

# RECYCLING COPYRIGHT: SURVIVAL & GROWTH IN THE REMIX AGE

Michael Katz

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## I. INTRODUCTION

Current copyright law, both as enacted in statute and as applied by copyright holders and the courts, stifles development of new content, limits uses of creative work, confuses consumers, and prohibits users from taking advantage of modern technology while failing to value public

gains. Copyright law should be amended to recognize profound change in publishing and editing created by the advent and growth of digital technology, and should allow for references to, creative reuse of, and recycling of all digital media. If changes are made proactively, the original goals of copyright – to encourage and reward the development of creative works for the betterment of society – will be served, and creative industries will grow.

## II. BACKGROUND

### A. Case Study: DJ Drama

DJ Drama, real name Tyree Simmons, was the “Mixtape DJ of the Year”.<sup>1</sup> Drama’s “Gangsta Grillz” line of mixtapes is a CD “bank [of] . . . exclusive tracks, devoted to a single rapper.”<sup>2</sup> It is generally considered an honor for a rapper to work with DJ Drama and “[m]ost of DJ Drama’s mixtapes begin with enthusiastic endorsements from the artists themselves,” in part, a recognition that “mixtapes can actually bolster an artist’s sales.”<sup>3</sup> DJ Drama’s mixtapes are well produced and creative, generating a strong following and that has acted as a key driver behind the success of many subsequent major label releases. For example, his mixtapes for rappers such as T.I., Lil’ Wayne and others demonstrate the ability of DJ Drama’s mixtapes to establish new artists in the music industry.

Mixtapes, are compilations that, despite their name, appear on CDs or are available online.<sup>4</sup> A key part of the hip-hop world, mixtapes “are often the only way for listeners to keep

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<sup>1</sup> Kelefa Sanneh, *With Arrest of DJ Drama, the Law Takes Aim at Mixtapes*, N.Y. TIMES, Jan. 18, 2007, <http://www.nytimes.com/2007/01/18/arts/music/18dram.html?bl&ex=1169528400&en=de03f8c95961a299&ei=5087%0A> (last visited Dec. 14, 2007).

<sup>2</sup> *Id.* (As the host, the performer has given consent).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

up with a genre that moves too quickly to be captured on” traditionally produced albums.<sup>5</sup> Mixtapes generally include some combination of unreleased remixes, unlicensed mashups that combine the works of one or more artists, that sometimes can include sneak previews from forthcoming feature releases, off-the-cuff freestyle rhymes and bloopers.<sup>6</sup> By definition, mixtape artists sample from other artists. “Sampling refers to a broad spectrum of musical techniques that involve taking some portion of a preexisting sound recording and incorporating it into a new sound recording.”<sup>7</sup> Using another artist’s music is a key tool for the mixtape artist, a way to refer to another artist’s work while demonstrating, through use of the original creator’s work, the mixtape artist’s superior skill. Further, sampling allows the mixtape artist to use the original artist’s own voice, simultaneously changing the context, referencing all that the listener knows of the original artist and enabling the mixtape artist to extol or critique the original artist’s work.<sup>8</sup> And all of this happens in only a few seconds, as a part of the new mixtape creation. “While [mixtape] CDs are consistently integrated into marketing campaigns for hip-hop projects, labels do not formally condone the use of non-copyrighted music,” as a result mixtape artists cannot

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Aaron Power, *15 Megabytes of Fame: A Fair Use Defense for Mash-Ups as DJ Culture Reaches it Postmodern Limit*, SOUTHWESTERN U. L. REV. at 1-2 (2007).

<sup>8</sup> Danah Boyd, speaking at the O’Reilly Emerging Technology Conference, *Incantations for Muggles: The Role of Ubiquitous Web 2.0 Technologies in Everyday Life*, Mar. 28, 2007, <http://www.danah.org/papers/Etech2007.html> (last viewed Apr. 6, 2007) (“This is quite different from the society that you and I were used to growing up. We were used to having walls. We assumed that the norms were set by the environment . . . . Context was key but context depends on there being walls. Online, there are no walls. . . . You can cross through spaces with the click of a few keystrokes and it’s impossible to know what speech will spread where,” changing contexts.).

sell their creations without violating the copyrights of others.<sup>9</sup> As Sasha Frere-Jones, pop music writer for *The New Yorker*, reflects “[m]ixtapes are free. Don't let anyone make you buy one.”<sup>10</sup>

“[M]ixtape DJs have, [however,] been paid by record labels to include up-and-coming artists and upcoming releases on such mixes” and, in fact, DJ Drama “inked a distribution and marketing deal . . . with Asylum Records in 2006.”<sup>11</sup> A lawyer well versed in rap and music industries recounts that “[t]he major labels encourage me to get our artists on mixed tapes. . . . Record labels send us music and ask us to put it on the tapes, saying, ‘I'll give you X amount of dollars to make a tape and you can make your own money, we don't care.’”<sup>12</sup>

Despite endorsements from the copyright-owning artists and record labels. . .

The offices of Atlanta-based Aphilliates Music Group, homebase to DJ Drama . . . were raided . . . by the Morrow County Sheriff's Joint Vice Task Force and the Clayton County Police, working [in partnership] with the Recording Industry Association of America.<sup>13</sup>

Officers froze the company's assets and confiscated computers, recording equipment, cars and over 81,000 mixtape CDs, which were to then be destroyed immediately thereafter.<sup>14</sup> “[A] SWAT team was used to raid a professional studio under investigation for a nonviolent, white-collar crime . . . [where] news footage of the raid shows RIAA officials boxing up only

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<sup>9</sup> Hillary Crosley, *DJ Drama Arrested in Mixtape Raid*, BILLBOARD, Jan. 17, 2007, [http://www.billboard.com/bbcom/news/article\\_display.jsp?vnu\\_content\\_id=1003533767](http://www.billboard.com/bbcom/news/article_display.jsp?vnu_content_id=1003533767) (last visited Dec. 9, 2007).

<sup>10</sup> Refinery 29, *Hot For*, [http://www.refinery29.com/hot\\_for/sasha\\_frerejones.php](http://www.refinery29.com/hot_for/sasha_frerejones.php) (last visited Sept. 14, 2007).

<sup>11</sup> Hillary Crosley and Ed Christman, *Atlanta raid leaves mixtape future in question*, REUTERS, Jan. 21, 2007, <http://www.reuters.com/article/musicNews/idUSN2135284520070122> (last visited Dec. 11, 2007) (noting that DJ Drama's label is Aphilliate Music Group).

<sup>12</sup> *Id.*

<sup>13</sup> Sanneh, *supra* note 1; Crosley, *supra* note 9.

<sup>14</sup> *Id.*

recordable CDs filled with mixes, not bootlegs of retail CDs.”<sup>15</sup> DJ Drama and his business partner were charged with a “felony violation of Georgia’s Racketeering Influenced Corrupt Organization law (known as RICO) and held on \$100,000 bond.”<sup>16</sup>

## B. Copyright Infringement Today

Under current copyright law, the work by DJ Drama, when sold, is a creative work that infringes on the copyrights of others. In order for a plaintiff to establish a claim of copyright infringement, that plaintiff must first show that they own a valid copyright.<sup>17</sup> A work is protected by copyright law if it is an (1) original, (2) expressive work, (3) recorded in a fixed medium.<sup>18</sup> A work that meets these criteria is protected by copyright law the moment it becomes fixed, and these rights extend to works “derived from ‘technologies not yet known’.”<sup>19</sup> The plaintiff must then show that the defendant violated the plaintiff’s exclusive rights, as enumerated in Section 106.<sup>20</sup>

Key in the context of mixtapes or mashups are the exclusive rights granted to copyright holders “to reproduce the copyrighted work” and “to prepare derivative works based upon the copyrighted work.”<sup>21</sup> A derivative work is defined as a copyrighted work that is “recast,

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<sup>15</sup> Tim Lee, *The Technology Liberation Front, SWAT Teams Enforcing Copyright*, Jan. 17, 2007, <http://www.techliberation.com/archives/041766.php> (last visited Sept. 10, 2007).

<sup>16</sup> Sanneh, *supra* note 1.

<sup>17</sup> *Copyright Office Basics*, Circular 1, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/circs/circ1.html#cr> (last visited Sept. 9, 2007).

<sup>18</sup> 17 U.S.C. § 102(a) (2006).

<sup>19</sup> Jonathan Kerry-Tyerman, *No Analog Analogue: Searchable Digital Archives and Amazon’s Unprecedented Search Inside the Book Program as Fair Use*, ¶ 27, Stanford Tech. L. Rev. (2006), [http://stlr.stanford.edu/STLR/Articles/06\\_STLR\\_N1](http://stlr.stanford.edu/STLR/Articles/06_STLR_N1) (last visited Sept. 10, 2007).

<sup>20</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *Rogers*, 960 F.2d at 306; *Harper & Row*, 471 U.S. at 548.

<sup>21</sup> 17 U.S.C. § 106(1).

transformed, or adapted.”<sup>22</sup> An unlicensed mashup or mixtape can certainly be considered an unauthorized derivative work, as the original works have been cut into pieces, reordered, modified, and combined with other copyrighted works or otherwise mixed with new creative content.<sup>23</sup> As unlicensed mashups and mixtapes are clearly created in violation of the copyright holder’s exclusive rights, the only defense for the remixer is the affirmative defense of fair use.<sup>24</sup>

### C. Bridgeport Music And Sampling As Theft

Unlicensed, commercial use of even a tiny section of another’s work is viewed as infringement. *Bridgeport Music, Inc. v. Dimension Films* set forth a bright-line rule for artists who wish to use music created by other artists as one piece of their own work: “Get a license or do not sample.”<sup>25</sup> At issue in *Bridgeport* was a two-second sample of a track by George Clinton, modified and used as a seven-second loop by the defendant.<sup>26</sup> The Sixth Circuit interpreted copyright law literally; even if a lay listener could not recognize the sample as the work of the plaintiff, that plaintiff still intentionally copied and infringed the copyright of the defendant.<sup>27</sup> In cases where a license is too expensive or otherwise impossible to obtain, then, the sampler is left with the options of recreating the desired clip from scratch or not using the clip. This system also “eliminated the possibility of a *de minimis* defense for sampling and recordings,” and allowed

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<sup>22</sup> *Id.* §§ 100, 106(2).

<sup>23</sup> *Id.* § 410(c).

<sup>24</sup> Power, *supra* note 7 at 5-6.

<sup>25</sup> *Bridgeport Music Inc. v. Dimension Films*, 383 F.3d 390, 398 (6th Cir. 2004) (holding that any unauthorized sample of a sound recording constitutes copyright infringement); Power, *supra* note 7 at 3.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

the industry to characterize any unlicensed use as intentional theft.<sup>28</sup> The music “industry realized that by establishing an institutional system for clearing samples, it could avoid future litigation costs and make money from catalog records that had been collecting dust for decades.”<sup>29</sup> This idea has since been expanded upon and used as the foundation for an increasing volume of copyright infringement litigation, a key assumption in later legislation aimed at strengthening copyright law and a means for dubbing the average consumer a “pirate.”<sup>30</sup>

#### D. Affirmative Defense: Fair Use

The affirmative defense of fair use should protect remixes or mashups that are not sold. Four factors are weighed to determine if use of copyrighted material may be considered fair use: (1) the purpose and character of the use, focusing on whether such use is of commercial nature; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>31</sup> Courts place emphasis on the first and fourth factors, and direct that the four statutory factors are to be considered "together in light of copyright's purpose [of promoting science and the arts]," so "courts must be free to adapt the doctrine to particular situations on a case-by-case basis" given this "period of rapid technological change."<sup>32</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (“Ironically, many artists, such as The Beatles, who rigorously opposed unlicensed sampling, employed identical techniques in their own works. . . . Therefore, if an artist’s vision is to include a certain piece of music by an artist who is opposed to licensing that piece, then the new work can never be realized unless it is done ‘illegally’.”).

<sup>31</sup> 17 U.S.C. § 107.

<sup>32</sup> Kerry-Tyerman, *supra* note 19 ¶¶ 44, 53, 102.

Yet relying on fair use as protection is a risky proposition, and “assuming a use qualifies as fair use remains a gamble.”<sup>33</sup> As fair use is an affirmative defense, it can only be put forth *after* a claim of infringement has been made. At this point the dispute has been taken to the judiciary and the remix artist, though innocent until proven guilty, must still pay to defend the disputed work, risk a judgment in the opponent’s favor, or agree to settle and stop the disputed creative endeavors. Although DJ Drama, for example, labeled each CD with the words “For Promotional Use Only,” courts often interpret “commercial” broadly, as including a wide range of acts.<sup>34</sup> Further, recent amendments to copyright law include only narrowly crafted exemptions for public use.<sup>35</sup> As Rep. Boucher states, “the fair use rights of consumers of digital media are severely threatened. . . [t]he fair use doctrine is threatened today as never before.”<sup>36</sup>

#### E. Sampling + Fair Use Analysis = Infringement

In *15 Megabytes of Fame: A Fair Use Defense for Mash-Ups as DJ Culture Reaches its Postmodern Limit*, Aaron Power uses audio mashups, such as Danger Mouse’s Grey Album, to show that the present fair use system does not permit more than *de minimus* quantitative or qualitative taking and argues, using the genre of mashups as his case study, that the present fair

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<sup>33</sup> Thomas Claburn, *Fair Use Worth More to Economy Than Copyright, CCA Says*, INFORMATION WEEK, Sept. 12, 2007, <http://www.informationweek.com/story/showArticle.jhtml?articleID=201805939> (last visited Dec. 15, 2007) (“The distinction between fair use and infringement isn’t easily defined, as the Copyright Office puts it. Companies like Google, which has been sued at least four times so far this year for copyright infringement, know this all too well.”).

<sup>34</sup> Saneh, *supra* note 1. Also see Louise Story, *Viacom’s Full-Court Press for Online Ads*, N.Y. TIMES, Mar. 19, 2007, <http://www.nytimes.com/2007/03/19/business/media/19viacom.html?ex=1331956800&en=6c8bb137e29f12a6&ei=5090&partner=rssuserland&emc=rss> (last visited Dec. 14, 2007).

<sup>35</sup> *Reps. Boucher and Doolittle Introduce the FAIR USE Act of 2007* (Feb. 27, 2007), [http://www.boucher.house.gov/index.php?option=com\\_content&task=view&id=1011&Itemid=75](http://www.boucher.house.gov/index.php?option=com_content&task=view&id=1011&Itemid=75) (last visited Sept. 8, 2007) [*hereinafter* FAIR USE].

<sup>36</sup> *Id.*

use analysis should be entirely renovated.<sup>37</sup> Powers points to the Sixth Circuit's decision in *Bridgeport Music* as a prime example of copyright law creating a disincentive to new creation, at the expense of fair use protection. The court in *Bridgeport* followed no precedent and instead relied "entirely on statutory interpretation of § 114 of the Lanham Act."<sup>38</sup> Meanwhile, the court's analysis focused on economic theory and discounted "any potential artistic or critical value in the selection and execution of a sample."<sup>39</sup> Yet artists may sample for a number of reasons, not just for ease of access or the lack of ability to create new content.

The court explained that "*sampling is never accidental* . . . When you sample a sound recording you know you are taking another's work product."<sup>40</sup>

This attitude makes little sense as applied to the mash-up [or mixtape] because a mash-up producer, unlike a sampler, is not trying to hide the authorship of the prior recordings, nor claim them as his own work. [Further, ] *Bridgeport Music's* economic approach ignores the possibility that art can, and should, be created outside of a market environment.<sup>41</sup>

While Powers focuses only on mashups, the analysis also applies to mixtapes and, more broadly, to failures in the copyright system in varied but fundamentally related contexts. Mixtapes are slightly different from mashups. Mashups combine long sections of two or more

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<sup>37</sup> *Id.* ("The best-known mashup in the United States is an unauthorized album-length project called 'The Grey Album,' assembled by Brian Burton, known professionally as Danger Mouse."); Sasha Frere-Jones, *I + I + I = I*, THE NEW YORKER, Jan. 10, 2005, [http://www.newyorker.com/archive/2005/01/10/050110crmu\\_music](http://www.newyorker.com/archive/2005/01/10/050110crmu_music) (last visited Oct. 4, 2007) (explaining that Danger Mouse created the CD by remixing the music tracks from The Beatles' White Album. He then used these instrumental remixes as the background for vocals from rapper Jay-Z's Black Album. While Jay-Z chose to release an a cappella version of his CD to enable the creation of remixes by other artists, the Beatles' label would not allow use of the White Album. As such, the album only found release online, as a free download, often in defiance of cease and desist letters from The Beatles' label.).

<sup>38</sup> Power, *supra* note 7 at 4. ("*Bridgeport Music* was limited to the *de minimis* defense issue for sound recording infringement . . . . [F]air use is distinct from a *de minimis* defense. A *de minimis* defense is successful when there has not been a substantial taking, and thus, the plaintiff has failed to prove infringement. On the other hand, fair use arises only after an infringement has been established.").

<sup>39</sup> *Id.*

<sup>40</sup> *Bridgeport supra* note 35 at 399 (emphasis added).

<sup>41</sup> Power, *supra* note 7 at 4.

songs to create a new work. Mixtapes differ because while mixtape tracks still combine and remix works from different artists, mashing them together into a new form, mixtapes also generally contain a large amount of original content, usually provided and created by participating artists. Both mashups and mixtapes “are different from traditional digital sampling, and consequently, . . . it would be inappropriate to analyze [either] under the . . . rule announced in *Bridgeport Music*.”

#### F. Conflicting Messages

Returning to DJ Drama, his entire business operated under mixed messages from the industry in which he worked. Over 81,000 CDs were seized, a volume suggestive of commerce. Though he founded his business on sampling without copyright holder permission, in violation of copyright law, the artists and recording companies who could enforce their rights against DJ Drama encouraged him to continue working. “Record companies usually portray the fight against piracy as a fight for artists’ rights, but this case complicates that argument: most of DJ Drama’s mixtapes begin with enthusiastic endorsements from the artists themselves.”<sup>42</sup> Copyright holders pushed their artists to work with him, sponsored and promoted his work, and profited from his creative effort. And then a SWAT team raided his business and placed him under arrest. DJ Drama sat “in jail, but dozens of his unlicensed compilations were still available at the iTunes shop.”<sup>43</sup>

In response to DJ Drama’s arrest, Brad Buckles, executive vice president of the RIAA's Anti-Piracy Division in Washington, D.C., stated that “[a] sound recording is either copyrighted

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<sup>42</sup> Sanneh, *supra* note 1.

<sup>43</sup> *Id.*

or it's not."<sup>44</sup> "Whether it's a mixtape or a compilation or whatever it's called, it doesn't really matter: If it's a product that's violating the law, it becomes a target."<sup>45</sup>

#### G. Creating Inefficiency By Adding Disincentives To The Generation Of New Creative Works

So what is required of an artist if they want to legally sell a mashup or mixtape? In 2003, Jeremy Brown, a.k.a. DJ Reset, took apart a song called "Debra" by Beck,<sup>46</sup> using software that allowed Software allowed Brown to isolate specific instrumental elements.<sup>47</sup> The thirty-three year-old professional musician, a student of jazz great Max Roach, then adjusted the tempo of "Debra" "and added live drums and human beat-box noises that he recorded at his [home]."<sup>48</sup> Next he sifted through thousands of "a-cappella vocals archived on several hard drives,"<sup>49</sup> some of which had been commercially released as singles, "specifically intended for d.j. use," while others appeared on the Internet, via leaks by people working "in the studio where the song was recorded, or sometimes even by the artist."<sup>50</sup> Brown finally found an a-cappella vocal called "Frontin'" in approximately the same key as "Debra."<sup>51</sup> While not stylistic analogs, "the vocalists [were] doing something similar. Brown exploited this commonality, and used his software to put the two singers exactly in tune."<sup>52</sup> After several months of adding to, cutting and

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<sup>44</sup> *Id.*

<sup>45</sup> Jem Aswad, *RIAA Speaks on DJ Drama Raid: 'We Enforce Our Rights'*, MTV, Jan. 17, 2006, [http://www.mtv.com/news/articles/1550169/20070117/dj\\_drama.jhtml](http://www.mtv.com/news/articles/1550169/20070117/dj_drama.jhtml) (last visited Dec. 11, 2007).

<sup>46</sup> Frere-Jones, *supra* note 37.

<sup>47</sup> *Id.*

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

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* ("Frontin' [is] a collaboration between the rapper Jay-Z and the producer Pharrell Williams.").

<sup>52</sup> *Id.*

modifying the base tracks by other artists, Brown's completed work, "Frontin' On Debra" sounded "not like two songs stitched together, but one single" song.<sup>53</sup> Brown first made the track available on his website, where it gained rapid audience support in the form of voluminous downloads.<sup>54</sup> Recognizing Brown's success, Beck convinced his record company to authorize Brown's final song. Thanks to Beck's efforts, "Frontin' On Debra" ultimately made its way to iTunes, for licensed, legal, profitable sale.<sup>55</sup>

At the time of its creation, "Frontin' on Debra" required several months of work by a professional musician, who needed to infringe multiple copyrights and then hope for permission from the copyright holders of the base works in order to sell the result of his creative labor. Brown, likely not well connected enough in the music industry to obtain permission ahead of time, had no choice but to assume the risk of an infringement suit in order to produce his creative work. If Brown had tried to sell his work without permission, Beck could have filed suit against Brown for infringement. Had Beck not recognized the quality of Brown's work, Beck would never have profited from that work, either.

By contrast, releasing an entire album of mashups or remixes would be much more difficult for a third party artist. In 2005, a legally cleared album of mashups combining Jay-Z's work on multiple albums with the music of the rock band Linkin Park reached the Billboard Top Ten.<sup>56</sup> Jennifer Justice, an attorney representing Jay-Z, explained how difficult it was to create the innovative, highly profitable album of new creative works.<sup>57</sup> The difficulties arose not from

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

musical challenges in creating the new artistic work, nor from diverging interests among the creators. Instead, the complications arose entirely from licensing issues, thanks to the morass of approvals required by current copyright law.<sup>58</sup>

Just one of Jay-Z's songs, "99 Problems":

Uses two huge samples and has four different credited publishers. That's before you've added anyone else's music to it, which would be yet another publisher or two. Making a mashup with that song means the label issuing the mashup has to convince all the publishers involved to take a reduction in royalty—otherwise, it won't be profitable for the label. The publishers are not going to agree to this if we're not talking about two huge artists. With Jay-Z and Linkin, it's like found money, but less well known artists might not be sexy enough or big enough.<sup>59</sup>

Despite these difficulties, remix artists continue to produce more mashups and mixtapes each year. Corporate copyright holders cannot act quickly enough to control when mashups are made, distributed or sold.<sup>60</sup>

Mashup artists . . . have found a way of bringing pop music to a formal richness that it only rarely reaches. See mashups as piracy if you insist, but it is more useful, viewing them through the lens of the market, to see them as an expression of consumer dissatisfaction [with poor quality releases]. Armed with free time and the right software, people are rifling through the lesser songs of pop music and, in frustration, choosing to make some of them as good as the great ones.<sup>61</sup>

### III. EXPANDING OUT

At their core, audio mashups and mixtapes are no different than video mashups, content-blending, aggregating software, or standard documentaries. All use (1) inexpensive (or free),

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

easy to use and widely available tools to (2) create works that (3) take bits and pieces from content created by others (4) and repurpose that content, along with the remixer's creative content, (5) to produce a brand new creative work.

#### A. Video Mashups

YouTube obtained rapid success under this framework, with the website itself acting as a tool that allowed for easy access to and distribution of consumer-created or edited content. End-users applied these new tools to not only publish and distribute homemade videos, but also to post direct copies of copyrighted work. These unlicensed postings led Viacom, after failing to reach a licensing accord, to file suit.<sup>62</sup> While the bulk of Viacom's suit is aimed at the posting of direct copies of video content to which Viacom holds the copyright, Viacom still takes pains to send cease and desist letters to users who use bits of copyrighted audio or video as part of a larger original creation.<sup>63</sup> Viacom also still sends takedown notices to YouTube regarding these user-created videos, just as they would call for the removal of a video clip posted in its entirety.<sup>64</sup>

#### B. Content-blending Or Aggregating Software

Google News ("News") is a website that aggregates links from online news sources worldwide. Google has been "sued for copyright infringement over Google News' modus operandi of indexing media content without permission."<sup>65</sup> "Google defended News saying that it is protected by the fair use principle . . . and that it provides great benefit to media Web sites by

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<sup>62</sup> David Kirkpatrick, *How Viacom could really protect its content*, FORTUNE, Mar. 16, 2007, [http://money.cnn.com/2007/03/15/technology/fastforward\\_viacom.fortune/index.htm?postversion=2007031610](http://money.cnn.com/2007/03/15/technology/fastforward_viacom.fortune/index.htm?postversion=2007031610) (last visited Dec. 15, 2007).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Juan Carlos Perez, *Google stands firm behind News search site*, COMPUTERWORLD, May 24, 2007, <http://www.computerworld.com.au/index.php/id;535941450;fp;;fpid;;pf;1> (last visited Dec. 9, 2007).

sending them readers.”<sup>66</sup> A Belgian court, disagreed, stating that “Google could not rely on exemptions, such as . . . ‘fair use’.”<sup>67</sup> Though not made by a U.S. court, the Belgian Court’s judgment is representative of a larger school of thought. As with much of the rhetoric from those who would strengthen copyright law, the ruling was “fundamentally out of sync with how the Web works. The whole basis of the Web is making links.”<sup>68</sup> The Internet “can both encourage creation and dissemination by reducing the costs associated with it, and can enhance the value of material made available over the network because of the ease with which it can be linked to other valuable material.”<sup>69</sup> The Web, and digital technology as a whole, is all about the ability to connect and share information, to repurpose, re-contextualize and create new from old.

### C. Documentaries

Documentaries, too, should be easier to make than ever before. After all, documentaries are often, at their core, remixed amalgams of already available content. Video and audio recording and editing equipment are now so inexpensive and readily available that even major motion pictures have been created using nothing but common, widely available computers and software.<sup>70</sup> Yet where an explosion of new creative content would normally be expected, there has been a decline in the number of documentaries produced in recent years.

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<sup>66</sup> *Id.*

<sup>67</sup> Aoife White, *Belgian Papers win Google copyright suit*, THE ASSOCIATED PRESS, Feb. 14, 2007, [http://www.usatoday.com/tech/news/2007-02-13-belgium-google\\_x.htm?POE=TECISVA](http://www.usatoday.com/tech/news/2007-02-13-belgium-google_x.htm?POE=TECISVA) (last visited Dec. 16, 2007).

<sup>68</sup> Andy Oram, *The Problem with Webcasting A cast that can be imprisoning*, O’REILLY, Jan. 13, 2006, <http://www.oreilly.com/pub/a/etel/2006/01/13/the-problem-with-webcasting.html> (last visited Sept. 4, 2007).

<sup>69</sup> JESSICA LITMAN, *DIGITAL COPYRIGHT 108* (Prometheus Books 2001).

<sup>70</sup> Joe Cellini, *Brian J. Terwilliger: Runway Romance*, <http://www.apple.com/pro/profiles/terwilliger/> (last visited Dec. 16, 2007) (““We made this whole film [*One Six Right*] on a Mac, start to finish,” he says. . . . “[W]hat sold me was that it was very inexpensive, and I could work anywhere.”). *Also see* Apple Pro Profiles <http://www.apple.com/pro/profiles/> (last visited Dec. 16, 2007) (noting that *South Park* and Tim Burton’s *Corpse Bride* were also made using commercially available hardware and software).

A key problem for documentary film makers is that while they are required to license content as though creating a standard, for-profit endeavor, documentaries are often made for reasons other than profit. As such, these documentary film makers cannot afford to pay licensing fees charged by content holders. Documentaries that aim to air the dirty laundry of copyright holders run into a further problem. Because the documentary is technically a for-profit endeavor, there is little room to apply the fair use doctrine as a defense. In these cases, copyright restrictions make the creation of documentaries using recent media extremely difficult to create.

As one small example...

Time Warner claims copyright ownership over the lyrics to “Happy Birthday” and vigorously enforces its purported exclusive rights based thereon. . . . [T]he makers of the documentary *The Corporation* have a minute of silence in their movie during a birthday party scene since they elected not to license the rights to the song – a use that allegedly would have cost them several thousand dollars.<sup>71</sup>

DJ Drama’s mixtapes. User-generated content published to YouTube. Google News. *The Corporation*. All are, at their core, the same. Each is taking content created by another, adding new creative content and re-publishing. Regardless of whether some of these actors view this work as creative art or intend to profit from their creations, all are finding new ways to generate new creative expression; maximizing the use of previously created content. As such, though each use is being challenged by current copyright holders, each is actively promoting the spirit and goals of copyright law.

#### IV. CHANGE OVER TIME: INFRINGERS TODAY ARE LESS MORALLY CULPABLE

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<sup>71</sup> John Tehranian, *Infringement Nation: Copyright Reform And The Law/Norm Gap*, n. 44, [http://www.turnergreen.com/publications/Tehranian\\_Infringement\\_Nation.pdf](http://www.turnergreen.com/publications/Tehranian_Infringement_Nation.pdf) (last visited Dec. 15, 2007) (citing KEMBREW C. MCLEOD, FREEDOM OF EXPRESSION: RESISTANCE AND EXPRESSION IN THE AGE OF INTELLECTUAL PROPERTY 15-18 (2007) and *The Corporation* (Big Picture Media Corp., 2003)).

The remixers and mashup artists, infringers under copyright law, are less morally culpable than infringers of ten years ago. Then, the primary infringers were large-scale criminal enterprises that profited by duplicating, as perfectly as possible, the works of others in large volumes for resale. These sophisticated enterprises required a great deal of capital, as the tools needed for duplication were costly and required expertise to operate. Worse, their business model was based on undercutting the artists from whom they were stealing; bootleggers sold for less than the original artist to those who otherwise could purchase only from the legitimate source. As such, this constituted a direct theft of the artist's costly-to-create content. Current copyright law developed in a world where this large-scale, expensive criminal infringement dominated as the primary threat to copyrighted, creative works.

The tools available for production and distribution evolved with the development of the Internet and digital technology.<sup>72</sup> Digital technology and the Internet have made access to others' work easy, cheap and fast; only minimal training is needed to make modifications formerly available only to highly trained professionals with expensive equipment.<sup>73</sup> While bootleggers, too, can more easily make and sell direct copies, the primary creativity-enabling advance stems

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<sup>72</sup> *End of an Era*, CORANTE.COM, Feb 28, 2004, <http://www.corante.com/cgi-bin/mt/mt-tb.cgi/1442> (last visited Nov. 10, 2007) (“We aren’t at the beginning of an era where we numbly accept content. The beginning of that era was when Edison first set stylus to wax cylinder, the beginning of the era of mechanical reproduction. It was an era of unchangeable physical format that could only be produced and distributed efficiently en masse. *That* era is dying. . . . After less than a century of dominance, . . . people are waking up from the consumerist coma induced by the era of mechanical reproduction. What we are seeing is the birth of a new era, an era of empowerment, where people are both consumers and producers of content, a wonderful bricolage of both old and new. Blogs are one example . . . but so is the Grey Album, Phantom Edit, machinima, and the whole modding community (among others).”).

<sup>73</sup> See Boyd, *supra* note 8 (“[The magic is] the way technologies serve the lives of \*everyday people\*, not just technologists.”).

from the advent of consumer ability to remix, mashup, modify and mix.<sup>74</sup> The average home user, at almost no cost, can now obtain all of the tools necessary to modify the works of another, to add their own spin to that work, and to distribute it to the world.<sup>75</sup> “You don’t need a distributor, because your distribution is the Internet. You don’t need a record label, because it’s your bedroom, and you don’t need a recording studio, because that’s your computer. You do it all yourself.”<sup>76</sup>

In contrast to the big, creative media copyright holders, established companies in a variety of other industries have chosen to embrace these changes in technology, especially regarding the sharing of scientific data and underutilized patents owned by companies with large patent portfolios.<sup>77</sup> Even some of the classic, blue chip titans, such as IBM, see value in allowing others to remix or repurpose their content, and voluntarily open their portfolios to encourage further exploitation.<sup>78</sup>

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<sup>74</sup> Cf. Steve Lohr, *Google’s Chief on What’s Different*, N.Y. TIMES, Dec. 16, 2007, <http://www.nytimes.com/2007/12/16/technology/16ericmemo-web.html?em&ex=1197954000&en=e8a756d8121a820a&ei=5087%0A> (last visited Dec. 16, 2007) (“The accelerating impact of digital technology on how businesses are organized and managed is beyond question. E-mail, BlackBerries, instant messaging, blogs, Web conferencing and wikis are all part of the mix.”).

<sup>75</sup> Gina Trapani, *Build Your Own Mashups with Microsoft’s Popfly*, LIFEHACKER.COM, Oct. 18, 2007, <http://lifehacker.com/software/web-publishing/build-your-own-mashups-with-microsofts-popfly-312523.php> (last visited Dec. 16, 2007) (noting that both Microsoft and Yahoo! have even released software “allowing regular folks . . . to tak[e] a building block approach to mashup creation . . . through a drag and drop interface”).

<sup>76</sup> Frere-Jones, *supra* note 37 (quoting Mark Vidler) (“Mashups find new uses for current digital technology, a new iteration of the cause-and-effect relationship behind almost every change in pop-music aesthetics: the gear changes, and then the music does. If there is an electric guitar of mashup, it is a software package called Acid Pro, which enables one to put loops of different songs both in time and in tune with each other. . . . [Vidler’s] first [mashup] was called “Slim McShady,” a combination of Eminem and Wings. ‘I created it on a Saturday, posted it on the Tuesday, and got played on the radio that Friday’.”).

<sup>77</sup> DAN TAPSCOTT & ANTHONY WILLIAMS, WIKINOMICS 163 (The Penguin Group 2006) (“The Human Genome Project represents a watershed moment, when a number of pharmaceutical firms abandoned their proprietary human genome project to back open source collaborations.”).

<sup>78</sup> See generally *Id.*

Yet copyright law has not been amended or adjusted to keep pace with these technological changes. The purpose, goal, and process for development are completely different for those who would remix or repurpose content when compared to the incentive and intent of bootleggers profiting from direct duplication. Still, the law makes no distinction between the enterprise-level bootlegger and the creative home mashup artist. Worse, entrenched copyright holders argue that there *should* be no difference between the two groups.<sup>79</sup> If this argument succeeds, not only will the average consumer remain in violation of copyright law, but the law will stunt innovation and economic growth.<sup>80</sup>

#### A. Generations And Expectations

More than half of online teens, dubbed the “NetGen,” are content creators – that is, “the ability to remix media, hack products, or otherwise tamper with consumer culture is their birthright”.<sup>81</sup> The programmable Web eclipses the static Web every time, and this “new Web is principally about participating rather than about passively receiving information.”<sup>82</sup> NetGens

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<sup>79</sup> Eric Bangeman, “*Copying music you own is stealing*”, ARS TECHNICA, Oct. 2, 2007, <http://arstechnica.com/news.ars/post/20071002-sony-bmgs-chief-anti-piracy-lawyer-copying-music-you-own-is-stealing.html> (last visited Oct 3, 2007) (“When an individual makes a copy of a song for himself, I suppose we can say he stole a song.” Making “a copy” of a purchased song is just “a nice way of saying ‘steals just one copy.’”) (quoting testimony in *Capitol Records, Inc. v. Thomas* 68 Fed. R. Serv. 3d (Callaghan) 264 (E.D.N.Y. 2007) by Jennifer Pariser, the head of litigation and chief anti-piracy lawyer for Sony BMG).

<sup>80</sup> See *The Death of Video Culture*, Feb. 26, 2007, <http://www.fimoculous.com/archive/post-2218.cfm> (last visited Mar. 12, 2007) (“There was a brief moment where these types of posts opened our eyes to the potential of a new form of curatorial criticism of video, with a mashup of moving illustrations . . . controlled by users. Suddenly, you could image whole new ways to conceive of writing about the history of visual culture. Now, just months later, that vision has been practically erased, as . . . 54 of 100 . . . clips from the above post have been removed from YouTube . . . . I find it hard to believe this is good for anyone -- artist, label, critic, fan, [or] the marketplace of ideas.”).

<sup>81</sup> TAPSCOTT & WILLIAMS, *supra* note 77 at 37, 52. (“[T]he generation that will inject the culture of openness, participation and interactivity into workplaces, markets and communities.”)

<sup>82</sup> *Id.* at 37, 38.

treat “the world as a place for creation, not consumption,” and consider these activities “natural to our next generation.”<sup>83</sup>

Modern consumers “configure products for their own ends”, making “[s]tatic, immovable, non-editable items . . . anathema, ripe for the dustbins of twentieth-century history.”<sup>84</sup> Within communities enabled by technology, “young people today are predisposed to connect and collaborate with peers to achieve their goals.”<sup>85</sup> Users no longer need innovate in isolation or wait to share their creative works.<sup>86</sup> Companies that ignore these consumers or try to stop them “risk becoming irrelevant spectators.”<sup>87</sup>

### B. A New Model Is Born

The Internet and digital technology have pushed the world economy into a new age; generating new business models to best leverage contemporary and future tools.<sup>88</sup> When pre-industrial tools prevailed, the feudal craft shop developed as the best means of exploiting available technology.<sup>89</sup> The Industrial Age brought about the corporate command and control hierarchy which remains as the entrenched, dominant business structure and, therefore retains the

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<sup>83</sup> *Id.* at 27; Eric Schmidt, *Google's Chief on What's Different*, N.Y. TIMES, Dec. 16, 2007, <http://www.nytimes.com/2007/12/16/technology/16ericmemo-web.html?em&ex=1197954000&en=e8a756d8121a820a&ei=5087%0A> (last visited Dec. 16, 2007).

<sup>84</sup> TAPSCOTT & WILLIAMS, *supra* note 77 at 127.

<sup>85</sup> *Id.* at 129.

<sup>86</sup> *Id.* at 49-50

<sup>87</sup> *Id.* at 53, 129. (“20% of online teens report remixing content they find online into their own artistic creations.”).

<sup>88</sup> See John Steele Gordon, *What Hath Google Wrought?*, AM. HERITAGE BLOG, Sept. 28, 2007, [http://www.americanheritage.com/rss/blog/20079\\_28\\_1252.shtml](http://www.americanheritage.com/rss/blog/20079_28_1252.shtml) (last visited Oct. 14, 2007) (“Just as the telegraph speeded up communication by orders of magnitude in the middle of the nineteenth century and changed the world profoundly thereby, so the Internet has accelerated research by a similar amount. Google has, in effect, created a single, integrated index to all the knowledge in the world. You don’t even have to flip the pages. Just type in a few keywords, and there is what you are looking for, ready to be highlighted, copied, and pasted into whatever you are working on.”).

<sup>89</sup> TAPSCOTT & WILLIAMS, *supra* note 77 at 25.

greatest impact on business and political decisions today.<sup>90</sup> While command and control functioned as the most efficient way of managing and encouraging profitable creation, consumers learned “numbly to accept that ‘content’ is just provided to us. It’s an atom, a thing that floats in space, unchanging. We can hear or see it, as part of a mass content-absorption experience, but we are at a distance from it.”<sup>91</sup> Emerging digital tools lend themselves to peer production, egalitarianism, open information and transparency.<sup>92</sup> These tools, along with the digitization of media, significantly changed the “economics of production . . . as we have moved from an industrial-based economy.”<sup>93</sup> We are at the beginning of a paradigm shift, and

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<sup>90</sup> *Id.*

<sup>91</sup> Susan Crawford, *Bits, Atoms, and Beethoven*, SUSAN CRAWFORD BLOG, Feb. 28, 2004, [http://scrawford.blogware.com/blog/\\_archives/2004/2/28/23653.html](http://scrawford.blogware.com/blog/_archives/2004/2/28/23653.html) (last visited Dec. 15, 2007) (quoting Leonard Slatkin: “[D]uring the last 25 years or so we’ve adopted this prayerful, pure ([Crawford’s] words) approach to “classical” music. We see and hear these works as unchanging and unchangeable. But that’s not what they are. . . . They change with the times.”).

<sup>92</sup> TAPSCOTT & WILLIAMS, *supra* note 77 at 25. *See also* Cory Doctorow, as interviewed by Jason Kottke, Nov. 4, 2007, <http://www.kottke.org/07/11/cory-doctorow> (last visited Nov. 4, 2007) (“[Artistically,] we live in a century in which copying is only going to get easier. It’s the 21st century, there’s not going to be a year in which it’s harder to copy than this year; there’s not going to be a day in which it’s harder to copy than this day; from now on. Right? If copying gets harder, it’s because of a nuclear holocaust. There’s nothing else that’s going to make copying harder from now on. And so, if your business model and your aesthetic effect in your literature and your work is intended not to be copied, you’re fundamentally not making art for the 21st century. It might be quaint, it might be interesting, but it’s not particularly contemporary to produce art that demands these constraints from a bygone era.”).

<sup>93</sup> *Id.* at 56, 68. *Also see* Yochai Benkler, *Coase’s penguin, or Linux and the Nature of the Firm* 112 YALE L.J. 369 (2002) (summarizing Coase’s Transaction Costs as: (1) search, (2) negotiation/contracts, (3) coordination (mesh products and processes). Traditionally, these costs decreased as these tasks are taken in-house. Coase’s Law: if it is cheaper to go to the marketplace, do not try to solve the problem internally. Coase’s Law has flipped. Now, a corporation should shrink until it is cheaper to develop in-house, as transaction costs are so low).

established experts in Industrial Age business models are ill-equipped to make decisions related to new technology.<sup>94</sup>

“[C]opyright law should adapt to this new technology, as it has in the past, to foster, rather than inhibit, its benefit to society.”<sup>95</sup> Current copyright protection, designed for a world where media reproduction and modification were difficult and costly, overreaches and, in doing so, stifles innovation.<sup>96</sup> Under current law...

John Tehranian, a law professor at the University of Utah, calculates . . . that he rings up \$12.45 million in liability over the course of an average day. The gap between what the law allows and what social norms permit is so great now that "we are, technically speaking, a nation of infringers."<sup>97</sup>

The U.S. should be a world leader in technological innovation but current law and proposed amendments to copyright law make the common consumer an infringer, create disincentives to

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<sup>94</sup>See Thomas David Kehoe, *How Experts Fail: The Patterns and Situations in Which Experts Are Less Intelligent Than Non-Experts, Paradigm Shifts and Profound Stupidity*, Aug. 10, 2007, [http://howexpertsfail.com/~howexper/index.php?title=Paradigm\\_Shifts\\_and\\_Profound\\_Stupidity](http://howexpertsfail.com/~howexper/index.php?title=Paradigm_Shifts_and_Profound_Stupidity) (last visited Dec. 14, 2007) (“The idea that intelligent, educated, respected experts can’t see that their ideas are wrong is upsetting to many people. However, . . . [w]hen you encounter a person in such a state, you can present any and all kinds of evidence proving that a belief he holds is wrong, and he’ll reject all of your evidence and go on believing his belief.”) (paraphrasing THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 151 (Univ. Of Chicago Press, Third Edition, 1996) (“[A] new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it.”)) (Note: The article is part of a wiki documenting a book in progress).

<sup>95</sup> *Id.* ¶ 52.

<sup>96</sup> This move to rapid production and easy modification has happened before, and our society chose not to protect creative work in affected industries. As a prime example, the fashion industry has thrived without copyright protection. James Surowiecki, *The Piracy Paradox*, *THE NEW YORKER*, Sept. 24, 2007, [http://www.newyorker.com/talk/financial/2007/09/24/070924ta\\_talk\\_surowiecki](http://www.newyorker.com/talk/financial/2007/09/24/070924ta_talk_surowiecki) (last visited Sept. 25, 2007) (The fashion industry is “not alone in its surprising mixture of weak intellectual-property laws and strong innovation: haute cuisine, furniture design, and magic tricks are all fields where innovators produce new work without being able to copyright it. . . . Fashion has . . . characteristics that limit the damage that copying can do: it’s relatively cheap to come up with new designs, there’s a culture of novelty, and people are willing to pay more for the right brands. But we should be skeptical of claims that tougher laws are necessarily better laws. Sometimes imitation isn’t just the sincerest form of flattery. It’s also the most productive.”).

<sup>97</sup> Nate Anderson, *Overly-broad copyright law has made USA a "nation of infringers"*, Nov. 19, 2007, *ARS TECHNICA*, <http://arstechnica.com/news.ars/post/20071119-overly-broad-copyright-law-has-made-us-a-nation-of-infringers.html> (last viewed Dec. 15, 2007) (citing Tehranian, *supra* note 71. (assuming the maximum statutory damages: \$150,000 per incidence of infringement, as per 17 U.S.C. § 504(c)(2) (2006)).).

innovation, and protect only a narrow segment of American industry, removing any need for established copyright holders to innovate and adapt.<sup>98</sup>

## V. COPYRIGHT HOLDERS CALL FOR INCREASED PROTECTION

Copyright is the nation's leading system for subsidizing the creative industries, especially film, television, and book publishing.<sup>99</sup> Despite the strong protection granted by current law to copyright holders, the U.S. Attorney General pressed Congress in May 2007 to enact a sweeping intellectual-property bill “that would increase criminal penalties for copyright infringement, including ‘attempts’ to commit piracy.”<sup>100</sup> The goal? “To meet the global challenges of IP crime, our criminal laws must be kept updated.”<sup>101</sup> In December 2007, a bipartisan coalition in Congress introduced the Prioritizing Resources and Organization for Intellectual Property (PRO-IP) Act of 2007, “a major bill aimed at boosting US intellectual property laws and the penalties that go along with them.”<sup>102</sup> “The PRO-IP Act seeks to stem the ‘tsunami’ (as one representative put it) of counterfeiting and piracy by making a pair of changes to the structure of the federal government.”<sup>103</sup>

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<sup>98</sup> FAIR USE *supra* note 35.

<sup>99</sup> Tim Wu, *Tolerated Use: The Copyright Problem, American Lawbreaking*, SLATE, Oct. 16, 2007, <http://www.slate.com/id/2175730/entry/2175731/> (last visited Dec. 15, 2007).

<sup>100</sup> Rep. Doolittle, FAIR USE *supra* note 35.

<sup>101</sup> Decian McCullagh, *Gonzales proposes new crime: ‘Attempted’ copyright infringement*, C|NET.COM, May 15, 2007, <http://www.slate.com/id/2165033/?sid13> (last visited Aug. 8, 2007).

<sup>102</sup> Nate Anderson, *Congress’ copyright reform: seize computers, boost penalties, spend money*, ARS TECHNICA, Dec. 6, 2007, <http://arstechnica.com/news.ars/post/20071206-congress-copyright-reform-seize-computers-boost-penalties-spend-money.html> (last visited Dec. 15, 2007).

<sup>103</sup> Nate Anderson, *House committee hears the cons of the PRO-IP Act*, ARS TECHNICA, Dec. 13, 2007, <http://arstechnica.com/news.ars/post/20071213-house-committee-hears-the-cons-of-the-pro-ip-act.html?rel> (last viewed Dec. 15, 2007) [*hereinafter* PRO-IP].

In addition to strengthening both civil and criminal penalties for copyright and trademark infringement, the big development here is the proposed creation of the Office of the United States Intellectual Property Enforcement Representative (USIPER). This is a new executive branch office tasked with coordinating IP enforcement at the national and international level. To do this work internationally, the bill also authorizes US intellectual property officers to be sent to other countries in order to assist with crackdowns there. In addition, the Department of Justice gets additional funding and a new unit to help prosecute IP crimes.<sup>104</sup>

In the face of changing technology, copyright holders are pushing Congress to strengthen their already powerful monopoly over creative content. Congress, in introducing the PRO-IP Act, is ignoring societal changes and far reaching opportunities for the development of new creative endeavors and new markets brought about by technological innovation. Instead of using this opportunity to redefine statutory language to specifically target counterfeiting and piracy, Congress is maintaining overly broad designations that also include private users or creative remixers as infringers. Ignoring copyright's goals of incentivizing and rewarding creative works, the PRO-IP Act continues to favor narrow, established business interests. In this way, the PRO-IP Act further entrenches business models ill-suited for the digital world. Worse, this call for added protection is unnecessary.

#### A. Protection Is Already Strong

Copyright protection is overly broad and too strong for use in the digital world. In the first file-sharing case to go to trial under current copyright law, a Minnesota jury found Jammie Thomas, a 30-year-old single mother...

Liabel for infringing the record labels' copyrights on all 24 of the 24 recordings at issue. . . . The jury awarded \$9,250 in statutory damages per song, after finding

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<sup>104</sup> *Id.*

that the infringement was ‘willful,’ out of a possible total of \$150,000 per song. The grand total? \$222,000 in damages.<sup>105</sup>

The parties hotly contested jury instructions regarding when, as a matter of law, copyright infringement occurred. The judge sided with the plaintiff on this key issue, finding that no showing of actual file transmission need be shown to legally demonstrate infringement.<sup>106</sup> Even though a jury awarded \$9,250 per song against a consumer who made 24 songs available from her home computer, some in Congress believe that current statutory penalties are not enough.

Under current law, for example, someone who pirates a single album will be charged with one crime. [The PRO-IP Act], however, would penalize criminals on a per-song basis, so if someone pirated a motion picture soundtrack that had songs from 12 different artists, the pirate would be charged with 12 separate offenses and be subject to exorbitant fees.<sup>107</sup>

Some members of Congress expressed concern, stating that “[t]hese statutory damages would provide for \$1.5 million damages for a single CD. I think that's unreasonable.”<sup>108</sup> Yet “Chairman Conyers was not convinced. ‘Damages need to reflect the fact that we live in a world where music is being consumed in bite-sized pieces, not just in albums or whole books.’”<sup>109</sup> Further, proponents in Congress are “not concerned with opportunistic lawsuits,” as the statutory fines are “discretionary.”<sup>110</sup> Conyers is also unconcerned with the potential seizure of family or

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<sup>105</sup> Eric Bangeman, *RIAA trial verdict is in: jury finds Thomas liable for infringement*, ARS TECHNICA, (Oct. 4, 2007) <http://arstechnica.com/news.ars/post/20071004-verdict-is-in.html> (last visited Dec. 15, 2007).

<sup>106</sup> Eric Bangeman, *How the RIAA tasted victory: a perfect storm which might not be repeated*, ARS TECHNICA, Oct. 7, 2007, <http://arstechnica.com/articles/culture/riaa-first-judgement.ars/2> (last visited Dec. 15, 2007) (Final jury instruction: “The act of making copyrighted sound recordings available for electronic distribution on a peer-to-peer network, without license from the copyright owners, violates the copyright owners' exclusive right of distribution, regardless of whether actual distribution has been shown.”).

<sup>107</sup> Chloe Albanesius, *DOJ Blasts New 'Copyright Czar' Bill*, PC MAGAZINE, Dec. 13, 2007, [http://news.yahoo.com/s/zd/20071213/tc\\_zd/221645](http://news.yahoo.com/s/zd/20071213/tc_zd/221645) (last visited Dec. 15, 2007).

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

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

<sup>110</sup> *Id.*

consumer property, noting that the “[b]ill authors ‘carefully crafted the language to allow seizure only if the property was owned or predominantly controlled by the infringer’.”<sup>111</sup>

### B. Large Copyright Holders Firmly Support The Proposed Legislation

NBC/Universal general counsel Rick Cotton suggests that society wastes entirely too much money policing crimes like burglary, fraud, and bank-robbing when it should be doing something about piracy instead. . . . "Our law enforcement resources are seriously misaligned," Cotton said. "If you add up all the various kinds of property crimes in this country, everything from theft, to fraud, to burglary, bank-robbing, all of it, it costs the country \$16 billion a year. But intellectual property crime runs to hundreds of billions [of dollars] a year."<sup>112</sup>

In supporting this legislation, “Cotton and his Coalition Against Counterfeiting and Piracy are seeking to change federal law enforcement emphasis so that intellectual property crimes are given priority over other kinds of crime . . . [what he calls] a realignment.”<sup>113</sup> Cotton also “suggested that IP issues tend to ‘fall down the “to-do” list’. Until there are senior policy executives specifically tasked with IP enforcement . . . ‘we will not make progress in addressing the issues that are on the table’.”<sup>114</sup>

The Department of Justice, however, opposes these proposed policy and enforcement amendments as an unnecessary and inefficient use of limited DOJ resources.<sup>115</sup> The record labels, for example, “have already made it clear that the RIAA's litigious campaign against alleged file-sharers is a money-loser. Now they want the government to ‘commit resources’” as

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

<sup>112</sup> Ken Fisher, *Copyright coalition: Piracy more serious than burglary, fraud, bank robbery*, ARS TECHNICA, Jun. 15, 2007, <http://arstechnica.com/news.ars/post/20070615-copyright-coalition-piracy-more-serious-than-burglary-fraud-bank-robbery.html> (last visited Sept. 9, 2007).

<sup>113</sup> *Id.*

<sup>114</sup> Albanesius, *supra* note 107.

<sup>115</sup> *Id.*

well.<sup>116</sup> Copyright holders have asked the DOJ to extend a program of enforcement that even the copyright holders themselves say is a failure. Instead of realizing that their approach is ill suited for modifying consumer behavior or protecting their own assets, these actors are attempting to redefine copyright infringement as more damaging than violent crime and have pressed Congress to use government resources to vigorously expand their failed approach. Congress' response to DOJ's dissent? "Subcommittee Chairman Howard Berman . . . called on the Copyright Office to hold a series of meetings with various stakeholders . . . to address any concerns."<sup>117</sup> If the negotiations continue as usual, these stakeholders will simply be established industry, again working to push its naturally narrow interests.

### C. Established Interests Write Copyright Law

Deferring to established copyright holders is standard operating procedure when drafting copyright legislation. Both sides of the debate are trying to determine "proper compensation when the same work takes on a different form in this baffling digital age."<sup>118</sup> This is an important choice, and those who are most directly impacted should be expected to fervently fight for their interests. While members of Congress are expected to represent the public domain, copyright issues are generally too complicated and have historically been of too little interest to engage the attention of constituents. The public domain and emerging technologies are thereby left without representation. "Copyright has acute difficulty in adapting to rapid, real-world change. The

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<sup>116</sup> Ryan Paul, *Big Content asks presidential candidates for more restrictive copyright laws*, ARS TECHNICA, Nov. 21, 2007, <http://arstechnica.com/news.ars/post/20071121-riaampaa-ask-presidential-candidates-for-more-restrictive-copyright-laws.html> (last visited Dec. 15, 2007).

<sup>117</sup> Albanesius, *supra* note 107.

<sup>118</sup> Tycho Brahe, *The Spur Of The Moment*, PENNY ARCADE, Nov. 7, 2007, <http://www.penny-arcade.com/2007/11/07> (last visited Dec. 15, 2007).

politics of copyright policy—concentrated media companies vs. millions of disorganized consumers—simply do not lead to balanced legislative outcomes.”<sup>119</sup>

As illustration, the Digital Millennium Copyright Act (DMCA), the most recent major amendment to copyright law, was “enacted at the behest of motion picture studios, the recording industry, and book publishers” to provide criminal penalties against anyone trafficking in a device or technology that circumvents the copyright holders’ digital rights management (DRM) systems.<sup>120</sup> Copyright holders also extended the monopoly term afforded by copyright on all subsisting and future creative works by an additional twenty years via the Sonny Bono Copyright Term Extension Act (CTEA).<sup>121</sup> Copyright term extension succeeded despite “[e]vidence show[ing] that music companies and artists generally make returns on material in a number of years - not decades.”<sup>122</sup> With these two pieces of legislation, copyright holders extended the term of their limited monopoly over creative content to a duration far exceeding the reasonable term needed to reward investment and encourage further creative effort.<sup>123</sup> Even owning or creating technology to bypass technological tools restricting consumer use is now outlawed. Creative

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<sup>119</sup> Wu, *supra* note 99 (“But there's a reason we do things this way: political failure. . . . Big media is the kind of politically effective group that economist Mancur Olson recognized back in the 1960s: small, well-organized, and with much to gain from government. Meanwhile, all the people . . . creating fan sites and YouTube videos are, to Washington, political eunuchs—too diffuse and underfunded to exert much influence on the nation's laws. It all boils down to this: Harry Potter fanboys don't have K Street representation. Consequently, the political system spits out one kind of answer—an answer friendly to the ‘property interests’ of powerful media companies but one that all but ignores the interests of the basement-dwellers. The formal result of that is what we have today: a copyright law that covers almost everything we do in the digital world.”).

<sup>120</sup> Digital Millennium Copyright Act, 17 U.S.C. §§ 1201-1205 (2006); FAIR USE *supra* note 35.

<sup>121</sup> Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102(g), 112 Stat. 2827, 2827-28 (1998) (codified at 17 U.S.C. §§ 310-304 (2006)).

<sup>122</sup> *Music stars ‘must keep copyright’*, BBC NEWS, May 17, 2007, <http://news.bbc.co.uk/2/hi/entertainment/6661283.stm> (last visited Dec. 16, 2007).

<sup>123</sup> Some predict that terms will be extended again when copyrighted works that are central to major brands near the end date for their monopoly protection, their date of entry into the public domain. If these predictions are correct, copyright’s limited monopoly would, in effect, become infinite in duration. As new works would never enter the public domain, the public domain would stagnate.

works will no longer enter the public domain for full exploitation and use by the public at large, and the copyright holder can now extend control not just to the sale of creative works, but also to how those works are used.

“Copyright today is less about incentives or compensation” – about a bargain between authors and the public – “than it is about control . . . the right of a property owner to protect what is rightfully hers.”<sup>124</sup> “The information that is available in our information society and the uses to which it can be put will inevitably be shaped by the structure of our copyright law.”<sup>125</sup> Therefore, “basing a legal framework on the exigencies of a particular industry at a particular time, especially in a fast-changing technological environment” endangers the long term interests of that industry and the larger economy as a whole.<sup>126</sup>

## VI. CONSUMERS ARE CONFUSED

Part of the reason that consumers have historically been uninterested in copyright law is that consumers do not understand what uses infringe. While copyright holders are free to use their content and enforce their rights as they please, they send consumers mixed messages by enforcing their rights inconsistently. “The reason people don’t believe in the copyright law . . . is that people persist in believing that laws make sense, and the copyright laws don’t seem to them to make sense, because they don’t make sense, especially from the vantage point of the individual end user.”<sup>127</sup>

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<sup>124</sup> LITMAN, *supra* note 69 at 80, 81.

<sup>125</sup> *Id.* at 194.

<sup>126</sup> Oram, *supra* note 68. Also see Joss Whedon, *From The Front Lines!*, Whedonesque (Nov. 6, 2007) <http://whedonesque.com/comments/14639#195462> (last visited Nov. 7, 2007) (“Our culture, our government, our corporate structures have all gotten pretty used to taking care of ourselves at the expense of our children and their children. Part of this is simple greed, part is immediate practicality trumping long-view perspective, and part is perfectly understandable fear. It’s easier to take what you’re given, not protest, not make a fuss.”).

<sup>127</sup> LITMAN, *supra* note 69 at 113.

### A. Inconsistent Behavior Adds To Confusion

Copyright holders' advertising argues that they will strongly and consistently enforce their copyrights. When copyright holders are then inconsistent in enforcing their rights, they leave consumers with a confused message that the consumers view as implicit approval or license of consumer use.<sup>128</sup> Left without consistent direction, consumers, including mashup and mixtape artists, develop expectations of allowed use based on the most lenient industry enforcement. As example, DJ drama had received support from the recording industry for years before his arrest.

"Even as [NBC] lawyers threaten YouTube with lawsuits", their marketing staffs mimic user content that would otherwise be seen as infringing in order to advertise to consumers.<sup>129</sup> To promote their show *Heroes*, NBC created spoof ads containing "saltier language, more adult themes" and content taken from the real show and remixed into the ads. NBC then uploaded and published their professionally produced videos via YouTube using a standard user alias, showing no affiliation with the network and appearing to the public as an unlicensed fan creation.<sup>130</sup>

NBC's online promos often look to ape the sort of user-generated clips consumers create to pay homage to their favorite shows. . . . Vince Manze . . . NBC's promo guru . . . [is particularly proud of a project] which contained not a trace of evidence that it came from NBC. . . . No credits whatsoever. . . . "We wanted to see how far we could go, and we wondered if (auds) knowing we did it would be a detriment." . . . Keeping the clip's origin secret was a means of building up its credibility with potential viewers. . . . one of dozens, if not hundreds, of NBC-created viral videos the network has unleashed over the past year.<sup>131</sup>

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<sup>128</sup> Outkast, *Art of Storytelling pt. 4 (Gangsta Grillz: The Album)*, Aphilliate Music Group, 2007) (Andre Benjamin: "I tell it like it is, then I tell it how it could be.").

<sup>129</sup> Josef Adalin, *Subtlety succeeds as NBC spreads buzz*, VARIETY (Mar. 8, 2007).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* ("All the broadcast nets [ABC, CBS, FOX] have embraced the Internet and YouTube to market their wares.").

Said one critic of these ads: “Minze seems to be one of the few marketing guys who ‘get it’. He knows that people aren’t going to YouTube to watch advertisement or promos (unless they’re exceptionally creative).” Creative, yes. But in the larger scheme of sending a clear message to consumers, these ads only confuse. From a viewer’s perspective, the ad looked just like another mashup or remix video, a creation that NBC would generally be expected to attack. In this case, however, the copyright holder did not insist on the video’s removal, lending authority to the idea that NBC accepted this type of user-created remix, to the idea that it did not violate NBC’s copyright.

Jay-Z’s decision to support mixtapes and remixes by releasing the a cappella version of the Black Album (which led to creation of the Grey Album) proved to be such a boon to his record sales and overall fame that he also released an a cappella version of his next CD, *American Gangster*.<sup>132</sup> Within days after the release of this a cappella version of the CD, MTV published an article on a highly anticipated remix. “The [remixing] DJ birthed the idea three weeks ago when Def Jam announced it would be releasing the a cappella tracks as an alternate LP, *American Gangster Acappella*.”<sup>133</sup> The record label, holder of the album’s copyright, gave the remix artist the idea to modify the original work, and then MTV, a subsidiary of Viacom, promoted the remix.<sup>134</sup> Not only did the copyright holder encourage the creation of remixes, but their aggressive promotion of the opportunity suggests that Viacom recognizes the creative value of these consumer-created products. These actions are in direct conflict with stated corporate

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<sup>132</sup> A CD created in support of and influenced by the film of the same name.

<sup>133</sup> Shaheem Reid and Jayson Rodriguez, *Jay-Z’s American Gangster Goes ‘Godfather’ With DJ Skee’s Help*, MTV, Dec. 12, 2007, [http://www.mtv.com/news/articles/1576362/20071212/jay\\_z.jhtml](http://www.mtv.com/news/articles/1576362/20071212/jay_z.jhtml) (last visited Dec. 15, 2007) (emphasis added).

<sup>134</sup> Media Networks, Viacom.com, <http://www.viacom.com/OUR%20BRANDS/MEDIA%20NETWORKS/default.aspx> (last visited Dec. 12, 2007).

goals of controlling copyrighted works and requiring licenses for samples. While copyright holders are free to enforce rights or allow use as they choose, providing tools for remixing and then promoting these tools through official corporate channels creates in the consumer an expectation that they, as fans, are free to remix other copyrighted content as well. When copyright holders then force the removal of remixed content, lawsuits against mixtape or mashup artists, or calls for stronger government protection, consumer confusion only grows.

### B. Public Rhetoric Intentionally Confuses Consumers

Coordinated public rhetoric, aimed at changing the meaning and intent of copyright law as originally written and publicly understood, exacerbates the problems of customer confusion and lack of user understanding of copyright law.<sup>135</sup> In May 2007, new, stronger copyright legislation was proposed in both Britain and the U.S. At the same time, artists in Britain spoke out, and an op-ed in the U.S. equated copyright protection with real property rights.<sup>136</sup> The U.S. op-ed, in the *New York Times*, went so far as to characterize the end of a copyright holder's term of protection and subsequent addition of their work to the public domain as equivalent to

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<sup>135</sup> Nate Anderson, *Two new from Wu: Free federal court opinions, free copyright info*, ARS TECHNICA, Oct. 2, 2007, <http://arstechnica.com/news.ars/post/20071002-tim-wu-rol.html> (last visited Dec. 15, 2007) ("Most creators know that any work they create is automatically copyrighted, even if they never send documentation to the Library of Congress. But [there are many] features of copyright law that many creators [do] not know; for instance, that the law gives everyone a chance to reclaim rights . . . 35 years after signing them away to a publisher, movie studio, or record label.")

<sup>136</sup> Mark Helprin, *A Great Idea Lives Forever. Shouldn't Its Copyright?*, N.Y. TIMES, May 20, 2007, [http://www.nytimes.com/2007/05/20/opinion/20helprin.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/05/20/opinion/20helprin.html?_r=1&oref=slogin) (last visited Dec. 16, 2007). *Contra* Mike Masnick, *Arguing For Infinite Copyright ... Using Copied Ideas and A Near Total Misunderstanding of Property*, May 21, 2007, <http://www.techdirt.com/articles/20070521/015928.shtml> (last visited Dec. 16, 2007) ("Helprin's argument is a blatant copy of Mark Twain's -- and yet we doubt he paid the descendants of Mark Twain for it. However, the key to Helprin's problem is his total and complete misunderstanding of the purpose of property as well as the purpose of copyright law.")

legalized slavery or an extreme form of eminent domain.<sup>137</sup> The timing of the legislation pushing for greater copyright holder control and of the articles conflating real and intellectual property rights implies a coordinated effort in two countries by sponsors of the legislation to actively set the public perception and legislative definition of copyright.<sup>138</sup>

“Instead of "property rights," copyright gives . . . a [limited] monopoly right (which is what Jefferson preferred to call it) to control how [the artist’s] output is used.”<sup>139</sup> Yet a consumer would never know about the different rights granted to real and intellectual property if they only read these articles or accepted the legislation as proposed in Congress. Instead, a consumer would believe that the two distinct sets of rights are identical, and that the two different sets of rights were always intended to be the same.

When consumers are transitioning from a world where they only consumed to one where they are also now creators and interact with copyright law daily, when an incorrect view is touted to consumers as long-standing truth, and when copyright holders inconsistently use and enforce their copyrights, consumer confusion becomes common and consumers make sense of their world by setting their own expectations. When these consumer expectations, then, conflict with current copyright law, it is disingenuous for industries dependent on copyrighted works to argue for stronger protection by saying that the consumers are acting so as to intentionally steal from

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<sup>137</sup> Helprin, *supra* note 136 (“It is, then, for the public good. But it might also be for the public good were Congress to allow the enslavement of foreign captives and their descendants (this was tried); the seizure of Bill Gates’s bankbook; or the ruthless suppression of Alec Baldwin. You can always make a case for the public interest if you are willing to exclude from common equity those whose rights you seek to abridge. But we don’t operate that way, mostly.”). *See also Music stars ‘must keep copyright’ supra* note 122 (Copyright protection “should be extended to at least 70 years, . . . allow aging performers to continue to benefit from their early recordings throughout their lifetimes.”).

<sup>138</sup> *See* Masnick, *supra* note 136 (“[I]nteresting that just as a new "copyright alliance" has formed to push for stronger copyright laws, we start seeing articles like this one and others pushing the argument for stronger copyright and patent laws to extreme positions”).

<sup>139</sup> *Id.*

them. Calling these same consumers pirates, cheats and thieves absolves these industry actors from their own culpability in failing to adapt to the demands of new and pervasive technology. Inconsistent behavior on the part of copyright holders is a key factor in how customer expectations have been set. Copyright holders should not be rewarded with stronger protection when they are the ones who have created their problem.

## VII. WHAT SHOULD CONGRESS DO TO REPAIR COPYRIGHT LAW?

Aggressive change using a mixed statutory and technology-based solution would be most effective, however only modest change will likely be palatable to entrenched industry interests.<sup>140</sup> The rapid pace of advances in technology requires that Congress act quickly, yet “[t]he new economy still lacks a political infrastructure.”<sup>141</sup> To give time for industry interests to adjust while still protecting the interests of the public, Congress should approach copyright law with the following modest goals in mind.

### A. Review The History Of Copyright Law And Its Impact On Constituents

[B]efore the passage of the 1976 Copyright Act, most creative works did not enjoy copyright protection [and] authors could only enforce exclusive rights to works whose copyrights had been properly registered (and, subsequently, renewed). As a result, the vast majority of our society’s creative output automatically belonged in the public domain and use of this output [was allowed]. With the passage of the 1976 Copyright Act, however, we radically altered our default regime from one of non-protection to one of protection. Under the current Act, copyright subsists in authors the moment they fix a creative, original work in

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<sup>140</sup> An integrated, more daring solution might include three elements: (1) Set the default level of copyright protection for digital works to the Creative Commons Copyright; (2) Require free registration of digital media in order to obtain greater protection, adding information to an online database similar to the CDDDB and tagging files with metadata concurrent with registration; and (3) Degrade copyright protection over time, with levels of control diminishing and available uses or allowed repurposing increasing. The current level of protection would be available and easy to find in each file.

<sup>141</sup> Garrett M. Graff, *Don't Know Their Yahoo From Their YouTube*, THE WASHINGTON POST, Dec. 2, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/30/AR2007113001802.html> (last visited Dec. 14, 2007).

a tangible medium. . . . Thus, virtually the entire universe of creative works created after 1978 is now subject to copyright protection.<sup>142</sup>

Reviewing the history and development of copyright law will allow members of Congress to push back against lobbyists who use extreme rhetoric in an attempt to rebalance copyright in the favor of copyright holders.<sup>143</sup> Members of Congress will also be better able to discuss cutting edge issues regardless of their understanding of technology.<sup>144</sup> A better understanding of the goals of copyright law, paired with the simple insight that the key driver behind digital technology is the ability to easily copy and distribute, will allow those tasked with amending copyright law to properly frame the issues in copyright terms without needing to understand the details of every new technological development.<sup>145</sup> Taking into account the goal of encouraging new creative works while protecting the public interest and factoring in the long term impact that technological changes will have on various industries will allow for reasoned planning. By learning that consumers are now also content producers, elected representatives can better detail

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<sup>142</sup> Tehranian, *supra* note 71 n. 44 (citing the Copyright Act of 1909 § 10 (codified as amended at 17 U.S.C. 11, 61 Stat. 652 (1947)) (repealed by Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541); *Save the Music & Creative Commons: Proceedings Before the U.S. Copyright Office* at 13, Mar. 25, 2005, <http://www.copyright.gov/orphan/comments/OW0643-STM-CreativeCommons.pdf> (Comments of Creative Commons and Save the Music); 17 U.S.C. § 102 (2006)).

<sup>143</sup> Kerry-Tyerman, *supra* note 19 ¶ 57 (Copyright and fair use “involv[e] a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand.”) (citing *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)). *See also* Graff, *supra* note 141 (“The older industries are still the best organized, most entrenched and therefore most powerful. They can land the meetings with officials that lead to government loans; their armies of lobbyists can operate in the back rooms, slipping in tax breaks and increasing the competition for newcomers.”).

<sup>144</sup> *See* Paul, *supra* note 116. *See also* Graff, *supra* note 141; Anne Broache, *Copyright Office chief: I'm a DMCA supporter*, C|NET NEWS BLOG, Sep. 17, 2007, [http://www.news.com/8300-10784\\_3-7.html?authorId=102&tag=author](http://www.news.com/8300-10784_3-7.html?authorId=102&tag=author) (last visited Dec. 12, 2007) (Register of Copyrights Marybeth Peters is a “self-proclaimed ‘Luddite,’ who confessed she doesn't even have a computer at home.”).

<sup>145</sup> *See* Masnick *supra* note 136 (“The purpose of property is to better manage the allocation of scarce resources. . . . This allows for resources to be efficiently allocated . . . when it comes to infinite resources (such as creative works), there's simply no need to worry about efficient allocation -- since anyone can have a copy. . . . [Copyright is] a government-granted incentive -- a subsidy -- to encourage the creation of new works. . . where the government believed there was a market failure.”).

the need to protect the public domain and can explain the issue's importance to voters. In turn, improved awareness on the part of constituents will allow representatives to devote time and resources to the issue and promote discourse and education regarding the proper role of copyright law.

### B. Give The Term "Pirate" Meaning Again

There are still large scale, industrial duplicators making bootlegs and then undercutting copyright holders as they attempt to sell their creative works. Yet "[i]f forty million people refuse to obey a law, then what the law says doesn't matter. . . . Whatever the reason, the law is not going to work well in the real world."<sup>146</sup> The appropriate targets of the law are now able to hide among average consumers as resources are wasted on users who are creating rather than stealing. Congress should limit the definition of copyright piracy to complete copying or unlicensed use for industrial-scale, purely commercial use. Doing so will focus resources on those actually stealing full copies and generating sales that should have been made by the copyright holder. Defining consumers as infringers and treating them as criminals for putting available technology to good use has not and will not work.<sup>147</sup>

[T]here's no solution that arises from telling people to stop using computers in the way that computers were intended to be used. They're copying machines. So telling the audience for art, telling 70 million American file-sharers that they're all crooks, and none of them have the right to due process, none of them have the right to privacy, . . . [that] we need to shut down their network connections without notice in order to preserve the anti-copying business model: that's a deeply

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<sup>146</sup> LITMAN, *supra* note 69 at 169.

<sup>147</sup> See Jason Rosenbaum, *The Anti-Piracy Equation Just Doesn't Add Up*, THE SEMINAL, Oct. 9, 2007, <http://www.theseminal.com/2007/10/09/the-anti-piracy-equation-just-doesnt-add-up/> (last visited Dec. 16, 2007) ("[F]ile sharing has only increased since the RIAA started [suing] its customers [for copyright infringement] in 2003. Some sites put that increase at over 300%. Clearly, the 'message' the RIAA was trying to send to file sharers isn't getting through.").

unethical position. It puts us in a world in which we are criminalizing average people for participating in their culture.<sup>148</sup>

Finally, copyright law should be amended to explicitly make legal and encourage the repurposing of existing content, allowing for the development of new and beneficial uses. A full citation requirement for remixed or repurposed copyright works should allow full use and the ability to reference while still protecting the original author.<sup>149</sup>

Clearly defining what can and cannot be done with content will simplify copyright law and minimize grey areas that do remain. Consumers should be able to quickly and easily learn the important details of copyright law. Innovators should not need to be concerned with the possibility of a court finding that fair use protection does not apply, or that the innovator enabled infringement. This risk discourages experimentation, innovation and development. In addition, explicit approval of uses common among and expected by consumers sends consumers a clear message, explaining what consumers can do with or to content.<sup>150</sup>

### C. Roll Back Copyright Provisions That Overreach

Congress should greatly reduce the statutory damages available against all but mass producing, industrial-level infringers. As is, statutory damages are set, per work, at a minimum of \$200 USD for infringers who had no reason to believe they were infringing, to a maximum of

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<sup>148</sup> Doctorow, *supra* note 92.

<sup>149</sup> LITMAN, *supra* note 69 at 185.

<sup>150</sup> See Boyd, *supra* note 8 (“To get to monetization, you have to have happy users. . . . [T]his is a fair trade-off.”)

\$150,000 USD in cases of willful infringement.<sup>151</sup> Designed for a world where copying was difficult and directed at large scale enterprises established for the purpose of intentional infringement, such high per-work damages threaten individuals who wish to profit from mixtapes or mashups with excessive fines and personal bankruptcy. Leveling these damages at private users, at grandparents and twelve-year-olds, amounts to abuse of the law and of judicial discretion.<sup>152</sup>

Jessica Litman suggests replacing copyright with a right to commercial exploitation.<sup>153</sup> One means to this end is to set thresholds based on sales numbers, where statutory damages would only be available when high volume sales are achieved by the infringer. Another would be to limit damages to actual damages or infringer profits against those who remix or mashup content.<sup>154</sup> While this shift in boundaries would likely create initial uncertainty, this early confusion would be no worse than the confusion caused by the current rules, designed for commercial infringers but now affecting the general public. Also, the term of monopoly control

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<sup>151</sup> 17 U.S.C. § 504(c) (2004). *See also* H.R. REP. 94-1476(3), 94th Cong. 2d Sess 162 (1976) (“Where the suit involves infringement of more than one separate and independent work, minimum statutory damages for each work must be awarded. For example, if one defendant has infringed three copyrighted works, the copyright owner is entitled to statutory damages of at least \$750 and may be awarded up to \$30,000. Subsection (c)(1) makes clear, however, that, although they are regarded as independent works for other purposes, “all the parts of a compilation or derivative work constitute one work” for this purpose. Moreover, although the minimum and maximum amounts are to be multiplied where multiple “works” are involved in the suit, the same is not true with respect to multiple copyrights, multiple owners, multiple exclusive rights, or multiple registrations. This point is especially important since, under a scheme of divisible copyright, it is possible to have the rights of a number of owners of separate “copyrights” in a single “work” infringed by one act of a defendant.”).

<sup>152</sup> Matthew Sag, *Piracy: Twelve Year-Olds, Grandmothers, and Other Good Targets for the Recording Industry’s File Sharing Litigation*, 4 Nw. J. Tech. & Intell. Prop. 133, 146 (2006).

<sup>153</sup> LITMAN, *supra* note 69 at 180-81 (noting that as is, all control is held by the copyright holder except for narrow, complex exemptions).

<sup>154</sup> 17 U.S.C. § 504(b) (2004).

granted by copyright should also be shortened, to at least pre-CTEA levels.<sup>155</sup> Long-term protection promotes stagnation and erodes the public domain, and is at odds with currently available technology that rewards flexibility and innovation.<sup>156</sup>

#### D. Account For Costs And Benefits To The Larger Economy

Congress should insist on restating the economics and accounting of copyright to more accurately show costs and benefits to the larger economy. Copying is only central to copyright because at the time of the original drafting, tracking copies was an easy benchmark.<sup>157</sup> “The centrality of copying to use of digital technology is precisely why reproduction is no longer an appropriate way to measure infringement.”<sup>158</sup>

Still, losses claimed by copyright holders for infringement are speculative, at best. Claims from \$6 billion, to \$12 billion, to hundreds of billions in losses are either completely false or based more on real property analyses, an incorrect measure for copyrighted works.<sup>159</sup> “Copyright was created as a functional tool to promote creativity, innovation, and economic activity. . . . It should be measured by that standard, not by some moral rights or abstract measure of property rights.”<sup>160</sup> Meanwhile, value obtained from use of works in the public domain and fair use of

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<sup>155</sup> *How Long Copyright Protection Endures*, Copyright Office Basics, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/circs/circ1.html#hlc> (last visited Dec. 14, 2007) (Before the CTEA, copyright protection would last for the life of the author plus 50 years. When a corporation was the author, protection would last for 75 years. The CTEA extended these terms to life of the author plus 70 years and, for works of corporate authorship, to 120 years after creation or 95 years after publication, whichever endpoint is earlier.).

<sup>156</sup> Paul, *supra* note 116.

<sup>157</sup> LITMAN, *supra* note 69 at 177.

<sup>158</sup> *Id.* at 178.

<sup>159</sup> See Fisher, *supra* note 112 (“The MPAA's own cherry-picked study from Smith Barney in 2005 put their annual loss at less than \$6 billion, and while the music and software industries also like to publish trumped-up claims, the figures are nowhere near hundreds of billions of dollars each year.”).

<sup>160</sup> Thomas Claburn, *Fair Use Worth More to Economy Than Copyright*, *CCLA Says*, INFORMATION WEEK, Sept. 12, 2007, <http://www.informationweek.com/story/showArticle.jhtml?articleID=201805939> (last visited Dec. 15, 2007) (quoting Computer and Communications Industry Association president and CEO Ed Black).

copyrighted work is rarely discussed.

[I]n the past twenty years as digital technology has increased, so too has the importance of fair use. With more than \$4.5 trillion in revenue generated by fair use dependent industries in 2006, a 31% increase since 2002, fair use industries are directly responsible for more than 18% of U.S. economic growth and nearly 11 million American jobs. In fact, nearly one out of every eight American jobs is in an industry that benefits from current limitations on copyright.<sup>161</sup>

#### E. A Hurdle: Convincing Copyright Holders To Surrender Some Control

Congress must convince copyright owners to give up some control over their work in order to obtain legislative compromise. Businesses will lobby against any change because current business models will no longer be profitable and because any change will be painful in the short term, requiring reinvestment of energy and capital.<sup>162</sup>

In the music industry, some now advocate for a flat fee, national subscription service.

To combat the devastating impact of file sharing, [Rick Rubin], like others in the music business . . . says that the future of the industry is a subscription model, much like paid cable on a television set. . . . For this model to be effective, all the record companies will have to agree. . . . Rubin sees no other solution.<sup>163</sup>

The problems with a subscription service are that it applies to only one narrow industry, will be difficult to implement, and will not have a direct impact on copyright statutes. Those who remix or repurpose content would still infringe another's copyright, for simply making the best use of

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<sup>161</sup> *Fair Use Economy Represents One-Sixth of U.S. GDP*, Computer & Communications Industry Association, Sep 12, 2007, [http://www.cciainet.org/artmanager/publish/news/First-Ever\\_Economic\\_Study\\_Calculates\\_Dollar\\_Value\\_of.shtml](http://www.cciainet.org/artmanager/publish/news/First-Ever_Economic_Study_Calculates_Dollar_Value_of.shtml) (last visited Dec. 11, 2007).

<sup>162</sup> Brian Hiatt & Evan Serpick, *The Record Industry's Decline*, ROLLING STONE, Jun. 19, 2007, [http://www.rollingstone.com/news/story/15137581/the\\_record\\_industrys\\_decline](http://www.rollingstone.com/news/story/15137581/the_record_industrys_decline) (last visited Dec. 10, 2007) (“Innovation means cannibalizing their core business. . . . More than 5,000 record-company employees have been laid off since 2000.”).

<sup>163</sup> Lynn Hirschberg, *The Music Man*, THE N.Y. TIMES MAG., Sept. 2, 2007, [http://www.nytimes.com/2007/09/02/magazine/02rubin.t.html?\\_r=2&pagewanted=all&oref=slogin&oref=slogin](http://www.nytimes.com/2007/09/02/magazine/02rubin.t.html?_r=2&pagewanted=all&oref=slogin&oref=slogin) (last visited Sept. 5, 2007) (“Either all the record companies will get together or the industry will fall apart and someone like Microsoft will come in and buy one of the companies at wholesale and do what needs to be done”).

available tools and content. A subscription service might, however, be useful as one step toward larger change. Copyright holding industries fear great short term losses if they are forced to change their business model, which is based in substantial part on the licensing of samples and approval of all derivative works.<sup>164</sup> If revenue streams can be stabilized in the music industry via business model change, (as with a move to annual subscription sales), there may be more incentive for all copyright holders to experiment with new business models and adapt to new technology. Developing improved metrics for understanding the value of gains from innovative exploitation or losses from infringement would also be a boon, as Congress must still figure out how to define and collect revenue and how to best enforce copyright law.

## VIII. IF CONGRESS FAILS TO ACT...

### A. Court-Led Protection Of Public Domain And Fair Use

If Congress does not act, the Courts can interpret fair use as a broad, expansive doctrine, as they have done in the past. In *Sony v. Universal City Studios*, the court found that new technology allowing for the unauthorized recording and time-shifting of video content did not infringe.<sup>165</sup> After this decision, an entire market for VCRs and video tapes blossomed, becoming a major source of income for the very actors who attempted to block the adoption of that technology.<sup>166</sup> In *Campbell v. Acuff-Rose*, the Court found substantial, unlicensed copying must be allowed to protect free speech when the copying is done as part of a transformative work when the new work is meant as direct commentary on the original work, thereby developing the

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<sup>164</sup> *Id.*

<sup>165</sup> *Sony v. Universal*, 464 U.S. 417 (1984).

<sup>166</sup> In 2005, combined domestic sales and rentals of DVDs and VHS tapes totaled \$26.4 billion. By contrast, movie theater sales totaled \$9.6 billion. STUART BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 439 (2d ed., Carolina Academic Press 2006).

parody doctrine as a subset of fair use.<sup>167</sup> And in *Perfect 10, Inc. v. Amazon Inc.*, the “9th Circuit . . . ruled that . . . thumbnails fell within a ‘fair use’ exception in copyright law because they play a role in the search process and thus have a function different from that of the original photos.<sup>168</sup> The court held “that the significantly transformative nature of Google's search engine, particularly in light of its public benefit, outweighs Google's superseding and commercial uses of the thumbnails in this case.”<sup>169</sup> Though established copyright holders argued that each of these uses were infringing, in each of these cases the judiciary reviewed transformative, creative uses of unlicensed copies and found the uses valid as new, functional, transformative contributions made possible by recent technology and fair use of the copyrighted material. And though plaintiffs in each case argued that their business would be harmed by the unlicensed use at issue, in the end each new use created an entirely new market for the original works, actually expanding the audience and availability of the original works while reducing costs of distribution.

There are, however, significant problems with relying on courts for change. First and most importantly, litigation is expensive and always involves risk to resolve legal questions. This risk and lack of certainty in the law will deter actors from experimenting with the creation of artistic works via new means of expression using the latest technology. Copyright was meant to encourage this creative experimentation. As currently written, however, copyright law acts as a disincentive to challenging established law or pushing for extensions of fair use. For example,

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<sup>167</sup> *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

<sup>168</sup> Alan Sipress, *Google Wins Appeal on Copyright of Nude Images*, WASH. POST, May 17, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/16/AR2007051602454.html> (last visited Dec. 10, 2007).

<sup>169</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, U.S. App. LEXIS 27843 (9th Cir. 2007).

[T]he court expanded the Copyright Act in the *Grokster* case to cover a form of liability it had never before recognized in the context of copyright - the wrong of providing technology that induces copyright infringement . . . even though at precisely the same time Congress was holding hearings about whether to amend the Copyright Act to create the same liability.<sup>170</sup>

Because copyright affects so many industries and can apply to such a wide variety of fact patterns, gains made in some cases are ignored in later cases with different facts but the same underlying issues.<sup>171</sup> As such, holdings can only be relied on when read narrowly or limited to facts that are physically similar, not as applied to conceptually similar cases. Without explicit statutory language, the risk of infringing via use of new technology always remains.

### B. Private Action Promoting Change

Emerging private industry can push for openness in copyright law.<sup>172</sup> Google is a prime example of a company intent on pushing copyright law's boundaries. As a business strategy, Google makes a point of creating software sandboxes – open environments in which content can be remixed, reused, shared and mashed up via provided tools. While Google publicly states that copyright law works in its current form, Google's open approach encourages mashups and remixing of content. This approach garners Google free publicity, public prototyping of new products, and successful recruitment of top talent.<sup>173</sup> It also encourages use of already created

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<sup>170</sup> Lawrence Lessig, *Make Way for Copyright Chaos*, N.Y. TIMES, Mar. 18, 2007, [http://www.nytimes.com/2007/03/18/opinion/18lessig.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/03/18/opinion/18lessig.html?_r=1&oref=slogin) (last visited Dec. 14, 2007) (citing *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005)).

<sup>171</sup> See William Patry, *Substantially Confusing Uses*, THE PATRY COPYRIGHT BLOG, Jul. 31, 2006, <http://williampatry.blogspot.com/2006/07/substantially-confusing-uses.html> (last viewed Dec. 9, 2007) (The discussion following the post is also informative.).

<sup>172</sup> See Nate Anderson, *MPAA: We are committed to fair use, interoperability, and DRM*, ARS TECHNICA, Apr. 26, 2007, <http://arstechnica.com/news.ars/post/20070426-mpaa-drm-must-be-interoperable-dvds-should-be-rippable.html>, (last visited Dec. 15, 2007) (“Dean Garfield, VP of Legal Affairs for the MPAA . . . has confidence in the market to sort all of these issues out. ‘You have to give some thought to how young the digital distribution market is,’ he said. ‘I suspect that the issues confounding people today won't be the issues challenging the industry six months from now’.”).

<sup>173</sup> TAPSCOTT & WILLIAMS, *supra* note 77 at 191.

content by allowing access and providing opportunities for others to repurpose and find new creative uses for that prior content.

Creating tools and platforms upon which customers are free to develop their own tools is a priority at Google.<sup>174</sup> They donate engineering time as well as money to open source projects around the world, and “are passionate about open source.”<sup>175</sup> Further, clear and consistent policy properly sets the expectation that consumers should participate, allowing for rapid development and deployment of new technology and content.

In Google's words, its recently unveiled "Android" is the "first truly open and comprehensive platform for mobile devices." But it is a signal of much more. Google is as much an ideology as a firm and . . . Google and its allies are now trying to make the principles of openness—the commanding ideology of the Internet—the conquering principle of the wireless world. . . . It's clear that any Android-based Gphone will be far more "open" than any cell phone the world has yet seen. That means any developer, anywhere, will be able to build whatever functions they think make sense for a mobile computer, and users will be able to install whatever they want. . . . We have no idea what the killer apps for a Gphone might be, and that's what makes Android truly revolutionary. Who, if anyone, is threatened by Android? . . . [T]he Bell system. Their ideology, which today governs the cell phone world, is called "Vailism," and it can be traced back to 1907 and the origins of AT&T's domination of American telephony. The Bells' philosophy, as promulgated by AT&T's greatest president, Theodore Vail, is based on closed systems, centralized power, and as much control as possible over every part of the network.<sup>176</sup>

Factored into Google's plan is litigating suits brought by those with opposing business interests and goals. After losing at trial, Google prevailed on appeal in Perfect 10's infringement suit. Google again lost at trial and is appealing infringement claims against Google News. When

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<sup>174</sup> Darren Waters, *Google helps terabyte data swaps*, BBC NEWS, Mar. 7, 2007, <http://news.bbc.co.uk/2/hi/technology/6425975.stm> (last visited Oct. 10, 2007).

<sup>175</sup> *Id.*

<sup>176</sup> Tim Wu, *Yes, Google Is Trying To Take Over the World*, SLATE, Nov. 16, 2007, <http://www.slate.com/id/2178158/> (last visited Dec. 12, 2007).

Google purchased YouTube, analysts factored in the cost of expected litigation as a part of the purchase price, and they were wise to do so. “Viacom asked a federal court to order the video-sharing service YouTube to pay it more than \$1 billion in damages.”<sup>177</sup> These business titans, still just private actors, have resorted to the courts to settle “this multiyear litigation about the legality of a business model.”<sup>178</sup>

There are significant limits to Google’s approach, or to attempts by any in the private sector to independently strengthen the public domain or expand fair use outside of boundaries set by Congress or established judicial precedent. First, Google is only one company. Other companies have different goals and will work toward opposing ends. Second, some of these companies will file suit against Google, and these infringement claims will be expensive to litigate. As such, Google, along with others following Google’s general model and philosophy, will never be secure in what can be done without firm boundaries as set by Congress. Finally, changes in one industry will likely not extend rapidly to other businesses and technologies, for while the issues are conceptually equivalent, they can be easily distinguished by physical differences. Arguments for combining content to allow for improved searchability in *Perfect 10* are not readily accepted by other courts, as is seen in *Google News* or Viacom’s claim against YouTube. Though both are fundamentally similar in that they are new works repurposing content via digital technology, remixing content to generate crime data maps is seen as qualitatively different from DJ Drama’s remixing of music to create new musical works.<sup>179</sup> That said, Google’s philosophy, business model and success to date are all encouraging. Google

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<sup>177</sup> Lessig, *supra* note 170.

<sup>178</sup> *Id.*

<sup>179</sup> John Gruber, *EveryBlock — New Startup Founded by Adrian Holovaty*, DARING FIREBALL, May 23, 2007, <http://daringfireball.net/linked/2007/may#wed-23-everyblock> (last visited Dec. 9, 2007).

understands how digital technology changes the world, and has placed itself in a position to lead and to promote adoption and awareness of these changes.<sup>180</sup>

## IX. CONCLUSION

Copyright law is broken. As currently read and interpreted, a number of beneficial uses intended to be promoted by copyright law are currently viewed as unlawful and infringing. Consumers are confused by labyrinthine statutes and inconsistent rights enforcement by varied copyright holders.<sup>181</sup> The general public now creatively interacts daily with copyrighted material and copyright law. Left without consistent, clear direction from Congress, the judiciary or private industry, the general public sets expectations based on the uses made available by contemporary content and tools, acting in novel ways deemed reasonable and fair by peers. As these actions violate the letter of copyright law, copyright holders now view their customers, with hostility, as infringers.

Congress should amend copyright law to protect the public domain, allow for best use of digital technology and encourage industry restructuring to meet the demand of our increasingly connected, collaborative, content-creating world. Historically, however, Congress has deferred to established rights holders to negotiate among themselves and draft legislation. Today, established copyright holders have failed to adapt to changes in technology, so are pushing not for more openness, but for more protection.

Until Congress adapts copyright law to modern national needs, the courts should interpret fair use as an expansive doctrine and allow for consumer repurposing and remixing of creative

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<sup>180</sup> See Kirkpatrick, *supra* note 62.

<sup>181</sup> Outkast, *supra* note 128. (DJ Drama: “I took the fall for hip hop. And I stand in front of you, stronger than ever. Watch what comes next.”).

digital content. Private industry should unilaterally open their content to public use and also push the boundaries of copyright law to encourage openness and the development of new techniques and models for using creative content. Updating copyright to meet the demands and abilities of modern technology and consumer-creators will benefit the public as a whole and will ensure that American industry continues to lead the world in developing art and creative content.