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NOT SO FAIR USE: THE SHORTCOMINGS OF CURRENT COPYRIGHT LAW IN MUSIC SAMPLING

ABSTRACT

The current enforcement method of the fair use doctrine is not suitable to handle the ever-evolving music industry. The fair use doctrine allows a copyright protected work to be used without getting it approved by the original owner of the work. This is seen often in music sampling. Music sampling is extremely prevalent in today's music industry; however, federal court is currently the only arena that sampling disputes can be resolved in. This has led to inconsistencies across circuits, unfairness, and exacerbated the backlog of the federal court docket. While many have pointed out both the inefficiency and unfairness of the current enforcement method of the fair use doctrine, the legislature has refused to make any changes to The Copyright Act since 1976. This Note considers how the fair use doctrine can keep up with the increase in music sampling, without having to amend the Copyright Act. Instead of federal court being the only arena for copyright disputes, an independent agency, modeled after current federal agencies, should conduct fair and impartial investigations into copyright infringement.

INTRODUCTION:

It was impossible to turn on the radio in 2013 without hearing the song “Blurred Lines” by Robin Thicke. The song was Billboard Music’s “Song of the Summer,”¹ spent twelve weeks at number one on the “Billboard Hot 100,” and made \$16,675,690 in profits.² Although the success of this song was astronomical, the artists could not enjoy that success for long. Soon after the song hit its peak of commercial success, the estate of legendary singer-songwriter Marvin Gaye sued the songwriters and producers claiming the song “Blurred Lines” copied Gaye’s 1977 hit “Got to Give It Up.”³ This was a highly publicized lawsuit that fellow musicians paid close attention to. After years of federal litigation and appeals, a California federal judge entered a nearly \$5 million judgment against Robin Thicke and co-writer

1. Gary Trust, *Robin Thicke’s ‘Blurred Lines’ Is Billboard’s Song of the Summer*, BILLBOARD (Sept. 5, 2013), <https://www.billboard.com/articles/news/5687036/robin-thicke-blurred-lines-is-billboards-song-of-the-summer>

2. Nolan Feeney, *Here’s Exactly How Much Money ‘Blurred Lines’ Made*, TIME (Mar. 4, 2015), [https://time.com/3731556/blurred-lines-profits/#:~:text=%E2%80%9CBlurred%20Lines%E2%80%9D%20made%20%2416%2C675%2C690%20in,really%20help%20write%20the%20song.](https://time.com/3731556/blurred-lines-profits/#:~:text=%E2%80%9CBlurred%20Lines%E2%80%9D%20made%20%2416%2C675%2C690%20in,really%20help%20write%20the%20song.;); Trust, *supra* note 1.

3. Korey Grow, *Robin Thicke, Pharrell Lose Multi-Million Dollar ‘Blurred Lines’ Lawsuit*, ROLLING STONE (Mar. 10, 2015), <https://www.rollingstone.com/music/music-news/robin-thicke-pharrell-lose-multi-million-dollar-blurred-lines-lawsuit-35975/>.

Pharrell Williams.⁴ In addition to the payment, the court held that the Gaye estate was also entitled to royalties going forward, equaling 50% of the songwriter and publishing revenue from “Blurred Lines.”⁵ Five years and one lawsuit later, “Blurred Lines” transformed from a hit summer song to a copycat.

The “Blurred Lines” case is just one example of how difficult it is to navigate the current climate of copyright law in the United States. This case presented the thorny issue of where the line between inspiration and copying is drawn. It may seem incredibly easy to not copy another artist’s song and make something completely original, however, drawing inspiration from other artists is extremely common in the music industry. Some artists even take clips from other songs and use them directly in their work.⁶ This is called music sampling. When done legally, music sampling and being inspired by other artists is just one way to keep pushing innovation and productivity in music. When done illegally, it can lead to lengthy and expensive legal battles.⁷ But, the line between legal and illegal is more blurred than one may think.

Music sampling is an extremely common practice within the music industry. In fact, 32% of the top 100 hip-hop songs in 2019 included samples.⁸ While the Copyright Act of 1976 does not directly mention music sampling, it gives the copyright owner a list of exclusive rights.⁹ Among these rights are the rights to reproduce the work and create derivative works using the original copyright-protected work.¹⁰ Using a sample to create a new song falls into the right to create a derivative work. The Act also gives the copyright owner permission to transfer this right and to allow others, typically for a fee, to use their work.¹¹ Therefore, since the original artist has exclusive rights, sampling another artist’s music requires permission from

4. Colin Stutz, *Judge Issues Final \$5M Judgment in ‘Blurred Lines’ Trial Against Robin Thicke & Pharrell Williams*, BILLBOARD (Dec. 12, 2018), <https://www.billboard.com/articles/columns/pop/8490066/blurred-lines-trial-final-judgment-robin-thicke-pharrell-marvin-gaye/>.

5. Althea Legaspi, *‘Blurred Lines’ Copyright Suit Against Robin Thicke, Pharrell Ends in \$5M Judgment*, ROLLING STONE (Dec. 13, 2018), <https://www.rollingstone.com/music/music-news/robin-thicke-pharrell-williams-blurred-lines-copyright-suit-final-5-million-dollar-judgment-768508/>.

6. *Digital Music Sampling: Creativity or Criminality?*, NPR (Jan. 28, 2011), <https://www.npr.org/2011/01/28/133306353/Digital-Music-Sampling-Creativity-Or-Criminality>.

7. Karl Fowlkes, *The Art of Clearing A Sample: Deciding If It’s Worth It and How To Actually Do It*, MEDIUM (Apr. 11, 2020), <https://medium.com/the-courtroom/the-art-of-clearing-a-sample-deciding-if-its-worth-it-and-how-to-actually-do-e26fa56ad090>.

8. *Share of the top 100 songs using music samples in the United States in 2019, by Genre*, STATISTA (Aug. 21, 2020), <https://www.statista.com/statistics/1136108/music-sampling-by-genre-us/>.

9. See Copyright Act of 1976, 17 U.S.C §106 (2018).

10. See *id.*

11. See Copyright Act of 1976, 17 U.S.C §201(d) (2018).

the original artist.¹² If a copyright-protected snippet is used without the permission of the original artist, it could lead to a copyright infringement lawsuit.¹³ However, “clearing a sample” can often be a complicated and expensive process.¹⁴

To rightly clear a sample, authorization is needed from the owners of the sound recording and the composition.¹⁵ This can be difficult to achieve when many parties worked on and have ownership of a song.¹⁶ Even once ownership is determined and permission is granted, clearance fees need to be paid for the use of that snippet, which is likely to range between \$2,000 and \$10,000.¹⁷ That is before attorney fees as well, since having a lawyer help clear the sample reduces vulnerability to a copyright lawsuit.¹⁸

The complicated and expensive process of clearing a sample¹⁹ can induce an artist to forgo the surest way to comply with the Copyright Act of 1976 and use a “loophole” that allows for unlicensed use of copyright-protected works.²⁰ This loophole is called the fair use doctrine—an affirmative defense that asserts, despite using a copyright-protected work without permission, the use of that work is considered “fair.”²¹ The statute and case law has provided a comprehensive four-part analysis to determine if a use is fair or not.²² However, the current enforcement method is inefficient, leads to inconsistencies in cases with similar facts, and unjustly benefits those who can afford an expensive and lengthy federal court trial. The federal court system is not the proper venue to hear copyright infringement cases related to music sampling and the fair use doctrine. Instead, an independent agency should be created to do a fair and impartial investigation on whether the unlicensed use of a copyright-protected work was fair use.

Part I of this Note provides background to the Copyright Act of 1976, including the fair use doctrine. Part II discusses the flaws of the current enforcement method of the fair use doctrine. Finally, Part III will introduce and discuss proposed changes to the fair use doctrine, and then provide a recommendation for how the doctrine can be enforced more fairly and efficiently.

12. *See id.*

13. *Digital Music Sampling: Creativity or Criminality?*, *supra* note 6.

14. Fowlkes, *supra* note 7.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Digital Music Sampling: Creativity or Criminality?*, *supra* note 6.

21. *See* Copyright Act of 1976, 17 U.S.C. §107 (2018).

22. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

I. COPYRIGHT LAW AND THE FAIR USE DOCTRINE

A. THE COPYRIGHT ACT OF 1976

The Copyright Act of 1976 is the source of current copyright law in the United States.²³ It created a single federal protection system for all “original works of authorship” from the moment they are fixed in a tangible medium of expression.²⁴ Once fixed in a tangible medium, the author automatically owns exclusive rights to the content.²⁵ The Act also recognized a fair use limitation on exclusive rights, known as the fair use doctrine.²⁶

B. THE FAIR USE DOCTRINE

Codified at 17 U.S.C §107, fair use is an affirmative defense to copyright infringement that permits the unlicensed use of copyright-protected work in certain circumstances.²⁷ According to the Supreme Court, the fair use doctrine “permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”²⁸ Rather than use a bright-line rule, §107 requires courts to engage in a case-by-case determination to establish whether a particular use is fair.²⁹ To aid this case-by-case analysis, §107 provides four factors to consider when determining if an unlicensed use of a copyright-protected work is fair use.³⁰ The factors are:

(1) the purpose and character of the use, including whether such use is of 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.³¹

23. See Copyright Act of 1976, 17 U.S.C. §102 (2018).

24. See *id.* “A tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is ‘fixed’ ... if a fixation of the work is being made simultaneously with its transmission.” Copyright act of 1976, 17 U.S.C. §101 (2018)

25. See Copyright Act of 1976, 17 U.S.C. §107 (2018). For works created after 1977, this exclusive ownership lasts for the lifetime of the author and an additional seventy years.

26. See *id.*

27. *Id.*; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 90 (1994).

28. *Campbell*, 510 U.S. at 577

29. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985)

30. See Copyright Act of 1976, 17 U.S.C. §107 (2018).

31. *Id.*

Since the doctrine is an equitable rule of reason, there can be no generally applied definition, and each case must be analyzed and determined on its facts using the four factors to aid in the analysis.³²

1. The Purpose and Character of the Use

The first factor courts consider for a fair use determination in a copyright infringement action is the purpose and character of the use.³³ In analyzing the purpose and character of the use, courts want to see whether the new work adds something with a new purpose or different character which alters or transforms the original work rather than just superseding the original creation.³⁴ The analysis of this factor involves a two-part inquiry: (1) is the copyrighted work being used for a commercial purpose, and (2) is the new work transformative.³⁵ Typically, if a work is being used for commercial gain, then the presumption is that it is unfair and the first factor will weigh against a finding of fair use.³⁶ In the context of music sampling, most music is solely for commercial gain and not for a nonprofit or educational purpose.³⁷ However, this is not a bright-line rule dispositive and is just one element of the first factor.³⁸

The court will also look to see if the work is transformative. If the snippet being used as a music sample is transformed enough, the use could still be considered fair, even if a work is being used for commercial gain.³⁹ In fact, the more a new work differs from the original, the less likely a court would use the commercialism factor in a finding towards fair use.⁴⁰ However, even if a work is transformative enough, the fair use defense will not necessarily prevail. The courts then turn to the other three factors to make a complete determination.⁴¹

2. The Nature of the Copyrighted Work

The nature of the copyrighted work factor refers to the idea that “some works are closer to the core of intended copyright protection than others.”⁴² When the work is considered to be of the type intended for copyright

32. *Harper*, 471 U.S. at 560–61.

33. C.T. Drechsler, Annotation, *Extent of ‘Fair Use’ under federal Copyright Act.*, 23 A.L.R.3d 139 (1969).

34. *Id.*

35. *Id.*

36. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994).

37. See *State of Sampling 2019*, TRACKLIB (Dec. 17, 2019), <https://www.tracklib.com/blog/tracklib-presents-state-of-sampling-2019>.

38. *Campbell*, 510 U.S. at 577.

39. Drechsler, *supra* note 33.

40. *Campbell*, 510 U.S. at 579.

41. Drechsler, *supra* note 33; see also 17 U.S.C. §107.

42. *Id.*

protection, fair use is more difficult to establish.⁴³ When analyzing a copyright infringement claim, the two fair use considerations concerning the nature of the copyrighted work are “(1) whether the work is factual or creative, and (2) whether the work has previously been published.”⁴⁴ Where a work is both creative and published, the factor weighs against a finding of fair use⁴⁵ because it falls into the category of works that are closer to the core of intended copyright protection.⁴⁶ While the nature of the copyrighted work is not determinative, the court must use this point of consideration when balancing the multiple factors in determining fair use and avoid a rigid application of the copyright statute.⁴⁷

3. The Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

When determining the amount and substantiality of the portion used in relation to the copyrighted work as a whole, the court analyzes if the portion of the copyrighted work used is reasonable in relation to the purpose of copying.⁴⁸ In their analysis, courts consider (1) the quantity of the work taken and (2) the quality of the portion taken.⁴⁹

There is no bright-line rule to determine how much of a copyright-protected work can be taken and still be considered fair use. However, “in general, as the amount of copyrighted material used increases, the likelihood of a court finding fair use on the part of a defendant decreases.”⁵⁰ While it is more likely to be copyright infringement if a large portion of the work is taken, “a taking may not be excused merely because it is insubstantial with respect to the infringing work.”⁵¹ The main question courts analyze when considering quantity is “whether the secondary use employs more of the copyrighted work than is necessary, and whether the copying was excessive in relation to any valid purposes asserted under the purpose and character of the use factor.”⁵² The case law makes it clear that quantity is not only based on how much is taken, but what proportion of the new work is comprised of the protected material and the purpose of the copying. Because of this, even in cases where only a small portion of the protected work was used, courts have declined to find fair use where the secondary user has not substantially transformed the protected work. On the other hand, courts have found fair use when large portions of protected work were used but substantially

43. *Campbell*, 510 U.S. at 586.

44. Drechsler, *supra* note 33.

45. *Stern v. Lavender*, 319 F. Supp. 3d 650, 681 (S.D.N.Y. 2018).

46. Drechsler, *supra* note 33.

47. *Id.*

48. *Id.*

49. *Id.*

50. 136 AM. JUR. TRIALS 193 (2014).

51. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 565 (1985).

52. 136 AM. JUR. TRIALS 193, *supra* note 50, at §12.

transformed to achieve the purpose of the new work.⁵³ In addition to the qualitative amount of the original work taken, the court also looks at the quality of the portion taken—whether the “heart” or the “essence” of the work is taken.⁵⁴ The court equates taking the “heart” of the work to copying the entire work, therefore in a fair use analysis it does not matter how much was taken quantitatively if the essence was taken.⁵⁵ In analyzing both the quantity and quality of the portion of the original work taken, the court will be able to determine whether its use is reasonable in relation to the purpose of copying.⁵⁶ If the court determines that the quantity and quality of the original work taken is reasonable in relation to the purpose, the third factor will weigh towards a finding of fair use.⁵⁷

4. The Effect on the Potential Market for or Value of the Copyrighted Work

The final factor in determining whether a use of a work is fair or not is the effect on the potential market for or value of the copyrighted work. In determining this factor, the court determines whether the copy brings a competing substitute for the original to the marketplace.⁵⁸ The inquiry must determine whether this substitute would deprive the rights holder of significant revenues because of the likelihood that potential purchasers may choose to purchase the newer copy rather than the original copyright-protected work.⁵⁹ The court will also look to see if derivative works will be impacted, either one that the creator of the original work would develop or license to others to develop.⁶⁰ In *Harper v. Row*, the Supreme Court said that the effect of the use upon the potential market was “undoubtedly the single most important element of fair use.”⁶¹ This is because, in the Court’s opinion, the essence of fair use when properly applied, is limited to copying by others only when it does not materially impair the marketability of the work which is copied.⁶² While it is clear the impact on the marketability is an important factor, it is still only one factor in the broad fair use analysis.⁶³

53. *Id.*

54. *See Harper*, 471 U.S. at 544.

55. *Id.* at 564–65.

56. Drechsler, *supra* note 33.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Harper*, 471 U.S. at 566.

62. *Id.* at 566–67.

63. 136 AM. JUR. TRIALS §193, *supra* note 50, at §13.

II. FLAWS OF THE FAIR USE DOCTRINE

Without bright-line rules, federal courts are left to determine each copyright infringement case using the four fact sensitive fair use factors.⁶⁴ However, using the federal courts as the sole arena for these types of cases leads to many issues. Litigating in federal court is expensive and can dissuade smaller independent artists from filing copyright infringement cases while giving an inequitable advantage to larger artists who can afford the resources necessary to win a copyright infringement case. Furthermore, since each case is analyzed separately by different federal courts, inconsistencies in rulings can develop even in cases with similar fact patterns.

A. COST OF LITIGATION AND FEDERAL COURT BACKLOG

Even when the use of copyrighted material is fair, it may not always be in the defendant's best interest to rely on that defense in court. "The nature of the fair use defense [is so fact sensitive that] a defendant normally must take a fair use case all the way to trial, and take their chances with a jury, to get a determination that . . . they should be absolved of liability."⁶⁵ This means that even if an artist is positive that what they are doing falls under the protection of fair use, they still have to spend the time and money litigating in federal court. This makes the fair use defense expensive given that it could cost hundreds of thousands or even millions of dollars in legal fees defending a case all the way through the trial, and a loss could mean paying even more in damages as well as the other side's legal fees.⁶⁶

The cost is particularly prohibitive for smaller independent artists who do not have the money to pay for the legal team and resources necessary to go through an entire trial.⁶⁷ This could potentially dissuade an artist from using a sample in their work even if the use is fair and may give larger artists who have legal teams an advantage over smaller independent artists who cannot afford to defend a copyright infringement suit. On the other hand, if a smaller artist notices a larger corporation or artist sampling their music without permission and clearance, it may be too costly for them to even bring a copyright infringement suit. Even without considering the expenses of the trial itself, simply bringing a copyright infringement case has a filing fee of \$1,200.⁶⁸ While the filing fee is less significant than the hundreds of

64. See Copyright Act of 1976, 17 U.S.C §107 (2018).

65. Amanda G. Ciccatelli, *The Impact of Drake's Fair Use Copyright Victory on Music Copyright Infringement*, IPWATCHDOG (June 17, 2017), <https://www.ipwatchdog.com/2017/06/17/drakes-fair-use-copyright-victory-music-copyright-infringement/id=84504/>.

66. *Id.*

67. See Scott Alan Burroughs, *Copyright Litigation: Now More Expensive And With More Delay Than Ever Before!*, ABOVE THE LAW (May 13, 2019), <https://abovethelaw.com/2019/03/copyright-litigation-now-more-expensive-and-with-more-delay-than-ever-before/?rf=1>.

68. *Id.*

thousands in court fees, it may be enough to dissuade independent artists from filing suit.⁶⁹ This is counterintuitive to the purpose of copyright law which is to promote innovation and creativity and instead stifles smaller creators while benefiting those with more money, status, and resources.

Not only can federal litigation be costly, but it can also be lengthy given the backlog of cases in the federal court system. In 2019 alone, there were 376,762 filings in U.S. District Courts and 47,977 filings in the twelve regional Courts of Appeals.⁷⁰ Having the federal courts be the only arena for copyright infringement cases adds to this backlog and could potentially cause the parties in the case to have to wait long periods of time before their trial.

B. INCONSISTENT RULINGS

The lack of a bright-line-rule and the fact intensive nature of the test gives rise to inconsistency.⁷¹ Even though every court is using the same factors, the lack of clear rules and the dependence on fact-sensitive analyses leave ample room for different courts to have different interpretations on both how much weight should be given to each factor and the meaning of each factor. As no one district court ruling is binding on any other, cases with similar fact patterns can have inconsistent rulings across different federal courts, even within the same circuit. For example, a more than thirty second, unedited sample of a copyright protected work was considered fair use while a highly transformed snippet that was influenced by a copyright protected work was not.⁷²

1. Estate of Smith v. Graham

In *Estate of Smith v. Graham*, singer-rapper Drake used lyrics from a spoken-word rap composition titled “Jimmy Smith Rap” and inserted them into his song “Pound Cake” changing a few of the words around.⁷³ The estate of Jimmy Smith brought a copyright infringement against Drake, and both parties cross-moved for summary judgment.⁷⁴ The Second Circuit applied the four factor fair use test but weighed the first factor—the purpose and character of the use—most heavily.⁷⁵ The court said that it weighed in favor

69. *Id.*

70. *Federal Judicial Caseload Statistics 2019*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019> (last visited Feb. 13, 2021).

71. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

72. *See infra* note 73 and 94.

73. *See Estate of Smith v. Graham*, 799 F. App’x 36 (2d Cir. 2020). Drake notably changed the lyrics from “Jazz is the only real music that’s gonna last” to “Only real music is gonna last.” This lyric change emphasizes the theme of the song, that Drake’s music is “real music” that will last. *Compare JIMMY SMITH, OFF THE TOP* (Elektra Musician 1982) to *DRAKE, Pound Cake*, on *NOTHING WAS THE SAME* (Cash Money Records 2013).

74. *See Estate of Smith*, 799 F.App’x at 36.

75. *See id.*

of fair use because the use was transformative.⁷⁶ According to the court in this case, “a work is transformative when it uses the copyrighted material itself for a purpose, or imbues it with a character, different from that for which it was created.”⁷⁷ The original work by Jimmy Smith was intended to discuss the supremacy of jazz compared to other types of music, asserting that unlike jazz, other music will not last.⁷⁸ In contrast, “Pound Cake” sends the message that it is not just jazz music that will last but all “real music” regardless of genre.⁷⁹ Throughout the remainder of the seven-minute song, Drake goes on to rap about the greatness and authenticity of his work, emphasizing that it is not the genre that matters, but the authenticity of the music.⁸⁰ The court here takes this song to be a criticism of the jazz-elitism that Jimmy Smith spoke about in the original work, meaning that Drake used the copywritten work for a purpose different from that which it was created.⁸¹ Therefore, they found that the first factor weighed heavily toward a finding of fair use.⁸²

The court spent relatively little time analyzing the remaining three factors. The court here said that they need not spend much time on the second factor, the nature of the copyrighted work, because it “has rarely played a significant role in the determination of a fair use dispute.”⁸³ The court went even further by saying when a use is transformative, the second factor will support fair use, even if the original work was in the scope of copyright protection.⁸⁴ The court spent a little more time on the third factor, the quantity and quality analysis, asserting that it weighed in favor of fair use because the amount of the original work used by Drake was reasonable in relation to the purpose of copying.⁸⁵ The court reasoned that the amount used was reasonable because the borrowed language was necessary to emphasize the message that Drake was trying to get across in his song.⁸⁶ Finally, in discussing the fourth factor, the court concluded that it also weighs in favor of fair use because there was no evidence to show that “Pound Cake” usurps demand for “Jimmy Smith Rap” or would otherwise cause a negative market effect.⁸⁷ They emphasized that the genres of music are extremely different and there would be minimal overlap in the audience.⁸⁸ The court finally touched on the fact that there is no active market for “Jimmy Smith Rap”

76. *Id.* at 38.

77. *Id.* (citing *TCA Television Corp. v. McCollum*, 839 F.3d 168, 180 (2d Cir. 2016)).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* (citing *Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015)).

85. *Id.* at 39.

86. *Id.*

87. *Id.*

88. *Id.* at 39.

which is vital for a fair use defense.⁸⁹ Summary judgment was granted to Drake finding that his use of “Jimmy Smith Rap” was fair.⁹⁰

This case is significant as rulings of fair use are unusual in songwriting.⁹¹ When it comes to using a music sample in a transformative way “nobody really knows what changes the nature or purpose of a work or [what] makes a use transformative.”⁹² This case came down to what this particular court felt was transformative, but a different judge or a jury could have analyzed this case by focusing on totally different aspects of the situation.⁹³ This case is just one example of the grey area that music sampling and fair use puts artists in and of how flawed and inequitable the current enforcement of copyright law is when it comes to the fair use of music samples. Drake is a very well-established artist signed to a major record label with a strong legal department, giving him the ability to defend his use of the sample and prove that his use was fair. The result could have been very different if this were a less-established artist who did not have the resources to take a gamble at a lengthy trial.

2. Bridgeport Music, Inc. v. UMG Recordings, Inc.

Bridgeport Music, Inc. v. UMG Recordings, Inc. involved the work of George Clinton, specifically his most popular 1992 single “Atomic Dog,” owned by Bridgeport Music.⁹⁴ In 1998, R&B group Public Announcement released the song “D.O.G. In Me.”⁹⁵ Bridgeport claimed that this song infringed on its copyright of Clinton’s “Atomic Dog” based on the phrase “Bow wow, yippie yo, yippie yea” which was a phrase directly used in both songs.⁹⁶ Bridgeport also alleged that the use of repetition of the word “dog” in a “low tone of voice at regular intervals and the sound of rhythmic panting” in “D.O.G In Me” was an infringement because of the similarities to “Atomic Dog.”⁹⁷ Bridgeport requested that UMG “either enter into a licensing agreement for the song or to cease distribution of the album and song.”⁹⁸ When UMG did not respond to this request, Bridgeport brought this action in federal district court.⁹⁹ The district court rendered a verdict in Bridgeport’s favor and found UMG liable for actual and statutory damages.¹⁰⁰

89. *Id.*

90. *Id.* at 38-39.

91. Ciccattelli, *supra* note 65.

92. *Id.*

93. *Id.*

94. *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 272 (6th Cir. 2009).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 273.

99. *Id.*

100. *Id.*

One issue of this case was to determine if UMG was liable to Bridgeport for copyright infringement.¹⁰¹ The first question the court asked was whether the new work has substantial-similarity to the protected work.¹⁰² The Sixth Circuit acknowledged that “the jury did not act unreasonably in concluding that there was a substantial similarity, given evidence that the copied elements had such great qualitative importance to the song.”¹⁰³ Next, the Sixth Circuit analyzed the fair use factors to determine whether the use here could be fair.¹⁰⁴ Applying the statutory factors of fair use, the court said that the jury was not unreasonable in finding that the use, in this case, was not fair.¹⁰⁵ The court said that while one factor might favor UMG, the balancing of the factors greatly favored Bridgeport.¹⁰⁶

When looking at the first factor of fair use, the court determined that “D.O.G in Me” was transformative because it had a different theme, tone, and mood from “Atomic Dog.”¹⁰⁷ However, the transformative nature of the track was not enough to tilt the balance of the factors in favor of UMG.¹⁰⁸ Regarding the second factor, “Atomic Dog” was clearly within the category of works intended for copyright protection because it was an original published music composition—falling within the creative and published category—so the factor favored Bridgeport.¹⁰⁹ When looking at the third fair use factor, the court acknowledged that the scope of the use consisted of relatively small elements of the song, however, they were the most distinctive and recognizable elements of “Atomic Dog,” or the “essence” of the work.¹¹⁰ Finally, the court considered the fourth factor and said that even though the market for “Atomic Dog” was not the same as “D.O.G. in Me,” the use would greatly impact the market for derivative works.¹¹¹ Since “Atomic Dog” is one of the most frequently sampled compositions of its era, Bridgeport could lose licensing revenue if they no longer had the right to license their content.¹¹² Since three of the four factors of fair use heavily tilted toward Bridgeport, the Sixth Circuit held that the weight of the evidence indicates that the use by UMG was not fair, and the jury was not unreasonable to come to this conclusion.¹¹³ Since “D.O.G. in Me” was substantially similar to “Atomic Dog” and the use of the copyright-protected material was not fair, the Sixth

101. *Id.*

102. *Id.* at 274.

103. *Id.* at 276–277.

104. *Id.* at 277.

105. *Id.* at 278.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

Circuit affirmed the judgment that UMG was liable to Bridgeport for copyright infringement.¹¹⁴

While this case may appear to be a typical balancing of the factors of fair use, it is crucial in analyzing the inconsistency of what is considered copyright infringement, and what is considered fair use.

3. Inconsistencies Across Circuits

As illustrated in the above two cases, Circuits have varying opinions on what exactly constitutes copyright infringement, and whether a use is fair or not. The Second Circuit in *Estate of Smith v. Graham* considered an unlicensed thirty-five-second sample used in a song to be fair use, and therefore not copyright infringement.¹¹⁵ While on the other hand, the Sixth Circuit considered the use of a similar verse and the repetition of one word (dog) to be copyright infringement and not protected by the affirmative defense of fair use.¹¹⁶ While the Supreme Court has previously ruled on the issue of fair use, there has been no distinctive case about music sampling which would give lower courts a direct example to follow. Without sound Supreme Court precedent, it is impossible to have consistency throughout jurisdictions. While the fair use factors are consistent, exemplified by the above cases, each circuit has a different opinion about which factor(s) carry more weight in determining whether a use is fair. In *Estate of Smith v. Graham* the Second Circuit's fair use analysis stressed the first factor of fair use and placed the most weight on the fact that the use was transformative.¹¹⁷ However, the Sixth Circuit in *Bridgeport Music, Inc. v. UMG Recordings, Inc.* placed much less weight on the fact that the use was transformative. Instead, they determined that even though the use was completely transformative, it was not transformative enough to consider the use as a whole, fair.¹¹⁸

Not only did these two circuits differ in what factors hold the most importance, but they also differed in how they analyzed the factors. For example, the Second Circuit believed that a thirty-five-second portion of a spoken word poem was reasonable in relation to the purpose of copying.¹¹⁹ However, the Sixth Circuit found that the repetitive use of one singular word and a short verse, a small portion of the original work, was still significant enough for the third factor to not support fair use.¹²⁰ Similarly, when analyzing the fourth factor, the Sixth Circuit placed weight on the effect of the market for derivative works, while the Second Circuit only considered

114. *Id.* at 279.

115. *Estate of Smith v. Graham*, 799 F. App'x 36, 38 (2d Cir. 2020).

116. *Bridgeport*, 585 F.3d at 279.

117. *Estate of Smith*, 799 F. App'x at 38.

118. *Bridgeport*, 585 F.3d at 278.

119. *Estate of Smith*, 799 F. App'x at 39.

120. *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 278 (6th Cir. 2009).

the commercial market, giving no weight to the potential impact on the market for derivative works.¹²¹ The different circuits not only have different outcomes, but inconsistent analytical approaches for each of the fair use factors.

The conflicting analyses and outcomes leave artists guessing on what they are and are not allowed to do when it comes to music sampling. This unpredictability may turn artists away from sampling songs completely, or even using the same chords that another song uses in fear that they may get sued. Alternatively, the unpredictability can also discourage artists from bringing a lawsuit against someone they believe infringed on their copyright because of the cost and the fear that they will not know the standard because of the inconsistency between judges and courts. This is especially true for smaller artists who do not have the funding to initiate or defend a suit, which can make artists cautious, or even dissuade them from creating new works. The purpose of copyright law is to promote the progress and creativity of the arts, including music.¹²² The inconsistency in application of the law is doing the exact opposite of what the copyright law should be doing. Either the law has to be changed to make it clearer, or the courts have to change the way they are enforcing copyright law to be not only more consistent but fairer.

III. PROPOSED SOLUTION

Since the Copyright Act of 1976 was passed, there has been much discussion about the flaws and shortcomings of the fair use doctrine. Many legal scholars have proposed solutions to amend or change the fair use doctrine to address and fix these issues. However, none of these ideas are adequate solutions for the problems that current copyright law poses to the music industry.

A. PREVIOUSLY PROPOSED SOLUTIONS

1. Fair Use as Efficient Use

One argument to improve the fair use doctrine suggests that the objective of copyright law in general and the fair use doctrine in particular should be the efficient allocation of resources.¹²³ William W. Fisher III argues this in his article “Reconstructing the Fair Use Doctrine.”¹²⁴ This approach promotes “economic efficiency” which is defined as the “allocation of resources which could not be improved in the sense that a further change would not so improve the condition of those who gained by it that they could

121. *Id.*; *Estate of Smith v. Graham*, 799 F. App'x 36, 38 (2d Cir. 2020).

122. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

123. William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988).

124. *See generally id.*

compensate those who lost from it and still be better off than before.”¹²⁵ This proposal stems from the idea that the current solution to copyright infringement fosters economic inefficiency—because granting an artist or inventor a property right in his creation could make him a monopolist, which would give rise to economic disparity.¹²⁶ The solution to this, according to Fisher, is for judges to use the fair use doctrine to shape copyright law in a way that will produce the most efficient solution.¹²⁷

Fisher lays out a process in which a federal judge would come to the determination on whether a use is considered economically efficient or not.¹²⁸ First, the judge would not concern himself solely with the defendant’s conduct but instead identify and compare all of the copyrighted material that makes use of the one in question.¹²⁹ Next, the judge will hear all of the suits on these potentially infringing materials and determine which of those activities should be considered fair.¹³⁰ The judge does this by ranking the multiple uses in order of the relative benefits and costs of legitimating them.¹³¹ This becomes the “incentive/loss ratio” which provides the judge with a preliminary indication of the net economic benefits of the use.¹³² Based on these findings the judge will conclude whether the prohibition of the use would result in a substantially higher incentive/loss ratio than would allow the use of the taken material.¹³³ Using this number the judge will determine which use of the copyright-protected material is the most economically efficient, and therefore fair.¹³⁴

This solution fails because similar to the current fair use rules, determining whether the use of a copyright-protected work is “economically efficient” is arbitrary. As discussed above, the four fair use factors are consistent, yet different circuit courts have differing opinions on how to weigh the factors. There is no reason to believe that this solution would make the issue of consistency any better. According to Fisher, it would be up to the judge to determine whether the use was economically efficient or not.¹³⁵ Even if judges were given the formula to determine this, similar to the fair use factors, there is still the potential for each judge to differ in what exactly they determine to be fair use. Not only will judicial determinations continue to result in inconsistencies, but the judicial process would be complicated even

125. *Id.* at 1699.

126. *Id.*

127. *Id.* at 1704.

128. *Id.*

129. *Id.* at 1706.

130. *Id.*

131. *Id.* at 1707.

132. *Id.*

133. *Id.* at 1709.

134. *Id.*

135. *Id.* at 1720.

further as judges would be required to complete their own economic analysis instead of simply interpreting the law the way that it is written.

This solution also fails to address the issue of litigation costs, and the backup of the docket of federal court cases. Fisher even says in his paper that when imagining this solution, “assume the judge has no other cases on his docket; he has unlimited research capabilities; and he knows that his decision will not be reversed and will be accepted in all other jurisdictions.”¹³⁶ Based on the current state of our legal system, it is unlikely that even one of these conditions will ever be satisfied. As stated earlier in this Note, in 2019, there were 376,762 filings in U.S. District Courts and 47,977 filings in the twelve regional Courts of Appeals. Given the large caseload, it would be too difficult to ask federal judges to do entire economic analyses on each copyright infringement case they see.¹³⁷ This solution fails to solve two major problems of the fair use doctrine: the time it takes to get a resolution in a federal case due to the backlog of cases in federal court, and the inconsistency of fair use rulings. Therefore, this is neither a realistic nor helpful solution.

2. Bright-Line Rules

Instead of going through the fair use factors and balancing them, there could be bright-line rules to determine whether or not the use of a copyrighted work is fair.¹³⁸ Bright-line rules would help to fix the current vagueness of copyright law and provide some level of certainty when it comes to a fair use case.¹³⁹ In the paper “Fair Use Harbors” Gideon Parchomovsky and Kevin A. Goldman propose that the “way to increase clarity and certainty for users of copyrighted works is by enacting clearly defined, nonexclusive fair use safe harbors.”¹⁴⁰ This paper proposes differing bright-line safe harbors for each type of copyright-protected work including literary works, sound recordings, and musical compositions, and audiovisual works.¹⁴¹ The rule this paper proposes for sound recordings is that “the lesser of ten percent or ten seconds may be copied without permission”¹⁴² The portions borrowed does not have to be consecutive, as long as the cumulative amount does not exceed the rule.¹⁴³ According to the authors, to make this rule consistent, there should be no restrictions to what the user can use the borrowed material for, as long as it does not exceed the lesser of ten seconds or ten percent of the original

136. *Id.* at 1706.

137. *Federal Judicial Caseload Statistics 2019*, *supra* note 70.

138. Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483 (2007).

139. *Id.*

140. *Id.* at 1502.

141. *Id.* at 1511-1518.

142. *Id.* at 1483.

143. *Id.* at 1512.

use.¹⁴⁴ The authors argue that this rule is fair because the protection of short samples is necessary to foster the creation of new musical works.¹⁴⁵

While this bright-line rule heads in the right direction of aiming to foster creativity and development in the music industry through music sampling, there are many problems with this solution as a substitution for fair use. The first being that these rules would have to be made into law. The Copyright Law of 1976 has not changed since it was signed, and it would be extremely difficult to get the legislature to come together and change a law that has been codified without change for almost thirty years. Even if the legislature does agree to amend the law, it would be extremely difficult to determine what the bright-line rules should be and there is no guarantee that the rules created will be better than the current enforcement of the fair use doctrine.

If the legislature decides to use the ten-second or ten percent rule that is introduced by Parchomivsky and Goldman, problems will also arise. In the rule that the authors propose, there are no restrictions to which parts of the song can be used as long as it is not more than ten percent or ten seconds.¹⁴⁶ They make it very clear there should be no restrictions to what the use can be.¹⁴⁷ If there is no restriction to which part of the song can be taken, the new work can take the most distinguishable and unique part of a song and copy it with no repercussions. This could cause significantly more harm than taking a portion that is ten percent of a song but is not as integral to the original song. This essentially would destroy the third and fourth factors of the fair use doctrine. The third factor of the fair use doctrine seeks to protect the “heart” and “essence” of a work to ensure that no matter how small the portion that is taken; the essence of the work is not stolen.¹⁴⁸ The fourth factor also considers the potential effect on the market if the use is allowed.¹⁴⁹ If this bright-line rule is adopted, it essentially allows the main part of a song to be taken. If the best part of a song is taken, this new work will likely be in direct competition with the old work with no repercussions. This solution effectively ends the current state of the fair use doctrine, while creating a new rule that could provide even more complex problems while providing fewer protections for artists.

B. INDEPENDENT COPYRIGHT AGENCY

Even with the discussion surrounding how the fair use doctrine should be changed, the legislature has not made any moves to change the law. It can be assumed that the fair use doctrine as it is currently written in the Copyright Act of 1976 will continue to govern. Therefore, the inconsistency and

144. *Id.*

145. *Id.* at 1513.

146. *Id.*

147. *Id.*

148. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539,564 (1985).

149. Copyright Act of 1976, 17 U.S.C §107 (2018).

unfairness of the current application of the fair use doctrine must be resolved without having the legislature make any substantive changes to the Act. To address the shortcomings of the current enforcement method of the fair use doctrine, an Independent Copyright Agency should be formed to conduct fair and impartial investigations into copyright infringement, and then come to a determination whether a use is fair or not.

1. Using Independent Federal Agencies as Framework

There are currently independent agencies in other areas of the law that operate successfully. The National Labor Relations Board (NLRB) is an example of an independent agency that can be used as the blueprint for how a copyright agency would look. The NLRB is an independent federal agency created to enforce the National Labor Relations Act (NLRA).¹⁵⁰ They are vested with the power to safeguard employees' rights and they also act to prevent, and remedy unfair labor practices committed by private-sector employees and unions.¹⁵¹ To fulfill these responsibilities, the NLRB has a range of things they can do to ensure they are protecting the rights of the employee. One of their responsibilities is to investigate charges.¹⁵² If an individual believes their NLRA rights have been violated, they may file a charge against an employer or a labor organization.¹⁵³ "The NLRB receives about 20,000 to 30,000 charges per year from employees, unions, and employers covering a range of unfair labor practices."¹⁵⁴ Once the charge is filed the Board's agents investigate the charge by gathering evidence, and may take affidavits from parties and witnesses.¹⁵⁵ Once the evidence is gathered the Board's agents use the NLRA and previous Board decisions to see if the charge is supported by evidence and precedent. Their findings are then evaluated by the Regional Director and a decision is made about the merits of a charge within seven to fourteen weeks, depending on the complexity of the case.¹⁵⁶ However, during this period, a majority of charges are settled by the parties, withdrawn by the charging party, or dismissed by the Regional Director.¹⁵⁷ If the NLRB investigation does find "sufficient evidence to support the charge, every effort is made to facilitate a settlement between the parties."¹⁵⁸

150. *Who We Are*, NAT'L L. RELS. BOARD, <https://www.nlr.gov/about-nlr/who-we-are> (last visited Feb. 13, 2021).

151. *What We Do*, NAT'L L. RELS. BOARD, <https://www.nlr.gov/about-nlr/what-we-do> (last visited Feb. 13, 2021).

152. *Id.*

153. *Investigate Charges*, NAT'L L. RELS. BOARD, <https://www.nlr.gov/about-nlr/what-we-do/investigate-charges> (last visited Feb 13, 2021).

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

Another one of the NLRB's main responsibilities is to facilitate settlements. "The NLRB encourages parties to resolve cases by settlement rather than litigation whenever possible."¹⁵⁹ This strategy is typically successful, and "more than 90% of meritorious unfair labor practice cases are settled by agreement at some point in the process."¹⁶⁰ There are two types of settlements that parties can come to, Board settlement agreements or private non-board agreements.¹⁶¹

In a Board settlement agreement, the Regional Director allows the charged party to settle, and regional staff members draft a proposed settlement agreement that remedies all of the unfair labor practice allegations that are meritorious.¹⁶² The charged party can then agree to the terms or suggest changes to the agreement that is subject to approval by the Regional Director.¹⁶³ The main goal of a Board settlement is to reach an agreement that is acceptable to the charging party, the charged party, and the Agency, so only on rare occasions will the Regional Director approve a settlement that the charged party agrees with but the charging party does not.¹⁶⁴ In this case, the charging party may appeal the Regional Director's approval of the settlement to the NLRB Office of Appeals.¹⁶⁵

On the other hand, a private non-board agreement is when the charges are resolved by a private agreement between the parties.¹⁶⁶ The Regional Director still must review and approve of this agreement before the charges are withdrawn, and they may choose to reject an agreement that violates the NLRA or Board policy.¹⁶⁷ If the parties fail to reach a settlement agreement the Region will issue a complaint and then a hearing will be scheduled.¹⁶⁸

The NLRB also has the power to decide cases.¹⁶⁹ If the investigation of a charge shows a violation of the NLRA and a settlement is not reached, a hearing will be scheduled before an NLRB Administrative Law Judge (ALJ).¹⁷⁰ Similar to a typical court proceeding, both parties will prepare an argument and present any evidence or witnesses they have.¹⁷¹ The ALJ will then evaluate the evidence and issue an initial opinion on the case.¹⁷² These

159. *Facilitate Settlements*, NAT'L L. RELS. BOARD, <https://www.nlr.gov/about-nlr/what-we-do/facilitate-settlements> (last visited Feb. 13, 2021).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *See Decide Cases*, NAT'L L. RELS. BOARD, <https://www.nlr.gov/about-nlr/what-we-do/decide-cases> (last visited Feb. 13, 2021).

170. *Id.*

171. *Id.*

172. *Id.*

decisions are subject to review by the Board which is composed of five members nominated by the President and confirmed by the Senate.¹⁷³ All parties may file for an appeal, and then the Board will review the case record including the findings of the initial investigation, and then make a decision.¹⁷⁴ If the parties would still like to appeal then the Board decision may be appealed to the appropriate U.S. Court of Appeals.¹⁷⁵ Circuit courts in recent years have decided about 65 cases a year involving the NLRB, with 80% of them decided in the Board's favor.¹⁷⁶ It is also important to note that parties have the voluntary option to have the case decided by Alternate Dispute Resolution (ADR) for cases that are pending before the Board.¹⁷⁷ Here, a mediator would assist the parties in reaching a settlement which the Board would then approve.¹⁷⁸ This system was set up to provide the opportunity to facilitate settlements at any point in the process with minimal cases having to go to federal court.

2. An Independent Copyright Agency

The NLRB provides a reasonable blueprint for how the Copyright Agency should operate. Similar to the NLRB's "regional offices" the Copyright Agency would have offices in charge of conducting independent investigation reviewing the facts. Instead of using the framework of the NLRA to come to decisions, the guiding principle would be the Copyright Act of 1976. If an individual or a company (such as a record label) believes their copyrighted work was used without their permission and it was not fair use, they can bring a complaint to one of the Regional Offices. Once the copyright infringement complaint comes into the Copyright Agency, they will gather the facts from both parties and conduct an independent investigation. Using the Copyright Act of 1976, and the four factors of fair use, they will be able to come up with a conclusion on whether or not the use of the copyright-protected work was fair. Those Regional Offices will then present the findings of the investigation to the Regional Director who will then confirm whether the charge has merit. If the charge has merit, then the Regional Director will issue a complaint which would lead to a hearing in front of an ALJ.

Similar to the NLRB, the Copyright Agency should strongly encourage and facilitate settlements between parties. Even before the independent investigation is completed the parties will have the opportunity to settle. Then once the investigation is complete and the case is not dismissed, the parties

173. *Id.*

174. *Id.*

175. *Id.*

176. *Enforce Orders*, NAT'L L. RELS. BOARD, <https://www.nlr.gov/about-nlr/what-we-do/enforce-orders> (last visited Mar. 13, 2021).

177. *Decide Cases*, *supra* note 169.

178. *Id.*

will have another chance to settle. The parties could either privately settle the matter or the Agency could facilitate it. If the parties decide to privately settle the matter, then the Agency would have authority to approve it to make sure it comports with the Copyright Act of 1976 as well as Agency standards. If the parties choose to have the Agency facilitate the settlement, then the Regional Director who issued the complaint will draft a proposed agreement based on their findings. Both parties will have the opportunity to propose changes, but the final agreement must be approved by the Regional Director. If the agreement is signed by both parties, there will be no complaint issued and no need to move the case forward to an ALJ hearing.

If the case does however move to an ALJ hearing, the Agency should also have the power to decide cases. The ALJ will hear arguments, evidence, and witnesses provided by each of the parties. The ALJ will then issue a decision on the matter. If one or both of the parties disagree with the ALJ decision, they can then appeal it to the Board. The Board will then review the case record and the documents produced by the regional investigation. The appeals process from then should also remain relatively similar to that of the NLRB. While the main purpose of this Agency is to limit the cases that have to be litigated in federal court, copyright law is still a federal issue, and the parties should be provided with the opportunity to appeal their case as many times as they see fit. If a party disagrees with the Board decision, they can then appeal to the proper Circuit Court of Appeals.

Having an independent agency take over copyright infringement cases is beneficial for multiple reasons. The first reason being that it will be more efficient. Not only will artists no longer have to wait for a trial date in federal court, but it will also ease the federal court docket from large amounts of copyright infringement cases. While it is inevitable that some cases will reach the point of federal litigation, this solution should significantly decrease the total amount of copyright cases to make it to federal litigation. As mentioned previously, NLRB investigations could take anywhere from 7-14 weeks depending on the magnitude of the charge and amount of evidence there is. Assuming a Copyright Agency would operate in a similar time frame, investigations could be completed, and a settlement could be reached in less time than it would take for the parties to have their federal court date scheduled.

The Agency will also provide consistency, having Board decisions to look at how other cases with similar fact patterns were resolved by the Agency will set a helpful precedent that will not vary as it does now across multiple jurisdictions. This eliminates the inconsistency that comes from different circuit courts having differing decisions. Unlike circuit courts, which can only look to their circuit and the Supreme Court for precedent, the Copyright Agency will look to previous Agency decisions and all of the Regions will follow the same standards.

Finally, this agency will provide a level of fairness that the current copyright infringement enforcement system does not provide. With reduced court fees, legal fees, and the other fees that compound when going through a lengthy federal court trial, smaller artists will have the opportunity to not only defend their fair use of a sample but to also bring copyright infringement complaints against more established artists without the massive expenses currently associated with typical copyright infringement cases.

3. Potential Problems with Federal Agency

An independent copyright agency modeled after the NLRB would be an efficient and effective solution to the current issues the enforcement method of the fair use doctrine presents, without making changes to the Copyright Act itself. However, there may be some initial problems with enacting this agency. The first potential problem to address would be how many regional offices are needed and where should they be located.

The NLRB currently has twenty-six regional offices and is headquartered in Washington, DC.¹⁷⁹ The Copyright Agency could follow and have different regional offices spread across the country; however, this may not be the most efficient allocation of resources. Most major record labels are headquartered in New York City, Los Angeles, Nashville, or other major cities.¹⁸⁰ The question then arises if it would be more beneficial to have more resources in those cities. While that may seem to make sense, it may again add to the bias toward large artists and ignore smaller artists in different areas of the country who would bring claims to the Copyright Agency.

Another logistical question is what precedent the Copyright Agency should start with. The Supreme Court has previously ruled on the issue of music sampling and fair use.¹⁸¹ However, this decision only determined that a music sample was fair use when it is used in a parody.¹⁸² There has been no precedent set by the Supreme Court when it comes to music sampling in any other context. As mentioned earlier in this Note, the circuit courts have had differing opinions when it comes to when sampling another artist's music is fair use. The question for the Copyright Agency then becomes, which circuit's interpretation should be used. The Copyright Agency could potentially pick a circuit that they feel did the best analysis of fair use, or they could set their own precedent by determining the first case completely on their own. Either way, they must make sure that they are being consistent throughout all regions, and do not subject themselves to the same type of inconsistencies the federal circuit courts have.

179. *Regional Offices*, NAT'L L. RELS. BOARD, <https://www.nlr.gov/about-nlr/who-we-are/regional-offices> (last visited Feb. 13, 2021).

180. See Nancy Levin, *10 Largest Record Labels in the World*, LARGEST.ORG (Oct. 4, 2019), <https://largest.org/entertainment/record-labels/>.

181. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

182. *Id.*

Despite these specific logistical problems that arise, an independent copyright agency is still the best solution to fixing the problems caused by the current enforcement of the fair use doctrine. Once the agency determines the precedent that will be used, each regional office across the country will be consistent in its determinations on whether a use is fair or not. While consistent, the agency will still be able to keep the integrity of the fair use doctrine by being able to consider the different facts on a case-by-case analysis.

This agency also solves the problem of artists not being able to afford the lengthy trials of federal court. The Copyright Agency, as mentioned previously, will conduct independent investigations on its own without requiring the parties to pay for a lawsuit in federal court. An independent copyright agency is both more efficient and more consistent than the current enforcement method of the fair use doctrine.

CONCLUSION:

It is clear that the current enforcement method of the fair use doctrine has fatal flaws that must be addressed. While fair use is a balance of factors based on a case-by-case basis, there is too much inconsistency between circuit courts in cases involving the sampling of music. This inconsistency of rulings leads to difficulty for artists determining what artists can and cannot do when it comes to music sampling. The fundamental goal of copyright law is to foster creativity and promote innovation while simultaneously protecting the rights of the creator. Having a law that is inconsistently enforced does the opposite of what copyright law was created to do.

The current enforcement method of the fair use doctrine is also unfair. Since every single fair use case must be litigated in federal court, fair use cases are extremely expensive and require a significant amount of time and resources. It is more likely that larger more established artists have the money and resources to fight and initiate these lawsuits, while smaller artists do not have the funds. This can dissuade artists from creating new and innovative work because they are scared to sample a song in fear that they will have to litigate a federal case. This also may cause smaller artists to not go after larger artists even when they know their work has been infringed on, simply because they know the larger artists have more resources to endure a lengthy federal trial.

An independent copyright agency would provide an efficient solution to the inconsistency and unfairness of the current enforcement of the fair use doctrine. This agency would not only relieve pressure from the federal court docket but would also make it easier and cheaper for artists to both bring and defend a copyright action involving fair use. Using the framework of current independent agencies, the Copyright Agency would be able to operate as a legal system effectively and efficiently for copyright law. By having the power to independently conduct investigations using the Copyright Act of

1976 as its foundation, their decisions will create agency precedent and take away the inconsistencies that occur between different circuit courts. The independent agency also solves the problem of fairness through the ability of the parties to have their case adequately heard without having to pay for federal litigation. The current method of fair use enforcement is flawed, and an independent copyright agency will solve these problems while still maintaining the integrity of the current law.

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