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SPACE AGE LOVE SONG: THE MIX TAPE IN A DIGITAL UNIVERSE

MEGAN M. CARPENTER

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SPACE AGE LOVE SONG: THE MIX TAPE IN A DIGITAL UNIVERSE

MEGAN M. CARPENTER[1]

Mix tapes are the classic, iconic form of music sharing. Mix tape creators of the past believed that they were making a piece of art larger than the sum of its possibly infringing parts. And even in the face of technological development so rapid and far-reaching as to remove the literal "tape" from "mix tape," there are nonetheless modern incarnations that crop up on a regular basis, from mix CDs to mix-sharing websites. The technology is different, but the song remains the same.

I. SPACE AGE LOVE SONG

And for a little while, I was falling in love.
– Flock of Seagulls
"Space Age Love Song"
Flock of Seagulls

With my first stereo came a $10 birthday gift certificate to Camelot Music. That piece of paper threatened to burn a hole in my pocket faster than one could say "parachute pants."[2] The day after my birthday party, my mom took me to the mall. I wandered the aisles excitedly, aimlessly, frenetically. I couldn't decide whether to buy the eponymous Flock of Seagulls record album or "H2O" by Hall and Oates. After much decision and indecision, I went for the Flock of Seagulls. I like to think that on that day

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[1] Megan M. Carpenter, Associate Professor of Law and Director of the Center for Law and Intellectual Property (CLIP) at Texas Wesleyan School of Law. I would like to thank Rebecca Quarles for her research assistance and dedication to this project, and particularly for living and breathing these issues with me over the last months. I would also like to thank Dan, for continuing to make me mixes even if he has to break the law to do it.

[2] For a discussion of the parachute pants of the 1980s, *see* http://en.wikipedia.org/wiki/Parachute_pants. To purchase parachute pants, *see* http://www.parachute-pants.com/store/index.php.

two music-loving roads diverged in a wood, and I, I went for the Flock of Seagulls, and that has made all the difference.

The track "Space Age Love Song" from that Flock of Seagulls album made it on to more than one mix tape over time. It was a synthesized encapsulation of an era, of what it was to be a teenager in the 1980s, hairspray and keyboards. In perfect 1980s fashion, what the song lacked in substantive brilliance, it made up for in its title. Looking back now, it occurs to me that "Space Age Love Song," encapsulates the dilemma one faces when applying current copyright law to the mix tape itself. What happens when the base human desire to share music personally meets a digital universe? If copyright law is meant to promote creativity and proscribe infringement, then the mix tape—past and present—is a perfectly situated subject for analytical inquiry. Are mix tape creators, from the teenager of the 1980s making mixes for their friends, to the bride and groom of the new millennium sharing the soundtrack of their wedding, infringers? Should the "Space Age Love Song" be replaced by "Jailhouse Rock?"

A. MIX TAPES COMMUNICATE MEANING THROUGH MUSIC.

With the advent of audio home recording technology, suddenly ordinary consumers could create their own compilations of music to communicate their feelings. Los Angeles based writer Matias Viegener observes that "[m]ix tapes mark the moment of consumer culture in which listeners attained control over what they heard, in what order and at what cost" and "I am no mere consumer of pop culture, it says, but also a producer of it."[3] Mix tapes rapidly became "a very subtle art" in "using someone else's

[3] MIX TAPE: THE ART OF CASSETTE CULTURE 35 (Thurston Moore ed., 2004).

poetry to express how you feel."[4] Viegener describes a mix tape as "predigested cultural artifacts combined with homespun technology and magic markers" that turn it into "a message in a bottle."[5]

The main character in Nick Hornby's generational classic *High Fidelity*, made into a film of the same name, details the complicated nature of making a mix: "You gotta kick it off with a killer to grab attention, then you gotta take it up a notch, but you don't wanna blow your wad, so then you gotta cool it off a notch . . . there are a lot of rules."[6] Musician Dean Wareham, founder of Galaxie 500, one of the most influential groups of the post-punk era, describes:

> "It takes time and effort to put a mix tape together. The time spent implies an emotional connection with the recipient. It might be a desire to go to bed, or to share ideas. The message of the tape might be: *I love you. I think about you all the time. Listen to how I feel about you.* Or, maybe: *I love me. I am a tasteful person who listens to tasty things. This tape tells you all about me."*[7]

Rob Sheffield writes about the mix in *Love Is a Mix Tape*, which he wrote after his wife died of a pulmonary embolism.[8] Each chapter discusses a particular mix one or both of them made, and tells the story of their life together:

> "I believe that when you're making a mix, you're making history. You ransack the vaults, you haul off all the junk you can carry, and you rewire all your ill-gotten loot into something new. You go through an artist's entire career, zero in on that one moment that makes you want to jump and dance and smoke bats and bite the heads off drugs. And then you play that one moment over and over."[9]

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[4] HIGH FIDELITY (Touchstone Pictures 2000). "The first song on a mix tape is by far the most important single song; but, the whole of all the songs that follow are equally significant." Max Mobley, *Requiem for the Mix Tape*, CRAWDADDY MAGAZINE, Dec. 5, 2007, *available at* http://www.crawdaddy.com/index.php/2007/12/05/requiem-for-the-mix-tape/.
[5] MIX TAPE: THE ART OF CASSETTE CULTURE, *supra* note 3, at 35.
[6] HIGH FIDELITY, *supra* note 4.
[7] MIX TAPE: THE ART OF CASSETTE CULTURE, *supra* note 3, at 28.
[8] ROB SHEFFIELD, LOVE IS A MIX TAPE 148 (2007).
[9] SHEFFIELD, *supra* note 8, at 23.

By the 1970s, in light of all the new recording technology, music fans of all ages and technical abilities were able to record onto cassette from a variety of sources—songs from the radio, their own record albums, and, with the entry of a double tape deck into the market, songs from cassettes themselves. Thurston Moore of the band Sonic Youth, one of the seminal underground American bands of the 1980s and 1990s, edited a book entitled *mix tape: the art of cassette culture*, and describes the first mix tape he ever heard of, which was made by Robert Christgau, a writer for the Village Voice.[10] Christgau wrote in the Voice about a compilation tape he had made of all of the non-LP B-sides by the Clash.[11] What struck Moore was that Mr. Christgau had made his own personalized Clash record to give to friends as a memento of his rock 'n roll devotion.[12]

Moore describes mix tapes as a sort of cultural love letter, both to rock 'n roll and to friends and lovers, emblematic of "the true love and ego involved in sharing music."[13] Moore himself made a mix of all of his favorite hardcore punk singles for his own listening, compiling something in a form he was unable to purchase so that he could hear the records in a "more time-fluid way," creating a "monolithic hardcore rush" that sustained "every cell and fiber in [his] body on heavy sizzle mode."[14] Moore began making other compilations. He made mixes of NYC hip-hop he culled from the cut-out bins of Sounds record store on St. Marks Place to take on a Sonic Youth tour in the mid 1980s.[15] He made a box of mixes for his wife, Kim, when she went to the hospital to have a baby.[16] He made many tapes, as did his friends, and they "would play them, lose

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[10] MIX TAPE: THE ART OF CASSETTE CULTURE, *supra* note 3, at 9.
[11] *Id.*
[12] *Id.*
[13] *Id.* at 12-13.
[14] *Id.* at 10.
[15] *Id.* at 11.
[16] *Id.* at 12.

them, bring them on tour, or lend them out and never see them again."[17]

B. LONG AFTER THE DEMISE OF THE CASSETTE, MIX TAPES REMAIN.

Today, even after the demise of the cassette, people still make mix tapes. Or more accurately, they make digital mixes of various sorts, many of which are still referred to by the vernacular "mix tape."[18] In some ways, in substance if not form, the modern mix tape is the same as the traditional mix tape. People make mix CDs for friends and lovers, centered on a certain theme or selected and arranged in a particular way. Sometimes the mixes have elaborate homemade cover art, and sometimes none. In other ways, however, digital technology has changed the mix tape. Instead of making a mix for a party and playing that mix at the party, hosts can now easily also give that mix out to every guest. Instead of playing a mix at a wedding, a bride and groom can give the CD out as a wedding favor. Modern mix creators can create playlists at the click of a mouse, and the audio quality is nearly indiscernible, to ordinary ears, from a digital master. Mix creators can make playlists and share them digitally (either with or without legitimate "gifting" features of software applications) through iTunes or other websites such as Mixcloud,[19] 8tracks.com,[20] Playlist,[21] Opentape,[22] Grooveshark,[23] and

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[17] *Id.* at 11.

[18] *See* SHEFFIELD, *supra* note 8, at 24 ("Most mix tapes are CDs now, yet people still call them mix tapes. The technology changes, but the spirit is the same. I can load up my iPod with weeks' worth of music and set it on shuffle to play a different mix every time. I can borrow somebody else's iPod and pack it with songs I think they'd like. I can talk to a friend on the phone, mention a couple of songs, download them on LimeWire while we're talking, and listen together. The hip-hop world now thrives on mix tapes, with artists circulating their rhymes on the street via bootleg CDs. They're never technically tapes, but they're always called mix tapes anyway."). For the purpose of this article, the term "mix tape" refers to the homemade compilations people create for themselves and others. For an in depth look at the underground world of hip-hop mix tapes, *see* Horace E. Anderson, Jr., *Criminal Minded?:Mix Tape DJs, the Piracy Paradox, and Lessons for the Recording Industry*, 76 TENN. L. REV. 111 (2008); Michael Katz, *Recycling Copyright: Survival & Growth in the Remix Age*, 13 INTELL. PROP. L. BULL. 21 (2008).

[19] http://www.mixcloud.com/ (an interactive internet radio, which likens itself to the YouTube of radio).

[20] http://8tracks.com/ (a website dedicated to allowing people to share music through mix tapes).

MixTape.me.[24] Sheffield writes that, although "technology changes . . . the spirit [of making mix tapes] is the same" now as it has always been.[25]

C. MUSIC SHARING IS ONE OF THE MOST HOTLY CONTESTED ISSUES IN CONTEMPORARY COPYRIGHT LAW.

One of the most hotly contested issues in contemporary copyright debate is music sharing.[26] In the digital age where the global economy is one of information and content, and yet technology is advancing faster than the law, there is a sense of pioneering, and copyright law has gotten a bad rap. Copyright law is often characterized in popular culture as the jailer that keeps information from being "freed."[27] In a society where cultural revolutionaries often rail against "the Man," copyright law itself is portrayed as "the Man." Jane Ginsberg attributes the bad name of copyright to the prevalence of both corporate and consumer greed.[28] And while a multitude of legitimate issues exists surrounding the proprietary nature of information, each position in the overarching debate

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[21] http://www.playlist.com/ (allows users to access free music online, create mix tapes, and share them via social networks).
[22] http://opentape.fm/ (free site for making web mix tapes).
[23] http://listen.grooveshark.com/ (a playlist-based online radio).
[24] http://mixtape.me/ (a website allowing people to share their playlists with others). Mix sharing sites are sometimes short-lived. By the time of this article's publication, the services of some of the listed sites may have been disabled. Mix sharing sites that have been shut down include: FavTape, Mixwit, Muxtape (the original version), and Seeqpod.
[25] SHEFFIELD, *supra* note 8, at 17.
[26] For the purposes of this paper, I adopt the common terminology of "music sharing," but not without acknowledgment of the political nature of vocabulary. To the caches of lexical weaponry, including "pro-life" and "pro-choice", we will add both "music sharing" and "music stealing."
[27] *See e.g.* STEWART BRAND, THE MEDIA LAB: INVENTING THE FUTURE AT MIT 202 (1988). A common quote is that "information wants to be free." Illustrative of a larger misunderstanding, perhaps, is the misquoting of this statement. The original statement was made by Brand, and was part of a larger context, which, in its entirety, reads: "Information wants to be free. Information also wants to be expensive. Information wants to be free because it has become so cheap to distribute, copy, and recombine - too cheap to meter. It wants to be expensive because it can be immeasurably valuable to the recipient. That tension will not go away. It leads to endless wrenching debate about price, copyright, 'intellectual property', the moral rightness of casual distribution, because each round of new devices makes the tension worse, not better."
[28] Jane C. Ginsburg, *Essay—How Copyright Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61, 61 (2002).

has become characterized in its extremity: Information should be free, and therefore copyright is bad; or information should be controlled, and therefore copyright is good.[29] As technology advances faster than the law—in fact, lapping it over and again—this advance further contributes to a lack of understanding and clarity as to how the law should be, or is, applied to new sets of facts. And the more that copyright law looks like an old man unable to keep up, the further those opposing viewpoints become entrenched. As notions of copyright become demonized, myths proliferate, including the myth that copying any music for any reason is bad.[30] And these gross misunderstandings of the law are harmful both because they are inaccurate and because they create a sort of "us" against "them" mentality, where "we" are the consumers and creators of content, and "they" are supposed to be the law whose essential purpose, ironically, is to support the creation and development of that content.[31]

This paper places the mix tape under the lens of contemporary copyright law. In Part II of this article, I discuss the history and progression of copyright law in conjunction with the development of audio home recording technologies and the sharing of music. In Part III, I explore the breadth and depth of the Audio Home Recording Act ["AHRA"], including its (in)application to modern technologies. To the extent that the AHRA was explicitly crafted with the purpose of guaranteeing "the right of consumers to make

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[29] RIP! A REMIX MANIFESTO (EyeSteelFilm 2008), *available at* http://www.hulu.com/watch/88782/rip-a-remix-manifesto (discussing the conflict between the "copyRIGHT" and the "copyLEFT").

[30] *See* LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID COMMUNITY 268-271 (2008) (addressing the need for the "decriminalization" of copying). *See also Mark Fischer on Copyright in the Digital Age*, Posting of Mark Fischer to Truthdig, http://www.truthdig.com/arts_culture/item/20090130_mark_fischer_on_copyright_in_the_digital_age/ (Jan. 30, 2009) ("The record industry's campaign of suing allegedly infringing consumers, even if legally correct, was never an entirely happy one. The [RIAA] recently announced that it is largely abandoning the tactic of litigating against individuals . . . [and instead] will focus on cooperative agreements with Internet service providers").

[31] *See* RIP! A REMIX MANIFESTO, *supra* note 21.

analog or digital audio recordings of copyrighted music for their private, noncommercial use,"[32] it fails to do so in contemporary reality. In Part IV, I analyze mix tapes under principles of fair use and existing statutory and case law; if the purpose of copyright law is to encourage creativity, how does this purpose play out when it comes to making mixes, which at their heart seek to create something larger than their "borrowed" parts? In Part V, I discuss the need for copyright law to address modern music sharing in practical ways. While technology has changed, mix tapes nonetheless remain. And, when significant others risk violating the law when they make mix CDs for each other for Valentine's Day, that law needs to be looked at very carefully. What is private and noncommercial may be more difficult to determine in the context of digital media, but no one is served—not the creators of content, nor the creators of mixes, nor an anthropomorphized copyright law—by failing to address the issue on its merits. The state of the law is unclear at best, and practically inapposite to contemporary reality at worst. By failing to address practical realities of modern home recording, copyright law alienates both the creators and the works it seeks to promote.

II. COPYRIGHT LAW AND AUDIO HOME RECORDING HAVE BOTH PROGRESSED RELATIVE TO TECHNOLOGICAL ADVANCEMENTS.

You may ask yourself, well, how did I get here?
– Talking Heads
"Once In a Lifetime"
Remain in Light

In the murk of legal waters, one thing is clear: At least under federal statutory law, prior to 1831 consumers would have been able to make as many mix tapes as they wanted and send them to as many people as they wanted, whether lover or stranger. The

[32] S. REP. NO. 102-294, at 30 (1992).

Constitution provides for copyright and patent protection to "promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[33] Intellectual property protection has as its core mission the promotion of creative works, and seeks to strike a balance between treating creative works as proprietary, so that the creator can reap a benefit from them, and ensuring that those works enter into the public domain at some later point, so that other creators can use that work to reap their own benefit.

A. COPYRIGHT LAW DEVELOPS IN PIECEMEAL FASHION.

The Copyright Act has evolved as a sort of legal crazy quilt, pieced together over time with the development and use of various new media. The Copyright Act of 1790, whose first incarnation interestingly predates the First Amendment right of free speech, only granted protection to maps, charts, and books, and did not include music.[34] Expansion of categories of protected works proceeded in a somewhat piecemeal way, often in response to technological and cultural developments; and, in 1831, Congress added musical compositions to the list.[35] The Copyright Act of 1909 further protected performance rights in musical compositions as well as the arrangement of the melody or any form of recording of it from which it could be reproduced.[36]

In illustrative fashion, sound recordings were not included until technology developed that enabled widespread copying of recorded works. By the early 1970s, reproduction of vinyl recordings onto magnetic tape inspired the 1971 Sound Recordings

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[33] U.S. CONST. art. I, § 8, cl. 8.
[34] Act of May 31, 1790, ch. 15, 1 Stat. 124, 124 (repealed 1802).
[35] Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 436 (1831).
[36] Act of Mar. 4, 1909, ch. 320, § 1, 35 Stat. 1075, 1075 (repealed 1976).

Act, affording copyright holders the right to reproduce and distribute the sound recordings of any copyrighted works produced on or after February 15, 1972.[37] Pre-1972 works are not included, leaving out, for example, John Lennon's "Imagine," which was released in 1971. While Lennon allegedly described the recording of this album as "chocolate-coated for public consumption,"[38] he may not have realized all of the forms that public consumption might take. The 1976 Copyright Act incorporated protection for sound recordings, as well, although it mistakenly did not extend such protection to pre-1972 recordings due to an error on the part of an attorney in the Justice Department.[39] Such anomaly persists today.

As copyright has existed as a set of rights, any or all of which may be retained or given away on an individual basis, technology and the market have often shaped who benefits most from recorded works. In the 1700s and 1800s, composers often sold any rights they had to publishers, who profited financially from sheet music without having to pay any royalties to composers.[40] While publishers enjoyed a good standard of living, composers were often poor.[41] Sheet music brought in solid revenue, as recordings of musical works were not yet readily available.[42] After musical recordings became

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[37] Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971).
[38] This quote is attributed to Lennon, but there is no record of when he originally made the statement.
[39] *See* 17 U.S.C.A. § 1101(a) (West 2006); MELVILL B. NIMMER ET AL, CASES AND MATERIALS ON COPYRIGHT: AND OTHER ASPECTS OF ENTERTAINMENT LITIGATION INCLUDING UNFAIR COMPETITION, DEFAMATION, PRIVACY 103 (7th ed. 2006).
[40] *See generally* Michael W. Carroll, *The Struggle for Music Copyright*, 57 FLA. L. REV. 907, 920-945 (2005) (discussing the struggle between composers and publisher in regards to changing copyright protection).
[41] AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 674 (4th ed. 2009).
[42] *Id.*

affordable and abundant, the revenue for sheet music decreased, replaced by a widespread market in the recorded music of professional entertainers.[43]

B. THE HISTORY OF HOME RECORDING PARALLELS ADVANCES IN CONSUMER TECHNOLOGY.

The history of audio home recording parallels the rapid development of consumer technology. While home recording was possible on a limited scale through eight-track cartridges in the 1960s and 1970s, it took root with the development of cassettes. Cassette recording technology was less expensive than eight-tracks and had practical advantages, such as rewinding capability and a smaller size. Single cassette recorders could be hooked up through a stereo receiver to record songs from vinyl records or, alternatively, the radio. Diehard music fans were often reluctant to buy cassettes, finding the quality of sound to be higher (and longer lasting) on vinyl; such fans would often purchase a record and then use a tape deck to record it onto cassette, engaging in an early form of "space-shifting" and creating a copy that was portable for use in cars and personal cassette players, which could then be replaced if the tape wore out or broke. The stereo receiver was, in those times, the hub of the action, uniting turntable and cassette recorder and adding its own radio reception to the mix. Through the stereo receiver, a consumer could record songs through these media with relative ease.[44]

When double cassette players became widely accessible, suddenly it became possible to record from cassettes, as well. Double tape decks were eventually joined, and then replaced, by CD players and burners, enabling higher quality home recording using

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[43] Brian D. Johnston, *Rethinking Copyright's Treatment of New Technology: Strategic Obsolesence as a Catalyst for Interest Group Compromise*, 64 N.Y.U. Ann. Surv. Am. L. 165, 175-76 (2008) (addressing the impact of piano rolls and phonographs on sheet music sales).

[44] *See generally* MIX TAPE: THE ART OF CASSETTE CULTURE, *supra* note 3, at 9-13.

digital technology. With this increase in quality came portability, and as car stereos and portable music players began incorporating CD players, both the need and the desire for cassettes were effectively eliminated, making them practically obsolete. Eventually, the personal computer and the internet became central to the way people consume music at every step in the process, from purchase to listening to storage. With the CD drive in a personal computer, consumers no longer needed a separate CD player, let alone a stereo receiver to serve as a central hub—the personal computer itself became the ultimate media hub. The development of software programs and online services, which greater facilitated the sharing of music, was not far behind.

C. THE DEVELOPMENT OF DIGITAL MEDIA MADE BOTH SHARING MUSIC AND STEALING MUSIC MUCH EASIER.

With the advent of digital media, it became much easier to share music in all ways, including without paying for it. Companies such as Napster facilitated peer-to-peer ["P2P"] file sharing of digital music files using specific software, and the process of sharing music became much faster and easier, both through legal and illegal means.[45] Music "sharing" services of all sorts became exponentially popular, and copyright law has at times wrestled with these processes and resultant products.[46] Many that have been created in recent years have been disabled or shut down entirely, only to be replaced by new sites with new technologies.

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[45] *See generally* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (addressing whether peer-to-peer file sharing was an infringement of copyright).

[46] *See Id.*; *see also* Recording Indus. Ass'n of Am. v. Diamond Multimedia Syss., Inc., 180 F.3d 1072, 1073 (9th Cir. 1999) (addressing whether an mp3 player's lack of anti-infringement technology constitutes a violation of the Audio Home Recording Act); and *In re* Aimster Copyright Litig., 334 F.3d 643 (7th Cir. 2003) (holding that an Internet service was liable for its chat room users' sharing of copyright protected music files because it facilitated such sharing).

At the same time file-sharing became widespread, revenue from the music industry as a whole decreased significantly.[47] Software applications such as iTunes arose to bridge the gap between purchasing a compact disc (an accepted legal way to purchase music) and downloading music online (an often illegal way to obtain music).[48] iTunes created a system that was both legal and easy, enabling individuals to purchase music online with a mere click. Purchases of music online have skyrocketed, with sales of digital music totaling 32 percent of the market in 2008.[49] The structure of iTunes generally enabled purchases by song instead of by album, which further transformed the manner in which people consume music. And in an ironic twist, along with increased ease of access to other people's copyrighted works, Do-It-Yourself technology has advanced as well, leading to an upsurge in the creation of amateur music.[50] The prevalence of music recording software, such as the multi-track recording application GarageBand (now standard issue with all Apple computers), has led to a proliferation of recorded DIY works.[51]

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[47] *See generally* Felix Oberholzer & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, JOURNAL OF POLITICAL ECONOMY, Feb. 2007, vol. 115, no. 1, *available at* http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf. *See also* Alejandro Zentner, *File Sharing and International Sales of Copyrighted Music: An Empirical Analysis with a Panel of Countries*, THE B.E. JOURNAL OF ECONOMIC ANALYSIS & POLICY, Vol. 5, Issue 1 (2005).

[48] *See e.g.* Terms and Conditions, iTunes Store, § 10, available at http://www.apple.com/legal/itunes/us/terms.html (last visited Oct. 10, 2009).

[49] RIAA: 2008 Year End Shipment Statistics, http://76.74.24.142/1D212C0E-408B-F730-65A0-C0F5871C369D.pdf.

[50] Various internet sites are devoted to helping people create, publish, and promote music. *See e.g.* Doing it Yourself: A Guide to Making Music, http://www.ram.org/music/making/tips/DiY.html; Tonepad, http://www.tonepad.com/.

[51] Apple's website even touts "Musicians wanted: No experience necessary" on its Garageband '09 software page, *available at* http://www.apple.com/ilife/garageband/.

III. THE AUDIO HOME RECORDING ACT SOUGHT TO PROTECT PRIVATE AND NONCOMMERCIAL HOME RECORDING UNDER COPYRIGHT LAW.

You will miss me when I burn.
– Palace Brothers
"You Will Miss Me When I Burn"
Days in the Wake

Under the Audio Home Recording Act, private, noncommercial home recording is permissible, whether digital or analog.[52] Therefore, the recording of copyrighted works for the purposes of making a mix tape, whether on cassette or CD, is theoretically permissible, provided the individual's use is private and noncommercial. The AHRA establishes that individuals can make noncommercial recordings of copyrighted music for personal use.[53] In fact, Congress enacted the AHRA in part expressly "to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use."[54] Congress recognized that home recording had become an issue of great concern to the music industry, after technological advances in audio recording had enabled widespread private copying and digital advances had enabled the preservation of sound quality in those copies.[55]

A. THE AUDIO HOME RECORDING ACT EMERGED AS A LEGISLATIVE COMPROMISE IN REACTION TO SONY.

The AHRA was, in part, Congress's response to the Supreme Court's decision in *Universal City Studios, Inc. v. Sony Corp*.[56] In that case, the Court held that private home taping of copyrighted television broadcasts for the purpose of time-shifting was a fair use,

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[52] 17 U.S.C. § 1008 (West 2006).
[53] *Id.*
[54] S. REP. NO. 102-294, at 30 (1992).
[55] H.R. REP. NO. 102-780(I), at 18 (1992).
[56] S. REP. NO. 102-294, at 31.

a holding that created more questions than answers when it came to the music industry.[57] Film industry companies, including Universal and Walt Disney Studios, had sued Sony, the manufacturer of the Betamax Video Tape Recorder, on the basis of contributory liability for manufacturing a device that could be used (and indeed was being used) for copyright infringement.[58] The Ninth Circuit had held that Sony was secondarily liable for copyright infringement, reasoning that the main purpose of the VTR was copying, and such copying of entire works was not a fair use of copyrighted material.[59]

In a legendary and controversial five-to-four decision, the Supreme Court reversed, holding that Sony was not liable for contributory infringement where the manufactured device was capable of significant non-infringing use.[60] Significantly, the Court noted that "private, noncommercial time-shifting in the home"[61] was a plain example of a significant, non-infringing use of the Betamax recorder:

> "When one considers the nature of a televised copyrighted audiovisual work . . . and that time-shifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact . . . that the entire work is reproduced . . . does not have its ordinary effect of militating against a finding of fair use."[62]

While the dissent focused on the possible aggregate harm created by the library-building capabilities of people who used a VTR,[63] the majority looked primarily to the time-shifting element of recording, claiming that the act of copying the material actually expanded the audience for the copyrighted works, because more people were able to view

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[57] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 421 (1984).
[58] *Id.* at 421-22.
[59] *Id.* at 420.
[60] *Id.* at 456. The Court also noted that respondents had "no right to prevent other copyright holders from authorizing" copying for their programs, and that the act of "supplying the equipment that makes such copying feasible should not be stifled simply because the equipment is used by some individuals to make unauthorized reproductions of respondents' works." *Id.* at 442, 446.
[61] *Id.* at 442.
[62] *Id.* at 449-50.
[63] *Id.* at 458-59, 485-86.

the programs without being limited by local programming schedules.[64] Furthermore, evidence suggested that consumers of the VTR remained consumers of regularly scheduled television programs, as well.[65]

Songwriters, music publishers, recording companies, and performers argued that the Betamax holding was limited to home videotaping for time-shifting purposes.[66] The electronics industry, on the other hand, argued that the decision was broadly applicable to home recording as a whole.[67] When digital audio recorders were developed, the controversy became more pronounced, as, for the first time, consumers were able to make "virtually perfect" reproductions of copyrighted works.[68] In contrast to analog recorders, Digital Audio Tape ["DAT'] technology enabled preservation of the sound quality of the original recordings.[69] The House of Representatives was additionally concerned that consumers had been (and would be) denied access to these advancements in technology due to disputes and litigation between the music industry and the electronics industry.[70]

Thus, another lawsuit was brought against Sony in 1990, this time to ban the importation of DAT recorders and blank cassettes.[71] Congress had contemplated the implementation of a royalty system even before the Supreme Court's decision in the Betamax case, and after the decision was issued, the music industry intensified lobbying efforts for anti-copying software, as well.[72] Before the DAT lawsuit was resolved, both houses of Congress pushed for enactment of a legislative solution in what eventually

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[64] *Id.* at 454.
[65] *Id.*
[66] S. REP. NO. 102-294, at 31 (1992).
[67] *Id.*
[68] H.R. REP. NO. 102-780(I), at 19 (1992).
[69] *Id.* at 18.
[70] *Id.* at 21.
[71] S. REP. NO. 102-294, at 32-33.
[72] *Id.* at 31.

became the AHRA.[73]

In debates about the AHRA, Congress sought information about the effect of home recording on the market. In Congressional hearings, the recording industry estimated that one billion dollars was lost every year because of home recording.[74] The Senate examined reports that sought to quantify the loss.[75] The Copyright Office concluded that "copying of prerecorded works . . . displace[s] sales of authorized copies, both in analog and digital formats, although the magnitude and economic impact of the displacement is difficult to assess."[76] A coalition of music publisher and songwriter interests, called the Copyright Coalition, agreed, estimating lost sales somewhere in the range of 322,500,000 recordings.[77] In that report, completed by the Roper Organization, a telephone survey of respondents 14 years and older found that 37 percent had taped prerecorded music, and nearly 50 percent of respondents from the ages of 14 to 49 taped music at home and believed that they would tape even more music at home if the equipment they owned had digital audio recording technology.[78] The Senate examined a third report, as well, completed by its Office of Technology Assessment ["OTA"].[79] While the OTA report was inconclusive as to the effect of home taping on sales, it did estimate that 40 percent of people taped recorded music in 1988, a significant increase over previous estimates, and further concluded that people who tape music are more likely to be interested in music and to purchase more music generally than non-tapers.[80]

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[73] *Id.*.
[74] *Id*. at 34.
[75] *Id*.
[76] *Id.* at 35.
[77] *Id.*
[78] *Id.* at 34-35.
[79] *Id.* at 34.
[80] *Id.*

B. BY ENACTING THE AUDIO HOME RECORDING ACT, CONGRESS SOUGHT TO END THE STALEMATE OVER HOME RECORDING AND ADD LEGAL CLARITY.

Through enactment of the AHRA, Congress sought to add some measure of clarity, if not "end th[e] stalemate,"[81] surrounding audio home recording. The statute is the product of compromise on the part of multiple competing interests—the music and consumer electronics industries, as well as the public.[82] The AHRA addresses both secondary liability issues, which were directly at issue in *Sony*, and primary liability issues on behalf of consumers.[83] Specifically, the statute prohibits copyright infringement suits for the manufacture, importation, or distribution of digital or analog audio recording media, or for the use of that recording media to make copies.[84] With regard to home taping, the statute provides that consumers may make analog or digital audio copies for noncommercial use.[85]

As the term "compromise" would indicate, the AHRA included concessions to the music industry, as well. As a balance to the prohibition on actions against individuals who copy music for noncommercial use and the manufacturers of devices that enable such copying, the AHRA also implemented certain procedures to benefit copyright holders and discourage mass copying.[86] Two aspects of the AHRA are particularly relevant toward these ends. First, the AHRA implemented a royalty system on digital recording devices and media, designed to benefit copyright holders;[87] second, it mandated the creation of a Serial Copy Management System ["SCMS"] on all devices

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[81] H.R. REP. NO. 102-780(I), at 19 (1992).
[82] *See e.g.* H.R. REP. NO. 102-780(I), at 26 ("the benefit to consumers of the legislation of release from liability regarding home copying and eventual access to digital technology outweigh the limited burdens of having to indirectly pay royalties and enduring some limits on taping through technological fixes).
[83] 17. U.S.C. § 1008 (West 2006).
[84] *Id.*
[85] *Id.*
[86] *See generally* §§ 1002-1007.
[87] § 1004.

made or sold in the United States, in order to prevent unlimited copying of protected works.[88]

Before the AHRA was enacted, 17 other countries had established royalty systems of some sort, creating a perceived imbalance of benefit between American artists and artists from other countries.[89] Thus, Congress was encouraged to adopt a royalty system not just because of pressure from the music industry at large, but also in order to even the playing field for trade.[90] The AHRA places a two percent royalty on the first sale of digital recording devices,[91] and a three percent royalty on the first sale of digital recording media.[92] A majority of the Act is spent delineating the necessary steps for both paying and collecting from these royalties.[93] Furthermore, the AHRA prohibits the import, manufacture, or distribution of any digital audio recording device or digital audio interface device that does not incorporate a Serial Copy Management System.[94] The SCMS allows people to make first-generation copies of digitally recorded work, but technologically prohibits second-generation copies.[95] However, users may make unlimited first-generation copies.[96]

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[88] § 1002.
[89] S. REP. NO. 102-294, at 47-48 (1992).
[90] *Id.* at 42.
[91] § 1004(a)(1).
[92] § 1004(b).
[93] Manufacturers must file notice and statements of account with the Register of Copyrights and include the royalty payments with the notice and statements. § 1003. The Register of Copyrights then deducts expenses and deposits the net sum in the United States Treasury, which invests it in interest-bearing securities. § 1005. Two-thirds of the funds go to the Sound Recordings Fund, which includes the American Federation of Musicians and the American Federation of Television and Radio Arts, and one-third goes to the Musical Works Fund, which includes music publishers and writers. § 1006(b). Interested copyright holders must then file a claim with the Copyright Royalty Judge to collect from these proceeds within the first two months of the year to collect for the prior year. § 1007(a) In return, copyright holders agree to waive claims of infringement against consumers for using recording devices in their homes. § 1008.
[94] § 1002(a).
[95] § 1001(11) (defining the term "serial copying").
[96] H.R. REP. NO. 102-780(I), at 18 (1992) (response to the music industry's concern about digital copying and its ability to produce perfect copies, regardless of how many times a copy is made from a copy, unlike analog, which deteriorates over time).

C. THE AUDIO HOME RECORDING ACT IS FLAWED BECAUSE IT DOES NOT COVER HOME RECORDING THAT INVOLVES PERSONAL COMPUTERS.

The AHRA seeks a balance between the interests of the music industry, the electronics industry, and consumers regarding audio home recording. However, while Congress expressly sought to address both contemporaneous as well as future, undeveloped technologies, there was one serious flaw: Certain provisions of the AHRA, including the royalty and SCMS requirements, only apply to digital audio recording devices as defined under the Act.[97] A digital audio recording device is:

> "any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use."[98]

Digital recording media includes "any material object in a form commonly distributed for use by individuals, that is primarily marketed or most commonly used by consumers for the purpose of making digital audio copied recordings by use of a digital audio recording device," but does not include any object "that is primarily marketed and most commonly used by consumers . . . for the purpose of making copies of nonmusical literary works, including computer programs or databases."[99] Digital musical recordings under the Act expressly exclude objects "in which one or more computer programs are fixed,"[100] which, of course, include recordings made through personal computers.

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[97] § 1001(3).
[98] *Id.*; *see also* § 1001(3)(a)-(b) (expressly excluding from this definition "professional model products" and "dictation machines, answering machines, and other audio recording equipment that is designed and marketed primarily for the creation of sound recordings resulting from the fixation of nonmusical sounds").
[99] § 1001(4).
[100] *See* 1001(5)(B)(2) ("Except that a digital musical recording may contain statements or instructions constituting the fixed sounds and incidental material, and statements or instructions to be used directly or indirectly in order to bring about the perception, reproduction, or communication of the fixed sounds and incidental material").

In crafting the language of the AHRA, Congress did not anticipate the explosion in home digital recording technologies through computers and the internet. Because computers are not digital recording devices as defined in the AHRA, they are not covered by its provisions—and neither is, consequently, the bulk of modern audio home recording.[101] With the advent of the mp3 file, computers became the primary audio home recording mechanism. In 1999, the Ninth Circuit, in *Recording Indus. Ass'n of Am. v. Diamond Multimedia Syss., Inc.*, examined whether mp3 players fell within the scope of the AHRA.[102] The manufacturers of the Rio mp3 player had been sued by the Recording Industry Association of America ["RIAA"] and other members of the music industry, arguing that the Rio was not in compliance with the AHRA's SCMS requirements because it did not contain the copyright-identifying codes that inform a device whether or not the audio material is protected, and also specify whether it is an original work or a copy of later generation.[103] The court noted that the Act specifically excluded objects or devices "in which one or more computer programs are fixed,"[104] and held that because the Rio had to copy the files from a hard drive, which was not governed by the AHRA because its primary purpose was not to copy audio files, the mp3 player could not be interpreted to be within the purview of the Act either, as it was not copying directly from digital music recordings under the language of the statute.[105]

The Ninth Circuit examined the legislative history of the Act and did not find any evidence that Congress intended "digital musical recording[s]" to include songs on

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[101] *See* Recording Indus. Ass'n of Am. v. Diamond Multimedia Syss., Inc., 180 F.3d 1072, 1081 (9th Cir. 1999).
[102] *Id.* at 1081.
[103] *Id.* at 1075.
[104] *Id.* at 1076 (quoting 17 U.S.C. § 1001(5)(B) (West 2006)).
[105] *Diamond*, 180 F.3d at 1076.

computer hard drives.[106] In fact, the court was influenced by express language in the Senate report, which asserted that a machine is not considered to be a "digital audio recording device" if "the primary purpose of the recording function is to make objects other than digital audio copied recordings . . . even if the machine or device is technically capable of making such recordings."[107] The court further pointed out that a stated purpose of the Act was to allow for private, noncommercial copying, and the mp3 player at issue was designed to allow individuals to make private and portable copies of their music files.[108] The AHRA is intended to shield manufacturers and distributors of recording media from secondary liability for copyright infringement.[109] Manufacturers of such media must, however, satisfy SCMS requirements per the Act;[110] the manufacturers of the Rio were not liable for a lack of compliance with SCMS requirements because the recording device used did not fall within the purview of the AHRA.[111]

While the manufacturers of the Rio were not obligated to comply with SCMS requirements because the device did not fall within the parameters of the AHRA, owners of peer-to-peer file sharing businesses ironically have not been able to seek safe harbor under the AHRA for similar reasons. The AHRA shields manufacturers and distributors of recording media from secondary liability for copyright infringement; it does not, however, preclude liability for peer-to-peer file sharing services, in part because it "does not cover the downloading of mp3 files to computer hard drives."[112] As the legislature

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[106] *Id.* at 1077.
[107] *Id.* at 1078 (quoting S. REP. NO. 102-294, at 122 (1992)).
[108] *Diamond*, 180 F.3d at 1079.
[109] *See* 17 U.S.C. § 1008.
[110] *See* § 1002.
[111] *Diamond*, 180 F.3d at 1081
[112] *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1024 (9th Cir. 2001) ("Under the plain meaning of the Act's definition of 'digital audio recording devices,' computers (and their hard drives) are not digital audio recording devices because their 'primary purpose' is not to make digital audio copied recordings. . . .

suggested, "[t]here are simply no grounds in either the plain language of the definition or in the legislative history for interpreting the term 'digital musical recording' to include songs fixed on computer hard drives."[113] Therefore, web services with software that allows music sharing, beginning with Napster in the late 1990s, cannot seek safe harbor under the AHRA because computers are the primary mechanism (and source) for that sharing.[114]

IV. MODERN MIX TAPES MAY NOT FALL WITHIN THE PARAMETERS OF FAIR USE.

Caught, now in court 'cause I stole a beat.
This is a sampling sport, but I'm giving it a new name
What you hear is mine.

–Public Enemy
"Caught, Can We Get a Witness?"
It Takes a Nation of Millions to Hold Us Back

Unable to seek protection under the AHRA for users' home recordings of copyrighted music files, music sharing sites have analogized to *Sony* and alleged that their users were making a fair use of the copyrighted works.[115] Courts, however, have been much less predisposed to find music file-sharing to be a fair use. The seminal case on music file-sharing is *A&M Records, Inc. v. Napster*. Napster enabled peer-to-peer file

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[Furthermore,] computers do not make 'digital music recordings' under the Act.") *See also Diamond*, 180 F.3d at 1078.

[113] *See Diamond*, 180 F.3d at 1077 (quoting S. REP. NO. 102-294, at 4-5 (1992)).

[114] *See generally Napster*, 239 F.3d 1004. In 1998, teenager Shawn Fanning launched Napster, one of the first peer-to-peer file-sharing networks. Fanning was heralded as an immediate new media celebrity, appearing on the cover of Wired magazine in DATE and as a surprise (albeit rumored) guest on the MTV Video Music Awards in 2000. MTV VMA host Carson Daly introduced Fanning as the teenager that, in a year, "developed a technology that has revolutionized the way we listen to music." Fanning entered from backstage wearing a Metallica t-shirt, which was notable because Metallica was a vocal opponent of music file-sharing. Laughing, host Carson Daly commented, "Nice shirt." Fanning responded, "Like it? Actually, a friend shared it with me. But I'm thinking about getting my own, though." Shawn Fanning at the MTV Music Awards, http://www.poetv.com/video.php?vid=45646 (last visited Mar. 23, 2010); *see also* MTV Music Video Awards: 2000, http://www.mtv.com/ontv/vma/2000/ (last visited Mar. 23, 2010).

[115] *See Napster*, 239 F.3d at 1014.

sharing of mp3 files through use of its free MusicShare software.[116] Users could create directories of their music files which others could search and access through the Napster system.[117] The users' file names were stored in a library on the Napster server, and the server provided a collective directory listing the users that were connected at any given time and all file names that were immediately accessible.[118] Napster had a search function on its server, which enabled users to search available files connected to the network servers, and to download those mp3 files to their computers.[119] In essence, Napster facilitated mass online sharing of copyright-protected music recordings. When sued by various components of the music industry for vicarious and contributory copyright infringement, Napster argued that, despite the reproduction of copyrighted works, the music sharing on its system was protected by the fair use doctrine under theories of sampling, space-shifting, and permissive distribution of recordings.[120]

Fair use is an affirmative defense to copyright infringement. The doctrine of fair use is premised on the strong public interest in promoting creativity, in big ways and small. It "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[121] The fair use analysis focuses on a set of four factors, although the Copyright Act instructs that this list is not exhaustive: (1) purpose and character of the use; (2) nature of the copyrighted work; (3) amount and substantiality of the portion taken in relation to the work as a whole; and (4) effect on the potential market for or value of the

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[116] *Id.* at 1011.
[117] *Id.* at 1011-12.
[118] *Id.* at 1012.
[119] *Id.*
[120] *Id.* at 1014.
[121] Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 719 (9th Cir. 2007) (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990) (alteration in original)).

copyrighted work.[122] Courts generally focus on factors one and four in their analyses, although the Supreme Court has cautioned that the fair use analysis is:

> "not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. . . . Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright."[123]

A. *THE PURPOSE AND CHARACTER OF THE USE IS A KEY ELEMENT OF THE FAIR USE DEFENSE.*

The first factor is the purpose and character of the use, one of the key inquiries for the fair use analysis.[124] This factor explores the degree to which "the new work merely replaces the object of the original creation, or instead adds a further purpose or different character."[125] Courts will examine whether the new work is "transformative," and whether it is a commercial or noncommercial use of the copyrighted material. According to the Supreme Court, a use is transformative if it does not "merely supersede the objects of the original creation . . . [but] adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[126] Uses are transformative when a work is changed or used "in a different context such that the . . . work is transformed into a new creation."[127] 2 Live Crew's use of the music from Roy Orbison's song "Oh, Pretty Woman" was found to be transformative, for example,

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[122] 17 U.S.C. § 107 (West 2006).
[123] *Campbell*, 510 U.S. at 577-78.
[124] § 107
[125] *Napster*, 239 F.3d at 1015.
[126] *Campbell*, 510 U.S. at 579.
[127] Wall Data, Inc. v. L.A. County Sheriff's Dep't, 447 F.3d 769, 778 (9th Cir. 2006) (holding that use of a reproduction of a copyrighted computer program to save the cost of buying additional copies was not fair use).

because it was a parody.[128] Parodies provide a "social benefit, by shedding light on an earlier work, and, in the process, creating a new one."[129] By way of another example, Google's use of copyrighted images reproduced in thumbnail size for image-searching purposes was highly transformative because it changed the image from having "an entertainment, aesthetic, or informative function" to serving as "a pointer directing a user to a source of information."[130] Just as parody has a social benefit, a search engine has a social benefit "by incorporating an original work into a new work, namely, an electronic reference tool."[131]

The copyrighted works at issue in *Napster* were held not to be transformative. Unlike parody, which changes the message of the work for the purposes of comment, or a search engine index, which changes the basic function of the work, Napster, at best, retransmitted a work in a different medium.[132] The copyrighted works were copied wholesale, with only minor, often indiscernible, reductions in sound quality.[133] When an original work is merely produced in a different medium, courts are reluctant to find that the work is sufficiently transformed.[134] Rather, it is the substance, not the form, that determines whether a use is fair.

As part of the analysis under the first factor, courts explore the degree of commercial activity involved. While commercial activity may generally weigh against a finding of fair use, the Supreme Court in *Campbell* objected to the tendency of courts to

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[128] *Campbell*, 510 U.S. at 594.
[129] *Id.* at 579.
[130] Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 721 (9th Cir. 2007).
[131] *Id.*
[132] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1015 (9th Cir. 2001).
[133] *See Id.* at 1011-12.
[134] *Id.* at 1015. *See also* Infinity Broad. Corp. v. Kirkwood, 150 F. 3d 104, 108 (2d Cir. 1998); UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000).

give it "virtually dispositive weight."[135] In fact, in that case, 2 Live Crew sold approximately 250,000 copies of a song that appropriated significantly the music of Roy Orbison's song "Oh, Pretty Woman."[136] The effect of commercial sales on the fair use analysis was a substantial part of the oral arguments in that case.[137] The court found that commercial activity did not automatically preclude fair use, and, in fact, that inquiry should instead be focused on the harm to the original work, of which commercial activity may or may not be indicative.[138]

In considering the purpose and character of Napster's use of the copyrighted works, the Ninth Circuit came to the conclusion that, despite the lack of economic purpose, the use was still commercial because the users were making their files available to other anonymous users in a "repeated and exploitive" manner.[139] Because this use saved others from purchasing the songs themselves, the use was considered commercial.[140] Like photocopying scholarly journal articles at a research laboratory to save the expense of purchasing additional copies, or downloading copies of video games to avoid having to buy a copy, or distributing unauthorized reproductions of religious texts to members of a church, Napster demonstrated a commercial use through repeated and exploitative reproduction and distribution of copyrighted works, thus enabling people to avoid having to purchase authorized copies.[141]

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[135] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 570 (1994).
[136] *Id.* at 572-73.
[137] *See generally* Transcript of Oral Argument, *Campbell*, 1993 WL 757656.
[138] *Campbell*, 510 U.S. at 590-91.
[139] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1015 (9th Cir. 2001).
[140] *Id.*
[141] *Id.* (referencing Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 922 (2nd Cir. 1994); Sega Enters. Ltd. v. MAPHIA, 857 F. Supp. 679, 687 (N.D. Cal. 1994); and Worldwide Church of God v. Philadelphia Church of God, 227 F.3d 1110, 1118 (9th Cir. 2000)).

The creator of a mix tape, whether analog or digital, faces the same analysis. The classic mix tape—a compilation of recorded songs given to a family member, a friend, a significant other, or even kept for one's own listening pleasure—is, as stated earlier, exempt from liability under the AHRA, provided the recording is for private and noncommercial use. However, modern digital mix tapes typically do not fall within the parameters of AHRA protection because they use computers as mechanism and/or source. Furthermore, the AHRA does not say that audio home recording is not infringing; rather, that a suit for infringement cannot be brought. The creator of a mix tape (analog or digital, old or new) is, without question, engaging in copyright infringement. Copyright infringement is a strict liability statute: If there is a copyrighted work, and a violation of one of the exclusive rights guaranteed by Section 106 of the Copyright Act, there is infringement.[142] The creator of a mix tape, whether analog or digital, thus infringes individual copyrights when he or she reproduces sound recordings to create a compilation. The question arises, thus: Is the creation of a mix tape a fair use of the underlying copyrighted works? While the spirit behind digital mix tapes may be the same as that of the analog version, technological developments create material differences between the two. The AHRA aside, what may have been "fair" in an analog world may be infringing in a digital one.

a. MIX TAPES TRANSFORM CONTENT SOLELY THROUGH CONTEXT.

Under the transformative prong of the first fair use factor, because mix tapes reproduce whole tracks faithfully, any transformation of the underlying work is contextual. While songs are typically copied in their entirety exactly as they sound on the

[142] 17 U.S.C. § 106 (West 2006).

original recording, the creator of a mix tape seeks to create a new meaning for particular songs by changing the context. As Sheffield states, "A mix tape steals . . . moments from all over the musical cosmos, and splices them into a whole new groove."[143] Mix tapes take musical tracks out of their context, and transport them to another auditory place, with a different landscape and to different effect. Context indicates experience when it comes to listening to music, and a mix tape at its best creates an entirely new contextual experience:

> "We music fans love our classic albums, our seamless masterpieces, our *Blonde on Blondes* and our *Talking Books*. But we love to pluck songs off of those albums and mix them up with other songs, plunging them back into the rest of the manic slipstream of rock and roll. I'd rather hear the Beatles' 'Getting Better' on a mix tape than on *Sgt. Pepper* any day. I'd rather hear a Frank Sinatra song between Run-DMC and Bananarama than between two other Frank Sinatra songs. When you stick a song on a tape, you set it free."[144]

The mix tape creator could argue that the removal and recombination of tracks is a transformative use of copyrighted material. In an analog mix tape, this argument would be analogous to the argument surrounding appropriation art. Appropriation art involves the "borrowing" of images or elements belonging to someone else and incorporating them into a new work with the purpose of reframing them or bring out some new meaning.[145] William Patry has noted that, with regard to appropriation art:

> "[T]here is a perspective brought to bear by the art community that deserves consideration by courts, and that is the conflation of originality, author, and copy into a reflexive need to protect copyright owners against

[143] SHEFFIELD, *supra* note 8, at 23.
[144] *Id.* at 24.
[145] The Patry Copyright Blog, http://williampatry.blogspot.com/2005/10/appropriation-art-and-copies.html (Oct. 20, 2005, 10:22 EST). A compilation of detailed comments and instructions on the art of making a mix can be found at http://www.kempa.com/articles/tape/; *see also* Heather J. Meeker, *The Ineluctable Modality of the Visible: Fair Use and Fine Arts in the Post-Modern Era,* 10 U. MIAMI ENT. & SPORTS LAW L. REV. 195 (1993).

> wholesale reproduction that might be viewed as conceptually transformative in the appropriation art sense of that term. Might some conceptual appropriation provide new insights into the original? If so, we might think twice before legally condemning it."[146]

Perhaps the same comment could be made about a mix tape. Geoffrey O'Brien has called mix tapes "the most widely practiced art form in America."[147] Mix tapes have been treated as art in the market, as well—cultural artifacts in a digital world. The Museum of Communication in Hamburg held an exhibition it entitled "Cassette Stories," featuring the mix tape. Eighty mix tape creators were invited to tell stories behind mixes they had made; "the picture that emerged was of the mix cassette as a way of re-sequencing music to make sense of our most stubbornly inexpressible feelings, a way of explaining ourselves to someone we love, or to ourselves."[148] To the extent that mix tapes represent collages of material illustrating a particular theme, the significance of the songs extrapolated from their albums and placed into that new context may imbue the original work with new meaning, may comment on that work by placing it in a new context, or may lend conceptual insights into the work.

i. AS CREATIVE WORKS, MIX TAPES MAY BE COPYRIGHTABLE AS COMPILATIONS.

In this vein, a mix tape creator may have copyright protection over the mix tape itself if the work as a whole qualifies as an original compilation. Under the Copyright Act, a compilation is defined as "collection and assembling of preexisting materials or of

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[146] *Id.*
[147] Posting of schobbejak! to The New Worck Info, http://temeier.blogspot.com/2007/06/mix tape-info.html (June 8, 2007, 07:24 EST).
[148] James Paul, *Last Night a Mix Tape Saved My Life*, THE GUARDIAN, Sept. 26, 2003. *See also* Mixtapes, http://en.wikipedia.org/wiki/Mixtape.

data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."[149] A compilation is copyrightable where an author selects, coordinates, or arranges preexisting materials in such a way as to create an original work of authorship.[150] In *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.,* the Supreme Court emphasized that the Congressional interest in protecting compilations was to "make plain that the criteria of copyrightable subject matter . . . apply with full force to works . . . containing preexisting material."[151] In that case, the Court held that a company's telephone directory was not protected as a compilation, because the selection of listings was obvious and did not contain the modicum of originality required under the Copyright Act.[152] While "the statute envisions that there will be some fact-based works in which the selection, coordination, and arrangement are not sufficiently original to trigger copyright protection,"[153] the originality requirement does not create a high bar.[154] The selection and arrangement must simply demonstrate a minimal level of creativity. Originality may occur, separately or solely, in the selection of the material in the compilation.[155]

The value of the mix tape lies in the originality of its selection, arrangement, and composition of the particular tracks used. The classic mix tape is arranged with a particular theme, whether temporal or substantive, or even in form. In *Love Is a Mix Tape*, Rob Sheffield makes a list of typical themes people use to create a mix: The Party Tape; I Want You!; We're Doing It? Awesome!; You Like Music, I Like Music, I Can

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[149] 17 U.S.C. § 101 (West 2006).
[150] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 357 (1991)
[151] *Id.* (internal quotations omitted).
[152] *Id.* at 362.
[153] *Id.* at 358.
[154] *Id.* ("the originality requirement is not particularly stringent").
[155] *Id.* at 358-59.

Tell We're Gonna Be Friends; You Broke My Heart and Made Me Cry and Here Are Twenty or Thirty Songs About It; The Road Trip; No Hard Feelings, Babe; I Hate This Fucking Job; The Radio Tape; and The Walking Tape.[156] "There are millions of songs in the world," Sheffield writes, "and millions of ways to connect them into mixes. Making the connections is part of the fun of being a fan."[157]

Whether or not a mix tape has sufficient originality to be protectable, a copyrightable compilation has a very limited protection, covering only the "author's original contribution – not the facts or information conveyed."[158] Thus, regardless of the mix tape's copyrightability, the creator would still be liable for copyright infringement for reproducing any protected works; the copyrightability of a compilation "has no effect one way or the other on the copyright or public domain status of the preexisting material."[159]

ii. DIGITAL TECHNOLOGY CHANGES CONTEXTUAL ASPECTS OF A MIX IN MATERIAL WAYS.

The argument that the mix tape transforms works by recontextualizing them, thus imbuing them with new meaning, becomes a more difficult one as mix tapes move from analog to digital. To the extent that the architecture of digital mixes facilitates separation of individual tracks from the whole, the division of a mix into its component parts, it becomes more difficult to argue that the context is transformative. If a digital mix

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[156] SHEFFIELD, *supra* note 8, at 17-23. Sheffield adds, "There are lots more where these came from. The drug tape. The commute tape. The dishes tape. The shower tape. The collection of good songs from bad albums you don't ever want to play again. The greatest hits of your significant other's record pile, the night before you break up." *Id.* at 23.
[157] *Id.* at 23.
[158] *Feist*, 499 U.S. at 359 (quoting 17 U.S.C. § 103 (West 2006)).
[159] *Feist*, 499 U.S. at 359 (quoting H.R. Rep. No. 94-1476, at 57 (1976).

effectively assimilates individual tracks into the whole of one's music library, it looks less like art and more like appropriation; if the context is dynamic, it becomes harder to argue there is any static message realized. Individuals may only listen to a digital mix tape in its entirety, as it was created, but often music library software applications, such as iTunes, import songs without distinction.[160] There may be some very slight reduction in sound quality, but, under *Campbell* and like *Napster*, that reduction alone does not in any way imbue the work with a new meaning or message.[161] For this reason, a mix CD in hard copy, read-only format would have a better argument than one with digital files ripped into a larger library on a hard drive.

One digital mix tape site, QCMixtapes, uses the back-end database SoundCloud to allow the uploading and sharing of mixes as single files, so that the creator of the mix has control over the content and the context in which the music is presented.[162] This service requires that the creator make the mix tape just as he or she would have done in the days of analog mixes—rather than dragging and dropping into a playlist, the mix tape creator must record individual and sequential tracks in order to create one large file.[163] While it is more difficult to create, the mix tape creator has a better argument for a transformative context where that context is a requisite and intrinsic part of the mix itself.

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[160] LESSIG, *supra* note 30, at 134 (detailing iTunes' method of importing tracks from CDs).
[161] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 569 (1994); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1015 (9th Cir. 2001).
[162] http://www.qcmix tapes.com/ (follow "about" hyperlink). *See also* Eliot Van Buskirk, *8 Best Way to Share 'Mix Tapes,'* WIRED, Oct. 26, 2009, *available at* http://www.wired.com/epicenter/2009/10/best-8-ways-to-share-mix-tapes/.
[163] http://www.qcmix tapes.com/ (follow "about" hyperlink then follow "documentation page" hyperlink). Buskirk, *supra* note 162.

b. MIX TAPES ARE GENERALLY CREATED FOR PERSONAL AND NONCOMMERCIAL USE.

The mix tape creator, whether analog or digital, benefits from the fact that the taping is a noncommercial and personal use. This, in fact, is the key motivation under the AHRA, and is a prime inquiry for the determination of fair use of copyrighted works.[164] As mentioned previously, the commercial aspect of a use has been somewhat deemphasized in recent fair use cases "since many, if not most, secondary uses seek at least some measure of commercial gain from their use,"[165] and uses that are commercial have nonetheless been found to be fair. However, the noncommercial aspect of a particular use, while not determinative, is nonetheless relevant to the inquiry both under the first factor and the fourth, for noncommercial uses do not affect the market for the copyrighted work in the way that a commercial appropriation might.[166]

Additionally, the more personal the use, the easier it will be for a mix tape creator to make the argument that the use is fair. One of the most recent cases on peer-to-peer file-sharing addressed this issue. In *Sony BMG Music Entm't v. Tenenbaum*, a district court rejected the assertion that file-sharing of copyrighted musical works on a P2P system was a fair use, due to the defendant's "widespread, unlimited file sharing."[167] The court noted, however, that it could "envision a scenario in which a defendant sued for

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[164] 17 U.S.C. § 1008 (West 2006); *see also Napster*, 239 F.3d at 1015.
[165] *See* Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 921 (2nd Cir. 1994); *Campbell*, 510 U.S. at 584 ("If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107").
[166] *Compare* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 450-51 (1984) (a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. . . . prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit) *with Napster*, 239 F.3d at 1015 ("commercial use is demonstrated by a showing that repeated and exploitive unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies").
[167] Sony BMG Music Entm't v. Tenenbaum, No. 07cv11446-NG, 2009 WL 4547019, at *17 (D. Mass. 2009).

file-sharing could assert a plausible fair use defense," when it might be relevant "with whom he shared files—a few friends or the world—as well as how many copyrighted works he shared."[168] The personal nature of a mix tape is really the heart of the creation itself, and this factor should be influential to the fair use analysis.

i. DIGITAL MIX TAPES CHALLENGE THE LIMITS OF WHAT IS PERSONAL AND NONCOMMERCIAL.

Under this aspect of the fair use defense, the typical creator of an analog mix once again fares better than the typical creator of a digital one. The creator of an analog mix makes one copy of a particular mix. It takes at least 90 minutes to make a 90 minute mix, and, if copies were made, they would experience such a rapid decline in quality, generation to generation, that they would quickly become useless. A digital mix has no such practical limitations. Digital mixes take very little time to create and can be reproduced indefinitely without discernible reduction in sound quality.[169] Whereas it would never have been conceivable for a couple to give out 200 analog mix tapes at their wedding, it is well within the realm of possibility to give out that number of mix CDs as favors. Furthermore, many of the online mix tape sites involve possible distribution to a large number of people—in some situations, anyone with internet access. The mix tape may have been created with a specific purpose for a specific person, but it may be nonetheless available to anyone for download.[170]

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[168] *Id.* at *16-17.

[169] Software applications have at times attempted to control this. iTunes allows a playlist to be copied a maximum seven time. iTunes further permits the authorization of only five supported devices at any given time for one user's account. *See* Terms and Conditions, iTunes Store, § 10, *available at* http://www.apple.com/legal/itunes/us/terms.html, (last visited Oct. 10, 2009).

[170] Muxtape was a site that allowed users to create mix tapes online, by uploading songs and creating playlists. It did not filter out copyright protected material through audio footprints, and was shut down following a dispute with the RIAA. *See* Eliot Van Buskirk, *Muxtape Keeps the Mix tape Concept Alive*,

The boundaries of "personal" or "private" uses are unclear. The AHRA, which statutorily exempts from liability qualifying audio recordings made for private, noncommercial use, offers little guidance. While the AHRA does not apply to recordings made using a computer as medium or source, the legislative history does give some illustration as to what the boundaries of the intended meaning of "private" may be under that statute.[171] Unfortunately, that illustration offers two extremes, without addressing the typical reality.

The legislative guidance from the AHRA begs the slippery slope: Is it a personal use to make four mix tapes for roommates? For six friends for Christmas gifts? For 20 party guests as party favors? For 100 of a couple's closest family and friends at their wedding? For all friends on a social network? Is it personal use to make the mix tape available for download on a personal blog? Is it personal use to post the mix on a searchable mix tape website? With analog mix tapes, there is a practical constraint imposed by the architecture of the medium and the practical reality of the effort it takes to create. With digital mix tapes, however, those constraints are often removed, and mass distribution is not only possible, but easy, looking more like *Napster* than *Sony*. As in so many other realms, the personal becomes the public. It becomes more important than ever, perhaps, to determine what a personal or private use is, and, at the same time, infinitely more difficult. One thing that is clear in the balance of fair use factors is that the less a use seems personal, the less fair it will seem relative to the other factors.

WIRED, Mar. 25, 2008, *available at* http://www.wired.com/listening_post/2008/03/muxtape-keeps-t/; Eliot Van Buskirk, *Life After Muxtape: Where Do We Go Now*?, WIRED, Aug. 26, 2008, *available at* http://www.wired.com/listening_post/2008/08/life-after-muxt/.

[171] S. REP. NO. 102-294, at 51-52 (1992) (noting that a person who makes a tape of a copyrighted recording for use in his home, car, or portable player, or for a family member would be protected from suit, whereas a person who makes copies of a recording and sells them to others would not be protected, but would still have the full range of defenses under copyright law).

B. THE SECOND AND THIRD FACTORS IN THE FAIR USE ANALYSIS WEIGH AGAINST THE MIX TAPE, IN BOTH DIGITAL AND ANALOG FORMS.

The second factor looks at the nature of the copyrighted work;[172] the more creative the work is, the less fair an appropriation of that work will be because creative works are closer to the core of copyright protection than fact-based works.[173] Musical compositions are generally considered to be very creative.[174] Works that are substantially comprised of factual material, such as historical or biographical texts, on the other hand, would have a narrower scope of protection.[175] Along the same lines, works that are published have a wider berth of fair use potential than works that are unpublished, based on the theory that an author should be able to control the initial public appearance of her work.[176] It is commonly stated that sound recordings of copyrighted musical compositions are highly creative and entitled to a wide berth of protection. [177]

The third factor to be considered in a fair use analysis is the amount and substantiality of the portion of the copyrighted work that was taken.[178] The more taken, the less fair an appropriation will often be. Reproduction of a work in its entirety, for example, "militates against a finding of fair use."[179] However, a use may be fair even if an entire work is taken, as was the case in *Sony*, where entire television programs were taped for time-shifting purposes.[180] And, by the same token, a use may not be fair even if a small portion of the copyrighted work was taken if that portion happens to be the "heart

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[172] 17 U.S.C. § 107 (West 2006).
[173] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994).
[174] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1016 (9th Cir. 2001) (upholding district court's determination that musical compositions are creative in nature).
[175] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985) ("The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy").
[176] *Id.* at 564 ("scope of fair use is narrower with respect to unpublished works").
[177] *See e.g. Napster*, 239 F.3d at 1016.
[178] 17 U.S.C. § 107 (West 2006).
[179] Hustler Magazine v. Moral Majority, Inc., 796 F. 2d 1148, 1155 (9th Cir. 1986).
[180] Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 449-50 (1984).

of the work."[181] In a musical work, for example, the heart of the work is often referred to as the "hook." Even a small quantity may not be able to sustain a fair use defense if it is a core aspect of the work that is appropriated.[182] In *Napster*, the court easily dismissed the second and third factors, the nature of the copyrighted works and the amount and substantiality of the portion taken, because musical compositions are very creative in nature and because the users were copying full songs.[183] Users of the Napster system were making full reproductions of compositions and sound recordings through their file transfers, copying the entire work at issue and leading the court away from fair use.[184]

The second and third factors similarly weigh against the mix tape creator because of the creativity of sound recordings and the fact that the amount taken is the work in its entirety, heart *and* soul (or blues, or rock). Courts have been increasingly critical of reproductions of sound recordings in recent years. Cases that have questioned whether or not small "sampled" reproductions of sound recordings are a fair use have often been answered in the negative; the Sixth Circuit, for example, held in the oft-cited/discussed/criticized *Bridgeport Music, Inc. v. Dimension Films* that a two-second sample of a sound recording was not a fair use.[185] While this case did not eliminate the fair use defense altogether for sampling, it did create a bright-line test for reproductions

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[181] *Harper & Row*, 471 U.S. at 600 ("Court adheres to its conclusion that The Nation appropriated the heart of the Ford manuscript").
[182] *See* Molly McGraw, *Sound Sampling Protection and Infringement in Today's Music Industry*,4 HIGH TECH. L.J. 147, 162-63 (1989) (referencing Jeffrey G. Sherman, *Musical Copyright Infringement:The Requirement of Substantial Similarity*, 22 COPYRIGHT L. SYMP. 81, 104 (1975)); *see also Harper & Row*, 471 U.S. at 565 ("a taking may not be excused merely because it is insubstantial").
[183] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1016 (9th Cir. 2001).
[184] *Id.*
[185] Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 800 (6th Cir. 2005) ("If you cannot pirate the whole sound recording, can you 'lift' or 'sample' something less than the whole[?] Our answer to that question is in the negative").

of sound recordings for the purpose of sampling in the Sixth Circuit.[186] The use of a copyrighted work for the purpose of sampling is materially different from the use of that work for the purpose of creating a mix tape, particularly relative to the other relevant factors. However, it is important to be aware of the line of cases addressing sound recordings and fair use, which exemplify a degree of intolerance on the part of some courts for reproduction of even brief sound recordings.[187]

C. THE EFFECT ON THE POTENTIAL MARKET IS GENERALLY THOUGHT TO BE THE MOST IMPORTANT FACTOR.

The final factor in the non-exhaustive list is the effect on the potential market.[188] This factor is often cited by courts as being of primary importance in the fair use analysis.[189] The key word in the analysis under this factor is often "potential."[190] Because the right to make derivative works is one of the exclusive rights of the copyright holder, the market is not limited simply to those channels of trade that the copyright holder engages in directly, but the potential for derivatives.[191] The use of thumbnails of copyrighted images, for example, may not be fair even though the copyright owner is not

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[186] *Id.* at 801 ("Get a license or do not sample. We do not see this as stifling creativity in any significant way").
[187] *See e.g. Id.*; Bridgeport Music, Inc. v. UMG Recordings, Inc., 585 F.3d 267 (6th Cir. 2009) (holding that there was sufficient evidence for a jury to determine that certain parts of a song were protectable under copyright law); *but see* Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2004) (holding that a three note sample from a song sequence was de minimis and therefore non-infringing). For a closer look at the sampling movement, *see* Shervin Rezaie, *Play Your Part: Girl Talk's Indefinite Role in the Digital Sampling Saga*, 26 TOURO L. REV. 175 (2010).
[188] 17 U.S.C. § 107 (West 2006).
[189] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985) ("last factor is undoubtedly the single most important element of fair use").
[190] *Id.* at 568 ("to negate fair use one need only show that if the challenged use 'should become widespread, it would adversely affect the *potential* market for the copyrighted work'") (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) (emphasis added by later Court).
[191] *Harper & Row*, 471 U.S. at 568.

in the present market of using thumbnails for anything.[192] The use of a copyrighted greeting card may not be a fair use in creating a large sculpture incorporating many of the aspects of the greeting card, even if the creator of the greeting card has no intent to create a large sculpture of the image.[193] The use of portions of unpublished letters for an unauthorized biography may not be fair use, even if the subject of the biography has stated he has no intent to publish anything biographical.[194] The potential market does not include solely the market areas the copyright holder is already involved in, nor the areas a copyright holder could become involved in directly, but potential licensing markets, as well.[195] The importance of this factor depends on the purpose and character of the use. If it is a commercial use, market harm may be presumed.[196] If it is a noncommercial use, however, the court will look at whether the "particular use is harmful, or that if it should become widespread, [whether] it would adversely affect the potential market for the copyrighted work."[197]

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[192] See Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 724-25 (9th Cir. 2007) (While the district court reasoned that Google's use of thumbnail images could cause harm to Perfect 10's potential market for cell phone downloads, the Ninth Circuit called this harm "hypothetical.").

[193] Rogers v. Koons, 960 F.2d 301, 312 (2nd Cir. 1992) ("defendants could take and sell photos of 'String of Puppies,' which would prejudice Rogers' potential market for the sale of the 'Puppies' notecards, in addition to any other derivative use he might plan").

[194] Salinger v. Random House, Inc., 811F.2d 90, 99 (2nd Cir. 1987) ("effect on the market for Salinger's letters is not lessened by the fact that their author has disavowed any intention to publish them during his lifetime . . . Salinger has the right to change his mind").

[195] The breadth with which this factor is viewed can create some difficulties, if not downright circular reasoning. If the court examines potential licensing markets, for example, practically speaking those markets will fill in the gap if the use is found not to be fair. If the use is found to be fair, the licensing market will not exist.

[196] *Sony*, 464 U.S. at 451.

[197] *Id*.

a. DIGITAL MIX TAPES MAY ADVERSELY AFFECT THE MARKET IN WAYS THAT ANALOG MIXES DID NOT.

The fourth factor seems to weigh in favor of the analog mix tape, but again, the digital form may lead to a different result. While it is true that a potential market for copyright holders would exist if a licensing scheme developed by which mix tape creators could pay to make additional copies of a particular work, (and that, similarly circularly, a potential market will not exist if the use is fair), there has been no appreciable evidence that analog mix tapes affect an individual's willingness to purchase music, or even an individual's willingness to purchase an album containing the very music that is on the tape to begin with.[198] *Wired Magazine* has followed the destruction/reincarnation/resurrection loop of the mix tape over the last several years, and details the distinction between the two.[199] Wired describes the "olden days," when "boys and girls used to spend hours using double cassette decks to carefully craft mix tapes to share in order to express their innermost longings in an artsy way. It sometimes led to love and inadvertently increased record sales by sharing a little taste of previously undiscovered bands."[200]

Whether or not the sharing of analog mixes actually increased record sales is unclear. However, the theory does not require a far leap of reasoning, given existent culture and common-sense market interests. Assuming that the more music people are exposed to by close friends the greater chance they will find something they like, they become more likely to purchase music after the exposure—unless, of course, the one song of an artist is enough, in which place it would be a potential market substitution, no

[198] A friend of mine had a favorite mix called, *Songs That Made Me Buy the Whole Damn Album.*
[199] *See* Buskirk, *supra* note 162.
[200] *Id.*

matter the likelihood that person would have been exposed to the music in the first place. This is where the digital mix differs from its analog counterpart. Not only is the quality of a digital track higher and capable of mass reproduction and distribution, but a significant portion of revenue from contemporary music sales is for single-track downloads. For 2008, consumers downloaded 1,033,000,000 single tracks, and 56,900,000 albums.[201] In 2007, consumers downloaded 809,900,000 single tracks, and 42,500,000 albums.[202]

While the increase in digital album downloads outpaced singles, singles still represent the vast majority of digital downloads. If a track from a digital mix tape is assimilated into a consumer's music library, it can be taken out of context and combined with other tracks. In addition, if a consumer decides to purchase more songs by that particular artist, it is usually possible to purchase other songs by that artist individually, even from the same album, without paying for the original track.[203] With digital mix tapes, that threatens to cause a total market substitution for the copyrighted work.

One may argue that the mix will expose consumers to music they would not have purchased otherwise, creating more sales than it prevents. However, this argument, no matter how earnestly made, has not seen much success in P2P file-sharing cases. The Ninth Circuit, for example, upheld the district court's holding that the Napster system had a deleterious effect on both the existing and potential digital downloading market.[204] The court evaluated Napster's expert testimony that the type of file-sharing involved actually

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[201] RIAA 2008 Year-End Shipment Statistics, *available at* http://76.74.24.142/D5664E44-B9F7-69E0-5ABD-B605F2EB6EF2.pdf.
[202] *Id.*
[203] *See generally* http://www.apple.com/itunes/ for a list of all possible ways to shop for music on iTunes.
[204] A&M Records, Inc. v. Napster, Inc., 239 F. 3d 1004, 1017 (9th Cir. 2001).

benefitted the artists because it "stimulate[d] more audio sales than it displace[d]."[205] The Ninth Circuit considered this testimony to be of "dubious reliability and value," and agreed that, regardless, "increased sales of copyright material attributable to unauthorized use should not deprive the copyright holder of the right to license the material."[206] The extent to which file-sharing affects the market for copyrighted works is disputed. However, courts have shown little sympathy for the argument that getting something for free that one would otherwise not choose to pay for results in a fair use of copyrighted material. Courts have shown equal reluctance to accept the argument that there is no adverse affect on the market because getting something for free stimulates the consumer to make additional purchases.

Napster had further argued that there was no deleterious effect on the market for copyrighted works because users were merely engaging in "space-shifting" of works they already owned.[207] Because Napster facilitated users' sharing of copyrighted files with the general public, this case was materially distinct from *Diamond* and *Sony*.[208] Napster argued additionally (and equally unpersuasively) that users were merely "sampling" the music in order to decide whether or not to purchase it.[209] This argument failed for two reasons.[210] First, Napster users downloaded a complete and permanent copy of the copyrighted work; samples are often short snippets of a work, or full songs that are programmed to "time-out" after a certain amount of time.[211] Secondly, even authorized temporary downloading of individual songs for sampling purposes is commercial in

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[205] *Id.* at 1017.
[206] *Id.* at 1018.
[207] *Id.* at 1019.
[208] *Id.* (distinguishing from Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072 (9th Cir. 1999) *and* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984)).
[209] *Napster*, 239 F.3d at 1018.
[210] *Id.*
[211] *Id.*

nature because it affects the potential licensing market for samples, and thus the copyright holder's derivative rights.[212] Once the court determined that users of the Napster system were liable for infringement, it was not a far step to hold Napster liable under a contributory theory for direct facilitation of such infringement.[213] To the extent that mix tapes are personal and noncommercial, they approach the *Sony* side of home recording; to the extent that they facilitate the acquisition of free music, creating a market substitution, they begin to look more like file-sharing.

V. TO ITS DETRIMENT, COPYRIGHT LAW FAILS TO ADEQUATELY ADDRESS THE PRACTICALITIES OF MODERN HOME RECORDING.

There'll be the breaking of an ancient western code
Your private life will suddenly explode.
– Leonard Cohen
"The Future"
The Future

Whether or not mix tapes are legal in digital form is, at best, totally unclear. The AHRA seeks to protect private and noncommercial recording of both digital and analog musical works; however, the AHRA does not apply to recordings made with the use of computers. This legislative exception means that analog mix tapes are protected under copyright law but the vast majority of modern home recording, including digital mixes, are not. The RIAA been unequivocal in its condemnation of making mixes, stating that, because of the sound quality and ease of reproduction of digital music, "it would be naïve

[212] *Id.*
[213] *Id.* at 1027. More recently, the Tenenbaum court noted that it might be possible for a defendant who has engaged in music file sharing to allege fair use if that defendant "deleted the MP3 files after sampling them, or created MP3 files exclusively for space-shifting purposes from audio CDs they had previously purchased," or even, for example, if a defendant "shared files during a period of time before the law concerning file-sharing was clear and paid outlets were readily available." However, the Napster court did not find any of these elements to be present, nor do they lend sympathy here. Sony BMG Music Entm't v. Tenenbaum, No. 07cv11446-NG, 2009 WL 4547019, at *16-17 (D. Mass. 2009).

. . . [to] allow that type of activity."[214] In this environment, the AHRA thus fails to fulfill its stated purpose, which is "to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use."[215] In light of this failure, one must turn to fair use principles to determine whether or not modern mix tapes are permitted or proscribed under contemporary copyright law. While analog mixes may have fallen within the parameters of fair use, the application of fair use to the digital mix becomes more difficult. By failing to adequately address digital realities, the law in its current state no longer reflects practical realities of consumer behavior. And in the murky waters of legal vagaries, other modalities creep in to fill in the gaps.

A. IN THE FACE OF GAPS IN COPYRIGHT LAW, CONSUMER BEHAVIOR BECOMES REGULATED BY OTHER MEANS.

In his seminal article on internet regulation, Larry Lessig discusses how four methods of regulating behavior–law, social norms, markets, and architecture–apply to cyberspace.[216] Law regulates behavior by demanding that individuals act or refrain from acting in certain ways, with punitive consequences for noncompliance. Norms are regulated by communities in a more decentralized way; as patterns of social behavior, they "typically have sanctions attached, and conformity to them is typically prescribed by

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[214] David Gallagher, *For the Mixtape, a Digital Upgrade and Notoriety*, N.Y. TIMES, Jan. 30, 2003, *available at* http://www.nytimes.com/2003/01/30/technology/for-the-mix-tape-a-digital-upgrade-and-notoriety.html?sec=&spon=&pagewanted=all ("Frank Creighton, who directs antipiracy efforts for the Recording Industry Association of America, said that money did not have to be involved for copying to be illegal. While mixes on cassette tapes may not have inspired the wrath of the record industry in the past, Mr. Creighton said, digital mixes have better sound quality. And given the proliferation of CD burning for friends and relatives, 'it would be naïve of us to say that we should allow that type of activity,' he said").
[215] S. REP. NO. 102-294, at 86 (1992).
[216] Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 507 (1999).

one person to another."[217] Markets regulate, to the extent permitted by law and norms, through price constraints, and architecture regulates behavior through the limits of physical construction and design.[218] A physical architecture may limit individuals' entry into a building through a certain route; a password requirement may limit individuals' access to a certain location online.

These methods of regulating behavior, both direct and indirect, interact—cooperatively or in contradiction—with differing results. The objective for a regulator, Lessig claims, is thus to determine the right mix of direct and indirect strategies.[219] The more that these methods exist in opposition to one another, the more difficult it is to constrain behavior in productive ways. And, where one strategy seeks to regulate behavior in a certain way, but proves inadequate to do so, the others will often crop up to take its place. The mix tape illustrates this problem well.[220]

The architecture of the digital mix both complicates the legal issues and fills in where the law is unclear. The creation of analog mix tapes was limited by the time it took to create them—at least 90 minutes for every 90-minute mix, and practically speaking, much, much more. Furthermore, the reproduction of those mixes would not only take significant additional time, but would decrease the audio quality of the mix dramatically (and generally unworkably). The architecture of digital media, however, enables the creation of a mix tape in the amount of time it takes to drag and drop songs into a playlist, and also facilitates indefinite quality reproduction of that mix. The

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[217] Steven Hetcher, *Social Norms, Fan Fiction, and Remix Culture*, 157(6) U. PA. L. REV. 1869, 1877 (2009).
[218] Lessig, *supra* note 216, at 507.
[219] *Id.* at 512.
[220] A thorough explication of the four modalities for regulation of behavior are outside the scope of this paper.

architecture of digital media also often allows the tracks to be separated from the mix and reassembled into an individual's general music library.

While the architecture results in behavior that is more problematic in a copyright sense, architecture has also arisen in some ways to constrain behavior in light of these normative difficulties. As the most popular software-based online store for downloading media, iTunes has led the charge to use architecture to regulate digital home recording behavior in ways directly relevant to the mix tape.[221] In its Terms of Service for the iTunes Store, Apple explicitly states that users of its service are only permitted to make copies of copyrighted works for personal, noncommercial use.[222] Beyond contractual provisions, however, iTunes has experimented a great deal over the years with architectural regulation, some of which has been more effective than others. One of the less popular efforts included what was, in the end, a failed attempt to charge more or less for music depending on whether or not it had embedded Digital Rights Management ["DRM"]. In 2007, Steve Jobs announced that EMI Music's ["EMI"'s] catalog would be DRM-free on iTunes for an extra 30 cents per track, or $1.29.[223] DRM-free tracks would

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[221] iTunes Store, http://en.wikipedia.org/wiki/ITunes_Store; Martyn Williams, *Apple's iTunes Store Serves Up 10 Billionth Song,* PC WORLD, Feb. 24, 2010, *available at* http://www.pcworld.com/businesscenter/article/190187/apples_itunes_store_serves_up_10_billionth_song.html.

[222] Usage Rules (ii, vii, xii), iTunes Store Terms of Service, http://www.apple.com/legal/itunes/us/terms.html#SERVICE ("(ii) You shall be authorized to use the Products only for personal, noncommercial use"); ("(vii) You shall be entitled to export, burn (if applicable) or copy (if applicable) Products solely for personal, noncommercial use"); ("(xii) . . . You may copy, store and burn iTunes Plus Products as reasonably necessary for personal, noncommercial use"). The AHRA, if it applied, would have used the language "private, noncommercial." Fair use principles consider the personal nature as well as the commercial aspect of the use in evaluating whether or not a use of a copyrighted work is fair, but the inquiry is not limited to those factors. Discussed *infra* part IV(A)(b).

[223] Apple Unveils Higher QualityDRM-Free Music on the iTunes Store, http://www.apple.com/pr/library/2007/04/02itunes.html. In February of that year, Jobs had released a now-legendary essay entitled "Thoughts on Music," in which he called upon the "big four music companies" to allow their music to be sold online without DRM software, creating a "truly interoperable music marketplace." Jobs asserts that DRM technology is ineffective at combating music piracy, difficult to maintain, and detrimental both to consumers and to innovation. Steve Jobs, *Thoughts on Music*, http://www.apple.com/hotnews/thoughtsonmusic/.

be in a new category called "iTunes Plus."[224] Soon, Amazon.com began selling DRM-free music for between 89 and 99 cents per track, and in response to that market pressure and competition, Apple dropped its price back down.[225] In January 2009, Apple announced that it would sell all DRM-free music in the iTunes store–eight million tracks from that day, and two million more in March of that year.[226]

FairPlay, Apple's DRM software, now manages only songs purchased before January, 2009, which are not part of the iTunes Plus category. FairPlay permits the reproduction of a particular playlist a maximum of seven times before that playlist must be changed.[227] A FairPlay-managed music track can be reproduced onto a CD an unlimited number of times, however, and the resulting CD is free of DRM and may be then reproduced, burned, or ripped an unlimited number of times.[228] An individual who wants to create a mix for multiple people with tracks purchased before January 2009 must

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[224] Usage Rule (xii), iTunes Store Terms of Service, http://www.apple.com/legal/itunes/us/terms.html#SERVICE ("(xii) iTunes Plus Products do not contain security technology that limites your usage of such Products, and Usage Rules (iii)-(vi) do not apply to iTunes Plus Products"). Usage Rules (iii)-(vi) read: "(iii) You shall be authorized to use the Products on five Apple-authorized devices at any time, except in the case of Movie Rentals, as described below. (iv) You shall be able to store Products from up to five different Accounts on certain devices, such as an iPod, iPhone, and Apple TV at a time; provided that each iPhone may sync ring tone Products with one a single Apply-authorized device at a time, and that syncing an iPhone with another Apple-authorized device will cause any ring tone Products stored on such iPhone to be erased and, if you so choose, to be replaces with any ring tone Products store on such other Apple-authorized device. Additional restrictions apply to Movie Rentals, as described below. (v) You shall be authorized to burn an audio playlist up to seven times. (vi) You shall not be entitles to burn video Products or ring tone Products."

[225] Candace Lombardi, *Apple drops price of DRM-free iTunes*, CNET, Oct. 17, 2007, http://news.cnet.com/8301-10784_3-9798044-7.html.

[226] Changes Coming to the iTunes Store, http://www.apple.com/pr/library/2009/01/06itunes.html. Music and television shows sold in the iTunes store still have DRM through Apple's FairPlay software.

[227] iTunes Store Terms of Service, http://www.apple.com/legal/itunes/us/terms.html#SERVICE. *See also* Can't burn a CD in iTunes for Windows, http://support.apple.com/kb/TS1436 ("An unchanged playlist that contains songs purchased from the iTunes Store can be burned no more than seven times.") Other architectural restrictions in iTunes include allowing a user to authorize a maximum of five computers to be associated with a particular account. FairPlay enables tracks to be played on up to five authorized accounts simultaneously. *See supra* note 224. *See also* Can't burn a CD in iTunes for Windows, *supra* note 227 ("iTunes will stop burning a disc if one or more of the songs in a playlist were purchased from the iTunes Store but are not authorized to play on this computer. This message appears: 'Some of the files can not be burned to an audio CD. Do you still want to burn the remainder of this playlist? For more information on why some files can not be burned, click below'").

[228] Such audio CD is not, however, entitled to first sale rights and cannot be sold, leased, distributed or lent.

presumably purchase the songs on that mix every eighth time.[229] Alternatively, users can upgrade their library to iTunes Plus for an additional 30 cents per track, and make as many mixes as they want, for personal, noncommercial use.[230] In the absence of clear legal guidance, Apple has put a lot of effort into managing home recording through the architecture of its services. That architecture has further been affected by market demands to change, most notably when Amazon.com entered into the music market and caused Apple to return to its original prices and maintain DRM-free music.

B. SOCIAL NORMS PERMIT, AND EVEN ENCOURAGE, THE MAKING OF MIX TAPES.

Whether or not creating digital mix tapes is illegal, there is a social norm that prevails, which says that there is nothing wrong with making a mix tape, digital or otherwise. To compare the Napster system with digital mix tape is reasonable under the state of the law, but the social norms surrounding mix tapes are very different. A permissive norm rightfully existed in the analog world, and it stretches well into the digital one, as well. Even the very first iTunes advertisement in 2001 encouraged the creation of a mix tape. The infamous "Rip. Mix. Burn." ad features a man selecting tracks from his music library to create a mix CD.[231] He sits in a concert hall and looks up to the stage, where all of the artists from his music collection are lined up before him.[232] He crafts a mix, beginning with Liz Phair and ending with Barry White, with artists from George Clinton to Wilco to Ziggy Marley in between.[233] At the end of the commercial,

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[229] On a personal note, I made a digital mix tape for a copyright class a few years ago, and had to purchase some tracks thrice for this very reason.
[230] Changes Coming to the iTunes Store, *supra* note 226.
[231] "Rip. Mix. Burn." Apple iTunes advert, http://www.youtube.com/watch?v=4ECN4ZE9-Mo.
[232] *Id*.
[233] *Id*.

George Clinton says, "It's your music. Burn it on a Mac."[234] It is still well within accepted social norms to make digital mixes for friends, either individually or in groups. *Brides of North Texas Magazine* recommends that a couple make a mix CD for guests as a wedding favor.[235] On the internet, there are eHow articles and Wikis giving instructions on "How to Make a Mix Tape."[236] The well-known supplier of prom supplies, Stumps, even offers personalized CD cases to go with mix CDs of songs played at prom, which can be handed out to all guests.[237] Even NPR has stated that "mix CDs have become the new cultural love letter/trading-post."[238] As Sheffield stated, "It's a fundamental human need to pass music around, and however the technology evolves, the music keeps moving."[239]

Perhaps there was more of an art form to the analog version of the mix tape, through the sheer time and effort it required (not to mention that the tape had to walk six miles in the snow, uphill both ways). Granted,

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[234] *Id*.

[235] *Favors: 4 Fab Gifts Your Guests Will Love*, BRIDES OF NORTH TEXAS, Spring/Summer 2010, at 108. *See also* The Knot, http://www.theknot.com/ (search "search the knot" for "mix CD"; then follow any of the many hyperlinks to articles and advice which involve the use of a homemade mix CD as a favor for wedding guests, bridal showers, and even "save-the-date" cards). An anecdotal story on Facebook indicated that many couples do not think twice about making a mix for wedding guests. Some typical responses to the question, "Did you make a mix CD for guests at your wedding, and if so, how many?" included: (1) "Yes . . . 100 for our wedding. Want one? It was actually widely popular I had to burn more. Are the copyright police going to come get us? The police did shut our wedding down . . . maybe it was the CDs . . ."; (2) "Yes—125 as the favor at our wedding. Would you like for me to send you a copy or jot down the tracks for you? Of course I'm sure no one used ours as coasters, since we have such exceptional taste (and it features wings' 'silly love songs' and who doesn't love that?)"; (3) I did—I know maybe some people don't like them—but everyone I passed them out to loved them (I really have no idea but I do know that my 90 year old grandfather still listens to his—I had to make him another copy). We made about 300 I think." Comments on file with author.

[236] *See e.g.,* Travis Derouin et al., How to Make a Perfect Mix Tape or CD, http://www.wikihow.com/Make-a-Perfect-Mix-Tape-or-CD; Ashley Sims, How to Make a Mix Tape, http://www.ehow.com/how_2111911_make-a-mixtape.html; How to Make the Perfect Mix Tape, http://www.angelfire.com/indie/tinymixtapes/columns/10.15.01_how_to_make_the_perfect_mix_tape.htm.

[237] Stumps, http://www.stumpsparty.com/party/Theme-CD-Case.cfm?caid=1068716 ("Create a mix of popular songs to play at your Prom and pass it out in this 5 1/2" high x 4 3/4" wide case . . .").

[238] *Talk of the Nation, The Mix Tape: Art and Artifact* (NPR broadcast June 14, 2005) (audio and transcript available at http://www.npr.org/templates/story/story.php?storyId=4701169).

[239] SHEFFIELD, *supra* note 8, at 24.

> "[i]t took hours to make just one: pulling apart your record collection of various formats and then listening to a few songs before making the commitment to sticking them on a cassette in real time. And you had to get the recording levels just right, muting the recorder at just the right point to avoid clumsy segues and clicks. And a mistake often meant going back several songs to fix it. Yes, making a mix tape required a level of commitment that just isn't necessary in our precise-copy, drag and drop, click and burn world."[240]

But that does not mean that digital mix tapes in their true form, personal and noncommercial and bigger than the sum of their borrowed parts, should be illegal. Sure, digital media is more easily mass produced. Sure, it becomes harder to define the parameters of "personal" and "noncommercial." But those should be the material and important questions to answer when it comes to the legality of audio home recording, and that should be the focus of the inquiry—not whether or not it was DAT technology or a computer that was involved in the recording process.

C. BY FAILING TO ADEQUATELY ADDRESS THE ISSUE OF HOME RECORDING, COPYRIGHT LAW IS INEFFECTIVE AND CONTRAINDICATIVE OF ITS ESSENTIAL PURPOSE.

The increasingly unclear and ineffectual application of copyright law to the mix tape (and, frankly, to many other digital media issues outside the scope of this paper), causes a disjuncture. Where the law is widely dissociated from the social norm, where changes in architecture seek to fill gaps through constant configuration and reconfiguration, where market forces exert pressure to resolve contradictions, the law becomes increasingly inapposite to practical reality. Under copyright law, it is very likely illegal for an individual to make a mix CD of significant songs and give it to a friend. In such a climate, it is no wonder that copyright law becomes the victim of mass

[240] Mobley, *supra* note 4.

disrespect.[241] Such a climate, in fact, creates an environment that compels one of the most talented record producer/recording engineers in modern music, who has worked with such prolific artists as Nirvana, the Pixies, PJ Harvey, and Jimmy Page and Robert Plant, speak unequivocally negatively about the very law that is supposed to encourage the production of creative works.[242] Steve Albini has engineered some of the most influential and critically acclaimed albums of the last two decades, including multiple artists mentioned throughout this paper.[243] One documentary about Albini claims that he has been "saving independent rock 'n roll" for the last 20 years, dedicated as he is to the creative process and helping bands record for minimal cost.[244] At NX35, a recent music conference where I spoke on copyright issues, Albini gave the keynote address. And he commented, "I think intellectual property as a concept is fucking absurd."[245]

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[241] *See* Matther Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381, 382-83 (2005) (discussing the growing opinion that "we are approaching the 'tyranny of copyrights'").

[242] Other bands include, but are not nearly limited to, The Jesus Lizard, Don Caballero, The Breeders, Helmet, Fred Schneider, The Wedding Present, Bush, Joanna Newsom, Low, Dirty Three, Cheap Trick, Manic Street Preachers, The Frames, Slint, Cath Carroll, Superchunk, Fugazi, Jon Spencer Blues Explosion, Urge Overkill, Man or Astro-Man, Palace Music, Smog, Veruca Salt, Guided by Voices, Scrawl, Will Oldham, Edith Frost, Godspeed You Black Emperor, Songs: Ohia, and Electrelane. List of Steve Albini's recording projects, http://en.wikipedia.org/wiki/List_of_Steve_Albini's_recording_projects. *See also* Steve Albini, http://en.wikipedia.org/wiki/Steve_Albini.

[243] *See id.* Some albums at the top of the list would include the Pixies' *Surfer Rosa* and Nirvana's *In Utero*.

[244] Steve Albini: Don't Call Me Producer, http://www.youtube.com/watch?v=mFMU-IFUMOI (stating also that Albini built a studio in his home and decided not to charge bands to use the studio, but only for his time, so that he could offer bands with no money a space with high-end equipment so that they could make an album at low cost).

[245] Steve Albini, Keynote Address, NX35 Music Festival, Denton, TX (Mar. 13, 2010) (video available at http://www.youtube.com/watch?v=aHlcGgrXLF8). After contemplating whether or not to include Albini's quote in raw and complete form, I was reminded of what Andy Warhol told the Velvet Underground. According to John Cale, one of the two founding members of the Velvet Underground, Andy "was always reminding us to put swear words back into songs." *Studio 360, John Cale on Andy Warhol,* (Public Radio International broadcast Aug. 9, 2009) (transcript and audio available at http://www.pri.org/arts-entertainment/music/john-cale-andy-warhol1450.html).

D. STEALING MUSIC IS BAD, AND SHARING MUSIC IS GOOD, AND COPYRIGHT LAW, IF IT IS TO BE EFFECTIVE, MUST ADDRESS THE DIFFERENCE.

Trying to control the stealing of music is an imperative for copyright law as it seeks to encourage the production of creative works through the granting of limited exclusive rights to the creators of those works. But, as Moore said, "trying to control sharing through music is like trying to control an affair of the heart—nothing will stop it."[246] Perhaps one of the first ways to share music and emotion in modern popular culture over distance and time was the Long Distance Dedication on Casey Kasem's *American Top 40* program.[247] Started in 1970, the *American Top 40* counts down the top 40 most popular singles in the United States each week.[248] During Kasem's reign, he would select and read one letter from a listener, dedicating a song to someone else who was usually far away. The song, which in my own memory seemed uncannily always to be the Eagles' "Desperado," was intended to surpass distance and time to connect individuals through music.[249] Mix tapes are more Casey Kasem than Shawn Fanning.[250] They are all about music sharing and not music stealing; they communicate emotion and meaning through time and distance.

Many years ago, when I was heading to Seville, Spain, to spend a couple of months doing research, I nearly missed a plane because it was inconceivable to leave without the tape that my boyfriend was making for my journey, even though I owned all of the tracks on that tape. A year later, after said boyfriend had become fiancé, we were

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[246] *Talk of the Nation, The Mix Tape: Art and Artifact, supra* note 238.
[247] American Top 40, http://en.wikipedia.org/wiki/American_Top_40#Features_of_the_Kasem-era_shows; *see also* AT 40, http://www.at40.com/.
[248] The show used the Billboard charts when it first aired. In the late 1990s it switched to Radio and Records, and it now uses data from Mediabase. American Top 40, *supra* note 247.
[249] Okay, so it wasn't always the Eagles' "Desperado." The first Long Distance Dedication, in fact, was made by a man whose girlfriend, Desiree, was moving with her family to an air force base in Germany. The song requested was "Desiree" by Neil Diamond. *Id.*
[250] *See supra* note 114.

late to the rehearsal dinner for our wedding because we were still working on the mix tape we wanted to play at the wedding. (To the truths of our lives, we will add both procrastination and music.) A wedding presented a chance to force our grandparents and distant cousins and college friends to sit in one place and listen to what the music we loved had to say.[251] As Dean Wareham stated, "in the future, when social scientists study the mix tape phenomenon, they will conclude—in fancy language—that the mix tape was a form of 'speech' particular to the late twentieth century."[252]

Since that time, through many moves, I've carted around boxes of cassettes, many unlabeled. It is likely that I would disclaim ownership of many of them. But in the silt of those boxes are dozens, dozens, of mix tape diamonds. Last year I borrowed a cassette player, hooked it up to my computer, downloaded several of the mix tapes, and burned them onto CDs. I took the cases, to the extent I could match up case to tape in such a haystack, made color copies, and turned them into CD covers. There is *Castle*, and *Waiting*, and *Christmas '94 Drive to DC*. There is *New Years '89*, *The Made-for-TV Mix*, and an untitled one I named *Someone One of Us Dated Must Have Made This*. And, yes, there is *Seville*, and there is *Wedding*. The value of the mix tape is not so much in the having of individual tracks as in the value added to those tracks, the stuff that came in addition to the tracks, the message that said, "I love you," or "I want you to miss me," or, even, "This is what it is like to sit in my room without air conditioning missing you on a summer day."

Audio recording for personal, noncommercial use should, quite simply, be legal. Whether that involves amending the AHRA to encompass software and personal

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[251] If we had digital mixes then, perhaps we wouldn't have been late for our own rehearsal dinner, as we could have made a playlist in mere minutes and forced everyone to take their own personal copy home.
[252] MIX TAPE: THE ART OF CASSETTE CULTURE, *supra* note 3, at 28.

computers, or fleshing out the fair use doctrine, or something else entirely, the law must provide clear guidance to the consumers it so affects. As we seek to define the dimensions of personal and noncommercial use in a digital world, the market will demand compliant technologies with supportive architecture. And just as iTunes facilitated a change of social norms in the area of music downloading by developing an easy and practical, legal alternative, such will be the case with modern mix tapes. But copyright law must take the lead, not leave the other modalities to grasp at ambiguity while technology evolves at warp speed. Developing concrete and realistic legal principles is essential to facilitate the production of creative works, the Progress of Science and the useful Arts, and compliance with (and respect for) the law.