[Re]mix and Mash: Toward a Copyright Home for Audio Mashups

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Introduction

We live in a Read-Write culture. We are no longer confined to the passive consumption of content, but are enabled and encouraged to participate in its creation. Emerging technologies allow us to interact with material by modifying it and adding our own contributions—this is the “remix” era. Copyright activist and Stanford Law professor Lawrence Lessig has compared the ability to remix as this century’s form of writing—as the literacy for a new generation. Remix builds on the sounds and images it incorporates in the same way a critical essay comments on the text it quotes. The challenge is developing a way to support the growth of the remix culture, and the goals of our copyright system. This paper addresses an aspect of this challenge presented by audio mashups, a relatively new and rapidly evolving genre of music involving the unauthorized sampling of preexisting works.

In addition to advancing the ways in which we interact with material, technology also facilitates the costless distribution of our remixed creations. The content industry’s fear of piracy has driven legislators to draft laws controlling public access to digital copyrighted works. While it is important to protect artists’ statutorily created rights and to provide an incentive for artists to produce new works, copyright should simultaneously promote creativity and innovation by others. Unfortunately, the expansion of copyright protection now outweighs the interests of consumers, presenting a noticeable imbalance. Copyright law does not seem to acknowledge the

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1 See LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 28-9 (2008) (noting the shift from a Read-Only culture to a Read-Write culture).
2 Id. at 69.
3 See Edward Lee, Remixing Lessig, 6 I/S: J.L. & POL’Y FOR INFO. SOC’Y 41, 43 (Winter, 2010).
6 U.S. CONST., ART. I, § 8, CL. 8.
creative potential of consumers, as illustrated by remix artists’ inability to legally create mashups.\(^7\)

This paper proposes creating a legal home for sample-based music by implementing a royalty-based compulsory licensing system for sound recordings. First, by providing an affordable option to sample legally, artists’ creativity is not stifled, and they are incentivized to profit from their work. Second, copyright owners would be afforded the chance to profit by licensing dormant back catalogues, gaining new exposure, and ultimately collecting more royalty payments.

Such a compulsory licensing scheme is more of a liability rule than a property rule.\(^8\) The copyright owner would be compensated for the use of his work—payment for the invasion of his intellectual property rights. On the other hand, the copyright owner would lack the power to veto the use of his or her work, leaving room for others to create. As remix becomes more and more pervasive, compulsory licensing offers a compromise likely to benefit both sides and to restore balance in copyright law.

The argument unfolds as follows. Part I will describe how audio mashups are made, and their inherent value as creative works. Part II will demonstrate how copyright law impedes mashup artists from creating legitimate works. Part III will illustrate that mashup artists would be unsuccessful in overcoming a copyright infringement claim. Finally, Part IV will address the imbalance in today’s copyright system with respect to fulfilling the goals of the Copyright Act, and will suggest a theory of compulsory licensing as a possible solution.

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\(^7\) See Kelly Cochran, *Facing the Music: Remixing Copyright Law in the Digital Age*, 20-SPG KAN. J.L. & PUB. POL’Y 312, 319 (Spring 2011).

\(^8\) See Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," 85 HARV. L. REV. 1089-1128 (1972) (providing a conceptual framework within which to analyze “entitlements,” or rights, which can be protected by either property, liability, or inalienability rules).
I. A Brief History of Digital Sampling and its Progeny

A. Audio Sampling: The Birth of a Genre

Sampling is the use of a portion of preexisting recordings or compositions in a new sound recording.\(^9\) The practice of sampling has roots in early genres such as folk music, Jamaican Dub music, and disco music.\(^10\) However, sampling came into its own during hip hop’s “golden era” of the late 1970s and 1980s.\(^11\) The process of integrating samples into new music compositions emerged from block parties in the New York City boroughs, where deejays would mix records to liven dance parties.\(^12\)

Like so many creative innovations, the practice of sampling is the product of improvisation. The break is the part of a song where the percussion takes over, and was a favorite of break-dancers who performed dance moves in syncopation with its rhythm.\(^13\) Deejays realized, however, that thirty-to-fifty seconds—the average length of a break—was not enough time for all of the dancers to showcase their talent.\(^14\) Consequently, they began looping the breaks, creating a continuous and potentially infinite break-beat.\(^15\) Soon after, MCs\(^16\) began rhyming over the break-beats and creating tapes of their performances to sell in their respective New York City

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9 See Jeffrey Omari, *Mix and Mash*, 33 LOS ANGELES LAWYER MAG. 6, 35 (Sept. 2010).
11 Omari, at 35.
13 Id. at 179.
14 Id.
15 Id.
16 Master of Ceremonies or Microphone Controller.
boroughs. These tapes typically consisted of sampled breaks from funk records and other copyrighted material over which the MCs rhymed original lyrical verses.

Thanks to technological advancement, this form of analog sampling has now evolved into digital sampling, prevalent in many genres of music today. It is not uncommon for an adult to recognize a childhood favorite on the radio that has been sampled and recycled as part of a new chart-topping hit.

B. The Progression to Mashups

The audio mashup is a category of sampling, which has recently developed into its own genre. Mashups differ from traditional sampling in one significant way: While traditional sampling consists of incorporating preexisting sound recordings onto which vocals and other original material are layered, mashups contain no original content. Rather, remix artists craft mashups using only preexisting, copyrighted songs.

There are several forms of mashups, the most basic being “A vs. B,” where the vocal track of one song is superimposed over the musical composition of another. One of the most famous A vs. B mashups to date is the Grey Album by Danger Mouse, which combines a cappella samples

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17 See Rezaie at 179.
18 Id.
20 See Billboard’s Hot 100, http://billboard.com/charts/hot-100#/charts/hot-100 (last visited March 17, 2012)(“Take Care” by Drake feat. Rihanna is currently number 7 on Billboard’s Top 100 Music Hits, and samples “It’s My Party” by Lesley Gore, which was number 1 on Billboard’s Top 100 Music Hits in June of 1963).
21 See Michael Allyn Pote, Mashed-Up In Between: The Delicate Balance of Artists’ Interest Lost Amidst the War on Copyright, 88 N.C. L. Rev. 639, 646 (2010).
22 Id.
from The Black Album\textsuperscript{24} by Jay-Z, with newly arranged instrumental samples taken from the White Album\textsuperscript{25} by The Beatles.\textsuperscript{26}

In addition to the traditional A vs. B mashup, the use of computers has improved the sampling process to facilitate the creation of "audio collages." Audio collages combine snippets of preexisting songs, often from a wide variety of genres.\textsuperscript{27} The most well-known mashup artist is Greg Gillis, who performs under the moniker Girl Talk. Girl Talk’s mashups typically sample between twenty and thirty different songs per track.\textsuperscript{28} This paper will focus on the legal issues surrounding audio collages.

Although mashups are derivative in nature, they are representative of a highly creative collaborative process, which has been prevalent throughout history. Methods of re-contextualizing original material to create new expression have been instrumental to the success of numerous art movements.\textsuperscript{29} There are conflicting views concerning the artistic value of mashups, largely due to generational gaps. Nonetheless, our remix culture is flourishing, and mashups should be accepted, if not embraced, as a legitimate genre of music.

Unfortunately, remix artists lack the means to make mashups legally. Whereas popular recording artists presumably obtain licenses to use samples in their songs, mashup artists rarely obtain such permission. To do so would be prohibitively expensive, especially for amateur remix

\begin{footnotesize}
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\item[	extsuperscript{25}] The Beatles, The Beatles (Apple 1968). Though the Beatles’ ninth official album is self-titled as The Beatles, it is commonly known as the White Album due to its plain white cover.
\item[	extsuperscript{26}] See Rezaie, at 182.
\item[	extsuperscript{27}] See Harper, at 409.
\item[	extsuperscript{28}] Id.
\item[	extsuperscript{29}] See Reuven Ashtar, Theft, Transformation, and the Need of the Immaterial: A Proposal for A Fair Use Digital Sampling Regime, 19 Alb. L.J. Sci. & Tech. 261, 302 (2009)(Likening creative sampling to the work of postmodern artists, “from Marcel Duchamp (with his ‘ready-made’ art) to the Dadaists (who used ‘collage’) to Jeff Koons (and his ‘appropriation art’)…”).
\end{enumerate}
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artists who lack the financing of established artists. A compulsory licensing scheme for sound recordings would enable mashup artists to legally create mashups without the fear of litigation—promoting creativity, rather than stifling it.

II. The Copyright Impediment to Mashups

A. The Prima Facie Case of Copyright Infringement

Copyright protects original works of authorship fixed in a tangible form of expression that can be communicated directly or indirectly, with the help of some device. Both musical works and sound recordings qualify for copyright protection, resulting in two separate copyrights for each song: for the musical composition—the lyrics and musical arrangement; and for the sound recording of the work—the fixation of a performance of the musical composition. The existence of two separate copyrights means two parties may have independent claims against a sampling artist for copyright infringement—the first being the artist who created the musical composition, and the second being the record label that facilitated the creation of the sound recording.

As a general rule, a copyright today attaches automatically from the date of creation, and lasts for the life of the author plus an additional seventy years. Works that are unprotected due

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30 See infra, section III(B) (discussing the burdensome process of obtaining licenses to sample).
33 See §102(a)(2).
34 See §102(a)(7).
35 See Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 800 (6th Cir. 2005).
36 See 17 U.S.C. §302(a). For works created after January 1, 1978, copyright protection lasts for the life of the author plus an additional seventy years. Id. For an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of ninety-five years from the year of its first publication or a term of 120 years from the year of its creation,
to copyright expiration or ineligibility fall into the “public domain.”

Until a work enters the public domain, the copyright holder retains the exclusive rights of reproduction, preparation of derivative works, distribution, public performance, and public display of the work.

In order to prevail in a copyright infringement case, the plaintiff must make two showings: 1) that the work in question holds a valid copyright, and 2) that the defendant violated one of the copyright holder’s exclusive rights without permission. Additionally, the use must be “substantial.” If the plaintiff is able to demonstrate that his or her exclusive rights were violated, the defendant has an opportunity to assert a defense. The two most common defenses in copyright litigation are the de minimis defense and the fair use defense, which place limitations on the copyright holders’ exclusive rights.

B. Mashups Constitute Copyright Infringement

To establish a claim of infringement of a musical work, the copyright holder must first prove ownership of a valid copyright, and second that the defendant copied the protected material without permission. The first element is usually straightforward, since ownership is easy to establish. Additionally, mashups feature well-known songs, which unquestionably hold valid copyrights.

whichever expires first. See U.S. Copyright Office, Circular 15(a), “Duration of Copyright.” For works first published prior to 1978, the term will vary depending on several factors. Id.

Black’s Law Dictionary 579 (3rd Pocket ed. 2006). “The universe of inventions and creative works that are not protected by intellectual property rights and are therefore available for anyone to use without charge.” Id.


See 4 Nimmer on Copyright §13.03[B], at 2 (noting that the substantial similarity between a plaintiff’s and defendant’s works is the threshold of liability for copyright infringement).

See Harper, at 413.

See Roger v. Koons, 960 F.2d at 306.

Id.

Id.

See Harper, at 418.
The second element of infringement also cuts in favor of copyright holders. Section 106 of the Copyright Act grants several exclusive rights to copyright holders in their copyrighted works, including the reproduction right, the adaptation right, the public distribution right, the public performance right, and the public display right.\textsuperscript{45} The unauthorized use of a digital sample potentially violates some, if not all, of these rights, save the public display right, which deals only with visual works.\textsuperscript{46}

1. The Reproduction Right

Copyright holders have “the exclusive right to [reproduce]…and to authorize” the reproduction of “the copyrighted work in copies or phonorecords.”\textsuperscript{47} The reproduction of a copyrighted work is a violation even if the copy is used “solely for the private purposes of the reproducer.”\textsuperscript{48} Also, the reproducer does not need to copy an entire work to risk liability for infringement—a portion of the work may suffice.\textsuperscript{49} Making additions to the copyrighted work is not a defense;\textsuperscript{50} by integrating a sample of a copyrighted sound recording into a mashup, the mashup artist is unequivocally violating the copyright holder’s reproduction right.

2. The Adaptation Right

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\textsuperscript{45} See 17 U.S.C. §106 (2006). Copyright holders have the exclusive right to display and to authorize the display of the copyrighted work publicly. See §106(5). Since music mashups consist only of preexisting sound recordings, a mashup could not violate the public display right. \textsuperscript{46} See 17 U.S.C. §106(5). \textsuperscript{47} 17 U.S.C. §106(1). \textsuperscript{48} Walt Disney Prods v. Filmation Assocs., 628 F. Supp. 871, 876 (C.D. Cal. 1986) (quoting 2 Nimmer on Copyright §8.02 [C], 8-34 (2006)). \textsuperscript{49} See Harper, at 418. \textsuperscript{50} See H.R. REP. NO. 94–1476 at 61. “Departures or variations from the copyrighted work would still be an infringement as long as the author’s ‘expression’ rather than merely the author’s ‘ideas’ are taken. Id.
\end{flushright}
Copyright holders have the exclusive right “to [prepare]…and to authorize” the preparation of derivative works “based upon the copyrighted work.”¹⁵¹ The Copyright Act defines a “derivative work” as a “work based upon one or more preexisting works, such as a…musical arrangement…sound recording…or any other form in which a work may be recast, transformed, or adapted.”¹⁵² A derivative work recasts preexisting material to form a new work that does not alter the purpose and character of the original work.¹⁵³ Thus, whether an audio mashup is a derivative work turns on whether it is transformative.¹⁵⁴

Audio mashups may be characterized as derivative works because they recast or transform “one or more preexisting…. sound recording[s]“ into a “new” work.⁵⁵ Copyright holders of sound recordings often license the ability to prepare derivative works such as remixes, thereby capturing potential royalties in the resulting work.⁶⁶ Mashup artists who use preexisting sound recordings without first obtaining a license violate the copyright holders’ exclusive right to prepare or authorize the preparation of derivative works. Further, this type of unauthorized sampling robs copyright holders of their right to control, and to subsequently profit from the use of their works.

3. The Public Distribution and Performance Rights

The public distribution right grants authors the exclusive right “to distribute…phonorecords of the copyrighted work to the public by sale or other transfer of ownership.”⁵⁷ Mashups sold or

¹⁵⁴ See infra, section III(B)(1)(i) (discussing whether mashups are transformative).
¹⁵⁶ See Pote, at 660.
otherwise distributed, regardless of the means, violate the public distribution right of each copyright holder whose sound recording has been used in the mashup.

A copyright holder also retains the exclusive right “to [perform]…and to authorize the performance of “the copyrighted work publicly.” To perform” means to “recite, render, play, dance, or act” the work, “either directly or by means of any device or process.” Hence, to “play” a sample of a sound recording as part of an audio mashup constitutes performance. To perform a work “publicly” means:

(1) to perform…it at a place…where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
(2) to transmit or otherwise communicate a performance…of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance…receive it in the same place or in separate places and at the same time or at different times.

Under the first prong of this definition, mashup artists’ performances at concerts and other venues surely constitute public performance. The second prong includes transmission of a performance, and suggests that posting a performance on a web site or posting an audio track to play at users’ requests would also violate the public performance right. This analysis illustrates the lose-lose situation in which mashup artists have found themselves as a result of an outdated copyright regime.

61 See Pote, at 662.
III. Limitations on the Exclusive Rights of Copyright Holders

While unauthorized sampling infringes on the exclusive rights of copyright holders, the Copyright Act imposes limitations on those rights. These limitations serve as a balancing mechanism between current artists’ rights and future artists’ rights. While current artists are incentivized to create original works through the grant of exclusive rights, future artists are able to use artists’ works to create new works. Aside from the Copyright Act’s limitations, the common law doctrine of de minimis use provides an additional limitation to copyrights and authorizes artists to lawfully make minimal use of preexisting works. The most applicable and often asserted defenses for mashup artists are the de minimis use doctrine, and the fair use doctrine.

A. The De Minimis Use Doctrine

Once the copyright owner shows infringement, the burden shifts to the alleged infringer to assert a defense. The de minimis doctrine is used both as an element of the prima facie case and as a defense to be asserted by the defendant. It is not an affirmative defense; rather, it directly attacks the plaintiff’s prima facie case by alleging that the plaintiff has not satisfied all of the required elements for infringement.

To be actionable, the unauthorized use must be “substantial.” Substantial similarity is evaluated through a two-part test: the copying has to be qualitatively significant, as well as quantitatively so. To determine whether the copied portion is qualitatively significant, courts

66 See 4 NIMMER ON COPYRIGHT §13.03[B], at 2 (noting that the substantial similarity between a plaintiff’s and defendant’s works is the threshold of liability for copyright infringement); see also Bridgeport Music v. Dimension Films L.L.C., 230 F. Supp. 2d 830, 340 (M.D. Tenn. 2002).
consider how important the copied portion is in relation to the work as a whole.\textsuperscript{68} In evaluating whether a use is quantitatively substantial, courts require more than a \textit{de minimis} amount of copying. Courts have not articulated a bright-line rule as to what is more than \textit{de minimis}, but have offered some guidance.

In \textit{Newton v. Diamond}, the Ninth Circuit determined that a three-note, six-second digital sample of defendant’s musical composition was \textit{de minimis} and dismissed the copyright infringement claim.\textsuperscript{69} The court relied on an expert’s testimony that stated the three-note passage was “simple, minimal, and insignificant.”\textsuperscript{70} In contrast, the District Court for the Southern District of New York has held that taking four notes was not \textit{de minimis} where the defendant copied “the heart of the composition.”\textsuperscript{71}

While courts have recognized the \textit{de minimis} defense in cases dealing with the infringement of musical compositions, the Sixth Circuit has held the defense inapplicable to the copying of sound recordings.\textsuperscript{72} In \textit{Bridgeport, Inc. v. Dimension Films}, the Sixth Circuit used the plain meaning of §114(b) of the Copyright Act to hold that a plaintiff need only prove ownership of a valid copyright and the defendant’s actual copying of the plaintiff’s work, and not the substantial similarity of the two works.\textsuperscript{73} Section 114(b) states that:

The exclusive right of the owner of copyright in a sound recording [to make derivative works] is limited to the right to prepare a derivative work in which the \textit{actual sounds

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\item \textsuperscript{68} See e.g. Iowa State Univ. Research Fund, Inc. v. American Broad Co., 463 F. Supp. 902 (S.D.N.Y.), aff’d, 621 F.2d 57 (2d. Cir. 1980) (holding that a twelve-second segment of a film was a qualitatively substantial part of the plaintiff’s work, and constituted infringement); Monster Commc’ns, Inc. v. Turner Broad. Sys., Inc., 935 F. Supp. 490, 496 (S.D.N.Y. 1996) (film clips aggregating two minutes were qualitatively substantial and therefore, constituted infringement).
\item \textsuperscript{69} See Newton v. Diamond, 388 F.3d 1189, 1194 (9th Cir. 2004).
\item \textsuperscript{70} Id. at 1195-96.
\item \textsuperscript{72} See Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 395-402 (6th Cir. 2004).
\item \textsuperscript{73} Id. at 398.
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fixed in the sound recording are rearranged remixed, or otherwise altered in a sequence or quality.\footnote{17 U.S.C. §114(b) (emphasis added).}

In holding that a sound recording owner has the exclusive right to “sample” his own recording, the Sixth Circuit concluded that the plain language of the statute precluded the use of a substantial similarity test.\footnote{See Bridgeport Music, Inc. v. Dimension Films, 383 F.3d at 398 n. 8.} The court reasoned that a bright-line rule of per se infringement for digital sampling would discourage piracy, and also be easy to enforce.\footnote{Id. at 398.} The court explicitly warned potential copyright infringers: “Get a license, or do not sample.”\footnote{Bridgeport Music, Inc. v. Dimension Films, 383 F.3d at 398.}

The strict holding of Bridgeport renders the de minimis defense of little use to mashup artists for several reasons. First, audio mashups by definition consist entirely of digital samples of preexisting works. Under Bridgeport, the use of such sound recordings is per se copyright infringement, regardless of the portion used.

Second, mashup artists’ defense of de minimis copying against claims of musical composition copyright infringement is likely to be unsuccessful. Although digital samples used in audio mashups tend to be short, the appeal of a mashup is based on the audience’s recognition of the original songs.\footnote{See David Tough, The Mashup Mindset: Will Pop Eat Itself? In GEORGE PLASKETES, PLAY IT AGAIN: COVER SONGS IN POPULAR MUSIC 205, 207. (Ashgate Publishing Company 2010).} Given this incentive, mashup artists are prone to using qualitatively significant samples that trigger recognition by the audience, and constitute “the heart of the composition.” For example, Girl Talk’s digital sample choices are based on popular “Top 40” hits played on the radio.\footnote{See Ryan Dombal, Interviews: Girl Talk, Pitchfork, Aug. 30, 2006, http://pitchfork.com/features/interviews/6415-girl-talk/ (last visited March 10, 2012).} He does not sample obscure portions of songs; rather, he samples the portion of songs that made them hits, and are likely to hype up a dancing crowd.
In order for mashup artists like Girl Talk to successfully assert the *de minimis* defense, they would have to attack the validity of the bright-line rule established by the Sixth Circuit in *Bridgeport*.

B. The Fair Use Defense

Though digital sampling without a license is per se copyright infringement, the infringer may escape liability by asserting the affirmative defense of fair use. Pursuant to §106 of the Copyright Act, fair use imposes limitations on the exclusive rights granted to owners. The purpose of the fair use doctrine is to balance the rights of current artists and future artists by allowing courts “to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”

Under §107 of the Copyright Act, four non-exclusive factors should be considered when determining whether use of a copyrighted material is for the purpose of “criticism, comment, news reporting, teaching…scholarship, or research,” and exempted from infringement liability. Those factors are: 1) the purpose and character of the use; 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. These factors are each important, and should be analyzed collectively, while bearing in mind the purposes of copyright law. The following subsections will discuss the four factors of fair use as applied to mashups. This analysis is non-determinative, as a finding of fair use is

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80 *See* 17 U.S.C. §106.  
83 *Id.*  
made on a case-by-case basis. Nevertheless, audio mashups share many characteristics as a
genre. Evaluating these characteristics is helpful to gauge the potential effectiveness of a mashup
artist like Girl Talk’s fair use defense.

1. Purpose and Character of the Use

While all of the fair use factors are important, the Supreme Court has indicated that the first
factor is the most probative. Courts typically approach this factor with a three part inquiry: 1) whether and to what extent the use is transformative; 2) whether the use is commercial; and 3) whether the alleged infringer acted in good faith. For the reasons discussed below, this factor weighs against a finding of fair use for mashup artists.

i. Transformative Use

The more transformative a secondary work, the more likely a court is to consider the
unauthorized use “fair.” Though no element of the fair use analysis is dispositive, recently courts
have held that the issue of whether a use is transformative is the “[most] critical to the inquiry
under the first fair-use factor.” In determining whether a work is “transformative,” courts
consider whether the defendant has “alter[ed] the original with new expression, meaning, or

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85 Id. at 577.
86 See Campbell v. Acuff-Rose Music, Inc., 510 U.S. at 579. “[T]he goal of copyright, to promote
science and the arts, is generally furthered by the creation of transformative works. Such works
thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of
copyright, and the more transformative the new work, the less will be the significance of other
factors…that may weigh against a finding of fair use.” Id. (Citations omitted).
message.” Examples of clearly transformative uses include showing a twenty-second clip of a movie in the biography of an actor, or parodying an original song.

In *Campbell v. Acuff-Rose*, the Supreme Court held that parodies are a form of criticism under §107. In that case, the Court found that 2 Live Crew’s “Pretty Woman” was a parody of Roy Orbison’s “Oh, Pretty Woman,” and was transformative because it changed the character of the song by changing the lyrics and criticizing the original work. Some legal scholars have since relied on this decision to advance a “quasi-parody” theory under which mashups are deemed sufficiently transformative to trigger fair use protection. Under this theory, mashups are likened to parodies because they criticize “the substance or style of the original composition.” However, this forced analogy looks more like an eager attempt to shelter mashup artists from infringement liability than a legitimate application of the law.

The argument that mashups provide social commentary by arranging samples in a way that criticizes the music industry or individual artists is unconvincing. Mashup artists like Girl Talk do not select samples as a means of criticizing or commenting on music; they select samples that

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89 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 569.
91 See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 578-85; see also *Abilene Music, Inc. v. Sony Music Entm't, Inc.*, 320 F.Supp.2d 84,89 (S.D.N.Y. 2008)(holding that the parodic use of the original is always transformative).
92 See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 579.
93 Id. at 570.
96 See id., at 578-85 (illustrating how strictly courts interpret the first fair use factor); but see *Pote*, at 673-75 (arguing that mashup artists might be able to claim their works offer commentary).
the listeners will enjoy.\textsuperscript{97} Further, any commentary on the music industry or mainstream music that proponents of the quasi-parody theory may infer from mashups does not support the characterization of mashups as parodies. Rather, it depicts mashups as satirical works, which are not sufficiently transformative under fair use analysis.\textsuperscript{98}

In \textit{Campbell v. Acuff-Rose Music}, the Court distinguished a parodical work from a satirical work: a satire makes a general comment or criticism on society, whereas a parody comments on or criticizes a specific work.\textsuperscript{99} In his concurrence, Justice Kennedy explained: “Parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole.”\textsuperscript{100} In that case, 2 Live Crew’s parody, “Pretty Woman,” was transformative because it “was clearly intended to ridicule the white-bread original and reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not without its consequences.”\textsuperscript{101} Unlike 2 Live Crew, mashup artists are not commenting on the original works they integrate into their audio collages.\textsuperscript{102} Mashups, albeit innovative, “merely ‘supersede the objects’ of the original creation”\textsuperscript{103} by recycling the samples and presenting them in a new way.

Some scholars call for the abandonment of the parody-satire distinction, calling it artificial and inappropriate.\textsuperscript{104} After all, parody and satire are conceptually similar. However, the courts’

\textsuperscript{97} See Harper, at 423.
\textsuperscript{98} See \textit{Campbell v. Acuff-Rose Music, Inc.}, 510 U.S. at 581.
\textsuperscript{99} \textit{Id.} at 581; see also \textit{Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.} 109 F.3d 1394, 1400 (9th Cir. 1997)(distinguishing satire from parody).
\textsuperscript{100} See \textit{Campbell v. Acuff-Rose Music, Inc.}, 510 U.S. at 597 (Kennedy, J., concurring).
\textsuperscript{101} \textit{Id.} at 582.
\textsuperscript{102} See Harper, at 424.
\textsuperscript{104} See \textit{e.g.} Christopher J. Brown, \textit{A Parody of A Distinction: The Ninth Circuit's Conflicted Differentiation Between Parody and Satire}, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 721, 748 (2004).
task of separating “the fair use sheep from the infringing goats”\textsuperscript{105} is not just an exercise in semantics; it is a mechanism to balance the competing public policies underpinning copyright law. While fair use is an important means of encouraging creativity, courts also need to protect copyright holders against the wrongful use of their works. As Judge Cardamone explained in Rogers v. Koons:

“[T]he copied work must be, at least in part, an object of the parody, otherwise…there would be no real limitation on the copier’s use of another’s copyrighted work to make a statement on some aspect of society at large…By requiring that the copied work be an object of the parody, we merely insist that the audience be aware that underlying the parody there is an original and separate expression, attributable to a different artist.”\textsuperscript{106}

Abandoning the distinction between parody and satire could lead to the unbridled misappropriation of copyrighted works, robbing artists of their integrity and incentive to create. Justice Kennedy anticipated this problem when he warned against the exploitation of the fair use defense by framing a successful work post hoc as a criticism or comment on a work.\textsuperscript{107} He was troubled by the prospect of allowing weak transformations to qualify as parodies, noting that “almost any revamped modern version of a familiar composition can be construed as a ‘comment on the naiveté of the original,’ because of the difference in style and because it will be amusing to hear how the old tune sounds in the new genre.”\textsuperscript{108} Justice Kennedy’s concerns about the over-inclusiveness of parody are magnified by the possibility of allowing satire to qualify as fair use as well. As easy as it is to make an argument that a derivative work qualifies as a parody, it is even easier to argue for the characterization of a work as satire.

\textsuperscript{105} Id. at 586.
\textsuperscript{106} Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992).
\textsuperscript{107} See Campbell v. Acuff-Rose Music, Inc., 510 U.S. at 600 (Kennedy, J., concurring).
\textsuperscript{108} Id. at 599.
The fair use of a copyrighted work must be for “purposes” of criticism, comment, news reporting, et cetera. The statute’s requirement of a specific “purpose” suggests the importance of the defendant’s intent in using the work. However, this intent can be easily be forged. For example, when popular mashup artist DJ Danger Mouse released The Grey Album, which combined Jay-Z’s The Black Album with the Beatles’ The White Album, he stated in an interview that it was the product of a “crazy idea” he had to combine the two. However, since its sharp rise in popularity, supporters have praised its critical brilliance. For instance, Michael Paoletta interpreted The Grey Album as a criticism of the sacrosanct position The Beatles hold in our cultural history. If DJ Danger Mouse had not already commented on his inspiration, he conceivably could have adopted any of the critics’ insightful interpretations to characterize the work as transformative—precisely the “post hoc” justification of which Justice Kennedy warned.

Under current fair use precedent, an interpretation like Paoletta’s would not classify the work as transformative since his criticism was directed towards the Beatles in general, rather than any one of the particular works Danger Mouse sampled on the Grey Album. Further, creators of audio collage like Girl Talk face more difficulty in establishing transformative use due to the sheer number of samples they use in each track. As one scholar notes, “even a legitimate post

112 The Beatles, The Beatles (Apple 1968). Though the Beatles’ ninth official album is self-titled as The Beatles, it is commonly known as The White album due to its plain white cover.
115 See Pote, at 672-63.
116 See supra n. 18 and accompanying text.
hoc rationalization seems difficult” when a mashup consists of snippets of so many different works.117 While mashups may be creative, they do not alter the original works with a new meaning or message. Courts are unlikely to find them transformative.

ii. Commercial Purpose

The second assessment in the purpose and character of the use test is whether the use of a work is for commercial or nonprofit, educational uses.118 A finding that the use was commercial tends to weigh against a finding of fair use, as the author of a work is the rightful beneficiary.119 Mashup artists have traditionally not released their creations commercially. Still, successful mashup artists may receive indirect or direct commercial benefit from the distribution of their work.

The indirect commercial benefit generated from mashup distribution is exemplified by the career of DJ Danger Mouse. Danger Mouse has not sold any of his mashup albums since receiving a cease-and-desist letter from EMI.120 However, the publicity and controversy surrounding The Grey Album has resulted in great success for Danger Mouse, including several chart-topping hits and award nominations with his band Gnarls Barkley.121 In fact, Danger Mouse has openly attributed his discovery in the music business to his use of Jay-Z and The Beatles’ albums.122

117 Pote, at 674.
122 See Moss, supra n. 113.
An example of a mashup artist receiving direct commercial success from his creations is Girl Talk. Gillis tours and plays regularly at clubs, colleges,¹²³ and other concert venues around the world. In fact, the profits from his performances have allowed him to quit his day job as a biomedical engineer and play mashups full-time.¹²⁴ Additionally, Gillis offers some of his albums on a “pay what you want” basis, which gives fans the option to download for free, or to pay what they think the album is worth.¹²⁵ Although this model is not as blatantly commercial as selling the albums for a fixed industry standard rate, “the crux of the profit/nonprofit distinction” is merely “whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”¹²⁶ All sound recordings require creativity, labor, and resources from the original artists, yet Gillis is making a living off of them without compensating those artists.

Despite the commercial success of popular mashup artists such as DJ Danger Mouse and Girl Talk, most mashup artists are amateurs without commercial incentive whose work is freely downloadable.¹²⁷ For those creating mashups strictly as a hobby, this factor would weigh in favor of fair use. However, “almost all works that seek fair use protection will be of a commercial nature.”¹²⁸ As a practical matter, when this issue of fair use as applied to mashups is finally litigated, the case will likely involve a professional mashup artist like Greg Gillis who is

¹²⁷ See Harper, at 426.
commercially benefitting from his infringing use, rather than an unknown high school student who makes mashups after school to share with his friends. Consequently, this factor would probably weigh against a finding of fair use in a courtroom.

iii. Good Faith

In addition to considering whether the use is transformative or commercial, courts also look to whether the alleged infringer acted in good faith. If an alleged infringer used the work before that work was published, that indicates bad faith and subsequently weighs against a finding of fair use.

In *Harper and Row Publishers v. Nation Enterprises*, the Supreme Court emphasized, “[f]air use presupposes good faith.” In that case, Nation was liable for copyright infringement after publishing substantial portions of President Ford’s not-yet-published memoir without authorization. The Nation was not entitled to fair use protection because it published the most powerful passages with the purpose of “supplanting the copyright holder’s commercially valuable right of first publication” in bad faith.

Unlike the defendant in *Harper and Row v. Nation*, mashup artists do not attempt to appropriate the benefits of first publication or production. To the contrary, mashups typically consist of songs that have achieved significant popularity and will be familiar to their audience. A song that has not been released cannot yet be popular, and holds little appeal for mashup artists. Additionally, the Supreme Court has held that failing to obtain permission before using another artist’s work does not necessarily result in a finding of bad faith. After all, the heart of fair use

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130 Id. at 564.
131 Id. at 562.
132 Id.
133 See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 585 n. 18.
is that the artist need not seek authorization if his or her use is fair. Considering mashup artists are not attempting to alter the value of the preexisting works, a court would likely find there was good faith, despite their unauthorized sampling.

In conclusion, the first factor of the fair use analysis, which examines the purpose and use of the use, cuts against mashup artists. Even though mashup artists typically act in good faith, their use of preexisting works can hardly be considered transformative. Also, despite the fact that most mashups are not distributed commercially, the music industry is most likely to challenge a use commercial in nature, or at least one that yields economic benefit for the remixer. Taken together, these sub-factors foreshadow an unfavorable outcome for mashup artists.

2. Nature of the Copyrighted Work

The second factor of the fair use analysis deals with the nature of the copyrighted work.\textsuperscript{134} The principal distinction courts make is between creative and factual works.\textsuperscript{135} Creative works are considered “closer to the core of intended copyright protection,” whereas factual works receive less protection.\textsuperscript{136} Since sound recordings are creative works, mashup artists’ usage of them weights against a finding of fair use.

Fortunately for mashup artists, courts consider an additional distinction when evaluating the nature of the work: whether the original work is published or unpublished. The “unpublished nature of a work” may tend to “negate a defense of fair use.”\textsuperscript{137} The sound recordings sampled in mashups are always published, and usually widely distributed. Since the preexisting works

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\textsuperscript{134} See 17 U.S.C. §107(2).
\textsuperscript{137} Harper and Row Publishers, Inc. v. Nation Enter., 471 U.S. at 554.
mashup artists incorporate into their creations are published, creative works, this factor does not counsel in favor of or against a finding of fair use.\textsuperscript{138}

3. Amount and Substantiality of the Portions Used

The third factor, which concerns the amount and substantiality of the portion of copyrighted material used, cuts against a finding of fair use for mashup artists. Where a quantitatively greater portion of the original is used, or where the “heart of the [original]” is taken, a court will tend to find against fair use.\textsuperscript{139} Authors of A v. B mashups sample a substantial and significant portion of each of the two songs used, which clearly disfavors a finding of fair use. However, the determination is less clear when evaluating more complex mashups.

Audio collages contain a large amount of samples. In the case of a professional mashup artist like Girl Talk, whose most recent album, “All Day,” is seventy-one minutes long and incorporates 372 samples,\textsuperscript{140} the amount and substantiality determination depends on the particular mashup and on the specific sample in question. Girl Talk’s “All Day” boasts “large catalogs of both blatantly appropriated melodies and blasts of unrecognizable fragments.”\textsuperscript{141} As a result, this factor’s application will vary case by case. However, “All Day,” like Girl Talk’s other albums, is also characterized as a “pop collage album,”\textsuperscript{142} the success of which is predicated on his audience’s recognition of the integrated samples. This suggests that the sample in question might very well be the “heart” of the song, rendering even a short sample unprotected by fair use.

4. Effect on the Market and Potential Markets

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\textsuperscript{138} See \textit{Campbell v. Acuff-Rose Music, Inc.}, 510 U.S. at 586.
\textsuperscript{139} \textit{Harper and Row Publishers, Inc. v. Nation Enter.}, 471 U.S. at 565.
\textsuperscript{140} See \textit{Illegal Art, supra} n. 125.
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{Id.}
In applying the fourth and final factor of the fair use analysis, courts consider whether the infringing conduct would have a harmful effect on the direct market and the derivative market for the original work.\textsuperscript{143} In an effort to preserve artists’ incentive to create, courts disfavor infringing uses that impair the marketability of the copyrighted work.\textsuperscript{144} This factor weighs against a finding of fair use for mashup artists.

The issue of direct market harm hinges on whether the secondary work “usurps or substitutes for the market of the original.”\textsuperscript{145} Mashups are unlikely to directly impair the economic rights of copyright holders. Realistically, fans of an original work are not going to purchase a mashup instead of the original work. Someone who considers purchasing Nirvana’s “Smells like Teen Spirit” on iTunes is unlikely to refrain from doing so because he can listen to part of it in the mashup “Smells like Teen Booty.”\textsuperscript{146} A fan is even less likely to refrain from purchasing a song because a few seconds of it is sampled on an audio collage. Additionally, mashups often appeal to a different audience than that of the original song.\textsuperscript{147} All in all, it is highly improbable that mashups will ever serve as substitutes for preexisting songs. As such, mashups have little to no effect on the sale of those songs.

If anything, mashups may actually increase the market value of the original songs by exposing a new audience to preexisting works to which they may not have been otherwise.\textsuperscript{148}

Further, if a fan enjoys a portion of a song he heard in a mashup, he or she might be inclined the

\textsuperscript{143} See 17 U.S.C. §107(4).
\textsuperscript{147} See Pote, at 681.
\textsuperscript{148} See Tough, at 209.
purchase the original.\textsuperscript{149} The fact that mashups do not negatively impact the direct market for copyrighted works, and may even positively impact their sales, favors a finding of fair use.

Although the lack of direct market harm seems to favor fair use, that optimism is contradicted by the injury mashups impose on potential derivative markets. To illustrate market harm to potential derivative markets, “one need only show that if the challenged use ‘should become widespread,’ it would adversely affect the potential market for the copyrighted work.”\textsuperscript{150} Since mashups are derivative works of the original works they incorporate, the copyright holders of the original works lose potential licensing revenue. In light of the rising popularity of sampled music, it is enough to show that mashup artists’ current use of copyrighted material may adversely affect the potential market for future mashups created with copyright holders’ authorization.\textsuperscript{151} The negative impact that mashups may have on the potential derivative market for copyright holders weighs against a finding of fair use.

In view of the above analysis, mashup artists are probably not entitled to the affirmative defense of fair use. First, although most mashups are created in good faith and for noncommercial purposes, the purpose and character of the use cuts against a finding of fair use because mashups are not transformative, and whether a use is transformative has been identified as the most significant inquiry in the evaluation of this factor.\textsuperscript{152} Additionally, not all mashups are noncommercial, and popular artists, who would likely be the ones challenged in a lawsuit, generate significant profit from their mashups. Second, the nature of the copyrighted material factor has hardly any effect on the application of fair use to mashups since mashup artists

\textsuperscript{149} Id.


\textsuperscript{151} See Power, 599-600.

integrate works that are both creative and published—traits that cancel each other out. Third, the amount and substantiality factor weighs against mashup artists because they typically incorporate the heart of the original work into the mashup. Finally, in light of mashups’ negative impact on the potential market for derivative works, the fourth factor cuts against a finding of fair use. Taken together, these considerations demonstrate that mashup artists are unlikely to be insulated from infringement liability by asserting fair use.

IV. The Imbalance in Copyright Law and Compulsory Licensing as a Possible Solution

A. There is an Imbalance in our Copyright System

The emergence of digital technologies and the Internet has enabled the zero-cost, widespread distribution of copyrighted works. The content industry’s fear of piracy has resulted in legislation that controls access to digital copyrighted works.\(^{153}\) The rationale for increased control is the protection of artists’ statutorily created rights\(^ {154}\) and the maintenance of an incentive for artists to continue creating new works. However, the content industry is currently wielding too much control in contradiction of the principal goal of copyright: “[t]o promote the Progress of Science and useful Arts....”\(^ {155}\)

Providing a monopoly to copyright holders incentivizes authors to create new works, but the ultimate objective of the Copyright Act is promote public access to those works.\(^ {156}\) These interests should be balanced; while it is important for copyright law to protect the economic interests of authors, it should also serve the valuable purpose of promoting creativity and

\(^{155}\) U.S. CONST., ART. I, § 8, CL. 8.
innovation by others. Unfortunately, the expansion of copyright protection now outweighs the interests of consumers. Copyright law does not seem to recognize the creative potential of consumers, nor does it allow consumers to interact with copyrighted works without facing legal consequences. Rather than cultivating innovation, the law is actively suppressing it.

Though mashups are derivative in nature, they are the product of a highly creative collaborative process to which the artistic community is not a stranger. Methods of re-contextualizing original material to create new expression have been instrumental to the success of numerous art movements. Claims that audio mashup is not a respectable music genre does not bar its rightful protection; there are critics of every genre. The goal of copyright law is not to evaluate taste, but to balance the competing interests of current and future artists.

Just as there are critics of mashups, there are proponents as well. For example, many artists have Lessig-inspired Creative Commons licenses. A Creative Commons license allows an artist to declare which exclusive rights he or she wishes to retain over a work. People are then free to avail themselves of the remaining rights, resulting in greater access to copyrighted material. While there are discordant views concerning the artistic value of mashups, the fact remains that it is a rapidly evolving genre, especially among young people.

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158 See Reuven Ashtar, Theft, Transformation, and the Need of the Immaterial: A Proposal for A Fair Use Digital Sampling Regime, 19 ALB. L.J. SCI. & TECH. 261, 302 (2009)(Likening creative sampling to the work of postmodern artists, “from Marcel Duchamp (with his ‘ready-made’ art) to the Dadaists (who used ‘collage’) to Jeff Koons (and his ‘appropriation art’)…”).
162 Id.
This paper argues for a reform of copyright law that properly balances the interests of current artists and the interests of future artists—specifically, mashup remixers. Copyright law applies to all creators, music industry giants and private individuals alike. Unsurprisingly, however, the corporate media has the resources and lobbying power to effectively deal with regulation and litigation of copyrights—powers the average citizen lacks. The fundamental purpose of copyright law is not solely to prevent the unauthorized copying of works, but also to foster the creativity of future artists by ensuring public access to those works.

B. Compliance with the Current Licensing Scheme is Impracticable for Mashup Artists

Although the foregoing legal analysis does not bode well for mashup artists who may face litigation, this paper argues for reform in favor of protecting these artists. As of now, mashup artists lack viable means to legally create their work. To obtain permission to use a sample, the mashup artist needs to secure a license. A license is a contractual agreement between a licensor (the copyright holder), and a licensee (the mashup artist), allowing a specified use of the work during a specified time for a specified price. Popular artists regularly obtain licenses for the works they sample. As some artists have discovered, failure to do so may result in costly infringement claims.

163 See Lessig, at 98-99.
164 See Cochran, at 319-20.
165 See Pote, at 685.
Unfortunately, requiring licensing for audio mashups would be logistically and financially cumbersome.\textsuperscript{168} The \textit{Bridgeport} Court’s advice to “get a license, or do not sample,”\textsuperscript{169} is not a realistic option for most mashup artists. While the Sixth Circuit claimed that the market would ensure that licensing costs were reasonable, the costs become downright unmanageable when one considers that a mashup artist must acquire several licenses per song. For example, one track by Girl Talk, “Friday Night,” samples twenty-one songs in three minutes.\textsuperscript{170} Each of the twenty-one titles is owned by an average of three corporations, each one wanting at least $2,500 up front per sample.\textsuperscript{171} That means it would cost at least $210,000 to pay the publishers. It would also cost about $52,000 to obtain clearances from the recording labels.\textsuperscript{172} Together, that would be about $262,500 for the one song. Night Ripper, the album on which “Friday Night” is featured contains sixteen tracks. It would cost Girl Talk well over four million dollars to clear the entire album.\textsuperscript{173} Considering it is too costly for professional mashup artists like Girl Talk to compensate the copyright holders for use of their songs, it is unfathomable for amateur artists to do so.

In addition to the exorbitant prices of the individual licenses, there are significant transactional costs as well. For example, artists pay sampling clearinghouses to assist them in locating rights holders, negotiating licensing agreements, and providing advice regarding which samples are likely to be unattainable.\textsuperscript{174} After extensive negotiation, a copyright holder still

\textsuperscript{168} See Power, at 586.
\textsuperscript{169} \textit{Bridgeport Music, Inc. v. Dimension Films}, 383 F.3d at 398.
\textsuperscript{170} See \textit{RIP! A REMIX MANIFESTO} at 24:00 (Brett Gaylor, 2008). This documentary is available at http://www.nfb.ca/film/rip_a_remix_manifesto/ (last visited March 10, 2012).
\textsuperscript{171} \textit{Id.} Note that these are approximate figures.
\textsuperscript{172} \textit{Id.}
\textsuperscript{173} \textit{Id.}
reserves the right to arbitrarily refuse to license his or her work. Since mashup artists sample sound recordings, they do not have access to compulsory licenses, leaving them completely dependent on the copyright owners’ approval. Owners may be unwilling to grant licenses if they consider the music to be somehow derogatory or of low value. While a few recording artists, like Jay-Z, have intentionally made their works available for remixing, they are few and far between.

Thus mashup artists lack the means to sample preexisting works without the fear of potential litigation. Considering the permeation of remix in our culture, specifically, mashups, there needs to be reform to enable its legal creation. In his book, Remix, Lessig offers several proposals to reform copyright law—all of which would require legislation by Congress. In fact, he suggests it may be time for the next major revision of the Copyright Act. In his words, “Criminalizing an entire generation is too high a price to pay… for a copyright system crafted more than a generation ago.”

C. A Viable Solution: Compulsory Licensing

1. The Reasoning Behind Compulsory Licenses for Sound Recordings

When a traditional musician decides to cover a preexisting work, he or she may do so by obtaining a compulsory license for the composition of the song. The idea behind the

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175 See Mongillo, at 21.  
178 Id. at 53.  
179 Lessig, at p. 4 of Preface.  
180 To cover is the process of recording a new version of an existing song.  
compulsory license provisions is that music should be made available to the public; without them, the copyright owner of a song could retain a monopoly on recordings of the work. Changes in the media landscape and Congress’s past willingness to accommodate those unable to pay licensing fees counsel in favor of adopting a compulsory licensing system for sound recordings.

When the recording copyright was created, there was no need to include a compulsory license for sound recordings, since recording a cover only required a license for the composition. Before digital technology, the only reason anyone would want to copy a recording would be to distribute identical copies in direct competition with the copyright owners without financing or putting in the effort to record a cover. Such a piratical use would be patently inconsistent with the goals of copyright. The development of digital technologies has simplified the process of copying recordings, and has also broadened the creative possibilities associated with doing so. Today, copying is not necessarily piracy; it is a process used to create new and innovative works.

Congress has already imposed a system of compulsory licensing under similar circumstances. In 2002, Congress extended compulsory licensing to small “webcasters.” The Small Webcaster Settlement Act simplified the licensing process for online broadcasts of music by authorizing a receiving agent, designated by the Librarian of Congress, to enter into agreements

182 See Vrana, at 828.
183 Id.
on behalf of all copyright owners and performers to set rates, terms and conditions for small commercial and non-commercial webcasters. 186

In drafting this Act, Congress acknowledged the legitimate need of small webcasters for compulsory licenses, reasoning that changes may be made to existing copyright law for those who were financially incapable of operating under the existing system. 187 This Congressionally sanctioned settlement between copyright holders and webcasters, motivated by their “inability to pay the fees due,” 188 suggests Congress may be open to accommodating mashup artists who are similarly unable to pay for licensing fees. 189

It should be noted that a compulsory licensing system would supplement the fair use doctrine, rather than replace it. Amateur artists creating mashups for personal use without economic incentive may qualify for fair use protection, in which case they would not have to pay any licensing fees. This scheme would principally benefit artists who were directly, or indirectly financially benefitting from the use of samples by making authorized sampling an option.

Compulsory licenses benefit future artists and copyright holders alike. First, by providing an affordable option to sample legally, artists’ creativity is not stifled, and they are incentivized to profit from their work. Second, the recording copyright owners would be afforded the chance to profit by licensing dormant back catalogues, gaining new exposure, and ultimately collecting more royalty payments. As remix becomes more popular, compulsory licensing offers a compromise likely to benefit both sides.

2. How a Compulsory Licensing Scheme for Sound Recordings Should be Implemented

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186 2 WEST’S FED. ADMIN. PRAC. §4016.1 (3d ed. 2010).
188 Id.
189 See Vrana, at 852.
Scholars have been proposing compulsory licenses for sound recordings for at least twenty years. Additionally, Scandinavian countries have adopted regimes of compulsory licensing for sound recordings. In Finland, for example, Gramex, a non-profit organization representing musicians and record companies, collects the licensing fees for the use of sound recordings by third parties. Membership in Gramex is on an opt-out basis, and anyone who wishes to use the sound recording of a Gramex-represented artist must acquire a license through Gramex. Gramex has devised a predetermined fee schedule for all different uses of music, including “copying,” which includes sampling and mashups. In Sweden, SAMI serves the same function. A similar system could be implemented in the United States. Since prohibitively expensive licenses currently bar remix artists from sampling legally, the compulsory licensing regime should be reasonably priced and royalty-based. Large advances on royalties should be discouraged or prohibited altogether to foster a pure royalty system of monthly compensation for the use of samples. The royalty system could be modeled after that of the Small Webcaster Settlement Act in that it would be based on a percentage of revenue, rather than a flat fee. The amount of each royalty could be based on several criteria, to be determined the Copyright Office; for instance, the amount of the recording taken, whether the portion used includes the voice of the performing artist, and whether the song is beyond its

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193 Id.
195 See Vrana, at 854.
196 Id.
commercially useful period. Such a regime would provide some standardization in the midst of the uncertainty generated by the current system of affirmative defenses.

As a practical matter, compulsory licenses for sound recordings would differ from those issued under §115 in that the licensee would not be required to retain the basic melody and fundamental character of the song in his new work. Imposing these constraints would bar the creation of most kinds of remix, including mashup, as the re-contextualization of a sample changes its fundamental character. This should be a welcomed change because the use of production techniques to manipulate original samples and make a new work is as much an art form as recording a cover of a song.

3. Arguments against Such a System of Compulsory Licensing

Opponents of a compulsory licensing scheme for sound recordings point to several potential shortcomings of such a system. First, the ever-present concern among copyright holders is that such a bright-line system would contribute to Internet piracy. However, a compulsory licensing system would encourage the opposite result by opening a legal channel for remixers to disseminate their work. Further, to prevent the wholesale copying of music, the compulsory license should only apply to copying that is truly transformative in nature, not merely

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198 See Vrana, at 855.
200 Id.
201 See Matthew Rimmer, The Grey Album: Copyright Law and Digital Sampling, MEDIA INT’L AUSTRALIA INCORPORATING CULTURE AND POLICY 40, 41 (2005) ("[C]opyright law was written with a particular form of industry in mind. The flourishing of information technology gives amateurs and home-recording artists powerful tools to build and share interesting, transformative, and socially valuable art drawn from pieces of popular culture. There’s no place to plug such an important cultural sea change into the current legal regime.”)(quoting Jonathan Zittrain, professor of Internet Law and Harvard Law School).
 derivative.\textsuperscript{202} Courts do not apply the current transformative standard uniformly, which yields uncertainty among remix artists. An executive body of specialists, such as the Copyright Royalty Board,\textsuperscript{203} seems better suited to devise and administer such a system than those “trained only to the law.”\textsuperscript{204} Moreover, an easier licensing process would free up resources that could be used to target actual piracy, rather than the transformative work of remix artists.\textsuperscript{205}

Second, critics of a statutory solution note the appeal of a flexible ad hoc approach due to the large amount of variation in remix.\textsuperscript{206} This is a valid argument in theory. However, courts have demonstrated an unwillingness to engage in case-by-case analysis, seeking bright-line rules notwithstanding their statutory obligation to make fact-specific determinations.\textsuperscript{207} Congress’s development of a clearer test would prevent judges from making artistic evaluations, minimize litigation costs, and allow current and future musicians to profit via easy and efficient means.

\textsuperscript{202}See Vrana at 855; see also Lessig, at 110-114 (advocating for changes to the law that would allow remix but would keep piracy illegal).

\textsuperscript{203}Copyright Royalty Judges are appointed by the Librarian of Congress and oversee the copyright law’s statutory licenses. See http://www.loc.gov/crb/background/.

\textsuperscript{204}Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).


\textsuperscript{206}See William F. Patry & Shira Perlmutter, Fair Use Misconstrued: Profit Presumptions, and Parody, 11 CARDOZO ARTS & ENT. L.J. 667, 719 (1993) (concluding that a “flexible doctrine, responsive to the facts of each individual case” is preferable for copyright cases).

\textsuperscript{207}See Morrison, at 107-8 (stating the prevailing opinion among copyright experts that the Sixth Circuit’s bright-line rule in Bridgeport is inconsistent with the plain meaning of §114 and further that the statute “was never intended to preclude application of the substantial similarity analysis on issues of actionable copying, much less preclude application of the common law principle of de minimis...”).
The most persuasive counterargument asserted by artists is that a compulsory licensing system would compromise the “artistic integrity” of their creations.\(^\text{208}\) However, the integrity of a musician’s work is already restricted by §115, which authorizes others to cover their compositions.\(^\text{209}\) Additionally, musicians rarely retain control over the use of their recordings, as record labels own most recordings. Most importantly, remixes tend to pay tribute to existing works, rather than criticizing or disparaging them; hence they infringe less on artistic integrity than parodies or terrible covers,\(^\text{210}\) neither of which require the original artist’s permission.\(^\text{211}\) Mashups artists and other remixers should have the same access to existing works as those obtaining licenses under the current compulsory licensing system.

**Conclusion**

We live in a Read-Write culture—a culture that is evolving every day. Accordingly, Copyright law should evolve to meet the needs of future artists. As the law stands today, remixers lack the legitimate means to create new works. Depriving artists of these means stifles the creative innovation copyright was intended to protect. Introducing a compulsory licensing system for sound recordings is a plausible way to restore the balance between current and future artists. Though such a system would require significant reform of copyright law, such revision is warranted by drastic changes in our media landscape. To echo a critical theme of Lessig’s work

\(^{208}\) See Al Kohn & Bob Kohn, Kohn on Music Licensing 1490 (3d ed. 2002) (arguing that a compulsory license “unreasonably ignores the rights of the creative artist’s right not to have his work ‘perverted, distorted, or travestied,’ a right which Congress has enacted into law”) (quoting H.R. Rep. 94-1476, 109, 1976 U.S.C.C.A.N. 5659, 5724 (1976)).


\(^{211}\) See Vrana, at 859.
as a copyright activist: “A free culture has been our past, but it will only be our future if we change the path we are on right now.”