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**Note:** This is a work in progress, with some sections needing further refinements. I welcome comments.

## **Adapting Copyright for the Mashup Generation**

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### **ABSTRACT**

Growing out of the rap and hip hop genres as well as advances in digital editing tools, music mashups have emerged as a defining genre for post-Napster generations. Yet the uncertain contours of copyright liability as well as prohibitive transaction costs have pushed this genre underground, stunting its development, limiting remix artists' commercial channels, depriving sampled artists of fair compensation, and further alienating netizens and new artists from the copyright system. In the real world of transaction costs, subjective legal standards, and market power, no solution to the mashup problem will achieve perfection across all dimensions. The appropriate inquiry is whether an allocation mechanism achieves the best overall resolution of the trade-offs among authors' rights, cumulative creativity, freedom of expression, and overall functioning of the copyright system. This article contends that by adapting the long-standing cover license for the mashup genre, Congress can support a charismatic new genre while affording fairer compensation to owners of sampled works, engaging the next generations, and channeling disaffected music fans into authorized markets. Such an approach sidesteps the inherent problems of relying upon fair use while promoting cumulative creativity.

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## Adapting Copyright for the Mashup Generation

Advances in digital technologies as well as Napster's charismatic file-sharing technology unleashed a digital tsunami that continues to reshape the content industries as well as the broader culture. While these technologies have empowered creators and enabled them to reach vast audiences without the high share of proceeds demanded by traditional record labels, publishers, and distributors,<sup>1</sup> they have introduced new challenges for those seeking to earn a living in the creative arts. The very technologies that liberate creators from the shackles of the old intermediaries make it ever more difficult to achieve an adequate return for their investments in training, time, expense, and opportunity cost to produce art. Copyright enforcement, which was rarely a problem in the pre-Internet age, has taken center stage in the post-Napster era, especially for independent creators. And although the much anticipated celestial jukeboxes – Pandora, Spotify, YouTube, and others – have arrived, they too are beholden to the old intermediaries.<sup>2</sup> To quote Pete Townshend, “Meet the new boss . . . same as the old boss.”<sup>3</sup>

Whereas prior generations of consumers and creators had few options for accessing copyrighted works outside of authorized channels, the Internet has irreversibly altered the technological constraints channeling most people into content markets. In the Internet age, kids, as well as grown-ups, can now find just about any copyrighted work with relative ease. While this new reality curtails some of the more restrictive practices of copyright owners, it also jeopardizes the funding and development of high cost and high risk creative projects through decentralized market mechanisms – the economic foundation of copyright protection.

A just, effective, and forward-looking copyright system would ideally channel new age creators and consumers – the post-Napster generations – into well-functioning digital content marketplaces.<sup>4</sup> Such a system must come to grips with the reality that a growing segment of the population doesn't view copyright markets as the only means to access creative works. To

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<sup>1</sup> See Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, 62 *J. Copyright Soc'y of the USA* 235, 291-98 (2014) (42<sup>nd</sup> Annual Brace Lecture).

<sup>2</sup> See *id.* at 292-97; YouTube – contentID vlogbrothers, *The Bizarre State of Copyright*, YouTube (posted Aug. 15, 2014) (explaining YouTube's ContentID monetization and permission process and the disregard of fair use) <[www.youtube.com/watch?v=hG\\_FCQiKUws&list=PLrEnWoR732-BHrPp\\_Pm8\\_VleD68f9s14-&index=14](http://www.youtube.com/watch?v=hG_FCQiKUws&list=PLrEnWoR732-BHrPp_Pm8_VleD68f9s14-&index=14)>

<sup>3</sup> See The Who, “Won't Get Fooled Again,” (1971) (capturing the frustration, hypocrisy, and cynicism of the power structures defining the era – “We were liberated from the fall that's all, But the world looks just the same”; “meet the new boss, same as the old boss” – punctuated by the greatest scream in rock 'n roll history).

<sup>4</sup> See Menell, *supra* n. 2, at 361-71.

many, participation in markets for copyrighted works is voluntary, more about convenience and fairness than compliance with the rule of law. Thus, trends in technology, social dynamics, and moral conscience have eroded copyright protection. Heavy-handed responses by copyright owners – such as mass litigation campaigns, efforts to ramp up enforcement tools, and troll litigation – have alienated consumers, judges, and legislators and spurred work-arounds that lead new generations away from authorized digital content marketplaces and copyright-based creative careers.

Notwithstanding the decline of the copyright system’s public approval rating, the core social, economic, and moral foundations on which copyright was built have not been rendered obsolete by technological advance. To a large extent, what creators want and need has remained the same: freedom to create and a fair compensation system based on the popularity of their art. And what consumers want has also remained the same: easy access to creative original art at a fair price. These two forces create the conditions for copyright to provide a critical engine of creative and free expression. But in order for the copyright system to remain vital, copyright reform must channel post-Napster era creators and consumers into a balanced marketplace, not alienate them. In a recent lecture, I sketched a comprehensive plan for adapting copyright law, institutions, and business practices for the Internet Age.<sup>5</sup>

This article builds on that project by exploring the challenges posed by music mashups. Although a relatively small slice of the overall content landscape, the mashup genre is of particular cultural and symbolic significance for transitioning the copyright system to the post-Napster era for several reasons.

First, popular music exerts strong biological,<sup>6</sup> social, and cultural force on every generation and has traditionally been among the most important formative copyright experiences for many young people during the past half century. The opportunities for adolescents to collect their favorite musical recordings and develop their own musical abilities – often inspired by their favorite composers and recording artists – can shape life-long passions, tastes, and values.

Second, new genres – from R&B to rock ‘n roll, metal, disco (and the first wave of electronic dance music (EDM)), grunge, rap, hip hop, house/EDM (second wave), and mashup – define and differentiate the youth of each generation from their parents’ generation. As such, they play a critical formative role in each generation’s values, self-identity, autonomy, and creative development.

A copyright system that fails to understand, accept, and embrace these social forces

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<sup>5</sup> See Menell, *supra* n.2.

<sup>6</sup> See DANIEL LEVITIN, *THIS IS YOUR BRAIN ON MUSIC: THE SCIENCE OF HUMAN OBSESSION* (2007); DANIEL LEVITIN, *THE WORLD IN SIX SONGS: HOW THE MUSICAL BRAIN CREATED HUMAN NATURE* (2008).

sacrifices relevancy among a key demographic, which over time will make the system progressively less acceptable to a growing proportion of society. Since digital and Internet technology provide easy access to unauthorized sources of copyrighted works, failure to accommodate new and popular art forms encourages “work arounds” to copyright markets, alienates post-Napster generations (and increasingly those who grew up in the era in which copyright markets were obligatory) from copyright markets, and confronts judges responsible for adjudicating copyright disputes with difficult choices, as reflected in the file-sharing and Internet safe harbor cases.<sup>7</sup>

The emergence of mashup creativity over the past decade epitomizes the marginalization of copyright as an economic, social, and cultural institution. Advances in remix hardware and software in conjunction with the ease of online distribution have empowered a new wave of mashup artists – from established disc jockeys (DJ’s) to bold new creators (such as Girl Talk) to adventurous teenagers developing their own identity – to assemble mashup tracks and distribute them outside of copyright markets. Yet legal uncertainty surrounding this new art form stunts and distorts its development and reinforces alienation and breeds contempt for the copyright system.

This article contends that by extending a compulsory license to mashup artists, Congress can invigorate the copyright system and channel new generations of consumers and creators into well-functioning online marketplaces for digital content. By augmenting the cover license, which has been in place for more than a century, with digital technologies for identifying and tracking usage of preexisting copyright works, a remix compulsory license would provide a calibrated mechanism for enabling both mashup artists and owners of underlying copyrighted works that are being sampled to profit equitably from the public’s enjoyment of the resulting work.

Such a regime would remove the dark cloud constraining and distorting the mashup genre. It would not supplant fair use, but rather sidestep its amorphous contours in those situations in which mashup artists choose to operate within the compulsory license regime. Others would be free to test the limits of fair use, but it seems likely that an increasing number of mashup artists would see the virtue in according value to those whom they sample. Opening up such a channel would stimulate copyright markets and expand the range of works available across a range of platforms – from YouTube to Spotify, iTunes, and SoundCloud. Consumers would see greater reason to participate in these markets, thereby further stimulating the creative arts.

This policy innovation would also signal that Congress seeks to reform the copyright system to accommodate new creators and the realities of the Internet Age. By moving copyright away from control towards calibrated compensation, Congress would recognize that consumers

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<sup>7</sup> See Menell, *supra* n. \_\_, at \_\_-\_\_.

play a critical role in the era of configurable culture,<sup>8</sup> foster norms that channel new age creators and consumers into markets for copyrighted works, and begin the process of building cultural bridges across generations.

## **I. Music Mashups**

While the music mashup genre is well-known to most younger music fans, its existence and characteristics are less familiar to the population-at-large. The reason for this generation gap has a lot to do with the effects of copyright law. The constraints and uncertainties surrounding copyright law, including the amorphous boundaries of the fair use doctrine, have pushed the mashup genre significantly underground. Major record labels have largely steered clear of signing and releasing mashup artists. Much of this work is available through streaming services that operate under the radar or in a state of legal and commercial limbo. The mashup artists, many of whom work as live performance disc jockeys (DJ's) in dance clubs, distribute recordings of these works through unlicensed channels primarily to promote their live performance gigs.

Notwithstanding the uncertain legal status of the musical mashup genre, it comprises one of the most vital, innovative, and exciting musical communities today. Although it is difficult to quantify its influence due to its underground channels, it has a worldwide reach – from the dance clubs in Ibiza to the most popular music festivals in the United States to a massive Internet fan base. The traditional music industry is aware of its growth and has even sought to use it to promote its products, but has not overtly embraced it.

As a prelude to analyzing copyright policy for mashup music, this section introduces the mashup culture through two lenses. The first section is anthropological, tracing my own journey into this underground musical domain. The second section looks more generally at how mashups are produced, distributed, and monetized.

### **A. A Personal Journey**

Attitudes about music, copyright, and copyright policy reflect each person's life experience. This article grows out of my own serendipitous journey into the Internet alleyways and back streets of mashup music. As such, it offers both a perspective on my own influences (and perhaps biases) as well as insight into the cross-generational currents affecting the copyright reform debate.

Like many people north of 30 years of age, my appetite for new musical forms and artists

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<sup>8</sup> Cf. ARAM SINNREICH, MASHED UP: MUSIC, TECHNOLOGY & THE RISE OF CONFIGURABLE CULTURE (2010).

has waned.<sup>9</sup> As a youth, Bob Dylan’s poetry, The Who’s rebellious rock ballads, Eric Clapton’s rock blues, and Led Zeppelin’s mystical, melodic, metal masterpieces captured my imagination and brought me through the insecurities and contradictions of the “wonder” years. The music scene, as well as recording technology, were among my deepest passions. I mastered rip, mix, and tape decades before the birth of the iPod.<sup>10</sup>

But professional responsibilities and perhaps simply just growing older quelled those passions for new. I became content with my favorite songs and less curious about discovering new talent, although new bands and artists – that includes you Bruce – occasionally captured my attention from time to time. Although I enjoyed the escapist pleasures of electronic dance music (thanks Giorgio and Donna) during graduate school, the disco era may well have snuffed out my musical curiosity. I was not particularly drawn to the rap and hip hop genres, although I respected the desire for each new generation to declare their musical independence.

With the arrival of two bundles of joy in the early 1990s, I felt a strong desire to expose Dylan (I wasn’t kidding about the influence of popular music on my life) and Noah to the passions of my youth. Both knew the rock ‘n roll classics before they mastered their times tables. On family road trips, they learned ethics through Bob Dylan’s poetry and ballads; they were mesmerized by the haunting imagery of the “Immigrant Song” as we ascended the Sierras on ski trips; they were awestruck by the greatest guitar riff of all time (“Layla”); they shared my anticipation (with the volume turned up to 11<sup>11</sup>) for the greatest scream in rock ‘n roll history;<sup>12</sup>

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<sup>9</sup> Cf. ANDY BENNETT, MUSIC, STYLE, AND AGEING: GROWING OLD DISGRACEFULLY? (2013); Exploring Age-Specific Preferences in Listening, Music Machinery (a blog about music technology by Paul Lamere), <<http://musicmachinery.com/2014/02/13/age-specific-listening/>> (last visited Feb. 28, 2015) (presenting data showing that older listeners tend to prefer music from their youth).

<sup>10</sup> In its provocative 2001 advertising campaign, Apple proclaimed “Rip. Mix. Burn.” to promote iTunes desktop CD burning capability. Still smarting from the Napster disruption, the content industries viewed this slogan as promoting unauthorized reproduction of copyrighted works. See Peter Cohen, Disney Boss Accuses Apple of Fostering Piracy, PCWorld (Mar. 1, 2002) <[www.macworld.com/article/1003743/eisner.html](http://www.macworld.com/article/1003743/eisner.html)>.

<sup>11</sup> See This Is Spinal Tap (1984) (featuring Spinal Tap, “one of England’s loudest bands”) <[www.imdb.com/title/tt0088258/](http://www.imdb.com/title/tt0088258/)>. In a classic scene, lead guitarist Nigel Tufnel explains to documentary filmmaker Marty DiBergi why the band is so loud:

Nigel Tufnel: The numbers [on the amplifier] all go to eleven. Look, right across the board, eleven, eleven, eleven and...

Marty DiBergi: Oh, I see. And most amps go up to ten?

Nigel Tufnel: Exactly.

Marty DiBergi: Does that mean it’s louder? Is it any louder?

Nigel Tufnel: Well, it’s one louder, isn’t it? It’s not ten. You see, most blokes, you know,

and they came to revere “Stairway to Heaven” – the greatest rock ‘n roll song of all time.

Dylan and Noah started guitar lessons as soon as they could hold a Baby Taylor<sup>13</sup> and quickly developed their own musical tastes and personalities. They drew me into their musical passions, reigniting some of my own youthful enthusiasm for new artists. I came to view Green Day (our local band), The Red Hot Chilli Peppers (from the tail end of my youth, but I did not appreciate them until my kids pushed), and the Foo Fighters (Noah’s melodic rendition of “Best of You”<sup>14</sup> was so beautiful that it took me a while to appreciate the original) as rightful inheritors of the rock ‘n roll crown. My playlists increasingly tipped towards new artists. Noah’s acoustic rendition of Kid Cudi’s “Up, Up and Away” opened my ears to new genres. I was even opening up to rap and hip hop.

With Dylan’s departure for college in the fall of 2008, I worried about losing my most reliable musical influence. Dylan’s rock band, with their covers of rock ‘n roll classics and new compositions had kept the musical flame glowing. Fortunately, I still had Noah’s voracious musical appetite and musicianship to keep me engaged.

Shortly after Dylan’s arrival at college, he sent me an intriguing email with a link to a new musical phenomenon performing under the peculiar name “Girl Talk” (with the query: “Is this legal?” He had heard enough intellectual property lectures during his youth to realize that this might raise some interesting issues. I was fully aware that my answer was not going to affect his enjoyment of this musical discovery – he was embarking on a degree in computer science and took pride in his online freedom – but I appreciated his curiosity about intellectual

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will be playing at ten. You’re on ten here, all the way up, all the way up, all the way up, you’re on ten on your guitar. Where can you go from there? Where?

Marty DiBergi: I don’t know.

Nigel Tufnel: Nowhere. Exactly. What we do is, if we need that extra push over the cliff, you know what we do?

Marty DiBergi: Put it up to eleven.

Nigel Tufnel: Eleven. Exactly. One louder.

Marty DiBergi: Why don’t you just make ten louder and make ten be the top number and make that a little louder?

Nigel Tufnel: [pause] These go to eleven.

See This Is Spinal Tap (1984) Quotes <[www.imdb.com/title/tt0088258/quotes](http://www.imdb.com/title/tt0088258/quotes)>.

<sup>12</sup> See n. \_\_.

<sup>13</sup> Not a reference to James Taylor’s wonderful Sweet Baby James, but rather to the 3/4 size guitar model made by Taylor Guitars. See Taylor Guitars <[www.taylorguitars.com/guitars/acoustic/series/baby-taylor](http://www.taylorguitars.com/guitars/acoustic/series/baby-taylor)>.

<sup>14</sup> See “Best of You,” Wikipedia <[en.wikipedia.org/wiki/Best\\_of\\_You](http://en.wikipedia.org/wiki/Best_of_You)>.

property law and the recommendation.

The experience that followed was exhilarating, hilarious, and confusing – all at the same time. I was mesmerized by the juxtaposition of rock classics, disco, rap, and hip hop. It whet my appetite for fuller versions of the fragments from my favorite songs but would whisk me into some new soundscape before I became too frustrated. Just as Phil Spector invented the Wall of Sound through recording techniques and echo chambers,<sup>15</sup> Gregg Gillis, who performed under the stage name Girl Talk, created marvelous dynamic meandering compositions by interweaving genres and samples to form engaging musical mosaics entirely from existing recordings. A typical composition, such as “Play Your Part (Pt. 1),” squeezed nearly 30 samples into five frenetic minutes.<sup>16</sup>

0:00 - 0:40	Roy Orbison - “Oh, Pretty Woman”
0:00 - 2:11	Spencer Davis Group - “Gimme Some Lovin”
0:01 - 0:41	UGK featuring OutKast - “International Player’s Anthem (I Choose You)”
0:42 - 1:07	DJ Funk - “Pump That Shit Up”
0:55 - 1:20	Cupid - “Cupid Shuffle”
1:08 - 1:56	Pete Townshend - “Let My Love Open the Door”
1:18 - 2:10	Unk - “Walk It Out”
1:59 - 2:37	Twisted Sister - “We’re Not Gonna Take It”
2:04 - 2:10	Huey Lewis and the News - “The Heart of Rock & Roll”
2:13 - 2:37	Lil Mama - “G-Slide (Tour Bus)”
2:29 - 3:01	Ludacris featuring Shawna - “What’s Your Fantasy”
2:36 - 3:01	Temple of the Dog - “Hunger Strike”
2:48 - 3:01	Birdman featuring Lil Wayne - “Pop Bottles”
3:01 - 3:15	Rage Against the Machine - “Freedom”
3:02 - 4:05	Aaliyah featuring Timbaland - “We Need a Resolution”
3:02 - 4:06	Birdman and Lil Wayne - “Stuntin’ Like My Daddy”
3:05 - 4:25	T.I. - “What You Know”
3:17 - 3:38	Edwin Starr - “War”
3:41 - 4:31	Sinéad O’Connor - “Nothing Compares 2 U”
4:13 - 4:43	Shawna - “Gettin’ Some” (portion sampled samples “Blowjob Betty” by Too Short)
4:32 - 4:45	Jay-Z featuring UGK - “Big Pimpin” (portion sampled samples “Khusara Khusara” by Hossam Ramzy and “Slow & Easy” by

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<sup>15</sup> See Wall of Sound, Wikipedia <[en.wikipedia.org/wiki/Wall\\_of\\_Sound](http://en.wikipedia.org/wiki/Wall_of_Sound)>. The Wall of Sound was perhaps best epitomized by the Righteous Brothers’s 1964 recording of “You’ve Lost That Lovin’ Feeling.”

<sup>16</sup> See Feed the Animals, Illegal Tracklist <[www.illegal-tracklist.net/Tracklists/FeedTheAnimals](http://www.illegal-tracklist.net/Tracklists/FeedTheAnimals)>.

Zapp)  
 4:32 - 4:45 DJ Funk - “Here We Go”  
 4:32 - 4:42 Joe Budden - “Drop Drop”  
 4:33 - 4:41 Kelis featuring Too \$hort - “Bossy”  
 4:34 - 4:44 Young Jeezy featuring Bone Crusher - “Take It to the Floor”  
 4:37 - 4:45 Rare Earth - “I Just Want to Celebrate”

After the initial shock, I was hooked. Like the mix tapes of my youth, mashups can be highly addictive. They quenched my thirst for recognizable classics while exposing me to new genres and artists as well as the craft of mashing them together. I especially enjoyed picking out songs from my youth within Gillis’s collages, and added several to my playlists. Some of the combinations would make me laugh out of loud which, if you know me, is somewhat rare. Others shocked – such as the Gillis’s intermingling on “Here’s the Thing”<sup>17</sup> of Rick Springfield’s sweet balled of unrequited love (“Jessie’s Girl”)<sup>18</sup> with Three 6 Mafia’s “I’d Rather,”<sup>19</sup> a rap homage to oral sex – but opened my ears to a much broader musical palette. Now that I have become accustomed to the dynamism, playfulness, and intrigue of mashup music, listening to an entire conventional sound recording can at times feel dull. But just to be clear, that will *never* be true of “Stairway to Heaven.”<sup>20</sup>

As regards Dylan’s question – “Is this legal?” – I was torn. Embedded within some of my favorite Girl Talk mashups were extended excerpts from popular copyrighted sound recordings – such as a 90 second continuous piano track from “Layla”<sup>21</sup> in “Down for the

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<sup>17</sup> See Girl Talk, Here’s the Thing, Feed the Animals (2008) (at 3:48 - 4:20) <[www.youtube.com/watch?v=TpHXcBUQ2hk](http://www.youtube.com/watch?v=TpHXcBUQ2hk)>.

<sup>18</sup> Jessie’s Girl, a ballad about a young man’s love for his best friend’s girlfriend, topped the Billboard Hot 100 in 1981. See Jessie’s Girl, Wikipedia <[en.wikipedia.org/wiki/Jessie's\\_Girl](http://en.wikipedia.org/wiki/Jessie's_Girl)>.

<sup>19</sup> See “I’d Rather - Three 6 Mafia (Feat. UNK),” YouTube <[www.youtube.com/watch?v=46XtszqVmRo](http://www.youtube.com/watch?v=46XtszqVmRo)>.

<sup>20</sup> I note with admiration that Zepparella, a talented and versatile female Led Zeppelin cover band, see Zepparella <<http://www.zepparella.com/>>, refuses to perform “Stairway to Heaven” on the ground that it is too sacred. As one member of the Zepparella commented, “if you hear us do ‘Stairway to Heaven,’ it’ll be the last show we ever play.” See Shea Conner, Female Tribute Band Captures Zeppelin’s Spirit, St. Joseph’s News-Press (Jun. 16, 2014) <[www.newspressnow.com/life/st\\_joe\\_live/music/article\\_3a81d91d-c924-5f97-b74e-424940b528ac.html](http://www.newspressnow.com/life/st_joe_live/music/article_3a81d91d-c924-5f97-b74e-424940b528ac.html)>.

<sup>21</sup> See Layla, Wikipedia (characterizing Layla as “among the greatest rock songs of all time” and “one of rock music’s definitive love songs, featuring an unmistakable guitar figure played by Eric Clapton and Duane Allman, and a piano coda that comprises the second half of

Count”<sup>22</sup> with a rap vocal track superimposed. Under the Sixth Circuit’s questionable *Bridgeport* decision,<sup>23</sup> even a minuscule sample would be vulnerable. Yet the developing case law coming out of the Second Circuit provides a viable fair use defense for an uncertain and expanding domain of “transformative” works.<sup>24</sup> And Professor Lawrence Lessig’s book, *Remix: Making Art and Commerce Thrive in the Hybrid Economy*,<sup>25</sup> which came out a short time after my becoming aware of Girl Talk, pushed aggressively down this path.

Fair use analysis is nuanced, case-specific, and often subjective – in the eye, or more aptly, ear of the beholder.<sup>26</sup> Gillis does not appear to be commenting on or parodying the “Layla” track – considerations that would favor his use – but rather using it for its distinctive musical qualities as well as commercial purposes. And while the “Layla” piano track provides a remarkable backdrop for B.o.B’s “Haterz Everywhere,”<sup>27</sup> it is not at all clear that this appropriation qualifies as fair use. I will merely note at this point that I would be hesitant to offer a robust opinion that courts throughout the land would find that this use is fair.

Gillis’s sample of Beyoncé’s “Single Ladies (Put a Ring on It)”<sup>28</sup> in “That’s Right”<sup>29</sup> is even more cavalier. The section beginning at 2:44 and running for 70 seconds appropriates the heart of Beyoncé’s hit song with relatively little embellishment.<sup>30</sup>

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the song) <[en.wikipedia.org/wiki/Layla](http://en.wikipedia.org/wiki/Layla)>.

<sup>22</sup> See Girl Talk, *Down for the Count, All Day* (2010) <[www.youtube.com/watch?v=Nr2cfwR0roU](http://www.youtube.com/watch?v=Nr2cfwR0roU)>.

<sup>23</sup> See *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390 (6th Cir. 2004).

<sup>24</sup> See *Cariou v. Prince*, 714 F. 3d 694 (2d Cir. 2013); *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605 (2d Cir. 2006); *Blanch v. Koons* 467 F.3d 244 (2d Cir. 2006).

<sup>25</sup> LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* (2008).

<sup>26</sup> See, *infra*, <Section II.A.1>.

<sup>27</sup> See B.o.B - Haterz Everywhere [Feat. Rich Boy] (video), YouTube <[www.youtube.com/watch?v=VLhZ52vVK-I](http://www.youtube.com/watch?v=VLhZ52vVK-I)>.

<sup>28</sup> See Beyoncé - Single Ladies (Put a Ring on It), YouTube <[www.youtube.com/watch?v=4m1EFMoRFvY](http://www.youtube.com/watch?v=4m1EFMoRFvY)>.

<sup>29</sup> See Girl Talk - That’s Right, YouTube <[www.youtube.com/watch?v=xVmXXWcfitw](http://www.youtube.com/watch?v=xVmXXWcfitw)>.

<sup>30</sup> See “Girl Talk’s That’s Right sample of Beyoncé’s Single Ladies,” WhoSampled App (providing side-by-side comparison)

Although I was sympathetic to there being ample berth for this engaging and innovative new genre, and would certainly have celebrated it in my youth, I was conflicted. My appreciation for Girl Talk's mashups owed as much or more to the creative contributions of the underlying composers and recording artists as it did for Gillis's creativity in mashing them together. Although I was already admiring of Gregg Gillis's compositional talent, I was troubled by the lack of any workable system for allocating the fruits of his borrowing. To enable Gregg Gillis to commercialize these collages without according any value to the creators of the works being remixed struck me as questionable.

I was also troubled by the prospect that if each and every underlying copyright owner could exercise veto power over mashups, then few if any mashups would be created and those that were would be far less interesting. The transaction costs alone would be prohibitive for Girl Talk's intensive musical collages. And even if the transaction cost hurdle could be surmounted, it seems unlikely that Rick Springfield would be inclined to have "Jessie's Girl" juxtaposed with a rap song celebrating oral sex.

These issues went to the heart of Dylan's seemingly straightforward question. My instinct was that neither extreme – mashup carte blanche or copyright owner veto power – achieved the golden mean. And it is this tension to which we will ultimately return. But before we can confront it, it will be useful to have some background about mashups, copyright law, and copyright policy.

## **B. The Mashup Genre**

Music mashups grow out of the basic human desire to personalize, engage with, recast, and combine art in conjunction with advances in technology that enable such manipulation.<sup>31</sup> The traditional radio industry was built around the "disc jockey," a music aficionado who selected music to broadcast.<sup>32</sup> The advent and commercialization of tape recording technology in the 1960s and 1970s empowered individuals to develop their own mix tapes and spurred the development of karaoke – enabling amateur singers to perform their own renditions of popular music.

On the professional creative side, the "cover" license – a compulsory license introduced

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<[www.whosampled.com/sample/70977/Girl-Talk-That's-Right-Beyonc%C3%A9-Single-Ladies-\(Put-a-Ring-on-It\)/](http://www.whosampled.com/sample/70977/Girl-Talk-That's-Right-Beyonc%C3%A9-Single-Ladies-(Put-a-Ring-on-It)/)>

<sup>31</sup> See SINNREICH, *supra* n.\_\_\_\_.

<sup>32</sup> Payola might also have had something to do with what was played. See Ronald Coase, Payola in Radio and Television Broadcasting, 22 J. Law & Econ. 269 (1979).

in the 1909 Act<sup>33</sup> and retained in the 1976 Act<sup>34</sup> – encouraged widespread experimentation in the interpretation of musical compositions.<sup>35</sup> As more versatile recording technology emerged, composers, artists, and producers came to see prior sound recordings as inputs to the creative process. The emergence of digital technologies for copying, pasting, and manipulating “samples” in the early 1980s fueled the rap and hip hop genres.<sup>36</sup> These technologies democratized musical creativity by enabling new voices and generations to blend sound and superimpose their own poetry on the works of others.

The rap and hip hop genres paved the way for music mashups, which rely entirely on sampled sources to construct musical collages.<sup>37</sup> Coinciding with the emergence of bootleg websites in the early 2000 period, music mashups emerged as a distinct genre with the superimposing of a vocal track from one recording onto the instrumental track of another.<sup>38</sup> In one of the breakthrough mashups, Freelance Hellraiser combined a guitar track from The Strokes’ “Had to Explain” with the lyrics from Christina Aguilera’s “Genie in a Bottle,” to create “A Stroke of Genius.” Douglas Wolk, music critic for *The Village Voice*, hailed the resultant work

cooler and sexier and tenser than either of its sources, and it makes me want more. There are no other records that sound like it right now: nothing else with the high-budget precision songcraft and high-definition pop tones of Christina that also rocks, nothing else with the skinny hips and sharp teeth of the Strokes that understands the pleasures of TRL [Total Request Live, an MTV series that featured popular music videos]. Each is what the other one was missing all along.<sup>39</sup>

The mashup genre went viral with the release of Danger Mouse’s *The Grey Album*

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<sup>33</sup> An Act to Amend and Consolidate the Acts Respecting Copyright, ch. 320, § 1(e), 35 Stat. 1075 (1909).

<sup>34</sup> See 17 U.S.C. § 115.

<sup>35</sup> See, *infra*, <Section III.B.>

<sup>36</sup> See KEMBREW MCLEOD & PETER DICOLA, *CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING* \_\_-\_\_ (2011).

<sup>37</sup> See Mashup (music), Wikipedia <[http://en.wikipedia.org/wiki/Mashup\\_\(music\)](http://en.wikipedia.org/wiki/Mashup_(music))>.

<sup>38</sup> See Roberta Cruger, *The Mash-up Revolution*, Salon.com (Aug. 9, 2003) <[dir.salon.com/story/ent/music/feature/2003/08/09/mashups\\_cruger/index.html](http://dir.salon.com/story/ent/music/feature/2003/08/09/mashups_cruger/index.html)>.

<sup>39</sup> See Douglas Wolk, *Barely Legal*, *The Village Voice* (Feb. 5, 2002) <[www.villagevoice.com/2002-02-05/music/barely-legal/](http://www.villagevoice.com/2002-02-05/music/barely-legal/)>.

(2004), cleverly combining Jay-Z's *The Black Album* with The Beatles' *The White Album*.<sup>40</sup> Although Danger Mouse released only 3,000 copies of the album and never intended to sell the album commercially, due in part to concerns about copyright infringement,<sup>41</sup> the album unwittingly became an overnight sensation. *Rolling Stone* praised *The Grey Album* as an "ingenious hip-hop record that sounds oddly ahead of its time,"<sup>42</sup> foreshadowing the emergence of the mashup genre. After EMI, the owner of the Beatles' sound recordings issued cease and desist letters to file-sharing sites hosting *The Grey Album*, music activists mounted "Grey Tuesday," a 24 hour online protest promoting distribution of the album.<sup>43</sup> Approximately 170 websites went "grey" on February 24, 2004 – muting the appearance of their homepage while hosting copies of the album, leading to 100,000 downloads of the album on that day. The album would garner favorable reviews from numerous critics as well as best album of 2004 honors from *Entertainment Weekly*.<sup>44</sup> Later that year, MTV introduced "Ultimate Mash-Ups," a series mashing together pairs of well-known recording artists.<sup>45</sup>

An early commentator captured the wonder and excitement surrounding this emerging art form:

Mash-ups might be the ultimate expression of remix culture, which has grown out of a confluence of influences: widespread sampling, DJs as performers, and the proliferation of digital technology, as well as a tangle of diverse musical styles from jungle to house to garage and techno. To lapse into postmodern jargon for a sec, mash-ups are the highest form of recontextualization, recycling toasty tunes by fusing pop hooks with grunge riffs, disco divas with hardcore licks. The groove and crunch combination melds black music back into rock, or pulls out a

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<sup>40</sup> See The Mouse That Remixed, *The New Yorker* (Feb. 9, 2004) <[www.newyorker.com/magazine/2004/02/09/the-mouse-that-remixed](http://www.newyorker.com/magazine/2004/02/09/the-mouse-that-remixed)>

<sup>41</sup> See Kembrew McLeod, Confessions of an Intellectual (Property): Danger Mouse, Mickey Mouse, Sonny Bono, and my Long and Winding Path as a Copyright Activist-Academic, 28 *Popular Music and Society* 79, 80 (2005); "The Mouse that Remixed," supra n. \_\_

<sup>42</sup> See Lauren Gitlin, DJ Makes Jay-Z Meet Beatles, *Rolling Stone* (Feb. 5, 2004) <[www.rollingstone.com/music/news/dj-makes-jay-z-meet-beatles-20040205](http://www.rollingstone.com/music/news/dj-makes-jay-z-meet-beatles-20040205)>.

<sup>43</sup> See The Grey Album, Wikipedia <[http://en.wikipedia.org/wiki/The\\_Grey\\_Album](http://en.wikipedia.org/wiki/The_Grey_Album)>.

<sup>44</sup> See id.

<sup>45</sup> See Jeff Leeds, Mix and Mash, *N.Y. Times* (Jan. 9, 2005) <[www.nytimes.com/2005/01/09/arts/music/09leed.html](http://www.nytimes.com/2005/01/09/arts/music/09leed.html)>; Collision Course (album), Wikipedia (describing a collaboration between rapper Jay-Z and rock band Linkin Park featured on MTV's series; the resulting work went on to sell 5 million copies worldwide) <[en.wikipedia.org/wiki/Collision\\_Course\\_\(album\)](http://en.wikipedia.org/wiki/Collision_Course_(album))>.

song's surprising inner essence. Toss in something vintage, obscure, silly or unexpected and the duet totally transcends all musical formats and canons of taste.<sup>46</sup>

Over the next several years, the art form blossomed in surprising and unexpected ways. A range of mashup artists – from Girl Talk to the Super Mash Bros, DJ Earworm, The Legion of Doom, and Norwegian Recycling – brought distinctive styles and sensibilities to mashup culture.

Mashups come to the public's attention largely through live DJ performances, radio shows, Internet channels, and mass media as opposed to traditional recording industry outlets. Few mashup artists clear the underlying copyrighted works and hence the products are considered infringing by most record labels. As a result, music services have been hesitant to sell or stream mashup artists. Nonetheless, the mashup genre has achieved a widespread following through file-sharing websites, fan and review sites,<sup>47</sup> and live DJ live performances.

## 1. Creation of Music Mashups

Rap, hip hop, and mashup producers require six principal inputs: hardware, software, digital tracks, creative ideas, mixing talent, and the time to craft distinctive mashups. Advances in digital technology enhanced the capacity and reduced the cost of digital audio workstations (“DAW”) – comprising a mixing console, control surface, audio converter, and data storage – and DAW software. Since the compact disc technology is not encrypted, remix artists can rip and sample tracks of substantially all sound recordings available in CD format. They can also work from beat libraries and karaoke tracks for instrumental versions of many popular recordings.

Mashup artists ideally prefer to have separated audio tracks or “stems” from which to work. Major record labels occasionally seed tracks from their catalogs into DJ communities to encourage promotion of new releases. DJ Earworm commends Kanye West and Radiohead for

participating in a long overdue trend that seems to now be emerging where musical artists are beginning to release ‘stems’ from their tracks. Until recently, a mashup or remix artist would feel lucky just to find an instrumental version or

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<sup>46</sup> See Roberta Cruger, *The Mash-up Revolution*, Salon.com (Aug. 9, 2003) <dir.salon.com/story/ent/music/feature/2003/08/09/mashups\_cruger/index.html >.

<sup>47</sup> See, e.g., Mashup Charts (featuring hundreds of mashup artists, videos, and rating charts) <www.mashup-charts.com/>; Jared Smith, *The 50 Best Mashups of 2013, Too Good for Radio* (Dec. 17, 2013) <www.toogoodforradio.com/mashup/the-30-best-mashups-of-2013-so-far/>; Max Chung & Sarah Polohsky, *Top 10 Mashup Albums Of All Time*, Vibe (Jul. 14, 2013) <www.vibe.com/photo-gallery/top-10-mashup-albums-all-time>.

acapella (vocals only) of a favorite track. But these musical stems allow us much more control.

Most modern recordings have many tracks, usually more than ten, and sometimes more than a hundred. Each track typically represents a single recording or electronic sound. Traditionally, before all these tracks are mixed down into a final stereo mix, it is first mixed down into about four to eight separate audio files (stems). All the foreground vocals might be on one stem, all the drums on another, while the guitars and keyboards might be on yet another. When all the stems are added together, you hear the song as it was originally meant to be heard. The traditional purpose of these stems was to enable the mastering engineer to give the final mixdown just the right sound for various formats (radio or club, CD or vinyl).

Now, with DIY remix culture exploding, we sonic manipulators are growing hungry for disassembled pop music, and the music industry is beginning to see the benefit of increased exposure through releasing stems directly to the public, allowing us much greater freedom than if they had simply released the instrumentals and acapellas. Now we can choose which instruments are playing. This new trend augers well for us in the mashup community, and I look forward to the practice expanding. Thank you Kanye, thank you Radiohead, and thanks to all the other musicians (and music execs) that are starting to see the light!<sup>48</sup>

The DJ community has developed a wide range of resources – some public and some secret – to obtain the source material for their craft.<sup>49</sup>

Mashup artists see their work less as DJ mixes than as their own creative compositions drawn from the stock of pre-existing works.<sup>50</sup> Gregg Gillis reports that he spent months testing out his compositional ideas in live performances and matching beats to produce *Feed the Animals*, his 2010 album featuring over 300 samples. He estimates spending a day to produce each minute of recording time.

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<sup>48</sup> See DJ Earworm, Kanye West – Love Lockdown; Radiohead – Reckoner <[dyearworm.com/reckoner-lockdown](http://dyearworm.com/reckoner-lockdown)> (visited Oct. 15, 2014).

<sup>49</sup> See, e.g., The Source: DJ Music Supply <[www.thesourceformusic.com/index.cfm?genre=all](http://www.thesourceformusic.com/index.cfm?genre=all)>; Music Resources Links, Discjockey101 <[www.discjockey101.com/links\\_musicresources.html](http://www.discjockey101.com/links_musicresources.html)>; List of musical works released in a stem format, Wikipedia <[en.wikipedia.org/wiki/List\\_of\\_musical\\_works\\_released\\_in\\_a\\_stem\\_format](http://en.wikipedia.org/wiki/List_of_musical_works_released_in_a_stem_format)>; Song Stems - Reddit <[www.reddit.com/r/SongStems/](http://www.reddit.com/r/SongStems/)>.

<sup>50</sup> See Robert Levine, Steal This Hook? D.J. Skirts Copyright Law, N.Y. Times E1 (Aug. 7, 2008).

## 2. Types of Music Mashups

Music mashups comprise a variety of forms. “A vs B” mashups combine an entire instrumental track from one recording with the entire vocal track of another recording. For example, Soundwax’s “Smells like Teen Booty” superimposes Destiny Child’s vocal track from “Bootylicious” on the instrumental track of Nirvana’s “Smells Like Teen Spirit.”

*The Grey Album* took mashing a step further, breaking the vocal tracks from JayZ’s *The Black Album* into samples in the process of assembling a vocal track for instrumental tracks from the Beatles’ *The White Album*. In “Boulevard of Broken Songs,” Party Ben superimposed a variety of recordings – Oasis’s “Wonderwall,” Travis’s “Writing to Reach You,” and Eminem’s “Sing for the Moment,” which samples Aerosmith’s “Dream On” – on Green Day’s “Boulevard of Broken Dreams.”<sup>51</sup>

Girl Talk uses a far more varied, eclectic collage technique, weaving samples from 20 to 30 recordings into each of his mashups. DJ Earworm has earned a reputation for his annual “United State of Pop” mashup, which weaves the top 25 songs from Billboard’s Year-End Hot 100 into a seamless composition.<sup>52</sup>

## 3. Marketing, Distribution, and Monetization

Copyright liability concerns have pushed the mashup genre into viral marketing and distribution through mashup artist websites and file-sharing platforms. SoundCloud is the leading mashup distribution hub, with 40 million registered users as of July 2013.<sup>53</sup> SoundCloud claims that “about 175 million people listen to music on its platform each month — more than four times Spotify’s global audience.”<sup>54</sup> It allows anyone to stream as much content as they wish. Artists may upload up to three hours of audio to their profile for free. SoundCloud earns money by charging subscribers up to \$130 per year for unlimited uploads as well as analytics tools for promoting tracks.<sup>55</sup> Even the major labels have used SoundCloud as a marketing tool to

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<sup>51</sup> See Boulevard of Broken Songs, Wikipedia <[en.wikipedia.org/wiki/Boulevard\\_of\\_Broken\\_Songs](http://en.wikipedia.org/wiki/Boulevard_of_Broken_Songs)>.

<sup>52</sup> See DJ Earworm, Wikipedia <[en.wikipedia.org/wiki/DJ\\_Earworm](http://en.wikipedia.org/wiki/DJ_Earworm)>.

<sup>53</sup> See SoundCloud, Wikipedia <[en.wikipedia.org/wiki/SoundCloud](http://en.wikipedia.org/wiki/SoundCloud)>.

<sup>54</sup> See Ben Sisario, Popular and Free, SoundCloud Is Now Ready for Ads, N.Y. Times B3 (Aug. 21, 2014) <[www.nytimes.com/2014/08/21/business/media/popular-and-free-soundcloud-is-now-ready-for-ads.html](http://www.nytimes.com/2014/08/21/business/media/popular-and-free-soundcloud-is-now-ready-for-ads.html)>.

<sup>55</sup> See Douglas Macmillian, Music-Sharing Service SoundCloud Raises New Funds at \$700 Million Valuation, Wall St. J. (Jan. 24, 2014)

reach its large fan community despite the fact that SoundCloud does not have licensing deals that would insulate it from takedown notices for many of the remixes on its site.<sup>56</sup> Other mashup distribution channels include Mixcloud,<sup>57</sup> Illegal Art,<sup>58</sup> Crooklyn Clan,<sup>59</sup> and Mashtix.<sup>60</sup> While many of these websites have operated without substantial interference from owners of copyrights in works sampled without authorization, that appears to be changing. In June 2014, Kaskade, a popular mashup artist and DJ,<sup>61</sup> was the subject of dozens of take-down notices to SoundCloud.<sup>62</sup> While praising SoundCloud for its “beautiful” and “elegant” way of working with social media, Kaskade criticized its handling of copyright notices and the record companies for short-sighted thinking:

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<<http://blogs.wsj.com/digits/2014/01/24/music-sharing-service-soundcloud-raises-new-funds-at-700-million-valuation/>>.

<sup>56</sup> See Adam Satariano, SoundCloud Said to Near Deals with Record Labels, Bloomberg (Jul. 10, 2014)

<<http://www.bloomberg.com/news/2014-07-10/soundcloud-said-to-near-deals-with-record-labels.html>>.

<sup>57</sup> “Mixcloud is an online music streaming service that allows for the listening and distribution of radio shows, DJ mixes and podcasts, which are crowdsourced by its registered users.” Mixcloud, Wikipedia <[en.wikipedia.org/wiki/Mixcloud](http://en.wikipedia.org/wiki/Mixcloud)>. Mixcloud restricts its users from downloading audio content from its website for licensing reasons. Mixcloud also requires its users to attribute their audio uploads with correct Artist and Song metadata in order to preserve intellectual property rights. See Katie Scott, British Entrepreneurs Mix Up Online Radio, Wired.Co.UK (Oct. 8, 2009)

<[www.wired.co.uk/news/archive/2009-10/09/british-entrepreneurs-mix-up-online-radio](http://www.wired.co.uk/news/archive/2009-10/09/british-entrepreneurs-mix-up-online-radio)>.

<sup>58</sup> See Illegal ART, <http://illegalart.net/home/> (visited Oct. 5, 2014) (noting that “[t]he Illegal Art label released over 40 titles from 1998-2012. The label is on indefinite hiatus, although you can still acquire downloads, CDs, DVDs, and vinyl on this site.”)

<sup>59</sup> See Crooklyn Clan: The Vault <[www.crooklynclan.net/](http://www.crooklynclan.net/)> (visited Oct. 5, 2014) (characterizing itself as “a remixing service designed for use mainly by performance DJ’s. The remixes contained on crooklynclan.net are produced by professional DJ’s and music producers from around the globe for the sole purpose of enhancing a DJ’s overall performance.”)

<sup>60</sup> See Mashtix <[www.mashtix.com/](http://www.mashtix.com/)> (visited Oct. 5, 2014).

<sup>61</sup> See Kaskade, Wikipedia <[en.wikipedia.org/wiki/Kaskade](http://en.wikipedia.org/wiki/Kaskade)>.

<sup>62</sup> See Kaskade (posting notice to takedown mashups) <[thisisadynasty.tumblr.com/post/87945465547/brb-deleting-soundcloud](http://thisisadynasty.tumblr.com/post/87945465547/brb-deleting-soundcloud)> (visited Oct. 12, 2014).

I imagine over the next week my entire sound cloud will be taken down. Sorry but there is nothing I can do here. . . . When I signed with Ultra [Records], I kissed goodbye forever the rights to own my music. They own it. And now Sony owns them. So now Sony owns my music. I knew that going in. Soundcloud is beholden to labels to keep copyright protected music (read: all music put out by a label, any label) off their site unless authorized by the label. Am I authorized to post my music? Yep. Does their soulless robot program know that? Not so much. So some stuff they pulled was mistakenly deleted, but some tracks were absolutely rule breakers. The mash ups.

Our marching orders are coming from a place that's completely out of touch and irrelevant. They have these legal legs to stand on that empower them to make life kind of a pain-in-the-ass for people like me... Countless artists have launched their careers though mash ups, bootlegs, remixes and music sharing. These laws and page take-downs are cutting us down at the knees.

It's laughable to assert that someone is losing money owed to them because I'm promoting music that I've written and recorded. Having the means to expose music to the masses is a deft tool to breathe new life into and promote a song.<sup>63</sup>

While the distribution channels for mashups are largely user-uploaded and non-commercial (in the sense that listeners do not pay for access), some unlicensed mashups are available on YouTube, iTunes, and Amazon.com,<sup>64</sup> although their availability is limited and unpredictable. With regard to YouTube, it is unclear whether mashup artists have been able to derive much if any revenue through advertising monetization. YouTube's monetization policy states:

Your video is not eligible if it contains content that you didn't create or get permission from its creator to use. You need to be able to show written permission for the following video elements:

- Audio: copyrighted sound recordings, live performances, background music, etc.
- Visuals: images, logos, software, video game footage, etc.

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<sup>63</sup> See Stuart Dredge, "Kaskade Attacks 'Out of Touch and Irrelevant' SoundCloud Takedowns," *music:ally* (Jun. 9, 2014) <[www.musically.com/2014/06/09/kaskade-attacks-out-of-touch-and-irrelevant-soundcloud-takedowns/](http://musically.com/2014/06/09/kaskade-attacks-out-of-touch-and-irrelevant-soundcloud-takedowns/)>; Sisario, *supra* n. \_\_.

<sup>64</sup> See Girl Talk, "Feed the Animals" <[www.amazon.com/Feed-Animals-Explicit-Girl-Talk/dp/B001ELBVLG/ref=pd\\_sim\\_dmusic\\_a\\_1?ie=UTF8&refRID=0Z8NJF2FHNHDR1XAEDPQ](http://www.amazon.com/Feed-Animals-Explicit-Girl-Talk/dp/B001ELBVLG/ref=pd_sim_dmusic_a_1?ie=UTF8&refRID=0Z8NJF2FHNHDR1XAEDPQ)> (visiting Oct. 5, 2014).

- Any other content you don't own worldwide commercial usage rights to.<sup>65</sup>

Uploaders who violate these rules are subject to takedown notices and having their YouTube channels removed. YouTube's ContentID system can catch videos containing copyrighted works and, depending upon the choices of the copyright owner, block or permit uploading the allegedly infringing content with advertising revenue siphoned to that copyright claimant.

While YouTube's Content ID system offers an innovative solution to screening uploaded content, the lack of a sophisticated mechanism for dividing mashup advertising revenue among the multiple creative influences (including the mashup artists) limits the ability of this new creative force from profiting directly from others' enjoyment of their mashups. Other considerations, such as self-expression and promotion for live performances, provide indirect rewards for posting mashups.

iTunes, Amazon.com, and other download services provide retail platforms for monetizing mashups, but are subject to takedown notices by owners of copyrights in the underlying works. The status of mashup projects on these services is uncertain. A few years ago, iTunes did not distribute Girl Talk's works,<sup>66</sup> although the situation has ebbed and flowed. iTunes currently sells downloads for Girl Talk's 2004 *Unstoppable* album, but his later, more popular, albums are not currently available on the service.<sup>67</sup> Most of Girl Talk's albums (*Feed the Animals* (2008), *Night Ripper* (2006), *Unstoppable* (2004), and *Secret Diary* (2002)) are currently available through Amazon.com, but *All Day* (2010) is not.<sup>68</sup> Similarly, the streaming service Spotify contains three of Girl Talk's albums (*Feed the Animals* (2008), *Night Ripper* (2006), *Unstoppable* (2004)), but not *All Day* (2010). Like YouTube, download and streaming services lack a mechanism for dividing value among multiple creative claimants absent a contractual agreement among the contributors.

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<sup>65</sup> See YouTube, Monetization <[https://www.youtube.com/account\\_monetization](https://www.youtube.com/account_monetization)> (visited Oct. 14, 2014).

<sup>66</sup> See Robert Levine, *Steal This Hook? D.J. Skirts Copyright Law*, N.Y. Times E1 (Aug. 7, 2008) (noting that both iTunes and a CD distributor stopped carrying Girl Talk's *Night Ripper* album because of legal concerns).

<sup>67</sup> See [itunes.apple.com/us/album/unstoppable/id465352069](https://itunes.apple.com/us/album/unstoppable/id465352069) (visited Oct. 5, 2014). Under Customer Reviews, Steven11211988 urges: "iTunes needs to put up the albums for sale 'feed the animals' and 'all day' by girl talk. Those are the best ones out of them all!! Please make this happen." Deuce Dizzle writes: "Girl Talk is just sick! The mixes are things you'd never dream of putting together...not only does it work, it's awesome! Get this album...and his other ones. iTunes, more Girl Talk please!"

<sup>68</sup> See Girl Talk, Albums, Amazon.com <[www.amazon.com/Girl-Talk/e/B00197HZTM/digital/ref=ntt\\_mp3\\_rdr?\\_encoding=UTF8&sn=d](http://www.amazon.com/Girl-Talk/e/B00197HZTM/digital/ref=ntt_mp3_rdr?_encoding=UTF8&sn=d)> (visited Oct. 13, 2014).

Given liability and platform concerns, most mashup artists have taken a more cautious approach, keeping their works off of websites that charge for downloads, characterizing their works as experimental, and offering to remove mashups at the request of copyright owners of embedded works. For example, DJ Earworm's website contains the following disclaimer:

The media files posted here were created for my own experimentation and entertainment, not profit. I am not the author or owner of the copyrights of the component tracks. If you like the mashups, support the artists and go and buy the originals...they are easy to find. Representatives of either the artist or publishing company can contact me, and I will take these tracks offline. If representatives of either the artist or publishing company have concerns, please contact me.<sup>69</sup>

#### **4. Live Performance, DJ Production, and Collaboration with Established Artists**

The most important revenue source for mashup artists has been live performance as DJ's. The mashup genre overlaps with the market for DJ's and electronic artists, which has thrived over the past several decades. Dance clubs featuring EDM and all manner of mashup creativity draw large crowds throughout the world.

The copyright concern has not emerged as saliently in this domain as a result of several factors. First, radio stations and live performance venues routinely obtain blanket public performance licenses from the major performance rights organizations. Second, U.S. copyright law does not grant recording artists public performance rights. Third, radio and live performance have traditionally been seen as promoting record sales, although the polarity is reversing in the mashup realm where download and streaming websites operate primarily to promote live performance revenue.

The amount of income that the top DJ's earn through live performances rivals that of top conventional performing artists.<sup>70</sup> Kaskadee, Avicii, Tiësto, David Guetta, Steve Aoki,

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<sup>69</sup> See DJ Earworm Mashups <[dजारworm.com/](http://dजारworm.com/)> (visited Oct. 12, 2014); see also see Roberta Cruger, The Mash-up Revolution, Salon.com (Aug. 9, 2003) (noting that "[d]isclaimers on mash-up sites generally state that music copyright is held by the artist, that remixes will be deleted on request and that listeners are downloading songs for 'evaluation purposes only' and agree to erase all material within 48 hours") <[dir.salon.com/story/ent/music/feature/2003/08/09/mashups\\_cruger/index.html](http://dir.salon.com/story/ent/music/feature/2003/08/09/mashups_cruger/index.html) >

<sup>70</sup> See Josh Eells, Night Club Royale: Can Las Vegas Make More Money From Dance Music than from Gambling? New Yorker (Sep. 30, 2013) <[www.newyorker.com/magazine/2013/09/30/night-club-royale](http://www.newyorker.com/magazine/2013/09/30/night-club-royale)>; Zack O'Malley Greenberg, The World's Highest-Paid DJs: Electronic Cash Kings 2014, Forbes (Aug. 19, 2013) <[www.forbes.com/sites/zackomalleygreenburg/2014/08/19/the-worlds-highest-paid-djs-electronic-cash-kings-2014/](http://www.forbes.com/sites/zackomalleygreenburg/2014/08/19/the-worlds-highest-paid-djs-electronic-cash-kings-2014/)>.

deadmau5, Afrojack, Skrillex, Girl Talk, and many other DJ's/remix artists maintain active performance schedules and can earn well in excess of \$100,000 per show.<sup>71</sup> Many remix artists have also parlayed their popularity in dance clubs into collaborations with conventional recording artists and developed their own electronica record labels. By promoting their brand through seeding of tracks on file-sharing websites and their own websites, live performance mashup artists indirectly appropriate income from their projects.

Mashup creativity has deeply influenced and been influenced by the Rap, Hip Hop, House, Electronica, and Electronic Dance Music (EDM) genres, leading many artists to profitably move across these genres. The most successful DJ's have become top record producers and collaborators with successful rap, hip hop, and other pop recording artists signed to major labels. Some have become top recording artists in their own right.

Kaskade's career trajectory illustrates this path. He began working in nightclubs in the early 2000 period.<sup>72</sup> He would go on to produce original dance track and remixes as his DJ career evolved. He successfully leveraged social media, "inviting fans into his daily life via Twitter, constantly sharing new music via SoundCloud, and crafting live shows with the fan experience in mind."<sup>73</sup> As his career developed, he increasingly collaborated with other DJ's and recording artists – ranging from deadmau5 to Skrillex, Tiësto, Mindy Gledhill, and Neon Trees. He now performs in the largest arena, headlines the top music festivals, and is a resident party DJ in Las Vegas.

Girl Talk's career is expanding along these lines. In 2014, he collaborated with noted rapper Freeway<sup>74</sup> on an EP entitled "Tolerated,"<sup>75</sup> featuring Waka Flocka Flame, another successful rapper. This release is available on iTunes and is promoted through a YouTube video.<sup>76</sup> Girl Talk has also branched out to performed in Las Vegas, but has expressed qualms about whether "it's the best way" to present his work.<sup>77</sup>

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<sup>71</sup> See *id.*

<sup>72</sup> See Kaskade, Wikipedia <[en.wikipedia.org/wiki/Kaskade](http://en.wikipedia.org/wiki/Kaskade)>; Bio, Kaskade Music <[www.kaskademusic.com/bio/](http://www.kaskademusic.com/bio/)>.

<sup>73</sup> See Bio, Kaskade Music <[www.kaskademusic.com/bio/](http://www.kaskademusic.com/bio/)>.

<sup>74</sup> See Freeway (rapper), Wikipedia <[en.wikipedia.org/wiki/Freeway\\_\(rapper\)](http://en.wikipedia.org/wiki/Freeway_(rapper))>;

<sup>75</sup> See Ian Cohen, Update – Girl Talk, Pitchfork (Mar. 25, 2014) <[pitchfork.com/features/update/9362-girl-talk/](http://pitchfork.com/features/update/9362-girl-talk/)>.

<sup>76</sup> See Girl Talk & Freeway - "Tolerated" ft. Waka Flocka Flame - Official Music Video, YouTube <[www.youtube.com/watch?v=ySZHeosB0rI](http://www.youtube.com/watch?v=ySZHeosB0rI)>.

<sup>77</sup> See Cohen, *supra* n.\_\_\_\_.

## **II. The Legal, Market, and Policy Divides**

As reflected in the prior section, copyright concerns have played a significant and not particularly constructive role in the emergence and evolution of the mashup genre. While the protest over *The Grey Album* catapulted mashup music onto the cultural radar, lingering concerns about copyright exposure have continued to limit the full blossoming of the genre.

Legal uncertainty has important ramifications for the development of the music mashup genre as well as the larger creative and copyright ecosystems. The present circumstances push the growing community of music mashup artists and fans outside of the copyright system and content marketplace. They also limit the ability of new generations of creators to test their talent and pursue financially sustainable careers. This section explores the legal, market, and policy stalemate.

### **A. The Copyright Backdrop**

Section 1 traces the general requirements for establishing copyright infringement, the fair use defense, the online safe harbor, and potential remedies. Section 2 explores how these standards have been applied to digital sampling.

#### **1. General Framework**

U.S. copyright law protects two principal components of musical creativity – musical compositions (often referred to as the “circle c”, based on the symbol for copyright notice (©)) and sound recordings of musical compositions (often referred to as the “circle p”, based on the symbol for notice of copyright in a phonogram (®)). Subject to various limitations and exceptions such as the fair use doctrine<sup>78</sup> and the “cover” license,<sup>79</sup> the Copyright Act grants composers and recording artists the exclusive rights to reproduce, adapt, and distribute copyrighted works.<sup>80</sup> In addition, it grants composers the exclusive right to publicly perform their works.

A mashup artist infringes the right to reproduce by copying a copyrighted musical composition or sound recording. This involves two components: (1) factual copying resulting in

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<sup>78</sup> See 17 U.S.C. § 107.

<sup>79</sup> The cover license (or compulsory mechanical license) authorizes anyone to record and distribute their own version of a musical composition once it has been publicly distributed under the authority of the copyright owner upon payment of a statutory fee. See, *infra*, <Section III.B>.

<sup>80</sup> See 17 U.S.C. § 106.

(2) substantial similarity of protected expression.<sup>81</sup> The first component is easily proven where a pre-existing sound recording is sampled. The presence of a copyrighted sound recording in a mashup artist's work will suffice.

A more difficult question is whether the use of the sample appropriates "substantial" amounts of the protected expression. Under the *de minimis* doctrine,<sup>82</sup> courts will generally excuse very small amounts of copying as causing too little harm to justify providing a remedy.<sup>83</sup> The applicability of this doctrine to digital sampling, however, was cast in doubt in a controversial 2005 case.<sup>84</sup> Even if the *de minimis* doctrine does not apply, courts apply a multi-faceted test to determine whether the amount of protected expression appropriated would be considered substantial by an ordinary observer.<sup>85</sup> The court must first dissect the plaintiff's copyrighted work to filter out the unprotected elements, such as lack of originality<sup>86</sup> and unprotectibility of ideas.<sup>87</sup> It then determines whether the defendant's work is substantially similar to the protected expression, a vague standard.<sup>88</sup>

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<sup>81</sup> See Nimmer on Copyright

<sup>82</sup> This doctrine is derived from the Latin phrase "*de minimis non curat lex*," meaning that the law does not concern itself with trifles. See Pierre N. Leval, Nimmer Lecture: Fair Use Rescued, 44 U.C.L.A. L. Rev. 1449, 1457 (1997); *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986) (noting that *de minimis* copying "is so meager and fragmentary that the average audience would not recognize the appropriation"); but see *CyberMedia, Inc. v. Symantec Corp.*, 19 F. Supp. 2d 1070, 1077 (N.D. Cal. 1998) (holding that "even if a copied portion be relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find substantial similarity").

<sup>83</sup> See Nimmer on Copyright § 13.03[A][2].

<sup>84</sup> See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6<sup>th</sup> Cir. 2005); Tim Wu, *Jay-Z Versus the Sample Troll*, Slate (Nov. 16, 2006) <[http://www.slate.com/articles/arts/culturebox/2006/11/jayz\\_versus\\_the\\_sample\\_troll.html](http://www.slate.com/articles/arts/culturebox/2006/11/jayz_versus_the_sample_troll.html)>.

<sup>85</sup> The seminal case establishing this framework is *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2<sup>nd</sup> Cir. 1930).

<sup>86</sup> See 17 U.S.C. § 102(a); *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

<sup>87</sup> See 17 U.S.C. § 102(b).

<sup>88</sup> See *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 907 (3d Cir. 1975) ("most cases are decided on an ad hoc basis"); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) ("[t]he test for infringement of a copyright is of necessity vague"); see generally Nimmer on Copyright, § 13.03 (citing cases).

A copyright owner need not prove that all or nearly all of the copyrighted work has been appropriated to establish infringement. The legislative history explaining the infringement standard provides that “a copyrighted work would be infringed by reproducing it *in whole or in any substantial part*, and by duplicating it exactly or by imitation or simulation. Wide departures or variations from the copyrighted works would still be an infringement as long as the author’s ‘expression’ rather than merely the author’s ‘ideas’ are taken.”<sup>89</sup> Thus courts have held that “[e]ven a small amount of the original, if it is qualitatively significant, may be sufficient to be an infringement.”<sup>90</sup>

Determining the threshold for infringement is particularly difficult in those cases in which a defendant has copied distinct literal elements of the plaintiff’s work and incorporated them into a larger work of his or her own. This class of cases has been referred to as fragmented literal similarity.<sup>91</sup> The Nimmer treatise states:

The question in each case is whether the similarity relates to matter which constitutes a substantial portion of plaintiff’s work-not whether such material constitutes a substantial portion of defendant’s work. The quantitative relation of the similar material to the total material contained in plaintiff’s work is certainly of importance. However, even if the similar material is quantitatively small, if it is qualitatively important the trier of fact may properly find substantial similarity. In such circumstances the defendant may not claim immunity on the grounds the infringement ‘is such a little one.’ If, however, the similarity is only as to nonessential matters, then a finding of no substantial similarity should result.<sup>92</sup>

If copyright infringement is found, the defendant can nonetheless escape liability by establishing that his or her use was fair.<sup>93</sup> Under the fair use doctrine, courts balance the following 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

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<sup>89</sup> See H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 61 (1976) (emphasis added).

<sup>90</sup> See *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 162 (2<sup>nd</sup> Cir. 1986).

<sup>91</sup> See Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §13.03[A][2].

<sup>92</sup> *Id.*

<sup>93</sup> See 17 U.S.C. § 107.

copyrighted work.<sup>94</sup>

Although fair use is considered critical to copyright law's fundamental purpose of promoting the progress of knowledge and learning,<sup>95</sup> its availability to insulate copying is notoriously difficult to predict<sup>96</sup> and it is rarely possible to obtain a legal determination prior to engaging in the use.<sup>97</sup>

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<sup>94</sup> Id.

<sup>95</sup> See Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 *J. Int. Prop. L.* 1, 4 (1997) (fair use is “[o]ne of the most important counterbalances to the rights granted to copyright owners”).

<sup>96</sup> See Joseph P. Liu, *Two-Factor Fair Use?*, 31 *Colum. J. L. & Arts*, 571, 574, 577-80 (2008); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 *U. Pa. L. Rev.* 549 (2008) (systematically evaluating published fair use decisions); Michael W. Carroll, *Fixing Fair Use*, 85 *N.C. L. Rev.* 1087, 1095 (2007); Paul Goldstein, *Goldstein on Copyright § 12.1*, at 12:3 (3d ed. 2005) (“No copyright doctrine is less determinate than fair use.”); David Nimmer, *‘Fairest of Them All’ and Other Fairy Tales of Fair Use*, 66 *Law & Contemp. Probs.* 263, 281 (Winter/Spring 2003) (lamenting that “Congress included no mechanism for weighing divergent results against each other and ultimately resolving whether any given usage is fair”); but cf. Pamela Samuelson, *Unbundling Fair Uses*, 77 *Fordham L. Rev.* (2009); Matthew Sag, *Predicting Fair Use*, 73 *Ohio State L.J.* 47, 51 (2012). But even though the application of the fair use doctrine is reasonably predictable in some areas, it is not risk-free. There is ample field evidence that fair use does not provide many creators with the clarity that they desire given financing and liability concerns. The risk of large statutory damages and injunctive relief reinforce a norm of “if in doubt, leave it out.” See Peter S. Menell & Ben Depoorter, *Using Fee Shifting to Promote Fair Use and Fair Licensing*, 102 *Cal. L. Rev.* 53, 69-71 (2014); Patricia Aufderheide & Peter Jaszi, *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers* (2004) (exploring the copyright-clearance challenges faced by documentary filmmakers).

<sup>97</sup> See Menell & Depoorter, *supra* n. \_\_\_, at 69-71; Peter S. Menell & Michael J. Meurer, *Notice Failure and Notice Externalities*, 5 *J. Leg. Analysis* 1, 23-25, 38 (2013) (discussing the virtues of pre-clearance institutions for promoting development of tangible and intangible resources). There has been notable progress on developing institutions for insuring copyright infringement risks in the film area. See Jesse Abdenour, *Documenting Fair Use: Has the Statement of Best Practices Loosened the Fair Use Reins for Documentary Filmmakers?*, 19 *Comm. L. & Pol’y* 367 (2014); Thomas Plotkin & Tarae Howell, *“Fair is Foul and Foul is Fair:” Have Insurers Loosened the Chokepoint of Copyright and Permitted Fair Use’s Breathing Space in Documentary Films?*, 15 *Conn. Ins. L.J.* 407 (2009); Michael C. Donaldson, *Clearance and Copyright* 29, 363-67 (3d ed. 2008); Peter Jaszi, *Copyright, Fair Use and Motion Pictures*, 2007 *Utah L. Rev.* 715; cf. Michael C. Donaldson, *Fair Use: What a Difference a Decade Makes*, 57 *J. COPYRIGHT SOC’Y U.S.A.* 331 (2010); Anthony Falzone & Jennifer Urban, *Demystifying Fair Use: The Gift of the Center for Social Media Statements of Best Practices*, 57 *J.*

As a result, those seeking to build on the work of others cannot typically achieve complete certainty as to the legality of their use short of obtaining a license.

Copyright law also imposes liability upon those who publicly perform musical compositions, but not sound recordings,<sup>98</sup> without authorization. It can also extend, through the doctrine of vicarious liability, to the venues hosting these performances.<sup>99</sup> Nonetheless, liability

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COPYRIGHT SOC'Y U.S.A. 337 (2010); Association of Independent Video & Filmmakers, Independent Feature Project, International Documentary Association, National Alliance for Media Arts & Culture & Women in Film & Video, Documentary Filmmakers' Statement of Best Practices in Fair Use, Center for Media & Social Impact (Nov. 2005) available at <[http://www.centerforsocialmedia.org/sites/default/files/documents/fair.use\\_final.pdf](http://www.centerforsocialmedia.org/sites/default/files/documents/fair.use_final.pdf)>. There has not, however, been any comparable development on the music side. But the given wide divide among groups affected by music remixes, see *infra* <\_\_-\_\_>, and the divergent case law, it will be difficult to gain anywhere near consensus on fair use principles for the mashup genre. And even if consensus did emerge, it would likely leave some socially valuable remixes outside of the fair use privilege and therefore in need of licensing to be safe. In view of the transaction costs, such works would remain outside of authorized markets.

<sup>98</sup> The explanation for this distinction reflects some of the complex politics surrounding copyright law. Congress first extended copyright protection for musical compositions in 1831 and added a performance right in 1897. When radio broadcasting emerged, ASCAP mounted a successful litigation campaign that ultimately resulted in a determination that broadcasters were required to obtain public performance licenses in order to broadcast copyrighted musical compositions. This led to the development of blanket licensing as well as antitrust oversight of such licenses. Due in substantial part to resistance from broadcasters, sound recordings did not receive federal copyright protection until 1972. As a condition for extending such protection, broadcasters were able to extract as a compromise that such protection would not include a performance right, thereby avoiding the burden of obtaining additional licenses. See Robert W. Woods, *Copyright: Performance Rights for Sound Recordings Under the General Copyright Revision Act — The Continuing Debate*, 31 Okla. L. Rev. 402 (1978). The lack of a general public performance right in sound recordings continues to be sore point for record labels and recordings artists. See Mary LaFrance, *U.S. Performance Rights in Sound Recordings*, *Music Business Journal* (Oct. 2011) <<http://www.thembj.org/2011/10/u-s-performance-rights-in-sound-recordings/>>.

Congress partially rectified the disparate treatment of public performances of sound recordings through the Digital Performance Right in Sound Recordings Act of 1995. See Pub. L. No. 104-39, 109 Stat. 336 (codified at 17 U.S.C. §§ 106, 114-15). The digital performance right in sound records does not, however, apply to live performances of sound recordings – the sorts of performances in live DJ shows.

<sup>99</sup> See *Gershwin Publ'g Corp. v. Columbia Artists Mgmt.*, 443 F.2d 1159 (2d Cir. 1971) (“When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted material—even in the absence of actual knowledge ... -the

for infringing the public performance right in musical compositions does not typically interfere with remixing of music in live performances because radio stations and public performance venues routinely obtain blanket licenses from the major performance rights organizations (ASCAP, BMI, and SESAC). Such licenses afford DJ's the ability to perform, even in sampled form, copyrighted musical compositions. To the extent such tracks are pre-recorded, however, the DJ could potentially face liability for violations of the reproduction or derivative work rights.

Copyright liability can extend beyond the mashup artist to record labels and websites that reproduce and distribute an infringing work. Internet service providers such as SoundCloud and YouTube, however, are immune from liability for storing infringing files at the direction of a user so long as they meet several procedural threshold requirements<sup>100</sup> and do not have actual knowledge or constructive knowledge of the location of specific infringing files residing on their system or fail to expeditiously remove such files upon becoming aware of their location.<sup>101</sup>

Copyright law's robust and highly discretionary infringement remedies compound the uncertainties surrounding copyright's limiting doctrines. As a result, cumulative creators must be extremely cautious in their use of copyrighted works. Even a small transgression can trigger injunctive relief barring distribution of the infringing work<sup>102</sup> as well as substantial monetary damages. For works that are registered prior to infringements, copyright owners can choose between actual damages and disgorgement of profits<sup>103</sup> or statutory damages – ranging from \$750 to \$30,000 for per infringed work and up to \$150,000 per infringed work in the case of willful infringement.<sup>104</sup>

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purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation.”).

<sup>100</sup> They must (i) adopt, implement, and inform its subscribers of its policy for terminating service to users who are repeat copyright infringers; (ii) adopt standard technical measures used by copyright owners to identify and protect copyrighted works; and (iii) designate an agent to receive notification of claimed infringement from copyright owners and register that agent with the Copyright Office. See 17 U.S.C. §§512(i)(1)(A), 512(i)(1)(B), 512(c)(2).

<sup>101</sup> See 17 U.S.C. §§512(c)(1); *Viacom Int'l, Inc. v. YouTube*, 679 F.3d 19 (2<sup>nd</sup> Cir. 2012).

<sup>102</sup> See 17 U.S.C. § 502.

<sup>103</sup> See 17 U.S.C. §§ 504(a)(1), (b).

<sup>104</sup> See 17 U.S.C. § 504(c). The statute also provides that the court may reduce the award of statutory damages to a sum of not less than \$200 in a case where the court finds that the infringer was not aware and had no reason to believe that his or her acts constituted copyright infringement. See 17 U.S.C. § 504(c)(2).

This regime poses significant exposure for mashup artists and websites that distribute their works. As noted above, Girl Talk “samples” twenty to thirty separate musical compositions and sound recordings, up to 60 copyrighted works, in a single mashup composition. By so doing, Gillis exposes himself to liability for 60 times the statutory damage range (since the popular music that he samples is invariably registered with the Copyright Office). The potential liability is staggering. While it is unlikely that a court would award millions of dollars of liability in a case such as this, just the minimum statutory damage award rises above \$10,000 per mashup composition.

## 2. Application of Copyright Law to Digital Sampling

Although no case has yet confronted the intensive sampling found in Girl Talk’s works, a number of cases dating back to the early rap and hip hop era found liability for unlicensed use of samples. This section traces the development of this body of copyright law. The next section explores how the law shaped licensing practices in the rap and hip hop genres.

With the advent of digital sampling devices in the 1980s,<sup>105</sup> a new breed of musical creators with extensive knowledge of beats, precise turntable dexterity, and training in recording technology as opposed to musical instruments emerged.<sup>106</sup> According to Grandmaster Flash,<sup>107</sup> an early influential hip hop artist and DJ, he “wasn’t interested in the actual making of music. . . . Electronics drew [him] in.”<sup>108</sup> As Public Enemy’s Hank Shocklee provocatively asked, “[w]ho said that musicians are the only ones that make music?”<sup>109</sup> As hip hop moved beyond the dance clubs to commercial recordings, issues of copyright infringement followed.

Traditional musicians and recording industry executives were not amused by what they viewed as “groove robbing”<sup>110</sup> and it was not long before copyright owners threatened and

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<sup>105</sup> See McLeod & DiCola, *supra* n. \_\_\_, at 62.

<sup>106</sup> See McLeod & DiCola, *supra* n. \_\_\_, at 53-54 (noting that DJ Kool Herc, a hip hop pioneer, “had encyclopedic knowledge of backbeats as well as a music collection and booming sound system to match”).

<sup>107</sup> See Grandmaster Flash, Wikipedia <[http://en.wikipedia.org/wiki/Grandmaster\\_Flash](http://en.wikipedia.org/wiki/Grandmaster_Flash)>.

<sup>108</sup> See Harry Allen, “Hip-Hop, High-Tech,” in KEVIN POWELL (ED.) *STEP INTO A WORLD: A GLOBAL ANTHOLOGY OF THE NEW BLACK LITERATURE*, 91-95(2000) (reprinting essay originally published in *The Village Voice* in 1988).

<sup>109</sup> See *id.*

<sup>110</sup> See Richard Harrington, *The Groove Robbers’ Judgment: Order on ‘Sampling’ Songs May Be Rap Landmark*, Wash. Post D1 (Dec. 25, 1991) (quoting a 2004 interview in which

ultimately pursued copyright infringement lawsuits.<sup>111</sup> In a notable early dispute that settled, Jimmy Castor sued the Beastie Boys and their record label Def Jam over their use of a small sample (less than two seconds) on their breakthrough debut album *Licensed to Ill*.<sup>112</sup> In another early controversy, the 1960s pop group The Turtles sued De La Soul over their use of their 1960 hit “You Showed Me,” resulting in what was reported to be a \$1.7 million settlement.<sup>113</sup>

The first litigated sampling case would reinforce artists’ and hip hop labels’ worst fears about copyright liability. On his third album, *I Need a Haircut* (1991), Biz Markie’s rap song “Alone Again” sampled Irish pop singer Gilbert O’Sullivan’s hit recording “Alone Again (Naturally).” O’Sullivan’s publisher sued for copyright infringement, prompting the court to grant Markie’s wish for a haircut. It is never a good sign for a defendant when a judge begins the opinion by quoting the Ten Commandments. The first sentence of *Grand Upright Music Ltd. v. Warner Bros. Records*<sup>114</sup> states: “Thou shalt not steal.” The court’s analysis of copyright infringement did not delve deeper than establishing that the plaintiff owned the copyrights in the musical composition and the master recording and that Biz Markie sampled the recording. The decision did not evaluate whether the sampling constituted substantial similarity of protected expression or consider whether it qualified for fair use. The court focused on the fact that the defendants had been denied a license, treating the clear the rights as proof of infringement.<sup>115</sup> The opinion assumes, without analysis, that a license is required for any sampling of sound recordings, labeling the defendants’ behavior “callous disregard for the law.”<sup>116</sup> Judge Duffy

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Castor commented that “Hip-hop has been fairly good to me. In the beginning it wasn’t, when people like the Beastie Boys just raped my music. ‘C’mon man,’ as L.L. Cool J said to me one day, ‘That’s like taking someone’s vintage car out of the driveway and just driving it away!’ When they pay, I love it.”); McLeod & DiCola, *supra* n. \_\_\_, at 62-63.

<sup>111</sup> See McLeod & DiCola, *supra* n. \_\_\_, at 60 (noting that the Sugarhill Gang’s 1979 hit “Rapper’s Delight” attracted an infringement action).

<sup>112</sup> See Terence McArdle, Jimmy Castor Dead at 71, ’70s Songs Became Popular among Sampling Hip-Hop Artists, Wash. Post (Jan. 12, 2012); *Licensed to Ill*, Wikipedia <[http://en.wikipedia.org/wiki/Licensed\\_to\\_Ill](http://en.wikipedia.org/wiki/Licensed_to_Ill)>; McLeod & DiCola, *supra* n. \_\_\_, at 131.

<sup>113</sup> See SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 141 (2001); McLeod & DiCola, *supra* n. \_\_\_, at 131-32 (questioning the size of the settlement).

<sup>114</sup> 780 F.Supp. 182 (1991).

<sup>115</sup> In *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 585 n.18 (1994), the Supreme Court would rule that “being denied permission to use a work does not weigh against a finding of fair use.”

<sup>116</sup> 780 F.Supp. at 185.

concluded the opinion by ordering an injunction as well as “sterner measures,” referring the matter to the U.S. Attorney for consideration of criminal prosecution. There is good reason to believe that Biz Markie got the lesson. His next album was entitled “All Samples Cleared!”

In 1993, another district court applied the substantial similarity framework to a digital sampling case.<sup>117</sup> In evaluating the defendants’ motion for summary judgment, the court rejected defendants’ assertion that a finding of infringement requires similarity of the songs in their entirety such that a lay listener would “confuse one work for the other.”<sup>118</sup> In applying the “fragmented literal similarity” framework, the court focused on “whether the copied segment constituted a substantial portion of the plaintiff’s work, not whether it constituted a substantial portion of the defendant’s work.”<sup>119</sup> In analyzing the works in question, the court noted that “the bridge section, which contains the words “ooh ... move ... free your body”, was taken. Second, a distinctive keyboard riff, which functions as both a rhythm and melody, included in the last several minutes of plaintiff’s song, were also sampled and incorporated into defendants’ work.”<sup>120</sup> The court denied the defendants’ motion for summary judgment, rejecting the contention that a series of “oohs”, “moves,” and “free your body” were too cliched or lacking in expressive qualities to attract copyright protection.<sup>121</sup>

A somewhat different hip hop copyright dispute made its way the U.S. Supreme Court in

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<sup>117</sup> See *Jarvis v. A & M Records*, 827 F.Supp. 282 (D.N.J. 1993).

<sup>118</sup> *Id.* at 290. The defendants cited as authority J. Sherman, *Musical Copyright Infringement: The Requirement of Substantial Similarity*, Common Law Symposium, No. 92, ASCAP, p. 145 (1977). The author of that article opined

A defendant should not be held liable for infringement unless he copied a substantial portion of the complaining work and there exists the sort of aural similarity between the two works that a lay audience would detect. As to the first requirement, the portion copied may be either qualitatively or quantitatively substantial. As to the second, the two pieces must be similar enough to sound similar to a lay audience, since only then is it reasonable to suppose that the performance or publication of the accused work could in any injure the rights of the plaintiff composer.

<sup>119</sup> *Id.* at 290. The court cited to the *Grand Upright Music* case as support for its interpretation. *Id.* at 290-91. As noted above, however, that decision sidestepped the substantial similarity stage of analysis.

<sup>120</sup> *Id.* at 289.

<sup>121</sup> *Id.* at 291-92.

1994.<sup>122</sup> In 1989, the rap group 2 Live Crew produced a parody of Roy Orbison’s classic hit “Oh Pretty Woman” featuring a rap style and comical lyrics. They contacted Acuff-Rose Music, the copyright proprietor, and offered compensation and to provide attribution. Acuff -Rose declined the offer. Nonetheless, 2 Live Crew released its version, which both sampled the original sound recording and altered some of the lyrics, prompting Acuff-Rose to sue.

Applying the fair use doctrine, the district court concluded that the defendant’s version qualified for fair use. Although recognizing the commercial purpose of the defendant’s cut against such a finding, the parodic nature of the work (the song “quickly degenerates into a play on words, substituting predictable lyrics with shocking ones” to show “how bland and banal the Orbison song” is), the recognition that 2 Live Crew had taken no more than was necessary to “conjure up” the original in order to parody it, and the unlikelihood that the parody would “adversely affect the market for the original” pushed the court to its fair use conclusion.<sup>123</sup> On appeal, the Sixth Circuit reversed, emphasizing that the “blatantly commercial purpose” of the use in conjunction with the appropriation of the heart of the song prevented a finding that the use was fair.<sup>124</sup>

In a wide-ranging opinion that substantially liberalized the fair use doctrine,<sup>125</sup> Justice Souter, writing for a unanimous Supreme Court,<sup>126</sup> recognized the transformativeness of the use<sup>127</sup> as a substantial factor in assessing fair use, eliminated any presumption that commercial use established market harm, and widened the berth for parodies. The court also eliminated any inference that seeking permission weighed against fair use. Based on these considerations, the Court reversed the Sixth Circuit and remanded the case for further fact-finding with regard to the market effect factor. The case settled without further judicial consideration of the fair use balance.

A decade later, the Sixth Circuit squarely addressed digital samples of sound recordings, ruling that the Copyright Act bars application of the *de minimis* doctrine in this class of works, with the result that even the copying of a single note could constitute copyright infringement.<sup>128</sup>

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<sup>122</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

<sup>123</sup> See *Acuff-Rose Music, Inc. v. Campbell*, 754 F.Supp. 1150 (M.D. Tenn. 1991).

<sup>124</sup> See *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429 (6th Cir. 1992).

<sup>125</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

<sup>126</sup> Justice Kennedy joined in the opinion and file a concurring opinion.

<sup>127</sup> See Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105 (1990).

<sup>128</sup> See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800-01 (6th Cir. 2005). The *Bridgeport* case involved a two-second sample looped on a lower pitch and extended to

Notwithstanding that the *de minimis* doctrine as well as other copyright infringement standards have largely evolved through common law development, the court based its ruling on a questionable inference from the statutory text

Section 114(b) provides that ‘[t]he exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.’ Further, the rights of sound recording copyright holders under clauses (1) and (2) of section 106 ‘do not extend to the making or duplication of another sound recording that consists *entirely* of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.’ 17 U.S.C. §114(b) (emphasis added). The significance of this provision is amplified by the fact that the Copyright Act of 1976 added the word ‘entirely’ to this language. Compare Sound Recording Act of 1971, Pub. L. 92-140, 85 Stat. 391 (Oct. 15, 1971) (adding subsection (f) to former 17 U.S.C. §1) (‘does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds’). In other words, a sound recording owner has the exclusive right to ‘sample’ his own recording.<sup>129</sup>

The effect of this ruling was to dispense with analysis of substantial similarity in digital sampling cases. The mere fact of sampling of any copyrighted sound recording establishes infringement. Although the court left fair use on the table, its staunch pronouncement to rap and hip-hop artists to “[g]et a license or do not sample” strongly suggested that the court was not particularly sympathetic to the muss and fuss of fair use analysis.<sup>130</sup>

Notwithstanding the Sixth Circuit’s disdain for unauthorized digital sampling, a line of cases emanating from the Second Circuit since 2006 suggests a more sympathetic attitude toward “transformative” use of pre-existing copyrighted works through the fair use doctrine. Although

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about 16 seconds in a rap song.

<sup>129</sup> Id. at 800-01.

<sup>130</sup> The court expressly concluded that “[t]he music industry, as well as the courts, are best served if something approximating a bright-line test can be established. Not necessarily a ‘one size fits all’ test, but one that, at least, adds clarity to what constitutes actionable infringement with regard to the digital sampling of copyrighted sound recordings.” See *id.* at 799. Relatedly, the court justified its cavalier interpretation of Section 114(b) to bar application of the *de minimis* doctrine to digital sampling on “ease of enforcement,” that “the market will control the license price and keep it within bounds” because the “sound recording copyright holder cannot exact a license fee greater than what it would cost the person seeking the license to just duplicate the sample in the course of making the new recording,” and “sampling is never accidental” as justifications for its statutory interpretation. See *id.* at 801.

none of the cases involved musical works, they each involved literal appropriation of fragments or even the entirety of prior works in developing new visual works.<sup>131</sup> The cases draw heavily on Judge Leval's seminal law review article on transformativeness<sup>132</sup> as well as the Supreme Court's invocation of that consideration in the *Campbell* case.<sup>133</sup> More generally, Professor Neil Netanel has shown that federal courts throughout the nation have increasingly emphasized transformativeness in their fair use analysis.<sup>134</sup> These trends would seem to provide greater leeway for music mashups to avoid copyright liability.

Cutting in the opposite direction, a recent Seventh Circuit decision questions the heavy emphasis on transformativeness in fair use analysis.<sup>135</sup> Judge Easterbook writes that

We're skeptical of *Cariou's* approach, because asking exclusively whether something is 'transformative' not only replaces the list in § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works. To say that a new use transforms the work is precisely to say that it is derivative and thus, one might suppose, protected under § 106(2). *Cariou* and its predecessors in the Second Circuit do not explain how every 'transformative use' can be 'fair use' without extinguishing the author's rights under § 106(2).

We think it best to stick with the statutory list, of which the most important usually is the fourth (market effect).<sup>136</sup>

There is currently a wave of digital sampling cases pending in various courts filed by TufAmerica, an entity that has acquired the rights to copyrights of many lesser known groups

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<sup>131</sup> See *Cariou v. Prince*, 714 F.3d 694 (2<sup>nd</sup> Cir. 2013) (digital alteration of photographs as part of appropriation art); *Blanch v. Koons*, 467 F.3d 244, 249–50 (2<sup>nd</sup> Cir. 2006) (digital alteration of a photograph as part of appropriation art); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2<sup>nd</sup> Cir. 2006) (use of scaled down photographs in an anthology of the Grateful Dead).

<sup>132</sup> See Leval, *supra* n.\_\_\_\_.

<sup>133</sup> See *Campbell*, <pinpoints to transformativeness>

<sup>134</sup> See Neil Weinstock Netanel, Making Sense of Fair Use, 15 Lewis & Clark L. Rev. 715 (2011).

<sup>135</sup> See *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014).

<sup>136</sup> *Id.* at 758.

whose works have been digitally sampled without authorization<sup>137</sup> for purposes of asserting infringement claims. It remains to be seen whether these cases will produce authoritative case law, although it seems likely, given the small samples at issue and the opportunistic aspects of these assertions,<sup>138</sup> that they will have the effect of confronting the *de minimis* question as well as loosening the application of the fair use to music sampling.<sup>139</sup>

## **B. What's Past is Prologue?:<sup>140</sup> The Rap and Hip Hop Genres and Digital Enforcement**

The mashup copyright controversy does not arise on a blank slate. The rap and hip hop genres struggled through copyright battles in the 1990s on their way to a market regulated, but expression-restricted, legitimacy. More recent tumultuous battles over file-sharing during the past decade add further considerations in assessing the mashup controversy.

### **1. Rap/Hip Hop's Rocky Road to Constrained Copyright Legitimacy**

The wide media coverage of the early sampling lawsuits, reportedly large settlements to copyright owners, and early, cramped judicial decisions brought an end to the era of

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<sup>137</sup> See Bill Donahue, *TufAmerica Puts Frank Ocean Song In Copyright Crosshairs*, Law360 (Feb. 12, 2014) <<http://www.law360.com/articles/509401/tufamerica-puts-frank-ocean-song-in-copyright-crosshairs>>; Jeff Sistrunk, *Jay-Z Accused Of Illegally Sampling '60s Funk Tune*, Law360 (Nov. 7, 2013) <<http://www.law360.com/articles/486827/jay-z-accused-of-illegally-sampling-60s-funk-tune>>; Marc Hogan, *Beastie Boys Fight Baffling 'Licensed to Ill' Sampling Lawsuit*, Spin (Nov. 12, 2012) <<http://www.spin.com/articles/beastie-boys-license-to-ill-sampling-frivolous-lawsuit-tuf-america/>>.

<sup>138</sup> See Aaron Vehling, *Jay-Z Says Label Can't Sue Over Single Use of 'Oh,'* Law360 (Sep. 9, 2014) <<http://www.law360.com/articles/575606/jay-z-says-label-can-t-sue-over-single-use-of-oh>>; Jaia A. Thomas, *Rise of the Sample Trolls: 99 Problems and a Sample is 1*, Uptown (Nov. 12, 2013) <<http://uptownmagazine.com/2013/11/rise-of-the-sample-trolls-99-problems-sample-is-1/>>.

<sup>139</sup> Cf. Peter S. Menell, *Judicial Regulation of Digital Copyright Windfalls: Making Interpretive and Policy Sense of *Viacom v. YouTube* and *UMG Recordings v. Shelter Capital Partners** (May 2012) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2049445](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2049445)>.

<sup>140</sup> See William Shakespeare, *The Tempest*, Act 2, scene 1, line 253.

unauthorized sampling<sup>141</sup> and “the golden age of sampling.”<sup>142</sup> The record industry imposed tight reins on rap and hip hop artists. Unless samples were cleared, labels would not release the new projects. Although the Supreme Court’s *Campbell* case opened the door to a fair use defense, few artists or labels wanted to test those limits. Litigation is time-consuming, expensive, distracting, and risky.

Other factors reinforced the shift toward licensing. Although initially hesitant to embrace the rap and hip hop genres, the major record labels came increasingly to see these genres as money-makers. Major record labels began signing Hip Hop artists as they developed fan bases.<sup>143</sup> The most successful Hip Hop artists were given sub-labels within the major record label umbrellas.<sup>144</sup> Furthermore, the ability to generate additional licensing revenue from their back catalog added an unanticipated benefit. Although many artist contracts provided for approval clauses for licensing, the prospect of greater exposure and additional revenue from the back catalog had something to offer artists as well. For example, the wide usage of Suzanne Vega’s song “Tom’s Diner” on works by Public Enemy, Nikki D, Lil’ Kim, and dozens of others produced significant new sources of revenue.<sup>145</sup>

Even the early, free-wheeling renegades adapted. We were not seeing the richness in sampling of the first wave – such as the Beastie Boys’ *Paul’s Boutique* (1989) album or Public Enemy’s *Fear of a Black Planet* (1990) – but both groups continued to prosper. Public Enemy’s usage of Buffalo Springfield’s “For What It’s Worth” in “He Got Game” was iconic. This 1960s Viet Nam protest song took on new meaning in Chuck D’s clutches. But the reality of the licensing era meant constrained experimentation, higher entry costs (if you did not have a major label and a good attorney, it was difficult to get your licensing requests heard), and many creative compromises. Remix artists had to develop the capacity for self-censorship.<sup>146</sup>

Among the problems of this sort of regime are that there is no standardized price list for samples, licensors often want to hear how their works are going to be used, and complex licensing terms and monitoring arrangements have to be established. The creative arts and complex accounting systems don’t mix well. Creative freedom took a large hit. In addition, rap

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<sup>141</sup> See McLeod and DiCola, *supra* n. \_\_, at 132.

<sup>142</sup> See McLeod and DiCola, *supra* n. \_\_, at 19-35.

<sup>143</sup> See Def Jam Recordings, Wikipedia  
<[http://en.wikipedia.org/wiki/Def\\_Jam\\_Recordings](http://en.wikipedia.org/wiki/Def_Jam_Recordings)>.

<sup>144</sup> See, e.g., Aftermath Entertainment, Wikipedia (describing Dr. Dre’s sub-label within Universal Music Group).

<sup>145</sup> See McLeod and DiCola, *supra* n. \_\_, at 88.

<sup>146</sup> See See McLeod and DiCola, *supra* n. \_\_, at 215.

and Hip Hop artists increasingly found themselves getting the short end of the stick. Licensors were major publishers and record labels, with extensive knowledge and negotiating experience. They had tremendous leverage, especially in dealing with new entrants. They typically knew a lot more about deal terms than the upstart remix artists. And if artists wanted to have a chance at a fair deal, they would have to retain experienced (and hence expensive) legal talent.

Negotiations for sampling could turn on a wide range of factors:

- how much of the musical composition or sound recording was used
- the qualitative importance of the sample
- the characteristics of the sample (chorus, melody, background; vocal, instrumental)
- recognizability of the sample
- commercial success/fame of original composer/recording artist
- commercial success/fame of remix artist
- usage of the sample (length, repeated/looped)
- importance of the sample to the remix
- offensiveness of the remix<sup>147</sup>

Based on information from Whitney Broussard, an experienced licensed lawyer, and a extensive interviews and surveys, Kembrew McLeod and Peter DiCola compiled an illustrative chart estimating the plausible costs for sampling along two principal dimensions – extent of use of the sampled work in the remix and profile of the sampled work/composer/artist. The royalty cost of sampling mounts rapidly. Remixes containing multiple samples become less and less valuable to the remix artist. Applying these hypothetical sampling rates to Beastie Boys' *Paul's Boutique* (1989) album or Public Enemy's *Fear of a Black Planet* (1990) pushes the net value of these two highly successful albums well into the red. The Beastie Boys would have been out of pocket \$19.8 million based on estimated sales of 2.5 million units and Public Enemy would have been out of pocket \$6.786 million on estimated sales of 1.5 million units.<sup>148</sup>

### **Table 1: Illustrative Licensing Cost Matrix**

This exercise illustrates the problem of royalty stacking. The total claims of all of the sampled works can swamp the total revenue available, even on a highly successful product. This problem frequently arises in patent sphere, where multiple patent holders seek damage remedies that can exceed the value of the product embodying all of the patents.<sup>149</sup>

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<sup>147</sup> This list is adapted from McLeod & DiCola, *supra* n. \_\_, at 154.

<sup>148</sup> See McLeod & DiCola, *supra* n. \_\_, at 206-11.

<sup>149</sup> See Mark Lemley & Carl Shapiro, Patent Holdup and Royalty Stacking, 85 *Tex. L. Rev.* 1991 (2007).

**Table 1: Illustrative Licensing Cost Matrix**

Table 1: Illustrative Licensing Cost Matrix					
	Extent of Use of the Sample in the Remixed Work				
			Small	Moderate	Extensive
<b>Profile of the sampled work artists/ composer</b>	<b>Low</b>	SR	\$0 - \$500	\$2,500 or 1¢/copy	\$5,000 or 2.5¢/copy
		MC	not infringing	\$4,000 or 10%	25%
	<b>Medium</b>	SR	\$2,500 or 1¢/copy	\$5,000 or 2.5¢/copy	\$15,000 or 5¢/copy
		MC	\$4,000 or 10%	25%	40%
	<b>High</b>	SR	\$5,000 or 2.5¢/copy	\$15,000 or 5¢/copy	\$25,000 or 10¢/copy
		MC	25%	40%	50% or co-ownership
	<b>Famous</b>	SR	\$50,000 or 12¢/copy		
		MC	100% (assignment)		
	<b>Superstar</b>	SR	\$100,000 or 15¢/copy		
		MC	100% (assignment)		

SR: sound recording ©; MC = musical composition ©

Adapted from Whitney Broussard, licensing attorney, as updated expanded by Kembrew McLeod and Peter DiCola. See McLeod & DiCola, supra n. \_\_, at 203-05.

This licensing simulation vastly understates the actual private and social cost. It does not incorporate the transaction costs that would have been required to obtain licenses and monitor the payouts. Nor does it include the loss in creativity and output that would have obtained as a result of the delays, stress, and hassles in working out the deals. Perhaps most significantly, it overlooks the high likelihood that some of the underlying samples most likely could not have been cleared because the copyright owners could have refused permission

## **2. The Digital Copyright Enforcement Debacle**

Another important influence on the development of the music mashup genre has been the larger copyright and Internet freedom issues surrounding the digital revolution. The rap and hip hop genres largely emerged in the pre-Internet age when record companies and music publishers had far more control over music distribution and artists had little option, if they wanted to reach an audience, than to work with these intermediaries. The digital revolution, triggered by Napster's meteor strike, adds other twists to the music mashup arc.

Web 2.0 technologies – such as file-sharing services and cloud storage – have made compliance with copyright optional for many netizens. Although many netizens are willing to participate in services that are convenient and fair, as reflected by the success of iTunes, Spotify, and Pandora, authorized content channels compete with illicit and ambiguous sources. Furthermore, heavy-handed enforcement efforts are more likely to backfire than succeed. The mass litigation campaign against file-sharers between 2003 and 2008 ended with withdrawal by the major record labels. Similarly, EMI's effort to squelch *The Grey Album* similarly backfired.

The breathing room created by the Internet Age has tempered the power of music copyright owners, which significantly explains how the music mashup genre was able to emerge at all. The difference between Public Enemy, which had to bring its sampling practices into line with industry clearance norms, and Girl Talk, who has been able to avoid such constraints, largely reflects the ability of artists today to go directly to the public through Internet channels.

This is not to say that the traditional copyright owners lack power. It is no longer near absolute. Copyright owners retain the ability to control many of the most important commercial channels, thereby relegating those who go around them to limiting their ability to appropriate a return on their investment, talent, and creativity. This is not to say that new age artists are without alternative channels. As we saw, DJ's have cultivated lucrative live performance markets that can be promoted through free distribution of their mashups. Nonetheless, their inability to sell their creative works distorts their priorities. There is also the possibility that traditional copyright interests can disrupt these alternative channels.

### **C. The Uncertain and Distorted Music Mashup Marketplace**

It was against this legal and market backdrop that the music mashup genre emerged. DJ's had relative immunity for mashing different samples together as part of their live performances. With the availability of ever more versatile and inexpensive sampling

technology, the desire to experiment with recordings grew. Furthermore, web 2.0 services – such as YouTube and SoundCloud – provided artists with greater ability to reach large audiences quickly and easily. While the conservatism of industry practices surrounding the rap and hip hop genres sensitized artists to the risks of sampling without authorization for commercially distributed albums, the ease with which mashup artists could release tracks onto file-sharing websites for personal edification and promotional value inspired a cautiously cavalier attitude. Furthermore, the recording industry’s surrender in its mass litigation campaign against file sharers suggested that mashup artists could potentially fly under the radar.

As noted above,<sup>150</sup> several early mashups garnered critical acclaim and encouraged others to follow suit. The variety of mashup forms inspired a new generation of remix artists. Danger Mouse’s bold release of *The Grey Album*, and the ensuing online protest further shifted the balance.

Although one can characterize the music mashup genre as grudgingly tolerated, it is substantially distorted and constrained by the specter of copyright liability. Those mashup artists who seek to earn direct remuneration for their projects are little better off than their hip hop forerunners, and their art form is even more difficult to clear licenses. They face the constant risk that their projects will be subject to takedown notices and, although remote, the possibility being sued for crushing liability. Some artists distort their works so as to stay under the radar.<sup>151</sup> Even Gregg Gillis, who many consider effectively immune from copyright liability,<sup>152</sup> laments the constrained mashup environment.<sup>153</sup> It is impossible to know how much the lack of a balanced, authorized entry ramp into the mashup genre chills creativity and robust careers.

A broader threat to the mashup genre has recently emerged as a result of greater enforcement efforts directed at SoundCloud, the leading distribution hub for mashup projects.<sup>154</sup>

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<sup>150</sup> See supra <Section IB>.

<sup>151</sup> See Peter C. DiCola, An Economic View of Legal Restrictions on Musical Borrowing and Appropriation, in MAKING AND UNMAKING INTELLECTUAL PROPERTY 247 (MARIO BIAGIOLI, PETER JASZI, AND MARTHA WOODMANSEE, EDS. 2011); Sinnreich, supra n. \_\_, at 130 (quoting Fred von Lohmann, stating that “the nature of mash-ups is being influenced by RepliCheck technology,” a production software that checks CDs to ensure that they don’t contained unlicensed material, and discussing how artists can distort their work through pitch-blending and using shorter samples in order to avoid detection, but this comes at the cost of artistic freedom).

<sup>152</sup> See McLeod & DiCola, supra n. \_\_, at 118.

<sup>153</sup> See Alex Mayyasi, The Economics of Girl Talk, Priceonomics (Apr. 11, 2013) <<http://blog.priceonomics.com/post/47719281228/the-economics-of-girl-talk>>; McLeod & DiCola, supra n. \_\_, at 200-01.

<sup>154</sup> See, supra n. \_\_. <Section IB3>.

In January 2014, the SoundCloud was poised to open up greater access for mashup artists. It announced plans to expand its operations following a \$60 million financing round valuing the music uploading and sharing service at \$700 million, characterizing its core objective to “become the dominant online digital delivery platform for audio in much the same way that YouTube has become the dominant online platform for video.”<sup>155</sup> The plan seeks to better monetize the platform through advertising.<sup>156</sup> In March 2014, it was reported that SoundCloud was in licensing talks with major music labels in an attempt to avoid the takedown and policing costs faced by YouTube.<sup>157</sup> News reports indicate that SoundCloud was close to reaching a deal, offering each of the three major record labels a three to five percent equity stake in the enterprise in addition to a percentage of future revenue.<sup>158</sup> These talks coincided with a significant uptick in takedowns and other changes to the service, generating substantial consternation among the

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<sup>155</sup> See Douglas Macmillian, Music-Sharing Service SoundCloud Raises New Funds at \$700 Million Valuation, *Wall St. J.* (Jan. 24, 2014) <<http://blogs.wsj.com/digits/2014/01/24/music-sharing-service-soundcloud-raises-new-funds-at-700-million-valuation/>>. The investors included several prominent Silicon Valley venture capital firms.

<sup>156</sup> See Sisario, *supra* n. \_\_.; Tom Pakinkis, SoundCloud Monetisation on the Horizon for Rights-holders, *Music Week* (Jun. 27, 2014) (reporting that the monetization experiments include native advertising models according the SoundCloud’s chief technology officer) <<http://www.musicweek.com/news/read/soundcloud-monetisation-on-the-horizon-for-rights-holders/058863>>.

<sup>157</sup> See Tom Pakinkis, SoundCloud Holding Licensing Talks with Labels - Report, *Music Week* (Mar. 28, 2014) (quoting an insider stating that major labels’ catalog “is all over SoundCloud, and it’s essentially too hard to police but that doesn’t mean they won’t start. If you look at what’s happening over at Google and YouTube, you have the BPI [British Phonographic Industry] flooding Google and YouTube with takedown notices.”) <<http://www.musicweek.com/news/read/soundcloud-holding-licensing-talks-with-labels-report/058049>>; Tom Pakinkis, BPI Sends 50 millionth Takedown Request to Google, *Music Week* (Nov. 15, 2013) <<http://www.musicweek.com/news/read/bpi-sends-50-millionth-takedown-request-to-google/056752>>.

<sup>158</sup> See Carol Williamson, SoundCloud Close to Finalising Major Label Deals - Report, *Music Week* (Jul. 11, 2014) <<http://www.musicweek.com/news/read/soundcloud-close-to-finalising-major-label-deals/058993>>; Adam Satariano, SoundCloud Said to Near Deals With Record Labels, *Bloomberg* (Jul. 20, 2014) <<http://www.bloomberg.com/news/2014-07-10/soundcloud-said-to-near-deals-with-record-labels.html>>.

user and mashup artist communities.<sup>159</sup> As of October 2014, the talks with labels reached a stalemate, with Universal Music Group no longer actively involved and independent artists fleeing SoundCloud as takedown notices have increased.<sup>160</sup>

Although less dramatic, these stories have a bit of a Napster déjà vu quality. As I have described elsewhere with regard to Spotify, we see a concerted efforts by record labels to leverage their back catalog to constrain and regulate the development of new platforms and the emergence of more robust outlets for independent and new artists.<sup>161</sup> There is good reason to believe that this strategy is both short-sighted – there may well be much greater economic opportunity by opening up the music mashup ecosystem through far more liberal licensing – as well as contrary to the larger societal goals in free expression and copyright policy.

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Notwithstanding these marketplace distortions and pathologies, there is little question that music mashups will continue to play a growing role in the culture. As two millennial commentators recently observed:

It's safe to say, mashups are part of today's pop culture zeitgeist, and can serve as a musical time machine stacking decades of music on top of one another. Still, due to copyright and distribution issues mashups remain in the backdrop of music, never quite getting the recognition some deserve. The internet is their sole medium (on the plus side, all the music is free) to release productions.<sup>162</sup>

#### **D. The Copyright Policy Divide**

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<sup>159</sup> See, supra n. \_\_ <Section IB4 – Kaskade>; Quick, Go Listen to Everything on Kskade's SoundCloud Before It's Deleted, Inthemix (Jun. 4, 2014) <[http://www.inthemix.com.au/news/58236/Quick\\_go\\_listen\\_to\\_everything\\_on\\_Kskades\\_SoundCloud\\_before\\_its\\_deleted](http://www.inthemix.com.au/news/58236/Quick_go_listen_to_everything_on_Kskades_SoundCloud_before_its_deleted)>; Nappy, Soundcloud Boldly Releases New App, Allows Universal to Flag Your Account, and Quietly Announces Data Mining, All in One Month, Do Androids Dance.com (Jun. 27, 2014) <<http://doandroidsdance.com/features/soundcloud-boldly-releases-new-app-allows-universal-flag-account-quietly-announces-data-mining-one-month/>>.

<sup>160</sup> See Robertson Cookson, SoundCloud hits an impasse with major record labels, Financial Times (Oct. 9, 2014) (noting that the “clock is ticking on how long they can continue operating as a service that's unmonetised.”) <<http://www.ft.com/intl/cms/s/0/e549661c-4ef6-11e4-b205-00144feab7de.html#axzz3Ff62q4dA>>.

<sup>161</sup> See Menell, supra n.1, at 292-97.

<sup>162</sup> See Chung & Polohsky, supra n. \_\_.

Based in part on the confusion surrounding mashups, the principal U.S. copyright policy institutions – the U.S. Copyright Office, an arm of the legislative branch operating under the Library of Congress, and the U.S. Patent and Trademark Office (PTO), the chief intellectual property adviser to the executive branch (within the Department of Commerce) – embarked on music licensing studies during the past two years.

The notice for the Copyright Office’s Music Licensing Study<sup>163</sup> solicited input on two dozen questions, including several related to licensing of remixes – the need for the § 115 compulsory license, music licensing practices, the role for the government in facilitating licensing, and the availability and quality of music rights ownership databases.

On a parallel track, the Administration’s study, spearheaded by the U.S. Patent and Trademark Office and the National Telecommunications Information Administration (NTIA), began with the release of the Administration’s July 2013 Report entitled “Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy.”<sup>164</sup> The study identifies five major study areas, including “the legal framework for the creation of remixes.” The Request for Comments provided the observed that:

Advances in digital technology have made the creation of ‘remixes’ or ‘mashups’ – creative new works produced through changing and combining portions of existing works – easier and cheaper than ever before, providing greater opportunities for enhanced creativity. These types of ‘user-generated content’ are a hallmark of today’s Internet, in particular on video-sharing sites. But because remixes typically rely on copyrighted works as source material – often using portions of multiple works – they can raise daunting legal and licensing issues.<sup>165</sup>

The Green Paper noted that “[m]any remixes may qualify as fair uses” and that “[r]emixers may also rely in some contexts on licensing mechanisms such as YouTube’s

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<sup>163</sup> See Copyright Office, Music Licensing Study: Notice and Request for Public Comment, 78 Fed. Reg. 14739 (Mar. 17, 2014).

<sup>164</sup> Available at <<http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf>>

<sup>165</sup> See U.S. Patent and Trademark Office and National Telecommunications and Information Administration, Request for Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy, 78 Fed. Reg. 61337 (Oct. 3, 2013) (hereinafter cited as “Green Paper”); see also See U.S. Patent and Trademark Office and National Telecommunications and Information Administration, Notice of Public Meetings on Copyright Policy Topics (as Called for in the Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy), 79 Fed. Reg. 21439 (Apr. 16, 2014).

Content ID system, Creative Commons licenses, and other online licensing tools.<sup>166</sup> The Green Paper also pointed out the development of best practices guidelines, but nonetheless concluded that “considerable” legal uncertainty surrounds remixes and “licenses may not always be easily available.” The Green Paper invited public comments on whether remixes are being significantly impeded by the existing legal framework and market realities and how such problems can be rectified.<sup>167</sup>

Both studies drew overlapping representatives of the traditional music industries, the ISP community, recording artists and composers, and public interest organizations. The predominant industry groups – representing music publishers, record labels, composers, and established recording artists on the one hand and Internet companies, technology companies, and technology-oriented interest groups on the other – came to diametrically opposed viewpoints on the legality of mashups.

The traditional music industry advocates expressed the view that most music mashups fall clearly on the infringing side of the copyright line and did not pass muster under the fair use doctrine.<sup>168</sup> By contrast, many from the technology sector expressed the view that most mashup creativity qualifies as fair use.<sup>169</sup>

Both sides of this divide are missing a tremendous opportunity to promote the creative arts, expand the market for pre-existing and new works, and entice new creators and the growing legions of disillusioned consumers into authorized marketplaces for copyrighted works. The following section explores the construction of such an on-ramp.

### **III. Bridging the Divide: The Case for a Remix Compulsory License**

As we have seen, a cramped interpretation of fair use confronts mashup creators with the choice of bearing exorbitant transaction costs and constraints on their artistic freedom for those works that can’t feasibly be cleared or running the risk of crushing liability. Even if many of these uses are ostensibly “tolerated,” such a regime unduly chills mashup creativity and distribution. By contrast, a broad interpretation of fair use potentially deprives the authors of works that are sampled of a fair share of the social value of their works. And without a clear resolution of this interpretive issue, everyone bears the costs of legal uncertainty.

Rather than tinker with the inherently vague, constitutionally-based, and politically charged fair use doctrine, there is much to be gained by opening up an alternative path for

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<sup>166</sup> Id. at 29. 87-89.

<sup>167</sup> See Green Paper, *supra* n. \_\_\_, at \_\_\_.

<sup>168</sup> <give examples>

<sup>169</sup> <give examples>

mashup music that insulates artists and distribution platforms from undue legal liability while encouraging low transaction cost and fair pricing of samples. A predictable, feasible alternative to relying upon the fair use doctrine is the establishment of a proportional compulsory license for mashup music. The elimination of statutory damages for mashup works would further insulate these productive uses without unduly exposing copyrighted works to piracy. The increasing shift to digital distribution platforms for music in conjunction with advancing technologies for monetizing and dividing revenues makes such a regime feasible. These augmentations to copyright law would liberate new generations of creators as well as old dogs who can learn new tricks to pursue their passions, increase the value of older catalog works through revenue sharing and increased exposure, expand the catalog of and reduce the costs associated with online content distribution, breakdown down anti-competitive forces, and build wider support for authorized content markets.

Section A explores the general economic considerations justifying a compulsory licensing approach to music mashups. Section B traces the history and functioning of the cover license to illustrate a model that has worked relatively well at promoting productive uses of musical compositions while providing efficient compensation for the creators of musical compositions. Section C extrapolates from the cover license to trace the contours of a mashup compulsory license. Section D explores additional advantages of a remix compulsory license. Section E responds to likely objections to the proposed regime and explores additional ways of designing the system to ameliorate those concerns.

## **A. Economic Analysis of the Music Mashup Stalemate**

The goal of copyright law is to promote progress in the expressive arts. By affording time-limited rights to exploit such works to the author, copyright law employs market forces to fund creative enterprise. The optimal level of protection accorded works of authorship becomes more complicated for works that serve as inputs to further creativity. Economic models of such cumulative innovation seek to find a balance between the rights of pioneers and those who build on pioneering works.

To a first approximation, copyright law affords the pioneer rights over derivative works. But as we have seen, the fair use doctrine opens up greater legitimacy for borrowing. Moreover, even the concept of a pioneering work is somewhat artificial in that just about all expressive creativity – whether literature, visual art, or music – builds on prior creativity to some extent. This dependence contributes to the inherent complexity of applying copyright law's infringement standard. In order to assess substantial similarity of *protected* expression, courts must carefully filter out those aspects of the plaintiff's work that are insufficiently original (including short phrases, *scènes à faire*) functional (ideas, procedures) as opposed to expressive. Of particular relevance to musical creativity, most rhythm patterns are considered part of the public domain. Even chord patterns in many popular songs are deemed unoriginal. On the other hand, complex melodies and lyrics as well as distinctive sound recordings attract relatively strong protection.

The fair use doctrine reflects several policy rationales – promoting cumulative creativity that does not adversely affect the market for underlying works; scholarship, creative experimentation and learning; and free expression, such as commentary, news reporting and criticism. The expansion of fair use over time has tended to expand over-all creative output. As several scholars have noted, copyright’s long duration justifies greater scope for reusing works as they age.<sup>170</sup>

Achieving the optimal balance between pioneering works and those that build upon them is no easy task.<sup>171</sup> If transactions were costless and society were not concerned with free expression, then a strict property-type rule could achieve economic efficiency.<sup>172</sup> We know, however, that both of those assumptions are mistaken,<sup>173</sup> which necessitates consideration of more complex rules and institutions to promote the optimal balance of primary and secondary creativity.

Nonetheless, there can be tremendous benefits from free market transactions even where property-type rules can lead to bargaining breakdown. The use of property rules can, in some circumstances, bring about the development of efficient private allocation institutions.<sup>174</sup> For example, relatively strong protection for public performance rights led to the development of efficient licensing institutions for musical compositions. ASCAP developed an effective blanket licensing regime that compensated songwriters as well as enabled dance halls and restaurants to perform popular music without high transaction costs.<sup>175</sup> As the radio industry emerged, blanket licensing enabled both song writers and broadcasters to profit from this remarkable new distribution medium. Yet we have not seen any comparable market-driven solutions in the remix area. The marketplace remains costly, unpredictable, and largely prohibitive for many mashup projects.

At the other extreme, an open-ended liability-type rule enables greater flexibility in balancing between pioneers and cumulative creators. Relatedly, the fair use doctrine provides a safety valve for achieving a balance among economic and social policies. Yet these institutions can be especially costly in practice. Musicians are generally interested in composing and performing, not negotiating, litigating, and strategic maneuvering over amorphous boundaries.

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<sup>170</sup> Hughes; Liu

<sup>171</sup> See Suzanne Scotchmer, <cumulative innovation>

<sup>172</sup> Coase

<sup>173</sup> Problems of fragmentation (Van Houweling)

<sup>174</sup> Merges, Contracting into Liability Rules

<sup>175</sup> See RUSSELL SANJEK & DAVID SANJEK, PENNIES FROM HEAVEN: THE AMERICAN POPULAR MUSIC BUSINESS IN THE TWENTIETH CENTURY (1996).

The contrast between the arc of rap and hip hop on the one hand and the emergence of mashups on the other highlights how the Internet has changed the creative ecosystem for remix music. In the pre-Internet era, record labels provided the only means to reach substantial audiences. The uncertainties of the scope of rights channeled even the most renegade of remix artists into the licensed mold. That was the only feasible option. It proved profitable, but limiting in terms of creative freedom. By contrast, the Internet affords mashup artists creative freedom, but without the opportunity to use the primary commercial channels. Publishers and labels continue to exercise some degree of control, but to what end? Pioneers lack control over the use of their work, while remixers lack market access. To the growing number of mashup music fans, this stalemate merely reinforces the irrelevance of copyright and authorized distribution channels. They can't find their favorite music on authorized music services, pushing them away from content markets. And new artists who seek to develop remixed works are pushed into underground channels.

Given the transaction costs, royalty stacking, and creative compromises inherent in an arms-length licensing regime and the inherent unpredictability, subjectivity, and cost of the fair use safety valve, the search for a stable platform for remix art lies in a system for easily and cheaply pre-clearing<sup>176</sup> uses coupled with sharing of the revenues resulting from the remixed works. As music enjoyment increasingly shifts toward streaming and online access, capturing a substantial share of the value and distributing it equitably becomes ever more feasible. Furthermore, such a regime holds the promise of attracting new generations of artists and fans into a vibrant, authorized content ecosystem. As such ecosystems grow, the piracy problem evaporates. Just as the television broadcasters are opening up authorized on-line channels for televised content to entice cord cutters,<sup>177</sup> the music industries would benefit over the longer run by opening up music markets to the full range of music mashups.

The cover license provides an illustrative model for developing such a system.

## **B. The “Cover” License as a Model for Opening up the Remix Marketplace**

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<sup>176</sup> See Menell & Depoorter, *supra* n. \_\_\_, at 69-71; Menell & Meurer, *supra* n. \_\_\_, at 23-25, 38.

<sup>177</sup> See David Carr, *The Stream Finally Cracks the Dam of Cable TV*, N.Y. Times (Oct. 19, 2014) (heralding the announcements by HBO and CBS that they would be opening up streaming services for their content) <[http://www.nytimes.com/2014/10/20/business/media/the-stream-finally-cracks-the-dam-of-cable-tv-.html?ref=business&\\_r=0](http://www.nytimes.com/2014/10/20/business/media/the-stream-finally-cracks-the-dam-of-cable-tv-.html?ref=business&_r=0)>; Menell, *supra* n. \_\_\_, at 352-58, 359-70 (promoting copyright reforms and market initiatives aimed at enticing netizens into fairer, better priced, more open authorized channels rather than waging enforcement campaigns against piracy).

For reasons that are no longer salient,<sup>178</sup> Congress established the nation’s first compulsory license as part of the 1909 Copyright Act.<sup>179</sup> Section 1(e) provided that

as a condition of extending the copyrighted control to [] mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof . . .<sup>180</sup>

This provision authorized anyone to sell piano rolls of musical compositions that had been released for a statutory fee of 2 cents per copy.

With the emergence of the sound recording industry over the next several years, the compulsory mechanical license morphed into a mechanism for recording artists to record their own versions of previously released musical compositions – what we call a “cover.” As updated as part of the omnibus Copyright Act of 1976,

When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords [], may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work.<sup>181</sup>

There are, however, limits on the use of the underlying musical composition. The “compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work.”<sup>182</sup>

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<sup>178</sup> See H.R. Rep. No. 60-2222 at 8 (1909) (expressing concern that by securing exclusive licenses to manufacture piano rolls of a large percentage of the extant musical compositions, the Aeolian Company, a leading manufacturer of player pianos, had created “a possibility of a great music trust in this country and abroad”).

<sup>179</sup> See Howard Abrams, Copyright’s First Compulsory License, 26 Santa Clara Computer & High Tech. L.J. 215, 217-21 (2010).

<sup>180</sup> See An Act to Amend and Consolidate the Acts Respecting Copyright, ch. 320, § 1(e), 35 Stat. 1075 (1909).

<sup>181</sup> See 17 U.S.C. § 115(a)(1).

<sup>182</sup> See 17 U.S.C. § 115(a)(2).

Furthermore, the compulsory license applies only to nondramatic musical works.

The statutory rate for the “cover” license has gradually risen over the past century. It now stands at 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever is greater.<sup>183</sup> Although the statute sets forth procedures for obtaining the compulsory license, most cover licenses are negotiated directly between the copyright owners and the licensees in the shadow of this regime so as to avoid the Copyright Office’s burdensome procedures, such as monthly accounting.<sup>184</sup> The statutory license rate provides a maximum effective limit on those negotiations.

As a result of the “cover” license, recording artists have enjoyed substantial freedom to record and distribute their own versions of musical compositions, resulting in many of the more memorable sound recordings. As much as I enjoy Bob Dylan’s rendition of his composition “All Along the Watchtower,” it is the Jimi Hendrix version that I find the most tantalizing. Bob Dylan has remarked that the Hendrix cover “overwhelmed” him. According to Dylan, Hendrix

had such talent, he could find things inside a song and vigorously develop them. He found things that other people wouldn’t think of finding in there. He probably improved upon it by the spaces he was using. I took license with the song from his version, actually, and continue to do it to this day.<sup>185</sup>

In the booklet accompanying his *Biograph* album, Dylan notes “I liked Jimi Hendrix’s recording of this and ever since he died I’ve been doing it that way. . . Strange how when I sing it, I always feel it’s a tribute to him in some kind of way.”<sup>186</sup>

The cover license has produced a vast number of remarkable sound recordings, as well as some truly regrettable, but innocuous, releases.<sup>187</sup> The cover license enables young musicians to develop and showcase their skill using popular songs. It provides a convenient mechanism for

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<sup>183</sup> See 17 U.S.C. § 115; U.S. Copyright Office, Copyright Royalty Rates <<http://www.copyright.gov/carp/m200a.html>>.

<sup>184</sup> See Al Kohn & Bob Kohn, *Kohn on Music Licensing*, 657-58 (2<sup>nd</sup> ed. 1996).

<sup>185</sup> See Interview with Dylan, Fort Lauderdale Sun Sentinel (Sep. 29, 1995), quoted in All Along the Watchtower, Wikipedia <[http://en.wikipedia.org/wiki/All\\_Along\\_the\\_Watchtower](http://en.wikipedia.org/wiki/All_Along_the_Watchtower)>.

<sup>186</sup> See All Along the Watchtower, Wikipedia <[http://en.wikipedia.org/wiki/All\\_Along\\_the\\_Watchtower](http://en.wikipedia.org/wiki/All_Along_the_Watchtower)>.

<sup>187</sup> See, e.g., Hung for the Holidays, Wikipedia (showcasing a remarkably off-key American Idol contestant) <[http://en.wikipedia.org/wiki/Hung\\_for\\_the\\_Holidays](http://en.wikipedia.org/wiki/Hung_for_the_Holidays)>; William Hung, Wikipedia <[http://en.wikipedia.org/wiki/William\\_Hung](http://en.wikipedia.org/wiki/William_Hung)>.

record labels to test markets. Television music reality shows, such as American Idol and The Voice, have relied upon this provision of the copyright law to promote sales of contestants on iTunes and other digital platforms. The resulting sales benefit the musical composers as well as the recording artists, with relatively few resources wasted on transactions or risk of holdup. Thus, the cover license promotes cumulative creativity, expressive freedom, and compensation while minimizing transaction costs. Its built-in metering – basing the compensation on sales – provides versatility and simple accounting.

This is not to say that there have not been complaints about the cover license not keeping up with inflation, underpricing some works, and impinging on composers' ability to control the use of their works.<sup>188</sup> Nonetheless, it has done much to support young musicians, promote experimentation, reduce uncertainty, ease the transition to digital download platforms, and expose musicians and the public to a diversity of styles.

### **C. Designing a Remix Compulsory License**

The cover license has succeeded because of its standardized features and low barrier to entry. It provides those interested in covering a previously released musical composition with a pre-set pricing mechanism that does not require a large initial outlay. If the cover attracts demand, then both the owner of the copyright in the underlying musical composition and the cover artist will see significant value. If it's a market flop, no one is worse for the wear. The division of the value is proportional to market value. The fact that it is available to anyone invites new forms of creativity and avoids the composer's endorsement. The key to the success of the cover license is that it is simple, efficient, non-discriminatory, and ostensibly fair. The perfect is not the enemy of the good.

A remix compulsory license would stretch the cover license along several dimensions. It would authorize much greater opportunity for alteration. In fact, the motivation for most remixes is to create something substantially new. And to the extent that it does so, it finds further cover under fair use considerations. Furthermore, a remix compulsory license must deal with a much more complicated revenue sharing formula. But the end goal tracks the cover license model. It offers remixers a balanced, low-cost, pre-clearance institution.

A remix compulsory license could work as follows. A remix artist would assemble the outline for the new work. The time usage of each selection would be coded, much as the Girl Talk listing for "Play Your Part (Pt. 1),"<sup>189</sup> and submitted through a standardized Copyright Office remix registration form along with the registration fee and a deposit copy. All of this

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<sup>188</sup> See Abrams, *supra* n. \_\_; Robert P. Merges, Compulsory Licensing vs. the Three 'Golden Oldies' Property Rights, Contracts, and Markets, *Cato Policy Analysis* No. 508 (Jan. 15, 2004).

<sup>189</sup> See *supra* n. \_\_ <Section IA>.

would be accomplished through an Internet portal. The composition/sound recording list would establish the division of value among the various musical composition owners, sound recording owners, and the remix artist. The Copyright Office would review the submission for compliance with applicable regulations and, assuming compliance, issue a digital registration certificate that would contain registration information, ownership shares, and where revenues for each of the contributors would be sent. This digital clearance file could then be provided to distribution channels as a way of ensuring that the remix complies with the Copyright Act and as a means for sharing revenue.

This mechanism would automate the clearance process, avoid the problems of gaining permission from copyright owners, and afford remix artists with a relatively straightforward and inviting voluntary on-ramp to the music marketplace. If the project succeeds, then all of the contributors would see some return. In the case of the underlying works, they would see revenue streams without putting forth any substantial effort.

The precise splits as well as a variety of other operational details would need to be worked out. As lobbyists for all sides would be quick to say, the devil is in the details. It is not difficult to imagine a variety of eligibility requirements and revenue splits. For example, the license could be available for non-dramatic remixes meeting a modest threshold of originality, splitting revenue three ways (one third to musical composition owners, one third to sound recording owners, and one third to the remix artist) and proportionally based on the time usage.

The best plan, however, would result from a multi-stakeholder process involving all of the affected communities. As a guide to the process, this section outlines the principal issues to be worked out: (1) eligibility requirements; (2) revenue sharing; (3) administrative process; (4) features and limitations; and (5) possible extensions.

## **1. Eligibility Requirements**

A core rationale for a Remix Compulsory License Act (RCLA) is to address the high transaction costs associated with intensive remixes. Therefore, there is some justification for limiting the compulsory license to those projects involving a relatively large number or high intensity of samples. The number could be less than a typical Girl Talk composition, but perhaps ought to more than conventional rap and hip hop samples.

A low intensity threshold, however, could displace the existing sample market for less intensive remixes. An argument could be that such displacement could be beneficial due to holdup and transaction cost problems plaguing the rap and hip hop genres. Furthermore, a high threshold could distort remix art, by pushing remix artists to higher intensity levels than they believe is artistically optimal. On the other hand, a minimal intensity level could authorize mere bootlegs of previously released tracks. Just as copyright law demands a higher level of

derivative originality for derivative works to garner protection,<sup>190</sup> a RCLA might also need to demand more than trivial adaptation.

## 2. Revenue Sharing

As Ben Sisario notes, “how do you split the money from a three-minute dubstep mash-up of Britney Spears, Eurythmics, Beethoven and a dozen others?”<sup>191</sup> This is obviously one of the most sensitive aspects of the RCLA regime and raises deep philosophical and economic questions. The performance rights organizations – ASCAP, BMI, and SESAC – deal with analogous issues in the division of their royalty pools.<sup>192</sup>

We might ask, drawing on Rawls,<sup>193</sup> how composers and recording artists would distribute value in a remixed work without knowing their particular career stage, abilities, tastes, and position within the social order of society. The point of the exercise would be to develop neutral principles for division of the fruits of both original and derivative creativity. Alternatively, economists might ask how society could reward useful labor<sup>194</sup> or maximize the social welfare from alternative distributional rules.

Any revenue sharing plan should seek to minimize transaction costs, including the costs of dispute resolution. A costly division rule could well defeat the primary purpose of facilitating the remix art form. Thus, the revenue sharing system should be clear, modular, and objective.<sup>195</sup> These considerations point strongly toward using a time-based metric for measuring relative contribution of samples for dividing value. It also favors dividing value among classes of contributors – composer, recording artist, remixer – on a fixed, focal point, ex ante basis such as one-third, one-third, one-third. It is possible to imagine more sophisticated algorithms, such as

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<sup>190</sup> See *Gracen v. Bradford Exchange*, 698 F.2d 300 (7<sup>th</sup> Cir. 1983); *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491-92 (2<sup>nd</sup> Cir. 1976) (en banc).

<sup>191</sup> See Sisario, *supra* n. \_\_.

<sup>192</sup> See Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 Cal. L. Rev. 1293, 1328-39 (1996); *Music Licensing Practices of Performing Rights Societies: Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the Senate Comm. on Judiciary*, 103d Cong., 2d Sess. (1994) (statement of Morton Gould, President Emeritus, ASCAP).

<sup>193</sup> See John Rawls, *A Theory of Justice* (1971).

<sup>194</sup> See McLeod & DiCola at 108-11 (suggesting that remix standards “should reward creative labor”).

<sup>195</sup> See Henry Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 Yale L.J. 1742 (2007) (discussing the virtues of modularity).

factoring in the intensity of the remix or the market popularity of the sampled works, but such an approach creates substantial complexity.

A time-based metric has the virtue of accounting for the significance of the sampled work to the remix composition (longer samples earn a higher percentage of the pie) and integrating the market success of the sampled works. Remixers would undoubtedly be influenced by the popularity of works within the culture and we would expect better known works to be sampled more heavily, thereby increasing their share of the overall remix pie.

A related issue concerns the sampling of prior remixes. A virtue of a simple time-based division rule is that those remixes could themselves be decomposed into the works that are embedded. We would also, however, need to value the creative contribution of the sampled remix artist. Where the sampled work is a remix, the value for that component could be divided using the same division rule (e.g., 1/3 to composers, 1/3 to recording artists, and 1/3 to the remix artist) applicable to conventional samples. Remixes of remixes could be easily handled because of the easy availability of the licensing data from previously registered remixes.

Another important issue relates to the minimum eligibility quantum. It might be appropriate to choose a *de minimis* level of usage for revenue sharing. For example, samples of less than two seconds could be categorically exempt. Certain sounds of even that length might be sufficiently iconic to merit recognition.

Finally, it will also be important to develop some rules for ensuring that revenue sharing is not distorted by the inclusion of long, barely imperceptible samples. A remixer might be able to skew the division of revenue toward him or her own work by including long imperceptible samples.

### **3. Administrative Process**

In order to achieve its goal of reducing transaction costs and welcoming remix artists into authorized distribution of their works, RCLA must establish an efficient, inexpensive online process for registering works and administering royalty payments. Developing this infrastructure would complement the broader call for modernizing copyright registration, developing comprehensive and up-to-date databases, and facilitating notice. The availability of royalty payments for remixes would encourage musical composition and sound recording owners to register their works.

The choice of institution to administer RCLA parallels contemporary discussions about how best to modernize copyright registration. RCLA could potentially be handled through the Copyright Office, a quasi-public agency (such as SoundExchange), or private collectives (such as ASCAP). Like existing collectives, a portion of the revenue collected could be used to cover administrative costs. This could include the costs of dispute resolution, which would depend on the complexity of the eligibility requirements and revenue sharing algorithm.

#### **4. Additional Features and Limitations**

The interplay of RCLA with other copyright rules would greatly influence its political viability and efficacy.

##### **i. Interplay with Fair Use**

Like the Section 115 compulsory license, RCLA would operate as a safe harbor for use of copyrighted works. In this way, it would augment the fair use doctrine. I recommend against having RCLA supplant fair use. Such a rule would arguably interfere with First Amendment protections. It would also generate substantial political opposition. Section III E3 discusses concerns that the availability of this licensing regime could influence the scope of fair use.

##### **ii. Use Limitations**

It would also be important to limit the types of uses eligible for the compulsory license. In order to avoid false endorsements and interference with the advertising marketplace, the compulsory remix license ought not to be used for advertisements, subject to fair use or express license. An argument can also be made that the compulsory remix license could not be used for political campaigns, but again remixes could qualify based on fair use or express license. There would also be issues surrounding synchronization (television, motion picture, video game) and dramatic work licensing.

##### **iii. Endorsement Disclaimer**

The RCLA should expressly disclaim that sampled composers and recording artists have consented to their works being remixed. Such artists might well welcome such uses, but given the compulsory nature of the licensing regime, it would be important to insulate the sampled authors and recording artists from any implication that they have endorsed the work unless they so choose. Section III E4 explores the broader moral rights aspects of a remix compulsory license regime.

##### **iv. Changes to Statutory Damages**

The risk of substantial statutory damages poses a significant risk for many remix artists. The uncertainty surrounding the application of the fair use doctrine to remix art exacerbates this concern. Given that all remix work has some transformative quality, there is good reason to remove or at least cap the level of statutory damages available for remixed music. Statutory damages would not be available against remixers or those who distribute remixed works on the grounds that these works are not piratical but presumptively productive (even if they do not qualify for fair use).

#### **5. Possible Extensions**

The music mashup genre is the leading wedge of an expanding range of remix art throughout the culture. It potentially provides a useful template for other forms of remix art. For example, it could usefully be adapted for dividing revenue for video mosaics of the music videos used in conjunction with audio remixes. Like music mashups, such music video mashups have proliferated, raising similar concerns about how fair use applies and the transaction costs of gaining permission. The RCLA framework could be tailored to this particular novel art form. The music mashup artists as well as the video producers, music composers, and recording artists should all share in the resulting video mozaic.

As digital technology expands the ability for artists to remix prior creations and for a wider range of creators to reach broad audiences without traditional publishing gatekeepers, we are witnessing substantial battles over of forms of remix art such as appropriation art<sup>196</sup> and fan fiction.<sup>197</sup> Compulsory licensing is not necessarily the right solution for all of these contexts. Nonetheless, it opens up the policy toolbox to tailoring distinctive regimes for new challenges.

#### **D. Additional Benefits of a Remix Compulsory License**

The remix compulsory license would greatly expand the marketplace for remix creativity and the motivation to undertake such projects. As such, it would promote freedom of expression. Such a regime would also greatly reduce the overhead costs of remix art as well as expand compensation for a broad range of composers, recording artists, music publishers, and record labels. Furthermore, this policy would provide several significant ancillary benefits to the copyright system.

##### **1. Enrich Input Materials**

As noted earlier,<sup>198</sup> remix artists depend critically on the availability of high quality source materials – especially the stems from which multi-track recordings are compiled. Although some master recording proprietors release such material, availability has been limited. A more robust system for expanding and sharing revenue from remix art could well encourage more record labels and recording artists to share stems and other sub-components that could expand the creative opportunities for remix projects.

##### **2. Channeling of Remix Artists and their Fans into Authorized Content Markets**

Perhaps the greatest long-term benefit of a remix compulsory license will be in channeling remix artists and their fans into authorized distribution platforms. As more of this

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<sup>196</sup> See *Cariou v. Prince*, 714 F. 3d 694 (2013).

<sup>197</sup> See Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 *Loy. L.A. Ent. L. Rev.* 651 (1997).

<sup>198</sup> See *supra* n. \_\_ <Section IB1>.

work becomes available and as remix artists affirmatively promote revenue-generating distribution channels, more fans will be attracted to these sources. This legitimization of remix content will also lower administrative costs for distribution channels, such as YouTube, Spotify, and iTunes, and broaden their catalog. As more consumers join these services, the piracy problem will abate. This will tend to erode the corrosive effects of a gap between norms and law, reducing alienation.

### **3. Enhance Notice Institutions and Databases**

Part of the challenge of licensing samples is the difficulty identifying rights holders. Scholars have lamented the lack of formalities as undermining efficient resource development.<sup>199</sup> A remix compulsory license system could spur the development of comprehensive, easily searchable music rights registries by encouraging rights holders to ensure that the most accurate and current data is available for claiming revenue. Failure to do so would stand in their way of claiming their share of compulsory license revenues. Furthermore, a compulsory system would encourage database entrepreneurs to develop convenient databases and related tools for remix artists to more easily compile their registration forms.

### **4. Reduce Antitrust Concerns**

Notwithstanding the disintermediation that the Internet has made possible, major record labels still command tremendous control over competition and revenue sharing through their ownership of a vast legacy catalog.<sup>200</sup> No online service can achieve economic viability without licenses to a substantial portion of the legacy collection. Even young fans want to be able to stream the classics. And through this power, the major record labels have structured online royalties in such a way that their own artists but also independent artists are unlikely to see a fair share. They also extend this power through their control over licensing samples of many classic works.

In addition to streamlining sample licensing, a remix compulsory license would open up the marketplace to all comers on a fair, reasonable, and non-discriminatory basis. This would remove the entry barriers faced by younger artists and those without formal legal representation and record labels. Although it would reduce the market power of the major players, a remix compulsory license could very well increase their licensing revenues by spurring a vast expansion in remix art, opening up authorized online distribution channels to these works, and welcoming a vast influx of artists and fans to commercial streaming, download, and advertising-based music services.

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<sup>199</sup> Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 *Stan. L. Rev.* 485 (2004); Menell & Meurer, *supra* n.\_\_\_\_.

<sup>200</sup> See Menell, *supra* n.\_\_\_\_, at 292-97, 361-66.

## **E. Objections and Responses**

Proposals to provide a compulsory license for remixes have already provoked objections from a variety of stakeholders. Composers and recording artists have objected to the loss of control such a system would entail. Some copyright scholars have expressed concern about the effects of licensing systems on the scope of fair use.

### **1. Potential Abuse**

Like any complex system for allocating rights, a remix compulsory license system could be gamed to skew the distribution of value among claimants. The eligibility requirements and revenue sharing algorithm will inevitably be somewhat over- and under-inclusive. Many of those issues would be addressed through the design of the revenue sharing model. Simpler systems are more transparent, but less sophisticated. More complex algorithms could hide abuses. A remix compulsory license system would need to be carefully monitored in order to ensure that it did not skew revenue sharing in unanticipated ways. Adjustments to the system could be made through transparent rulemaking processes.

### **2. Freedom of Contract**

Various scholars have resisted compulsory licensing systems on the grounds that free markets are better able to allocate resources and less prone to rent-seeking and other distortions introduced by government-based resource allocation systems.<sup>201</sup> The experience with sample licensing across the rap, hip hop, and mashup genres reveals tremendous transaction costs and market distortions. With over two decades of experience, there has been ample opportunity to see if the market can produce effective alternatives. Nothing has emerged. The added complication of vast, difficult to monitor unauthorized distribution platforms indicate that the most productive solution will be to rely upon carrots rather than enforcement sticks. A remix compulsory license would draw remix artists and their fans into authorized markets. While a remix compulsory license would not achieve perfection for each transaction, it would greatly promote progress in the creative arts as well as freedom of expression while expanding compensation, markets, entry, and competition. The expanded velocity of activity would greatly expand over-all market performance.

### **3. Potential Distortions to Fair Use**

The establishment of a convenient and effective compulsory license for mashups could

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<sup>201</sup> See Abrams, *supra* n. \_\_; Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 *Stan. L. Rev.* 455 (2010); Robert P. Merges, *Compulsory Licensing vs. the Three 'Golden Oldies' Property Rights, Contracts, and Markets*, *Cato Policy Analysis* No. 508 (Jan. 15, 2004).

affect the scope of fair use.<sup>202</sup> In assessing the potential market for copyrighted works under the fourth fair use factor, courts consider the availability of licensing channels. A comprehensive compulsory licensing regime could lead courts to narrow the scope for fair use in evaluating sampling of sound recordings.<sup>203</sup> It is critical, however, to distinguish between economic uses and political, parodic, and other free speech uses. The compulsory license would appropriately affect economic uses, but should not the latter.

The need for fair use in cases of economic uses would be alleviated by the ease and low cost of the compulsory license. If this pathway is widely used, the problem that fair use seeks to resolve largely solves itself. Moreover, the elimination of statutory damages for mashups would curtail both the motivation to bring infringement actions as well as the adverse effects of enforcement actions on mashup artists.

With regard to speech-motivated uses, the Supreme Court's decision in *Campbell* in conjunction with the growing recognition of First Amendment dimensions of copyright law should continue to provide relatively wide berth for parodies, commentary, and political uses. Furthermore, Congress can bolster protection for freedom of speech by expressly emphasizing that the compulsory license does not alter the traditional fair use privilege. When Congress sought to discourage undue emphasis on the sanctity of unpublished works, it appended a sentence to Section 107 stating that "[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."<sup>204</sup> For example, Congress could add a sentence stating that "[t]he fact that work is eligible for a compulsory license should not influence the determination of whether use of a copyrighted work is fair."

#### **4. Moral Rights**

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<sup>202</sup> See Jennifer E. Rothman, Copyright, Custom, and Lessons from the Common Law, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* 203 (SHYAM BALGANESH, ED., 2013); Jennifer E. Rothman, The Questionable Use of Custom in Intellectual Property, 93 Va. L. Rev. 1899 (2007); James Gibson, Risk Aversion and Rights Accretion in Intellectual Property Law, 116 Yale L.J. 882 (2007).

<sup>203</sup> Cf. Wendy J. Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors, 82 Colum. L. Rev. 1600 (1982).

<sup>204</sup> See 17 U.S.C. § 107; 102 Pub. L. No. 492, 106 Stat. 3145 (1992). The extent to which this provision re-equilibrates the balance in favor of the use of unpublished works remains unclear. The House Report accompanying this bill expressly approved the Supreme Court's statement in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), that the unpublished nature of the work is a "key though not necessarily determinative factor tending to negate the defense of fair use." See H.R. No. 836, 102d Cong., 2d Sess. 9 (1992). Since this amendment, courts have placed far less weight on the unpublished nature of a work in conducting fair use analysis. See Nimmer on Copyright, <pincite>.

It is not difficult to imagine that Rick Springfield might not appreciate Girl Talk's weaving a rap song about oral sex between verses of his hit recording Jessie's Girl. It could be personally offensive to him as well as alienate his fan base. Several commenters to the recent Copyright Office and Administration copyright studies Copyright Office Music Licensing Study and the Green Paper study raised impassioned moral criticisms of music remixes.<sup>205</sup> They strongly criticized the how unauthorized remixes deprive original composers and recordings artists of control over the use of their works, impair the integrity of their works, unjustly enrich remixers, and falsely associate the original composers and recording artists with offensive messages. Some commenters invoked private property metaphors reminiscent of Blackstone's exclusive dominion view of private property.<sup>206</sup>

Yet it is precisely these areas where the First Amendment has the most force. As the Supreme Court noted in *Campbell*, parody will often offend the work or artist being used and hence is much less likely to be authorized by the target.<sup>207</sup> The First Amendment comes down strongly on the side of preventing censorship, even hate speech.<sup>208</sup> Thus, even if composers and recording artists could decline consent on the grounds that a use is offensive to the author or fans, that basis for asserting copyright infringement would be Exhibit A for the defense in its invocation of a parodic or more general free expression fair use.

Furthermore, the view that property law confers absolute dominion has long been discredited. Property law has long evolved to balance public and private interests.<sup>209</sup> And copyright protection is even more tempered with limitations and exceptions, especially with

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206 There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (facsimile ed. 1979) (1765-69). See

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<sup>209</sup> See Michael Carrier, *Cabining Intellectual Property through a Property Paradigm*, 54 *Duke L.J.* 1 (2004); Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 *Yale L.J.* 601 (1998).

regard to free expression.<sup>210</sup>

While I empathize with the desire of composers and recording artists to avoid association with offensive speech, I do not believe that these desires are best directed at censorship of remix art. As discussed earlier,<sup>211</sup> music mashups have been embraced by a large and growing swath of the population and can find numerous outlets in the Internet Age. Record companies no longer serve as gatekeepers for this expanding genre. The real question is whether to channel this work and those who enjoy it into authorized channels and services.

A legitimate argument can be made, however, that a compulsory license for mashups legitimates such offensive art. It should be noted that the same argument applies to parodic fair use cases as well as First Amendment protections. But neither fair use law nor the First Amendment require that a compulsory license be extended. They affirmatively authorize such offensive uses and act.

It is true that a compulsory license creates a somewhat distinct imprimatur by commoditizing the offensive use. In addition, it removes the risk of copyright infringement, although that depends, of course, on the breadth of fair use.

Perhaps the best approach to alleviating this philosophical dilemma would be for Congress to expressly disclaim that composers and recording artists whose works are remixed reflect endorsement of the remixed work absent express approval. I think that such a norm would be understood from the context, but the legislative statement could have some expressive significance.<sup>212</sup> An alternative approach, that could be done in tandem, would be to afford authors the ability to opt-out of the compulsory license regime on a transactional basis. In that way, they could affirmatively communicate their opposition. But it is unlikely that this approach would completely address the moral concern.. The remix artist could still assert a fair use defense. Unless the author is willing to back up the decision with costly litigation, it is unlikely that this symbolic gesture would have much effect. Perhaps a better approach would be for the artists to donate the remix revenue attributable to the offensive use to organizations that counter the messages that the author finds offensive.

Beyond controlling hate speech, the broader desire for authors to control use of their works for artistic integrity reasons runs counter to the broad cultural freedom that has developed in the United States. In contrast to its European counterparts, the United States has long resisted

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<sup>210</sup> See Peter S. Menell, *Governance of Intellectual Resources and the Disintegration of Intellectual Property in the Digital Age*, 26 *Berkeley Technology Law Journal* 1523 (2011).

<sup>211</sup> See, *supra*, TAN \_\_\_-\_\_\_.

<sup>212</sup> See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 *Univ. Penn. L. Rev.* 1503 (1999).

strong moral rights protection.<sup>213</sup> While the U.S. grudgingly added moral rights protections for works of visual art as part of its accession to the Berne Convention,<sup>214</sup> it has not made any such efforts in the musical arts realm. And although the desire to control how one's expressive works are used can have social value, it comes at the expense of free expression and arguably interferes with the American free expression ethos of taking ourselves too seriously.<sup>215</sup>

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<sup>213</sup> See *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14, 24 (2d Cir. 1976) (observing that “American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors”); *Granz v. Harris*, 198 F.2d 585, 589 (2d Cir. 1952) (discussing the rejection by American courts of the term “moral rights”). Nonetheless, several cases have effectively granted authors control over alteration of their work under copyright's general exclusive rights. See, e.g., *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14 (2d Cir. 1976) (holding that truncation of Monty Python episodes through the insertion of commercial advertisements implicated the right to prepare derivative works); *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) (recognizing that the fact that a work is unpublished has tended to negate a finding of fair use, thereby lending some support to a right of first publication); *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987) (applying *Harper & Row* in finding that a biography that liberally paraphrased J.D. Salinger's unpublished letters was not fair use). Nonetheless, these cases have been narrowed through legislation, see 102 Pub. L. No. 492, 106 Stat. 3145 (1992) (amending section 107 to include state that “[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all of [the section 107] factors”), and broadening interpretations of the fair use doctrine. See, e.g., *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013); *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

<sup>214</sup> The Visual Artists Rights Act of 1990 (VARA), Pub. L. No. 101-650, 104 Stat. 5089, 5132, added Section 106A to the Copyright Act. Although added two years after the Berne Convention Implementation Act of 1988, Pub. L. No. 100-446, 102 Stat. 1774, Congress was considering additional moral rights legislation in 1988. See House Report on the Berne Convention Implementation Act of 1988, p. 40, n.91 (noting that “The Senate Judiciary Committee has held hearings in both the 99th and 100th Congresses on legislation . . . protect the rights of integrity and paternity of visual artists. . . . See, e.g., Visual Artists Rights Amendment of 1986: Hearings on S. 2796 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary, 99th Cong., 2d Sess (1986). H.R. 3221, introduced in the House by Representative Edward Markey, would create the same rights, and has been referred to the Subcommittee on Courts, Civil Liberties, and the Administration of Justice. “).

<sup>215</sup> Even my suggestion that “Stairway to Heaven” is sacred was a bit tongue-in-cheek. See, *supra* n.\_\_. I love the fact that Zepparella takes one of my most favorite songs so seriously. But I have to chuckle at Led Zeppelin's effort to block a mashup of the lyrics from the Gilligan's Island theme song and “Stairway to Heaven.” See *Stairway to Gilligan's Island*, YouTube <<https://www.youtube.com/watch?v=KTCYLbFxTpI>> (visited Oct. 20, 2014); Little Roger and

By releasing artistic works into the marketplace and public discourse, creators open themselves to comment as well as ridicule. That is an implicit part of the social contract in a free society. Efforts to regulate such speech inherently involves the government in privileging some speech over other speech, a dangerously slippery slope. The protest movements and traditions in American society over the past century reinforce the importance of respecting everyone's right to speech, even if it offends.

These values have particular force in the music domain. By its ability to combine poetry with rhythm and melody, music can be especially powerful in delivering messages and promoting freedom. This freedom is especially important to new generations and marginalized communities. It played a particularly important role in the development of the modern music industry, which flourished in the protest songs of the 1960s and has profited handsomely as new genres have emerged.

It is ironic, therefore, that some rock 'n roll icons, who themselves benefitted from broad artistic freedom, have stepped forward to object to their art being remixed without their exclusive control.<sup>216</sup> The past decade has shown that the remix art movement cannot be stopped in the Internet Age, it can only be channeled in ways that can empower the next generation while breathing new life into the works of those who came before. A remix compulsory license would broaden expressive freedom while sharing the expanded revenues with those works were sampled. To stand in the way of mashup art is futile. Steven Tyler cannot effectively prevent

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the Goosebumps, Wikipedia (reporting that "Led Zeppelin threatened a copyright infringement lawsuit against the label, its attorneys demanding that all copies be destroyed, and the band withdrew the song, seeing their legal resources as inadequate")  
<[http://en.wikipedia.org/wiki/Little\\_Roger\\_and\\_the\\_Goosebumps](http://en.wikipedia.org/wiki/Little_Roger_and_the_Goosebumps)>. After all, even the great Led Zeppelin did their share of borrowing. See Joey DeGroot, 7 Songs That Led Zeppeling Ripped Off, Music Times (May 20, 2014)  
<<http://www.musictimes.com/articles/6250/20140520/7-songs-other-than-stairway-to-heaven-th-at-led-zeppelin-stole.htm>>; DAVE LEWIS, THE COMPLETE GUIDE TO THE MUSIC OF LED ZEPPELIN (1994) (reporting that "Whole Lotta Love" contained lyrics that were derivative of Willie Dixon's 1962 song "You Need Love." After a 1985 lawsuit resulting in a settlement, later pressings of Led Zeppelin II credited Dixon as co-writer); Whole Lotta Love, Wikipedia <[http://en.wikipedia.org/wiki/Whole\\_Lotta\\_Love](http://en.wikipedia.org/wiki/Whole_Lotta_Love)> (quoting Robert Plant's acknowledgment of the borrowing: "well, you only get caught when you're successful. That's the game."); DAVE LEWIS, THE COMPLETE GUIDE TO THE MUSIC OF LED ZEPPELIN (1994) (reporting that "Babe I'm Gonna Leave You" was written by folk singer Anne Bredon; since 1990, the Led Zeppelin version has been credited with Bredon, who received a substantial back-payment in royalties).

<sup>216</sup> See, e.g., Kurt Orzeck, Steven Tyler Blasts Remix-Friendly Copyright Law Proposal, Law360 (Feb 10, 2014)  
<<http://www.law360.com/ip/articles/508829/steven-tyler-blasts-remix-friendly-copyright-law-pr-oposal>>

the Girl Talks and other remix artists from using his and Aerosmith's catalog. He can only limit their distribution through authorized services, which ultimately will be counterproductive by steering fans of Aerosmith and remixed Aerosmith into unauthorized channels. This is more likely to reduce the flourishing of art than it is to protect his reputation or financial well-being.

#### **IV. Broader Ramifications: Bridging Fair Use's Binary Divide**

As scholars have recognized, the fair use doctrine often creates a polarizing binary choice between exclusive control and free, uncompensated use of pre-existing works of authorship.<sup>217</sup> Although the Supreme Court's decision in 2006 decision in *eBay v. MercExchange*<sup>218</sup> opened up the potential for awarding ongoing royalties as opposed to injunctive relief in intellectual property cases, the availability of such remedies are risky.<sup>219</sup> Such risks have pushed the rap and hip hop genres into a costly and restrictive licensing marketplace to the detriment of creativity and economic opportunity for many artists. Mashup artists have avoided that path, but find themselves without effective access to authorized online markets for their work and living under a looming cloud of potential liability and arbitrary takedowns of their works.

The rap and hip hop experience suggests that many scholars place far too much faith in fair use (it is too costly and risky to use)<sup>220</sup> and too little attention on the values of compensating those whose work is used. The binary choice is a falsely polarizing choice between control and free.<sup>221</sup> Fair compensation furthers copyright law's utilitarian goals as well as basic moral values. In fact, many remix artists support compensating those whose work upon which they build their own,<sup>222</sup> but given the prohibitive transaction costs involved are forced to either forgo distributing their art in recorded form or run the risk of massive copyright liability. A carefully

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<sup>217</sup> See See Alex Kozinski & Christopher Newman, What's So Fair About Fair Use?, 46 J. Copyright Soc'y 513 (1999).

<sup>218</sup> 547 U.S. 388, 391 (2006).

<sup>219</sup> See Menell & Depoorter, supra n. \_\_.

<sup>220</sup> Kerri Eble, This Is a Remix: Remixing Music Copyright to Better Protect Mashup Artists, 2013 U. Ill. L. Rev. 661 (2013); Lessig, supra n. \_\_.

<sup>221</sup> Jane Ginsburg's recent work recognizes this flaw. See Jane C. Ginsburg, Fair Use for Free, or Permitted-But-Paid, 29 Berkeley Tech L.J. \_\_ (2014) ; see also Menell & Depoorter, supra n. \_\_; Kozinski & Newman, supra n. \_\_.

<sup>222</sup> See Menell, supra n. \_\_, at 356-58; McLeod & DiCola, supra n. \_\_, at 227 (noting Philo Farnsworth, operator of the Illegal Art website that distributes Girl Talk's music, "thinks that it would be great if there was a compulsory license similar to recording a cover song"; "that would at least give artists more options. . . . Artists could still claim fair use, but that would at least provide safe avenues since fair use is a grey area.")

calibrated remix compulsory license offers a constructive, practical path for re-equilibrating copyright protection for the Internet Age.

The point here is not to deny the importance of fair use to a productive and free culture. Rather it is to suggest that society better propose expressive creativity and free expression – and relieve pressure on the fair use doctrine – by offering sensible, low transaction cost, and balanced compulsory licenses. Remix artists remain free to roll the fair use dice. But as we saw with the cover license, a compulsory license can open up a valuable complementary pressure release valve for creative, free expression without adversely affecting the fair use doctrine.

### Conclusion

In the real world of transaction costs, subjective legal standards, and market power, no solution to the mashup problem will achieve perfection across all dimensions. The appropriate inquiry is whether an allocation mechanism achieves the best overall resolution of the trade-offs among authors' rights, cumulative creativity, freedom of expression, and overall functioning of the copyright system. On balance, a remix compulsory license regime offers a constructive path for supporting a charismatic new genre, engaging the next generations, and channeling disaffected music fans into authorized markets. In so doing, it promises to raise the overall social welfare and compensation of both legacy and new artists.

In many respects, the debate over remix music mirrors a recurrent generational divide over youth's desire for freedom and older generations' resistance.<sup>223</sup> I am reminded of Steven Stills' timeless protest anthem, "For What It's Worth,"<sup>224</sup> brilliantly reinterpreted (through licensed sampling) in Public Enemy's "He Got Game".<sup>225</sup>

There's battle lines being drawn  
Nobody's right if everybody's wrong  
Young people speakin' their minds  
Getting so much resistance from behind

It's time we stop  
Hey, what's that sound?  
Everybody look, what's going down?

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<sup>223</sup> Cf. Bennett, *supra* n. \_\_\_, at 123-50 (discussing continuity and conflict across generational audiences).

<sup>224</sup> See For What It's Worth (Buffalo Springfield song), Wikipedia <[http://en.wikipedia.org/wiki/For\\_What\\_It%27s\\_Worth\\_\(Buffalo\\_Springfield\\_song\)](http://en.wikipedia.org/wiki/For_What_It%27s_Worth_(Buffalo_Springfield_song))>.

<sup>225</sup> See He Got Game (soundtrack), Wikipedia <[http://en.wikipedia.org/wiki/He\\_Got\\_Game\\_\(soundtrack\)](http://en.wikipedia.org/wiki/He_Got_Game_(soundtrack))>.

Although Stills had much larger social and political concerns on his mind, his words resonate in the contemporary debate over music mashups. Copyright should not stand in the way of young people “speakin’ their minds.” And it can play a role in motivating and sustaining the careers of the next generation of Steven Stills and those, like Public Enemy, that personalize, engage, and remix that art. Robust pathways for cumulative creativity, free speech, and low transaction cost/fair compensation licensing point the way.