

## NOTE

### MUSIC MASHUPS: TESTING THE LIMITS OF COPYRIGHT LAW AS REMIX CULTURE TAKES SOCIETY BY STORM

#### I. INTRODUCTION

In an age where rapidly changing technology is transforming traditional methods of communication and expression, many wonder if the laws of the twentieth century will suffice in the new millennium.<sup>1</sup> The Framers of the Constitution certainly did not anticipate the World Wide Web, and it is unlikely that the drafters of the Copyright Act of 1976 could have foreseen the difficulties that would arise in the digital era.<sup>2</sup> Digital technology and the Internet have not only made infinite collections of unique art available, but they have also made it possible for people to mix and mash others' works with little difficulty and no authorization.<sup>3</sup> Consequently, society is witnessing a shift away from passive involvement in culture toward a more active, participation-oriented scheme.<sup>4</sup> The practice of borrowing ideas to create and inspire new art has never been as prevalent as it is now.<sup>5</sup> One area that is increasingly affected by this shift is music.<sup>6</sup> In fact, there is an entire genre of music, commonly known as "mashups," dedicated to borrowing

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1. See Lawrence Lessig, *Free(ing) Culture for Remix*, 2004 UTAH L. REV. 961, 964.

2. See LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* 131 (2004).

3. See Edward Lee, *Developing Copyright Practices for User-Generated Content*, J. INTERNET L., July 2009, at 1, 13; Lessig, *supra* note 1, at 965; Michael Allyn Pote, Comment, *Mashed-Up in Between: The Delicate Balance of Artists' Interests Lost Amidst the War on Copyright*, 88 N.C. L. REV. 639, 646 (2010).

4. See Lee, *supra* note 3, at 14.

5. LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* 82-83 (2008) (discussing how technological advances have facilitated the practice of borrowing from others to create new works of art).

6. Eric Hellweg, *Mix and Mash: The Mashup Is Born from a Blend of Two Songs*, EDUTOPIA (Sept. 2004), <http://www.edutopia.org/node/5708>.

and mixing others' works.<sup>7</sup> A music mashup<sup>8</sup> is a song formed by combining two or more preexisting songs.<sup>9</sup>

This Note argues that mashups constitute copyright infringement, and that mashup artists are not entitled to the affirmative defense of fair use. Ambiguity and gaps in current legislation illustrate the need for copyright reform in a world increasingly dependent on the Internet and technology in general.<sup>10</sup> Although no one has brought suit to allege infringement by mashup artists, it is unlikely that original artists and record companies will ignore the problem forever, and it is therefore imperative that legislators address mashups before this ticking time bomb explodes.<sup>11</sup> For example, if and when copyright holders decide to sue mashup artists, they will run the risk of creating unfavorable precedent which could give mashup artists more freedom to use preexisting works without authorization.<sup>12</sup> In the alternative, a court might find that mashups are illegal, thereby providing an incentive for copyright holders to sue mashup artists.<sup>13</sup> Either way, one group would suffer a catastrophic loss while the other would savor a landslide victory.<sup>14</sup>

Part II of this Note discusses the rising popularity of mashups and the unlikelihood that they are a passing fad. Part III then addresses the legal issues associated with mashups. Section A demonstrates why mashups are not entitled to copyright protection, while Section B illustrates why mashups constitute copyright infringement. Section C then explains why mashup artists are not entitled to any affirmative defenses, and are therefore liable for copyright infringement. Part IV points out various gaps in legislation, arguing that lawmakers should

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7. See Pote, *supra* note 3, at 646; Hellweg, *supra* note 6.

8. The term "mashup" will refer to music mashups only. Also, although there are various spellings of the term, this Note will adhere to "mashup" for the sake of consistency.

9. See Aaron Power, Comment, *15 Megabytes of Fame: A Fair Use Defense for Mash-Ups as DJ Culture Reaches Its Postmodern Limit*, 35 SW. U. L. REV. 577, 579 (2007).

10. Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1473; Lessig, *supra* note 1, at 969.

11. See David Mongillo, *The Girl Talk Dilemma: Can Copyright Law Accommodate New Forms of Sample-Based Music?*, U. PITT. J. TECH. L. & POL'Y, Spring 2009, at 1, 3; Pote, *supra* note 3, at 640.

12. See Mongillo, *supra* note 11, at 3.

13. See Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869, 1885 (2009) (noting that many mashup artists have not released commercial albums for fear of litigation); see also *Girl Talk as Fair Use Martyr*, COPYCENSE (Mar. 12, 2009), [http://www.copycense.com/2009/03/girl\\_talk\\_as\\_fair\\_use\\_martyr.html](http://www.copycense.com/2009/03/girl_talk_as_fair_use_martyr.html) (asking why no one has sued Girl Talk, an artist who is "playing a game of statutory chicken with the music labels from whose records he has culled his considerable sample list").

14. See Lessig, *supra* note 1, at 969 (noting that the current system does not enable protection for both remix artists and original artists).

reform copyright law to account for recent technological advances. Part V suggests alternatives to the problematic aspects of copyright law today, specifically as it applies to remix culture, such as mashups. And finally, Part VI concludes by highlighting the need for copyright reform as the demand for remix culture increases.

## II. POPULARITY OF MASHUPS: A SMASH HIT

Long before Rihanna brought Soft Cell's "Tainted Love" back into the spotlight with her chart-topping hit "S.O.S." in 2006, musicians had discovered that integrating preexisting works into their music tended to increase the newer work's popularity.<sup>15</sup> This process of using one sound recording in a new sound recording is known as digital sampling.<sup>16</sup>

Although digital sampling is often associated with the rise of hip-hop in the 1980s, the process has roots in earlier genres, such as folk music, Jamaican Dub music, and disco music.<sup>17</sup> Nevertheless, music lovers inevitably consider artists like Vanilla Ice and Notorious B.I.G. the forerunners of digital sampling for their unforgettable hits "Ice, Ice, Baby" and "Juicy."<sup>18</sup> Vanilla Ice and B.I.G. were not alone, however, as developments in technology facilitated many other hip-hop artists' ability to sample preexisting works without permission.<sup>19</sup>

Over the years, musicians have offered various defenses for their unauthorized use of others' works.<sup>20</sup> For example, rapper Biz Markie claimed that he should not be liable for sampling without permission because the practice had become so widespread that everyone in the business was doing it.<sup>21</sup> Unsurprisingly, however, the Southern District of New York rejected that argument in *Grand Upright Music, Ltd. v. Warner Brothers Records, Inc.*<sup>22</sup> Others have unsuccessfully opined that incorporating short, edited samples into new songs should not give rise to liability because the use is de minimis, or so insubstantial that it may be deemed excusable.<sup>23</sup>

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15. See Power, *supra* note 9, at 579; *Rihanna's Sample-Based Music*, WHO SAMPLED, <http://www.whosampled.com/artist/Rihanna/> (last visited Mar. 16, 2011).

16. Power, *supra* note 9, at 579.

17. See Pote, *supra* note 3, at 644; Power, *supra* note 9, at 579.

18. See Mongillo, *supra* note 11, at 4; K. Matthew Dames, *Uncleared Sample Halts Sales of Seminal Hip Hop Album*, COPYCENSE (Mar. 20, 2006, 10:14 hrs. EST), [http://www.copycense.com/2006/03/uncleared\\_sampl.html](http://www.copycense.com/2006/03/uncleared_sampl.html).

19. See Pote, *supra* note 3, at 645.

20. See Power, *supra* note 9, at 585.

21. See *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991); Power, *supra* note 9, at 583-84.

22. See 780 F. Supp. at 183; Power, *supra* note 9, at 583-84.

23. See Power, *supra* note 9, at 584 & n.56.

In 2004, the issue of digital sampling came before the Sixth Circuit in *Bridgeport Music, Inc. v. Dimension Films*.<sup>24</sup> In response to the question of whether musicians may sample others' works without authorization, the court created a bright-line rule, which still stands.<sup>25</sup> As a result of *Bridgeport*, it is now illegal to digitally sample another's music without first obtaining a license.<sup>26</sup>

Despite the bright-line rule for digital sampling, there is great uncertainty surrounding the legality of mashups because courts have not yet addressed the matter.<sup>27</sup> It is unclear whether the rule for sampling should apply to mashups because mashups are distinguishable from conventional sampling.<sup>28</sup> For example, traditional sampling consists of incorporating preexisting sound recordings into otherwise new, original songs.<sup>29</sup> One example of this is Puff Daddy's "I'll Be Missing You," which features instrumentals from The Police's "Every Breath You Take" and *new* vocals by Puff Daddy and Faith Evans.<sup>30</sup>

In contrast, mashups contain no original content.<sup>31</sup> Rather, mashup artists create mashups solely by combining preexisting, copyrighted songs.<sup>32</sup> Unlike hip-hop artists who add original vocals to the beats they sample, mashup artists offer nothing new.<sup>33</sup> Thus, given the differences between the sampling involved in *Bridgeport* and the sampling involved in mashups, one should not assume that the bright-line rule from *Bridgeport* automatically applies to mashups.<sup>34</sup>

Despite legal ambiguities, professionals and amateurs (either bravely or indifferently) continue to create mashups for a variety of purposes.<sup>35</sup> Such purposes include, but are not limited to, tribute, homage, criticism, education, curiosity, and popular demand.<sup>36</sup>

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24. See 383 F.3d 390, 398 (6th Cir. 2004).

25. See *id.*; Power, *supra* note 9, at 584-85.

26. See *Bridgeport*, 383 F.3d at 398; Power, *supra* note 9, at 585. Common types of authorization include licenses, permission from the original work's copyright holders, and implied licenses. See Pote, *supra* note 3, at 684, 686. It is worth noting that this bright-line rule applies even when the sample is insubstantial. See Power, *supra* note 9, at 584-85. In *Bridgeport*, for example, the plaintiff prevailed even though the defendant had only taken a two-second sample and edited it to the point that it was virtually unrecognizable. *Id.*

27. See Mongillo, *supra* note 11, at 3 (noting that Girl Talk, the most celebrated mashup artist, has not yet been sued).

28. See Power, *supra* note 9, at 583-86.

29. See Pote, *supra* note 3, at 646.

30. See Brett I. Kaplicer, Note, *Rap Music and De Minimis Copying: Applying the Ringgold and Sandoval Approach to Digital Samples*, 18 CARDOZO ARTS & ENT. L.J. 227, 233 (2000).

31. Pote, *supra* note 3, at 646.

32. *Id.*

33. *Id.*

34. See Power, *supra* note 9, at 585.

35. See, e.g., CTR. FOR SOC. MEDIA, RECUT, REFRAME, RECYCLE: QUOTING COPYRIGHTED

In terms of form, the most common type of mashup is referred to as “A vs. B,” where the vocal track of one song is superimposed over the musical composition of another song.<sup>37</sup> One “A vs. B” mashup that gained considerable acclaim is Freelance Hellraiser’s “A Stroke of Genie-us,” which plays the vocal track of Christina Aguilera’s “Genie In A Bottle” over a rock song by The Strokes.<sup>38</sup> Other famous tracks have mashed Nirvana and Destiny’s Child (“Smells Like Teen Booty”)<sup>39</sup> and, more recently, rapper Mims with pop icon Toto (“This Is Why Africa Is Hot”).<sup>40</sup>

Another type of mashup is known as an “audio collage.”<sup>41</sup> Audio collages combine snippets of up to thirty songs from various genres.<sup>42</sup> In recent years, Girl Talk, also known as Gregg Gillis, has become one of the most celebrated mashup artists, as well as one of few mashup artists who have released commercial albums.<sup>43</sup> Girl Talk’s mashups often sample between twenty and thirty different songs, sometimes rendering

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MATERIAL IN USER-GENERATED VIDEO 6 (2008), available at [http://www.centerforsocialmedia.org/sites/default/files/CSM\\_Recut\\_Reframe\\_Recycle\\_report.pdf](http://www.centerforsocialmedia.org/sites/default/files/CSM_Recut_Reframe_Recycle_report.pdf) (arguing that mashup artists sample “in order to comment, critique, illustrate, express . . . salvag[e], rescu[e], celebrat[e], herald[, and] bond”); JORDAN “DJ EARWORM” ROSEMAN, AUDIO MASHUP CONSTRUCTION KIT (2007); Lee, *supra* note 3, at 13 (demonstrating that the Internet has facilitated amateurs’ ability to create their own works); Lessig, *supra* note 1, at 965, 969 (explaining that mashup technology is readily available for download); Andrew S. Long, Comment, *Mashed Up Videos and Broken Down Copyright: Changing Copyright to Promote the First Amendment Values of Transformative Video*, 60 OKLA. L. REV. 317, 322-25 (2007) (discussing the various purposes of mashups); Roberta Cruger, *The Mash-up Revolution*, SALON.COM (Aug. 9, 2003), [http://dir.salon.com/story/ent/music/feature/2003/08/09/mashups\\_cruger/index.html](http://dir.salon.com/story/ent/music/feature/2003/08/09/mashups_cruger/index.html) (noting that mashup entrepreneurs may be subject to lawsuits); *Music Mashup Charts*, MASHUP CHARTS, <http://www.mashup-charts.com/> (last visited Mar. 16, 2011) (demonstrating the wide array of mashup artists).

36. Long, *supra* note 35, at 322-25; Graham Reynolds, *A Stroke of Genius or Copyright Infringement? Mashups, Copyright, and Moral Rights in Canada*, IPOSGOODE (Aug. 24, 2009), <http://www.iposgoode.ca/2009/08/a-stroke-of-genius-or-copyright-infringement-mashups-copyright-and-moral-rights-in-canada/>.

37. See Reynolds, *supra* note 36; see also Hetcher, *supra* note 13, at 1872 (describing mashups).

38. Reynolds, *supra* note 36; Mazzy12345, *The Strokes vs. Christina Aguilera—A Stroke of Genie-us*, YOUTUBE (Sept. 18, 2007), <http://www.youtube.com/watch?v=ShPPbT3svAw>.

39. Spacemanspiff0, *Nirvana v. Destiny’s Child*, YOUTUBE (Jan. 22, 2007), <http://www.youtube.com/watch?v=7958669iFu0> (mixing “Smells Like Teen Spirit” with “Bootylicious”).

40. Threatsd, *This Is Why I’m Hot—Mims vs. Africa—Toto*, YOUTUBE (May 30, 2007), <http://www.youtube.com/watch?v=Fl6s2Q9BNO4> (mixing “This Is Why I’m Hot” with “Africa”) [hereinafter *This Is Why Africa Is Hot*].

41. See Mongillo, *supra* note 11, at 2 (discussing Girl Talk’s audio collages); Power, *supra* note 9, at 581.

42. See Mongillo, *supra* note 11, at 18; Power, *supra* note 9, at 581.

43. See Mongillo, *supra* note 11, at 2, 15; *Girl Talk as Fair Use Martyr*, *supra* note 13.

the original tracks unrecognizable to even the most sophisticated listeners.<sup>44</sup>

Unlike Girl Talk, however, most mashup artists choose not to release commercial albums for fear of legal consequences.<sup>45</sup> In fact, it is unclear how those who have released commercial albums have avoided litigation thus far.<sup>46</sup> One theory purports that copyright holders would rather forfeit a few battles than lose the entire war.<sup>47</sup> In other words, if courts were to declare mashups legal, then more mashup artists would release albums without authorization from the copyright holders.<sup>48</sup> Meanwhile, the fear of legal liability currently deters a number of mashup artists from releasing albums.<sup>49</sup>

Despite legal concerns, the genre continues to flourish, attracting a great deal of attention.<sup>50</sup> The mashup fan base is currently a unique, yet expanding group of individuals who tend to approach music with an eager ear and open mind.<sup>51</sup> Listeners who prefer music in its purest, original form, on the other hand, may not appreciate the way mashups combine genres that sound nothing alike and have different types of fans, such as rap and classic rock.<sup>52</sup> In fact, some critics contend that

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44. See Mongillo, *supra* note 11, at 18.

45. See Katehunsicker, *Bridging the Gap: Mash-Up Artists*, COPYRIGHT, COMMERCE, & CULTURE (Feb. 15, 2010), <http://copyrightcommerceandculture.com/2010/02/15/bridging-the-gap-mash-up-artists/comment-page-1/>. DJ Earworm's website illustrates the fear of liability within the mashup community. DJ EARWORM—MUSIC MASHUPS, <http://dyearworm.com/> (last visited Mar. 16, 2011). For example, a disclaimer on DJ Earworm's webpage states the following:

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[. T]hey are easy to find. Representatives of either the artist or publishing company can contact me, and I will take these tracks offline. If representatives of either the artist or publishing company have concerns, please contact me.

*Id.*; see Cruger, *supra* note 35 (explaining that many mashup artists post disclaimers on their websites and agree to remove copyrighted material upon request).

46. *Girl Talk as Fair Use Martyr*, *supra* note 13 (inquiring why no one has sued Girl Talk).

47. See Mongillo, *supra* note 11, at 3, 17.

48. See *id.*

49. See *id.* at 15.

50. Power, *supra* note 9, at 583, 586; John Jurgensen, *Musician Makes Tunes By Borrowing Others*, WALL ST. J., June 27, 2008, at B7 (acknowledging the rise of mashups); *Glee: Mash-Up* (FOX television broadcast Oct. 21, 2009); *Glee: Vitamin D* (FOX television broadcast Oct. 7, 2009) (one of the most popular television programs of fall 2009 aired an episode featuring mashups).

51. Mongillo, *supra* note 11, at 27 (noting that many mashup fans consider themselves music elitists).

52. See CTR. FOR SOC. MEDIA, *supra* note 35, at 6 ("Mashups commonly feature improbable combinations . . ."); Hellweg, *supra* note 6 (acknowledging that mashups usually draw from several different genres); Reynolds, *supra* note 36.

mashups are simply “made by cynical, tired people with no ideas” and discourage talented artists from using their imagination.<sup>53</sup>

Just as there is discrepancy among music fans about the artistic value of mashups, the music industry itself is divided with regard to the practice of using others’ works.<sup>54</sup> Some artists, like David Bowie and Nine Inch Nails, actually support the idea of others using their songs to create new music.<sup>55</sup> In fact, many artists have Creative Commons licenses, which provide greater access to copyrighted material.<sup>56</sup> With a Creative Commons license, an artist can declare which exclusive rights he wishes to retain over his work, allowing others to avail themselves of the remaining rights.<sup>57</sup> For example, someone with a Creative Commons license may approve of another artist’s unauthorized reproduction of his work as long as the use is not for commercial purposes.<sup>58</sup> On the other hand, there is a history of jurisprudence that demonstrates many artists and record labels’ disapproval of the use of their work by others.<sup>59</sup> Most famously, Roy Orbison’s record label sued rap group 2 Live Crew for the unauthorized use of “Oh, Pretty Woman” in a parody entitled “Big Hairy Woman.”<sup>60</sup>

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53. Martin Turenne, *Pop’s Bastards: Are Mash-Ups a Clever Culture Jam or Mere Cynical Sarcasm?*, EXCLAIM (Apr. 2003), <http://exclaim.ca/articles/pointofview.aspx?csid1=46>; see Pote, *supra* note 3, at 653.

54. See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 804 (6th Cir. 2005), *aff’g*, 383 F.3d 390 (6th Cir. 2004) (explaining that the music industry is always on both sides of the fence as “today’s sampler is tomorrow’s samplee”); Lee, *supra* note 10, at 1503 (acknowledging artists like Nine Inch Nails who have encouraged others to use their work for free); Molly McGraw, *Sound Sampling Protection and Infringement in Today’s Music Industry*, 4 HIGH TECH. L.J. 147, 152 (1989) (quoting a Grammy award-winner who said, “[w]e’re all blatantly stealing from everyone else”); Jurgensen, *supra* note 50 (noting that bands will tolerate unauthorized use of their music if it exposes them to new fans); see also Turenne, *supra* note 53 (demonstrating that not all music fans approve of mashups).

55. Lee, *supra* note 10, at 1503; *Enter and Win*, BOWIENET, <http://davidbowie.com/neverfollow/#> (last visited Mar. 16, 2011) (showing that David Bowie held an amateur mashup contest awarding the winner with a new Audi); see Hellweg, *supra* note 6; Reynolds, *supra* note 36; *Share, Remix, Reuse—Legally*, CREATIVE COMMONS, <http://creativecommons.org/> (last visited Mar. 16, 2011).

56. See Pote, *supra* note 3, at 686-87; *Share, Remix, Reuse—Legally*, CREATIVE COMMONS, <http://creativecommons.org/> (last visited Mar. 16, 2011); see also Reynolds, *supra* note 36 (explaining that Creative Commons licenses allow mashup artists to lawfully create and distribute mashups).

57. See Pote, *supra* note 3, at 686-87.

58. See *id.* at 687.

59. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 572-73 (1994); *Bridgeport*, 410 F.3d at 795; *Newton v. Diamond*, 388 F.3d 1189, 1190 (9th Cir. 2004); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1010-11 (9th Cir. 2001); *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1151-53 (N.D. Cal. 2008); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000); *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

60. *Campbell*, 510 U.S. at 571-72.

Unsurprisingly, there is also a split among scholars, some advocating creativity and free expression, and some defending the limited rights of copyright holders.<sup>61</sup> Proponents of the Free Culture movement stress the idea that borrowing from predecessors to create new works is not a novel practice, but rather a tradition and form of expression worth protecting.<sup>62</sup> Nonetheless, other scholars harp on the importance of enforcing the rights of copyright holders in order to protect the incentive to create.<sup>63</sup>

Finally, while there are discordant views on whether mashups should be legal, the one non-debatable, clear conclusion about copyright law today is that it needs reform.<sup>64</sup> Currently, an artist who wants to make a mashup without risking liability must obtain permission from the copyright holders of the songs he wishes to use.<sup>65</sup> However, the costs associated with obtaining a license are high, and as a result, very few people abide by the law.<sup>66</sup> After all, an amateur artist has little incentive to purchase the rights to a song that will not put any money in his pocket.<sup>67</sup> Consequently, many artists have begun engaging in informal copyright practices to fill the gaping holes left by outdated legislation.<sup>68</sup> In brief, it is imperative that lawmakers catch up to technological advances to prevent people from threatening the rights of copyright holders.<sup>69</sup>

### III. LEGAL IMPLICATIONS FOR MASHUP ARTISTS

The Framers of the Constitution addressed the need to promote progress in the arts and sciences by granting innovative thinkers limited monopolies over their works to encourage creativity.<sup>70</sup> For example,

61. See Mike Steere, *Mash-Up Makers Move into the Mainstream*, CNN.COM (Sept. 18, 2008), <http://www.cnn.com/2008/TECH/science/09/15/mashup.internet/index.html>.

62. See Steere, *supra* note 61; see also LESSIG, *supra* note 2, at 28-29 (“Creators here and everywhere are always and at all times building upon the creativity that went before and that surrounds them now.”).

63. See Pote, *supra* note 3, at 649-50.

64. See LESSIG, *supra* note 5, at 266 (“[W]hen copyright law purports to regulate everyone with a computer . . . then there is a special obligation to make sure this regulation is clear. And that obligation is even stronger when, as [in remix culture], the regulation is a regulation of speech.”); Lee, *supra* note 3, at 18; Lessig, *supra* note 1, at 969 (discussing problems with the current law).

65. See Lee, *supra* note 3, at 18.

66. See Mongillo, *supra* note 11, at 17-18; David M. Morrison, *Bridgeport Redux: Digital Sampling and Audience Recoding*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 75, 133-34 (2008) (describing the various costs associated with licensing).

67. See Pote, *supra* note 3, at 684-85.

68. Lee, *supra* note 10, at 1473-75, 1479 (describing gaps in the law).

69. See *id.* at 1474-75; Lessig, *supra* note 1, at 969.

70. See U.S. CONST. art. I, § 8, cl. 8; *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985).



until a work enters the public domain, copyright holders have the exclusive rights of reproduction, preparation of derivative works, distribution, public performance, and public display.<sup>71</sup> The theory behind copyright law is that these rights will provide artists and thinkers with economic incentives to make cultural, scientific, or artistic contributions that will benefit society as a whole.<sup>72</sup>

To obtain copyright protection, however, one must create an original work of authorship that is fixed in a tangible form of expression.<sup>73</sup> Then, if someone interferes with a copyright holder's rights (e.g., reproduces copies of the copyrighted material without permission), the copyright holder may sue for infringement.<sup>74</sup>

In order to prevail on an infringement claim, the plaintiff copyright holder must prove that the work in question holds a valid copyright, and that the defendant violated one of the copyright holder's exclusive rights.<sup>75</sup> Then, after showing that the defendant violated one of the copyright holder's exclusive rights, the plaintiff will be entitled to a remedy unless the defendant successfully asserts an affirmative defense.<sup>76</sup> Two of the most common affirmative defenses in copyright litigation are the de minimis defense and the fair use defense, which place limitations on the copyright holders' exclusive rights.<sup>77</sup> Before illustrating why mashup artists are not entitled to any affirmative defenses, it is necessary to explain why mashup artists are guilty of copyright infringement.

#### A. *Are Mashups Entitled to Copyright Protection?*

Since musical compositions and sound recordings are among the types of protected subject matter, it follows that mashup artists who incorporate musical compositions and sound recordings into their works are using copyrighted material.<sup>78</sup> Before explaining why mashups constitute copyright infringement, this Note will discuss whether

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71. See 17 U.S.C. § 106 (2006).

72. See Pote, *supra* note 3, at 647-48.

73. 17 U.S.C. § 102(a).

74. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); Power, *supra* note 9, at 589.

75. See *Feist*, 499 U.S. at 361; Power, *supra* note 9, at 589.

76. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574-75 (1994); Pote, *supra* note 3, at 669; Power, *supra* note 9, at 589.

77. See Pote, *supra* note 3, at 663, 669.

78. See 17 U.S.C. § 102 (illustrating that songs may receive protection either as musical compositions or sound recordings); Power, *supra* note 9, at 579.

mashups themselves are capable of protection as compilations or derivative works.<sup>79</sup>

### 1. Compilation

Under the Copyright Act of 1976, a compilation of copyrighted works may be entitled to copyright protection if the artist “selected, coordinated, or arranged [the material] in such a way that the resulting work as a whole constitutes an original work of authorship.”<sup>80</sup> While the word “original” often means “creative” or “unique,” someone seeking copyright protection need only show that the work in question literally originated with that person.<sup>81</sup> Indeed, “the requisite level of creativity is extremely low.”<sup>82</sup>

With regard to compilations, one must merely demonstrate that the particular arrangement of the underlying works originated with him.<sup>83</sup> Thus, even though mashups mix samples in a seemingly random manner, it is likely that they are still entitled to protection for their arrangement since the standard is so low.<sup>84</sup> Some mashups, such as those arranged by theme, certainly meet the requisite level of creativity to merit copyright protection.<sup>85</sup> For instance, performer DJ Earworm has created mashups of the top twenty-five Billboard hits for the years 2007, 2008, and 2009,<sup>86</sup> and he could argue that the theme of these mashups is “the most popular songs of the year.”<sup>87</sup> Alternatively, one of DJ Earworm’s 2008 mashups suggests that the common thread that tied the songs together was the idea of overcoming obstacles.<sup>88</sup> Either way, themed mashups likely satisfy the originality requirement.<sup>89</sup>

79. See 17 U.S.C. § 103(b); *infra* Part III.A.1–2.

80. 17 U.S.C. § 101; see *Feist*, 499 U.S. at 356–59 (explaining the minimal level of creativity for compilations).

81. See *Feist*, 499 U.S. at 345.

82. *Id.*

83. See *id.*

84. See *id.* at 358–59; see also CTR. FOR SOC. MEDIA, *supra* note 35, at 6 (listing some of the myriad reasons why people create mashups); Hellweg, *supra* note 6 (noting the element of surprise or randomness that makes mashups great); Turenne, *supra* note 53 (explaining how simple and uncreative the process of making mashups can be).

85. See *Feist*, 499 U.S. at 348; *Caffey v. Cook*, 409 F. Supp. 2d 484, 497 (S.D.N.Y. 2006) (holding a compilation of songs to be copyrightable).

86. See Djeaworm, *DJ Earworm—United State of Pop 2008 (Viva La Pop)—Mashup of Top 25 Billboard Hits*, YOUTUBE (Dec. 25, 2008), <http://www.youtube.com/watch?v=XLaZ-8IMtt0>; Djeaworm, *DJ Earworm—United State of Pop 2009 (Blame It on the Pop)—Mashup of Top 25 Billboard Hits*, YOUTUBE (Dec. 27, 2009), <http://www.youtube.com/watch?v=iNzrwh2Z2hQ&feature=related> [hereinafter *United State of Pop 2009*]; Kliz9, *United State of Pop—The Billboard Top 25 of 2007*, YOUTUBE (Jan. 7, 2008), <http://www.youtube.com/watch?v=ls7yJmxAF9Y>; kliz9.

87. See *Caffey*, 409 F. Supp. 2d at 497 (implying that arranging songs by theme is sufficiently original to earn protection as a compilation).

88. See *Together as One*, DJ EARWORM, <http://djeaworm.com/together-as-one.htm> (last

Nevertheless, regardless of whether a mashup is original, mashup artists can only achieve copyright protection for their mashups if they have *lawfully* created an original work of authorship, such as a compilation.<sup>90</sup> In order to *lawfully* create a compilation, one must first obtain authorization to use the copyrighted material that makes up the compilation.<sup>91</sup> Since most mashup artists do not obtain authorization before incorporating copyrighted songs into their mashups, their failure to comply with the law precludes them from receiving copyright protection.<sup>92</sup>

In sum, a mashup would only be entitled to protection as a compilation upon receiving authorization from copyright holders and creating an original arrangement.<sup>93</sup> However, it is extremely rare for mashup artists to obtain authorization before incorporating copyrighted material into their work, so mashups are generally not entitled to copyright protection as compilations.<sup>94</sup>

## 2. Derivative Works

In addition to compilations, derivative works are also eligible for copyright protection.<sup>95</sup> However, as explained below, copyright holders enjoy the exclusive right to prepare derivative works, and violating that exclusive right renders one liable for infringement.<sup>96</sup> Thus, while mashups may be eligible for protection as derivative works, mashup artists will still be liable for infringement if, absent authorization, they create mashups in which they sample songs to which they do not hold the copyrights.<sup>97</sup> Of course, before considering whether mashup artists

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visited Mar. 16, 2011). While commenting on what inspired his creation of a 2009 mashup, DJ Earworm remarked, “[y]eah, we’ve been through a lot, but right now we’re gonna celebrate with music and dance, and it’s gonna be ok.” DJ EARWORM—MUSIC MASHUPS, *supra* note 45. Interestingly, DJ Earworm has created a few themed mashups, including a U2, Beatles, Mariah Carey, and Diana Ross mashup based on the idea of togetherness. See *Together as One*, *supra*; Djeaworm, *Together as One—A DJ Earworm Mashup*, YOUTUBE (Mar. 15, 2008), [http://www.youtube.com/watch?v=aKoBye\\_\\_Txw](http://www.youtube.com/watch?v=aKoBye__Txw).

89. See *Feist*, 499 U.S. at 345 (noting that “[t]he vast majority of works make the grade quite easily”). However, DJ Earworm is a rare exception in the mashup community when it comes to arranging mashups by theme. See, e.g., Mashup Charts, *supra* note 35 (demonstrating how rare themed mashups are); Hellweg, *supra* note 6 (crediting mashups’ popularity with their randomness and apparent lack of theme or cohesion).

90. See 17 U.S.C. § 103(a) (2006).

91. See 17 U.S.C. § 103; Pote, *supra* note 3, at 657.

92. See 17 U.S.C. § 103; Hetcher, *supra* note 13, at 1912; Pote, *supra* note 3, at 657.

93. See 17 U.S.C. § 103; Pote, *supra* note 3, at 657.

94. Pote, *supra* note 3, at 640, 657.

95. 17 U.S.C. § 103.

96. 17 U.S.C. § 106; see *infra* text accompanying notes 119, 123, 127.

97. See 17 U.S.C. § 106; Pote, *supra* note 3, at 660-61.

violate the right to prepare derivative works, one must determine whether a mashup is, in fact, a derivative work.

A derivative work is based on a copyrighted work, but “recast[s], transform[s], or adapt[s]” the original work by presenting it in a new way, such as by making a film adaptation of a book.<sup>98</sup> One can create a derivative work by recasting preexisting material to form a new work that does not alter the purpose or character of the original work.<sup>99</sup> Since mashup artists recast works by editing or altering songs to create mashups, the end product is seemingly capable of protection as a derivative work.<sup>100</sup> However, a new work that is based on a preexisting work will not be deemed a derivative work if its purpose and character are sufficiently transformative.<sup>101</sup>

Thus, the relevant concern is whether mashups are transformative.<sup>102</sup> In other words, although a derivative work may transform the method in which the content is presented, the secondary work is *transformative* only if it modifies the purpose or character of the original work.<sup>103</sup> For instance, when a book is adapted into a movie, the movie is a derivative work because even though the secondary artist transforms the method of presentation, the junior artist does not transform the purpose or meaning of the original work.<sup>104</sup>

Like most film adaptations, mashups are not transformative because they do not change the original song’s purpose or connotation.<sup>105</sup> For instance, Girl Talk samples many upbeat songs and then combines them to create one ultimate upbeat song.<sup>106</sup> Even though Girl Talk may alter the speed of the original song in his mashup, the character of the song remains the same in both the original and the mashup.<sup>107</sup> For instance, a party track will cause mashup listeners to dance the same way it would in its original, unaltered form, just as a mellow track will have the effect of slowing the mashup down.<sup>108</sup> Conversely, video mashups do alter the

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98. 17 U.S.C. § 101; *see Castle Rock Entm’t v. Carol Publ’g Grp., Inc.*, 955 F. Supp. 260, 268 (S.D.N.Y. 1997).

99. *See Castle Rock*, 150 F.3d 132, 143 (2d Cir. 1998), *aff’g*, 955 F. Supp. 260.

100. *See Mongillo*, *supra* note 11, at 2; *Pote*, *supra* note 3, at 660.

101. *See Castle Rock*, 150 F.3d at 143 n.9.

102. *See id.* at 142-43.

103. *See id.* at 143.

104. *See* 17 U.S.C. § 101 (2006); *see also Castle Rock*, 150 F.3d at 141-43 (explaining why a trivia book based on a television program is a derivative work even though it does not transform the purpose or meaning of the original work).

105. *See Pote*, *supra* note 3, at 670-71. *But see Power*, *supra* note 9, at 593.

106. *See, e.g.*, FeedTheAnimals, *06 No Pause*, YOUTUBE (June 21, 2008), <http://www.youtube.com/watch?v=9LvLkqraXFI>.

107. *See id.*

108. *See id.*

effect of video content, specifically by taking the original material out of context and arranging samples to give them new meaning.<sup>109</sup> In brief, mashups are derivative works because mashup artists do not transform the character of the songs they recast.<sup>110</sup>

In summary, it is possible for mashups to receive copyright protection as original works of authorship, such as compilations or derivative works.<sup>111</sup> However, mashup artists rarely seek permission to put songs in their mashups, and artists who unlawfully use copyrighted material to create a compilation or derivative work are not entitled to protection.<sup>112</sup> In fact, as discussed below,<sup>113</sup> artists who fail to obtain proper authorization before using copyrighted material to create new works are liable for copyright infringement.<sup>114</sup>

### B. Mashups Constitute Copyright Infringement

In order to encourage creativity, copyright holders are entitled to various exclusive rights over their works.<sup>115</sup> Copyright infringement occurs when someone violates one of the exclusive rights reserved to a copyright holder, provided there is a valid copyright in the original work.<sup>116</sup> When a copyright holder proves infringement, the defendant

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109. See, e.g., BelYaun, *A Fair(y) Use Tale*, YOUTUBE (May 18, 2007), [http://www.youtube.com/watch?v=CJn\\_jC4FNDo](http://www.youtube.com/watch?v=CJn_jC4FNDo) [hereinafter *A Fair(y) Use Tale*] (rearranging clips from Disney movies to teach a lesson about copyright law, thereby transforming the purpose of the original movie clips).

110. See *supra* notes 98-109 and accompanying text. Video mashups are transformative because they change the character of the original works, and therefore they are likely to meet the requisite level of minimum creativity for copyright protection. See Long, *supra* note 35, at 322-25. Unlike music mashups, video mashups serve more obvious purposes, such as education, reinterpretation, parody, political or social commentary, or fantasy. See *id.* For example, in “Hillary’s Inner Tracy Flick,” the mashup artist combines clips from the comedy *Election* with footage of Hillary Clinton to depict Clinton as a neurotic, insecure, control freak, thereby transforming the film’s purpose from comedy to political commentary. Slatester, *Hillary’s Inner Tracy Flick*, YOUTUBE (Jan. 29, 2008), <http://www.youtube.com/watch?v=rleUPHX8yfM>. In contrast, when a music mashup artist incorporates a song into a mashup, he does not give the original song new meaning or purpose. But see Roll Call—*Copyright Structure Needs Update*, PROJECT VOTE SMART (Oct. 22, 2007), [http://www.votesmart.org/speech\\_detail.php?sc\\_id=333480&keyword=&phrase=&contain=](http://www.votesmart.org/speech_detail.php?sc_id=333480&keyword=&phrase=&contain=) [hereinafter *Roll Call*] (contending that mashups are transformative).

111. See *supra* notes 80-110 and accompanying text.

112. See Pote, *supra* note 3, at 640, 657.

113. See *infra* Part III.B.

114. See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 & n.10 (6th Cir. 2005).

115. See U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. § 106 (2006).

116. Power, *supra* note 9, at 589. Among the exclusive rights granted to copyright holders are: (1) the right to reproduce; (2) the right to prepare derivative works; (3) the right to distribute; (4) the right to perform the work publicly; (5) the right to display the work publicly; and (6) “in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.” 17 U.S.C. § 106. Although these rights may be limited upon a showing of fair use,

will be liable unless he shows that he is entitled to an affirmative defense, such as *de minimis* or fair use.<sup>117</sup> With regard to mashups, the first element of infringement that requires a valid copyright in the original or primary work is easily met because, as previously discussed, mashups feature well-known songs, which undoubtedly hold valid copyrights.<sup>118</sup>

The second element of infringement—requiring copyright holders to show that the alleged infringer has violated an exclusive right reserved to copyright holders—also disfavors mashups because mashup artists violate the rights of reproduction, preparation of derivative works, distribution, and public performance.<sup>119</sup> For example, by incorporating samples of preexisting songs into their work, mashup artists are reproducing parts of those songs; a right which is reserved for the copyright holder.<sup>120</sup> Furthermore, one need not reproduce or copy an entire work to risk liability for infringement.<sup>121</sup> Thus, even if a mashup only contains a few seconds of a copyrighted song, the mashup creator is still liable for violating the copyright owner's right to reproduce by incorporating exact copies of audio content into his mashups.<sup>122</sup>

Similarly, as previously discussed, mashups are derivative works, and copyright protection offers the exclusive right to prepare derivative works.<sup>123</sup> The underlying reason is that copyright holders should be compensated for junior works that are based on their labor.<sup>124</sup> For example, it would be unfair for someone to create an adaptation of J.K.

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courts do not address that issue until the copyright holder has shown infringement. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574 (1994) (applying the fair use test to an uncontested copyright infringement).

117. *See Pote, supra* note 3, at 662-63, 669-70.

118. *See* 17 U.S.C. § 102 (noting that songs are entitled to copyright protection as they are original works of authorship fixed in a tangible medium of expression); *Pote, supra* note 3, at 647; *Power, supra* note 9, at 589 (implying that mashup artists only use popular songs that listeners can easily recognize); *Jurgensen, supra* note 50 (noting that mashups feature popular songs).

119. *See* 17 U.S.C. §§ 106, 114; *Pote, supra* note 3, at 659-62; *Power, supra* note 9, at 590.

120. *See* Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 52 (2002) (explaining that one need only reproduce a small portion of a work to face liability for infringement); *Power, supra* note 9, at 590.

121. *Rubenfeld, supra* note 120, at 52.

122. *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564-65 (1984); *Rubenfeld, supra* note 120, at 52. In addition, when the mashup artist posts his mashup online, he may be liable for violating the copyright holders' "right of reproduction, the right of distribution, and the right of public performance" of the audio source. Sarah Trombley, *Visions and Revisions: Fanvids and Fair Use*, 25 CARDOZO ARTS & ENT. L.J. 647, 659-60 (2007). However, this Note only addresses liability for creating mashups, and does not consider liability for posting them online.

123. *See Pote, supra* note 3, at 660; *see also supra* Part III.A.2 (explaining why mashups are derivative works).

124. *See Pote, supra* note 3, at 660-61.

Rowling's *Harry Potter* books without Rowling's permission.<sup>125</sup> Copyright law conveniently allows artists like Rowling to deny others the right to prepare works based on their work, or in the alternative, to license the right to prepare derivative works and enjoy some of the profits produced by such derivative works.<sup>126</sup> Given copyright holders' exclusive right to prepare derivative works, it follows that mashup artists cannot prepare mashups (which are derivative works) without authorization.<sup>127</sup>

Lastly, many mashup artists also violate copyright holders' rights to distribute and perform the work in public.<sup>128</sup> First, the right to distribute gives copyright holders the exclusive right to sell their music.<sup>129</sup> Thus, commercial mashup artists like Girl Talk who sell CDs and mp3s violate copyright holders' exclusive right to distribute.<sup>130</sup> Similarly, copyright holders have the exclusive right to perform their work in public, e.g., at a concert, on the radio, on the Internet, or at a bar.<sup>131</sup> Thus, mashup artists who post their work online or go on tour violate copyright holders' exclusive right to perform their music in public.<sup>132</sup>

In sum, mashups are not entitled to copyright protection as compilations or derivative works because mashup artists use copyrighted material unlawfully.<sup>133</sup> In addition, mashup artists are liable for copyright infringement because they violate several rights reserved exclusively for copyright holders.<sup>134</sup> Therefore, unless mashup artists can successfully establish a fair use defense, they will be liable for infringement.<sup>135</sup>

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125. See *Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 554 (S.D.N.Y. 2008) (permanently enjoining defendant from publishing an encyclopedia based on the Harry Potter series that, *inter alia*, was substantially similar to plaintiffs' copyrighted material).

126. See Pote, *supra* note 3, at 660-61.

127. See *id.*

128. See *id.* at 661-62.

129. See 17 U.S.C. § 106 (2006).

130. See Pote, *supra* note 3, at 662.

131. See 17 U.S.C. § 101.

132. See Pote, *supra* note 3, at 661-62.

133. See 17 U.S.C. § 103; Pote, *supra* note 3, at 657.

134. See 17 U.S.C. § 106; Pote, *supra* note 3, at 659-62.

135. See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801-02 (6th Cir. 2005). (abolishing the de minimis defense for digital sampling, thereby leaving fair use as mashup artists' best defense to liability for infringement); Long, *supra* note 35, at 330; Power, *supra* note 9, at 590.

C. *Are Mashup Artists Entitled to an Affirmative Defense? Negative.*

1. De Minimis Defense

Typically, once the copyright holder shows infringement, the burden then shifts to the alleged infringer to assert an affirmative defense. However, sometimes an unauthorized use is so minimal that courts will excuse it as de minimis, thereby relieving the defendant from liability for infringement and eliminating the defendant's need to prove an affirmative defense, such as fair use.<sup>136</sup> Although an unlikely defense, certain mashup artists who only sample a few notes of a song might argue that the use was de minimis, and therefore, excusable.<sup>137</sup>

In *Newton v. Diamond*,<sup>138</sup> for example, the Ninth Circuit held that the unauthorized use of three notes was not a grave enough offense to constitute infringement.<sup>139</sup> Thus, when a use is de minimis, an artist who copies material from another artist may not be liable.<sup>140</sup> However, mashup artists typically incorporate much more than three notes into their mashups to ensure that listeners will be able to recognize the original song.<sup>141</sup> Therefore, since mashup artists sample more than three notes, mashup artists would not prevail on a de minimis defense.

Furthermore, even if it were common practice for mashup artists to sample less than three notes, they still would not be entitled to a de minimis defense because the de minimis doctrine only applies to a song's musical composition, not its sound recording.<sup>142</sup> While it may be acceptable for a band to recreate the musical composition of a song with its own instruments, it is never permissible to simply copy and paste a copyrighted sound recording into a new song without authorization from the original song's copyright holder.<sup>143</sup> As a result of the Sixth Circuit's bright-line rule of "[g]et a license or do not sample," the de minimis defense does not apply to sound recordings, such as digital samples, which cannot be used without authorization, no matter how small the sample may be.<sup>144</sup>

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136. Power, *supra* note 9, at 585, 589.

137. See *infra* notes 138-40 and accompanying text.

138. 388 F.3d 1189 (9th Cir. 2004).

139. *Id.* at 1191-92.

140. *Id.* at 1192-93.

141. See, e.g., Mashup Charts, *supra* note 35 (providing thousands of examples of mashups that clearly sample substantial portions of preexisting works).

142. See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801-02 (6th Cir. 2005); Pote, *supra* note 3, at 664.

143. See Pote, *supra* note 3, at 667.

144. See *Bridgeport*, 410 F.3d at 801.



## 2. Fair Use Defense

Since mashup artists will not prevail on a de minimis defense, their best approach to defending an accusation of copyright infringement would be the affirmative defense of fair use.<sup>145</sup> The doctrine of fair use limits the copyright holders' exclusive rights by permitting the unauthorized use of copyrighted material under certain circumstances.<sup>146</sup> Typically, when someone violates a copyright holder's exclusive rights for such purposes as "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research," the would-be infringer may be exempt from liability because such uses are considered fair.<sup>147</sup>

The logic behind the fair use doctrine is that not all unauthorized use is wrong.<sup>148</sup> Rather, there are situations where people should be able to borrow from others to the extent that their use of the work is fair and legitimate.<sup>149</sup> Thus, if mashup artists could show that they use others' songs to criticize, comment, or teach, then mashup artists might be able to use copyrighted material without authorization.<sup>150</sup>

In determining fair use, courts balance four factors.<sup>151</sup> These factors are:

- (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>152</sup>

Although no factor is determinative, the Supreme Court has suggested that the first and last factors are the most important.<sup>153</sup> Finally, the

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145. See 17 U.S.C. § 107 (2006); *Bridgeport*, 410 F.3d at 801-02 (demonstrating why mashups artists are not entitled to a de minimis defense); Long, *supra* note 35, at 330.

146. 17 U.S.C. § 107; Long, *supra* note 35, at 330-31.

147. 17 U.S.C. § 107.

148. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). On the importance of fair use, Professor Lawrence Lessig has famously said, "[f]air use is a critically important safety valve within copyright law." LESSIG, *supra* note 5, at 255.

149. See Long, *supra* note 35, at 330.

150. See 17 U.S.C. § 107.

151. *Campbell*, 510 U.S. at 576-78.

152. *Id.* at 577 (quoting 17 U.S.C. § 107).

153. See *id.* at 579; *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

subjective nature of the test requires courts to analyze fair use on a case-by-case basis.<sup>154</sup>

a. Purpose and Character of the Use

The Supreme Court has implied that the first factor is the most important determination in the fair use analysis.<sup>155</sup> Incidentally, the first factor is often the most difficult inquiry, especially in the case of mashups where the purpose and character of the use of copyrighted songs is unclear.<sup>156</sup> Due to the complexity of the first factor, courts tend to break the analysis down into three parts: (1) whether and to what extent the use is transformative; (2) whether the use is commercial; and (3) whether the alleged infringer acted in good faith.<sup>157</sup> For the following reasons, the first factor will weigh slightly against a finding of fair use for mashups.

i. Transformative Use

Courts consider whether and to what extent the junior or secondary work is transformative.<sup>158</sup> Generally, the more transformative the secondary work is, the more likely a court will find the use to be fair.<sup>159</sup> In deciding whether something is transformative, courts examine whether the secondary work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>160</sup> If the court finds that the secondary work adds new meaning or serves a different purpose than the original work, then the court will likely declare the secondary work transformative.<sup>161</sup> Although no element of the fair use test is determinative, courts have held that the issue of whether the alleged infringement is transformative is the “[m]ost critical to the inquiry under the first fair-use factor.”<sup>162</sup>

In *Campbell v. Acuff-Rose Music, Inc.*,<sup>163</sup> the Supreme Court discussed whether parody is a transformative use, ultimately finding that

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154. *Campbell*, 510 U.S. at 577.

155. *Id.* at 579.

156. *See id.* at 578-85 (analyzing the first factor); Pote, *supra* note 3, at 678.

157. *Harper & Row*, 471 U.S. at 561-62; *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 185-87 (D. Mass. 2007).

158. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1269 (11th Cir. 2001).

159. *Campbell*, 510 U.S. at 579.

160. *Id.*

161. *Warner Bros. Entm't Inc. v. RDR Books*, 575 F. Supp. 2d 513, 541 (S.D.N.Y. 2008).

162. *Id.* at 540 (citing *Campbell*, 510 U.S. at 579).

163. 510 U.S. 569.

it is.<sup>164</sup> The Court defined parody as “the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works.”<sup>165</sup> Relying on that definition, some people contend that mashups are parodies because they criticize “the substance or style of the original composition.”<sup>166</sup> However, the argument that mashups offer social commentary by arranging samples in a way that criticizes the music industry or certain artists within it is weak and not likely to pass muster in a college dorm, let alone in a courtroom.<sup>167</sup>

The claim that mashups offer social commentary is vulnerable to attack because mashup artists do not select samples for the purpose of criticizing or commenting on music.<sup>168</sup> Rather, mashup artists arrange samples in a way that listeners will enjoy, which usually involves sampling very popular songs from various genres.<sup>169</sup> As a result of their work, mashup artists often show that dissimilar genres can coexist in harmony.<sup>170</sup> Even though the mashup artist’s driving force is to create mashups that people will enjoy, one could argue that because mashup artists typically incorporate the most popular songs into their work, the final product is, albeit indirectly, a commentary on mainstream music.<sup>171</sup> However, that theory is a long-shot, at best.

In rejecting the argument that mashups are parodies, one can also conclude that mashups are not transformative because, as previously mentioned, they do not add a new expression, meaning, or message, but merely copy original works and rearrange them in a random way.<sup>172</sup>

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164. *Id.* at 579-83 (holding that 2 Live Crew’s “Pretty Woman” was a parody of “Oh, Pretty Woman,” and was transformative because it changed the character of the song).

165. *Id.* at 580.

166. *Id.*; see Mongillo, *supra* note 11, at 24-25 (arguing that some of Girl Talk’s songs could be considered parodies because of their underlying comic expressions); Power, *supra* note 9, at 591 (suggesting that a mashup is like a “quasi-parody”).

167. See *Campbell*, 510 U.S. at 578-85 (demonstrating how strictly courts interpret the first factor). *But see* Pote, *supra* note 3, at 673, 675 (arguing that mashup artists might be able to argue that their works provide commentary).

168. See *CTR. FOR SOC. MEDIA*, *supra* note 35, at 6 (suggesting that mashups seem random); Reynolds, *supra* note 36; Turenne, *supra* note 53. *But see* Mongillo, *supra* note 11, at 24-25 (claiming that Girl Talk’s music arguably offers commentary). In contrast, video mashups are a powerful vehicle for expressing criticism and offering social commentary. Long, *supra* note 35, at 323-25.

169. See Jurgensen, *supra* note 50; Reynolds, *supra* note 36.

170. See Reynolds, *supra* note 36; Turenne, *supra* note 53.

171. See Mongillo, *supra* note 11, at 24-27.

172. See *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) (stating that a work must add “new meaning, new understandings, or the like” in order to be considered transformative); Branwen Buckley, Note, *Suetube: Web 2.0 and Copyright Infringement*, 31 COLUM. J.L. & ARTS 235, 250 (2008); *supra* Part III.A.2. *But see* Hetcher, *supra* note 13, at 1871 (mentioning Lessig’s position that remix works in general are transformative); *Roll Call*, *supra* note 110 (arguing that mashups are transformative).

Mashups are distinguishable from 2 Live Crew's parody of "Oh, Pretty Woman," which was deemed transformative because it "was clearly intended to ridicule the white-bread original and reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences."<sup>173</sup> Unlike 2 Live Crew, mashup artists do not ridicule or shed new light on the songs they incorporate into their audio collages.<sup>174</sup> Rather, mashups "merely 'supersede[] the objects' of the original creation."<sup>175</sup>

This is probably the most difficult issue to grasp in the fair use analysis of mashups because some people point to very elaborate mashups, like those created by Girl Talk, and assert that the editing, altering, and arranging of various snippets is transformative.<sup>176</sup> However, even if Girl Talk arranges snippets in an intricate manner that makes them nearly unrecognizable to the average listener, it does not follow that he is changing the meaning or purpose of the underlying material simply by limiting the amount he copies to a few notes or beats.<sup>177</sup>

For example, the Beatles, who created *The White Album*, and Jay-Z, who created *The Black Album*, both produced music for entertainment purposes.<sup>178</sup> In 2004, DJ Danger Mouse famously combined Jay-Z and the Beatles' music to create a mashup album known as *The Grey Album*, also for entertainment purposes.<sup>179</sup> Thus, the entertainment purpose remains the same, and while the music may be arranged a certain way, the arrangement does not give Jay-Z's or the Beatles' music new meaning.<sup>180</sup> Unlike video mashups, which often provide comical reinterpretations of dramatic movies, music mashups do not transform

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173. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994) (internal quotation marks omitted).

174. *But see* Mongillo, *supra* note 11, at 15.

175. *Campbell*, 510 U.S. at 579 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (CCD Mass. 1841) (No. 4901)).

176. *See* Mongillo, *supra* note 11, at 25; Power, *supra* note 9, at 593.

177. *See Campbell*, 510 U.S. at 578-82 (explaining that a work must add something new or change the purpose or character of the senior work to be considered transformative for the purposes of the fair use analysis); *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005) (holding that the de minimis defense does not apply to digital sampling); *UMG Recordings*, 92 F. Supp. 2d at 351 (noting that merely repackaging recordings in a different way is not a transformative use).

178. Power, *supra* note 9, at 580-81.

179. *See id.* (noting that *The Grey Album* was so popular that Internet users downloaded more than 100,000 copies of the album in one day).

180. *Compare* Jivevidz, *DJ Dangermouse—The Grey Album Part 1*, YOUTUBE (Aug. 8, 2008), <http://www.youtube.com/watch?v=vQF2JzpNi0> (mashing rap and classic rock songs to create music with classic rock instrumentals and rap vocals), *with* THE BEATLES, *THE WHITE ALBUM* (Capitol 1990) (1968) (providing examples of classic rock songs by the Beatles), *and* JAY-Z, *THE BLACK ALBUM* (Roc-A-Fella 2003) (offering examples of rap songs by Jay-Z).

the meaning of the original songs.<sup>181</sup> In other words, mashups do not typically take melodramatic love songs and alter them to produce upbeat dance tracks, or arrange them to provide reinterpretations of the original songs.<sup>182</sup>

Furthermore, although *The Grey Album* consists of “A vs. B” mashups, the same analysis applies to more complex mashups like audio collages.<sup>183</sup> Regardless of whether samples used in audio collages are recognizable to the average listener, it remains that the music’s character is not transformed.<sup>184</sup> One example that helps demonstrate why mashups are not transformative is DJ Earworm’s “Together As One,” which is less random than most mashups in that DJ Earworm chose songs about togetherness.<sup>185</sup> For example, “Together As One” mashes U2’s “One,” the Beatles’ “Come Together,” Mariah Carey’s “We Belong Together,” and Diana Ross’ “Someday We’ll Be Together.”<sup>186</sup> Even though DJ Earworm has clearly altered the original songs in some fashion, his creation actually bolsters the argument that mashups are not transformative because the mashup reiterates the meaning or concept of togetherness expressed in the original songs.<sup>187</sup> Thus, the mashup does the exact opposite of changing the meaning of the copyrighted material.<sup>188</sup>

In summary, since mashup artists do not change the character of the original songs they use by contributing new meaning, expression, or

181. Compare Orangeohm, *Brokeback to the Future*, YOUTUBE (Feb. 1, 2006), <http://www.youtube.com/watch?v=8uwuLxrv8jY> [hereinafter *Brokeback to the Future*] (mashing video clips of *Back to the Future* with music from *Brokeback Mountain*), with *United State of Pop 2009*, *supra* note 86 (showing that video mashups change the meaning of their underlying works, whereas music mashups do not transform the meaning or connotation of the original works).

182. See generally Mashup Charts, *supra* note 35. But see Mongillo, *supra* note 11, at 23-24 (arguing that mashups do offer new interpretations and suggesting that Girl Talk may have juxtaposed Notorious B.I.G.’s “Juicy” and Elton John’s “Tiny Dancer” to “comment on the romantic naiveté of Elton John’s song”).

183. It is important to note that most mashups are nowhere near as elaborate or complex as Girl Talk’s audio collages. See LESSIG, *supra* note 5, at 11 (explaining that Girl Talk used “between 200 and 250 samples from 167 artists” in *Night Ripper*); Mongillo, *supra* note 11, at 15. Compare *This Is Why Africa Is Hot*, *supra* note 40 (illustrating the more common “A vs. B” form), with FeedTheAnimals, *03 Still Here*, YOUTUBE (June 21, 2008), <http://www.youtube.com/watch?v=trmacqG9uKA> [hereinafter *Still Here*] (showing that audio collages are more elaborate than “A vs. B” mashups).

184. But see Mongillo, *supra* note 11, at 25.

185. Djeaworm, *supra* note 88; *Together as One*, *supra* note 88. But see Reynolds, *supra* note 36 (suggesting that mashups are random).

186. Djeaworm, *supra* note 88; *Together as One*, *supra* note 88.

187. *Id.* (illustrating DJ Earworm’s selection and arrangement of songs in a mashup to reiterate the common theme of the original songs); see *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

188. See Djeaworm, *supra* note 88; *Together As One*, *supra* note 88.

message, courts will find that mashups are not transformative.<sup>189</sup> This determination will weigh against a finding of fair use for mashups.<sup>190</sup>

## ii. Commercial or Nonprofit

The commercial inquiry favors a finding of fair use because most mashups, and user-generated content in general, are not commercial.<sup>191</sup> Unlike professional artists like Girl Talk, most mashup artists are amateurs who do not intend to commercialize their material.<sup>192</sup> Although there is a market for professional mashups, creating mashups remains a hobby for most artists.<sup>193</sup> Given the popularity of mashups, it seems odd that more artists have not attempted to infiltrate the commercial market.<sup>194</sup> Some people propose that the mashup community may fear drawing undesired legal attention to the genre by rendering its work commercially available.<sup>195</sup> Whatever the reason may be, the vast majority of mashups are currently not commercially available and can be found for free on the Internet.<sup>196</sup> Thus, the fact that most mashup artists

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189. See *Campbell*, 510 U.S. at 579. Although it is possible for mashup artists to arrange songs in a way that sends a message, the odds that the end product will sound good are slim. See Pote, *supra* note 3, at 675; *A Fair(y) Use Tale*, *supra* note 109 (showing that mashup artists can combine different sources to tell a story; however, the result is not pleasing to the ear). Thus, while mashups technically have the potential to be transformative, mashups today are not transformative. See Pote, *supra* note 3, at 675; Mashup Charts, *supra* note 35 (demonstrating which types of mashups are currently popular).

In contrast, video mashups are distinguishable from music mashups and are transformative. Long, *supra* note 35, at 322-25. For instance, video mashups almost always add something new to the original works, whether it is political or social commentary, humor, or reinterpretation. *Id.* In “Brokeback to the Future,” for example, the mashup artist uses music from *Brokeback Mountain* and clips from the motion pictures *Back to the Future* to suggest that two male friends are actually lovers, thereby changing the meaning of the original content. See *Brokeback to the Future*, *supra* note 181.

190. See Pote, *supra* note 3, at 675.

191. See Hetcher, *supra* note 13, at 1907 (noting that most remix culture is noncommercial); Buckley, *supra* note 172, at 248-49 (discussing what constitutes a commercial use).

192. See Power, *supra* note 9, at 594, 599 (noting that most mashups are only available online and cost fans nothing); Mashup Charts, *supra* note 35 (demonstrating that commercial artists like Girl Talk, Negativland, Soulwax, Freelance Hellraiser, 2 ManyDJs, and Danger Mouse constitute a small fraction of the genre); MASHUP HITS, <http://mashuphits.com/> (last visited Mar. 16, 2011); DJ EARWORM—MUSIC MASHUPS, *supra* note 45 (illustrating that although DJ Earworm does not sell his mashups, he does benefit financially by using his mashups to attract future employment).

193. See Mongillo, *supra* note 11, at 2, 31 (indicating that there is a commercial market for mashups, as evidenced by Girl Talk’s success as a professional artist having released four albums and performed around the world); Power, *supra* note 9, at 595 (explaining that most mashups are not available for commercial sale).

194. See Mongillo, *supra* note 11, at 2, 15 (commenting on Girl Talk’s success as a professional mashup artist).

195. Hetcher, *supra* note 13, at 1885.

196. See *supra* note 192 and accompanying text. *But see* LESSIG, *supra* note 5, at 256 (arguing that amateur remix content, like mashups, becomes commercial when posted on websites like

do not stand to profit from their creations suggests that mashup artists have noneconomic motives.<sup>197</sup> Alternative reasons for creating mashups may include paying tribute to one's favorite artists, educating or introducing listeners to new music, or simply responding to popular demand.<sup>198</sup>

The fact that most mashup artists do not create mashups for the sole purpose of economic gain may weigh in favor of a finding of fair use for the majority of mashup artists, but it should not be dispositive.<sup>199</sup> For example, the Supreme Court has held that “[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”<sup>200</sup> With regard to both creating and posting mashups online, mashup artists receive no profit from using songs for which they do not pay.<sup>201</sup> Therefore, courts will consider the fact that most mashup artists are not driven solely by economic incentives, but the fact that mashup artists do not stand to profit from exploiting the songs they use is ultimately what will lead courts to find that the commercial inquiry favors a finding of fair use.<sup>202</sup>

Nevertheless, there is a minority of mashup artists that stand to profit from exploiting the songs they use.<sup>203</sup> Most notably, Girl Talk has released four albums under the Illegal Art label, some of which are available through vendors like Amazon and BestBuy.<sup>204</sup> Furthermore, aside from album sales, mashup artists may experience financial benefits

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YouTube, which generate advertising revenue).

197. See Power, *supra* note 9, at 594.

198. See Reynolds, *supra* note 36.

199. See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 592 (1985) (Brennan, J., dissenting).

200. Harper & Row, 471 U.S. at 562.

201. See *id.*; Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 COLUM. J.L. & ARTS 497, 513-14 (2008) (“That YouTube [and other websites like it] is profit-seeking no more renders individual participants’ work commercial than the fact that paint and canvas cost money makes every painting commercial.”).

202. See Harper & Row, 471 U.S. at 562.

203. See Power, *supra* note 9, at 595; *Girl Talk as Fair Use Martyr*, *supra* note 13; ILLEGAL ART, <http://illegal-art.net/shop/> (last visited Mar. 16, 2011); *Girl Talk: MP3 Downloads*, AMAZON, [http://www.amazon.com/s/ref=nb\\_sb\\_noss?url=search-alias%3Ddigital-music&field-keywords=Girl+talk&x=0&y=0](http://www.amazon.com/s/ref=nb_sb_noss?url=search-alias%3Ddigital-music&field-keywords=Girl+talk&x=0&y=0) (last visited Mar. 16, 2011).

204. *Girl Talk*, BESTBUY, [http://www.bestbuy.com/site/olspage.jsp;jsessionid=431869D0B095F93A4303EC5B5DCEF06C.bbolsp-app03-30?\\_dyncharset=ISO-8859-1&\\_dynSessConf=2163031478026546187&id=pcat17071&type=page&st=girl+talk&sc=Global&cp=1&nrp=15&sp=&qp=&list=n&iht=y&usc=All+Categories&ks=960](http://www.bestbuy.com/site/olspage.jsp;jsessionid=431869D0B095F93A4303EC5B5DCEF06C.bbolsp-app03-30?_dyncharset=ISO-8859-1&_dynSessConf=2163031478026546187&id=pcat17071&type=page&st=girl+talk&sc=Global&cp=1&nrp=15&sp=&qp=&list=n&iht=y&usc=All+Categories&ks=960) (last visited Mar. 16, 2011); *Girl Talk: MP3 Downloads*, *supra* note 203. However, Apple removed Girl Talk’s most popular album from the iTunes Music Store. LESSIG, *supra* note 5, at 12.

in the form of future employment.<sup>205</sup> For instance, based on the mashups they create and share for free, artists like DJ Earworm, 2 Many DJ's, and DJ Danger Mouse may receive offers to perform at concerts or clubs for a fee.<sup>206</sup> This indirect benefit demonstrates that one need not necessarily sell his mashups in order to profit.<sup>207</sup>

This finding supports the notion that there are indeed mashup artists who produce mashups for commercial purposes.<sup>208</sup> It follows that the commercial subfactor will weigh against a finding of fair use for mashup artists who either sell their mashups or indirectly experience economic benefits through employment opportunities obtained as a result of their mashups.<sup>209</sup> However, it is important to remember that the fair use test is applied on a case-by-case basis,<sup>210</sup> so it is possible that the commercial subfactor will favor some artists and disfavor others.

### iii. Good Faith

In addition to whether the use is commercial or transformative, courts also consider whether the alleged infringer acted in good faith.<sup>211</sup> In other words, if the court finds that the alleged infringer acted with bad faith when he used the copyrighted material, then that determination will weigh against a finding of fair use.<sup>212</sup> One factor that courts consider in this analysis is whether the alleged infringer used the work before that work was published.<sup>213</sup> Courts consider who released the work first because the right of first publication is economically valuable.<sup>214</sup> For instance, if a work is available before its authorized release date, then fewer people will purchase the work when it is actually for sale.<sup>215</sup>

In *Harper & Row, Publishers, Inc. v. Nation Enterprises*,<sup>216</sup> the Supreme Court stressed that “[f]air use presupposes good faith.”<sup>217</sup> In that pivotal case, *The Nation* magazine published the most important

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205. See Power, *supra* note 9, at 595; see, e.g., DJ EARWORM—MUSIC MASHUPS, *supra* note 45.

206. See Power, *supra* note 9, at 595; DJ EARWORM—MUSIC MASHUPS, *supra* note 45.

207. See Power, *supra* note 9, at 595.

208. See *id.*

209. See Mongillo, *supra* note 11, at 29; Pote, *supra* note 3, at 676; Power, *supra* note 9, at 595.

210. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985).

211. *Id.* at 562; *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 478-79 (2d Cir. 2004).

212. See *Harper & Row*, 471 U.S. at 562; *NXIVM Corp.*, 364 F.3d at 478.

213. See *Harper & Row*, 471 U.S. at 564.

214. See *id.* at 553, 564.

215. See *id.* at 568-69.

216. 471 U.S. 539.

217. *Id.* at 562 (internal quotation marks omitted) (quoting *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968)).



part of President Gerald Ford's forthcoming memoir, and the Court held that *The Nation* was not entitled to the fair use defense because it had published the heart of the book before President Ford's publisher had commercially released it.<sup>218</sup> *Harper & Row* illustrates that a defendant who uses copyrighted material without authorization for the purpose "of supplanting the copyright holder's commercially valuable right of first publication" is not acting in good faith.<sup>219</sup>

Unlike the defendant in *Harper & Row*, mashup artists do not attempt to reap the benefits of first publication or production. Even if mashup artists had access to songs before their scheduled release dates, it is unlikely that they would want to incorporate an unreleased song into a mashup because mashups typically feature songs that have achieved popularity.<sup>220</sup> Since a song that has not been released to the public cannot yet be popular, it follows that an unknown song is not appealing to mashup artists.<sup>221</sup>

However, copyright holders have argued that interfering with one's right of first publication is not the only concern in determining good faith.<sup>222</sup> Some believe that an additional concern arises when someone knowingly uses copyrighted material against the copyright holder's wishes.<sup>223</sup> For example, in *Campbell v. Acuff-Rose*, the plaintiff record company claimed that 2 Live Crew had acted in bad faith because the rap group used "Oh, Pretty Woman" despite having been denied authorization by the song's copyright holders.<sup>224</sup> Even though the rap group ignored the record company's request not to use the song, the Supreme Court held that the group had not necessarily acted in bad faith.<sup>225</sup> In other words, the fact that one fails to obtain permission before using another's work does not necessarily result in a finding of bad faith.<sup>226</sup>

After all, if a secondary work satisfies the fair use test, then one need not obtain permission because the use is fair and legitimate, regardless of whether or not the original artist disapproves of the unauthorized use.<sup>227</sup> Therefore, even if a mashup artist uses a song

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218. *See id.* at 542-43, 548-49, 564-65.

219. *Id.* at 562.

220. *See* Jurgensen, *supra* note 50 (noting that mashups feature popular songs).

221. *See* Power, *supra* note 9, at 589.

222. *See* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 n.18 (1994); *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 478 (2d Cir. 2004).

223. *See* *Campbell*, 510 U.S. at 585 n.18.

224. *Id.* at 572-73, 585 n.18.

225. *Id.* at 585 n.18.

226. *See id.*

227. *See id.*; *Fisher v. Dees*, 794 F.2d 432, 436-37 (9th Cir. 1986).

without authorization or against the copyright holders' wishes, that will not necessarily rule out a finding of good faith or fair use.<sup>228</sup> Based on *Campbell* and *Harper & Row*, the fact that mashup artists do not intend to affect the value of the underlying works would most likely lead to a finding of good faith, even if the mashup artist uses copyrighted material without authorization.<sup>229</sup>

In summary, the first factor of the fair use test, which considers the purpose and character of the use, weighs slightly against mashup artists. On the one hand, the fact that mashup artists act in good faith and are generally noncommercial favors a finding of fair use.<sup>230</sup> On the other hand, mashups are not transformative, and the question of whether the secondary work is transformative is the most critical subfactor.<sup>231</sup> Thus, the first factor will not tip the scale, but it will have a slightly negative impact on mashup artists in the determination of whether mashups are entitled to a fair use defense.

#### b. Nature of the Copyrighted Work

The second factor concerns the nature of the copyrighted work. Courts generally divide the second factor into two subfactors.<sup>232</sup> First, courts consider whether the copyrighted material is factual or fictional in nature.<sup>233</sup> Next, courts ask whether the copyrighted material is published or unpublished.<sup>234</sup> If the copyrighted material is fictional and unpublished, then the second factor will weigh against a finding of fair use.<sup>235</sup> On the other hand, if the work is factual and has already been published, then the second factor will weigh in favor of a finding of fair use.<sup>236</sup> In contrast, if the copyrighted material is either factual and unpublished or fictional and published, then the nature of the copyrighted work will have little effect on the fair use determination.<sup>237</sup>

#### i. Fictional or Factual

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228. See *Campbell*, 510 U.S. at 585 n.18; *Fisher*, 794 F.2d at 436-37.

229. See *Campbell*, 510 U.S. at 585 n.18; *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

230. See *Harper & Row*, 471 U.S. at 562.

231. See *Campbell*, 510 U.S. at 579.

232. *Harper & Row*, 471 U.S. at 563-64; Hetcher, *supra* note 13, at 1908.

233. *Harper & Row*, 471 U.S. at 563.

234. *Id.* at 564.

235. See *id.* at 563-64; Hetcher, *supra* note 13, at 1908.

236. See *Harper & Row*, 471 U.S. at 563-64; Hetcher, *supra* note 13, at 1908.

237. See *Harper & Row*, 471 U.S. at 563-64; Hetcher, *supra* note 13, at 1908 & n.149.

Although the law provides copyright protection to both factual and fictional works alike, fictional material receives more protection than factual content.<sup>238</sup> The basis for this rule is that society benefits from making factual, educational materials readily available.<sup>239</sup> Thus, unfortunately for authors of factual works, such as textbooks and news stories, the need to disseminate information outweighs the copyright holder's right to exercise his exclusive rights as vigorously as copyright holders of fictional works can.<sup>240</sup>

For the sake of clarity, it is worth noting that songs fall under the fictional, or creative, category.<sup>241</sup> Thus, the fact that mashup artists incorporate creative material into their mashups will weigh against a finding of fair use because creative material is afforded more protection than factual content.<sup>242</sup>

## ii. Published or Unpublished

Fortunately for mashup artists, the second factor of the fair use analysis does not end with the "fact or fiction" inquiry. Just as factual works receive less protection than creative works, published works receive less protection than unpublished works.<sup>243</sup> In so ruling, courts have acknowledged the valuable right of first publication.<sup>244</sup> If a mashup artist incorporates a song into his mashup before that song is released, then the mashup artist is infringing upon the privacy, economic, and editorial interests associated with the copyright holder's right of first publication.<sup>245</sup>

However, as previously mentioned, mashup artists feature popular, published songs, and therefore mashup artists do not interfere with the right of first publication.<sup>246</sup> Unlike the defendant in *Harper & Row*, who published a significant part of a book before its release date, mashup artists feature songs that have been released long enough to achieve

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238. See *Harper & Row*, 471 U.S. at 563; Hetcher, *supra* note 13, at 1908.

239. See *Feist Publ'ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347-51 (explaining that copyright law protects fictional works more than factual works because unlike creative expression, facts do not originate with any author, and there is a need to disseminate factual information to the public).

240. See *Harper & Row*, 471 U.S. at 563.

241. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

242. *Harper & Row*, 471 U.S. at 563; Hetcher, *supra* note 13, at 1908.

243. See *Harper & Row*, 471 U.S. at 564.

244. See *id.* at 553.

245. See *id.* at 564, 568.

246. See *id.* at 564 (explaining that unpublished works are afforded more protection than published works); Jurgensen, *supra* note 50 (indicating that mashup artists incorporate popular songs into their creations).

considerable acclaim.<sup>247</sup> Thus, the “published or unpublished” subfactor favors a finding of fair use.

Nevertheless, the nature of the copyrighted work as a whole will have a neutral effect on the determination of fair use. While the fact that mashups feature creative material weighs against a finding of fair use, the fact that mashups contain published songs supports a finding of fair use.<sup>248</sup>

### c. Amount and Substantiality

For the reasons set forth below, the third factor, which examines the amount and substantiality of the portion of copyrighted material used, weighs against a finding of fair use. This factor concerns the quantity and quality of the copyrighted material used in the secondary work.<sup>249</sup> Although courts consider the amount taken, the fact that one incorporates a large portion of the copyrighted work into the secondary work does not preclude a finding of fair use.<sup>250</sup>

Similarly, copying a particularly small amount of the original work will not necessarily prevent a court from declaring the use unfair.<sup>251</sup> In *Harper & Row*, for example, the third factor weighed against a finding of fair use even though *The Nation* had only copied a few hundred words from the plaintiff’s book.<sup>252</sup> The Court reached this conclusion on the basis that the small portion constituted the “heart” of President Ford’s book.<sup>253</sup> In other words, *The Nation* copied the most important part of the book and people would no longer need to read the book after having read the excerpt.<sup>254</sup>

Since mashups range in complexity, some mashup artists may use large amounts of the original song while others may copy only a few notes.<sup>255</sup> Authors of simple “A vs. B” mashups may copy substantial amounts from the underlying works.<sup>256</sup> For instance, a mashup like “This

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247. See *Harper & Row*, 471 U.S. at 564.

248. But see *Hetcher*, *supra* note 13, at 1908 (claiming that “when the factor two subfactors point in opposite directions, courts typically find that factor two disfavors fair use”).

249. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586-87 (1994).

250. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50, 456 (1984) (holding that a machine that allows one to record television broadcasts for private purposes is capable of being a substantial, non-infringing use).

251. *Harper & Row*, 471 U.S. at 564-65, 569.

252. *Id.* at 548, 566.

253. *Id.* at 564-65.

254. See *id.* at 564-65, 568.

255. Compare *This Is Why Africa Is Hot*, *supra* note 40 (illustrating how some mashups sample large portions of their underlying works), with *Still Here*, *supra* note 183 (demonstrating more complex mashups, which often include shorter samples).

256. See *This Is Why Africa Is Hot*, *supra* note 40.

Is Why Africa Is Hot” is comprised of only two songs but lasts over four minutes, containing significant amounts of copyrighted material from both songs.<sup>257</sup> Furthermore, because “This Is Why Africa Is Hot” features the popular, recognizable background beat from “This Is Why I’m Hot” as well as the well-known chorus from “Africa,” a court would likely find that the mashup copies the heart of the original works.<sup>258</sup> Thus, the third factor disfavors a finding of fair use for simple “A vs. B” mashups like “This Is Why Africa Is Hot,” which copy both substantial portions as well as the most significant parts of the underlying works.<sup>259</sup>

Finally, the same analysis applies to more complex mashups, such as audio collages.<sup>260</sup> Even though some audio collages contain very brief samples and may not always incorporate the heart of the preexisting works into the collage, other audio collages do contain the heart of the preexisting works and sample substantial portions of those works.<sup>261</sup> Thus, although the amount and substantiality factor could weigh in favor of fair use for those like Girl Talk who create intricate audio collages, courts will have to consider the factor on a case-by-case analysis.

#### d. Effect

The fourth and final factor that courts consider in their determination of fair use is the effect of the use on the potential market.<sup>262</sup> In order to preserve the incentive to create art, courts disfavor uses that impair the marketability of the copyrighted work.<sup>263</sup> After all, if the copyrighted material’s market diminishes, fewer people will be inclined to produce work for that market, and such a result is not only contrary to the copyright goal of promoting progress in the arts, but also unfair to people who create art for that particular market.<sup>264</sup>

The Supreme Court has declared that the fair use defense should not extend to uses that impair the marketability of the copyrighted material.<sup>265</sup> In determining whether a work materially impairs the marketability of another work, courts first address whether the secondary work causes direct market harm, and then ask if the secondary work

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257. *See id.*

258. *See Harper & Row*, 471 U.S. at 564-66; *This Is Why Africa Is Hot*, *supra* note 40.

259. *See Harper & Row*, 471 U.S. at 564-66; *This Is Why Africa Is Hot*, *supra* note 40.

260. *See Pote*, *supra* note 3, at 680-81.

261. *See id.* at 680.

262. *Harper & Row*, 471 U.S. at 566.

263. *See, e.g., id.* at 566-67.

264. *See id.* at 566 & n.9, 567-68; *Pote*, *supra* note 3, at 681.

265. *Harper & Row*, 471 U.S. at 566-67.

exploits a potential market for the copyrighted material.<sup>266</sup> As explained below, the fourth factor—the effect factor—weighs against a finding of fair use for mashup artists.

i. Direct Harm

In order to protect the economic rights of copyright holders, courts frown upon uses that cause direct harm to copyright holders.<sup>267</sup> In *Campbell*, the Court held that the secondary work must not usurp demand for the original work, such as by serving as an adequate substitute for the original.<sup>268</sup> Fortunately for mashup artists, it is highly improbable that listeners will use a mashup as an alternative or substitute for the original songs in the mashup. In other words, it is unlikely that someone who considers purchasing Toto's "Africa" on iTunes will choose not to do so because he can listen to part of the song in the mashup "This Is Why Africa Is Hot." Similarly, Girl Talk fans will not forego buying a song simply because they can hear a few seconds of it in one of Girl Talk's audio collages, even if that small portion includes the most popular part of the song. At bottom, it is very unlikely that mashups will serve as substitutes for preexisting songs, thereby having little or no effect on the sale of those songs.<sup>269</sup>

In addition, because most mashups are not for sale, it is improbable that fans who would use mashups as an alternative to the original song will have the opportunity to purchase the mashup.<sup>270</sup> In fact, if the fan really enjoys a song from the mashup, then he may be inclined to purchase the original song.<sup>271</sup> In that regard, mashups arguably have a positive effect on the market for the copyrighted material.<sup>272</sup> In summary, the fact that mashup artists do not cause direct harm to the market for the songs that they incorporate into their mashups favors a finding of fair use.<sup>273</sup>

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266. *See id.* at 568.

267. *See id.* at 568-69.

268. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994).

269. *See* Power, *supra* note 9, at 599 (asserting that one would not buy a mashup album to avoid buying the original album).

270. *See* Mongillo, *supra* note 11, at 15.

271. *See* Reynolds, *supra* note 36 (proposing the notion that mashups might positively impact copyright holders by encouraging mashup listeners to purchase the original songs or attend the original artists' concerts).

272. *See id.*

273. *See* Pote, *supra* note 3, at 681; Power, *supra* note 9, at 600; Neal R. Axton, *Fair Use and Mashups*, LAW LIBR. BLOG (Nov. 15, 2007), [http://lawprofessors.typepad.com/law\\_librarian\\_blog/2007/11/fair-use-and-ma.html](http://lawprofessors.typepad.com/law_librarian_blog/2007/11/fair-use-and-ma.html).

## ii. Harm to Potential Derivative Market

Even though the lack of direct market harm favors fair use, it is not difficult to negate such a positive aspect.<sup>274</sup> In *Harper & Row*, for example, the Court held that “one need only show that if the challenged use ‘should become widespread, it would adversely affect the *potential* market for the copyrighted work.’”<sup>275</sup> Therefore, copyright holders need only demonstrate that mashup artists’ current use of copyrighted material may negatively affect the potential market for mashups created in the future with the copyright holders’ authorization.<sup>276</sup> In other words, copyright holders would argue that they might want to create mashups of their work in the future, and the marketability of those future mashups will be impaired by current mashup artists who are using the copyright holders’ songs without authorization.<sup>277</sup>

Since copyright holders retain the exclusive right to prepare derivative works, they, and they alone, can prepare derivative works like mashups without seeking authorization.<sup>278</sup> Given the rising popularity of mashups, it is fair to assume that copyright holders themselves may one day choose to cash in on the mashup phenomenon.<sup>279</sup> Therefore, the unauthorized use of copyrighted material in mashups could harm copyright holders in the future if they decide to start creating their own mashups.<sup>280</sup> In brief, the negative effect that mashups may have on the potential derivative market for mashups will weigh against a finding of fair use.<sup>281</sup>

In light of the above analysis, mashup artists are generally not entitled to the affirmative defense of fair use.<sup>282</sup> First, while most mashups are created in good faith and for noncommercial purposes, the purpose and character of the use weighs slightly against a finding of fair use because mashups are not transformative, and whether the secondary use is transformative is the most critical inquiry in the first factor.<sup>283</sup> This

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274. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1985) (stating that courts must consider both direct harm and harm to the market for derivative works).

275. *Id.* (quoting *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)); see *Power*, *supra* note 9, at 599-600 (stating that as the demand for mashups grows, copyright holders might begin licensing the rights to incorporate their songs into mashups).

276. See *Power*, *supra* note 9, at 599-600.

277. See *id.*

278. See 17 U.S.C. § 106 (2006).

279. See *Pote*, *supra* note 3, at 682.

280. See *id.*

281. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1985).

282. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (noting that courts weigh the four factors to determine if a use is fair).

283. See *supra* Part III.C.2.a.

conclusion is fortified by the fact that, as previously mentioned, not all mashups are noncommercial.<sup>284</sup> Thus, the purpose and character of the use will definitely weigh against a finding of fair use for mashups that are commercial and not transformative.<sup>285</sup>

In addition, the second factor, which considers the nature of the copyrighted material, has virtually no effect on the fair use analysis for mashups.<sup>286</sup> Since mashup artists incorporate creative, published works into their mashups (i.e., traits that cancel each other out), it is unclear what, if any, effect the second factor would have on the fair use determination.<sup>287</sup> However, the amount and substantiality factor will most likely weigh against a finding of fair use because mashup artists tend to exploit the heart of the original work.<sup>288</sup> Likewise, due to mashups' negative effect on the potential market for derivative works, the final factor weighs against a finding of fair use.<sup>289</sup>

For the foregoing reasons, mashup artists are generally not entitled to the affirmative defense of fair use, and are therefore guilty of copyright infringement. However, it is important to remember that courts determine fair use on a case-by-case basis, so it may be possible to create a mashup that qualifies for the fair use defense.<sup>290</sup> Nevertheless, the fact that the fair use inquiry is so fact-specific demonstrates how time consuming and unhelpful the analysis can be for lawyers and mashup artists who would like to predict whether creating mashups can give rise to liability.<sup>291</sup> The need for reform is therefore apparent because there is no reason to believe that people will stop creating mashups, especially as the world of Web 3.0 approaches.<sup>292</sup>

#### IV. NEED FOR REFORM

Since mashups are not a fad and people will continue to create them despite legal obstacles, lawmakers should reform the system in order to protect the rights and interests of copyright holders and society alike.<sup>293</sup> The law must strike a balance between promoting the progress of the arts on the one hand, and allowing members of society to enjoy and

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284. See *supra* Part III.C.2.a.ii.

285. See *supra* Part III.C.2.a.

286. See *supra* Part III.C.2.b.

287. See *supra* Part III.C.2.b.

288. See *supra* Part III.C.2.c.

289. See *supra* notes 274-81 and accompanying text.

290. See Pote, *supra* note 3, at 670.

291. See Mongillo, *supra* note 11, at 16.

292. See Lee, *supra* note 3, at 13; Lessig, *supra* note 1, at 969; Pote, *supra* note 3, at 642.

293. See Pote, *supra* note 3, at 642.



appreciate the arts on the other.<sup>294</sup> The abundance of gray area in the copyright system may be encouraging people to take their chances with lawsuits because the law is so unclear and rarely enforced.<sup>295</sup> With regard to mashups, if artists are unsure whether they are entitled to a fair use defense and their peers are all producing mashups without being reprimanded, then why bother obtaining the authorization required by law?

Under the current system, one way of obtaining authorization from copyright holders is to negotiate a license.<sup>296</sup> Upon acquiring a license, the licensee has the right to use the copyrighted material in accordance with the terms of the license.<sup>297</sup> In the music industry, this typically means that the licensee can incorporate a digital sample of the copyrighted song into his new song.<sup>298</sup> However, this system is complicated and costly.<sup>299</sup> Despite the *Bridgeport* decision's successful result for copyright holders in digital sampling cases, the bright-line rule of "get a license or do not sample" is not fit for mashups.<sup>300</sup> While the Sixth Circuit claimed that the market would ensure that licensing costs were reasonable, the costs become much less reasonable when, as is the case for many mashups, an artist must acquire several licenses per song.<sup>301</sup>

Furthermore, artists seeking a license must concern themselves not only with the actual price of the license, which can cost thousands of dollars, but also the transactional costs involved in the negotiation process.<sup>302</sup> One must first locate the copyright holder, then negotiate a license, and then come up with the money for the negotiated price.<sup>303</sup> And despite all these efforts, a copyright holder can arbitrarily refuse to license his work.<sup>304</sup>

Additionally, while the licensing process is burdensome and extremely expensive for professional artists like Girl Talk, it is

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294. *See id.* at 653.

295. *See Lee, supra* note 3, at 1.

296. Morrison, *supra* note 66, at 111.

297. Pote, *supra* note 3, at 684.

298. *See id.*

299. *See id.*; *see also* Power, *supra* note 9, at 586 (explaining the problems associated with applying the bright-line rule for sampling to mashups).

300. *See* Mongillo, *supra* note 11, at 17-18 (quoting *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005)).

301. *See id.*

302. *See* Morrison, *supra* note 66, at 134 (describing the various costs associated with the licensing system).

303. *Id.*

304. Mongillo, *supra* note 11, at 21.

unfathomable for amateur artists.<sup>305</sup> It is unlikely that any amateurs will play it safe and obtain a license before making a mashup because mashup artists have virtually no incentive to purchase the rights to a song that will not bear any financial fruits.<sup>306</sup> After all, Girl Talk, one of few commercial artists, has confessed that despite his desire to compensate copyright holders for use of their songs, doing so would simply be too costly.<sup>307</sup> It follows that amateurs cannot be expected to pay for the rights to songs if their professional counterparts find it nearly impossible to turn a profit and bear the costs of legal fees and licensing costs at the same time.<sup>308</sup>

Aside from licensing costs, another problem with today's law is that mashup artists who cannot afford licenses may feel the need to hire a lawyer to predict whether their songs would be entitled to a fair use defense, presenting yet another expense.<sup>309</sup> Thus, as a result of unreasonable licensing costs, many mashup artists have no choice but to stop mashing or break the law.<sup>310</sup> Those who choose the latter option must then rely on lawyers to speculate as to the outcome of an issue that has not yet been litigated in court.<sup>311</sup> However, as previously discussed, fair use is difficult to predetermine and mashups will almost never be covered by fair use, so the lawyer would be an unnecessary expense.<sup>312</sup>

In addition to the aforementioned problems, the current system lacks an efficient enforcement structure.<sup>313</sup> Given the fact that anyone with a computer and the requisite software can create his very own mashup, regulating the creation of mashups seems like an insurmountable challenge.<sup>314</sup> Consequently, due to the difficulties associated with regulating the creation and posting of mashups, mashup artists may feel that they are better off taking their chances with the law

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305. See Lee, *supra* note 3, at 8, 17.

306. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 802 n.15 (6th Cir. 2005) (noting that the bright-line rule will lead artists to employ a cost-benefit analysis in order to determine whether it is worth it to pay the licensing fee); Lee, *supra* note 3, at 8, 14, 17 (explaining that licensing costs are often too high for noncommercial uses).

307. Alicia Van Couvering, *RIP! A Remix Manifesto's Brett Gaylor*, FILMMAKER (Mar. 14, 2009), [http://filmmakermagazine.com/sxsw\\_features/2009/03/rip-remix-manifesto-s-brett-gaylor-by.php](http://filmmakermagazine.com/sxsw_features/2009/03/rip-remix-manifesto-s-brett-gaylor-by.php).

308. See Lee, *supra* note 3, at 8, 18; Morrison, *supra* note 66, at 134.

309. LESSIG, *supra* note 2, at 173; Lee, *supra* note 3, at 19 (quoting Professor Lessig, who famously said, "[f]air use . . . simply means the right to hire a lawyer to defend your right to create").

310. See Mongillo, *supra* note 11, at 17-18 (discussing how impractical it would be for mashup artists to obtain licenses for all of the songs they sample).

311. See LESSIG, *supra* note 5, at 267.

312. See *id.*; *supra* Part III.C.2.

313. See Lessig, *supra* note 1, at 970.

314. See LESSIG, *supra* note 5, at 266; Lee, *supra* note 3, at 13-14.

than paying the unreasonable fees associated with licensing and contracting.<sup>315</sup>

Lastly, an alternative way for mashup artists to evade the risk of losing in court is to negotiate a settlement. The general practice of avoiding litigation by settling disputes out of court has become relatively common in copyright law.<sup>316</sup> Unfortunately, this custom has resulted in limited case law, which has consequently prolonged the resolution of ambiguities in legislation.<sup>317</sup>

The existence of gray areas, in conjunction with the lack of case law on point, has led to “warming” and the use of gap fillers.<sup>318</sup> Although ambiguity in the law likely chills free speech, legal uncertainty may also lead to “warming.”<sup>319</sup> “Warming” is the concept used “to explain how uncertainty in copyright law may influence behavior.”<sup>320</sup> In contrast to chilling, warming actually results in people taking more risks.<sup>321</sup> For example, people will engage in conduct that their peers have informally accepted as a legitimate practice without knowing whether something is legal or illegal.<sup>322</sup> Therefore, in the absence of clarity, it is safe to assume that the warming phenomenon will continue to serve as a gap filler in the years to come as the practice of sharing art online becomes more prevalent.<sup>323</sup>

In other words, the more people see their friends post content on social networking sites like Facebook and Twitter, the more likely it is that they will engage in similar conduct.<sup>324</sup> Thus, if one amateur mashup artist notices more and more mashups online, he may be inclined to post his own mashups online simply because he assumes that such a widespread practice must be legitimate, or at least, unregulated.<sup>325</sup> Whether this is conducive to the goal of promoting the progress of the arts is another story.<sup>326</sup> On one side of the coin, the Internet has facilitated the process of borrowing from others to create new works and

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315. See Hetcher, *supra* note 13, at 1891 (purporting that copyright holders who employ a cost-benefit analysis generally condone noncommercial remix culture due to high enforcement costs); *supra* notes 305-12 and accompanying text.

316. See Lee, *supra* note 10, at 1476-77.

317. See *id.* at 1479.

318. Lee, *supra* note 3, at 19-20 (defining “warming” and its connection to the uncertainty surrounding copyright law).

319. *Id.*

320. Lee, *supra* note 10, at 1463.

321. See Lee, *supra* note 3, at 20.

322. *Id.*

323. See *id.*

324. See *id.*

325. See *id.*

326. See Pote, *supra* note 3, at 653.

then share those works with others, which benefits society by encouraging creativity.<sup>327</sup> On the other side, however, this process chips away at the limited monopoly that copyright holders secure over their works.<sup>328</sup>

The debilitating struggle between society's right to savor creative works and copyright holders' right to exercise a limited monopoly over their works exemplifies the need for reform.<sup>329</sup> Legislators must discover how technological advances affect copyright, and adjust the law accordingly, especially as the warming phenomenon continues to prosper.<sup>330</sup> Until lawmakers provide a reasonable means for people to abide by the law, or, in the alternative, discover a more effective way to police infringement, the public will most likely ignore the law and take matters into their own hands, which could, over time, have devastating effects on the copyright system.<sup>331</sup>

## V. SUGGESTIONS: WAYS TO REMIX COPYRIGHT LAW

As recent scholarship indicates, copyright reform is essential in order to revamp copyright's principal objective of granting creators enough of a financial incentive to promote the progress of the arts.<sup>332</sup> However, before the appropriate changes can occur, Congress must adopt a more realistic attitude about society and the growth of technology.<sup>333</sup> In addition, until Congress amends the law, courts must be more proactive in providing clarification through litigation.<sup>334</sup> This Section will address potential solutions to the gaps in today's copyright law.

### A. Public Reform Ideas

#### 1. Legalize Amateur Remix Culture

One public reform option is to legalize amateur remix culture and adopt one of the licensing systems discussed below to regulate professional mashup artists.<sup>335</sup> Legalizing amateur use would allow

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327. See Lee, *supra* note 3, at 20; Pote, *supra* note 3, at 651-52.

328. See Pote, *supra* note 3, at 651-52.

329. See *id.* at 650-52.

330. See LESSIG, *supra* note 5, at 266; Lee, *supra* note 3, at 20; Pote, *supra* note 3, at 682.

331. See LESSIG, *supra* note 5, at 266; Lee, *supra* note 3, at 20.

332. See LESSIG, *supra* note 5, at 266.

333. See Lessig, *supra* note 1, at 970-71 (explaining why policy makers' response to technological advances have been unsuccessful).

334. See Lee, *supra* note 10, at 1479.

335. See LESSIG, *supra* note 5, at 254 (arguing for the legalization of remix culture); see also

amateur mashup artists to mash copyrighted songs without permission. However, if an amateur artist begins to profit from his art, then he will be deemed a professional and will need to obtain the requisite authorization before incorporating copyrighted material into his work.<sup>336</sup> The theory behind legalizing amateur remix culture is that amateurs are innocuous, and it makes little sense for Congress to penalize people for engaging in such a widespread practice.<sup>337</sup> After all, if, unlike a professional, an amateur mashup artist does not affect the copyright holder's profits and receives no direct benefit, then what reason is there to preclude that amateur artist from experimenting with others' works?<sup>338</sup>

Although legalizing remix culture for amateur use would allow amateurs to mash copyrighted material without entering costly licensing agreements, such action may actually produce positive economic effects on copyright holders. For instance, in order to incorporate a song into one's mashup, the mashup artist would first have to purchase a copy of the song if he has not already done so, thereby increasing the original song's sales. Moreover, if amateur mashups are legalized, paranoid (or law-abiding) artists will no longer have a reason to withhold their creations, and the proliferation of mashups on the Internet may encourage people to listen to unfamiliar music that, but for mashups, they would not have discovered. Not only would this transform strangers into fans, but it would lead to additional sales for copyright holders because new fans might decide to purchase a copy of the whole song if they heard a sample of it in a mashup.

Whether legalizing amateur mashups is moral is certainly debatable, but more importantly, it is irrelevant because one must remember that the prevailing reason why copyright law grants creators exclusive rights is to incentivize them to produce more art for society's benefit. As cynical as it seems, legislators presume that artists will not create unless they are entitled to a reasonable financial reward. Thus, society must preserve artists' financial incentive to create so it can in turn reap the cultural benefits of art. In brief, since amateurs do not negatively affect original artists' direct sales or unfairly profit from using others' songs, they do not disrupt professional artists' financial incentive to create.<sup>339</sup> Therefore, if Congress legalized amateur remix

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*infra* Part V.A.2-3 (discussing potential licensing regimes).

336. See LESSIG, *supra* note 5, at 256.

337. See LESSIG, *supra* note 5, at 255; Lessig, *supra* note 1, at 969 (noting the pervasive nature of remix culture, the illegality of which children apparently disregard).

338. See Power, *supra* note 9, at 599-600.

339. See *supra* Part III.C.2.d.

culture, the premier goal of copyright law would remain intact.<sup>340</sup> Finally, instead of complete legalization for all remix culture, Congress could adopt one of the following licensing systems to regulate professional mashup artists.

## 2. Implement a Compulsory Licensing System

Alternatively, some people have recommended a compulsory licensing system.<sup>341</sup> Under such a system, Congress could grant professional mashup artists the right to sample copyrighted material as long as they pay the copyright holders a certain percentage of the royalties to which the original artists would have been entitled.<sup>342</sup> This percentage would be based on community standards, i.e., the standard in the mashup community.<sup>343</sup> Additionally, one of the most appealing aspects of the compulsory licensing system is that remix artists would have access to all copyrighted content unless the copyright holder had opted out of the compulsory system through registration.<sup>344</sup> Lastly, the compulsory regime addresses the concerns of those who have a problem with legalizing amateur remix altogether by allowing noncommercial remix artists to sample copyrighted work for an incredibly low, flat fee.<sup>345</sup>

## 3. Blanket Licensing System

Another option is to have Congress set up a blanket licensing system.<sup>346</sup> Such an institution would consist of mashup or remix artists paying an annual fee for the right to sample copyrighted material.<sup>347</sup> This system would be similar to associations like Broadcast Music, Inc. and the American Society of Composers, Authors and Publishers, which collect fees from businesses that play music and then distribute royalties to participating copyright holders.<sup>348</sup> In addition, just as businesses pay different rates based on factors like how often they play music and how big their business is, remix artists would pay different rates based on a

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340. See *supra* notes 263, 269-73 and accompanying text.

341. See Lessig, *supra* note 1, at 973 (describing a compulsory licensing system); Long, *supra* note 35, at 357.

342. See Lessig, *supra* note 1, at 973; Long, *supra* note 35, at 357.

343. See Lessig, *supra* note 1, at 973.

344. See *id.*

345. See *id.*

346. Mongillo, *supra* note 11, at 18.

347. *Id.* at 18-19.

348. See *id.*

variety of factors.<sup>349</sup> Such factors might include “the length of the sample and the popularity of the original artist.”<sup>350</sup>

Contrary to the licensing regime currently in place, a blanket licensing system would be more appropriate and reasonable for mashup artists who incorporate several samples into one song.<sup>351</sup> For instance, rather than purchasing the rights to the entire song, mashup artists could adjust the fee depending on how much of the song they actually use.<sup>352</sup> Thus, by virtue of offering a reasonable way of compensating copyright holders, a blanket licensing system would likely result in fewer instances of infringement and greater cooperation with copyright law in general.<sup>353</sup>

Ideally, Congress will legalize amateur remix culture and implement a compulsory or blanket licensing system to cover professional mashup artists. By mitigating the costs associated with the current licensing system, these alternative licensing regimes would encourage professionals to obtain authorization from copyright owners, thereby reducing the frequency of infringement. If, however, legislators do not create an exemption for amateur mashup artists, Congress should at least establish either a compulsory or blanket licensing system to provide all mashup artists an affordable means of compensating copyright owners.

### B. *Private Reform*

On the private front, many people endorse the Creative Commons, a nonprofit organization.<sup>354</sup> The Creative Commons is useful in that it facilitates the process of using copyrighted material for a new, creative purpose.<sup>355</sup> For example, the nonprofit organization allows copyright holders to “mark their creative works in such a way as to clearly define the scope of the freedom to copy.”<sup>356</sup> Despite hopeful reactions from musicians and copyright scholars alike, however, some maintain that contracting and negotiating are more appropriate solutions.<sup>357</sup>

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349. *See id.* at 19.

350. *Id.*

351. *See id.*

352. *See id.*

353. *See id.*

354. *See Share, Remix, Reuse—Legally*, *supra* note 56.

355. *See* Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477, 556 (2007).

356. *Id.*

357. *See* David Berry & Giles Moss, *On the “Creative Commons”: A Critique of the Commons Without Commonality*, FREE SOFTWARE MAG. (July 15, 2005), [http://www.freesoftwaremagazine.com/articles/commons\\_without\\_commonality?page=0%2C1](http://www.freesoftwaremagazine.com/articles/commons_without_commonality?page=0%2C1) (criticizing the Creative Commons).

## VI. CONCLUSION

In conclusion, the Internet has triggered a shift towards a participation-oriented culture in which people build off of others' works. This copy-and-paste practice is on the rise in the music industry where mashup artists create new songs merely by combining preexisting songs. Despite mashups' strong fan base, however, the genre's future may be grim. Although copyright holders have not yet sued mashup artists for infringement, it is unlikely that they will continue to sweep the problem under the rug, especially as more mashup artists enter the mainstream. Unfortunately for mashup artists, their failure to obtain authorization for the works they sample leaves them liable for copyright infringement and they are most likely not entitled to a *de minimis* or fair use defense.<sup>358</sup> Fortunately for mashup fans, however, the fear of creating unfavorable law has deterred copyright holders from suing mashup artists for copyright infringement.<sup>359</sup>

Nonetheless, amateur and professional mashup artists alike continue to produce mashups and have little reason to stop doing so since copyright holders have not yet sued any mashup artists. In light of this condition, Congress should enact legislation that protects the exclusive rights of copyright holders, but also accounts for the widespread practice of borrowing from others to create something new.

Finally, ambiguities in legislation have led scholars to suggest various solutions to the problems presented by technological advances. In response to the main concern that current licensing costs are unreasonably high, recommendations have been made to implement new licensing systems, such as a compulsory or blanket licensing system, or perhaps the Creative Commons licensing system. Alternatively, with respect to amateur mashup artists, some have suggested that amateurs pay only a very modest fee for their use of copyrighted material, or even no fee at all since they do not stand to profit from their use of copyrighted music.

Regardless of how legislators attempt to revamp copyright law, the general consensus is that professional mashup artists should compensate copyright holders for the use of their songs.<sup>360</sup> That consensus, however, is contingent upon the implementation of an economically feasible means of compensating copyright holders. In addition, the government must develop an enforcement mechanism to encourage citizens to follow the law. Until a financially reasonable method of compensating

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358. See *supra* Part III.C.

359. See Mongillo, *supra* note 11, at 3, 17.

360. See *supra* Part V.A.



copyright holders is presented and an enforcement structure is employed to police infringement, the rights battle will not cease, nor will mashup artists desist.

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\* J.D. candidate, 2011; Hofstra University School of Law. This Note is dedicated to my family, specifically my parents, Bob and Christine, and my big brothers, Rob and Steve. Thank you all for your endless love, support, and motivation. I would also like to extend my sincerest gratitude to my friends, especially those who first introduced me to mashups, as well as those who tolerate my obsession with this unique genre of music. Next, I would like to acknowledge the diligent efforts of my editor, Marissa “MD” Wiley, whose patience, guidance, and enthusiasm inspired me throughout the writing of this Note. I am also forever grateful to the members of Volumes 38 and 39 of the *Hofstra Law Review* for their commendable work ethic. Finally, I would like to thank my faculty advisor and mentor, Professor Frank Gulino, for his insight and direction throughout the writing of this Note. Professor, you have encouraged me to reach new heights and words cannot express how much I value your wisdom, dedication, and superior pedagogical skills.