JOURNAL ON EMERGING TECHNOLOGIES

BLOG

Damages Aren't So Damaging: Property and Remedies Justifications for Denying Injunctions in Song Sampling Infringement Cases

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INTRODUCTION

Today, many popular songs rely on "sampling" other artists' songs. Beyoncé's "Crazy in Love" samples a 1970 song;[1] Drake's newest album, Certified Lover Boy, samples the Beatles' "Michelle" on the track "Champagne Poetry";[2] Eminem's smash hit "My Name Is" samples a funk artist;[3] Britney Spears' "Toxic" samples a song from a Bollywood movie.[4] It took this Author just a few minutes to find all of these and more. These

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[1] MTV NEWS, http://www.mtv.com/news/1484784/road-to-the-grammys-the-making-of-beyonces-crazy-in-love/ (last visited Feb. 3, 2022). Critics, and "B" herself, say the 1970 Chi-Lites sample is what made the song so successful. *Id.* The song paid dividends in public entertainment, getting used on a Pepsi ad, on "Glee," and on the official soundtracks of several movies including "Good Luck Chuck." *See* CAMPAIGN LIVE, https://www.campaignlive.co.uk/article/beyonce-smash-crazy-love-features-new-pepsi-ad/185483?src_site=brandrepublic (last visited Feb. 3, 2022).

[2] HITC, https://www.hitc.com/en-gb/2021/09/03/drake-the-beatles/ (last visited Feb. 3, 2022). "Michelle" has been sampled by other artists over the years, including by Doug E. Fresh and Slick Rick in 1985, and more recently by Masego in "Navajo." *Id.*

[3] The song samples funk artist Labi Siffre's "I Got The …" NEW HUMANIST, https://newhumanist.org.uk/articles/2915/qa-labi-siffre (last visited Feb. 3, 2022).

[4] UPROXX, https://uproxx.com/music/britney-spears-toxic-samples-bollywood-song/ (last visited Feb. 3, 2022). *See also* BBC, https://www.bbc.co.uk/music/articles/b48884a1-688b-4d0d-80d3-d974b9b7987b (last visited Feb. 3, 2022) (collecting contemporary popular songs that use samples, including Taylor Swift's "Look What You Made Me Do").

are just some examples of famous, well-loved songs that were only made possible by sampling other artists' existing songs.

Sampling is the practice of "taking pre-existing sound recordings and using portions of those recordings as new elements in a new musical composition."[5] It does not mean taking another song wholesale and retailing it. Instead, samples typically use a small bit of someone else's work and spin it into an entirely new song. It became very popular in hip-hop circles and helped launch the careers of countless rap stars.

A standard remedy for artists whose music has been infringed via sampling is a judge-issued injunction.[6] However, this Author questions the wisdom of that approach by examining the property justifications and remedies justifications for enjoining good-faith, albeit unauthorized, music sampling. Instead of injunctions, music infringement should be housed mostly—if not exclusively—in legal damages.

I. BACKGROUND

There is a history of denying injunctions in favor of damages, and there is a history of viewing some intellectual property differently than, say, real estate. Combined together, this background suggests a new judicial approach may be in order. But before we can examine new possibilities, we must understand equitable remedies and general property principles, as well as music sampling and music infringement as it exists today.

A. Property

Property is going through an "identity crisis."[7] The idea of property is typically conceived of in one of two ways. First, the right to property is a right to exclude all others from it— a right against the whole world.[8] Alternatively, property is a "bundle of sticks"—a collection of

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[5] John S. Pelletier, *Note*, *Sampling the Circuits: The Case for a New Comprehensive Scheme for Determining Copyright Infringement as a Result of Music Sampling*, 89 WASH. U. L. REV. 1161 (2012). Sampling has been described as moving pieces of existing sound recordings "into a newly collaged composition." KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE 1 (2011).

[6] McClimon, *infra* note 100, at 303-04.

[7] J.E. Penner, THE IDEA OF PROPERTY IN LAW (1997, Oxford University Press).

[8] *See* 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (Univ. of Chicago Press 1979) (1766) (describing property as "that sole and despotic dominion . . . exercise[d] over the external things . . . in total exclusion of the right of any other"). *See also* Balganesh, *infra* note 117, at 600 n. 17 (quoting Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) ("[P]roperty means the right to exclude others from valued resources, no more and no less.")). *See generally* Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371 (2003).

rights. Penner laments that property has come to be seen as "just a bundle of other concepts, a mere chimera of an entity."[9] As Penner notes, a bundle of rights "doesn't effectively characterize any particular sort of legal relation. . . . It is not even clear there is any workable notion of 'enough' rights to make up a property bundle."[10] Penner argues that is lamentable, because it denigrates our idea of property as a category and can make us lose track of where property ends and where other categories begin.[11]

Conversely, Grey argues that the concept of property has "disintegrated."[12] In its place is mostly a bundle-of-rights theory. The realist, bundle-of-sticks proponents would wipe away property as an important category.[13] According to Penner, that would be unfortunate because there is a need to link rights of use with rights of exclusion: "[A]ny meaningful right to use is the opposite side of the coin to a right to exclude."[14] In this sense, the relevant question in assessing a new form of property is whether the defendant has a duty to exclude himself from it.[15]

However, views of property have shifted over time toward the bundle of rights. Whereas in an encroachment case a court would once have recognized that a defendant has no right to occupy land that does not belong to him,[16] even if it was unintentional and slight, in later cases courts started allowing encroachments and instead awarding damages.[17]

The *INS v. AP* case considered whether news or facts are protected by property rights. The Supreme Court gave a "quasi-property" right to news outlets such that in order "to prevent competitors from reaping the fruits of [their] efforts and expenditure," they may exclude others from time-sensitive information that they produced with effort. In one sense, this echoed the natural-law Lockean theory of mixing labor with property and thus creating ownership.[18] But it also denigrated the exclusion idea: The information in question could not be copyrighted because it was not created by a writer. If INS and AP's effortfully-produced facts were

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[9] Penner, *supra* note 7, at 1.
[10] Penner, *supra* note 7, at 1-2.
[11] Penner, *supra* note 7, at 3. In addition, the exclusion theory was crucial to the conceptions of property found in, for example, Blackstone, Kant, and the early American constitutions. *See* Thomas C. Grey, *The Disintegration of* Property, 22 NOMOS: AM. SOC'Y POL. LEGAL PHIL. 69, 73.
[12] Grey, *supra* note 11, at 74.
[13] *Id.* at 81.
[14] Penner, *supra* note 2, at 71.
[15] *Id.* at 74.
[16] Pile v. Pedrick, 31 A. 646 (Pa. 1895). The foundation in that case had encroached just 1.5 inches, and yet the right to exclude was vindicated. *See id.*
[17] Golden Press, Inc. v. Rylands, 235 P.2d 592 (Colo. 1951). Here, the foundation encroached just 2.5-3 inches.
[18] *See generally* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (1690).

property, they would have the right to exclude everyone from those facts for all of time, until that property is disposed of. But they do not—they have "quasi"-property.

Justice Brandeis dissented: "An essential element of individual property is the legal right to exclude others from enjoying it."[19] He warned that a vague, new, unbounded right might damage the public interest. Excepting narrow intellectual property rights, he said, information should be as "free as the air to common use."[20] In other words—generally—where property begins, it should be protected against the whole world. Where it ends, it should end.

Further, in the Ninth Circuit intellectual property case *White v. Samsung*,[21] Judge Kozinski dissented from an order rejecting a rehearing en banc. The case allowed Vanna White to block a humorous Samsung ad depicting a White-like robot. The court reasoned that White had the right to exclude others from depicting her personal image. The dissent wrote that the ad "is not some unforeseen byproduct of our intellectual property system; it is the system's very essence."[22]

This Author presumes that property should be viewed as a thing against which a human has the right to exclude the entire world.[23] But what about intellectual property? Judge Kozinski once warned that "[o]verprotecting intellectual property is as harmful as underprotecting it." Thomas Jefferson wrote that the moment an idea is publicly divulged, the original artist cannot dispossess any receiver of it. Society may for utilitarian purposes reward creative feats, but only "according to the will and convenience of the society."[24]

The Supreme Court has explained that the right to exclude intellectual property "is distinct from the provision of remedies."[25] In *eBay Inc. v. MercExchange L.L.C.*, the Court held that in order to enjoin the trespasser, ordinary compensatory remedies must be inadequate.[26]

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[19] 248 U.S. 248 (Brandeis, J., dissenting).
[20] *Id.* at 250.
[21] White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting).
[22] *Id.* at 1512. Judge Kozinski seems to pit the Lockean exclusion theory against his application of a Kantian exclusion theory.
[23] There are exceptions—for example, the Constitution provides for government takings of property via eminent domain in exchange for just compensation.
[24] Alex Kozinski, *What's So Fair About Fair Use?*, 64 J. COPYR. SOC'Y U.S. 513, 519.
[25] eBay Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837, 1840 (2006). Justice Kennedy concurred, emphasizing that the "right to exclude does not dictate the remedy for a violation of that right." *Id.* at 1842 (Kennedy, J., concurring). *See also* Balganesh, *infra* note 117, at 598 (describing *eBay* as "effectively unlink[ing] the right to exclude from any entitlement to exclusionary relief").
[26] *eBay*, 126 S. Ct. at 1839-40. The Court was specifically discussing patent injunctions, but the Court implied that its logic applies to all injunctive relief: it does not issue as a matter of right, but as a matter of discretion. *See* Balganesh, *infra* note 117, at 599. Scholars have noted *eBay*'s application in various other areas, including

Property interests hanging in the balance sets the stakes high enough—and the stakes get even higher when one considers that the public domain implicates the value of creativity itself. As Judge Kozinski said: "Creativity is impossible without a rich public domain."[27]

B. Equity in American Courts

Equity serves as a backup when legal rules fail. The distinction harkens back to the English Court of Chancery, when "law" and "equity" were divided.[28] Judges may at times exercise discretion in granting remedies, especially in cases sounding in equity; that discretion is an "impartial judgment, guided by moral reasoning and taking into account the body of past decisions by judges."[29] Damages serve as the common remedy at law. Damages aim to put the plaintiff back where she would have been if the wrong had not occurred.[30] Equitable remedies, by contrast, often require that the defendant take a certain action (or refrain from taking a certain action).[31]

Judges' discretion does follow a body of law. The U.S. Constitution contemplates that equity is "a precise legal system" with "specific equitable remed[ies]."[32] But equitable courts' discretion "allowed them to deny or tailor a remedy despite a demonstrated violation of a right."[33]

The Constitution recognizes federal courts' authority to consider equity cases,[34] and most states developed equity courts;[35] meanwhile, federal equity follows something like the traditional principles that

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copyright. Samuelson, Pamela, *Withholding Injunctions in Copyright Cases: The Impact of* eBay (March 9, 2021). William & Mary Law Review, Forthcoming, Available at SSRN: https://ssrn.com/abstract=3801254.

[27] *White*, 989 F.2d at 1513 (9th Cir. 1993) (Kozinski, J., dissenting).

[28] EMILY SHERWIN & SAMUEL L. BRAY, AMES, CHAFEE, AND RE ON REMEDIES: CASES AND MATERIALS 4 (3d ed. 2020). The Federal Rules of Civil Procedure merged the procedures of law and equity, and most states have merged procedures too. *Id.* at 417. However, the divide persists in some ways. See Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997 (2015), for a discussion of how the Supreme Court in particular has reinforced the division. A lot still hangs on whether Plaintiff seeks a legal or equitable remedy, including how Plaintiff can enforce the remedy. *See* SHERWIN & BRAY, *supra* note 28, at 422-23.

[29] SHERWIN & BRAY, *supra* note 28, at 4.

[30] *Id.* at 10.

[31] *Id.* at 4. *See generally* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 97-116 (4th ed. 2007).

[32] Liu v. SEC, 140 S. Ct. 1936 (2020) (Thomas, J., dissenting) (citation omitted).

[33] *Liu*, 140 S. Ct. at 1950 (Thomas, J., dissenting) (quoting *Trump v. Hawaii*, 585 U.S. ___ (Thomas, J., concurring (slip op., at 5).

[34] U.S. Const. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity . . . ."

[35] Austin Wakeman Scott & Sydney Post Simpson, CASES AND OTHER MATERIALS ON CIVIL PROCEDURE 161-63 (1950).

existed in the English Court of Chancery at the time of the Founding.[36] Not long after the Founding, Justice Story laid out out American equity jurisprudence,[37] and despite several measures being taken to merge legal procedures and equitable procedures, equity is still distinctive in American law.[38]

Possibly of interest in this Paper's inquiry are the "maxims of equity." They are not decisional rules in and of themselves, but they do "focus the attention of judges."[39] They include: "Those who seek equity must do equity."[40]

An injunction is a classic equitable remedy. When considering issuing a permanent injunction, courts follow certain steps,[41] including:

- Plaintiff prevails on the merits;
- Plaintiffs would suffer irreparable injury the in absence of an injunction (meaning, here, there is no adequate remedy at law);
- Plaintiff's harms outweigh the harms Defendant would suffer from injunction;
- The public interest will not be adversely affected by an injunction.

C. Sampling

Sampling is the cornerstone of hip-hop music.[42] In fact, it is prevalent throughout all pop music today—even rock-and-roll.[43] As mentioned above, sampling involves one musical artist taking what this Paper will refer to as an "original artist's" song recording, then splicing it, rearranging it, putting it on a loop, or otherwise using bits of that recording as "elements" in a new, original musical composition.[44] In hip-hop, sampling descended from DJs playing just the most catchy pieces of existing songs overlaying drum beats in order to get people dancing. Inventors created a digital sampler that later became more sophisticated and allowed producers to edit the samples as well as create entirely new

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[36] *Liu*, 140 S. Ct. 1950 (Thomas, J., dissenting); *see Liu*, 140 S. Ct. at 1943 n. 2.
[37] Scott & Simpson, *supra* note 35, at 61-63 (1950).
[38] *See* SHERWIN & BRAY, *supra* note 28; *see also, e.g.*, Strank v. Mercy Hospital of Johnstown (Sup. Ct. Pa. 1955); Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 428 (1999) (noting the continuing *substantive* importance of equity as distinct from law).
[39] SHERWIN & BRAY, *supra* note 28, at 439.
[40] J.D. Heydon, M.J. Leeming, & P.G. Turner, MEAGHER, GUMMOW AND LEHANE'S EQUITY: DOCTRINES AND REMEDIES (5th ed. 2015), at § 3-050, at 74-75.
[41] *See* A.W. Chesterton Co. v. Chesterton (1st Cir. 1997).
[42] Pelletier, *supra* note 5, at 1161.
[43] *Id.*
[44] *Id.*

musical arrangements.[45] By the 1980s, rap groups like Public Enemy and Run D.M.C.[46] were using samples with great success.

Through the early 1990s, rap artists "sampled liberally from other musicians."[47] But the Southern District of New York's decision in *Grand Upright Music, Ltd. v. Warner Bros. Records*[48] complicated things. The case held that the unlicensed use of a sample in a hip-hop recording is copyright infringement. The court implied that it viewed song samples as the type of thing against which one has the right to exclude the entire world: the opinion's opening words are "Thou shalt not steal."[49] The court preliminarily enjoined the infringing sample, and the song for which the offending artist, Biz Markie, wanted to use a sample was omitted from his next album.[50]

D. Copyright and Music Infringement

Copyright began in the Middle Ages, after the printing press was invented.[51] The "ultimate aim" of U.S. copyright law is "creativity *for the public good*."[52] The Constitution permits copyright protection, granting Congress the power "[t]o promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[53] Congress exercised that power to protect copyright and patent.[54]

This Author lacks space to fully describe inadequate alternative defenses, but samplers accused of infringement typically use either (1) fair use[55] or (2) de minimis use.[56] The latter has failed because, for example, it puts the onus on courts to decide where the line is crossed past de minimis. The Fair Use concept defeats liability if Defendant can show that the use was reasonable based on several factors outlined in § 107 of the copyright statute,[57] including the purpose of the use, the nature

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[45] *Id.* at 1165.
[46] *See* Loren E. Mulraine, 52 AKRON L. REV. 702 n. 19.
[47] SPIN, https://www.spin.com/2008/11/sampling-dying/ (last visited Feb. 3, 2022).
[48] 780 F. Supp. 182, 185 (S.D.N.Y. 1991).
[49] Pelletier, *supra* note 5, at 1179.
[50] *Id.*
[51] Timothy James Ryan, *Infringement.com: RIAA v. Napster and the War against Online Music Piracy*, 44 ARIZ. L. REV. 495 (2002).
[52] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 432 (1984) (emphasis added). *See also* SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 132-48 (2001) ("Copyright should be about policy, not property.").
[53] U.S. CONST. art. I, § 8, cl. 8.
[54] 17 U.S.C. §§101–1100 (2000).
[55] Pelletier, *supra* note 5, at 1173 (citation omitted).
[56] Pelletier, *supra* note 5, at 1180.
[57] Pelletier, *supra* note 5, at 1180; Ryan, *supra* note 51, at 503 (citing 17 U.S.C. § 107 (2000)).

of the work, the sample's size in relation to the whole, and how much the use affects the work's marketability.[58]

The Supreme Court has waded into music sampling only once: in a fair use case.[59] In *Acuff-Rose*, the Court analyzed § 107 of the Copyright Act and found that, among other things, the more transformative the new work is, the less significant the other factors in § 107 will be.[60]

Hip-hop enthusiasts and journalists suggest that judicial decisions beginning in the early 1990s has seriously harmed creativity, including *Grand Upright*. "Up until the early '90s, artists sampled liberally from other musicians. But a case brought against [famous hip-hop artist] Biz Markie in 1991 changed the rules of hip-hop and sampled-based music as a whole."[61] After *Grand Upright*, sampling became prohibitively expensive for many rappers.[62]

II. A JUDICIAL SOLUTION: DISCRETIONARY DENIAL OF EQUITABLE INJUNCTIONS IN SAMPLING INFRINGEMENT CASES

Should we pay a royalty each time we sing "Happy Birthday to You" in public? For years, we were supposed to.[63] It is not sampling, but it illustrates the point: If the birthday song owner tried to enjoin half the country for singing Happy Birthday to their families, a judge could reasonably find that the balance of hardships and consideration of the public interest counsel a denial of the injunction.

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[58] 17 U.S.C. § 107 (2000).

[59] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

[60] Pelletier, *supra* note 5, at 1181 (discussing the Supreme Court's opinion in *Acuff-Rose*).

[61] *See* SPIN, https://www.spin.com/2008/11/sampling-dying/ (last visited Feb. 3, 2022).

[62] PITCHFORK, https://pitchfork.com/reviews/albums/19997-public-enemy-it-takes-a-nation-of-millions-to-hold-us-backfear-of-a-black-planet/ (last visited Feb. 3, 2022) ("Overnight it became forbiddingly difficult and expensive to incorporate even a handful of samples into a new beat."). *See also* Pelletier, *supra* note 5, at 1189-90 ("[L]icensing practices and expensive litigation have prevented samplers from using sampling in a creative sense."). Some artists who can afford it still sample songs to great success, such as Kanye West and Jay-Z's "Otis," as well as Eminem's "Stan," "Without Me," and "Berzerk."

[63] *See* Douglas G. Baird, Common Law Intellectual Property and the Legacy of International News Service v. Associated Press, 50 U. CHI. L. REV. 411, 415 (1983) (citing Salamon, *On the Other Hand, You Can Blow Out the Candles for Free*, WALL ST. J., June 12, 1981, at 1, col. 4. A few years ago, a court held that "Happy Birthday's" purported owners did not have a valid copyright. *See* Marya v. Warner/Chappell Music, Inc., 131 F. Supp. 3d 975, 979 (C.D. Cal. 2015). At any rate, Baird notes that under the 1976 Copyright Act, copyright protection extends for the writer's lifetime plus 50 years, 17 U.S.C. § 302 (1976). By statute, the copyright holder has, among other things, the exclusive right to perform the work publicly. *Id.* § 106(4) (Supp. V 1981).

In Judge Kozinski's dissent described above, he wrote that something "very dangerous"[64] was happening with intellectual property. After extolling private property's crucial importance to human flourishing,[65] he argues that diminishing everything to property can be counterproductive. "Overprotecting intellectual property is as harmful as underprotecting it," he said—"[c]reativity is impossible without a rich public domain."[66]

Today, we are overprotecting songs. Sampling, like humor and satire, contributes to the public interest.[67] When it produces a genuinely new artistic creation, it serves the common good.[68] Even when an original artist can show monetary harm, judicial relief can be provided through legal remedies. Shutting down a genuinely new song is a drastic response that robs the public domain of a new song and does more than is necessary to accord respect for her creation and dominion over its related profits.

A. Remedies

Much of what we now call intellectual property is not described by the Constitution as "property" at all. The Founders may not have equated ideas with real estate, and their protection is "but an instrumental means to an end."[69] In fact, Thomas Jefferson "emphatically denied that inventors had 'a natural and exclusive right' to their inventions":[70]

> '[A]n individual may exclusively possess [an idea] as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of

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[64] White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting).

[65] *Id.* ("It provides an incentive for investment and innovation; it stimulates the flourishing of our culture; it protects the moral entitlements of people to the fruits of their labors.").

[66] *Id.*

[67] *See, e.g.*, Kozinski, *supra* note 24, at 524.

[68] That is why I propose *discretionary* denial of equitable injunctions, because where a so-called "sampling" is clearly not a new creation but is instead the mere reproduction of a song, judges should not necessarily deny an injunction there. In such a case, property and the public interest may counsel that courts enforce the right to exclude against the world.

[69] Kozinski, *supra* note 24, at 519.

[70] *Id.* at 519-20 (quoting DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 78 (1994)). *See also* Fox Film Corp. v. Doyal, 286 U.S. 123, 127-28 (1932) ("A copyright, like a patent, is at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals, and the incentive to further efforts for the same important objects" (internal quotation marks omitted)).

> it.' Society '*may* give an exclusive right to the profits arising from them, as an *encouragement* to men to pursue ideas,' but such a right would be *entirely utilitarian*, 'according to the will and convenience of the society, without claim or complaint from anybody.'[71]

If Jefferson is right, then in order to justify an injunction in a copyright infringement case, one should propose a utilitarian argument that it "will promote the progress of the arts."[72]

Remedies might not be of right, including in property cases. Therefore, an injunction should not automatically issue in copyright infringement cases. Professor Bray has said it is widely believed that having a property right, by definition, entails that a court will issue an injunction if that property is trespassed. But, he implies, that belief is inaccurate.[73] *eBay* showed the right to exclude does not automatically come with the right to an injunction: "[T]he creation of a right is distinct from the provision of remedies for violations of that right."[74]

Judge Leval[75] in *New Era* did not want to issue an injunction when it "was not the kind of harm to markets that copyright law was designed to protect."[76] In *New Era*, the book admittedly did infringe to some degree, and Judge Leval even noted that in some copyright cases injunctions should issue if "harm from infringement may be difficult to measure and incentives to create would be eroded unless infringements were enjoined."[77] This view supports a discretionary denial of injunctive relief where the public interest is not hurt by a denial, according with the maxim that he who seeks equity must do equity.

B. Property (and its Theories)

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[71] Kozinski, *supra* note 24, at 519-20 (emphasis added).
[72] *Id.* at 519-20. Both patent and copyright law "balance the need to provide authors and inventors with incentives against the need for free access to what has been produced." Baird, *supra* note 63, at 415.
[73] Bray, *supra* note 28, at 1016 (citing Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J. L. & PUB. POL'Y 593, 638-39 (2008)). Professor Bray notes that Balganesh recognizes that the misconception "disregards the fact that the injunction is an equitable remedy." Bray, *supra* note 28, at 1016 n. 100.
[74] eBay Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837, 1840, 1841 (2006). *See also* New York Times Co. v. Tasini, 533 U.S. 483, 505 (2001); Dun v. Lumbermen's Credit Assn., 209 U.S. 20, 23-24 (1908).
[75] *See* Samuelson, *supra* note 26, at 9.
[76] Samuelson, *supra* note 26, at 11.
[77] *Id.*

Furthermore, if Jefferson is correct in suggesting that a copyright is *given* by the public *to* skilled individuals, then it was not their property in the first place. If that is true, there still may be elements of property used in creating the song, and perhaps the song itself becomes the writer's property—yet the copyright itself would not accord some different kind of property. Instead, it grants the creator extra benefits in order to reward her creativity. That accords with Judge Kozinski: "Vanna White and those like her have been given something they never had before, and they've been given it at our expense."[78]

Judge Leval has "lamented the harm caused by overly automatic injunctions,"[79] sentiments that the Supreme Court endorsed in *Acuff-Rose*.[80] If all this is true, then denying injunctions in sampling infringement cases would not necessarily deny the right to property at all—not even if we assume the exclusionary sense is the best formulation. It is possible that reasonable samples (that is, depending on the conception that we decide on, either samples that are made into genuinely new compositions or at least ones that are not a mere reproduction of the exact song) should not be viewed as property at all. But if we assume sampling gets exclusionary protection against all the world, damages still serve that exclusionary protection. It is simply a different way of circumscribing the protection. Remedies can be circumscribed in myriad ways while still affording the right to exclude.[81]

At least under the exclusionary sense, samples should not be considered property. Perhaps certain protections that we call "intellectual property" are merely something *like* property, something that we *call* property for the utilitarian purpose of promoting national flourishing, more creative works, and a richer public domain. Perhaps songwriting is property up to a point. Jefferson applied such a limit: once you put the idea out there in the public, it is no longer just yours.[82] If some such limit is placed on songwriting as property, it would not endanger other forms of intellectual property. For example, trade secrets remain property because they are not put out there publicly. The relevant question in assessing a new form of property is whether Defendant has a duty to exclude himself from it; here, the fact that the original artist is within her rights to make the original song does not answer the question as to whether sampling takes from her property.

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[78] White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting).
[79] Kozinski, *supra* note 24, at 523. *See* Pierre N. Leval, *Fair Use or Foul?*, 36 J. COPYR. SOC'Y 167, 179-80 (1989).
[80] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 578 n. 10 (1994).
[81] *See* Penner, *supra* note 7.
[82] *See* Kozinski, *supra* note 24, at 519-20.

It is not necessarily the case that sampling harms record companies. Perhaps Eminem's sampling leads a music buff to find out who made the original, and then she goes and buys the original. Or maybe she does not. But it is hard to believe that just because Vanilla Ice used a beat from Queen, people bought fewer Queen records. If they did, Queen can sue in a court of law and collect damages. But in a court of equity, requests that do little justice to either Plaintiff or Defendant, while harming the public interest, ought to fall on deaf ears. The equitable remedies are a backup system meant to do maximal justice; they are not drawn from the same pool as legal remedies. If an original song owner can show damages, then courts may need to grant relief. If not, we should enjoy the new song and move on.

We understandably want to avoid undesirable consequences. We do not want to create incentives for artists to ignore one another's interests. Judges can deny injunctive relief discretionarily, yet this does not mean that injunctive relief will never be proper in a music sampling infringement case.

CONCLUSION

Perhaps property requires a precarious conceptual balance. Maybe our best explanation of what property is—and what property is not—looks something like G.K. Chesterton's description of Christianity as a "ragged rock."[83] Chesterton argued that the Church "could not afford to swerve a hair's breadth on some things" to succeed in her "irregular equilibrium."[84] Property is the same. Some things are property and therefore earn radical protection. Some things are not property and therefore earn radical freedom. Whether song samples are not property can be considered further. More immediately, judges have to keep a precarious balance of their own if the arts are to flourish while property entails the right to exclude the whole world. We cannot change our theory of property when we turn to song sampling out of convenience, but that should worry us little. Discretionary equitable remedies are enough to do justice to the public interest.

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[83] G.K. CHESTERTON, ORTHODOXY (1908), Chapter 6.
[84] *Id.*