

BEFORE THE  
DEPARTMENT OF COMMERCE  
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

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Request for Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and  
Innovation in the Digital Economy

**REGARDING REFORMING STATUTORY DAMAGES FOR TRANSFORMATIVE USES**

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COMMENTS OF  
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Remixing, sampling and other transformative activities advance creativity and innovation in the arts. But, in recent years, the strictures of copyright law have made such practices increasingly risky by subjecting them to the potential of massive liability. As a consequence, the arts have suffered. But, fortunately, this malaise is not incurable. This Public Comment in response to the Department of Commerce's Internet Policy Task Force *Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy* proposes specific changes to the liability regime in copyright, particularly as it pertains to transformative uses such as remixing and sampling, in order to revitalize the arts.

Policy choices in modern copyright law have resulted in ill-designed interventions into the organic functioning of the creative and expressive marketplace. Outmoded statutes (the last wholesale revision to the Copyright Act took place in 1976) and troubling court holdings have combined to suppress innovation—not just in hip-hop and music, but in the arts as a whole. We propose a legislative solution that applies free-market principles that already inform the rest of our legal code. Moreover, this solution benefits artists, musicians, writers, directors, and the general public as a whole. And lastly, it's a solution that hews closely to the constitutional purpose of copyright—something that the United States has veered dramatically away from in recent years.

### *Copyright's Remix/Sampling Problem: The Example of Hip-Hop*

In 2002, *Stay Free Magazine* interviewed Chuck D of Public Enemy and his producer, Hank Shocklee, to get their take on the practice of sampling and its legal status. When asked whether it would be possible today to make a record like *It Takes a Nation of Millions to Hold Us Back*, which featured hundreds of samples, Shocklee remarked<sup>1</sup> that “It wouldn't be impossible. It would just be very, very costly. . . Now you're looking at *one song costing you more than half of what you would make on your album.*” Chuck D added that the noticeable difference in Public Enemy's sound between 1988 and 1991

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<sup>1</sup> Kembrew McLeod, *How Copyright Law Changed Hip Hop: An Interview with Public Enemy's Chuck D and Hank Shocklee*, *Stay Free!*, Issue 20, Fall 2002, at 24, available at: [http://www.stayfreemagazine.org/archives/20/public\\_enemy.html](http://www.stayfreemagazine.org/archives/20/public_enemy.html).

was a direct product of the sampling lawsuits that occurred at the time: “Public Enemy's music was affected more than anybody's because we were taking thousands of sounds. . . we had to change our whole style, the style of *It Takes a Nation* and *Fear of a Black Planet*, by 1991.”

Erik Nielson’s *Atlantic* piece explains the stark change: “[L]andmark albums such as De La Soul’s *Three Feet High and Rising* and Public Enemy’s *It Takes a Nation of Millions to Hold Us Back*, built upon a dizzying array of samples, soon became all but impossible to produce because of the costs involved.” Nielson concludes that “[t]o this day, sample-based rap remains a shadow of its former self, practiced only by hip hop’s elite—those with the budgets to clear increasingly expensive samples or defend lawsuits<sup>2</sup> when they don’t.” The liability for these classic hip-hop works is still piling up. Just weeks ago, the copyright holders to Sly Johnson’s 1967 song *Different Strokes* sued<sup>3</sup> Public Enemy, Run-D.M.C., Marc Wahlberg, Usher and others for unauthorized sampling of the song in their works, many of which are now several decades old.

As Neilson’s piece and Shocklee’s interview allude to, bad case law and crippling liability have contributed to the current malaise in hip-hop. 1991 marked the issuance of the first reported decision to consider the legality of sampling. The judge resolved<sup>4</sup> the issue by quoting Exodus and sophistically equating the Seventh Commandment with the law of copyright. “Thou shalt not steal.” More recently, a federal appellate court held<sup>5</sup> that any unauthorized sample of a sound recording, no matter how small, constituted copyright infringement: “Get a license or do not sample.”

Not all courts have found liability against unauthorized samplers. But many have, making it difficult for artists to reliably count on a defense of “fair use”—a legal doctrine that allows for segments of works to be repurposed without permission from rights holders, particularly in the case of new uses that are deemed transformative. To avoid any specter of liability, record labels have pushed artists to be

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<sup>2</sup> Devon Maloney, *Jay-Z and Kanye West Settle Syl Johnson Suit, Sell Non-Working Maybach*, Spin Magazine (March 12, 2012), available at [www.spin.com/articles/jay-z-and-kanye-west-settle-syl-johnson-suit-sell-non-working-maybach/](http://www.spin.com/articles/jay-z-and-kanye-west-settle-syl-johnson-suit-sell-non-working-maybach/).

<sup>3</sup> Tim Kenneally, *Usher, Mark Wahlberg, Run-D.M.C. and More Slapped With Copyright Infringement Lawsuit*, The Wrap (October 2, 2013), available at [www.thewrap.com/usher-mark-wahlberg-run-dmc-sued-copyright-infringement-different-strokes](http://www.thewrap.com/usher-mark-wahlberg-run-dmc-sued-copyright-infringement-different-strokes).

<sup>4</sup> *Grand Upright v. Warner*, 780 F. Supp. 182 (S.D.N.Y. 1991), available at [mcir.usc.edu/cases/1990-1999/Pages/granduprightwarner.html](http://mcir.usc.edu/cases/1990-1999/Pages/granduprightwarner.html).

<sup>5</sup> *Bridgeport Music v. Dimension Films, et al.*, 410 F. 3d 792 (6th Cir. 2005), available at [mcir.usc.edu/cases/2000-2009/Pages/bridgeportdimension.html](http://mcir.usc.edu/cases/2000-2009/Pages/bridgeportdimension.html).

incredibly conservative in their practices, such that they will not release records with unlicensed samples, even if there is a legitimate fair use argument for it.

William Patry, author of one of the leading treatises on copyright law, explains the problematic consequences of current law:

The result of this terrible decision has been an unwillingness of record companies to put out albums unless each and every sample is cleared. Producers of records must certify that all samples have been licensed . . . previous hip-hop albums used hundreds (and sometimes thousands) of samples, licensing that number of samples is out of the question due to financial and transactional cost reasons. As a result, the creative process of hip-hop has changed.<sup>6</sup>

*Paul's Boutique* by the Beastie Boys came out in 1989 and it is considered one of the most influential and innovative hip-hop albums of all time. It featured more than 300 samples—some of them unlicensed. This level of sampling led to a unique final product. As Mike Simpson, who produced the album, explained, “What we were doing was making entire songs out of samples taken from various different sources. On *Paul's Boutique* everything was a collage.”

Today, Simpson notes<sup>7</sup>, clearing all necessary samples would be “unthinkable.” Professor Jason Mazzone estimates<sup>8</sup> that the current cost of obtaining clearances, along with finding and tracking down every single artist, would amount to over \$3 million. *Paul's Boutique* could never be affordably created under the existing legal regime.

### *Impediments to Sampling and Transformative Use Impact the Entire Creative Marketplace*

Innovators inevitably stand on the shoulders of those who came before them, and laws that restrict the inherently iterative process of creation ultimately harm the robustness of the arts. Consider Public Enemy’s *Don’t Believe the Hype* from 1988, a work that would have been economically

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<sup>6</sup> WILLIAM PATRY, HOW TO FIX COPYRIGHT 93 (2012).

<sup>7</sup> Paul Tingen, *The Dust Brother: Sampling, Remixing & The Boat Studio*, Sound on Sound (May 2005), available at [www.soundonsound.com/sos/may05/articles/dust.htm](http://www.soundonsound.com/sos/may05/articles/dust.htm).

<sup>8</sup> *BLS Law Notes*, THE MAGAZINE OF BROOKLYN LAW SCHOOL, Vol.16, No.2 (Fall 2011), available at [www.herrick.com/siteFiles/News/C49CC36483AA2D538BD4AE8F3A30CBD7.pdf](http://www.herrick.com/siteFiles/News/C49CC36483AA2D538BD4AE8F3A30CBD7.pdf).

prohibitive to produce in the wake of the recent case law on sampling. The song itself builds on the work of at least seven different artists, including James Brown, who are sampled through the course of the track. But the song itself wasn't merely taking; it was giving too—and not just to fans of rap and hip-hop. In fact, *Don't Believe the Hype* has itself been sampled by at least 47 other songs.<sup>9</sup> A wide array of artists, from the expected (The Game, N.W.A. and the Roots) to the unexpected (U2, Weezer and the unforgettable Milli Vanilli) have used the track to create their own works.

Sampling is therefore not merely the pastime of a few young college students residing in dorms tinkering with their turntables. Instead, it is an essential part of the cohesive tissue that connects music and people together as part of our shared culture. And it is a part of rich, referential practice that has long fueled innovation in all forms of content creation. Long before sampling ever became viable, writer Donald Barthelme highlighted<sup>10</sup> the power of mash-ups, pastiche, juxtapositions and appropriation. The ultimate tool of the genius, he wrote, is rubber cement.

The law has taken the tool of rubber cement out of the hands of musicians. And it's not just copyright experts who are concerned by this. Musicians have also identified the substantial impact of the law on their artistic decisions. Explaining why his 2005 album, *Guero*, relied less extensively on sampling than earlier recordings, Beck acknowledged that:

There's a lot of fun in sampling, and the sampling that we did do was a lot of fun and sparked a lot of creativity, but I think now it's a little bit prohibitive to sample. It's just so damn expensive, and it's such a hassle trying to clear things. As far as sampling goes, it's an interesting area these days, because it's definitely been dying out. It hasn't been arranged in a way where it's workable for musicians to do it."<sup>11</sup>

As DJ Earworm, a noted mash-up artist, explained to one of us in a recent interview, even well-financed artists are only able to afford one or two samples, at best, these days. If DJ Earworm were to sell his *SummerMash '13*<sup>12</sup> as an MP3 or CD, for example, the sampling clearances would likely cost him far more than any money he might ever earn from his sales.

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<sup>9</sup> Who Sampled, *Don't Believe the Hype*, available at [www.whosampled.com/Public-Enemy/Don%27t-Believe-the-Hype/sampled/](http://www.whosampled.com/Public-Enemy/Don%27t-Believe-the-Hype/sampled/).

<sup>10</sup> <http://withhiddennoise.net/2007/12/17/tools-of-the-genius/>.

<sup>11</sup> JASON MAZZONE, COPYFRAUD 61 (2011).

<sup>12</sup> DJ Earworm, *SummerMash 2013*, available at [https://www.youtube.com/watch?feature=player\\_detailpage&v=\\_g0cYLVrCz4](https://www.youtube.com/watch?feature=player_detailpage&v=_g0cYLVrCz4).

DJ Earworm is not just some rogue musician. In 2013, the organizers of the Grammys asked him to produce the award show's opening sequence on television. They recognized the transformative artistry of what he does with pre-existing recorded materials. Yet, ironically, the Grammy Foundation is closely aligned with the RIAA, which has actively lobbied for restrictive laws that make sampling (when it's not done at their request and for their broadcast benefit) punishable with severe civil penalties. The RIAA has a licensing information section on its website,<sup>13</sup> presumably for artists and the public, where it warns: "generally speaking, the use of any part of a song requires a license." The MPAA, for its part, is similarly dismissive of any right to use copyrighted materials without permission. In fact, it has repeatedly resisted the very concept of "fair use" as a part of copyright law:

There is no fair use to take something that doesn't belong to you. That's not fair use. [A teacher can fast-forward a movie in class] and there's no performance fee for that. That's fair use. Now, fair use is not in the law. People are taking fair use and changing it to unfair use and claiming that it's fair use. (Jack Valenti,<sup>14</sup> former President of the MPAA)

When viewed in both comparative and historical contexts, the practical inability of modern artists to make use of the raw materials of their musical progenitors is nothing short of striking. Warhol could draw on the iconography of Marilyn, Mao, Marlon, and Mohammed. Elvis Presley and Led Zeppelin could riff on the rhythm and blues of their youth. Marcel Duchamp could take Da Vinci's *Mona Lisa* and turn her into the mustachioed subject of ribald word play (*L.H.O.O.Q.*). And, luckily, courts have not yet taken away the ability of writers to quote the words of others.

Imagine how feeble and constrained intellectual debate would become if essayists, polemicists and academics were foreclosed by copyright law from quoting the works of others without authorization and payment (sadly, in recent years, there have even been some issues<sup>15</sup> on this front as well).

Music sampling is a form of "quoting" the music of others in the process of creating one's own compositions and sound recordings. Yet the rulings on digital sampling have effectively foreclosed the

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<sup>13</sup> RIAA, *Licensing: Voluntary vs. Statutory Licensing*, available at [www.riaa.com/aboutus.php?content\\_selector=Licensing](http://www.riaa.com/aboutus.php?content_selector=Licensing).

<sup>14</sup> Peter Rojas, *The Endadget Interview: Jack Valenti* (August 30, 2004), available at [www.engadget.com/2004/08/30/the-engadget-interview-jack-valenti/](http://www.engadget.com/2004/08/30/the-engadget-interview-jack-valenti/).

<sup>15</sup> Joseph Thomas, *Executors or Executioners? Why can't my biography of Shel Silverstein quote the works of Shel Silverstein? His censorious estate.*, THE SLATE BOOK REVIEW (October 11, 2013), available at [www.slate.com/articles/arts/books/2013/10/my\\_shel\\_silverstein\\_biography\\_can\\_t\\_quote\\_shel\\_silverstein\\_why.single.html](http://www.slate.com/articles/arts/books/2013/10/my_shel_silverstein_biography_can_t_quote_shel_silverstein_why.single.html).

ability to reference and transform other music at all. And the impact is not just limited to hip-hop. The current case law on sampling impedes the development of electronic dance music, the work of mash-up artists and innovation in virtually every genre of modern music.

*Does Sampling and Remixing Help Artists Rather Than Hurt Them?*

The decline of sampling and its impact on creative expression is a recent phenomenon and a direct result of laws created by Congress and holdings of the courts. And it's a state of affairs that is even more perplexing since it has been rationalized in the name of *protecting* the arts and artists. Yet these rulings directly contravene the constitutionally mandated purpose for copyright law in the first place.

Copyright law exists for a specific purpose: promoting progress in the sciences and useful arts. The Constitution provides unequivocal language that is nearly as clear as the mandatory age minimum for serving in Congress (25-years old) or how many Senators each state gets (2). Clause 8 of Article I, Section 8 states that Congress may, *if it so chooses*, provide limited-term copyrights for authors (and patents for inventors), but solely for the purpose of "promot[ing] the Progress of Science and useful Arts." The language of this Clause is unique within the framework of the Constitution. The Constitution does not tell us why we protect the freedom of speech or religion or why the federal government can regulate interstate commerce. In fact, of the 18 enumerated powers granted to Congress in Article I, Section 8, the power to provide copyright and patent protection is alone in providing for its specific purpose.

Unfortunately, as interpreted by the courts, modern copyright law turns the Constitution and the original public meaning of this clause on its head. Rather than promoting progress in the sciences and useful arts, copyright law now all too often inhibits it. The creation and dissemination of transformative works benefits the public and progress in the arts. Yet the problematic ambiguity of the fair use defense and the severe consequences of an infringement verdict have made it difficult for artists to engage in transformative activities such as sampling, mash-up or pastiche.

When artists are sampled, they frequently enjoy the positive attention it garners for their work. Jay-Z certainly seemed<sup>16</sup> to feel that way when his song was mashed-up without permission or payment on Danger Mouse's *Grey Album* (which is now banned in the United States):

I think it was a really strong album. I champion any form of creativity. And that was a genius idea to do, and it sparked so many others like it. It's really good. ... I was honored someone took the time to mash those records up with Beatles records. I was honored to be on quote-unquote the same song with The Beatles.

Recently, Michael Schuster conducted an empirical study<sup>17</sup> on the effect that digital sampling has on sales of copyrighted songs. Specifically, he examined the impact of Greg Gillis's (Girl Talk's) most recent album, which sampled over 350 songs, on the market for the borrowed works. Within a 92.5% degree of statistical significance, he found that sampled songs sold significantly better in the year after being sampled relative to the year before.

Admittedly, Schuster's work represents just one study and his survey did not include a control sample. However, it does support an intuitively broader point: in most cases, an allegedly infringing sample generates increased exposure for commercially (but certainly not critically) passé artists such as Parliament, Rick James, the Isley Brothers, and James Brown and makes them better off economically as a result.

George Clinton provides a quintessential illustration of this effect. Clinton sold over 10 million records in the 1970s, but, by the 1980s, most of his records were out of print. But then, Clinton became a favorite of hip-hop producers who used samples of his songs in their music. The sampling of Clinton's work introduced him to an entirely new generation and revitalized Clinton's career through the republication of most of his records. He has famously encouraged<sup>18</sup> artists to sample his work, "we never minded them sampling. . ." Ironically, about 170 songs written by Clinton and other members of his band

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<sup>16</sup> Jay Mohegan, *Jay-Z: The Fresh Air Interview*, NPR Fresh Air (November 16, 2010), available at [www.npr.org/2010/11/16/131334322/the-fresh-air-interview-jay-z-decoded](http://www.npr.org/2010/11/16/131334322/the-fresh-air-interview-jay-z-decoded).

<sup>17</sup> W. Michael Schuster, *Fair Use, Girl Talk, and Digital Sampling: An Empirical Study of Music Sampling's Effect on the Market for Copyrighted Works* (October 14, 2013), available at SSRN: <http://ssrn.com/abstract=2340235> or <http://dx.doi.org/10.2139/ssrn.2340235>.

<sup>18</sup> Jeremiah Alexis, *George Clinton: 'We Never Minded Them Sampling'* (May 14, 2013), available at [www.redbull.com/us/en/music/stories/1331590648362/george-clinton-on-samples-youtube-and-youth](http://www.redbull.com/us/en/music/stories/1331590648362/george-clinton-on-samples-youtube-and-youth).

are now owned by Bridgewater Music, and, while that ownership is subject<sup>19</sup> to dispute, Bridgewater Music has sued many artists for the very sampling that has revitalized Clinton's career.

Of course, sampling doesn't necessarily help every single artist. While there is no way to know how policies every single artists, omniscience is not necessary for policy-making. Instead, it is worth noting that, while sampling not only enables new artistic creation, it also frequently benefits those artists whose works are sampled. Yet the problematic ambiguity of the fair use defense and the severe consequences of an infringement verdict have made it difficult for artists to engage in transformative activities such as sampling, mash-up or pastiche.

### *"Fair Use" Ambiguity*

Fair use is notoriously unpredictable. While Biz Markie got hit<sup>20</sup> with liability (and a referral to the DA's office for potential jail time<sup>21</sup>) for sampling several bars of a piano line from Gilbert O'Sullivan's *Alone Again (Naturally)*, the Beastie Boys escaped<sup>22</sup> liability when they sampled a six-second riff from jazz flutist James Newton. While the writer of an unauthorized take on *Gone with the Wind* (told from the perspective of the slaves) won<sup>23</sup> the right—under the fair use doctrine—to publish her work over the objections of the Margaret Mitchell Estate, the writer of an unauthorized send-up of *Catcher in the Rye* (where an elderly Holden Caulfield confronts author J.D. Salinger) was deemed infringing and had his book banned<sup>24</sup> in the United States.

Appropriationist artist Jeff Koons has experienced the law's inexplicable vacillation first hand. He's had federal appellate courts weigh in on two infringement suits for his unauthorized use of source

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<sup>19</sup> Allison Keyes, *George Clinton Fights For His Right To Funk*, NPR The Record (June 6, 2012), available at [www.npr.org/blogs/therecord/2012/06/06/154451399/george-clinton-fights-for-his-right-to-funk](http://www.npr.org/blogs/therecord/2012/06/06/154451399/george-clinton-fights-for-his-right-to-funk).

<sup>20</sup> *Grand Upright v. Warner*, 780 F. Supp. 182 (S.D.N.Y. 1991), available at [mcir.usc.edu/cases/1990-1999/Pages/granduprightwarner.html](http://mcir.usc.edu/cases/1990-1999/Pages/granduprightwarner.html).

<sup>21</sup> *Id.*

<sup>22</sup> *Newton v. Diamond*, 349 F.3d 591 (9th Cir. 2003), available at [mcir.usc.edu/cases/2000-2009/Pages/newtondiamond.html](http://mcir.usc.edu/cases/2000-2009/Pages/newtondiamond.html).

<sup>23</sup> Content Regulation, *'Wind Done Gone' Copyright Case Settled* (May 29, 2002), available at [www.rcfp.org/browse-media-law-resources/news/'wind-done-gone'-copyright-case-settled](http://www.rcfp.org/browse-media-law-resources/news/'wind-done-gone'-copyright-case-settled).

<sup>24</sup> Sewell Chan, *Judge Rules for J.D. Salinger in 'Catcher' Copyright Suit*, New York Times (July 1, 2009), available at [www.nytimes.com/2009/07/02/books/02salinger.html?\\_r=0](http://www.nytimes.com/2009/07/02/books/02salinger.html?_r=0).

materials in his art. In the first case,<sup>25</sup> a court denied his fair use defense and found him liable. In the second case,<sup>26</sup> a court found his work transformative and, therefore, excused him from liability under the fair use doctrine. All told, there is little consistency in the way courts weigh the various factors dictated by statute.

Wildly disparate outcomes on similar fact patterns have resulted, making copyright cases hard to decipher. For example, as Professor Rebecca Tushnet has pointed out, “After decades of litigation, it is still difficult to tell when and whether one can photocopy copyrighted materials, even for scientific research.”<sup>27</sup> As we have seen with musicians, nebulous fair use standards have prompted self-censorship in the creative process. Potential “infringers” are, understandably, unwilling and unable to bear the substantial costs of litigation and liability, even where it does not or should not exist.

### *Statutory Damages Run Amok*

These legal uncertainties are exacerbated by the massive statutory damages available under copyright law. Copyright infringement is, in legal parlance, similar to a tort (and some scholars argue that it is, in fact, a tort). Copyright stands in sharp contrast to the general tort regime because Congress has chosen to enact specific legislation that provides copyright holders with the ability to recover statutory damages—damages that are presumed without a plaintiff needing to prove any actual damages. The amount chosen by Congress is high and, in some instances, even Draconian—up to \$150,000 per act of willful infringement (plus recovery of attorneys’ fees to boot).

Such a policy might make sense when seeking to deter the pirates and bootleggers that the content industry regards as thieves.<sup>28</sup> But it makes no sense to use the same blunt instrument that punishes

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<sup>25</sup> *Rogers v. Koons*, 751 F. Supp. 474 (SD New York 1990), available at [scholar.google.com/scholar\\_case?case=9116893010009845497&q=751+F.+Supp.+474+&hl=en&as\\_sdt=20006](http://scholar.google.com/scholar_case?case=9116893010009845497&q=751+F.+Supp.+474+&hl=en&as_sdt=20006).

<sup>26</sup> *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), available at [http://scholar.google.com/scholar\\_case?case=9102865469766650757&q=Rogers+v.+Koons,+960+F.2d+301+\(2d+Cir.+1992\)&hl=en&as\\_sdt=20006](http://scholar.google.com/scholar_case?case=9102865469766650757&q=Rogers+v.+Koons,+960+F.2d+301+(2d+Cir.+1992)&hl=en&as_sdt=20006).

<sup>27</sup> Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 24 (2000).

<sup>28</sup> RIAA, *For Students Doing Reports*, available at [www.riaa.com/faq.php](http://www.riaa.com/faq.php).

bootlegging to squelch transformative activity that promotes progress in the arts. Bootlegging is both difficult to catch and requires heavy deterrence. Neither of these rationales exists for transformative works.

Under current law, artists such as Danger Mouse, DJ Earworm, the Beastie Boys and Biz Markie are treated as little different from commercial bootleggers and piracy-enablers. In the process, we have effectively outlawed an entire method of music making.

For example, with its more than 300 samples, *Paul's Boutique* could create \$22.5 million in potential liability for the Beastie Boys if just half of the samples are not deemed “fair use.” The exorbitance of these penalties inhibits anyone but the most bold and well-financed artists – potential infringers – from relying upon a fair use defense. The consequences of unauthorized sampling or any other unlicensed use of copyrighted works (no matter how transformative) can be severe. A mash-up that makes use of several songs can quickly rack up millions of dollars in liability—even if the mash-up is non-commercial in nature, causes no cognizable actual damages and generates no revenues whatsoever. This is the potential liability that any artists faces if he/she is on the wrong side of the “fair use” Rubicon.

Judicial rulings over the past two decades have caused copyright’s Sword of Damocles, through massive statutory damages, to precariously hang over the heads of would-be sampling artists and, in turn, have fundamentally changed the type of creative output we, as the public, can and do enjoy.

#### *Overdeterrence and the Permission Problem*

The threat of enormous statutory damages results in an overdeterrence of potentially lawful, and clearly beneficial, future content creation. Imagine an analogous statutory damages system for vehicular torts: each time you had an accident—even if it caused little or no damages—the owner of the car you bumped into could recover up to \$150,000 from you. On the positive side, people might drive more carefully. But the extreme caution that might arise from such stiff penalties would create an intolerable rise in traffic as many individuals would drive only at glacial speeds. Perhaps most individuals would

chose not to drive at all since they could not afford to pay \$150,000 if they hit a car – a likely occurrence at some point on the road. Insurance rates would skyrocket as we would all face liability for potentially enormous damages, with the costs subsequently borne by everyone on the road and built into the costs of truck delivery and taxi-rides.

This manifestly unfair system would leave only the most wealthy able to drive and would severely impact our freedom as a society. It might also lead to inefficient legal windfalls, where \$5000 in damages to person's car could generate an award of \$150,000—3000% more than what is needed to make the individual whole. Under such a scenario, even when individuals have arguably not caused any accident or damage at all, they would still settle potential claims for vast sums of money just to avoid costly attorneys' fees and the possibility of a monstrous \$150,000 penalty. Clearly, a \$150,000 statutory fine for each vehicular tort, no matter how small, would cause serious overdeterrence. And even if it did reduce injuries on the road at the margins, such an arbitrarily steep statutory damage rate would not ultimately benefit society.

Put simply, we don't impose massive statutory damages on car accidents because we don't want people to stop driving. And we shouldn't impose massive statutory damages on transformative artists because we don't want people to stop creating.

Like individuals who would either drive more conservatively or not at all under a statutory damages regime for car accidents, many artists facing copyright's statutory damages regime have elected to eschew sampling, mash-ups or any other type of transformative activity altogether. Even when someone who makes use of a copyrighted work has a good chance at a successful fair use defense, the terrifying consequences of being wrong will lead rational actors to get a license—even where the law doesn't require one. As a result, millions of dollars—representing an enormous deadweight loss rewarding rent-seeking rather than productive activity in the economy—are spent every year on obtaining licenses for works that are in the public domain or otherwise don't require a license to use. This well documented fact of over-licensing is evidence of serious overdeterrence.

Large content owners, who are rarely the artists themselves, are perhaps the main beneficiaries of the regime they created because it creates a permission culture that lines their pocketbooks. But, unfortunately, this system stifles legitimate artistic activities rather than promoting the arts. Policy-makers should look to the real interests of established, emerging and future artists and content creators, as well as the interests of the general public who may enjoy hip-hop, electronic dance music and DJ remixes, when considering if copyright policies will lead to the “progress” of the “sciences” and “useful arts” as required by the Constitution.

### *The Solution*

The ambiguity of the fair use defense and the severe penalties of the statutory damages regime have combined to deter transformative artistic activity—the use of underlying copyrighted materials to create new works of art imbued with their own meanings, expressions and messages. Transformative activities such as digital sampling, mash-up, appropriationist art, parody and satire advance the arts—the proper goal of the copyright regime—by criticizing or illuminating our values, assessing our social institutions, and commenting on current events and our culture.

However, when dealing with transformative uses of copyrighted works, current law forces courts to choose between two generally extreme options: infringement or fair use.<sup>29</sup> If courts find infringement, hefty statutory damages can issue and the public is deprived of valuable new creative expressions. However, if a court finds fair use, an unauthorized user of a copyrighted work is able to use (without permission or payment) the work of another with impunity and thereby benefit from the creation of the original author.

Recognizing the problems with statutory damages and the fair use doctrine, as currently applied, we propose a damages-cap solution that applies strictly to transformative uses of copyrighted works. Specifically, for unauthorized transformative uses, copyright holders could no longer seek statutory

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<sup>29</sup> Courts also occasionally draw on the *de minimus* use exception to insulate a technical infringement from liability.

damages or attorneys' fees. They would similarly be barred from receiving injunctive relief (*i.e.*, a judicial order banning the work). After all, what could be more un-American than our courts banning books and other art? In other words, copyright holders would lose the blunt instruments that, under the current regime, deter against the creation and distribution of transformative uses of their works.

Under our proposal, copyright holders can still seek monetary redress for the unauthorized use of their works.<sup>30</sup> However, relief against transformative users could be capped in one of three ways:

- **Option A. The Disgorgement Cap:**  
Transformative users would, at most, face liability to disgorge all profits generated from their work. This would be limited on a per-track/work basis.
- **Option B. The Actual Damages Cap:**  
Transformative users would, at most, face liability for the provable actual damages resulting from their activities.
- **Option C. The Apportionment Cap:**  
Transformative users would, at most, face liability to disgorge a portion of the profits generated from their work—the portion attributable to the infringement.

Our proposal would ensure that, if sampling causes real damage to the content owner, the sampler would owe the copyright holder for the resulting damages caused by or revenue earned from the unauthorized use—but never more than that. All three proposed damages caps would allow artists to make transformative uses of underlying content without risking a veto on their activities from rightsholders who either charge exorbitant licensing rates or flatly refusing to license to anyone they don't like. The elimination of statutory damages and implementation of caps as a remedy for transformative use is not entirely dissimilar from the medical-malpractice tort reform that states across the country have implemented in recent years.

Although we feel that the imposition of such liability is still not optimal, it represents a vast improvement from the current system, where an artist may face millions of dollars in liability for creating works that earns little or even no revenues. With a cap on damages—whether that cap is limited to actual damages or some disgorgement of profits—the creation of new transformative works becomes far less

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<sup>30</sup> Under the plan, transformative artists would still retain the right to argue any existing affirmative defenses to liability, including fair use.

risky. Essentially, liability would be unlikely to ever exceed profitability and, as a result, artists would have far greater freedom to create using the rich body of creative works that came before them.

As an example, if Biz Markie sampled a Gilbert O’Sullivan piano riff and a George Clinton bass line for a new song, O’Sullivan and Clinton could not deny Biz Markie that right (just as they can’t deny Biz Markie the right to do a cover song which is a more approximate replication of the song than a sample). And, they could not charge Biz Markie an outrageous rate to license the works. By the same token, however, assuming the sampling was not fair use, Biz Markie would not be able to “freeride” (to use the vernacular of supporters of the current legal policies) on O’Sullivan and Clinton’s contributions to the song. Instead, under the first version of our plan, O’Sullivan and Clinton would receive Biz Markie’s profits. Under the second version of our plan, they would need to prove actual damages to a court—just like someone in a car accident seeking to recover for their sustained injuries. And under the third version of our plan, O’Sullivan and Clinton would receive a portion of Biz Markie’s profits, depending on what portion of the profits from Biz Markie’s song could be reasonably attributed to the unauthorized samples. In all three scenarios, Biz Markie would still face some accountability to share in the gains made from his use of the underlying works with O’Sullivan and Clinton. In other words, these policies would stimulate the creation and distribution of new artistic works, while ensuring that original rightsholders receive a benefit for contributing to this innovative activity.

### *The Effect of This Change*

An overwhelming majority of proposals and op-eds, essentially almost all of them, directed towards policy-makers relate to the topic of piracy. We recognize the cost of copyright infringement to the creative industries and – where the data demonstrates veracity to the claims – the need to combat its pernicious effects. But our proposed change to copyright law does nothing to undermine the ability of content creators to enforce their legitimate rights against those who make wholesale copies of their works without permission. Under our plan, copyright holders can still vigorously pursue pirates with the

economic death sentence of statutory damages (and the possibility of criminal sanctions). But, we need to protect enterprising artists from being felled by the same blunt weapons wielded against pirate enterprises.

The impact of this proposed damages-cap solution upon transformative users and the licensing market for copyrighted content would be quite profound. The damages-cap solution would advance the constitutionally mandated goals of the copyright system by stimulating more artistic creation and wealth generation for new content and sampled content alike. Specifically, small and emerging DJ's, electronic dance artists, rappers and hip-hop artists could sample from major recordings without the threat of litigation. More established artists like U2, Beck and Eminem would see the costs of sampling for their future works driven down in a competitive marketplace. Like George Clinton, artists with older music portfolios that may have fallen off the general public's radar could see their work repurposed with an appeal to a new generation of listeners. Rightsholders could no longer refuse to allow the use of their content for any purpose or by holding out for obscene highly licensing rates. This change would not simply benefit hip-hop, electronic dance and remix/mash-up music; instead, the gains would be felt throughout the arts, from documentary directors who will no longer have to pay exorbitant rates to sample a few seconds of a film clip to appropriationist artists (and their exhibiting galleries) who will no longer have to fear massive liability from creating and exhibiting art that borrows cultural symbols and other pre-existing works.

The rent-seeking behavior caused by the current copyright regime imposes a deadweight loss on the economy and represents the precise reason that the Framers limited copyright both in scope (to promote progress in the arts) and time in the first place. In fact, the copyright system of our Founders, as enacted in 1790, guaranteed only a fourteen-year term and merely prohibited the complete copying of an entire protected work (and only applied to maps, charts and books). It is not much of a stretch to posit that the Framers would be disappointed that aspects of our copyright regime now actively harm artists and stifle content creation.

While we do not endorse a strict return to the Founders' statutory copyright, their motivations for a limited copyright should inform our judgments within the context of the modern economy. The American copyright system, in contrast with other conceptions that the Constitution rejected, has always adopted only a limited protection so as to balance the needs of owners and users, creators and transformers, and special interests and the public interests.

Under our proposal, negotiations between artists would be informed by the fact that transformative users can always make use of underlying materials, even if they don't reach a deal with rightsholders—so long as they account in some way with those rightsholders (whether through a payment of actual damages or disgorgement of profits). Artists in a variety of creative fields will enjoy the right to create using underlying source materials without the fear that they will face millions of dollars in legal liability or, worse yet, find the FBI raiding their house in the middle of the night—a very real fear that even DJ Earworm raised during our interview with him. While this change will clearly impact musicians, it will also help artists of all types, including documentary film-makers who want to use small film clips that they believe are fair use without the threat of crippling liability.

Of course, since our proposal is free market oriented, parties would be free to contract around these default damages rules for transformative uses. But the proposed damage cap informs the reasonable starting point for negotiations between the original copyright owner(s) and the transformative user; and it prevents the ambiguity of the fair use defense and the *in terrorem* effect of copyright's statutory damages regime from deterring valuable artistic activity. It also prevents original copyright owners from discriminating between favorable and unfavorable transformative uses of their copyrighted works. In short, in practice, the damages-cap proposal put forward here will ensure that parties negotiate for more reasonable rates on royalties.

Existing content owners whose works are sampled will also reap economic benefits by sharing in the profits stemming from the transformative works – many works that would never have existed otherwise. New listeners may also be attracted to older content when they find out that it has been sampled. As an example, DJ Danger Mouse's *Grey Album*, mashing-up The Beatles' *White Album* and

Jay-Z's *The Black Album*, likely served as a music discovery tool for those who may not have been Beatles or Jay-Z fans before. Admittedly, it is possible that some artists who receive windfall benefits under the current regime would receive less money under this proposed system. But, for policy-makers, concerns about promotion of progress in the useful arts—rather than enrichment of a very few in perpetuity—should drive the framing of copyright law.

Thus, our proposed solution simply relies on the operation of the free market, just as we do in so many other areas of the economy. And the proposal recognizes that the law should enable the unfettered functioning of the creative marketplace, not inhibit it.

### *The Cover Song Exception*

Of course, defenders of copyright's status quo might attack this damages-cap solution as both unworkable and unprecedented. However, they would be wrong on both counts. Besides the plan's consistency with the constitutional goals of the copyright regime, there is important precedent to support its viability. Specifically, in one particular area of copyright, we already have something like the damages-cap solution in operation. And, unbeknownst to most Americans, it has functioned remarkably well for more than century. It is the so-called "compulsory mechanical license" provision of the Copyright Act and it illustrates the tremendous benefits that both content industries and the public can enjoy when the law enables, rather than hinders, the transformative use of copyrighted works with payment, even if it occurs without permission.

Copyright law generally provides creators of an original work with a series of exclusive rights, including the rights to reproduce, publicly distribute, and create derivatives of the work. However, since 1909, musical compositions (and *only* musical compositions) have enjoyed an exception to this rule. Under the exemption, anyone can record a "cover" version of a copyrighted, nondramatic musical composition and distribute copies of it without the permission of the original composer. Instead, "cover" artists need only notice of their intention to record a cover song and then make payment of a fixed per-

album fee fixed to the copyright owner. Although fully transformative uses of musical compositions cannot be made under the statute, cover artists are free to tinker with the composition to adapt it to a particular musical genre: “a compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved.” Thus, without any authorization from the original artist, Limp Bizkit can record a thrash-metal version of George Michael’s pop song *Faith*; Luna a dreamy, lo-fi cover of Guns N’ Roses’s *Sweet Child O’ Mine*; William Shatner a lounge-tinged take on Pulp’s alternative rock classic *Common People*; and Dynamite Hack an acoustic folk-rock rendition of NWA’s gangsta rap *Boyz N tha Hood*.

As the history of modern music has demonstrated, the public, artists, and the industry have thrived from the availability of the compulsory mechanical license. Although Bob Dylan is a remarkable songwriter and musician, there are few who would consider his renditions of *All Along the Watchtower* and *Mr. Tambourine Man*—two songs he both composed and recorded—superior to the covers of those songs by Jimi Hendrix and the Byrds, respectively. Hendrix’s version of *All Along the Watchtower* helped launch him into rock’s pantheon; it also secured the place of Dylan’s composition in rock history. The availability of the compulsory mechanical license therefore enabled Hendrix to expand his popularity and introduced a whole new audience to the works of both Dylan and Hendrix. Without this exemption from liability, however, the world would have never enjoyed these cherished contributions to rock history. As an example of the incredible artistic creation that this “permission” culture has created, just try searching for the iconic song *All Along the Watchtower* in Spotify. Over 500 covers will appear—some good, some not so good, but all paying Bob Dylan royalties. The cover song exemption has spawned innovation and transformation in music and our damages-cap proposal will too.

### *Capping Damages, Uncapping Creativity*

Our proposed damages cap would advance the fundamental purpose of the federal copyright system—spurring innovation. Copyright owners would receive reasonable payments for the commercial

exploitation of their works; however, importantly, just as for music covers, they could no longer deny individuals the right to make transformative use of their copyrighted works. And they could no longer hold out from licensing by demanding exorbitant rates. In other words, by taking away the power of copyright holders to categorically reject transformative uses of their works, our damages-cap solution would free the creative marketplace from the shackles of the permission problem.

Of course, we recognize the limits of our expertise. We are not musicians and do not possess omniscience about artistic composition and the creative process. And our proposal here is not meant to serve as a panacea. Rather, we aim to provide a soupçon of stimulation to the creative world. As reflected by the case of sampling in hip-hop, existing laws have profoundly limited the palate of artists by making transformative use of underlying materials either impermissible or cost prohibitive. In the process, the copyright regime has unwittingly impoverished music and the arts.

Our proposal balances the legitimate interests of copyright holders in reaping economic rewards from the use of their work with the legitimate interests of artists in creative and expressive activities. This balance best serves the public interest and furthers the constitutional goal of promoting progress in the arts.