are no exceptions. Yet, copyright’s failure to protect Black musicians and Black digital sampling artists reveals that current understandings of U.S. copyright law fail to value those contributions. Reframing the fair use analysis is one way that courts can recognize Black musicians’ contributions to American musical culture. Further, reframing fair use will allow courts to take the first step in repairing the harm copyright law has historically inflicted on Black musicians. American music owes its existence to Black musicians, and legal recognition of that assertion is warranted.

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then he may deserve some money, but he’s dead and gone and nobody owes me anything.”

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