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ADAPTING COPYRIGHT FOR THE  
MASHUP GENERATION

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PETER S. MENELL†

*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. 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.*

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† Koret Professor of Law and Director, Berkeley Center for Law & Technology, University of California at Berkeley, School of Law. I thank my sons Dylan and Noah, Peter DiCola, Kembrew McLeod, Gregg Gillis, DJ Guzie, and DJ Solarz for inspiration and background about mashup culture. I also thank Mark Avsec, Jane Ginsburg, Eric Goldman, Molly Van Houweling, David Nimmer, Dotan Oliar, Sean Pager, and participants at the Berkeley Law IP Scholarship Seminar, Berkeley Law Faculty Seminar, and Fifth Annual Internet Law Work-in-Progress Conference for comments. All views expressed, errors, and omissions are my own.

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## INTRODUCTION

Advances in digital technologies in conjunction with Napster's charismatic file-sharing technology unleashed a digital tsunami that continues to reshape the content industries and 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, they have also introduced new challenges for those seeking to earn a living in the creative arts.<sup>1</sup> The very technologies that liberate creators from the shackles of the old intermediaries make it ever more difficult to achieve an adequate return on their investments in training, time, expense, and opportunity cost to produce art.<sup>2</sup> 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>3</sup> To quote Pete Townshend, “Meet the new boss, same as the old boss.”<sup>4</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 consumers 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 exploitive 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.

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<sup>1</sup> See generally Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, 61 J. COPYRIGHT SOC'Y USA 235, 291-98 (2014) (42d Annual Brace Lecture) (outlining the “Copyright/Internet paradox” whereby the Internet has broken down many of the traditional content distribution barriers to market entry but has also made it much harder for artists to profit from their works).

<sup>2</sup> *Id.* at 292.

<sup>3</sup> See *id.* at 292-97 (describing how the major record labels use their extensive legacy catalogues as leverage in licensing negotiations); see also Hank Green, *The Bizarre State of Copyright*, YOUTUBE (Aug. 15, 2014), [http://www.youtube.com/watch?v=hG\\_FCQiKUws](http://www.youtube.com/watch?v=hG_FCQiKUws) [<http://perma.cc/ENK4-7LQ3>] (explaining YouTube's ContentID monetization and permission process and the disregard of fair use).

<sup>4</sup> See THE WHO, *Won't Get Fooled Again*, on WHO'S NEXT (MCA Records, Inc. 1995) (1971) (capturing the frustration, hypocrisy, and cynicism of the power structures defining the era—“We were liberated from the fold that's all, And 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).

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>5</sup> Such a system must come to grips with the reality that a growing segment of the population does not view copyright markets as the only means to access creative works.<sup>6</sup> To many, participation in markets for copyrighted works is voluntary; it is more about convenience and fairness than compliance with the rule of law.<sup>7</sup> 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.<sup>8</sup>

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 many creators want and need has remained the same: freedom to create and fair compensation based on the popularity of their art.<sup>9</sup> And what many consumers want has also largely remained the same: easy access to creative original art at a fair price.<sup>10</sup> These two forces create the conditions for copyright to provide a critical engine of creative and free expression. But for the copyright system to remain vital, copyright reform must channel post-Napster 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>11</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>12</sup> social, and cultural force on every generation and has long been among the most important formative

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<sup>5</sup> See Menell, *supra* note 1, at 361-71 (envisioning a "Grand Kumbaya Experiment," which would consist of record labels providing greater compensation to creators in return for a substantial proportion of consumers pledging to use a noninfringing music service).

<sup>6</sup> See *id.* at 288 (explaining that music fans now view recorded music "as essentially a free good," and therefore do not feel unethical when downloading music files in violation of copyright protection).

<sup>7</sup> *Id.* at 278-79, 361.

<sup>8</sup> See generally *id.* at 259-69, 271-72.

<sup>9</sup> *Id.* at 292.

<sup>10</sup> *Id.*

<sup>11</sup> See generally Menell, *supra* note 1.

<sup>12</sup> See, e.g., DANIEL J. LEVITIN, *THE WORLD IN SIX SONGS: HOW THE MUSICAL BRAIN CREATED HUMAN NATURE* (2008) (exploring how songs about six subjects—friendship, joy, comfort,

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 lifelong 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 prior generations. 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 formative and social processes 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>13</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 a new generation of disc jockeys (DJs) 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 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 sampled works to profit equitably from the public’s enjoyment of the resulting work.

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knowledge, religion, and love—have shaped human development); DANIEL J. LEVITIN, *THIS IS YOUR BRAIN ON MUSIC: THE SCIENCE OF A HUMAN OBSESSION* 85 (2006) (“[T]he emotions we experience in response to music involve structures deep in the primitive, reptilian regions of the cerebellar vermis, and the amygdala—the heart of emotional processing in the cortex.”).

<sup>13</sup> See, e.g., Menell, *supra* note 1, at 259-69 (describing various copyright enforcement actions brought by recording studios against individuals and the resulting negative perception of copyright law).

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 sharing the proceeds of their success with 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 embrace new creators and their fans through adapting copyright to the realities of the Internet Age. By moving copyright away from control towards calibrated compensation, Congress would recognize that remix artists and consumers play a vital role in the era of configurable culture,<sup>14</sup> foster norms that channel modern creators and consumers into markets for copyrighted works, and begin the process of building intergenerational bridges.

## 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. Mashup artists, many of whom work as live performance DJs 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 and innovative musical forms 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 and Las Vegas to the most popular music festivals in the United States to a massive Internet fanbase. 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.

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<sup>14</sup> Cf. ARAM SINNREICH, *MASHED UP: MUSIC, TECHNOLOGY AND THE RISE OF CONFIGURABLE CULTURE* 194-95, 208 (2010) (arguing that the rise of configurable culture, typified by mashups, suggests a “paradigmatic change” in cultural production and the need for “a new set of [cultural] institutions to serve [the people’s] needs”).

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

### A. *A Personal Journey*

Attitudes about music and copyright 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 thirty years of age, my appetite for new musical forms and artists has waned.<sup>15</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 formative years' passions. I mastered rip, mix, and tape decades before the birth of the iPod.<sup>16</sup>

But professional responsibilities and perhaps simply just growing older eventually quelled those passions for new music. I became content with my favorite songs and less curious about discovering new talent, although new bands and artists occasionally captured my attention. Although I enjoyed the escapist pleasures of electronic dance music 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 my sons Dylan (I wasn't kidding about the influence of popular music) and Noah to the passions of my youth. Both knew the rock 'n' roll

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<sup>15</sup> Cf. ANDY BENNETT, MUSIC, STYLE, AND AGING: GROWING OLD DISGRACEFULLY? 13-33 (2013) (exploring how characterizations such as the "old hippie" and "aging rocker"—fans who remain attached to the music of their youth—are reinforced through contemporary social discourse); Paul Lamere, *Exploring Age-Specific Preferences in Listening*, MUSIC MACHINERY (Feb. 13, 2014, 2:09 PM), <http://musicmachinery.com/2014/02/13/age-specific-listening> [<http://perma.cc/M9FA-VEY4>] (presenting data showing that older listeners tend to prefer music from their youth).

<sup>16</sup> In its provocative 2001 advertising campaign, Apple proclaimed "Rip. Mix. Burn." to promote iTunes desktop CD burning capability. *Apple Unveils New iMacs with CD-RW Drives & iTunes Software*, APPLE (Feb. 22, 2001), <https://www.apple.com/pr/library/2001/02/22Apple-Unveils-New-iMacs-With-CD-RW-Drives-iTunes-Software.html> [<http://perma.cc/B4FZ-LD83>]. 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*, MACWORLD (Mar. 1, 2002, 12:00 AM), <http://www.macworld.com/article/1003743/eisner.html> [<http://perma.cc/EQT9-J3ZR>].

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>17</sup> for the greatest scream in rock 'n' roll history,<sup>18</sup> 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>19</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 Chili 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>20</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, including rap and hip hop.

With Dylan's departure for college in the fall of 2008, I worried about losing one of my most reliable artists and repertoire scouts. Dylan's rock band,

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<sup>17</sup> See THIS IS SPINAL TAP (MGM Home Entm't 1984) (featuring Spinal Tap, "one of England's loudest bands"). 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, 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, 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.

*Id.*; *This Is Spinal Tap (1984) Quotes*, IMDB, <http://www.imdb.com/title/tt0088258/quotes> [<http://perma.cc/QL48-JJGA>] (last visited Oct. 31, 2015).

<sup>18</sup> See *supra* note 4.

<sup>19</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 *Baby Taylor Series*, TAYLOR GUITARS, <http://www.taylorguitars.com/guitars/acoustic/series/baby-taylor> [<http://perma.cc/N6XD-UW67>] (last visited Oct. 31, 2015) (offering "Baby"-branded 3/4-size Taylor guitars).

<sup>20</sup> FOO FIGHTERS, *Best of You*, on IN YOUR HONOR (RCA Records 2005).

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 consumption 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 property law and the recommendation.

The experience that followed was at once exhilarating, hilarious, and confusing. I was mesmerized by the juxtaposition of rock classics, disco, rap, and hip hop. It whetted my appetite for fuller versions of the fragments from my favorite songs but whisked 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>21</sup> Gregg Gillis, who performed under the stage name Girl Talk, created marvelous, dynamic, meandering compositions by interweaving genres and samples entirely from existing recordings. A typical composition, such as “Play Your Part (Pt. 1),” squeezed nearly 30 samples into five frenetic minutes:

- 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 Shawnna - “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”

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<sup>21</sup> See *Phil Spector’s Wall of Sound*, BBC NEWS (Apr. 14, 2009, 11:59 AM), <http://news.bbc.co.uk/2/hi/entertainment/6467441.stm> [<http://perma.cc/A3DD-MVLH>] (observing that Phil Spector has been credited with inventing the “Wall of Sound,” a style “[c]haracterised by bombastic, reverberating instruments which constantly threatened to drown out the vocals”). The Wall of Sound was perhaps best epitomized by the Righteous Brothers’s 1964 recording of “You’ve Lost That Lovin’ Feelin’.” *Id.*

- 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 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 Short - "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"<sup>22</sup>

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. I also discovered and came to appreciate entirely new genres and artists. Some of the combinations would make me laugh out loud, not something I had been known to do. Others shocked—on "Here's the Thing,"<sup>23</sup> Gillis intermingles Rick Springfield's sweet ballad of unrequited love, "Jessie's Girl,"<sup>24</sup> with Three 6 Mafia's "I'd Rather,"<sup>25</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>26</sup>

<sup>22</sup> *Feed the Animals*, ILLEGAL TRACKLIST, <http://www.illegal-tracklist.net/Tracklists/FeedTheAnimals> [<http://perma.cc/AVE7-6QZE>] (last visited Oct. 31, 2015).

<sup>23</sup> See GIRL TALK, *Here's the Thing*, on FEED THE ANIMALS (Illegal Art 2008) (at 3:48 – 4:20).

<sup>24</sup> "Jessie's Girl," a ballad about a young man's love for his best friend's girlfriend, see RICK SPRINGFIELD, *Jessie's Girl*, on WORKING CLASS DOG (RCA Records 1981), topped the Billboard Hot 100 in 1981, *The Hot 100—1981 Archive*, BILLBOARD, <http://www.billboard.com/archive/charts/1981/hot-100> [<http://perma.cc/HA7K-VJRZ>].

<sup>25</sup> THREE 6 MAFIA, *I'd Rather (Featuring UNK)*, on LAST 2 WALK (Columbia Records 2008).

<sup>26</sup> I note that Zepparella, a talented and versatile female Led Zeppelin cover band, see ZEPPARELLA, <http://www.zepparella.com/> [<http://perma.cc/D75Y-RYJR>] (last visited Oct. 31, 2015), refuses to perform "Stairway to Heaven" on the ground that it is too sacred, Shea Conner, *Female Tribute Band Captures Zeppelin's Spirit*, ST. JOSEPH NEWS-PRESS (June 26, 2014, 11:55 PM), [http://www.newspressnow.com/life/st\\_joe\\_live/music/article\\_3a8id91d-c924-5f97-b74e-424940b528ac.html](http://www.newspressnow.com/life/st_joe_live/music/article_3a8id91d-c924-5f97-b74e-424940b528ac.html) [<http://perma.cc/R4D6-9LRS>].

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 piano track from "Layla"<sup>27</sup> in "Down for the Count,"<sup>28</sup> with a rap vocal track superimposed. Under the Sixth Circuit's questionable *Bridgeport* decision,<sup>29</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>30</sup> And Professor Lawrence Lessig's book, *Remix: Making Art and Commerce Thrive in the Hybrid Economy*,<sup>31</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>32</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 for commercial purposes. And while the "Layla" piano track provides a remarkable backdrop for B.o.B's "Haterz Everywhere,"<sup>33</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 this use to be safely on the "fair use" side of the line.

Gillis's sample of Beyoncé's "Single Ladies (Put a Ring on It)"<sup>34</sup> in "That's Right"<sup>35</sup> is even more cavalier. The section beginning at 2:44 and running for

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<sup>27</sup> See *Layla*, LAST.FM, [http://www.last.fm/music/Derek+and+the+Dominos/\\_/Layla/+wiki](http://www.last.fm/music/Derek+and+the+Dominos/_/Layla/+wiki) [<http://perma.cc/T5LP-ZJ2A>] (last visited Oct. 31, 2015) (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 the song").

<sup>28</sup> GIRL TALK, *Down for the Count*, on ALL DAY (Illegal Art 2010).

<sup>29</sup> See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 798 (6th Cir. 2005) (finding a two-second sample to be infringing).

<sup>30</sup> See *Cariou v. Prince*, 714 F.3d 694, 705-06 (2d Cir. 2013) (finding fair use in part because the artwork "manifest[ed] an entirely different aesthetic"); *Blanch v. Koons* 467 F.3d 244, 252 (2d Cir. 2006) (finding fair use when the defendant's "purposes in using [the plaintiff's] image are sharply different from [the plaintiff's] goals in creating it"); *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) (finding fair use because the defendants used the concert posters as "historical artifacts").

<sup>31</sup> LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* (2008).

<sup>32</sup> See *infra* subsection II.A.1.

<sup>33</sup> B.O.B, *Haterz Everywhere (Featuring Rich Boy)*, on EASTSIDE (Atl. Recording Corp. 2007).

<sup>34</sup> BEYONCÉ, *Single Ladies (Put a Ring on It)*, on I AM... SASHA FIERCE (Columbia Records 2010).

<sup>35</sup> GIRL TALK, *That's Right*, on ALL DAY, *supra* note 28.

70 seconds appropriates the heart of Beyoncé's hit song with relatively little embellishment.<sup>36</sup>

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 to Gillis's creativity in mashing them together. Although I admired Gillis's compositional talent, I was troubled by the lack of any workable system for allocating the fruits of his borrowing. To enable Gillis to commercialize these collages without according any value to the creators of the appropriated works 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.<sup>37</sup> 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 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 configurable technology.<sup>38</sup> The traditional radio industry was built around the "disc jockey," a music aficionado who selected music to broadcast.<sup>39</sup> The advent and commercialization of tape recording technology in the 1960s and 1970s

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<sup>36</sup> *Girl Talk's That's Right Sample of Beyoncé's Single Ladies (Put a Ring on It)*, WHOSAMPLED, [http://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)) [<http://perma.cc/6RXC-MM7Y>] (providing a side-by-side comparison of "Single Ladies" and "That's Right").

<sup>37</sup> See KEMBREW MCLEOD & PETER DICOLA, *CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING* 165-66 (2011) (detailing the high transaction costs associated with clearing samples).

<sup>38</sup> Cf. SINNREICH, *supra* note 14, at 74-76 (agreeing with Lawrence Lessig that "remix culture" serves long-standing instincts to "put one's own 'spin' on previously existing cultural ideas and creative expressions" but arguing that the ease of distribution of remixed works makes the rise of configurable culture fundamentally more disruptive).

<sup>39</sup> "Payola," or undisclosed payments in return for playing a song, might also have had something to do with what DJs played. See generally R. H. Coase, *Payola in Radio and Television Broadcasting*, 22 J.L. & ECON. 269 (1979).

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.<sup>40</sup>

On the professional creative side, the “cover” license—a compulsory license introduced in the 1909 Act<sup>41</sup> and retained in the 1976 Act<sup>42</sup>—encouraged widespread experimentation in the interpretation of musical compositions.<sup>43</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>44</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>45</sup> Coinciding with the emergence of bootleg websites at the turn of the new millennium, music mashups emerged as a distinct genre which involved superimposing a vocal track from one recording onto the instrumental track of another.<sup>46</sup> In one of the breakthrough mashups, Freelance Hellraiser combined a guitar track from The Strokes’s “Hard to Explain” with the lyrics from Christina Aguilera’s “Genie in a Bottle,” to create “A Stroke of Genius.”<sup>47</sup> Douglas Wolk, music critic for *The Village Voice*, hailed the resultant work as

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

40 See, e.g., Alexis C. Madrigal, *Someone Had to Invent Karaoke—This Guy Did*, ATLANTIC (Dec. 18, 2013), <http://www.theatlantic.com/technology/archive/2013/12/someone-had-to-invent-karaoke-this-guy-did/282491> [<http://perma.cc/F4RN-L9TQ>] (recounting how Daisuke Inoue came up with the idea for a karaoke machine when he “taped a number of his favorite songs onto an open-reel tape recorder”).

41 Act to Amend and Consolidate the Acts Respecting Copyright, ch. 320, § 1(e), 35 Stat. 1075 (1909).

42 17 U.S.C. § 115 (2012).

43 See *infra* Section III.B.

44 See MCLEOD & DICOLA, *supra* note 37, at 19-29 (describing the “golden age of hip hop, when sampling artists were breaking new aesthetic ground on a weekly basis,” a period which included works such as De La Soul’s *3 Feet High and Rising*, Public Enemy’s *It Takes a Nation of Millions to Hold Us Back*, and Pete Rock & C. L. Smooth’s *Mecca and the Soul Brother*).

45 See *Mashup (music)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Mashup\\_\(music\)](http://en.wikipedia.org/wiki/Mashup_(music)) (last visited Oct. 31, 2015) (tracing the history of various elements of mashups back to hip hop, DIY punk, and the free culture movement).

46 Roberta Cruger, *The Mash-up Revolution*, SALON (Aug. 9, 2003, 4:00 PM), [http://www.salon.com/2003/08/09/mashups\\_cruger](http://www.salon.com/2003/08/09/mashups_cruger) [<http://perma.cc/PP4G-CFBH>].

47 Douglas Wolk, *Barely Legal*, VILLAGE VOICE (Feb. 5, 2002), <http://www.villagevoice.com/2002-02-05/music/barely-legal> [<http://perma.cc/63XS-79Y6>].

MTV series that featured popular music videos]. Each is what the other one was missing all along.<sup>48</sup>

The mashup genre went viral with the 2004 release of Danger Mouse's *The Grey Album*, seamlessly combining Jay-Z's *The Black Album* with The Beatles' *The White Album*.<sup>49</sup> Although Danger Mouse released only 3000 copies of the album and never intended to sell the album commercially, due in part to concerns about copyright infringement, the album unwittingly became an overnight sensation.<sup>50</sup> *Rolling Stone* praised *The Grey Album* as an "ingenious hip-hop record that sounds oddly ahead of its time,"<sup>51</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>52</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.<sup>53</sup> The album would garner favorable reviews from numerous critics as well as Best Album of 2004 honors from *Entertainment Weekly*.<sup>54</sup> Later that year, MTV introduced "Ultimate Mash-Ups," a series mashing together pairs of well-known recording artists.<sup>55</sup>

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

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<sup>48</sup> *Id.*

<sup>49</sup> *The Mouse that Remixed*, NEW YORKER (Feb. 9, 2004), <http://www.newyorker.com/magazine/2004/02/09/the-mouse-that-remixed> [<http://perma.cc/5B9J-ER2K>].

<sup>50</sup> 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 & SOC'Y 79, 80 (2005); *The Mouse that Remixed*, *supra* note 49.

<sup>51</sup> Lauren Gitlin, *DJ Makes Jay-Z Meet Beatles*, ROLLING STONE (Feb. 5, 2004), <http://www.rollingstone.com/music/news/dj-makes-jay-z-meet-beatles-20040205> [<http://perma.cc/BHH2-WYQJ>].

<sup>52</sup> McLeod, *supra* note 50, at 80-81.

<sup>53</sup> Joseph Patel, *Grey Tuesday Group Says 100,000 Downloaded Jay-Z/Beatles Mix*, MTV (Mar. 5, 2004), <http://www.mtv.com/news/1485593/grey-tuesday-group-says-100000-downloaded-jay-zbeatles-mix> [<http://perma.cc/A2UZ-T4PQ>].

<sup>54</sup> JUNE SKINNER SAWYERS, READ THE BEATLES: CLASSIC AND NEW WRITINGS ON THE BEATLES, THEIR LEGACY, AND WHY THEY STILL MATTER, at xlvi (2006).

<sup>55</sup> Jeff Leeds, *Mix and Mash*, N.Y. TIMES (Jan. 9, 2005), <http://www.nytimes.com/2005/01/09/arts/music/09leed.html> [<http://perma.cc/K6EC-ZF2N>]. A collaboration between rapper Jay-Z and rock band Linkin Park featured on the MTV series went on to sell 5 million copies worldwide. Joe D'Angelo, *Jay-Z's Retirement Gets Even Richer as Collision Course Debuts at #1*, MTV (Dec. 8, 2004), <http://www.mtv.com/news/1494614/jay-zs-retirement-gets-even-richer-as-collision-course-debuts-at-1> [<http://perma.cc/UU4R-MGEP>]; Evan Rytlewski, *Jay-Z and Linkin Park's Collision Course Was at Once a Cash-In and a Labor of Love*, A.V. CLUB (Feb. 12, 2013), <http://www.avclub.com/article/jay-z-and-linkin-parks-icollision-course-i-was-at-o-92389> [<http://perma.cc/H6XQ-9J39>].

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 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>56</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—captured millennials' attention largely through live DJ performances, radio shows, Internet channels, and mass media as opposed to traditional recording industry outlets.<sup>57</sup> Few mashup artists clear the underlying copyrighted works and hence the products are considered infringing by most record labels.<sup>58</sup> As a result, music services have been hesitant to sell or stream mashup artists.<sup>59</sup> Nonetheless, the mashup genre has achieved a widespread following through file-sharing websites, fan and review sites,<sup>60</sup> and live DJ 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.<sup>61</sup> Since the compact disc technology is not

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<sup>56</sup> Cruger, *supra* note 46.

<sup>57</sup> See *infra* subsection I.B.4.

<sup>58</sup> See *infra* subsection II.A.2.

<sup>59</sup> See *infra* notes 92–96 and accompanying text.

<sup>60</sup> See, e.g., MASHUP CHARTS, <http://www.mashup-charts.com> [<http://perma.cc/PT3F-8E7M>] (last visited Oct. 31, 2015) (featuring hundreds of mashup artists, videos, and rating charts); Jared Smith, *The 50 Best Mashups of 2013*, TOO GOOD FOR RADIO (Dec. 17, 2013), <http://www.toogoodforradio.com/mashup/the-30-best-mashups-of-2013-so-far> [<http://perma.cc/PZH6-PNL5>] (listing a fan's favorite fifty mashups from 2013); Max Chung & Sarah Polohsky, *Top 10 Mashup Albums of All Time*, VIBE (June 14, 2013), <http://www.vibe.com/photo-gallery/top-10-mashup-albums-all-time> [<http://perma.cc/U7QM-L3PW>] (listing *Vibe's* selection of the top ten mashup albums of all time accompanied by embedded SoundCloud streams of some of the albums).

<sup>61</sup> Abi Grogan & Louis Pattison, *Music Production in the 2010s*, ENGINEERING & TECH. MAG. (Nov. 14, 2011), <http://eandt.theiet.org/magazine/2011/11/todays-producers.cfm> [<http://perma.cc/NW9T-3FDU>].

encrypted,<sup>62</sup> 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.<sup>63</sup> 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 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>64</sup>

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<sup>62</sup> Wendy Seltzer, *The Imperfect Is the Enemy of the Good: Anticircumvention Versus Open User Innovation*, 25 BERKELEY TECH. L.J. 909, 943 & n.162 (2010).

<sup>63</sup> *Inside a Remix Competition: Insight and Interviews*, REVERBNATION (Oct. 9, 2012), <http://blog.reverbNation.com/2012/10/09/inside-a-remix-competition-insight-and-interviews> [<http://perma.cc/TPY6-K9ZA>].

<sup>64</sup> *Kanye West—Love Lockdown; Radiohead—Reckoner*, DJ EARWORM, <http://www.djearworm.com/reckoner-lockdown> [<http://perma.cc/ZQ99-RKZ3>] (last visited Oct. 31, 2015).

The DJ community has developed a wide range of resources—some public and some secret—to obtain the source material for their craft.<sup>65</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>66</sup> 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.<sup>67</sup> He estimates spending a day to produce each minute of recording time.<sup>68</sup>

## 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, Soulwax’s “Smells Like Teen Booty” superimposes Destiny’s Child’s vocal track from “Bootylicious” on the instrumental track of Nirvana’s “Smells Like Teen Spirit.”<sup>69</sup>

*The Grey Album* took mashing a step further, breaking the vocal tracks from Jay-Z’s *The Black Album* into samples in the process of assembling a vocal track for instrumental tracks from The Beatles’s *The White Album*.<sup>70</sup> 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>71</sup>

Girl Talk uses a far more varied, eclectic collage technique, weaving samples from 20 to 30 recordings into his typical mashup compositions.<sup>72</sup> DJ Earworm has earned a reputation for his annual “United State of Pop”

<sup>65</sup> See, e.g., SOURCE: DJ MUSIC SUPPLY, [www.thesourceformusic.com/index.cfm?genre=all](http://www.thesourceformusic.com/index.cfm?genre=all) [<http://perma.cc/YLY2-V99D>] (last visited Oct. 31, 2015) (making available numerous songs for use by DJs); see also *List of Musical Works Released in a Stem Format*, WIKIPEDIA, [http://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) [<http://perma.cc/PP36-U5WK>] (last visited Oct. 31, 2015) (listing songs legally made available in the stem format); *Song Stems*, REDDIT, <http://www.reddit.com/r/SongStems/> [<http://perma.cc/5WAN-QL2N>] (last visited Oct. 31, 2015) (providing an online forum for users to obtain song stems).

<sup>66</sup> See Robert Levine, *Steal This Hook? D.J. Skirts Copyright Law*, N.Y. TIMES (Aug. 6, 2008), <http://www.nytimes.com/2008/08/07/arts/music/07girl.html> [<http://perma.cc/SL9S-QYK7>] (reporting that Girl Talk has said that he “want[s] to be a musician and not just a party D.J.”).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See Dom Phillips, *Smells Like Teen Booty*, GUARDIAN (Feb. 27, 2002), <http://www.theguardian.com/culture/2002/feb/27/artsfeatures> [<http://perma.cc/L6DN-JL6A>].

<sup>70</sup> See *supra* note 49 and accompanying text.

<sup>71</sup> See *Music Downloads*, PARTY BEN, <http://www.partyben.com/downloads/> [<http://perma.cc/NN65-RFQH>] (last visited Oct. 31, 2015).

<sup>72</sup> See, e.g., *Feed the Animals*, *supra* note 22.

mashup, which weaves the top 25 songs from Billboard's Year-End Hot 100 into a seamless composition.<sup>73</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 150 million registered users as of July 2015.<sup>74</sup> SoundCloud claims that "about 175 million people listen to music on its platform each month."<sup>75</sup> It allows anyone to stream as much content as they wish. Artists may upload up to three hours of audio to their profiles for free.<sup>76</sup> SoundCloud earns money by charging subscribers up to \$135 per year for unlimited uploads and access to analytics tools, which can be used to promote tracks.<sup>77</sup> Even the major labels have used SoundCloud as a marketing tool to reach its large fan community, notwithstanding that SoundCloud lacks licensing deals to insulate it from takedown notices for many of the remixes on its site.<sup>78</sup> Popular DJ and dance-music producer David Guetta laments, "I feel like I'm too big to use SoundCloud, but I want to use it."<sup>79</sup> Guetta cannot release his mashups on such services until they start paying the creators of the tracks that he samples. He considers the burden of getting clearance to be too onerous.<sup>80</sup>

<sup>73</sup> Jason Lipshutz, 'United State of Pop' Premiere: Watch DJ Earworm's Mash-Up of 2014's Biggest Hits, BILLBOARD (Dec. 3, 2014, 11:00 AM), <http://www.billboard.com/articles/columns/pop-shop/6334723/united-state-of-pop-2014-dj-earworm> [<http://perma.cc/2DEW-ZHJA>].

<sup>74</sup> Rob Walker, *Can SoundCloud Be the Facebook of Music?*, BLOOMBERG (July 10, 2015), <http://www.bloomberg.com/news/features/2015-07-10/can-soundcloud-be-the-facebook-of-music-> [<http://perma.cc/QQ5D-JFRE>].

<sup>75</sup> Ben Sisario, *Popular and Free, SoundCloud Is Now Ready for Ads*, N.Y. TIMES (Aug. 21, 2014), <http://www.nytimes.com/2014/08/21/business/media/popular-and-free-soundcloud-is-now-ready-for-ads.html> [<http://perma.cc/865C-MRHW>].

<sup>76</sup> *On SoundCloud Overview*, SOUND CLOUD, <https://on.soundcloud.com/overview> [<http://perma.cc/7LW3-CGR2>] (last visited Oct. 31, 2015).

<sup>77</sup> Douglas MacMillan, *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> [<http://perma.cc/Q5YG-KQJH>]. SoundCloud earns some advertising revenue, which it shares "with several dozen partners, including Warner Music." Hannah Karp, *Turning a Profit from Music Mashups*, WALL ST. J. (Mar. 6, 2015, 7:18 PM), <http://www.wsj.com/articles/turning-a-profit-from-music-mashups-1425687517> [<http://perma.cc/8S7W-ANA9>]. It is also planning to introduce a paid-subscription service later this year. *Id.* But it lacks licensing deals with Universal Music and Sony Music, the largest two record labels, and Warner Music is not being paid for unauthorized samples. *Id.*

<sup>78</sup> Adam Satariano, *SoundCloud Said to Near Deals with Record Labels*, BLOOMBERG (Jul. 10, 2014, 6:54 PM), <http://www.bloomberg.com/news/articles/2014-07-10/soundcloud-said-to-near-deals-with-record-labels> [<http://perma.cc/296X-KTRG>].

<sup>79</sup> Karp, *supra* note 77.

<sup>80</sup> *See id.* (noting that Guetta feels he "doesn't have time to get clearance for every song himself").

Other mashup distribution channels include Mixcloud,<sup>81</sup> Illegal Art,<sup>82</sup> Crooklyn Clan,<sup>83</sup> and Mashtix.<sup>84</sup> While many of these websites have operated without substantial interference from owners of the sampled works, that appears to be changing as the recording industry seeks to monetize their catalog and post-Napster generations become a greater share of the marketplace. In June 2014, Kaskade, a popular mashup artist and DJ,<sup>85</sup> was the subject of dozens of takedown notices submitted to SoundCloud.<sup>86</sup> While praising SoundCloud for its “beauti[ful]” and “elegant”<sup>87</sup> way of working with social media, Kaskade criticized its handling of copyright notices and the record companies for shortsighted thinking,

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

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<sup>81</sup> See *What Is Mixcloud?*, MIXCLOUD (May, 14, 2015, 4:07 PM) <http://support.mixcloud.com/customer/portal/articles/122188-what-is-mixcloud-> [<http://perma.cc/V8K4-3VV2>] (describing Mixcloud as “the world’s leading platform for radio and DJs” with “over half a million recognized DJs and radio presenters”). Mixcloud restricts its users from downloading audio content from its website for licensing reasons. *Mixcloud Founder Claims Service Can Be a Piracy Beater*, MUSIC WEEK (July 2, 2011, 3:58 PM), <http://www.musicweek.com/news/read/mixcloud-founder-claims-service-can-be-a-piracy-beater/046136> [<http://perma.cc/6VEG-UBLP>]. Mixcloud also requires its users to attribute their audio uploads with correct artist and song metadata in order to preserve intellectual property rights. Katie Scott, *British Entrepreneurs Mix up Online Radio*, WIRED.CO.UK (Oct. 8, 2009), <http://www.wired.co.uk/news/archive/2009-10/09/british-entrepreneurs-mix-up-online-radio> [<http://perma.cc/A2YR-GZR9>].

<sup>82</sup> See ILLEGAL ART, <http://illegalart.net/home> [<http://perma.cc/M4B6-7LSL>] (last visited Oct. 31, 2015) (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>83</sup> See CROOKLYN CLAN: THE VAULT, <http://www.crooklynclan.net> [<http://perma.cc/4BGG-FQJD>] (last visited Oct. 31, 2015) (characterizing the website as “a re mixing service designed for use mainly by performance DJs. The re mixes 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>84</sup> See MASHSTIX, [www.mashstix.com](http://www.mashstix.com) [<http://perma.cc/S26L-B3YN>] (last visited Oct. 31, 2015) (featuring on “The Frontpage” some of the leading mashups uploaded by users).

<sup>85</sup> See generally *Kaskade Biography*, BILLBOARD, <http://www.billboard.com/artist/305529/kaskade/biography> [<http://perma.cc/KP8R-WKGW>] (last visited Oct. 31, 2015).

<sup>86</sup> See Kaskade, *brb . . . Deleting SoundCloud.*, THIS IS A DYNASTY, <http://thisisadynasty.tumblr.com/post/87945465547/brbdeleting-soundcloud> [<http://perma.cc/KX3T-46SP>] (last visited Oct. 31, 2015) (posting a screenshot of a notice from SoundCloud to take down mashups).

<sup>87</sup> Sisario, *supra* note 75.

kind of a pain-in-the-ass for people like me. . . . Countless artists have launched their careers through 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>88</sup>

While the distribution channels for mashups are largely user-uploaded and noncommercial (in the sense that listeners do not pay for access), some unlicensed mashups are available on YouTube, iTunes, and Amazon,<sup>89</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,

For your videos to be eligible for monetization, you must own all the necessary rights to commercially use all visuals and audio elements, whether they belong to you or to a third party. These elements include (but are not limited to) logos, thumbnails, intro/outro/background music, software interfaces, and video games. If you decide to incorporate third-party content in a video, you must clear the rights to use and monetize this content on YouTube. Often, this clearance takes the form of explicit written permission from the rights holders.<sup>90</sup>

Uploaders who violate these rules are subject to takedown notices and may have their YouTube channels removed. YouTube's Content ID system can catch videos containing copyrighted works and—depending upon the choices of the copyright owner—block the allegedly infringing content or permit it and divert the advertising revenue to that copyright claimant.<sup>91</sup>

While YouTube's Content ID system represents 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 of mashup artists from profiting directly from others' enjoyment of their

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<sup>88</sup> Kaskade, *supra* note 86; see also Stuart Dredge, *Kaskade Attacks 'Out of Touch and Irrelevant' SoundCloud Takedowns*, MUSIC:ALLY (June 9, 2014), <http://musically.com/2014/06/09/kaskade-attacks-out-of-touch-and-irrelevant-soundcloud-takedowns> [<http://perma.cc/9QH6-ZEK9>] (quoting Kaskade's post); Sisario, *supra* note 75 (same).

<sup>89</sup> See, e.g., *Feed the Animals [Explicit]*, AMAZON, [http://www.amazon.com/Feed-Animals-Explicit-Girl-Talk/dp/B001ELBVLG/ref=pd\\_sim\\_dmusic\\_a\\_1?ie=UTF8&refRID=0Z8N2F2FHNHDR4XAEDPQ](http://www.amazon.com/Feed-Animals-Explicit-Girl-Talk/dp/B001ELBVLG/ref=pd_sim_dmusic_a_1?ie=UTF8&refRID=0Z8N2F2FHNHDR4XAEDPQ) [<http://perma.cc/P9TB-3LGH>] (last visited Oct. 31, 2015) (offering Girl Talk's album *Feed the Animals* for download).

<sup>90</sup> *What Kind of Content Can I Monetize?*, YOUTUBE, <https://support.google.com/youtube/answer/2490020?hl=en> [<http://perma.cc/E588-6KJX>] (last visited Oct. 31, 2015).

<sup>91</sup> *How Content ID Works*, YOUTUBE, <https://support.google.com/youtube/answer/2797370?hl=en> [<http://perma.cc/G58Q-FVY3>] (last visited Oct. 31, 2015).

mashups. Other considerations, such as self-expression and promotion for live performances, provide indirect rewards for posting mashups.

iTunes, Amazon, 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.<sup>92</sup> A few years ago, iTunes did not distribute Girl Talk's works,<sup>93</sup> but since then access has ebbed and flowed. iTunes currently sells downloads for Girl Talk's 2004 *Unstoppable* album (and a few singles), but his later, more popular, albums are not currently available on the service.<sup>94</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, but *All Day* (2010) is not.<sup>95</sup> Similarly, Spotify contains three of Girl Talk's albums—*Feed the Animals*, *Night Ripper*, *Unstoppable*—but not *All Day*.<sup>96</sup> Like YouTube, downloading and streaming services lack a mechanism for dividing value among multiple creative claimants absent a contractual agreement among the contributors.<sup>97</sup>

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

<sup>92</sup> See Karp, *supra* note 77 (“Spotify AB, Apple Inc.’s Beats Music and most subscription music services don’t include DJ creations or user-made mixes in their song libraries because they don’t have a way to pay for them. Record labels, meanwhile, have been slow to agree on a revenue-sharing plan.”).

<sup>93</sup> See Levine, *supra* note 66 (noting that both iTunes and a CD distributor stopped carrying Girl Talk’s *Night Ripper* album because of legal concerns).

<sup>94</sup> *Girl Talk*, iTUNES, <https://itunes.apple.com/us/artist/girl-talk/id155905421> [<http://perma.cc/QFE4-YHBD>] (last visited Oct. 31, 2015). Under Customer Reviews on iTunes, 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.” Steven11211988, Comment to *Unstoppable*, iTUNES, <https://itunes.apple.com/us/album/unstoppable/id465352069> [<http://perma.cc/4MR5-Z5R2>] (last visited Oct. 31, 2015). Deuce Dizzle concurs: “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!” Deuce Dizzle, Comment to *Unstoppable*, *supra*.

<sup>95</sup> *Girl Talk, Albums*, AMAZON, [http://www.amazon.com/Girl-Talk/e/Bo0197HZTM/digital/ref=ntt\\_mp3\\_rdr?\\_encoding=UTF8&sn=d](http://www.amazon.com/Girl-Talk/e/Bo0197HZTM/digital/ref=ntt_mp3_rdr?_encoding=UTF8&sn=d) [<http://perma.cc/6HCD-HKU9>] (last visited Oct. 31, 2015).

<sup>96</sup> *Girl Talk*, SPOTIFY, <https://play.spotify.com/artist/6awzBEyEEwWH0jLox1DkLr> [<http://perma.cc/35JM-Z5EP>] (last visited Oct. 31, 2015).

<sup>97</sup> See *supra* notes 90–91 and accompanying text.

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>98</sup>

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

The most important revenue source for mashup artists has been live performance as DJs. The mashup genre overlaps with the market for DJs and electronic artists, which has thrived over the past several decades.<sup>99</sup> Dance clubs featuring EDM and all manner of mashup creativity draw large crowds throughout the world.<sup>100</sup>

Several factors contribute to the lack of a salient copyright concern in the live performance domain. First, radio stations and live performance venues routinely obtain blanket public performance licenses from the major performance rights organizations.<sup>101</sup> Second, U.S. copyright law does not grant recording artists public performance rights.<sup>102</sup> Third, radio and live performance have traditionally been seen as promoting record sales,<sup>103</sup> although the polarity is reversing in the mashup realm where download and streaming websites operate primarily to promote live performance revenue.<sup>104</sup>

The amount of income that the top DJs earn through live performances rivals that of top conventional performing artists.<sup>105</sup> Kaskade, Avicii, Tiësto, David

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<sup>98</sup> DJ Earworm, EARWORM MASHUPS, <http://www.djearworm.com> [<http://perma.cc/2K56-WT65>] (last visited Oct. 31, 2015); *see also* Cruger, *supra* note 46 (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”).

<sup>99</sup> *See infra* note 105 and accompanying text.

<sup>100</sup> *See infra* note 105 and accompanying text.

<sup>101</sup> *See infra* note 143 and accompanying text.

<sup>102</sup> 17 U.S.C. § 114(a) (2012).

<sup>103</sup> *See* Jay L. Cooper, *Recording Contract Negotiation: A Perspective*, 1 LOY. L.A. ENT. L. REV. 43, 50 (1981) (“Companies are cognizant of the fact that sales increase significantly in a city in which an artist has performed, particularly when an act has a substantial impact in ‘live’ performances; therefore, touring is an important promotional vehicle.”); Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 827 & n.208 (2007) (noting the traditional belief that the record labels and radio broadcasters “coexisted in a symbiotic relationship” but citing an unpublished manuscript that questions whether radio airtime still encourages album sales).

<sup>104</sup> *See* Phil Morse, *5 Reasons Why DJs Should Make Mash-ups (Not Mixtapes) to Get Bookings*, DIGITAL DJ TIPS (Feb. 9 2011), <http://www.digitaldjtips.com/2011/02/djs-make-mash-ups-not-mixtapes/> [<http://perma.cc/9TTK-PCGH>] (“Since the mash-up scene exploded globally in 2003 . . . , artists have increasingly got[ten] DJ bookings on the back of viral mash-ups . . .”).

<sup>105</sup> *See* Josh Eells, *Night Club Royale: Can Las Vegas Make More Money from Dance Music than from Gambling?*, NEW YORKER (Sept. 30, 2013), <http://www.newyorker.com/magazine/2013/09/30/night-club-royale> [<http://perma.cc/25T9-H9PU>] (recounting how the competition among Las Vegas nightclubs for the top DJs has driven up wages); Zack O’Malley Greenburg, *The World’s Highest-Paid DJs: Electronic Cash Kings 2014*, FORBES (Aug. 19, 2014, 9:57 AM), <http://www.forbes.com/sites/zackomalleygreenburg/2014/08/19/the-worlds-highest-paid-djs-electronic-cash-kings->

Guetta, Steve Aoki, deadmau5, Afrojack, Skrillex, Girl Talk, and many other DJs/remix artists maintain active performance schedules and can earn well in excess of \$100,000 per show.<sup>106</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.<sup>107</sup> 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 EDM genres, leading many artists to move profitably among these genres.<sup>108</sup> The most successful DJs have become top record producers and collaborators with successful rap, hip hop, and other pop recording artists signed to major labels.<sup>109</sup> Some have become top recording artists in their own right.

Kaskade's career trajectory illustrates this path. He began working in nightclubs in 1995.<sup>110</sup> He would go on to produce original dance track and remixes as his DJ career evolved.<sup>111</sup> 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>112</sup> As his career developed, he increasingly collaborated with other DJs and recording artists—ranging from deadmau5 to Skrillex, Tiësto, Mindy Gledhill, and Neon Trees.<sup>113</sup> He now performs in the largest arenas, headlines the top music festivals, and is a resident party DJ in Las Vegas.<sup>114</sup>

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2014/ [http://perma.cc/2ALT-E2S9] (estimating that the top ten DJs earned \$286 million in 2014, which represents an eleven percent increase from the previous year).

<sup>106</sup> *Id.*

<sup>107</sup> Zack O'Malley Greenburg, *From Skrillex to Steve Aoki: Inside the Rise of DJ-Owned Labels*, FORBES (Aug. 24, 2015, 9:52 AM), <http://www.forbes.com/sites/zackomalleygreenburg/2015/08/24/from-skrillex-to-steve-aoki-inside-the-rise-of-dj-owned-labels/> [http://perma.cc/CJ4J-HBAS] (chronicling the career transition of several prominent remix artists from predominantly performance-focused to the signing of major record deals).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Michael Schulman, *How Ryan Raddon Became the \$200,000-a-Night D.J. Known as Kaskade*, N.Y. TIMES (Nov. 9, 2011), <http://www.nytimes.com/2011/11/10/fashion/a-200000-a-night-dj-known-as-kaskade-is-really-ryan-raddon-a-mormon.html> [http://perma.cc/54J8-447A].

<sup>111</sup> *Id.*

<sup>112</sup> *Kaskade Bio*, BEATPORT, <http://dj.beatport.com/kaskade> [http://perma.cc/GQC6-WS8E] (click "read more") (last visited Oct. 31, 2015).

<sup>113</sup> *Kaskade Discography*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Kaskade\\_discography](https://en.wikipedia.org/wiki/Kaskade_discography) (last visited Oct. 31, 2015).

<sup>114</sup> Schulman, *supra* note 110.

Girl Talk's career is expanding along similar lines. In 2014, he collaborated with noted rapper Freeway<sup>115</sup> on an EP entitled *Tolerated*,<sup>116</sup> featuring Waka Flocka Flame, another successful rapper. This release is available on iTunes and is promoted through a YouTube video.<sup>117</sup> Additionally, Girl Talk has branched out to perform in Las Vegas, but has expressed qualms about whether "it's the best way" to present his work.<sup>118</sup>

## II. THE LEGAL, MARKET, AND POLICY DIVIDES

As reflected in the prior section, copyright concerns have played a significant, but 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 for the larger creative and copyright ecosystems. The current 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 Part explores the legal, market, and policy stalemate.

### A. *The Copyright Backdrop*

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

#### 1. General Framework

United States 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

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<sup>115</sup> See generally *Freeway*, ITUNES, <https://itunes.apple.com/us/artist/freeway/id112076> [<http://perma.cc/B2SX-C7PC>] (last visited Oct. 31, 2015).

<sup>116</sup> Ian Cohen, *Update—Girl Talk*, PITCHFORK (Mar. 25, 2014), <http://pitchfork.com/features/update/9362-girl-talk/> [<http://perma.cc/64LQ-X9CK>].

<sup>117</sup> Maker Music, *Girl Talk & Freeway—"Tolerated" ft. Waka Flocka Flame—Official Music Video*, YOUTUBE (Mar. 31, 2014), <http://www.youtube.com/watch?v=ySZHeosBoI> [<http://perma.cc/N6VR-KS3U>].

<sup>118</sup> Cohen, *supra* note 116.

exceptions such as the fair use doctrine<sup>119</sup> and the “cover” license,<sup>120</sup> the Copyright Act grants composers and recording artists the exclusive rights to reproduce, adapt, and distribute copyrighted works.<sup>121</sup> In addition, it grants composers the exclusive right to publicly perform their works.<sup>122</sup>

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 (2) substantial similarity of protected expression.<sup>123</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>124</sup> courts will generally excuse very small amounts of copying because they cause too little harm to justify providing a remedy.<sup>125</sup> The applicability of this doctrine to digital sampling, however, was cast in doubt in a controversial 2005 case.<sup>126</sup> Even if the *de minimis* doctrine does not apply, courts apply a multifaceted test to determine whether the amount of protected expression appropriated would be considered substantial by an ordinary observer.<sup>127</sup> The court must first dissect the plaintiff’s copyrighted work to filter out the unprotected elements, such as ideas<sup>128</sup> or unoriginal

<sup>119</sup> 17 U.S.C. § 107 (2012).

<sup>120</sup> The cover license (or compulsory mechanical license) authorizes anyone, upon payment of a statutory rate, to record and distribute their own version of a musical composition as long as the work has already been publicly distributed under the authority of the copyright owner. *See infra* Section III.B.

<sup>121</sup> 17 U.S.C. § 106 (2012).

<sup>122</sup> *Id.*

<sup>123</sup> *See* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01[B] (2015) (asserting that infringement requires both factual copyright and substantial similarity, although courts have not often explicitly differentiated between the two inquiries).

<sup>124</sup> This doctrine is derived from the Latin phrase “*de minimis non curat lex*,” which means that the law does not concern itself with trifles. Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1457-58 (1997); *see also* Fisher v. Dees, 794 F.2d 432, 435 n.2 (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) (“[E]ven 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.” (citation omitted)).

<sup>125</sup> *See* 2 NIMMER & NIMMER, *supra* note 123, at § 8.01[G] (acknowledging that courts have occasionally recognized a *de minimis* defense in copyright suits but arguing that the doctrine “should be limited largely to its role in determining either substantial similarity or fair use”).

<sup>126</sup> *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 799-801 (6th Cir. 2005) (deeming any amount of sampling to be an infringement); 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) [<http://perma.cc/FW8X-SK24>] (asserting that the Sixth Circuit’s *Bridgeport* decision, if adopted by other courts, threatens to make sampling prohibitively expensive).

<sup>127</sup> The seminal case establishing this framework is *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

<sup>128</sup> 17 U.S.C. § 102(b) (2012).

expression.<sup>129</sup> It then determines whether the defendant's work is substantially similar to the protected expression, a notoriously vague standard.<sup>130</sup>

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 work would still be an infringement as long as the author's "expression" rather than merely the author's "ideas" are taken.<sup>131</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>132</sup>

Determining the threshold for infringement is particularly difficult when a defendant has copied distinct literal elements of the plaintiff's work and incorporated them into a larger work of her own. This class of cases has been referred to as fragmented literal similarity.<sup>133</sup> The Nimmer treatise states,

The question in each case is whether the similarity relates to matter that 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 general under such circumstances, the defendant may not claim immunity on the grounds that 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>134</sup>

<sup>129</sup> See *id.* § 102(a) ("Copyright protection subsists . . . in *original* works of authorship . . ." (emphasis added)); *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) ("The *sine qua non* of copyright is originality.").

<sup>130</sup> See *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 907 (3d Cir. 1975) ("[M]ost cases are decided on an ad hoc basis."); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) ("The test for infringement of a copyright is of necessity vague."). See generally 4 NIMMER & NIMMER, *supra* note 123, § 13.03 (identifying the numerous tests that courts have employed to determine substantial similarity).

<sup>131</sup> H.R. REP. NO. 94-1476, at 61 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5675 (emphasis added).

<sup>132</sup> *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 162 (2d Cir. 1986).

<sup>133</sup> See 4 NIMMER & NIMMER, *supra* note 123, § 13.03[A][2] (defining fragmented literal similarity as when "no more than a line, or a paragraph, or a page or chapter of the copyrighted work has been appropriated").

<sup>134</sup> *Id.* § 13.03[A][2][a].

If copyright infringement would otherwise be found, the defendant can nonetheless escape liability by establishing that his or her use was fair.<sup>135</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 copyrighted work.<sup>136</sup>

Although fair use is considered critical to copyright law's fundamental purpose of promoting the progress of knowledge and learning,<sup>137</sup> its availability to insulate copying is "notoriously difficult to predict"<sup>138</sup> and it is rarely possible to obtain a legal determination prior to engaging in the use.<sup>139</sup> As a result,

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<sup>135</sup> 17 U.S.C. § 107 (2012).

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

<sup>137</sup> See Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 4 (1997) (describing fair use as "[o]ne of the most important counterbalances to the rights granted to copyright owners").

<sup>138</sup> See Joseph P. Liu, *Two-Factor Fair Use?*, 31 COLUM. J.L. & ARTS 571, 574-78 (2008) (arguing that the fair use test exemplifies how "notoriously difficult" it is to predict accurately the outcomes of multifactor balancing tests); see also PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 12.1, at 12:3 (3d ed. 2005) ("No copyright doctrine is less determinate than fair use."); Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1095 (2007) ("[T]he fair use doctrine produces significant ex ante uncertainty"); David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 281 (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.* Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 51 (2012) (offering "considerable evidence against the oft-repeated assertion that fair use adjudication is blighted by unpredictability and doctrinal incoherence"); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2570 (2009) (arguing that "productive uses are likely to be fair" when the users are "careful about how much they take from copyrighted works in relation to their purpose"). See generally 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). 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 risks of large statutory damages and injunctive relief reinforce a norm of "if in doubt, leave it out." Peter S. Menell & Ben Depoorter, *Using Fee Shifting to Promote Fair Use and Fair Licensing*, 102 CALIF. L. REV. 53, 69-71 (2014); see also PATRICIA AUFDERHEIDE & PETER JASZI, *UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS* 18 (2004), [http://www.cmsimpact.org/sites/default/files/UNTOLDSTORIES\\_Report.pdf](http://www.cmsimpact.org/sites/default/files/UNTOLDSTORIES_Report.pdf) [<http://perma.cc/X5MS-NYJF>] ("Filmmakers sometimes must cut out scenes that would improve the documentary, in order to avoid rights problems.").

<sup>139</sup> Menell & Depoorter, *supra* note 138, at 69-71 (criticizing the absence of preclearance institutions that could preemptively address copyright uncertainties to "avoid unnecessarily risking large investments in production, marketing, and distribution"); see also Peter S. Menell & Michael

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.

Federal copyright law also imposes liability upon those who publicly perform musical compositions without authorization, but does not extend protection to public performance of sound recordings.<sup>140</sup> As a result, to

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J. Meurer, *Notice Failure and Notice Externalities*, 5 J. LEG. ANALYSIS 1, 23-25, 38 (2013) (discussing the virtues of preclearance 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 MICHAEL C. DONALDSON, CLEARANCE AND COPYRIGHT 29, 365-67 (3d ed. 2008) (describing the development of insurers' newfound willingness to insure fair use material); 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, 369, 379 (2014) (noting that insurance companies have become more willing to insure documentary films after a contingent of attorneys published a "Best Practices in Fair Use" guide for documentarians); Peter Jaszi, *Copyright, Fair Use and Motion Pictures*, 2007 UTAH L. REV. 715, 732-36 (offering a drafter's perspective on the "Statement of Best Practices" and its effects); 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, 485 (2009) (noting that "insurers, film-makers, academics, and attorneys have all expressed optimism for the future of fair use in the documentary field, especially since the insurers have become a more permissive gatekeeper"); cf. Michael C. Donaldson, *Fair Use: What a Difference a Decade Makes*, 57 J. COPYRIGHT SOC'Y USA 331, 332 (2010) (examining how the "Statement of Best Practices" has allowed documentary filmmakers to increase the use of copyrighted materials in their films); Anthony Falzone & Jennifer Urban, *Demystifying Fair Use: The Gift of the Center for Social Media Statements of Best Practices*, 57 J. COPYRIGHT SOC'Y U.S.A. 337, 346-47 (2010) (contending that the "Statement of Best Practices" has coaxed the insurance industry into insuring "unlicensed material so long as [it] was reviewed by a qualified attorney"). See generally ASSOC. INDEP. VIDEO & FILMMAKERS ET AL., DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE (2005), [http://www.cmsimpact.org/sites/default/files/fair\\_use\\_final.pdf](http://www.cmsimpact.org/sites/default/files/fair_use_final.pdf) [<http://perma.cc/9TSN-HVY8>]. There has not, however, been any comparable development on the music side. Given the wide divide among groups affected by music remixes, see *infra* Section II.B, 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>140</sup> The explanation for this distinction reflects some of the complex politics surrounding copyright law. Congress first extended copyright protection to musical compositions in 1831, see An Act to Amend the Several Acts Respecting Copy Rights, ch. 16, 4 Stat. 436 (1831), and added a performance right in 1897, see An Act to Amend Title Sixty, Chapter Three, of the Revised Statutes, Relating to Copyrights, ch. 4, 29 Stat. 481 (1897). When radio broadcasting emerged, the American Society of Composers, Authors and Publishers (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. Marcus Cohn, *Music, Radio Broadcasters and the Sherman Act*, 29 GEO. L.J. 407, 414-25 (1941) (noting ASCAP's initial successes in imposing liability on radio stations, radio advertisers, and public venues that played radio broadcasts). This led to the antitrust oversight of such licenses. See Michael A. Einhorn, *Intellectual Property and Antitrust: Music Performing Rights in Broadcasting*, 24 COLUM.-VLA J.L. & ARTS 349, 354-56 (2001) (chronicling the Justice Department's successful efforts to compel ASCAP and BMI to obtain only nonexclusive licenses from copyright holders, to refrain from engaging in price discrimination among "similarly situated" licensees, and to accept the creation of the "Rate Court" that would resolve any licensing disputes). Due in substantial part to resistance from broadcasters, sound recordings did not

perform a track publicly, a user must obtain a license from the owner of the copyright in the musical composition but not the owner of the copyright in the sound recording.<sup>141</sup> Liability can also extend, through the doctrine of vicarious liability, to the venues hosting these performances.<sup>142</sup> Nonetheless, liability 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).<sup>143</sup> Such licenses afford DJs the ability to perform, even in sampled form, copyrighted musical compositions. To the extent that they prerecord such tracks, however, DJs could potentially face federal liability for violations of the reproduction or derivative work rights.

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receive federal copyright protection until 1972. Robert W. Woods, Note, *Copyright: Performance Rights for Sound Recordings Under the General Copyright Revision Act—The Continuing Debate*, 31 OKLA. L. REV. 402, 402-04 (1978). 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 Melvin L. Halpern, *The Sound Recording Act of 1971: An End to Piracy on the High Seas?*, 40 GEO. WASH. L. REV. 964, 974, 977-78, 985-86 (1972) (identifying how the positioning of the 1971 bill as a narrow, anti-record-piracy measure allowed it to overcome broadcasters' steadfast resistance to recognizing a public performance right in sound recordings). 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 BUS. J. (Oct. 2011), <http://www.thembj.org/2011/10/u-s-performance-rights-in-sound-recordings/> [<http://perma.cc/2AKD-S3GF>] (“Until the U.S. enacts a broader public performance right for sound recordings, domestic performers and record companies will be unable to claim their share of foreign performance royalties.”).

Congress partially rectified the disparate treatment of public performances of sound recordings through the Digital Performance Right in Sound Recordings Act of 1995. Pub. L. No. 104-39, 109 Stat. 336 (codified at 17 U.S.C. §§ 106, 114-15 (2012)). 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>141</sup> State law potentially affords owners of sound recordings fixed in a tangible medium of expression prior to February 15, 1972, with a public performance right. See 17 U.S.C. § 301(c) (2012) (preserving rights in pre-1972 sound recordings from federal preemption); *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, 112 U.S.P.Q.2d (BNA) 1307 (C.D. Cal. 2014) (holding that California law recognizes a public performance right in sound recordings); see also *Flo & Eddie, Inc. v. Sirius XM Radio*, 62 F. Supp. 3d 325 (C.D. Cal. 2014) (denying summary judgment motion contending that New York does not afford a public performance right in sound recordings and is barred by laches); *Waring v. WDAS Broad. Station*, 194 A. 631 (Pa. 1937).

<sup>142</sup> See *Gershwin Publ'g Corp. v. Columbia Artists Mgmt.*, 443 F.2d 1159, 1161-62 (2d Cir. 1971) (“[O]ne may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.”).

<sup>143</sup> GENELLE BELMAS & WAYNE OVERBECK, *MAJOR PRINCIPLES OF MEDIA LAW* 262-63 (2011); James Barron, *Facing the Music; There's a Bill when Songs Fill the Air*, N.Y. TIMES (Aug. 7, 1993), <http://www.nytimes.com/1993/08/07/nyregion/facing-the-music-there-s-a-bill-when-songs-fill-the-air.html> [<http://perma.cc/62DV-4S9Q>] (describing performance rights organizations' efforts to ensure that night clubs purchase blanket licenses); see also *United States v. Am. Soc'y of Composers, Authors, Publishers*, No. 41-1395(WCC), slip op. at 8-9 (S.D.N.Y. June 11, 2001) (ordering ASCAP “to grant to any music user . . . a non-exclusive license to perform all of the works in the ASCAP repertory”).

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>144</sup> and (1) do not have actual or constructive knowledge of the location of specific infringing files residing on their system, or (2) fail to expeditiously remove such files upon becoming aware of their location.<sup>145</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>146</sup> as well as substantial monetary damages. For works that are registered prior to infringement, copyright owners can seek either actual damages and disgorgement of profits,<sup>147</sup> or statutory damages, which range from \$750 to \$30,000 per infringed work and up to \$150,000 per infringed work in the case of willful infringement.<sup>148</sup> This regime exposes mashup artists and the websites that distribute their works to significant liability. Girl Talk "samples" twenty to thirty separate musical compositions and sound recordings, up to sixty copyrighted works in total, in a single mashup composition.<sup>149</sup> 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.

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144 They must (1) adopt, implement, and inform their subscribers of their policy for terminating service to users who are repeat copyright infringers; (2) adopt standard technical measures used by copyright owners to identify and protect copyrighted works; and (3) designate an agent to receive notification of claimed infringement from copyright owners and register that agent with the Copyright Office. 17 U.S.C. § 512(i)(1)(A), (i)(1)(B), (c)(2) (2012).

145 See *id.* § 512(c)(1); *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 32 (2d Cir. 2012) (holding that a service provider can only be held liable for copyright infringement if it has "actual knowledge or awareness of facts or circumstances that indicate specific and identifiable instances of infringement").

146 See 17 U.S.C. § 502 (2012) (giving courts the discretion to "grant temporary and final injunctions on such terms as [they] may deem reasonable to prevent or restrain infringement").

147 *Id.* § 504(a)(1), (b).

148 *Id.* § 504(c). The statute also provides that the court may reduce the award of statutory damages "to a sum of not less than \$200" if the court finds that the infringer "was not aware and had no reason to believe" that his or her acts constituted copyright infringement. *Id.* § 504(c)(2).

149 MARK J. BUTLER, *PLAYING WITH SOMETHING THAT RUNS: TECHNOLOGY, IMPROVISATION, AND COMPOSITION IN DJ AND LAPTOP PERFORMANCE* 234 (2014). The total number of copyrighted works potentially infringed is double the number of songs sampled because there are, as mentioned above, generally two copyrights in every track (the musical composition and the sound recording).

## 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 subsection traces the development of this body of copyright law. The next subsection 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>150</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>151</sup> According to Grandmaster Flash, an early influential hip hop artist and DJ,<sup>152</sup> he “wasn't interested in the actual making of music. . . . Electronics drew [him] in.”<sup>153</sup> Likewise, as Public Enemy's Hank Shocklee provocatively asked, “[w]ho said that musicians are the only ones that can make music?”<sup>154</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>155</sup> and it was not long before copyright owners threatened and ultimately pursued copyright infringement lawsuits.<sup>156</sup> In a notable early dispute, which ultimately 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>157</sup> In another early controversy, the 1960s pop group The Turtles sued De La Soul

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<sup>150</sup> MCLEOD & DICOLA, *supra* note 37, at 62.

<sup>151</sup> See *id.* at 53-54 (noting that DJ Kool Herc, a hip hop pioneer, “had an encyclopedic knowledge of backbeats as well as a music collection and booming sound system to match”).

<sup>152</sup> See generally *Grandmaster Flash and the Furious Five Biography*, ROCK & ROLL HALL FAME, <https://rockhall.com/inductees/grandmaster-flash-and-the-furious-five/bio> [http://perma.cc/YS9K-NA58] (last visited Oct. 31, 2015).

<sup>153</sup> MCLEOD & DICOLA, *supra* note 37, at 62 (citation omitted).

<sup>154</sup> Harry Allen, *Hip-Hop, High-Tech* (1988), reprinted in *STEP INTO A WORLD: A GLOBAL ANTHOLOGY OF THE NEW BLACK LITERATURE* 91, 95 (Kevin Powell ed., 2000) (reprinting an essay originally published in *The Village Voice*).

<sup>155</sup> Richard Harrington, *The Groove Robbers' Judgment: Order on 'Sampling' Songs May Be Rap Landmark*, WASH. POST, Dec. 25, 1991, at D1; see also MCLEOD & DICOLA, *supra* note 37, at 62-63.

<sup>156</sup> See, e.g., MCLEOD & DICOLA, *supra* note 37, at 60 (noting that the Sugarhill Gang's 1979 hit “Rapper's Delight” attracted an infringement action).

<sup>157</sup> *Id.* at 131; see also Terence McArdle, *Jimmy Castor Dead at 71; '70s Songs Became Popular Among Sampling Hip-Hop Artists*, WASH. POST (Jan. 19, 2012), [https://www.washingtonpost.com/entertainment/music/jimmy-castor-dead-at-71-70s-songs-became-popular-among-sampling-hip-hop-artists/2012/01/19/gIQAbbkCBQ\\_story.html](https://www.washingtonpost.com/entertainment/music/jimmy-castor-dead-at-71-70s-songs-became-popular-among-sampling-hip-hop-artists/2012/01/19/gIQAbbkCBQ_story.html) [http://perma.cc/7TCG-CV9Z] (quoting a 2004 interview in which Castor commented: “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.”).

over its use of their 1960 hit “You Showed Me,” resulting in what was reported to be a \$1.7 million settlement.<sup>158</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*,<sup>159</sup> Biz Markie’s rap song “Alone Again” sampled Irish pop singer Gilbert O’Sullivan’s hit recording “Alone Again (Naturally).”<sup>160</sup> 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 v. Warner Brothers Records* states, “Thou shalt not steal.”<sup>161</sup> The court’s analysis of copyright infringement did not delve deeper than establishing that the plaintiff owned the copyrights in both the musical composition and the master recording, and that Biz Markie sampled the recording.<sup>162</sup> The decision neither evaluated whether the sampling constituted substantial similarity of protected expression nor considered whether it qualified for fair use. Instead, the court focused on the fact that the defendants had been denied a license, treating the failure to clear the rights as proof of infringement.<sup>163</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>164</sup> Judge Duffy 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.<sup>165</sup> Biz Markie learned his lesson: His next album was entitled *All Samples Cleared!*<sup>166</sup>

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158 SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 141 (2001). *But see* MCLEOD & DiCOLA, *supra* note 37, at 131-32 (questioning the size of the settlement).

159 BIZ MARKIE, *I NEED A HAIRCUT* (Cold Chillin’ Records 1991).

160 *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

161 *Id.* (citing *Exodus* 20:15).

162 *See id.* at 183-85 (finding that, since the defendants admitted to sampling the plaintiff’s work, “[t]he only issue . . . seems to be who owns the copyright to the song ‘Alone Again (Naturally)’ and the master recording thereof made by Gilbert O’Sullivan”).

163 *See id.* at 184-85 (“One would not agree to pay to use the material of another unless there was a valid copyright! What more persuasive evidence can there be!”). In *Campbell v. Acuff-Rose Music*, the Supreme Court would later rule that “being denied permission to use a work does not weigh against a finding of fair use.” 510 U.S. 569, 585 n.18 (1994).

164 *Grand Upright Music*, 780 F. Supp. at 185.

165 *Id.*

166 Oliver Wang, *20 Years Ago Biz Markie Got the Last Laugh*, NPR (May 6, 2013, 12:50 PM), <http://www.npr.org/sections/therecord/2013/05/01/180375856/20-years-ago-biz-markie-got-the-last-laugh> [<http://perma.cc/8HF6-QPET>].

In 1993, another district court applied the substantial similarity framework to a digital-sampling case.<sup>167</sup> In evaluating the defendants' motion for summary judgment, the court rejected the defendants' assertion that a finding of substantial similarity for infringement requires similarity of the songs in their entirety such that a lay listener would "confuse one work for the other."<sup>168</sup> Applying the "fragmented literal similarity" framework, the court focused on "whether the segment in question constituted a substantial portion of the plaintiff's work, not whether it constituted a substantial portion of the defendant's work."<sup>169</sup> The court found 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>170</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 clichéd or lacking in expressive qualities to attract copyright protection.<sup>171</sup>

A somewhat different hip hop copyright dispute made its way to the Supreme Court in 1994.<sup>172</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.<sup>173</sup> They contacted Acuff-Rose Music, the copyright proprietor, and

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<sup>167</sup> See *Jarvis v. A & M Rec.*, 827 F. Supp. 282, 289-90 (D.N.J. 1993) (acknowledging that factual copying of a sound recording is not sufficient to establish infringement, but rejecting the defendants' stricter test for substantial similarity).

<sup>168</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)." *Jarvis*, 827 F. Supp. at 290. 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 way injure the rights of the plaintiff composer.

Jeffrey G. Sherman, *Musical Copyright Infringement: The Requirement of Substantial Similarity*, 22 COPYRIGHT L. SYMP. 81, 145 (1972).

<sup>169</sup> *Jarvis*, 827 F. Supp. at 290. The court cited to *Grand Upright Music* as support for its interpretation. *Id.* (citing *Grand Upright Music*, 780 F. Supp. at 182). As noted above, however, that decision sidestepped the substantial similarity stage of analysis. See *supra* notes 162-63 and accompanying text.

<sup>170</sup> *Jarvis*, 827 F. Supp. at 289.

<sup>171</sup> *Id.* at 2992.

<sup>172</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

<sup>173</sup> *Id.* at 572.

offered compensation and attribution.<sup>174</sup> Acuff-Rose declined the offer.<sup>175</sup> 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.<sup>176</sup>

Applying the fair use doctrine, the district court concluded that 2 Live Crew's version qualified for fair use.<sup>177</sup> The court recognized that the commercial purpose of 2 Live Crew's version cut against such a finding. However, 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>178</sup> On appeal, the Sixth Circuit reversed, emphasizing that the "blatantly commercial purpose" of the use and the appropriation of the heart of the song prevented a finding that the use was fair.<sup>179</sup>

In a wide-ranging opinion that substantially liberalized the fair use doctrine, Justice Souter, writing for a unanimous Supreme Court,<sup>180</sup> recognized the transformativeness of the use<sup>181</sup> as a substantial factor in assessing fair use,<sup>182</sup> eliminated any presumption that commercial use established market harm,<sup>183</sup> and thereby widened the berth for parodies.<sup>184</sup> The Court also eliminated any inference that seeking permission weighed against fair use.<sup>185</sup> 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.<sup>186</sup> The case settled without further judicial consideration of the fair use balance.<sup>187</sup>

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 implication that even the copying of a

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 572-73.

<sup>176</sup> *Id.* at 573.

<sup>177</sup> *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1159 (M.D. Tenn. 1991).

<sup>178</sup> *Id.* at 1155-56, 1158.

<sup>179</sup> *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1439 (6th Cir. 1992).

<sup>180</sup> Justice Kennedy joined in the opinion and filed a concurring opinion. *Campbell*, 510 U.S. at 571.

<sup>181</sup> *Id.* at 579; see also Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (arguing that a fair use analysis "turns primarily on whether, and to what extent, the challenged use is transformative").

<sup>182</sup> *Campbell*, 510 U.S. at 579.

<sup>183</sup> *Id.* at 591.

<sup>184</sup> *Id.* at 579.

<sup>185</sup> *Id.* at 585 n.18.

<sup>186</sup> *Id.* at 594.

<sup>187</sup> *Acuff-Rose Settles Suit with Rap Group*, COM. APPEAL (Memphis), June 5, 1996, at A14.

single note could constitute copyright infringement.<sup>188</sup> 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>189</sup>

The effect of this ruling was to dispense with analysis of substantial similarity in digital sampling cases. The mere 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”<sup>190</sup> strongly suggested that the court was not particularly sympathetic to the muss and fuss of fair use analysis.

Notwithstanding the Sixth Circuit’s disdain for unauthorized digital sampling, a line of cases emanating from the Second Circuit since 2006 suggests

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<sup>188</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800-01 (6th Cir. 2005). *Bridgeport* involved a two-second sample looped on a lower pitch and extended to about 16-seconds in a rap song. *Id.* at 796.

<sup>189</sup> *Id.* at 800-01.

<sup>190</sup> *Id.* at 801. The court expressly concluded,

The 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.

*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. *Id.* at 801.

a more sympathetic attitude toward “transformative” use of pre-existing copyrighted works through the fair use doctrine.<sup>191</sup> Although none of these cases involved musical works, they all involved literal appropriation of fragments or even the entirety of prior works in developing new visual works.<sup>192</sup> The cases draw heavily on Judge Leval’s seminal law review article on transformativeness<sup>193</sup> as well as the Supreme Court’s invocation of that consideration in the *Campbell* case.<sup>194</sup> More generally, Professor Neil Netanel has shown that federal courts throughout the nation have increasingly emphasized transformativeness in their fair use analysis.<sup>195</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>196</sup> Judge Easterbook writes,

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 no [sic] 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>197</sup>

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<sup>191</sup> See, e.g., *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013) (reasoning that use of a copyrighted work was fair because the artwork “manifest[ed] an entirely different aesthetic”); *Blanch v. Koons*, 467 F.3d 244, 252 (2d Cir. 2006) (holding that use was fair since the defendant’s “purposes in using [the plaintiff’s] image are sharply different from [the plaintiff’s] goals in creating it” and this “confirms the transformative nature of the use”); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) (finding fair use because the defendants used the concert posters as “historical artifacts”).

<sup>192</sup> See *Cariou*, 714 F.3d at 698-99 (finding use of digitally altered copies of photographs as part of defendant’s appropriation art to be fair use); *Blanch*, 467 F.3d at 247-48, 259 (deeming use of digitally altered copies of a photograph as part of defendant’s appropriation art to be fair use); *Bill Graham Archives*, 448 F.3d at 607 (holding that use of scaled down photographs in a published coffee table book detailing the history of the Grateful Dead was fair use).

<sup>193</sup> Leval, *supra* note 181.

<sup>194</sup> See *Cariou*, 714 F.3d at 706 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994), and Leval, *supra* note 181, at 1111); *Blanch*, 467 F.3d at 251-52 (quoting *Campbell*, 510 U.S. at 579, and Leval, *supra* note 181, at 1111); *Bill Graham Archives*, 448 F.3d at 607 (quoting *Campbell*, 510 U.S. at 579 and Leval, *supra* note 181, at 1111).

<sup>195</sup> See Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 755 (2011) (finding that between 2006 and 2010 95.83% of all unreversed district court decisions considered the transformativeness of the defendant’s use, while between 1995 and 2000 only 70.45% of decisions did so).

<sup>196</sup> See *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014).

<sup>197</sup> *Id.* at 758.

There is currently a raft 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, whose works have been digitally sampled without authorization, for purposes of asserting infringement claims.<sup>198</sup> 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>199</sup> that they will have the effect of confronting the de minimis question as well as loosening the application of the fair use defense to music sampling.<sup>200</sup>

### B. *What's Past Is Prologue?*<sup>201</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<sup>202</sup> on their way to market-regulated, but expression-restricted, legitimacy.<sup>203</sup> More

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<sup>198</sup> See, e.g., Bill Donahue, *TufAmerica Puts Frank Ocean Song in Copyright Crosshairs*, LAW360 (Feb. 12, 2014, 4:40 PM), <http://www.law360.com/articles/509401/tufamerica-puts-frank-ocean-song-in-copyright-crosshairs> [<http://perma.cc/HP29-7HJU>] (reporting that TufAmerica is suing Frank Ocean for sampling a derivative work of a copyright it owns); Marc Hogan, *Beastie Boys Fight Baffling 'Licensed to Ill' Sampling Lawsuit*, SPIN (Nov. 29, 2012), <http://www.spin.com/articles/beastie-boys-license-to-ill-sampling-frivolous-lawsuit-tuf-america> [<http://perma.cc/QS99-XPFX>] (reporting that TufAmerica is suing the Beastie Boys for alleged copyright infringement, even though the similarity cannot be recognized without “[a] careful audio analysis”); Jeff Sistrunk, *Jay-Z Accused of Illegally Sampling '60s Funk Tune*, LAW360 (Nov. 7, 2013, 4:29 PM), <http://www.law360.com/articles/486827/jay-z-accused-of-illegally-sampling-60s-funk-tune> [<http://perma.cc/LG36-87V8>] (reporting on TufAmerica's suit against Jay-Z).

<sup>199</sup> See Aaron Vehling, *Jay-Z Says Label Can't Sue over Single Use of 'Oh'*, LAW360 (Sept. 9, 2014, 6:49 PM), <http://www.law360.com/articles/575606/jay-z-says-label-can-t-sue-over-single-use-of-oh> [<http://perma.cc/54PX-L6L3>] (noting that according to the defendant, “the alleged sample is a single instance of the word ‘oh’”); see also 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> [<http://perma.cc/QAA2-PWAM>] (criticizing the rise of “sample trolls” like TufAmerica and describing efforts to curb their litigiousness).

<sup>200</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 1-3* (UC Berkeley Pub. Law, Res. Paper No. 2049445, 2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2049445](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2049445) [<http://perma.cc/LC87-EJVN>] (describing efforts by courts to interpret the Digital Millennium Copyright Act in light of technological changes in order to lessen the liability facing websites like YouTube that host infringing user-generated content).

<sup>201</sup> WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. 1.

<sup>202</sup> See, e.g., Richard Schur, *Copyright Outlaws and Hip Hop Moguls: Intellectual Property Law and the Development of Hip Hop Music*, in *THE ORGANIC GLOBALIZER: HIP HOP, POLITICAL DEVELOPMENT, AND MOVEMENT CULTURE* 79, 81 (Christopher Malone & George Martinez, Jr., eds., 2015) (“In the late 1980s and early 1990s, most notably with the *Grand Upright Music v. Warner Brothers* (1991) case, hip hop artists found themselves mired in [copyright] litigation.”).

<sup>203</sup> In the early 1990s, rap and hip hop were becoming increasingly commercialized. See Mark Anthony Neal, *Sold Out on Soul: The Corporate Annexation of Black Popular Music*, 21 *POPULAR*

recent tumultuous battles over file-sharing during the past decade add further considerations in assessing the mashup controversy.<sup>204</sup>

### 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 unauthorized sampling<sup>205</sup> and “the golden age of sampling.”<sup>206</sup> The record industry imposed tight reins on rap and hip hop artists; unless samples were cleared, labels would not release the new projects.<sup>207</sup> Although the Supreme Court's *Campbell* decision opened the door to a fair use defense, few labels wanted and few artists dared to test those limits.<sup>208</sup> Copyright litigation is time-consuming, expensive, distracting, and risky.<sup>209</sup>

Other factors reinforced the shift toward licensing. Although initially hesitant to embrace the rap and hip hop genres, the major record labels came to see these genres as vehicles to reach younger audiences and to monetize their back catalogs. Major record labels began signing hip hop artists as they developed fan bases.<sup>210</sup> The most successful hip hop artists were given sublabels under the major record label umbrellas.<sup>211</sup> Furthermore, the ability to generate additional licensing revenue from their back catalog added an unanticipated benefit.<sup>212</sup>

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MUSIC & SOC'Y, 117, 131 (1997) (describing corporate consolidation and control of rap and hip hop beginning in the late 1980s). But with increasing commercialization, “high costs, difficulties negotiating licenses, and outright refusals made it effectively impossible for certain kinds of music to be made legally.” MCLEOD & DICOLA, *supra* note 37, at 28.

204 See Menell, *supra* note 1, at 259-69 (discussing file-sharing lawsuits).

205 See MCLEOD & DICOLA, *supra* note 37, at 132 (identifying *Grand Upright Music* as ending the era of the “Wild West” in unauthorized sampling).

206 See *id.* at 19-35 (characterizing the period from 1987 to 1992 as sampling's “golden age”).

207 See *id.* at 27 (“[E]very second of sound [in a sample] had to be cleared.”).

208 See, e.g., *id.* at 28 (“[T]oday it is impractical to license songs with two or more samples. Given this, no wonder that the Beastie Boys never attempted to follow up on *Paul's Boutique's* densely layered collages.”).

209 See Anthony Ciolli, *Lowering the Stakes: Toward a Model of Effective Copyright Dispute Resolution*, 110 W. VA. L. REV. 999, 1003 (2008) (discussing the “high general costs of copyright litigation”).

210 See S. Craig Watkins, *A Nation of Millions: Hip Hop Culture and the Legacy of Black Nationalism*, 4 COMM. REV. 373, 390 (2001) (noting that the commercial success of the rap and hip hop genres led to their stronger commercial ties to major record labels).

211 For example, Universal Music Group's Interscope Records spun out Aftermath Entertainment for Dr. Dre and Shady Records for Eminem. *Dr. Dre Biography*, ROLLING STONE, <http://www.rollingstone.com/music/artists/dr-dre/biography> [<http://perma.cc/YG45-3CE4>] (last visited Oct. 31, 2015); see also Adam Graham, *Eminem Looks Back, Forward on 15 Years of Shady Grove*, DETROIT NEWS (Nov. 20, 2014, 7:13 AM), <http://www.detroitnews.com/story/entertainment/music/2014/11/19/Eminem-looks-back-years-shady-records/19307415> [<http://perma.cc/E9TW-LNNT>].

212 See, e.g., Josh Norek, “*You Can't Sing Without the Bling*”: *The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System*, 11 UCLA ENT. L. REV. 83, 97-98 (2004) (describing how rap group US3 sampled and licensed jazz group Blue Note's entire catalog, which in turn boosted sales of Blue Note's back catalog).

Although many artist contracts provided for approval clauses for licensing,<sup>213</sup> 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" in works by Public Enemy, Nikki D, Lil' Kim, and dozens of others, produced significant new sources of revenue.<sup>214</sup>

Even the early, free-wheeling renegades adapted. While we were not seeing the richness in sampling of the first wave—such as the Beastie Boys's *Paul's Boutique* (1989) or Public Enemy's *Fear of a Black Planet* (1990)—both groups continued to prosper.<sup>215</sup> Public Enemy's use of Buffalo Springfield's "For What It's Worth" in "He Got Game" was iconic.<sup>216</sup> This 1960s Vietnam War protest song took on new meaning in Chuck D's clutches.<sup>217</sup> But the reality of the licensing era meant constrained experimentation, higher entry costs (if an artist did not have a major label and a good attorney, it was difficult to get licensing requests answered), and many creative compromises.<sup>218</sup> Remix artists had to develop the capacity for self-censorship.<sup>219</sup>

There are a number of problems inherent in this regime: 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.<sup>220</sup> The creative arts and complex accounting systems do not mix well—creative freedom took a large hit.<sup>221</sup> In addition, rap 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, because they typically knew a lot more about deal terms than the

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<sup>213</sup> See MCLEOD & DICOLA, *supra* note 37, at 79-80 ("[R]ecording artists traditionally have signed contracts with record labels to sell their sound recordings. These record-label contracts have provisions in them determining how much money from sample licenses goes to the record label and how much goes to the recording artists.").

<sup>214</sup> *Id.* at 88-89.

<sup>215</sup> See Marcia Alesan Dawkins, *Close to the Edge: The Representational Tactics of Eminem*, 43 J. POPULAR CULTURE 463, 466 (2010) (stating that before Eminem, the Beastie Boys were the most culturally and commercially successful white hip hop group); Watkins, *supra* note 210, at 380 ("Though many groups contributed to and complicated the expression of hip hop nationalism no group was as commercially and critically successful as Public Enemy.").

<sup>216</sup> See Krin Gabbard, *Race and Reappropriation: Spike Lee Meets Aaron Copland*, 18 AM. MUSIC 370, 386 (2000) (noting the sociopolitical effect of layering "For What It's Worth" over "He Got Game").

<sup>217</sup> See *id.* (noting that Public Enemy member "Chuck D actually convinced Stephen Stills to join the group in the studio so that he could rerecord his thirty-one-year-old lyrics").

<sup>218</sup> See *supra* note 208 and accompanying text.

<sup>219</sup> See MCLEOD & DICOLA, *supra* note 37, at 215 ("In a system that requires permission to sample . . . self-censorship can become a problem.").

<sup>220</sup> For an overview of the process of obtaining clearance for a sample, see *id.* at 148-76.

<sup>221</sup> See *supra* note 208 and accompanying text.

upstart remix artists.<sup>222</sup> 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<sup>223</sup>:

- how much of the musical composition or sound recording was used,
- the qualitative importance of the sample,
- the characteristics of the sample (whether it is from the chorus, melody, or background; from a vocal or instrumental segment),
- the recognizability of the sample,
- the commercial success or fame of the original composer or recording artist,
- the commercial success or fame of the remix artist,
- usage of the sample (length, repeated, or looped),
- the importance of the sample to the remix, and
- the offensiveness of the remix.

Based on information from Whitney Broussard, an experienced licensing attorney, and extensive interviews and surveys, Kembrew McLeod and Peter DiCola compiled an illustrative chart estimating the plausible costs for sampling along two principal dimensions—the extent of use of the sampled work in the remix, and the profile of the sampled work, composer, or artist.<sup>224</sup> The royalty cost of sampling mounts rapidly.<sup>225</sup> Therefore remixes containing multiple samples become less and less economically valuable to the remix artist.<sup>226</sup>

Applying these hypothetical sampling rates to The Beastie Boys's *Paul's Boutique* or Public Enemy's *Fear of a Black Planet* pushes the net value of these two highly successful albums well into the red.<sup>227</sup> The Beastie Boys would have been out of pocket \$19.8 million, based on estimated sales of \$2.5 million, and Public Enemy would have been out of pocket \$6.786 million, based on estimated sales of \$1.5 million.<sup>228</sup>

Table 1: Illustrative Licensing Cost Matrix

Extent of Use of the Sample in the Remixed Work<sup>229</sup>

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<sup>222</sup> See MCLEOD & DICOLA, *supra* note 37, at 155-56 (describing the complex skills needed to navigate the system of acquiring a sample license from major record labels).

<sup>223</sup> This list is adapted from *id.* at 154.

<sup>224</sup> See *id.* at 205 tbl.2.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 207 tbl.3, 208 tbl.4.

<sup>228</sup> *Id.*

<sup>229</sup> Adapted from Whitney Broussard a licensing attorney, as updated and expanded by Kembrew McLeod and Peter DiCola. See MCLEOD & DICOLA, *supra* note 37, at 203-05.

Profile of the sampled work artists/composer		Small	Moderate	Extensive
Low	SR	\$0 - \$500	\$2500 or 1¢/copy	\$5000 or 2.5¢/copy
	MC	not infringing	\$4000 or 10%	25%
Medium	SR	\$2500 or 1¢/copy	\$5000 or 2.5¢/copy	\$15,000 or 5¢/copy
	MC	\$4000 or 10%	25%	40%
High	SR	\$5000 or 2.5¢/copy	\$15,000 or 5¢/copy	\$25,000 or 10¢/copy
	MC	25%	40%	50% or co-ownership
Famous	SR	\$50,000 or		
	MC	100% (assignment)		
Superstar	SR	\$100,000 or		
	MC	100% (assignment)		

SR = sound recording ©; MC = musical composition ©

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 the patent sphere, where multiple patent holders seek licensing fees (or damage remedies) that can vastly exceed the value of the product embodying all of the patents.<sup>230</sup>

This licensing simulation vastly understates the actual private and social cost of complex sampling and licensing schemes. 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 occurred as a result of the delays, stress, and hassles in working out the deals. Perhaps most significantly, this simulation overlooks the high likelihood that some of the underlying samples could not have been cleared because the copyright owners 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

<sup>230</sup> See Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 2010-17 (2007) (describing the costs associated with patent stacking as resulting from overlapping patent rights on a single product).

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 choice, if they wanted to reach an audience, than to work with these intermediaries.<sup>231</sup> The digital music revolution, embodied by Napster's meteoric rise,<sup>232</sup> adds other twists to the emergence and development of music mashup.

Web 2.0 technologies, such as file-sharing services and cloud storage, have made compliance with copyright optional for many netizens.<sup>233</sup> Although many are willing to participate in services that are convenient and fair, as reflected in the success of iTunes, Spotify, and Pandora, authorized content channels compete with illicit and ambiguous sources.<sup>234</sup> 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.<sup>235</sup> Similarly, EMI's effort to squelch *The Grey Album* similarly backfired.<sup>236</sup>

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,<sup>237</sup> and Girl Talk, who has been able to avoid such constraints,<sup>238</sup> largely reflects the ability of contemporary artists to go directly to the public through Internet channels.

This is not to say that the traditional copyright owners lack power. It is more accurate to say that their power is no longer near absolute. Copyright

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<sup>231</sup> See Tom Phillips & John Street, *Copyright and Musicians at the Digital Margins*, 37 MEDIA, CULTURE & SOC'Y 342, 343 (2015) (discussing how some believe that the Internet has lifted artists from the "autocratic and conservative" control of large companies in the music industry).

<sup>232</sup> See Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 272-75 (2002) (exploring the impact of Napster and peer-to-peer file sharing on copyright law and the music industry).

<sup>233</sup> See generally Marc Aaron Melzer, *Copyright Enforcement in the Cloud*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 403 (2011) (discussing the relationship among cloud computing, peer-to-peer file sharing, and copyright law).

<sup>234</sup> See generally ROBERT LEVINE, FREE RIDE: HOW DIGITAL PARASITES ARE DESTROYING THE CULTURE BUSINESS, AND HOW THE CULTURE BUSINESS CAN FIGHT BACK (2011) (emphasizing the challenge of competing with free content channels).

<sup>235</sup> Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J. (Dec. 19, 2008, 12:01 AM), <http://www.wsj.com/articles/SB122966038836021137> [<http://perma.cc/N8QY-B9QQ>].

<sup>236</sup> See *supra* note 53 and accompanying text.

<sup>237</sup> Kembrew McLeod, *How Copyright Law Changed Hip Hop*, ALTERNET (May 31, 2004), [http://www.alternet.org/story/18830/how\\_copyright\\_law\\_changed\\_hip\\_hop](http://www.alternet.org/story/18830/how_copyright_law_changed_hip_hop) (quoting Chucky D as stating, "Public Enemy's music was affected more than anybody's because we were taking thousands of sounds. . . . So we had to change our whole style, the style of It Takes a Nation and Fear of a Black Planet, by 1991").

<sup>238</sup> See *supra* subsection I.B.4.

owners retain the ability to control many of the most important commercial channels, thereby relegating those who go around copyright owners to less robust channels to appropriate a return on their investment, talent, and creativity. Some DJs have successfully cultivated lucrative live performance markets that can be promoted through free distribution of their mashups.<sup>239</sup> Nonetheless, their inability to sell their creative works distorts their priorities. There is also growing concern that the legacy recording industry is beginning to disrupt these alternative channels.<sup>240</sup>

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

It was against this legal and market backdrop that the music mashup genre emerged. DJs had relative immunity for mashing different samples together as part of their live performances.<sup>241</sup> With the availability of increasingly versatile and inexpensive sampling technology, the desire to experiment with recordings grew.<sup>242</sup> 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 sensitized rap and hip hop artists to the risks of unauthorized sampling on commercially distributed albums, the ease with which mashup artists could release tracks onto file-sharing websites 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>243</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 away from the traditional recording industry.

Although one can characterize the music mashup genre as grudgingly tolerated by the music industry,<sup>244</sup> it is substantially distorted and constrained by the specter of copyright liability.<sup>245</sup> Mashup artists who seek to earn direct remuneration for their projects are little better off than their rap and hip hop forerunners. Their art form possesses daunting clearance challenges. They face the constant risk that their projects will be subject to

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<sup>239</sup> See *supra* subsection I.B.4.

<sup>240</sup> See *supra* subsection I.B.3.

<sup>241</sup> See *supra* subsection I.B.4.

<sup>242</sup> See MCLEOD & DICOLA, *supra* note 37, at 61 (using new digital samplers, “[h]ip-hop artists radically rewired the way that we understand how music can be made”).

<sup>243</sup> See *supra* Section I.B.

<sup>244</sup> See Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 619 (2008) (“Tolerated use is infringing usage of a copyrighted work of which the copyright owner may be aware, yet does nothing about.”).

<sup>245</sup> See *supra* note 208 and accompanying text.

takedown notices and, although remote, the possibility of crushing liability. Some artists alter their works so as to stay under the radar.<sup>246</sup> Even Gregg Gillis, whom many consider effectively immune from copyright liability,<sup>247</sup> laments the constrained mashup environment.<sup>248</sup>

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>249</sup> In January 2014, SoundCloud was poised to open up greater access for mashup artists. The music uploading and sharing service announced plans to expand its operations following a \$60 million financing round valuing it at \$700 million, characterizing its core objective as “becom[ing] the dominant online digital delivery platform for audio in much the same way that YouTube has become the dominant online platform for video.”<sup>250</sup> The plan sought to better monetize the platform through advertising.<sup>251</sup> In March 2014, SoundCloud reportedly began licensing talks with major music labels in an attempt to avoid the takedown and policing costs faced by YouTube.<sup>252</sup> News reports indicate that

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<sup>246</sup> See Peter C. DiCola, *An Economic View of Legal Restrictions on Musical Borrowing and Appropriation*, in *MAKING AND UNMAKING INTELLECTUAL PROPERTY* 235, 247 (Mario Biagioli et al. eds., 2011) (noting that artists may “adjust their music to avoid infringement” of copyright laws); see also SINNREICH, *supra* note 14, 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 do not contained unlicensed material, and discussing how artists can distort their work through pitch-bending and using shorter samples in order to avoid detection, but noting that this comes at the cost of artistic freedom).

<sup>247</sup> See MCLEOD & DiCOLA, *supra* note 37, at 118 (recounting an interview with Gillis in which he confirmed that he has not had legal action taken against him for his use of copyrighted music).

<sup>248</sup> See Alex Mayyasi, *The Economics of Girl Talk*, PRICEONOMICS (Apr. 11, 2013), <http://blog.priceonomics.com/post/47719281228/the-economics-of-girl-talk> [<http://perma.cc/SWS4-XFY4>] (discussing the disconnect between Gillis, who wants to be viewed as “a musician and not just a party D.J.,” and the music industry’s position on Gillis’ use of copyrighted music); see also MCLEOD & DiCOLA, *supra* note 37, at 200-01 (describing market responses to sampling clearance issues).

<sup>249</sup> See *supra* subsection I.B.3.

<sup>250</sup> MacMillan, *supra* note 77. The investors included prominent Silicon Valley venture capital firms such as Kleiner Perkins and GGV Capital. *Id.*

<sup>251</sup> See Sisario, *supra* note 75 (“SoundCloud will begin incorporating advertising and for the first time let artists and record labels collect royalties.”); see also Tom Pakinkis, *SoundCloud Monetisation on the Horizon for Rights-Holders*, MUSIC WK. (June 27, 2014, 3:05 PM), <http://www.musicweek.com/news/read/soundcloud-monetisation-on-the-horizon-for-rights-holders/058863> [<http://perma.cc/VMX5-MKJ4>] (reporting that SoundCloud’s monetization experiments include native advertising models).

<sup>252</sup> See Tom Pakinkis, *SoundCloud Holding Licensing Talks with Labels—Report*, MUSIC WK. (Mar. 28, 2014, 10:31 AM), <http://www.musicweek.com/news/read/soundcloud-holding-licensing-talks-with-labels-report/058049> [<http://perma.cc/UW8M-3Z9P>] (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”); see also Tom Pakinkis, *BPI Sends 50 Millionth Takedown Request to Google*, MUSIC WK. (Nov. 15, 2013, 12:17 PM),

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>253</sup> These talks coincided with a significant uptick in takedowns and other changes to the service, generating substantial consternation among the user and mashup artist communities.<sup>254</sup> The talks with labels reached a stalemate in October 2014, with Universal Music Group no longer actively involved and independent artists fleeing SoundCloud as takedown notices increased.<sup>255</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>256</sup> There is good reason to believe that this strategy is both shortsighted—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 promoting expressive creativity.

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<http://www.musicweek.com/news/read/bpi-sends-50-millionth-takedown-request-to-google/056752> [<http://perma.cc/X835-CAMK>] (reporting on the high number of takedown requests sent by the BPI).

<sup>253</sup> See Coral Williamson, *SoundCloud Close to Finalising Major Label Deals—Report*, MUSIC WK. (July 11, 2014, 10:29 AM), <http://www.musicweek.com/news/read/soundcloud-close-to-finalising-major-label-deals/058993> [<http://perma.cc/79C9-EFAB>] (reporting that SoundCloud was close to a deal with Universal Music Group, Sony Music Entertainment, and Warner Music Group that would allow SoundCloud to continue hosting songs); see also Adam Satariano, *SoundCloud Said to Near Deals with Record Labels*, BLOOMBERG (July 20, 2014, 6:54 PM), <http://www.bloomberg.com/news/2014-07-10/soundcloud-said-to-near-deals-with-record-labels.html> [<http://perma.cc/TA6G-JVX4>] (writing that the largest record labels are close to an agreement regarding a stake in SoundCloud in exchange for an agreement not to sue).

<sup>254</sup> See Nappy, *Soundcloud Boldly Releases New App, Allows Universal to Flag Your Account, and Quietly Announces Data Mining, All in One Month*, COMPLEX (June 27, 2014), <http://www.complex.com/music/2014/06/soundcloud-boldly-releases-new-app-allows-universal-flag-account-quietly-announces-data-mining-one-month> [<http://perma.cc/TGB9-D5BQ>] (discussing changes in SoundCloud's cookie and privacy policies that allow increased data mining from user accounts); see also *Quick, Go Listen to Everything on Kaskade's SoundCloud Before It's Deleted*, INTHEMIX (June 4, 2014), [http://www.inthemix.com.au/news/58236/Quick\\_go\\_listen\\_to\\_everything\\_on\\_Kaskades\\_SoundCloud\\_before\\_its\\_deleted](http://www.inthemix.com.au/news/58236/Quick_go_listen_to_everything_on_Kaskades_SoundCloud_before_its_deleted) [<http://perma.cc/3B9Q-M4K4>] (encouraging readers to listen to as much music as possible before SoundCloud's potentially acquisition by Twitter, which would likely result in a copyright infringement crackdown).

<sup>255</sup> See Robert Cookson, *SoundCloud Hits an Impasse with Major Record Labels*, FIN. TIMES (Oct. 9, 2014, 1:23 PM), <http://www.ft.com/intl/cms/s/0/e549661c-4ef6-11e4-b205-00144feab7de.html#axzz3Ff62q4dA> [<http://perma.cc/35QB-T7PF>] (noting that the “clock is ticking on how long [SoundCloud] can continue operating as a service that’s unmonetised”).

<sup>256</sup> See Menell, *supra* note 1, at 292-97 (discussing the emergence of Spotify and the challenges it presented).

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 [sic], 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>257</sup>

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

Based in part on the confusion surrounding mashups, the principal U.S. copyright policy institutions—the Copyright Office, an arm of the legislative branch operating under the Library of Congress, and the 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 several years.<sup>258</sup>

The notice for the Copyright Office's Music Licensing Study solicited input on two dozen questions, including several related to licensing of remixes: the need for the section 115 compulsory license, music licensing practices, the role for the government in facilitating licensing, and the availability and quality of music rights ownership databases.<sup>259</sup>

On a parallel track, the Administration's study, spearheaded by the PTO 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>260</sup> The study identifies a number of major study areas, including "[t]he legal framework for the creation of remixes."<sup>261</sup> The Request for Comments provided the observation 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

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<sup>257</sup> Chung & Polohsky, *supra* note 60.

<sup>258</sup> See Music Licensing Study: Notice and Request for Public Comment, 78 Fed. Reg. 14,739 (Mar. 17, 2014).

<sup>259</sup> *Id.*

<sup>260</sup> INTERNET POLICY TASK FORCE, U.S. DEP'T OF COMMERCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (2013).

<sup>261</sup> *Id.* at 101.

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>262</sup>

The Request for Comments 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 Content ID system, Creative Commons licenses, and other online licensing tools.”<sup>263</sup> The Request for Comments also pointed out the development of best practices guidelines, but nonetheless concluded that “considerable” legal uncertainty surrounds remixes and that “licenses may not always be easily available.”<sup>264</sup> In addition, public comments were sought on whether remixes are being significantly impeded by the existing legal framework and market realities and how such problems can be rectified.<sup>265</sup>

The studies drew overlapping representatives of the traditional music industries, the Internet Service Provider (ISP) community, recording artists and composers, free speech advocacy groups, and other public interest organizations. Traditional music industry advocates expressed the view that most music mashups fall on the infringing side of the copyright line and should not pass muster under the fair use doctrine.<sup>266</sup> By contrast, free speech advocates expressed the view that most mashup creativity qualifies (or should qualify) as fair use.<sup>267</sup> Almost all of the commenters advised against

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<sup>262</sup> Request for Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy, 78 Fed. Reg. 61,337, 61,338 (Oct. 3, 2013) [hereinafter Request for Comments]; *see also* 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. 21,439 (Apr. 16, 2014).

<sup>263</sup> Request for Comments, *supra* note 262, at 61,338.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *See, e.g.*, Copyright Alliance, Comment Letter on Department of Commerce’s Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy 8 (Jan. 17, 2014), [http://www.ntia.doc.gov/files/ntia/copyright\\_alliance\\_post-meeting\\_comments.pdf](http://www.ntia.doc.gov/files/ntia/copyright_alliance_post-meeting_comments.pdf) [<http://perma.cc/HC4K-R8A4>] (“Remixes rely on ‘raw materials’, original works to be remixed. A broader fair use doctrine would reduce the number of protected original works and . . . the number of remixes. Unfortunately, courts have lately appeared to be expanding the fair use defense from a limited privilege to a broad alternative to licensing.”); Dina LaPolt & Steven Tyler, Comment Letter on Department of Commerce’s Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy (Feb. 10, 2014), [http://www.ntia.doc.gov/files/ntia/lapolt\\_and\\_tyler\\_comment\\_paper\\_02-10-14.pdf](http://www.ntia.doc.gov/files/ntia/lapolt_and_tyler_comment_paper_02-10-14.pdf) [<http://perma.cc/2WS7-Q9MP>] (characterizing mashups as “derivative works” and suggesting approval is a right artists possess); National Music Publishers’ Association et al., Comment Letter on Department of Commerce’s Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy, [http://www.ntia.doc.gov/files/ntia/national\\_music\\_publishers\\_association\\_et\\_al\\_comments.pdf](http://www.ntia.doc.gov/files/ntia/national_music_publishers_association_et_al_comments.pdf) [<http://perma.cc/D4YX-UV4G>] (“[O]ur members’ experience suggests the vast majority of unauthorized ‘remixes’ are not entitled to [fair use] protection.”).

<sup>267</sup> *See, e.g.*, Organization for Transformative Works, Comment Letter on Department of Commerce’s Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy

government intervention. Most believed that the market solutions would emerge to address the concerns raised about mashup creativity.<sup>268</sup>

All 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 Parts I and II have illustrated, a cramped interpretation of fair use confronts mashup creators with the choice of either bearing exorbitant transaction costs and constraints on their artistic freedom for those works that cannot feasibly be cleared, or running the risk of crushing liability. Even if many of these uses are ostensibly “tolerated,”<sup>269</sup> such a regime unduly chills mashup creativity and distribution. By contrast, a broad interpretation of fair use potentially deprives the authors of sampled works 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 mashup music that insulates artists and distribution platforms from undue legal liability while encouraging low transaction costs and fair pricing of samples. A predictable, feasible alternative to relying on 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 anticompetitive forces, and build wider support for authorized content markets.

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(n.d.), [http://www.ntia.doc.gov/files/ntia/organization\\_for\\_transformative\\_works\\_comments.pdf](http://www.ntia.doc.gov/files/ntia/organization_for_transformative_works_comments.pdf) [<http://perma.cc/GWB4-KZR7>].

<sup>268</sup> See, e.g., National Music Publishers' Association et al., *supra* note 266 (“The marketplace works.”).

<sup>269</sup> See generally Wu, *supra* note 244.

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 remarkably well at promoting productive uses of music composers while providing efficient compensation for 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 potential 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.<sup>270</sup> 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.<sup>271</sup>

To a first approximation, copyright law affords the pioneer rights over derivative works. But as we have seen, the fair use doctrine affords some leeway for borrowing.<sup>272</sup> 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) or functional (ideas, procedures) as opposed to expressive. Of particular relevance to musical creativity, basic rhythm patterns, standing alone, are generally considered part of the public domain for want of originality.<sup>273</sup> Even chord patterns in many popular songs are deemed

<sup>270</sup> U.S. CONST. art. I, § 1, cl. 8.

<sup>271</sup> See Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 997 (1997) (“As countless economists have demonstrated, efficient creation of new works requires access to and use of old works.”); cf. Suzanne Scotchmer, *Standing on the Shoulders of Giants: Cumulative Research and the Patent Law*, 5 J. ECON. PERSP. 29, 32-35 (1991) (arguing that the patent law can better encourage innovation by balancing the first inventor’s incentives with those of inventors of improvements to the first inventor’s patent).

<sup>272</sup> See *supra* subsection II.A.2.

<sup>273</sup> See AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING* 417 (2d ed. 1996) (noting that there is “doubt about whether simple drum beats, rhythms, or lyrics comprised merely of common short phrases . . . would be considered a musical work”).

unoriginal.<sup>274</sup> On the other hand, complex original rhythm, melodies, and lyrics as well as original compilations of such elements and distinctive sound recordings attract relatively robust protection.<sup>275</sup>

The fair use doctrine reflects several policy rationales: promoting cumulative creativity that does not adversely affect the market for underlying works; encouraging scholarship, creative experimentation, and learning; and supporting free expression, such as commentary, parody, news reporting, and criticism. The expansion of fair use over time has tended to expand overall creative output. As several scholars have noted, copyright's long duration justifies greater scope for reusing works as they age.<sup>276</sup>

Achieving the optimal balance between pioneering works and those that build upon them is no easy task.<sup>277</sup> If transactions were costless and society were not concerned with free expression, then a strict property-type rule could achieve economic efficiency.<sup>278</sup> We know, however, that both of those assumptions are mistaken,<sup>279</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>280</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

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<sup>274</sup> See COPYRIGHT OFFICE, COMPENDIUM II: COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 406.03 (1984) ("Chord charts ordinarily contain a significant number of public domain standard chords. To be registrable, works embodying chord charts must qualify as a compilation or as some other original work of authorship.").

<sup>275</sup> See KOHN & KOHN, *supra* note 273, at 417.

<sup>276</sup> See Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 799 (2003) ("[A]s a work grows older, the public domain aspects of the work increase."); Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 410 (2002) ("[T]he older a copyrighted work is, the greater the scope of fair use should be . . .").

<sup>277</sup> Cf. Scotchmer, *supra* note 271, at 37-39 (summarizing the multifaceted issues facing patent policymakers in encouraging cumulative creativity while protecting the rights of pioneering inventors).

<sup>278</sup> See R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15-19 (1960) (outlining the assumptions inherent in the Coase Theorem for the allocation of property rights in the face of transaction costs).

<sup>279</sup> See Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549, 553-55 (2010) (discussing the costs involved in the distribution and maintenance of copyrights).

<sup>280</sup> See Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1327-61 (1996) (contending that the process of certain firms and individuals repeatedly exchanging music rights has led to the creation of copyright collectives).

transaction costs.<sup>281</sup> As the radio industry emerged, blanket licensing enabled both song writers and broadcasters to profit from this remarkable new distribution medium.<sup>282</sup> Yet we have not seen any comparable market-driven solutions in the remix area.<sup>283</sup> The marketplace remains costly, unpredictable, and largely prohibitive for many mashup projects.

At the other extreme, an open-ended liability 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.

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 surrounding the scope of rights channeled even the most renegade of remix artists into the licensing mold.<sup>284</sup> 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. Fans cannot find their favorite music on authorized music services, which pushes them away from authorized 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 preclearing<sup>285</sup> uses coupled

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<sup>281</sup> See generally RUSSELL SANJEK UPDATED BY DAVID SANJEK, *PENNIES FROM HEAVEN: THE AMERICAN POPULAR MUSIC BUSINESS IN THE TWENTIETH CENTURY* (1996) (tracing the history of collective licensing of music).

<sup>282</sup> See Michael B. Rutner, *The ASCAP Licensing Model and the Internet: A Potential Solution to High-Tech Copyright Infringement*, 39 B.C. L. REV. 1061, 1074 (1998) (discussing how blanket licenses of music “protects both the rights of the copyright holder and benefits a wide public audience”).

<sup>283</sup> Cf. Karp, *supra* note 77 (examining the potential avenues for creating revenues from mashups).

<sup>284</sup> See MCLEOD & DICOLA, *supra* note 37, at 26-30 (describing the legal difficulties hip hop artists faced during the early 1990s in their efforts to sample copyrighted music).

<sup>285</sup> See Menell & Depoorter, *supra* note 138, at 69-71 (comparing the lack of preclearance in the music industry with other property-based transactions featuring preclearance); Menell & Meurer, *supra* note 139, at 23-25 (“Unlike land institutions—which enable developers to preclear projects

with sharing of the revenues 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 abates.<sup>286</sup> Just as the television broadcasters are opening up authorized online channels for televised content to entice cord cutters,<sup>287</sup> the music industries would benefit over the long run by opening up music markets to the full range of music mashups.

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

The “cover” license provides an instructive model for developing such a system. For reasons that are no longer salient,<sup>288</sup> Congress established the nation’s first compulsory license as part of the 1909 Copyright Act.<sup>289</sup> Section 1(e) provided that

as a condition of extending the copyright control to . . . mechanical reproductions, [t]hat 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 two cents on each such part manufactured, to be paid by the manufacturer thereof.<sup>290</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.<sup>291</sup>

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through zoning administrations and quiet title through legal proceedings—intangible resource regimes do not provide much in the way of advance clearance options.”).

<sup>286</sup> See Menell, *supra* note 1, at 352, 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).

<sup>287</sup> See, e.g., David Carr, *The Stream Finally Cracks the Dam of Cable TV*, N.Y. TIMES (Oct. 19, 2014), <http://www.nytimes.com/2014/10/20/business/media/the-stream-finally-cracks-the-dam-of-cable-tv-.html> [<http://perma.cc/KCS3-4PVP>] (heralding the announcements by HBO and CBS that they would be opening up streaming services for their content).

<sup>288</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 Company Fonotipin, “the largest music-publishing company in the world,” had created “a possibility of a great music trust in this country and abroad”).

<sup>289</sup> See Howard B. Abrams, *Copyright’s First Compulsory License*, 26 SANTA CLARA COMPUTER & HIGH TECH. L. J. 215, 217-21 (2010) (reviewing the purpose and origins of the 1909 Copyright Act).

<sup>290</sup> An Act to Amend and Consolidate the Acts Respecting Copyright, ch. 320, § 1(e), 35 Stat. 1075 (1909).

<sup>291</sup> *Id.*

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.”<sup>292</sup> The omnibus Copyright Act of 1976 updated the law,

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>293</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>294</sup> 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>295</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>296</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 original version of “All Along the Watchtower,” it is the Jimi Hendrix version that I find the most tantalizing. Bob Dylan has

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<sup>292</sup> Abrams, *supra* note 289, at 222.

<sup>293</sup> 17 U.S.C. § 115(a)(1) (2012).

<sup>294</sup> *Id.* § 115(a)(2).

<sup>295</sup> COPYRIGHT ROYALTY BD., U.S. COPYRIGHT OFFICE, M-200A, MECHANICAL LICENSE ROYALTY RATES (2010).

<sup>296</sup> See KOHN & KOHN, *supra* note 273, at 656-59 (explaining “[t]he provision of the copyright statute compelling copyright owners to issue mechanical licenses” and the history of the fee system that was devised).

remarked that the Hendrix cover “overwhelmed” him.<sup>297</sup> 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>298</sup>

In the booklet accompanying his *Biograph* album, Dylan notes, “I liked Jimi Hendrix’s record of this and ever since he died I’ve been doing it that way. . . . Strange though how when I sing it I always feel like it’s a tribute to him in some kind of way.”<sup>299</sup>

The cover license has produced a vast number of remarkable sound recordings, as well as some truly regrettable, but innocuous, releases.<sup>300</sup> The cover license enables young musicians to develop and showcase their skill using popular songs. It provides a convenient mechanism for record labels to test markets. Television music reality shows, such as *American Idol*, have relied upon this provision of the copyright law to promote sales of contestants on iTunes and other digital platforms.<sup>301</sup> 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.

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<sup>297</sup> See John Dolen, *A Midnight Chat with Dylan*, FORT LAUDERDALE SUN SENTINEL (Sept. 28, 1995), [http://articles.sun-sentinel.com/1995-09-28/lifestyle/9509270260\\_1\\_songs-sunrise-musical-theatre-tour](http://articles.sun-sentinel.com/1995-09-28/lifestyle/9509270260_1_songs-sunrise-musical-theatre-tour) [<http://perma.cc/VKR3-8GXW>].

<sup>298</sup> Shelby Morrison, *Rare Performances: Jimi Hendrix Experience All-Star Tribute Jam*, ROCK & ROLL HALL FAME (Nov. 27, 2012, 10:30 AM), <http://rockhall.com/blog/post/rare-performances-jimi-hendrix-rock-hall-tribute> [<http://perma.cc/SUL2-ZNUV>].

<sup>299</sup> BOB DYLAN, *BIOGRAPH* (CBS Inc. 1985).

<sup>300</sup> See, e.g., Dan Epstein, *William Hung*, Hung for the Holidays, WONDERING SOUND (Apr. 22, 2011), <http://www.wonderingsound.com/review/hung-for-the-holidays-william-hung> [<http://perma.cc/XK9J-M3BQ>] (reviewing one of William Hung’s Christmas album mashups, which samples a Queen song, as it “surely has Freddie Mercury turning in his grave like a rotisserie chicken”); WILLIAM HUNG, *HUNG FOR THE HOLIDAYS* (Koch Records 2004).

<sup>301</sup> See Brian Day, *In Defense of Copyright: Record Labels, Creativity, and the Future of Music*, 21 SETON HALL J. SPORTS & ENT. L. 61, 83 (2011) (“[M]eteric jumps are not uncommon in the music industry, as when, for example, an unknown artist attains worldwide success after a season of *American Idol*.”); Bilal Kaiser, *Royalties for Cover Songs*, LEGALZOOM (Apr. 2011), <https://www.legalzoom.com/articles/royalties-for-cover-songs> [<http://perma.cc/BQ4J-8S5H>] (mentioning that popular TV shows such as *American Idol* obtain mechanical licenses to allow artists to perform cover songs); *American Idol Top 5 Season 14*, iTUNES, <http://itunes.apple.com/us/album/american-idol-top-5-season-14/id990051024> [<http://perma.cc/9SNW-ZCKM>] (last visited Oct. 31, 2015) (selling an *American Idol* album via iTunes).

There have been, however, 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>302</sup> Nonetheless, the cover license 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 preset pricing mechanism that does not require any 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 is 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, nondiscriminatory, 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. To the extent that a remix does so, it finds further cover under fair use considerations.<sup>303</sup> 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, preclearance institution.

A remix compulsory license could work as follows. A remix artist would assemble an outline for the new work. The time usage of each selection would be coded, much as Girl Talk's listing for "Play Your Part (Pt. 1),"<sup>304</sup> and submitted through a standardized Copyright Office remix registration form along with the registration fee and a deposit copy. All of this could be accomplished through an Internet portal. The composition and 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

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<sup>302</sup> See Abrams, *supra* note 289, at 226-41 (arguing that compulsory licenses are antiquated and should be repealed); Robert P. Merges, *Compulsory Licensing vs. the Three "Golden Oldies" Property Rights, Contracts, and Markets* 6-11 (Cato Policy Analysis, Working Paper No. 508, 2004), <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa508.pdf> [<http://perma.cc/J3B5-5BA3>] (arguing that compulsory licensing is overly complex and inflexible).

<sup>303</sup> See *Carriou v. Prince*, 714 F.3d 694, 705-06 (2d Cir. 2013) (holding that transformative use of another work is protected by the fair use doctrine).

<sup>304</sup> See *supra* note 22 and accompanying text.

regulations and, assuming compliance, issue a digital registration certificate containing registration information, ownership shares, and the location 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 insulating them from copyright liability for distributing the work, and providing the necessary information channeling revenue to owners of underlying copyrights.

This mechanism would automate the clearance process, avoid the problems of gaining permission from copyright owners, and afford remix artists with a relatively straightforward, inviting, and 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 receive revenue streams without putting forth any additional effort.

The precise splits as well as a variety of other operational details would need to be determined. 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 nondramatic remixes meeting a modest threshold of originality, splitting revenue three ways equally among the musical composition owners, sound recording owners, and 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 be more than conventional rap and hip hop samples.

A low-intensity threshold could displace the existing sample market for less intensive remixes. Such displacement could be beneficial due to holdup and transaction cost problems plaguing the rap and hip hop genres.<sup>305</sup> Furthermore, a high threshold could distort remix art by pushing remix artists to intensity levels beyond what 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

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<sup>305</sup> See *supra* subsection II.B.1.

derivative originality for derivative works to garner protection,<sup>306</sup> RCLA might also need to demand more than trivial adaptation.

## 2. Revenue Sharing

As Ben Sisario notes, “[H]ow do you split the money from a three-minute dubstep mash-up of Britney Spears, Eurythmics, Beethoven and a dozen others?”<sup>307</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>308</sup>

We might ask, drawing on Rawls,<sup>309</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. 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>310</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>311</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 an equal three-way division. It is possible to imagine more sophisticated algorithms, such as factoring in the intensity of the remix or the market popularity of the sampled works, but such an approach creates substantial complexity.

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<sup>306</sup> See, e.g., *Gracen v. Bradford Exch.*, 698 F.2d 300, 305 (7th Cir. 1983) (holding that the law must “assure a sufficiently gross difference between the underlying and the derivative work”); *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491 (2d Cir. 1976) (en banc) (“A considerably *higher* degree of skill is required, true artistic skill, to make [a] reproduction copyrightable.”).

<sup>307</sup> Sisario, *supra* note 75.

<sup>308</sup> See *Music Licensing Practices of Performing Rights Societies: Hearing Before the Subcomm. on Intellectual Prop. & Judicial Admin. of the H. Comm. on the Judiciary*, 103d Cong. 26-31 (1994) (statement of Morton Gould, President Emeritus, American Society of Composers, Authors and Publishers (ASCAP)) (describing ASCAP’s licensing practices); *Merges*, *supra* note 280, at 1328-39 (overviewing the role and history of performing rights societies, and specifically, of ASCAP).

<sup>309</sup> See generally JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999).

<sup>310</sup> See MCLEOD & DICOLA, *supra* note 37, at 108-10 (suggesting that remix standards “should reward creative labor”).

<sup>311</sup> See generally Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 *YALE L.J.* 1742 (2007) (discussing the virtues of modularity).

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 of integrating the market success of the sampled works. Remixers would undoubtedly be influenced by the popularity of works within the culture. Hence, 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. One 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 one-third division rule applicable to conventional samples. Remixes of remixes could be easily handled because of the 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, however, might be sufficiently iconic to merit recognition,<sup>312</sup> but stretching the rules beyond copyright limits would make the regime less workable.

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 or revenue toward his or her own work by including long imperceptible samples.

### 3. Administrative Process

To achieve its goal of reducing transaction costs and welcoming remix artists into authorized distribution of their works, RCLA must establish an efficient and inexpensive online process for registering works and administering royalty payments.<sup>313</sup> Developing this infrastructure would complement the broader call for modernizing copyright registration, developing comprehensive and up-to-date databases, and facilitating notice.<sup>314</sup> The availability of royalty

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<sup>312</sup> Cf. *Bridgeport Music, Inc. v. SmelzGood Entm't, Inc.*, No. 3:01-0780, 2006 WL 2432126, at \*2 (M.D. Tenn. Aug. 22, 2006) (addressing “bow wow yippie yo yippy yay”). Classic screams—from Roger Daltry (“Won’t Get Fooled Again”) to Janis Joplin (“Piece of My Heart”)—come to mind.

<sup>313</sup> Karp, *supra* note 77 (noting that Dubset Media, Inc., has developed technology to track how much of each song is used in mashups).

<sup>314</sup> See generally Peter S. Menell, *Economic Analysis of Copyright Notice: Tracing and Scope in the Digital Age*, 96 B.U. L. REV. (forthcoming 2016); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004) (arguing for changes to copyright procedures, not substantive rights, to address modern concerns surrounding the copyright laws).

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<sup>315</sup>), 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.

##### a. *Interplay with Fair Use*

Like the section 115 compulsory license,<sup>316</sup> 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 interfere with First Amendment protections. Subsection III.E.3 discusses concerns that the availability of this licensing regime could influence the scope of fair use.

##### b. *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 such remixes could well be permissible based on fair use. There would also be issues surrounding synchronization (television, motion picture, video game) and dramatic work licensing.

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<sup>315</sup> See, e.g., *About*, SOUNDEXCHANGE, <http://www.soundexchange.com/about> [<http://perma.cc/Z7G5-8HJD>] (last visited Oct. 31, 2015) (“SoundExchange is the independent nonprofit collective management organization that collects and distributes digital performance royalties to featured artists and copyright holders.”).

<sup>316</sup> See 17 U.S.C. § 115 (2012).

c. *Endorsement Disclaimer*

RCLA should expressly disclaim that sampled composers and recording artists have consented to their works being remixed. Such artists might 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. Subsection III.E.4 explores the broader moral rights aspects of a remix compulsory license regime.

d. *Changes to Statutory Damages*

The threat 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 be adapted for dividing revenue for video mosaics of the music videos used in conjunction with audio remixes.<sup>317</sup> 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 mosaic.

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

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<sup>317</sup> See, e.g., Norwegian Recycling, *Norwegian Recycling—Mash It Up*, YOUTUBE (Dec. 5, 2010) [https://www.youtube.com/watch?v=HU\\_m6gS8rO8](https://www.youtube.com/watch?v=HU_m6gS8rO8) [http://perma.cc/4APY-ENVT]

of forms of remix art such as appropriation art<sup>318</sup> and fan fiction.<sup>319</sup> Compulsory licensing is not necessarily the right solution for all of these contexts. Nonetheless, it opens up the policy toolbox for tailoring distinctive regimes to 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, remix artists depend critically on the availability of high quality source materials, and especially the stems from which multitrack recordings are compiled.<sup>320</sup> Although some master recording proprietors release such material, availability has been limited.<sup>321</sup> A more robust system for expanding and sharing revenue from remix art would encourage more record labels and recording artists to share stems and other subcomponents that could expand the creative opportunities for remix projects.

##### 2. Channel Remix Artists and Their Fans into Authorized Content Markets

Perhaps the greatest long-term benefit of a remix compulsory license would be in channeling remix artists and their fans into authorized distribution platforms. As more of this work becomes available on streaming and download services 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 will broaden their catalog. As more consumers join these services, the piracy problem will

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<sup>318</sup> See, e.g., *Cariou v. Prince*, 714 F.3d 694, 699 (2d Cir. 2013) (discussing appropriation art involving a painter “taking photographs and other images that others have produced and incorporating them into paintings and collages that he then presents, in a different context, as his own”).

<sup>319</sup> See, e.g., Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 659-64 (1997) (finding, in an early assessment, the status of fan fiction uncertain under then-current copyright law).

<sup>320</sup> See *supra* subsection I.B.1.

<sup>321</sup> See *supra* note 64 and accompanying text.

abate. There is no need to download and stream illegally if you have what you want through a fairly priced and fully authorized channel. This would erode the corrosive effects of a gap between norms and law, thereby improving the acceptability of copyright markets more generally. Just as Netflix, Hulu, and Amazon Prime have brought cord-cutters and downloaders into the marketplace, fully stocked remix-subscription services can do the same.

### 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>322</sup> A remix compulsory license system would 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. 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>323</sup> No online service can achieve economic viability without licenses to a substantial portion of the legacy collection.<sup>324</sup> “Even young fans want to be able to stream the classics.”<sup>325</sup> Through this power, the major record labels have structured online royalties in such a way that not only their own artists, but also independent artists, cannot derive a fair share of streaming revenues.<sup>326</sup> 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, those without formal legal representation, and those without 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

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<sup>322</sup> See Menell, *supra* note 1, at 296; Menell & Meurer, *supra* note 139, at 47 (arguing that relaxed formalities in copyright hinders creativity); Sprigman, *supra* note 314, at 500-43 (predicting negative consequences from an unconditional copyright system).

<sup>323</sup> See Menell, *supra* note 1, at 292-97, 361-66 (discussing the economics of music licensing).

<sup>324</sup> See *id.* at 295 (stating that the legacy catalog is necessary for viability of music streaming services, such as Spotify).

<sup>325</sup> *Id.* at 362.

<sup>326</sup> See *id.* at 295 (noting the power of the major labels to impact the flow of digital music revenues).

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.

### 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 could 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 and undesirable 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>327</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. Little has emerged.<sup>328</sup> The added complication of vast, difficult-to-monitor unauthorized

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<sup>327</sup> See Abrams, *supra* note 289, at 241-43 (discussing whether a compulsory licensing scheme offers benefit relative to free markets in protecting intellectual property); Merges, *supra* note 302, at 4 (“[C]osts that are saved by a compulsory license in the short run are usually more than offset by the inefficiencies that it causes over time.”); cf. Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455, 519-20 (2010) (warning against giving Congress too much power to develop exceptions to valid patents).

<sup>328</sup> *The Wall Street Journal* reports that Dubset Media Inc. is in discussions with major record labels to license DJ recordings. Karp, *supra* note 77. Such a deal could open the way for such works

distribution platforms indicates 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 overall market performance.

### 3. Potential Distortions to Fair Use

The establishment of a convenient and effective compulsory license for mashups could affect the scope of fair use.<sup>329</sup> In assessing the potential market for copyrighted works under the fourth fair use factor, courts consider the availability of licensing channels.<sup>330</sup> A comprehensive compulsory licensing regime could lead courts to narrow the scope for fair use in evaluating sampling of sound recordings.<sup>331</sup> It is critical, however, to distinguish between economic uses and political, parodic, and other free-speech uses.

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 and 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

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to make their way onto streaming platforms like Spotify. *Id.* The solution, however, would only apply to samples that have been approved by the underlying copyright owners.

<sup>329</sup> See James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 895 (2007) (“[R]isk-averse actors in important copyright industries tend to seek copyright licenses when they do not need to. . . . [And] fair use doctrine places substantial weight on existing licensing practices.”); Jennifer E. Rothman, *Copyright, Custom, and Lessons from the Common Law* (analyzing the role of custom in fair use analysis), in INTELLECTUAL PROPERTY AND THE COMMON LAW 230, 233-240 (Shyamkrishna Balganesh ed., 2013); Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1916 (2007) (arguing that the culture of seeking pre-clearance “does not reflect any evaluation by IP users of their preferred allocation of IP rights”).

<sup>330</sup> See Rothman, *The Questionable Use of Custom in Intellectual Property*, *supra* note 329, at 1932 (“[C]ourts view both existing and potential licensing markets as an indication of whether a use is for profit and also whether a given use is likely to harm the market for the work at issue.”).

<sup>331</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, 1657 (1982) (“An economic and structural analysis of the fair use doctrine and its place in the copyright scheme reveals that fair use is ordinarily granted when the market cannot be relied upon to allow socially desirable access to, and use of, copyrighted works.”).

dimensions of copyright law,<sup>332</sup> should continue to provide relatively wide berth for parodies, commentary, and political uses. Furthermore, Congress can bolster protection for freedom of speech by expressly stating 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>333</sup> Similarly, Congress could add a sentence stating that “the fact that a work is eligible for a compulsory license should not influence the determination of whether use of a copyrighted work is fair.”

#### 4. Moral Rights

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.”<sup>334</sup> It could be personally offensive to him as well as his fanbase. Several commenters to the recent copyright studies raised impassioned moral criticisms of music remixes.<sup>335</sup> They strongly criticized 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>336</sup>

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<sup>332</sup> See, e.g., C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 951 (2002) (“Copyright legislation that restricts an individual’s expressive choices and copyright rules that limit the media’s capacity to perform the democratic roles of a free press should be found unconstitutional under the First Amendment.”).

<sup>333</sup> 17 U.S.C. § 107 (2012). 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, 555 (1985), that the unpublished nature of the work is a “key, though not necessarily determinative factor tending to negate the defense of fair use,” H.R. REP. NO. 102-836, at 9 (1992). Since this amendment, courts have placed far less weight on the unpublished nature of a work in conducting fair use analysis. See 4 NIMMER & NIMMER, *supra* note 123, § 13.05[A][2][b][ii].

<sup>334</sup> See *supra* note 24 and accompanying text.

<sup>335</sup> See LaPolt & Tyler, *supra* note 266 (representing the views of Steven Tyler and appending comments by Don Henley, Joe Walsh, Andre Young (Dr. Dre), Gordon Sumner (Sting), Joel Zimmerman (deadmau5), Ozzy Osbourne, Mick Fleetwood, Britney Spears, and Billy Joel).

<sup>336</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES \*2 (“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.”); cf. LaPolt & Tyler, *supra* note 266 (“Music is very personal to the creator and the law cannot treat it as a simple commodity. Requiring a compulsory right for derivatives would discourage many artists and songwriters from releasing their music in the first place . . .”).

Yet it is in 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>337</sup> The First Amendment comes down strongly on the side of preventing censorship, even of hate speech.<sup>338</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 of fair use as parody or social commentary.

Furthermore, the view that property law confers absolute dominion has long been discredited. Property law has evolved to balance public and private interests.<sup>339</sup> And copyright protection is even more tempered with limitations and exceptions, especially with regard to free expression.<sup>340</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>341</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 plausible 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. A compulsory license creates a somewhat distinct imprimatur by commoditizing the offensive use. In addition, it potentially

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<sup>337</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994) (“[T]he unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.”).

<sup>338</sup> See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 393-94 (1992) (“[St. Paul] has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort . . . would alone be enough to render the ordinance presumptively invalid . . .”).

<sup>339</sup> See Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 145 (2004) (“IP in fact has begun to resemble property. But if IP can take on the powers of property, it must also be saddled with property’s limits.”); Carol M. Rose, *Canons of Property Talk, or, Blackstone’s Anxiety*, 108 YALE L.J. 601, 632 (1998) (“[W]hen scholars read Blackstone’s ringing words about property as exclusion, they should read the rest of the paragraph too—to appreciate Blackstone’s anxiety and to consider how much of that anxiety redounds back to the seemingly mighty axiom of exclusive dominion.”).

<sup>340</sup> See Peter S. Menell, *Governance of Intellectual Resources and the Disintegration of Intellectual Property in the Digital Age*, 26 BERKELEY TECH. L.J. 1523, 1557-58 (2011) (noting the challenges of protecting property while preserving creative expression).

<sup>341</sup> See *supra* subsection II.B.2.

removes the risk of copyright infringement, although that depends, of course, on the breadth of fair use.

Perhaps the best approach to alleviating this morality-free expression dilemma would be for Congress to disclaim that composers and recording artists whose works are remixed reflect these creators' endorsement of the remixed work absent express approval. Such a norm would be understood from the context, but the legislative statement could have some expressive significance.<sup>342</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 fully 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 and risky litigation, with the collateral damage of calling attention to the offensive remix,<sup>343</sup> it is unlikely that this symbolic gesture would have much effect. A better approach might be for the artists to donate the remix revenue attributable to the offensive use to organizations that counter the messages that the sampled composer or recording artist finds troubling.

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 strong moral rights protection.<sup>344</sup> While the United States grudgingly added moral rights protections

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<sup>342</sup> See generally Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000) (discussing the power of expressive conceptions of law to shape personal behaviors and attitudes).

<sup>343</sup> See, e.g., Andy Greenberg, *The Streisand Effect*, FORBES (May 11, 2007, 6:00 AM), [http://www.forbes.com/2007/05/10/streisand-digg-web-tech-cx\\_ag\\_0511streisand.html](http://www.forbes.com/2007/05/10/streisand-digg-web-tech-cx_ag_0511streisand.html) [<http://perma.cc/V97D-G8VH>] ("When the Streisand effect takes hold, [digital] contraband doesn't disappear quietly. Instead, it infects the online community in a pandemic of free-speech-fueled defiance, gaining far more attention than it would have had the information's original owners simply kept quiet.")

<sup>344</sup> See *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 24 (2d Cir. 1976) ("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, 590 (2d Cir. 1952) (Frank, J., concurring) (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., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 553-54 (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, 99 (2d Cir. 1987) (applying *Harper & Row* in finding that a biography that liberally paraphrased J.D. Salinger's unpublished letters was not fair use); *Gilliam*, 538 F.2d at 17-18, 20 (holding that truncation of *Monty Python* episodes through the insertion of commercial advertisements implicated the right to prepare derivative works). Nonetheless, these cases have been narrowed through legislation. See Pub. L. No. 102-492, 106 Stat. 3145 (1992) (codified as amended at 17 U.S.C. § 107 (2012)) (amending section 107 to state that "[t]he fact that a work is unpublished shall not itself bar

for works of visual art as part of its accession to the Berne Convention,<sup>345</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 not taking ourselves too seriously.<sup>346</sup>

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 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. Through 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

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a finding of fair use if such finding is made upon consideration of all of [the section 107] factors"). Also, the fair use doctrine has been given broader interpretations. *See, e.g.,* Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013) (holding that the transformative presentations of photographs constituted fair use); *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006) (determining that use of photograph for distinct artistic purposes was transformative, and as such, did not constitute copyright infringement); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006) (holding that using an image for a purpose plainly different than that of its original use weighs in favor of a fair use finding).

<sup>345</sup> The Visual Artists Rights Act of 1990 (VARA), Pub. L. No. 101-650, 104 Stat. 5128, 5132 (codified as amended at 17 U.S.C. § 106A (2012)), added section 106A to the Copyright Act. Although added two years after the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853, Congress was considering additional moral rights legislation in 1988. *See* H. REP. NO. 100-609, at 40 n.91 (1988) ("The Senate Judiciary Committee has held hearings in both the 99th and 100th Congresses on legislation introduced . . . to protect the rights of integrity and paternity of visual artists . . .").

<sup>346</sup> Even my suggestion that "Stairway to Heaven" is sacred was a bit tongue-in-cheek. *See supra* note 26 and accompanying text. 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." MCLEOD & DICOLA, *supra* note 37, at 120. After all, even the great Led Zeppelin did their share of borrowing. For instance, "Whole Lotta Love" contained lyrics that were derivative of Willie Dixon's 1962 song "You Need Love," but after a 1985 lawsuit resulting in a settlement, later pressings of *Led Zeppelin II* credited Dixon as co-writer. DAVE LEWIS, *THE COMPLETE GUIDE TO THE MUSIC OF LED ZEPPELIN* 14-15 (1994); *see also* Charles M. Young, "I'm Not Such an Old Hippie," *MUSICIAN*, June 1, 1990, at 45, 47 (quoting Robert Plant's acknowledgment of the borrowing in "Whole Lotta Love," "well, you only get caught when you're successful. That's the game"). Also, "Babe I'm Gonna Leave You" was written by folk singer Anne Bredon; since 1990, the Led Zeppelin version has credited Bredon, who received a substantial backpayment in royalties. LEWIS, *supra*, at 7. For a more songs that Led Zeppelin did copy or may have copied, *see* Joey DeGroot, *7 Songs That Led Zeppelin Ripped Off*, *MUSIC TIMES* (May 20, 2014, 17:30 PM), <http://www.musictimes.com/articles/6250/20140520/7-songs-other-than-stairway-to-heaven-that-led-zeppelin-stole.htm> [<http://perma.cc/F8QY-9UGH>].

industry, which flourished in the protest songs of the 1960s and has profited handsomely as new genres have emerged.<sup>347</sup>

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>348</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 whose works were sampled. To stand in the way of mashup art is futile. Steven Tyler cannot effectively prevent 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 counterproductively steer 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>349</sup> Although the Supreme Court's 2006 decision in *eBay, Inc. v. MercExchange, LLC* opened up the potential for awarding ongoing royalties as opposed to injunctive relief in intellectual property cases,<sup>350</sup> the availability of such remedies is risky.<sup>351</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

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<sup>347</sup> See generally Ron Eyerman & Andrew Jamison, *Social Movements and Cultural Transformation: Popular Music in the 1960s*, 17 *MEDIA CULTURE & SOC'Y* 449 (1995) (associating the 1960s counterculture and social upheaval with the growth and development of popular music and the music industry in that era).

<sup>348</sup> See, e.g., Kurt Orzeck, *Steven Tyler Blasts Remix-Friendly Copyright Law Proposal*, LAW360 (Feb. 10, 2014, 9:20 PM), <http://www.law360.com/ip/articles/508829/steven-tyler-blasts-remix-friendly-copyright-law-proposal> [<http://perma.cc/EWQ7-PQWW>] (discussing the singer's public criticism of reforms made by the USPTO in creating compulsory licenses for derivative works).

<sup>349</sup> See Alex Kozinski & Christopher Newman, *What's So Fair About Fair Use?*, 46 *J. COPYRIGHT SOC'Y U.S.A.* 513, 515 (1999) ("Fair use is conceptually a hard-edged box; either you're in it or you're out of it.").

<sup>350</sup> 547 U.S. 388, 391 (2006) (holding in a patent infringement case, the court has equitable discretion to grant relief).

<sup>351</sup> See Menell & Depoorter, *supra* note 138, at 75 ("In essence, if copyright owners defeated a fair use argument, they obtained veto power over exploitation of the cumulative creation . . . . [T]he copyright owner could enforce its entitlement with a property rule.").

effective access to authorized online markets for their work and live 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) and too little attention on the values of compensating those whose work is used.<sup>352</sup> The binary choice is a falsely polarizing one between control and free.<sup>353</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>354</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 calibrated remix compulsory license offers a constructive, practical path for re-equilibrating copyright protection for the Internet Age.

The point here is not to diminish the critical importance of fair use to a productive and free culture. Rather, it is to suggest that society can better pursue 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.

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<sup>352</sup> See, e.g., LESSIG, *supra* note 31, at 255 (“My recommendation is that Congress exempt an area of creative work from the requirements of fair use or the restriction of copyright.”); Kerri Eble, Note, *This Is a Remix: Remixing Music Copyright to Better Protect Mashup Artists*, 2013 U. ILL. L. REV. 661, 692-94 (arguing for the expansion of the fair use doctrine to protect mashups).

<sup>353</sup> Jane Ginsburg's recent work recognizes this flaw. Jane C. Ginsburg, *Fair Use for Free, or Permitted-but-Paid?*, 29 BERKELEY TECH. L.J. 1383, 1386 (2014) (“[T]he copyright law should distinguish new distributions from new works, and should confine (free) ‘fair use’ to the latter. . . . [M]any distribution uses formerly deemed ‘fair’ [should] be ‘permitted-but-paid,’ and be subject to a statutory framework for license negotiations . . . .”); see also Kozinski & Newman, *supra* note 349, at 521 (“[W]e . . . have inefficient hold outs, in the form of authors who use their exclusive right to prevent the creation of valuable derivative works. . . . A piece of land can't serve both as your living room and Trump Towers, but a piece of intellectual property suffers from no such limitations.”); Menell & Depoorter, *supra* note 138, at 81 (proposing modifications to improve the implementation of the fair use doctrine so that “copyright owners can more efficiently develop convenient licensing markets for their catalogs of copyrighted materials”).

<sup>354</sup> See MCLEOD & DICOLA, *supra* note 37, at 227 (noting that Philo Farnsworth, operator of the Illegal Art website that distributes Girl Talk's music, “think[s] that it would be great if there was a compulsory license similar to recording a cover song” and also that a compulsory license “would at least give artists more options. . . . Artists could still claim fair use, but that would at least provide safer avenues since fair use is a very grey area”); Menell, *supra* note 1, at 357 (describing reactions from DJs to a potential remix compulsory license as positive and “a direction for the industry to go”).

## 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 post-Napster 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>355</sup> I am reminded of Steven Stills's timeless protest anthem "For What It's Worth" brilliantly reinterpreted (through licensed sampling) in Public Enemy's "He Got Game"<sup>356</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?<sup>357</sup>

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."<sup>358</sup> Its reform can play a role in motivating and sustaining the careers of the next generation of Steven Stillses and those, like Public Enemy, who personalize, engage, and remix that art. Robust pathways for cumulative creativity, free speech, and low-transaction-cost, fair compensation licensing point the way.

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<sup>355</sup> Cf. BENNETT, *supra* note 15, at 123-50 (discussing continuity and conflict across generational audiences).

<sup>356</sup> See *supra* note 216 and accompanying text.

<sup>357</sup> BUFFALO SPRINGFIELD, *For What It's Worth*, on BUFFALO SPRINGFIELD (Rhino/Elektra 2007).

<sup>358</sup> *Id.*