

GREY TUESDAY LEADS TO BLUE MONDAY? DIGITAL SAMPLING OF SOUND RECORDINGS AFTER *THE GREY ALBUM*

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I. INTRODUCTION

The protection of intellectual property rights has long been important in the United States. The government, aware that the intellectual property industry accounts for approximately 5 percent of the gross domestic product, has been particularly vigilant in ensuring that such rights are protected.¹ The protection of such rights, particularly in the movie and music industries, has been made much more difficult with the eruption of the Internet and Internet-related technologies such as peer-to-peer file sharing, which allow the dissemination of copyrighted materials almost instantaneously.²

These technologies have not been used solely for criminal purposes. Any individual browsing music on the Internet will quickly notice the countless number of small bands and record labels that rely heavily on the Internet to promote and distribute their products. Furthermore, the ease of transporting digital music files compared to compact discs (“CDs”) and the wide availability of digital music devices have made digital music an extremely popular—if not the preferred—format.³ The record industry initially had been slow to respond to this shift in consumer demand, and online music services such as iTunes, Musicnet, and Pressplay have only recently become widely available.⁴

Because of their self-imposed lag, the major record labels, through the Recording Industry Association of America (“RIAA”),⁵ have been

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1. John G. Malcolm, Privacy and Intellectual Property—Legal Issues Related to Peer-to-Peer File Sharing over the Internet, Address Before the New York State Bar Association & International Bar Association (Oct. 23, 2003), at <http://www.cybercrime.gov/Malcolmtestimony102303.htm>.

2. *Id.*

3. See David Lieberman, *How Dangerous Are Pirates? Music Industry Blames Dying Sales on Copying*, USA TODAY, Apr. 5, 2002, at B1 (stating that approximately 17 percent of adults who have Internet access have downloaded music, and that sales of blank CDs have eclipsed those of recorded CDs); *Apple Posts \$46M Profit, iPod Sales up 909 Percent*, MAC NEWS NETWORK [hereinafter *iPod Sales*], at <http://www.macnn.com/news/24221> (Apr. 14, 2004) (discussing phenomenal success of the iPod, even outselling Apple’s Macintosh units).

4. Malcolm, *supra* note 1; see *iPod Sales*, *supra* note 3.

particularly hostile to the distribution of online music. In 2003, the RIAA sent a loud warning shot to online music purveyors when it set an example by suing four college students.⁶ The students—one from Princeton University, one from Michigan Technological University, and two from Rensselaer Polytechnic Institute—were forced to pay as much as \$17,500 each in exchange for the dismissal of RIAA’s lawsuits, which could have resulted in fines of \$150,000 per copyrighted song.⁷ More recently, the record industry has moved to pursuing small-time disk jockeys (“DJs”) who sample copyrighted works, such as the one described here: DJ Danger Mouse.

II. BACKGROUND—THE RECORD INDUSTRY MEETS DJ DANGER MOUSE

It is common knowledge that mixing black and white yields grey. Unfortunately for Brian Burton, a.k.a. DJ Danger Mouse, such a mixture has produced troublesome results. Burton created the underground hit *The Grey Album*, taking an *a cappella* version of rap artist Jay-Z’s *The Black Album* and splicing beats from The Beatles’ *The White Album* into it.⁸ This musical experiment has since led to arguments over the intellectual property rights of the original works and whether such unauthorized use constitutes a legal violation of the creators’ rights.

A. Creating The Grey Album

In December 2003, Jay-Z had just released an *a cappella* version of his latest album, *The Black Album*.⁹ By doing so, Jay-Z intended for DJs to mold his work into creative endeavors, specifically declaring that he wanted music-lovers to “remix the hell out of it.”¹⁰ Brian Burton, a relatively unknown DJ in Los Angeles working under the name DJ Danger Mouse, was a member of the category to which Jay-Z intended to cater when he released his *a cappella* version.¹¹ Like most DJs, Burton would typically experiment with new ideas by remixing or combining

5. The RIAA is “the trade group that represents the U.S. recording industry,” including all the major record labels. RIAA, About Us, at <http://www.riaa.com/about/default.asp> (last visited Apr. 18, 2005); see also RIAA, About Us, Distributed Labels of Reporting Companies, at <http://www.riaa.com/about/members/default.asp> (last visited Apr. 18, 2005).

6. See Frank Ahrens, *Four Students to Pay for Music File Swapping: Agreement Settles Suit by Recording Industry*, WASH. POST, May 2, 2003, at E1.

7. *Id.*

8. See Michael Paoletta, *Danger Mouse Speaks Out on “Grey Album,”* BILLBOARD DAILY MUSIC NEWS, at http://www.billboard.com/bb/daily/article_display.jsp?vnu_content_id=1000455930 (Mar. 8, 2004).

9. Corey Moss, *Grey Album Producer Danger Mouse Explains How He Did It*, MTV NEWS, at http://www.mtv.com/news/articles/1485693/20040311/jay_z.jhtml (Mar. 11, 2004).

10. Shaheem Reid & Joseph Patel, *Remixers Turn Jay-Z’s Black Album Grey, White and Brown*, MTV NEWS, at http://www.mtv.com/news/articles/1484608/01262004/jay_z.jhtml (Jan. 26, 2004).

11. Moss, *supra* note 9.

existing musical works. Being an avid fan of both Jay-Z and The Beatles, Burton envisioned blending *The Black Album*¹² with The Beatles' *The White Album*¹³ to create a new product. Burton worked on his new project for two weeks.¹⁴ First, he measured the amount of beats per minute on each track of *The Black Album*.¹⁵ Burton then immersed himself in every musical element on *The White Album*—he began with individual drum and cymbal beats, moved on to bass guitar samples, and finished by collecting various sounds and beats that appealed to him.¹⁶ Once he finished collecting the elements, Burton used the aid of a software program called ACID Pro¹⁷ to combine various tracks of the samples.¹⁸ In addition to layering tracks, ACID Pro also allowed Burton to modify the samples from *The White Album*, giving the tracks a more “hip-hop” feel.¹⁹ The result was the intermixed record that Burton dubbed *The Grey Album*.²⁰ Burton likely was unaware of the controversy that would ensue.

Because *The Grey Album* was intended for limited use, Burton felt it was unnecessary to obtain permission from the record labels of the source albums.²¹ Burton only created a few thousand copies, stating, “I intended for it to be for friends and for people who knew my stuff. I figured it would get passed around, and it would be this little underground thing, but it kind of took off on its own.”²² Instead, the album became a widespread hit, with *Rolling Stone* hailing it as “an ingenious hip-hop record that sounds oddly ahead of its time.”²³ Unfortunately for Burton, the emergence of his handiwork not only boosted his reputation with the public, but also alerted the record industries of *The Grey Album*'s existence. EMI Records, which owns the rights to The Beatles' sound recordings, quickly responded by issuing

12. JAY-Z, *THE BLACK ALBUM* (Roc-A-Fella Records 2003).

13. THE BEATLES, *THE BEATLES* (Capitol/EMI 1968). The album was originally self-titled, but the all-white cover prompted it to be dubbed “The White Album,” by which it is now commonly known. *The Beatles (album)*, WIKIPEDIA: THE FREE ENCYCLOPEDIA (Apr. 6, 2005, 18:38 UTC), at [http://en.wikipedia.org/wiki/The_Beatles_\(album\)](http://en.wikipedia.org/wiki/The_Beatles_(album)).

14. Moss, *supra* note 9.

15. *Id.*

16. *Id.*

17. ACID Pro is a widely available software product from Sony Media that retails for around \$400. See Sony Media Software Products, ACID Pro 5 Software, at <http://mediasoftware.sonypictures.com/products/showproduct.asp?pid=928> (last visited Apr. 15, 2005).

18. Moss, *supra* note 9.

19. *Id.*

20. DJ Danger Mouse Biography, at <http://www.djdangermouse.com/bio.html> (last visited Apr. 15, 2005).

21. Nekesa Mumbi Moody, “Art Project” Steps into a Legal “Grey” Area, SAN DIEGO UNION-TRIB., Feb. 29, 2004, available at http://www.signonsandiego.com/uniontrib/20040229/news_1a29grey.html (quoting Burton calling *The Grey Album* an “art project”).

22. *Id.* However, there was conflicting evidence that Burton actually sold copies to record stores for distribution and promoted the album on his personal Web site. *Id.*

23. Lauren Gitlin, *DJ Makes Jay-Z Meet Beatles*, ROLLINGSTONE.COM, at http://www.rollingstone.com/news/story/_/id/5937152 (Feb. 5, 2004).

Burton a cease-and-desist letter in early February 2003.²⁴ Thus far, Jay-Z's label, Roc-A-Fella Records, has not taken any action against Burton.²⁵ In fact, a Roc-A-Fella executive, while noting that Burton should have obtained permission before the commercial release of the album, praised Burton's artistic ability.²⁶

B. Grey Tuesday—The Underground Strikes Back

Although EMI may have resolved one source of the problem when Burton immediately complied with its request,²⁷ EMI faced a much larger predicament due to the unexpected backlash from the underground music industry.²⁸ Although Burton created *The Grey Album* as a "limited-edition promotional item," it became so popular that he lost control over the copies, which found their way into retail stores and Internet auction sites.²⁹ EMI's problems escalated when music activist group Downhill Battle³⁰ organized a day of protest it hailed as "Grey Tuesday."³¹ Grey Tuesday organizers encouraged Web site operators to offer *The Grey Album* to the public for twenty-four hours as a protest to "EMI's attempts to censor this work."³² The protest was a tremendous success according to Grey Tuesday organizers, who issued figures indicating that over one hundred thousand copies of the album were downloaded.³³ This is the equivalent of more than one million digital tracks.³⁴ Such statistics, if true, would make *The Grey Album* more popular than albums released by many of the current top-selling artists.³⁵

24. Paoletta, *supra* note 8; *see also infra* note 36 (discussing EMI Records). The Beatles' creations have been notoriously off-limits for remixing and sampling use, with the rare exception of the Beastie Boys' *Paul's Boutique*, which was created in 1994 before sampling rights were clearly defined. Noah Shachtman, *Copyright Enters a Gray Area*, WIRED NEWS, at <http://www.wired.com/news/print/0,1294,62276,00.html> (Feb. 14, 2004); THE BEASTIE BOYS, *PAUL'S BOUTIQUE*, (Capitol Records 1994).

25. Moody, *supra* note 21. *See generally* Roc-A-Fella Records, at <http://www.rocafella.com> (last visited Apr. 15, 2005).

26. *Id.*

27. Joseph Patel, *Grey Tuesday Group Says 100,000 Downloaded Jay-Z/Beatles Mix*, MTV NEWS, at http://www.mtv.com/news/articles/1485593/20040305/jay_z.jhtml (Mar. 5, 2004).

28. *See id.*; Grey Tuesday, Free the Grey Album: February 24, 2004, at <http://www.greytuesday.org> (last visited Apr. 15, 2005); *see also* Downhill Battle—Music Activism, at <http://www.downhillbattle.org> (last visited Apr. 15, 2005).

29. Joseph Patel, *Producer of The Grey Album, Jay-Z/Beatles Mash-Up, Gets Served*, MTV NEWS, at http://www.mtv.com/news/articles/1484938/02102004/jay_z.jhtml (Feb. 10, 2004) (explaining that Burton only had a limited 3,000 copies of the album made for his own promotional use).

30. Downhill Battle is a non-profit activist organization that seeks to challenge the five major record labels it deems to be holding a monopoly on music, as well as to encourage independent labels to provide an alternative source of music. Downhill Battle, *supra* note 28.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* (declaring that the number of downloads of *The Grey Album* exceeded album sales of artists such as Norah Jones and Kanye West).

III. ANALYSIS—EMI, COPYRIGHT LAWS, AND GREY TUESDAY

EMI³⁶ never filed suit against those who contributed to the Grey Tuesday protest. Instead, EMI used threatening cease-and-desist letters in an attempt to quiet the protest groups. In one warning letter, EMI requested that Downhill Battle, the ringleader of Grey Tuesday:

1. cease and desist from the actual or intended distribution, reproduction, public performance or other exploitation of *The Grey Album* and any other unauthorized uses of the Capitol Recordings or any other sound recordings owned and/or controlled by Capitol;
2. identify the names and addresses of any third parties who have supplied [Downhill Battle] with physical or digital copies of *The Grey Album* or who are otherwise involved in *The Grey Album*'s unauthorized distribution, reproduction, public performance, or other exploitation;
3. provide Capitol with an accounting of all units of *The Grey Album* that have been distributed via [Downhill Battle's] website, either physically or digitally, and of all instances of public performance of *The Grey Album* rendered via [Downhill Battle's] website; and
4. preserve any and all documents and records relating to this matter, including but not limited to electronic data and other information which may be relevant/discoverable in the event of litigation.³⁷

In addition, EMI demanded that Downhill Battle pay Capitol an undetermined amount for any previously distributed copies of *The Grey Album*.³⁸ Downhill Battle was defiant, declaring, "Despite [EMI's] letter, Downhill Battle will be posting [*The Grey Album*] on our website tomorrow."³⁹ Downhill Battle further asserted that it had a fair use right to post the music under current copyright laws and that EMI had no legal right to make such demands; it even threatened to file a countersuit against EMI under the Digital Millennium Copyright Act of 1998 ("DMCA")⁴⁰ if any attempts were made to frustrate Grey Tuesday.⁴¹ In

36. Note that EMI and Capitol Records merged in 1955, with Capitol acting as the United States licensee and owner of EMI artists, including The Beatles. *EMI*, WIKIPEDIA: THE FREE ENCYCLOPEDIA (Jan. 7, 2005, 19:44 UTC), at <http://en.wikipedia.org/wiki/EMI> (discussing history of EMI, as well as listing labels under the EMI banner); see also E-mail from J. Christopher Jensen, Partner, Cowan, Liebowitz & Latman, P.C., to Downhill Battle (Feb. 23, 2004) [hereinafter Cease-and-Desist Letter], available at http://downhillbattle.org/grey/emi_cd_letter.html.

37. Cease-and-Desist Letter, *supra* note 36.

38. *Id.*

39. Ashlee Vance, *Grey Tuesday Goes On Despite EMI Protest*, THE REGISTER, at http://www.theregister.co.uk/2004/02/24/grey_tuesday_goes_on_despite (Feb. 24, 2004).

40. In 17 U.S.C. § 512(f) (2000), Congress amended the DMCA to provide for an alleged infringer's recovery of damages against "[a]ny person who knowingly materially misrepresents that material is infringing, or that it was removed or blocked through mistake or misidentification" in a notice or a counter notice. UNITED STATES COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 12 (Dec. 1998), available at <http://www.copyright.gov/legislation/dmca.pdf>.

addition to EMI, Sony Music/ATV Publishing (“Sony ATV”) also issued a DMCA “takedown” notice⁴² to at least one internet service provider (“ISP”).⁴³

A. Overview of Federal and State Copyright Laws

Thus, there is a dispute as to the extent of EMI’s rights with respect to *The Grey Album*. A brief glance at the existing copyright laws suggests that Downhill Battle may be partially correct in its interpretation, at least with respect to federal law. However, the copyright laws may not be as accommodating to the protesters under state common law.

There are three entities that could possibly make intellectual property claims in this instance: (1) EMI, because it owns the rights to the sound recordings of The Beatles’ *The White Album*;⁴⁴ (2) Sony ATV, because, within *The White Album*, the musical works (songs or “compositions”) of John Lennon and Paul McCartney belong to the company;⁴⁵ and (3) the entities that own the rights to the sound recordings and musical works in *The Black Album*.⁴⁶ However, the analysis here will be limited to legal issues surrounding the first possibility: a claim by EMI regarding The Beatles’ sound recordings.

41. Letter from Nicholas Reville & Holmes Wilson, Co-Founders, Downhill Battle, to EMI Records Ltd. (Feb. 23, 2004) [hereinafter Response Letter], at <http://www.joegrossberg.com/archives/001277.html>.

42. A copyright owner must issue a takedown notice to the service provider in order to have the service provider remove or disable access to an allegedly infringing Web site. See 17 U.S.C. § 512(c) (2000). This notice must include substantially the following:

(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.

(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

Id. § 512(c)(3)(A)(i)–(vi). If the service provider is using an “information location tool,” the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

Id. § 512(d)(3).

43. Electronic Frontier Foundation, *Grey Tuesday: A Quick Overview of the Legal Terrain* [hereinafter EFF Overview], at http://www.eff.org/IP/grey_tuesday.php (last visited Apr. 15, 2005).

44. *Id.*

45. *Id.*

46. *Id.*

Burton only sampled the sound recordings of *The White Album*, not the compositions. Also, no opposition has come from entities owning rights to *The Black Album*.

B. Application of Federal Law

The most pertinent question is whether EMI has a valid copyright infringement claim against Downhill Battle or any other individuals involved with *The Grey Album*. A strong argument can be made that *The White Album* is not covered under United States copyright laws. It was not until 1971 that Congress amended the copyright code to include copyright protection for sound recordings fixed and published on or after February 15, 1972.⁴⁷ Because *The White Album* was published and released in 1968, it appears to fall outside the realm of U.S. federal copyright protection. However, according to the U.S. Copyright Office, “[a]ny rights or remedies under state law for sound recordings fixed before February 15, 1972, are not annulled or limited by the 1976 Copyright Act until February 15, 2047.”⁴⁸ Therefore, sound recordings fixed before February 15, 1972, may remain protected under common law or state statutes.⁴⁹ Most states do have statutes that make it illegal to copy, reproduce, and distribute sound recordings without authorization.⁵⁰

C. Application of State Law

Some states contain copyright statutes that apply to sound recordings fixed or published before 1972, while others mirror the federal copyright code and do not protect recordings fixed or published before that year.⁵¹ In California, where Burton created and distributed *The Grey Album*, valid copyright ownership is limited to the “owner of a copyright of a nondramatic musical work recognized and enforceable under the copyright laws of the United States pursuant to Title 17 of the United States Code, P.L. 94-553 (17 U.S.C. Sec. 101 et seq.),”⁵² thereby appearing to limit EMI’s rights under California state law to works following the February 15, 1972, benchmark. However, EMI might be able to file for legal relief against other parties involved with Grey Tuesday’s online distribution of *The Grey Album* under the rights and remedies provided in other states.⁵³ One example of such a party is Massachusetts-based Downhill Battle, the organizer of Grey Tuesday.

47. UNITED STATES COPYRIGHT OFFICE, COPYRIGHT REGISTRATION FOR SOUND RECORDINGS 1 (1999), at <http://www.copyright.gov/circs/circ56.pdf> (revised Jan. 2004).

48. *Id.*

49. *See id.*

50. RIAA, Copyright Laws: State, at <http://www.riaa.com/issues/copyright/laws.asp> (last visited Apr. 15, 2005).

51. *Id.*

52. CAL. BUS. & PROF’L CODE § 21750(a) (1996).

53. EFF Overview, *supra* note 43.

But under these facts, Downhill Battle and other Grey Tuesday protestors might be able to make a rather persuasive fair use argument in their defense.⁵⁴

D. Fair Use

If other parties are found subject to copyright law in their states, they may attempt to raise a “fair use” defense. The fair use defense refers to the federal copyright law exception contained in Section 107 of the Copyright Act.⁵⁵ Although fair use is not explicitly applicable to any state law claims, state courts are likely to look at fair use principles and general principles of equity when applying state law doctrine.⁵⁶ In deciding whether the use of a work is a fair use, Congress instructs the courts to consider, along with other relevant factors of each particular case, the following statutory factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁵⁷

Based on these factors, the individuals who participated in Grey Tuesday are likely to be successful in their arguments against any copyright infringement claims. The Electronic Frontier Foundation suggests that the fair use doctrine may support those participating in Grey Tuesday because: (1) posting *The Grey Album* on the Internet was for a noncommercial purpose; (2) downloading *The Grey Album* was not provided as a substitute for purchases of *The White Album*; (3) EMI was unlikely to license the work for use in a protest critical of itself; (4) *The Grey Album* was a transformative use of *The White Album*, not a wholesale copy; and (5) the act was a constitutionally protected commentary on how copyright law stifles musical creativity.⁵⁸

IV. POLICY RATIONALE OF COPYRIGHT LAWS

One basis for protest against EMI, and the record industry in general, is whether the original purpose of copyright law is being thwarted. Some argue that the fundamental premise of copyright law is to grant copyright holders a virtual monopoly on their works in exchange

54. *Id.*; see *infra* note 58 and accompanying text.

55. 17 U.S.C. § 107 (2000).

56. EFF Overview, *supra* note 43.

57. 17 U.S.C. § 107 (2000).

58. EFF Overview, *supra* note 43.

for promoting and stimulating new creative works.⁵⁹ Those who wish to use the works of others should use the proper procedure of requesting the copyright holder's permission. But are such requests realistic?

Most small artists such as Burton cannot afford the exorbitant fees required to sample copyrighted works of well-known artists, if the artists are willing to sell them at all.⁶⁰ It is one thing for the artists who toil to create these artistic pieces to personally wish to prevent others from using them. However, the spirit of copyright law does not seem to apply when faceless corporations use the law to dissuade other artists from using works within the corporations' control. These corporations are the same ones that have been chastised by the Federal Trade Commission ("FTC") for utilizing price-fixing tactics intended to take advantage of the general public.⁶¹ This industry claims tremendous losses; however, the major record labels' revenues dropped a mere 4.1 percent between 2000 and 2001 when the economy was dealing with the implosion of the technology industry.⁶² Few industries have enjoyed as much success as the record industry, which had tremendous growth during the 1990s, referred to as the "prime price-fixing years" by the FTC.⁶³ The RIAA's cries of injustice sound even more ridiculous when one considers that the artists themselves receive only 4 percent of the profit from CD sales.⁶⁴

EMI's harsh stance against *The Grey Album* seems less than justified, particularly where (1) the artist created a small, private distribution of the product, and (2) the majority of the infringing works was circulated by the public without permission of or profit to the artist. Has the granting of monopoly rights through copyright law overshadowed the intended benefits of creativity and innovation? Or does copyright law explicitly provide for such rights, shielding recording artists from having their original product spliced and incorporated into unlicensed works without the artists' permission?

59. Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785, 787 (2004).

60. See Devon Powers, *More Than Words: Musings on Music Journalism*, POPMATTERS, Mar. 10, 2004, at <http://popmatters.com/music/columns/powers/040310.shtml> (questioning why The Beatles and other influential artists impose a "cultural silence" around their music by charging exorbitant fees for sampling or disallowing it altogether). For example, the estate of R&B legend Curtis Mayfield charges upwards of \$350,000 for a sample, in addition to securing royalties on sales of the album that uses the sample; this ultimately can result in a multimillion-dollar payoff if the album becomes popular. Steve Morse, *Setting the New Market in Sampling Sellers Are Looking to Make a Deal, But Buyers Are Wary*, BOSTON GLOBE, Mar. 3, 2002, at L1, available at <http://www.jsonline.com/onwisconsin/music/mar02/25361.asp>.

61. See Ashlee Vance, *Labels Charged with Price-Fixing—Again*, THE REGISTER, at http://www.theregister.com/2003/07/29/labels_charged_with_pricefixing_again/ (July 29, 2003).

62. *Id.*

63. *Id.* (noting that record sales doubled from 1993 to 2002).

64. See Lynn Morrow, *The Recording Artist Agreement: Does It Empower or Enslave?*, 3 VAND. J. ENT. L. & PRAC. 40, 50 (2001).

V. THE FUTURE OF UNDERGROUND REMIX

The creative activities of remixing DJs such as Burton are unlikely to diminish any time in the near future. Along with well-attended public events such as the Detroit Electronic Music Festival,⁶⁵ there is no shortage of weekly underground gatherings throughout the country or even throughout the world.⁶⁶ The question then is: what responses are to be expected from the record industry should something similar to *The Grey Album* occur in the future?

The recent decision in *Bridgeport Music, Inc. v. Dimension Films*,⁶⁷ issued by the U.S. Court of Appeals for the Sixth Circuit, provides some hints about how federal courts may address such issues. In that case, the owner of a partial copyright interest in a rap song sued a movie producer for using a sample of both the composition and the sound recording of the song in a movie soundtrack.⁶⁸ On one hand, the *Bridgeport* decision appears to support Burton's cause because it notes that sound recordings created before 1971 remain unprotected and are available for sampling.⁶⁹ However, by interpreting 17 U.S.C. § 114 as prohibiting any use of a copyrighted sound recording for sampling without proper authorization, the court greatly limited the ability of remixers to lawfully incorporate any post-1971 works into their creations, even if they edited and reworked the original sound recording like Burton did with *The White Album*.⁷⁰ Specifically, the *Bridgeport* court removed any substantial similarity or *de minimis* defenses that a defendant might raise where the defendant undeniably sampled a copyrighted sound recording.⁷¹ The copyright laws grant protection for the sound recording copyright owners in the rearranging, remixing, and altering of the sounds fixed in the recording.⁷² As summarized by the Sixth Circuit, "a sound recording owner has the exclusive right to 'sample' his own recording."⁷³

Although record labels such as EMI declare that any copyright violations, no matter how limited, will be pursued under all legal avenues

65. Movement: Detroit's Electronic Music Festival 04, 2004 Movement Official Website, at <http://www.movementfestival.com> (last visited Apr. 16, 2005).

66. See, e.g., Ravelinks.com, RaveLinks Upcoming Events, at <http://www.ravelinks.com> (last visited Apr. 16, 2005) (listing various events in California and the Midwest and Northeast regions of the United States); 2004 International DJ Expo, What's New, at <http://www.djtimes.com/djexpo/expoeast2005/index.htm> (last visited Apr. 16, 2005); Iceland Airwaves, Homepage, at <http://www.icelandairwaves.com> (last visited Apr. 16, 2005) (discussing sold-out events in Iceland venues featuring various international DJs and artists); WorldDJ.Com, Intro to WorldDJ.com, at <http://worlddj.com/public/about.wdj?ref=> (last visited Apr. 16, 2005) (providing links to electronic and dance music DJs and events throughout the world).

67. 383 F.3d 390 (6th Cir. 2004).

68. See *id.* at 393.

69. *Id.* at 401.

70. *Id.* at 398.

71. *Id.* at 395. The court reasoned that no matter how small the sample was of a sound recording, the part taken was something of value. *Id.* at 399.

72. *Id.* at 398 (discussing the rights and limits granted by 17 U.S.C. § 114(b)).

73. *Id.*

available, it is likely that only commercially successful remixes will be prosecuted by the record industry.⁷⁴ As discussed previously, the *Bridgeport* decision may provide a safe harbor if the remixer incorporates pre-1971 sound recordings. However, should the success of *The Grey Album* be duplicated by another DJ using samples from any era, the record industry will likely issue threats, as it successfully did against Burton.⁷⁵ Perhaps in the future a DJ will attempt to strike back against the record industry when faced with such a threat instead of complying or settling.

Part of the problem is the paradox many DJs face: they are forced to violate the laws protecting the same record industry in which they are trying to gain success. The court in *Bridgeport* suggested that any artist wishing to sample copyrighted works must simply obtain a license.⁷⁶ It pointed out that for the number of artists who take a risk and sample illegally, an equal number seek licenses as a matter of course.⁷⁷ Artists who cannot afford a license are free to imitate or simulate sound recordings, they just cannot directly sample (i.e., make a copy of) the recording.⁷⁸ The Sixth Circuit recognized that digital sampling was not being done in 1971; therefore, the best option for artists and record companies may be to lobby Congress to update the copyright laws to incorporate this popular method of creating music.⁷⁹ Should Congress decide that licenses are necessary for all samples, there are two things the parties should keep in mind. First, it is in the best interest of the copyright holders to keep license fees to a minimum, otherwise they will continually have to pay exorbitant litigation fees to stop artists who cannot afford to sample legally.⁸⁰ Second, the remix artists should not be so quick to dismiss copyright law because “today’s sampler is tomorrow’s samplee.”⁸¹

74. See Shachtman, *supra* note 24 (quoting a copyright expert, “Labels are saying, ‘If you do [a remix] on the underground scene, it’s OK. But if it’s so compelling that people trade it all over the Internet, then we’re going to sue you.’”); see also *Bridgeport*, 383 F.3d at 401 (noting that copyright owners often take a “live and let live” approach to sampling, either ignoring it or settling disputes instead of pursuing litigation).

75. See Shachtman, *supra* note 24 (quoting a source close to Burton that fear of repercussions against Burton’s future career in the music industry caused him to comply quickly with EMI’s requests).

76. See *Bridgeport*, 383 F.3d at 398.

77. *Id.* at 401.

78. *Id.* at 398. Note, however, that there are two separate copyright protections for music: protection for the musical composition and protection for the sounds fixed in a recording. See *id.* at 400 nn. 14–15. Therefore, an artist can imitate a sound recording without obtaining a license from the recording copyright-holder, but he must obtain permission from the holder of the composition copyright. *Id.* at 398 n.7.

79. *Id.* at 401–02 (noting that Congress has better resources than courts to properly investigate these complex technical and business issues by way of holding hearings).

80. See *id.* at 400. The Sixth Circuit noted that the market will control license prices because, for artists to comply, copyright holders cannot set license fees greater than what it would cost the artists to imitate the sample on their own. *Id.* at 398–99.

81. *Id.* at 401.

The question remains whether the current status of copyright law maintains the balance between protecting artists' rights and promoting creativity. An additional aspect to that question is whether the freedom to be creative exists only for those who have enough money to pay the licensing fees sought by the sound recording owners. Some happy medium must be reached within the law because sampling will only continue to permeate the face of popular music. As long as the threat of copyright law and license fees dampen the success of remix artists, the record industry will remain silent. However, when an artist gains artistic and financial success by illegally sampling protected work, the record label holding the copyright will be alerted and will seek powerful repercussions. Perhaps this dilemma is best summarized by the chorus from a Notorious B.I.G. song:

I don't know what, they want from me
It's like the more money we come across
The more problems we see.⁸²

82. NOTORIOUS B.I.G., *Mo' Money Mo' Problems*, on LIFE AFTER DEATH (Bad Boy Entertainment 1997), available at http://www.lyricsdomain.com/14/notorious_big/mo_money_mo_problems.html (last visited Apr. 18, 2005) (reproducing the lyrics).