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Optimizing Musical Creativity Through North American Copyright Law

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OPTIMIZING MUSICAL CREATIVITY THROUGH NORTH AMERICAN COPYRIGHT LAW

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ABSTRACT: This article weighs the competing views on music copyright law in North America: exclusivity versus idea sharing. After laying out the basic structure of music copyright law it is found to favor individual exclusivity. While this might seem to be beneficial to musicians, it can make artists releasing new music fearful of copyright claims against them since their work may resemble a song that already exists. The *Pharrell Williams, et al. v. Bridgeport Music* decision heightens the stringency of copyright by finding a song could infringe on another song because of its "groove". These progressions in music copyright law will negatively affect the creativity of artists going forward who will face copyright claims whether they intended to copy another musical work or not. Furthermore, the law is unforgiving to sample artists who use snippets of existing works in their new creations. This paper proposes changes to music copyright law in North America to encourage musical creativity while still respecting individuals' autonomy over their work.

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I. INTRODUCTION

There are two competing views regarding the effect copyright laws have on musical creativity in North America. The first is that copyright laws protect musical works from being copied and create an economic incentive for artists which in turn promotes creativity. The second view is that music is a public good and sharing ideas freely between artists and building off one another enhances the creative process. North American copyright laws and music litigation aim to strike a balance between protecting an individual's work and allowing ideas to be shared for the public good. While there is merit to both perspectives, sharing works and artistic expression is a positive practice that promotes musical creativity more than the protection of exclusivity. Changes should be made to the law in both Canada and the United States, which currently prioritize exclusive rights over idea sharing. I propose amending the law by lowering statutory damages for copyright infringement and adding sampling into the current copyright framework. These changes will encourage musical creativity and idea sharing, without losing sight of original authors' exclusive rights.

II. OVERVIEW OF MUSIC COPYRIGHT LAW

To begin, an explanation of how copyright law protects music is required. Something is protected by copyright in Canada when it is an original expression.[1] *CCH v Law Society of Upper Canada* determined that exercising skill and judgment when expressing an idea is required for something to be protected by copyright.[2] The idea must be fixed in a tangible form.[3] Once those requirements are met, the owner of a song retains a group of rights such as the right to reproduce the song, perform the song, and authorize others to use, among others. Similarly, in the United States, copyright protects original works of authors that are in a fixed form.[4] This includes musical works and sound recordings. This also allows artists the freedom to do what they like with such works, including creating derivative works, making, and distributing copies of it.[5]

A. Musical Works – Copyright Protection and Infringement

Most discussion of music copyright focuses on a combination of three elements: melody, harmony, and rhythm.[6] While all of these elements can be subject to copyright, melody, which is the combination of notes and their duration,

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[1] Laura J. Murray, Samuel E. Trosow, CANADIAN COPYRIGHT: A CITIZEN'S GUIDE at 45 (2nd ed., 2013).
[2] CCH v. LSUP, 2004 SCC 13 (Can.).
[3] Murray, *supra* note 1 at 47.
[4] The Copyright Society of the USA, *Copyright Basics*, www.csusa.org/page/Basics.
[5] *Id.*
[6] Aaron Keyt, *An Improved Framework for Music Plagiarism Litigation*, 76 Cal. L. Rev. 421, 403 (1988).

is the most important element that will be taken into account.[7] In comparison rhythms and harmonies can be reused in many more instances than melody because they are the building blocks of a piece of music. Certain chord progressions and styles of rhythm are not copyrightable because they fall under mere ideas, not expressions of ideas that constitute a copyrightable work.

While musical works are much more complex than the aforementioned three elements, things such as tempo and performance style are not copyrightable. Furthermore, the *scenes a faire* doctrine makes it so that key elements of a musical genre cannot be owned by copyright.[8] For example, in *Velez v. Sony Discos*[9] the eight measures found in both the defendant and plaintiff's compositions "had been a widely used structural device for over 50 years, therefore the use of this structural element is not protectable and cannot form the only basis for establishing substantial similarity."[10] I will explain substantial similarity more in depth below.

A finding of copyright infringement occurs when someone unauthorized to do so uses a copyrighted work as if it was their own. This can either be the style of the work as a whole or a small portion of it. In Canada, section 3(1) of the *Copyright Act* states copyright means the sole right to produce or reproduce the work or any substantial part thereof.[11] In *Cinar Corporation v Robinson*,[12] the Supreme Court of Canada elaborated on what "substantial part" in section 3(1) means. Substantial part is a flexible idea that must be decided by quality rather than quantity.[13] This means that taking a small part of the work is the same as copying the entire thing from a copyright perspective. A substantial part is something that represents a substantial portion of the author's skills and judgment. This is not determined by looking at each copyrightable element, but rather the cumulative effect of the copied features together.[14]

In the United States there are some situations when unlicensed sampling and infringement is acceptable. Infringement is allowed if it falls within the de minimis range as established in *Newton v. Diamond*.[15] In *Newton* two notes lasting less than 6 seconds of another song were used. This was decided to be so minimal that it did not constitute infringement.[16] Moreover, American copyright infringement revolves around substantial similarity. Substantial similarity, not virtual identity is required to substantiate a copyright infringement claim.[17] For example in *Three Boys Music v. Bolton*, five elements of a song, that individually would not be

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[7] *Id*.
[8] Stav Iyar, *Musical Plagiarism: A True Challenge for the Copyright Law*, DePaul J of Art Tech & IP, 2014, at 20.
[9] *Velez v. Sony Discos*, 2007 U.S. Dist. LEXIS 5495 (SDNY 2007).
[10] Stuart Anello, *Musical Innovation's Sworn Enemy: The Infringer*, 36 Cardozo AELJ 797, 813 (2018).
[11] Copyright Act, 1985 (C-422 § 3(1)) (Can.).
[12] Cinar v. Robinson, 2013 SCC 73 (Can.).
[13] *Id* at para 26.
[14] *Id* at para 36.
[15] Newton v. Diamond, 349 F.3d 591 (9th Cir. 2003) at 598.
[16] *Id* at para 598.
[17] John Quagliariello, *Blurring the Lines: The Impact of Williams v. Gaye on Music Composition*, 10 Harv. J. Sports & Ent. L. 133, 140 (2019).

copyrightable, in combination amounted to infringement by becoming substantially similar to the copied work.[18]

B. Second Circuit & Ninth Circuit Tests

There are two main tests used in the United States for copyright litigation cases. While there is no case law in Canada on this issue, Canadian courts would likely be influenced by the tests used in the United States as well if a case were to arise. The precursor for both substantial similarity tests is proving the defendant had access to the plaintiff's copyrighted work. This is a very easy hurdle to surpass if the song in question has been commercially released.[19]

The first test is the second circuit approach. The essential elements of it are exemplified in *Arnstein v. Porter*.[20] The first prong of the test requires proving the defendant copied the original work in fact. This is usually done through circumstantial evidence, showing they had access to the work and that there are similarities between the two works.[21] Expert evidence can be used to prove this point. For the second prong of the test the ordinary lay listener determines whether the works are similar enough to establish the defendant infringed the plaintiff's work. This prong only considers the parts of the plaintiff's work that are protected by copyright.[22] When elements of a composition that were original to the plaintiff have been wrongfully appropriated then infringement is found.

The Ninth Circuit approach is laid out in *Sid & Marty Krofft Television Productions Inc v. McDonald's Corp*.[23] The first step is the extrinsic test where the trier of fact must identify similarities of "concrete elements based on objective criteria."[24] This step requires expert testimony to determine if works are objectively alike. If not, the inquiry ends here to prevent cases from going to the jury when the works in question are substantially different.

The second step is the intrinsic test. This asks whether an ordinary reasonable person would find the concept of the two works to be substantially similar.[25] The Ninth Circuit test was used in *Gray v. Hudson*[26] where Katy Perry's single 'Dark Horse' was claimed to have infringed another song. A descending ostinato minor scale was the main point of contention between the two songs. However, on appeal it was found that a descending scale is not copyrightable. It is a common place musical element that no composer can monopolize.[27] The lower court made the mistake of allowing this to proceed to the second prong of the test where the jury found there was substantial similarity, which was overturned.

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18 Three Boys Music Corp. v. Bolton, 212 F.3d 447 (9th Cir. 2000) at 485.
19 Anello, *supra* note 10 at 815.
20 Arnstein v. Porter, 154 F.2d 464 (2nd Cir.1946) at 468.
21 Anello, *supra* note 10 at 806.
22 *Id* at 807.
23 Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977).
24 *Id* at 808.
25 *Id* at 810.
26 Gray v. Hudson, No. 20-55401 (9th Cir. 2022).
27 *Id* at 98.

Overall, both the Canadian and American approaches to musical works favor protecting individual rights. The law is set up so that unless the phrase in question is a basic building block of music, part of the required sound of a genre of music, or such a small amount that it can hardly be recognized as a copy, then infringement is likely to be found. This also applies to subconscious copying. Inadvertent plagiarism can easily occur due to the sheer quantity of music that has been created around the world which can result in artists facing infringement claims.[28] I will argue later in this paper that these regulations discourage creativity in artists who become fearful the music they release will be subject to copyright claims.

American music litigation takes the stringent copyright rules a step further than Canadian laws in the *Pharrell Williams, et al. v. Bridgeport Music*[29] case regarding the song 'Blurred Lines.' The Gaye family brought a claim that 'Blurred Lines' infringed Gaye's song 'Got to Give it Up.'[30] To much surprise, the jury's finding of infringement was upheld on appeal.[31] This was the first case that found a song could infringe another song because of its "groove". As I will argue later, this case will negatively affect creativity in music creation going forward by allowing the feel of a song to constitute grounds for copying.

C. Sound Recordings – Copyright Protection and Infringement

The law around sound recordings differs from that of musical works. Sound recordings are audio versions of a song, a podcast, a lecture, or other sounds. In Canada, section 18 of the *Copyright Act* establishes that the maker of a sound recording has the exclusive right to publish, reproduce or rent the entire work or a substantial part of the work.[32] This means if an insubstantial portion of the sound recording was sampled it would not constitute infringement. However, there has been no music litigation in Canada to help define what constitutes a substantial part of a sound recording.

In the United States, the owner of a sound recording also has the right to duplicate it directly or indirectly into another recording.[33] Sounds can be emulated or imitated from sound recordings but a substantial part of it cannot be sampled, as established in section 114 of the *Copyright Act*.[34] *Bridgeport Music inc v. Dimension Films* set out the precedent that the de minimis rule from musical works does not apply to sound recordings. The court found a license is required, or sampling could not take place. However, in a subsequent case, *VGM Salsoul, LLC v. Ciccone*,[35] the *Bridgeport* decision was overturned. In *Salsoul*, Madonna used two very short horn notes from another song and successfully argued that they fell under the de minimis exception. As I will argue in this paper, *Bridgeport* set out a

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[28] Anello, *supra* note 10 at 812.
[29] Williams, et al. v. Bridgeport Music Inc. LA CV13-06004 JAK (AGRx) 2016.
[30] Quagliariello, *supra* note 17 at 137.
[31] *Id* at 140.
[32] *Copyright Act*, *supra* note 11 s. 18(1).
[33] Copyright Act of 1976, USC tit. 17§114.
[34] *Id.*
[35] VMG Salsoul, LLC v. Madonna Louise Ciccone, 824 F.3d 871 (9th Cir. 2016).

dangerous precedent by not allowing small portions of sound recordings to be sampled. This caused shock throughout the musical community and forced people to license every little sound they used in their songs. The *Salsoul* decision is an improvement, but the law still needs to change its treatment of sampling.

D. Sampling

Sampling is when snippets of songs made by previous artists are used in new creations. This practice has become increasingly popular in modern music production because the "digitalization of music and its availability on the internet have made sampling and remixing easier to do or find than ever before for an increasingly wider audience."[36] Sampling poses challenges to copyright law. Evidently, taking someone else's music infringes copyright, unless it falls under an insubstantial portion of the original work or one of the exceptions. This leaves sample artists, who sample substantial portions of other songs, with two choices. The first option is to get a license from the copyright owner to use the sample. This includes paying a fee and there can be restrictions imposed on how the composition can be used.[37] While this seems easily done, it can be difficult to locate the rights holders and consult them, and the licensing fees can be too exorbitantly expensive for some artists to afford, especially if they use a lot of different samples. For example, mashup artist Gregg Gillis does not obtain licenses for his works because he states it would cost him millions of dollars and take years to negotiate.[38]

The second option that remix artists are left with is using the copy without permission and risk the potential lawsuit.[39] They can distribute their work non-commercially or illegally on the internet and hope to build a music career another way such as by touring.[40] This can have costly ramifications for artists who take the risk.

Recently, many artists are bringing claims against people for stealing their music. While sampling is an art form that is on the rise, artists can be hesitant to release their musical works because neither of the two options currently available appeal to them. If they are caught stealing someone else's music, they will have to pay a steep price.

E. Damages

In Canada, statutory damages for copyright infringement are laid out in section 38.1(1) of the *Copyright Act*. Infringements done for commercial purposes range

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[36] Lisa Macklem, *This Note's For You - Or is it? Copyright, Music and the Internet*, 4 J. of Intl. Media & Ent. L. 249, 255.

[37] *Id* at 260.

[38] Staia Famili, *Mashed Up In Between*, 5 Berkeley J. of Ent. & Sports L. 97, 99 (2016).

[39] Joanna Demers & Paul G. Lyons, *Steal This Music: How Intellectual Property Law Affects Musical Creativity*, Syracuse Sci. & Tech. L. Rev., 2008, at 6.

[40] Christopher J. Norton, *Little Bits Can't Be Wrong: The De Minimis Doctrine in the Context of Sampling Copyright-Protected Sound Recordings in New Music*, 7 Berkeley J Ent & Sports L. 14, 29 (2018).

from $500 to $20 000 in damages.[41] For infringements done for non-commercial purposes, the statutory damages range from $100 to $5000. Section 7 establishes that getting statutory damages does not affect the rights of the copyright owner to get exemplary or punitive damages if they are entitled to them. In the United States, statutory damages for infringement are even higher, ranging from $750 to $30 000.[42] For American cases of willful infringement, the maximum rises to $150 000. The current system for statutory damages poses a huge risk for artists who use unauthorized samples. I will propose later in this paper that changes should be made to lower these statutory damages to relieve some of the fear artists who sample and even those who are creating music without sampling carry. This will encourage them to be creative and let their musical ideas come to life without fear of costly damages.

F. Exceptions

While I take the stance that the current legal framework in both Canada and the United States limits idea sharing, there are some exceptions to copyright that encourage creativity. In Canada, the fair dealing defense for infringement can be utilized. Section 29 of the *Copyright Act* states that fair dealings for the purpose of research, private study, education, parody, or satire do not infringe copyright.[43] Furthermore, fair dealing for criticism or review is not considered to infringe copyright as long as the source is mentioned. *CCH v. Law Society of Upper Canada* laid out the test for fair dealing. First it must be determined if the dealing was done for one of the categories in section 29, and then it must be determined if the dealing was fair.[44] This includes looking at the purpose, character, amount, alternatives, nature of the work and effect of the dealing on the work.[45]

In the United States, the equivalent of fair dealing is the fair use exception. For certain uses such as criticism, comment, news reporting, teaching, scholarships, and research there are exceptions to infringement. There are four factors the court uses to determine if the fair use defense can be used; the purpose and character of the use (including if it is for commercial purposes), the nature of the work, the amount used, and the effect upon the potential market for value of the copyrighted work.[46]

These exceptions, however, do not favor mashups. Mashups can be seen as a threat to the primary work's potential market, especially if they are for commercial use. This can weigh against them in the factors for both fair dealing and fair use. Mashups could be considered parody in some cases, but in the United States satirical works that provide general commentary or criticism were not deemed to be transformative and therefore are not protected.[47] Thus mashups must comment

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41 Copyright Act, 1985 (C-422 § 38.1(1)) (Can.).
42 Copyright Act of 1976, USC tit. 17§35.
43 Macklem, *supra* note 36 at 263.
44 *CCH*, *supra* note 2 at 53.
45 *Id.*
46 Macklem, *supra* note 36 at 109.
47 *Id* at 106.

on the original work to receive this protection, which does not coincide with the stylistic form of a typical mashup.

Lastly, Canada has another exception for user generated content. Section 29.21(1) allows people to use a published work provided the source and author are identified for non-commercial purposes, and if there is no substantial adverse effect on the exploitation of the original work.[48] This allows mashups and remixes to be created with a copyrighted work for amateur purposes and people not making a profit. This is a positive distinction that will encourage creativity. However as soon as one of those non-commercial songs becomes popular on the internet and begins making money, the protection is lost. Therefore, it is a limited exception.

G. Concluding Remarks

Overall, copyright laws surrounding musical works and sound recordings in North America do an excellent job of protecting the creators' works. However, this makes it difficult for new artists to produce music that might sound like something that has already been released, and even more difficult for sampling and remix artists to perform their craft. In the next section of this paper, I will argue that these laws are preventing creativity from thriving in modern day music, and in the last section, I will propose changes to improve this issue.

III. SHOULD COPYRIGHT FIERCELY PROTECT CREATIONS, OR ALLOW THEM TO BE SHARED?

The copyright laws illustrated above are seen through one of two competing views on creativity. The first is that strong copyright laws that protect individuals' creations encourage people to be creative. The other view is that to truly promote creativity, copyright law should be relaxed to allow more communal idea sharing and focus less on individual protection. Is it more creative to make an entirely original song or to build off someone else's? Long before copyright laws were created, creative works flourished in the classical music era. Musical borrowing has been used since the beginning of time in works that we think of as "originals."[49] Modern day copyright laws changed the conception into an individualistic and autonomous process. While both perspectives hold merit, it is my view that copyright laws favor individual protection too heavily.

Today, musical similarity is so common because musical ideas are a limited resource. There are only so many possible combinations of notes and chords to create a song, especially in popular music.[50] There are three main explanations for musical copying; coincidence that portions of both works overlap, influence from previous songs and composers, and wrongful appropriation when someone claims another's work as their own.[51] Wrongful appropriation is what is central to the

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[48] Copyright Act, 1985 (C-422 § 29.1(1)) (Can.).

[49] Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C.L. Rev. 551, 551 (2006).

[50] Iyar, *supra* note 8 at 3.

[51] *Id* at 6.

debate about what copyright should and should not allow. I elaborate on these two different perspectives that are taken on musical appropriation, theoretically for both the United States and Canada.

A. Approach One: Stronger Laws, Stronger Quality of Music

This approach takes the view that current copyright laws allow for too much infringement. This property-based conception of intellectual property laws concludes that the *Canadian Copyright Act* is based on recognizing the property of the author in their creation. This also frames copyright's purpose as to "protect and reward the intellectual effort of the author."[52] This approach implies that any public benefit produced from music is a by-product of private entitlement.

Someone who uses another's work is not seen as contributing to the store of knowledge. Their actions are thievery rather than participation in dialogue and production. Virtually everything is suspected to be theft until proven otherwise.[53] This approach takes the view that copyright laws should be made stricter to discourage infringement and artists who use other people's work. The creators who remain will be those who can successfully bring their audience new and exciting works. Creators who copy others and do not add to the artistry of musical creation will be removed from the industry.[54] This approach sees individuality and protecting somebody's work fiercely, as having the most beneficial effect on creativity in the music industry.

B. Approach Two: Encouraging Using Other Works

In stark contrast to the previous approach, this approach takes the perspective that copyright laws should be relaxed. It has been argued that there is no such thing as an uninspired piece of music.[55] Even when someone thinks they are being original with their music "we all stand on the proverbial shoulders of giants."[56] The public domain consists of all the raw materials of authorial creativity that are then used to produce works.[57] This view sees copyright law as lagging behind changes being made in transformative appropriation, which is when an artist engages with another's work.[58] While some authors despise this and see it as not being truly original, others argue it is a legitimate form of musical creation.

A historical perspective realizes that it was very common for European composers to reshape previously composed materials, and that plagiarism only

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[52] Carys Craig, *Locke, Labour and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law*, 28 Queen's L.J., ¶ 23 (2002).

[53] Anne Barron, *Copyright Law's Musical Work*, 15 Soc. & Leg. Studies 101, 104 (2006).

[54] Anello, *supra* note 10 at 801.

[55] Brandon P. Evans, *Let Me Get My Glasses, I Can't Hear You: Sheet Music, Copyright, and Led Zeppelin*, 24 Vanderbilt J. of Ent & Tech L. 157, 159 (2021).

[56] Carys Craig, *Resisting "Sweat" and Refusing Feist: Rethinking Originality After CCH*, 40 U.B.C. L. Rev. 69 ¶ 2 (2007).

[57] David Fewer, *Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada*, 55 UT Fac. L. Rev. ¶ 53 (1997).

[58] Demers, *supra* note 39 at 3.

occurs when someone else's work is taken without anything new being added to it.[59] This approach sees the trend towards being protective of one's work, increasing licensing fees, and taking a strict approach to illegal sampling as having the potential to stifle creativity and the exchange of cultural production.[60]

C. Promoting Idea Sharing is Promoting Creativity

The second approach is the most beneficial to musical creativity. Copyright should be rationalized as the intellectual production of a social good, because it recognizes that underproduction of artistic works is a danger that should be avoided.[61] The first rhetoric, that plagiarism and stealing music from others should be entirely prohibited, fails to see the benefit of building from previous music and overemphasizes the importance of exclusive rights.

The benefits of sampling are that it allows artists to engage in a new form of creativity and brings remixed forms of music into society. Sampling can bring back older songs that are no longer popular and can become a good source of publicity for older artists.[62] An example of this is when Taylor Swift made her song 'Look What You Made Me Do' based on 'I'm Too Sexy' by the group Right Said Fred. She interpolated their song into hers, and they claimed to be honored and glad it was reaching new fans 26 years after its original release.[63] Whole genres such as hip-hop have been developed from the practice of sampling and now entire albums are being produced made of just sampled works. Sampling is growing into a form of musical genius that takes something old and makes it new.

Furthermore, non-sampled works that happen to sound like another song add to the public arena of creative new works. They should not be strictly discouraged in every case from a creativity standpoint. For example, in the *Williams v. Gaye* appeal, Justice Nguyen wrote a compelling dissent about the danger of that decision for creativity in the United States.[64] She argued this was the first time style or groove was allowed to be copyrighted. This should have been an unprotectable idea because musicians going forward will have a diminished store of ideas for which they can build their works upon.[65] This has the serious effect of stifling creativity going forward in the United States. With already so many sounds covered under copyright that artists cannot use, copyrighting style as well will further limit the creative possibilities of musicians. Going forward from this case in the United States musicians will need to be less open about their sources of information and may need to be more proactive about obtaining samples and licenses when creating songs.[66]

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[59] *Id*.
[60] *Id* at 7.
[61] Craig, *supra* note 52 at para 9.
[62] Jessica Mauceri, *Why the Bridgeport Rule is No Longer Vogue*, 36 Cardozo Arts & Ent. L.J. 541, 566 (2018).
[63] *Id*.
[64] Williams v. Gaye, No. 15-56880 (9th Cir. 2018) at para 1138.
[65] Quagliariello, *supra* note 17 at 140.
[66] *Id*.

There is a counter argument that copyright protection is an incentive for creators to generate new works. The Intellectual Property Clause in the US Constitution states it promotes progress of science and useful arts by securing limited times to authors and inventors the exclusive right to their receptive writings and discoveries.[67] There can be no music market without copyright because all incentive would be lacking. This view argues copyright encourages artists to produce original works to make a profit to therefore make a living.[68] If anyone could take their ideas, remix them, and potentially produce more money than them, it would disincentivize the production of their original works.

Centuries before copyright laws were in place and enforced, creative works flourished throughout the world.[69] However, before statutory protection, Beethoven was said to have made his piano sonatas exceptionally difficult to control use by others.[70] By the end of the nineteenth century, European composers could begin to take to financial rewards of their compositions. Therefore, although music and creativity existed before copyright laws, there is an argument to be made that artists such as Bach and Beethoven would have been advocates for copyright protection of their works.[71] There is merit to this counter argument, but it must be asked how much protection is required to provide incentive?

Evidently, rewarding creativity is not the only goal of the copyright system.[72] It does provide financial rewards for artists and acts as a strong incentive to produce creative works. With the changes I will propose in the next section, the economic incentive that copyright currently provides will still be in place. The copyright systems in both Canada and the United States can be altered slightly to maintain the economic incentive, while also decreasing the strictness and fear that limits the creative ability of artists. This will strike the perfect balance between protection and creation.

IV. PLAUSIBLE CHANGES TO THE LAW

There are a few directions the law could go from here to promote creativity. The first is to increase individual rights for musicians and strengthen copyright laws. These would be laws that make it easier to find there has been copyright infringement. For example, currently, access to a musical work must be proven before infringement could be found. This could be changed to a rebuttable presumption for the defendant to prove that the plaintiff did not have access to their work. Assuming someone had access to the work not only takes into account that anyone with a computer can find a piece of music, but also makes it slightly easier for infringement to be found.[73] Next, what constitutes substantial similarity in a musical composition could include musical features that arise in the studio,

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67 Olufunmilayo B. Arewa, *Creativity, Improvisation, and Risk: Copyright and Musical Innovation*, 86 N.D. L. Rev. 1829, 1830 (2011).
68 Jason Toynbee, *Musicians in* MUSIC AND COPYRIGHT. 123-134 (Second ed., 2004).
69 Macklem, *supra* note 36 at 252.
70 Arewa "Creativity", *supra* note 67 at 1835.
71 *Id* at 1838.
72 Dennis S. Karjala, *Copyright and Creativity*, 15 UCLA Ent. L. Rev. 169, 172 (2008).
73 Anello, *supra* note 10 at 815.

even if they are not notated within the song itself. This could include having sound designers and engineers as witnesses instead of strictly musicologists to be able to spot these similarities in production technologies.[74]

If these proposed changes to the law were implemented, they would not benefit musicality and creativity. Increasing copyright law to be able to find infringement more easily through the access step and by including musical features when recording, will further limit and scare off musical creations that happen to be influenced by other sounds. While this would successfully have the effect of weeding out artists who sample, remix, or base their songs off someone else's, I argue this will discourage creativity. This will take exclusive rights and protection for artists to an extreme.

In the opposite direction, North American copyright laws could be altered to share ideas more freely. This can be done by utilizing the creative commons and legalizing amateur remix culture in the United States. The creative commons are where songs can be released with some rights reserved rather than all right reserved.[75] This grants the use of a work for non-commercial purposes so that people can share and build on each other's works. Legalizing amateur remix culture in the United States would free younger artists from the expensive licensing agreements professionals currently face. However, once novice artists begin to profit from their creations they would be required to gain authorization before using copyrighted works.[76]

This approach is moving more in the correct direction copyright law needs to go. However, these would be major changes to the American copyright legal system. They risk taking the sharing ideas for the public good argument too far out of balance with protecting exclusive rights. Legalizing amateur works and the creative commons approach is similar to Canada's user generated content exception which allows a defence for copyright infringement as long as the works are not being used for commercial purposes. As laid out within the law section of my paper, there are limitations to that exception. Non-commercial works can unexpectedly become extremely popular and then the line between commercial and non-commercial becomes blurred. Therefore, these are not the ideal changes to be made.

V. PROPOSED CHANGES TO THE LAW

There are two proposed changes to the law that strike a balance between respecting individual rights and encouraging creativity.

A. Limit Damages

The current system for statutory damages, in both Canada and the United States, poses a substantial risk for artists who are using unauthorized samples. As previously stated, $20 000 for statutory damages in Canada, and $30 000 for

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[74] *Id* at 822.
[75] Famili, *supra* note 38 at 112.
[76] *Id* at 111.

statutory damages in the United States are large enough amounts to scare off artists who use unlicensed samples. This has the potential to impact not only sampling artists, but also artists who create their own original songs and are worried there may be another similar song that already exists. This severely limits creativity and stifles artists who are hesitant to try to remix or produce new music.

I propose that the statutory damages should be reduced. In Canada, infringements done for commercial purposes should have the maximum amount of $10 000 instead of $20 000. In the United States, the maximum for commercial infringements should be lowered from $30 000 to $15 000. Willful infringement statutory damages in the United States can currently go up to $150 000. This amount should be reduced to $50 000. I believe that by lowering the maximum statutory damages artists will be less fearful to use samples which will in turn allow them to be more creative. Simultaneously, the statutory damages will still punish people from using others' works and leaves a sizeable incentive in place for the original artists whose work was stolen. In addition to statutory damages, there are several other damages artists can claim as well. This ensures that the economic incentive to produce original creative works remains in place.

B. Integrate Sampling into the Existing Copyright Framework

The next major change that I suggest is to distinguish between different types of sampling and to integrate them into the existing copyright framework. Sampling should be broken down into three categories. The first category would be sampling in which the original source is not recognizable. A compulsory licensing system that is patterned as closely as possible to the existing one in the United States should be implemented, except that the section 115(a)(2) limitation on changing the melody or fundamental character of the work should be eliminated.[77] This will allow sample artists to take unrecognizable portions of an original song and change them however they wish. This should apply to both musical works and sound recordings as well. Courts have generally found that trivial unrecognizable uses of existing musical works fall under the de minimis exception.

A compulsory licensing system does not exist in Canada. Canadian artists who want to record or duplicate another artist's song must obtain a license through CMRRA or similar sites. A licensing system for sampling should be implemented in Canada that is like the United States example. Artists would give consent for their works to be used before they are entered into the system for others to add to or sample. This too would account for sound recordings and musical compositions.

The second category would be sampling in which the original source is recognizable but de minimis. Things falling into the second category would not constitute copyright infringement, and the existing judicial standard should be codified. The third category would be for sampling in which the original source is recognizable and not de minimis. This would also involve codifying the existing judicial standards for de minimis use, meaning these would only constitute infringement in certain circumstances, as explained above.

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[77] Arewa, "JC Bach", *supra* note 49 at 642.

The main issue with implementing a compulsory licensing system in Canada, some may argue, is that it would take away the power of the original artists to decline someone else using their song.[78] While this would be beneficial from a creativity and sharing perspective, this loses sight of the hard work and effort a musician put into their song and their say over how it can be used.

In response to this, it should be noted that while Canada currently does not have a compulsory licensing system, CMRRA and SODRAC represent most songwriters and publishers. When artists apply to use another song permission is usually granted, and therefore it is almost as if a compulsory system already exists. Having a compulsory licensing system for strictly unrecognizable samples allows artists to have more control over recognizable versions of their songs and share unrecognizable portions more readily to up and coming artists who wish to sample. This still allows for balance between autonomy and idea sharing. While the CMRRA and SODRAC can currently decline uses of samples, this will still be allowed for recognizable samples, because the interests of the original creator may be heightened when their work is recognizable.

VI. CONCLUSION

Current North American copyright laws do not encourage creativity as effectively as they could. Moving in the direction of stricter copyright laws to create pure original works excludes the rich musical creativity that stems from remixing, sampling, and building off previous musicians' ideas. Major changes such as legalizing amateur remix culture and the creative commons take idea sharing too far. Lowering statutory damages for plagiarism and incorporating types of sampling into the copyright frameworks in both Canada and the United States are minor changes that will effectively encourage creativity. This will allow new artists to use ideas that were put out before them, while keeping most of the previously existing legal framework intact. These proposed changes strike a balance between respecting individuals' creations and their autonomy over their work and encouraging creativity. The current copyright system in Canada and the United States is overbearingly harsh on artists who sample, remix and use others music. Making artists fearful to make new sounds and share them commercially only hurts society who will not get to benefit from hearing these creations. Creativity is a vital aspect of music and using others' works to make new songs is innately creative. North American laws should encourage this artform and allow creativity to flourish beyond the current boundaries of the law.

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[78] Keyt, *supra* note 6 at 462.