THIS IS A REMIX: REMIXING MUSIC COPYRIGHT TO BETTER PROTECT MASHUP ARTISTS

KERRI EBLE

Modern copyright law has strayed from its original purpose as set out in the Constitution and is ill-equipped to protect and foster new forms of artistic expression. Since the last major amendment to the Copyright Act, new art forms have arisen, particularly "mashup music." This type of music combines elements of other artists' songs with other sounds to create a new artistic work. Under modern copyright law, various courts treat this type of music inconsistently, creating uncertainty among mashup artists and stifling this new artistic expression. In addition, copyright law, as applied to music, unduly favors primary artists, sacrificing the Copyright Clause's focus on preserving the public domain.

This Note discusses the history of mashup music and its increasing popularity in the United States, as well as the relevant history of copyright law. This Note then discusses current safe harbors that exist under copyright law for secondary artists and analyzes why mashups do not fit within these safe harbors. This Note concludes by recommending that the fair use exception be expanded to protect mashup artists by adding a safe harbor for "recontextualized" or "redesigned" artworks.

I. INTRODUCTION

> Everything is breaking down in a good way. . . . Once upon a time . . . there was a line. You know, the edge of the stage was *there*. The performers are on one side. The audience is on the other side, and never the twain shall meet. . . . Now, being an artist is not the same as—you're not necessarily giving people finished product. You're giving people an unfinished product. A platform that they can do stuff on.[1]

Music as an art form and as an industry has changed greatly over time and with advancements in technology.[2] Many artists are using tech-

1. ARAM SINNREICH, MASHED UP: MUSIC, TECHNOLOGY, AND THE RISE OF CONFIGURABLE CULTURE 2 (2010) (quoting Eric Kleptone) (omissions in original).

2. *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 798–99 (6th Cir. 2005) ("Advances in technology coupled with the advent of the popularity of hip hop or rap music . . . have spawned a plethora of copyright disputes and litigation."); *see also* Kelly Cochran, Note, *Facing the Music: Remixing Copyright Law in the Digital Age*, 20 KAN. J.L. & PUB. POL'Y 312, 314 (2011) (ex-

nology to create new, unique styles and genres of music.[3] Take, for example, Gregg Gillis, better known to the public as Girl Talk—an artist who creates electronic music based on samples of other artists' music.[4] Gillis's musical creations can be classified as mashups, which take "songs and mash them together to make an even richer explosion of musical expression."[5]

Gillis began the Girl Talk project in 2000.[6] In his early career, he worked as a biomedical engineer in Pittsburgh, Pennsylvania, by day and travelled the country and the world performing by night and on weekends, unbeknownst to his coworkers and community members.[7] Gillis refers to himself as a "pop music enthusiast" who combines elements from Top 40 pop songs with different types of music to create recontextualized and original sounds.[8] Over the past eleven years, he has released five albums under his record label Illegal Art.[9] His June 2008 album, "Feed the Animals," and his latest November 2010 album, "All Day," each sampled and combined over three hundred songs in a fifty-minute span.[10]

Gillis's music was originally popular with a small group of cult-like followers, but his following has since grown greatly.[11] His fan base includes Pittsburgh Steelers spectators who enjoy his music during games at Heinz Field,[12] residents of the city of Pittsburgh who celebrated

plaining that with advances in technology and digital media people are able to share and create in ways they could not before).

3. *See* Cochran, *supra* note 2, at 314 ("Once works were available digitally, these new tools coupled with the Internet's instant communication made it possible for people to play with, remake, and share creations in ways beyond what was possible when only analog technology was available in the market.").

4. *See* Lauren Knapp & Tim Peters, *Talking About Girl Talk*, PBS (Feb. 16, 2011), http://www.pbs.org/newshour/art/blog/2011/02/the-two-sides-of-girl-talk.html ("Gillis . . . has been remixing popular songs from the 1960s to present day, isolating different beats, slowing them down, speeding them up and mixing them back together to create something new. Gillis is a mash-up artist, and his laptops are his primary tools."); *see also* Morgan Spurlock, *A Day in the Life: Girl Talk,* HULU (Aug. 17, 2011), http://www.hulu.com/watch/275374/a-day-in-the-life-girl-talk#s-p1-so-i.

5. *Glee: Vitamin D* (FOX television broadcast Oct. 7, 2009).

6. Ryan Dombal, *Interviews: Girl Talk*, PITCHFORK (Aug. 30, 2006), http://pitchfork.com/features/interviews/6415-girl-talk/.

7. *Id.*; *see* Knapp & Peters, *supra* note 4 ("Gillis studied biomedical engineering at Case Western Reserve University and then worked as an engineer after graduating. . . . [H]e quit his day job in 2007 to dedicate himself to Girl Talk . . . .").

8. Dombal, *supra* note 6; *see* Spurlock, *supra* note 4 ("[E]ven though [Gillis's music is] all sampled it's original music.").

9. Zachary Lazar, *The 373-Hit Wonder*, N.Y. TIMES MAG., Jan. 9, 2011, at 38.

10. *Id.*; Robert Levine, *Steal This Hook? D.J. Skirts Copyright Law*, N.Y. TIMES, Aug. 7, 2008, at E1; *Girl Talk/Gregg Gillis On New Album, Music Industry*, WASH. POST (July 29, 2008), http://www.washingtonpost.com/wp-dyn/content/discussion/2008/07/16/DI2008071601445.html.

11. *See* D.X. Ferris, *Gregg Gillis Talks About the Continuing Popularity of his Mashup Project, Girl Talk*, RIVERFRONT TIMES (Jan. 13, 2011), http://www.riverfronttimes.com/2011-01-13/music/girl-talk-interview-2011-gregg-gillis-tour-dates-st-louis-pageant/ (stating that Gillis originally had a small cult following, but after the release of *Night Ripper* in 2006 his popularity increased and his shows started selling out).

12. Marah Eakin, *Gregg Gillis of Girl Talk*, A.V. CLUB (Apr. 7, 2011), http://www.avclub.com/articles/gregg-gillis-of-girl-talk,53227/.

"Gregg Gillis Day" on December 7, 2010,[13] Pennsylvania Congressman Mike Doyle who supported Gillis's music in front of the House of Representatives Subcommittee on Telecommunications and the Internet,[14] and thousands of others who crashed Internet servers in their attempt to download Gillis's latest album in November 2010.[15]

Gillis's music, however, has also been subject to much controversy because he does not receive license or permission to sample the songs he includes in his works.[16] Gregg Gillis and his record label, Illegal Art, have yet to see the courtroom over this alleged copyright infringement, and thus there is uncertainty about how a court would treat this kind of music sampling under current copyright laws.[17] The fact that Gillis has never been sued, however, suggests that at least some record labels and music industry members recognize the value of this kind of art.[18] In fact, some artists even send him their music and request that it be included in his album.[19] Other artists, however, view the use of their music by mashup artists such as Gillis as copyright infringement, claiming the music is used without permission and without sufficient transformation.[20]

This Note addresses how copyright law should handle the conflicting interests of mashup artists, such as Greg Gillis, who create music through the process of sampling the prior musical works of others, and primary artists, who created the pieces that are sampled in the "new" mashup music. Part II discusses the history of mashup music in the United States and its recent increase in popularity as well as the relevant history of U.S. copyright law. Part III then considers different suggestions for the treatment of mashup music under the current copyright law framework and the strengths and weaknesses of these suggestions. Finally, Part IV suggests that the best solution is to expand the Copyright Act's "fair use" exception to include protection of art created for the purpose of "recontextualization" and "redesign."

13. Ryan Dombal, *Girl Talk Gets His Own Holiday in Pittsburgh*, PITCHFORK (Dec. 7, 2010, 10:30 AM), http://pitchfork.com/news/40931-girl-talk-gets-his-own-holiday-in-pittsburgh/; Lazar, *supra* note 9.

14. *Girl Talk As Fair Use Martyr*, COPYCENSE, http://www.copycense.com/2009/03/girl_talk_as_fair_use_martyr.html (last visited Feb. 22, 2013).

15. Lazar, *supra* note 9. Gillis released his latest album "All Day" for free download on the Internet. The extremely heavy download traffic led to server crashes and headlines on MTV stating "Girl Talk Apologizes for Breaking the Internet." *Id.*

16. Madeleine Brand, *Girl Talk Chops Pop Music to Pieces*, NPR (Oct. 10, 2008, 10:27 AM), http://www.npr.org/templates/story/story.php?storyId=95596414.

17. *See id.* ("Gillis never pays for the use of his samples, and he doesn't ask permission. He says he's covered by fair-use laws, but he's risking legal trouble with the labels and bands that he samples.").

18. Dombal, *supra* note 6 (stating that if Girl Talk or Illegal Art were ever to be sued for copyright infringement, they would hope for a cease and desist letter first).

19. Ferris, *supra* note 11 ("I hear from labels more often now, and they send me a cappella CDs in the mail. People are interested in having their music incorporated into a Girl Talk live show or album.").

20. *Cf. Bridging the Gap: Mash-Up Artists and Copyright Law*, GENYU (Nov. 24, 2009), http://genyu.net/2009/11/24/bridging-the-gap-mash-up-artists-and-copyright-law/.

II. BACKGROUND AND HISTORY

This Part discusses the background and relevant history of mashup music. First, it details the history of mashup music in the United States as relevant to this Note. Second, it provides a brief history of copyright law and the exceptions to the exclusive rights provided by a copyright.

A. History of Mashups

Mashup artists work with existing songs.[21] They extract the vocals from some songs and the instruments from others. The artists then combine the vocals and instrumentals from others' songs with their own sounds, often created with computer software.[22] This combination leads to the creation of new music.[23] This is not a new concept. The practice of assembling new songs from elements of previous work dates back to the beginning of recorded music and reaches beyond modern genres of pop and rap and into genres such as jazz and folk.[24]

Mashups of pop music are a relatively recent trend in the United States. Mashups were previously generally associated with British pop and underground music.[25] The release of DJ Danger Mouse's "The Grey Album," which combined the vocals from Jay-Z's "The Black Album" with music from The Beatles' "White Album," brought attention to pop music mashups in the United States.[26] DJ Danger Mouse created the album and distributed the work himself by sending out over three thousand promotional copies.[27] The *Boston Globe* called it "the most intriguing hip-hop album in recent memory,"[28] and *Rolling Stone* raved that the Grey Album was "the ultimate remix record."[29] Copies of DJ Danger Mouse's albums were selling on eBay for $81.[30]

The success of the album and increasing popularity of mashup music was halted when EMI, the company that owns the right to The Beatles' sound recordings, contacted DJ Danger Mouse and others selling the album.[31] EMI sent a notice to Danger Mouse and retailers ordering them

21. Knapp & Peters, *supra* note 4.

22. Lauren Barbagallo, *New York: Making Musical History with Mashups*, UMASSAMHERST (Fall 2007), http://www.umassmag.com/2007/Fall2007/alumni_news/almanac/brown.html.

23. *Id.*

24. *DJ Maquiavelo's Mash Ups*, DJ MAQUIAVELO, http://www.djmaquiavelo.com/Mashups.html (last visited Feb. 22, 2013); *see* Brett Gaylor, *RiP!: A Remix Manifesto*, NAT'L FILM BD. OF CAN. (2008), http://films.nfb.ca/rip-a-remix-manifesto/.

25. *See DJ Maquiavelo*, *supra* note 24.

26. *See Bridging the Gap*, *supra* note 20; Noah Shachtman, *Copyright Enters a Gray Area*, WIRED (Feb. 14, 2004), http://www.wired.com/entertainment/music/news/2004/02/62276?currentPage=all.

27. *DJ Danger Mouse's Grey Album and the Grey Video*, WHAT IS FAIR USE? (Mar. 26, 2008), http://whatisfairuse.blogspot.com/2008/03/dj-danger-mouses-grey-album.html.

28. Renée Graham, *Jay-Z, the Beatles Meet in 'Grey' Area*, BOSTON GLOBE, Feb. 10, 2004, at E1.

29. Lauren Gitlin, *Jay-Z Meets the Beatles*, ROLLING STONE (Feb. 19, 2004).

30. Shachtman, *supra* note 26.

31. *Id.*

to cease and desist selling the music because DJ Danger Mouse had not licensed The Beatles' music that he sampled on the album.[32] The artist complied with the order, but others continued distributing the album over the Internet.[33] EMI, as well as Sony, who owns the rights to the Beatles' musical compositions, sent takedown notices to many of these websites.[34] Under the Digital Millennium Copyright Act (DMCA), a copyright holder can send a completed takedown notice to one who digitally posts copyrighted material, and the host must take down the copyrighted material or disable access.[35] Both Sony and EMI dropped their cases, and although the Grey Album can no longer be distributed by Danger Mouse or in record stores, it can still be found online.[36] Because the claims were dropped and never taken to court, the legality of the album is still in question, and the uncertainty surrounding noncommercially distributed mashup albums remains.

Another mashup artist that caught the public eye and increased popularity in mashup music in the United States was DJ Drama. DJ Drama was a mashup artist who was known for mixing the music of popular rappers, and he was considered instrumental in the rap explosion of the early twenty-first century.[37] Drama did not license the copyrighted works he sampled in his mashups, and in 2006, he signed a distribution and marketing agreement for his mashups that included unlicensed samples.[38] His Atlanta-based office was raided, and equipment, computers, and mix tapes were seized.[39] DJ Drama was charged with a felony violation of Georgia's Racketeering Influenced Corrupt Organization law.[40] Although arrests for distribution of mashups are not unprecedented, this was the first arrest of a musician as prominent as DJ Drama, bringing mashup music and the legal issues surrounding it into the media spotlight.[41] "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."[42] Copyright holders encouraged their artists to work

32. *Id.* ("Danger Mouse hadn't paid for the rights to the [Beatles'] music . . . [and he] hadn't even asked for permission to use their songs. So . . . EMI's lawyers sent a letter to Danger Mouse—as well as to the select record stores and eBay retailers selling his remix—ordering them to cease and desist.").

33. *DJ Danger Mouse's Grey Album and the Grey Video*, *supra* note 27.

34. *Id.*

35. *DMCA Takedown 101*, BRAINZ, http://brainz.org/dmca-takedown-101/ (last visited Feb. 22, 2013).

36. *DJ Danger Mouse's Grey Album and the Grey Video*, *supra* note 27.

37. Kelefa Sanneh, *With Arrest of DJ Drama, the Law Takes Aim at Mixtapes*, N.Y. TIMES, Jan. 18, 2007, at E1.

38. Michael Katz, *Recycling Copyright: Survival & Growth in the Remix Age*, 13 INTELL. PROP. L. BULL. 21, 22–23 (2008).

39. *See id.* at 24; *see also* Samantha M. Shapiro, *Hip-Hop Outlaw (Industry Version)*, N.Y. TIMES MAG., Feb. 18, 2007, at 29, 30.

40. Katz, *supra* note 38, at 24.

41. Sanneh, *supra* note 37.

42. *Id.*

with DJ Drama, promoted his work, and profited from his music.[43] DJ Drama could argue that this granted him an implied license to use the music, but because his work contained many samples of music, it is unclear whether this defense would protect his entire collection of work.[44] Because there was no charge of a violation of federal copyright law, it is unclear what the legal status of DJ Drama's work is under the Copyright Act.[45] The action, however, made it a reality that even popular mashup artists whose songs are endorsed by the original artists featured in the mashup face the threat of liability.[46]

Media attention is not the only reason for the increase in the popularity of mashup music. Mashup music has become increasingly popular with advances in technology that allow anyone to become a creator of this music.[47] Mashup artists can gain exposure, and fans have increased access to music, through websites such as The Hype Machine and Pitchfork Media.[48] Artists have benefited from this exposure firsthand, including Gillis, who went from playing twenty-person shows in 2000 to selling out shows all over the world and travelling with a ten-person crew in 2011.[49]

In the past few decades, as technology has advanced and become more important, so has copyright law. In 2006, industries that depend on copyright law's fair use exception generated more than $4.5 trillion in revenue, an increase of thirty-one percent since 2002.[50] Fair use industries are responsible for nearly eleven million American jobs.[51]

With the above mentioned advancements in technology, increasing popularity of mashup music, and increased revenue from copyright law-dependent industries, comes continued uncertainty about where mashups stand within the current body of copyright law.

43. Katz, *supra* note 38, at 28.

44. *Id.* at 28 n.54 ("While such apparent approval could have been interpreted as an implied license to use some samples, that license would only extend to a fraction of the underlying samples, and then only from some of the rights holders. As so many samples from a multitude of different artists were used, it is unlikely that DJ Drama could successfully claim a reasonable belief of approval via an implied license to use all of the sampled content.").

45. Jennifer Geller, *A Mixtape DJ's Drama: An Argument for Copyright Preemption of Georgia's Unauthorized Reproduction Law*, 8 CHI.-KENT J. INTELL. PROP. 1, 7 (2008).

46. *See id.*; Katz, *supra* note 38, at 28–29 ("In response to DJ Drama's arrest, Brad Buckles, executive vice president of the RIAA's Anti-Piracy Division in Washington, D.C., stated, '[a] sound recording is either copyrighted or it's not.' '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.'"(citations omitted)).

47. Jonathan Melber, *A Remix Manifesto for Our New Copyright Czar*, HUFFINGTON POST, Sept. 30, 2009, http://www.huffingtonpost.com/jonathan-melber/a-remix-manifesto-for-our_b_305064.html ("[T]hanks to digital technology, anyone can make a film or cut an album . . . .").

48. Roger Kristof, *Mashups Move from Novelty Music to Mainstream*, COMMEDIA SHOWCASE (Jan. 7, 2011), *cached version available at* http://tinyurl.com/RKristof.

49. Ferris, *supra* note 11.

50. Katz, *supra* note 38, at 55 (quoting another source).

51. *Id.*

B. History of Copyright Law

The United States government recognized the value of creative artistic work and the concept of copyright as far back as the eighteenth century.[52] Beginning with the Constitution's Copyright Clause and expanding into an entire body of federal law, copyright is an area of law that remains important and ever changing.[53]

1. The United States Constitution's Copyright Clause

The U.S. Constitution establishes a power in Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[54] In eighteenth-century language, the term "science" referred to "knowledge or learning."[55] The idea behind the Copyright Clause is that art creates public good, and copyright ensures that art will enter the public domain by establishing a temporary exclusive right, which provides an economic incentive for artists to create art.[56] Thus, as the Constitution's Copyright Clause references, the main policies behind copyright are the promotion of learning, the preservation of the public domain, and the protection of the author's ability to use his work as he chooses, specifically for his own economic gain.[57]

The order of the policies within the Clause displays their priority: first the promotion of science (learning), second the preservation of the public domain, and third encouraging the distribution of work by benefiting the author.[58] Congress has emphasized that "the primary objective of our copyright laws is not to reward the author, but rather to secure for the public the benefits from the creations of authors."[59] The policy of preserving the public domain acts to further the main policy of promotion of learning because in protecting works for a limited time, copyright ensures that works will eventually reach, and thus enrich, the public domain.[60] Likewise, the third policy acts as a means to achieving the first two.[61] Congress and the courts have adopted the idea that giving an artist exclusive rights to their works incentivizes knowledge, creativity, and the

52. *See* U.S. CONST. art. I, § 8, cl. 8.

53. *See id.;* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 107–1336 (2006)).

54. U.S. CONST. art. I, § 8, cl. 8.

55. L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 48 (1991).

56. *Id.* at 48–49.

57. *See* U.S. CONST. art. I, § 8, cl. 8; PATTERSON & LINDBERG, *supra* note 55, at 49.

58. PATTERSON & LINDBERG, *supra* note 55, at 49.

59. BERNE CONVENTION IMPLEMENTATION ACT OF 1988, H.R. REP. NO. 100–609, at 22 (1988).

60. PATTERSON & LINDBERG, *supra* note 55, at 50.

61. *Id.* at 49.

progression of the Arts, and therefore promotes the goal of the Copyright Clause.[62]

Within these three explicit policies is an implicit policy that individuals have a right to access copyrighted materials.[63] This implicit policy comes from the idea that access to and use of copyrighted material is necessary to facilitate the most important policy of knowledge and learning.[64]

2. Nineteenth-Century Copyright

After the Framers included the Copyright Clause in the Constitution, the First Congress adopted an English statute as the first enacted federal copyright law, the Copyright Act of 1790.[65] With the Copyright Clause stating the policies behind copyright, and the Copyright Act of 1790 establishing the rules, it was up to the courts to formulate principles based on the policies that would give the rules meaning.[66] The main principles that the courts identified include protection of limited rights, statutory monopoly, protection for the market, reasonable and fair use, right of public access, personal use, and public interest as the primary benefit.[67] The early courts put much emphasis on the principles of protection of limited rights, statutory monopoly, and protection of the market.[68] For example, when interpreting a copyright placed on sheets of music, the court found the copyright holder had an exclusive right to print or make copies of the music, including the bars, notes, and words on the sheets, but did not have an exclusive right to the performance or production of the sounds on the sheet.[69] The Copyright Act of 1909, however, changed the concept of copyright from regulatory to proprietary.[70]

3. Copyright Act of 1909

The Copyright Act of 1909 made major changes to the then-existing body of copyright law. In debating how music recordings should be treated under copyright law, Congress expressed concern that "the progress of science and useful arts would not be promoted, but rather hin-

62. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349–50 (1991) ("[C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work." (citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 555 (1985))).

63. PATTERSON & LINDBERG, *supra* note 55, at 52.

64. *Id.*

65. *See* U.S. CONST. art. I, § 8, cl. 8; Copyright Act of 1790, 1 Stat. 124; PATTERSON & LINDBERG, *supra* note 55, at 56–57.

66. PATTERSON & LINDBERG, *supra* note 55, at 57.

67. *Id.* at 59–60.

68. *Id.* at 75.

69. White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1, 13–14 (1908).

70. PATTERSON & LINDBERG, *supra* note 55, at 77.

dered" if the rights were too broad.[71] Congress recognized that "[t]he main object to be desired in expanding copyright protection accorded to music has been to give to the composer an adequate return for the value of his composition, and it has been a serious and a difficult task to combine the protection of the composer with the protection of the public."[72]

Two of the most important changes relevant to this Note created by the Copyright Act of 1909 were compulsory licensing for musical recordings and the expansion of the copyright holder's rights to include the right to copy, which attempted to balance the interests of both copyright holders and the public.[73] Compulsory licensing attempted to strike this balance by giving the owner of a musical composition copyright the right to make the first recording but providing that anyone else could record the same composition after with the payment of a fee.[74] Additionally, the Act extended the exclusive right granted by copyright law to copyright holders to include the right to "print, reprint, publish, *copy*, and vend the copyrighted work."[75] Thus, by granting the copyright holder the right to copy, the Copyright Act of 1909 gives the holder the sole right to produce replicas of the original artistic work (without the payment of a fee).[76]

4. Copyright Act of 1976

The Copyright Act of 1909 was in place for almost seventy years until a revolution in technology and communications spurred the Copyright Act of 1976.[77] Between the time of the 1909 Act and the 1976 Act, there was rapid growth in motion pictures, radio, TV, photocopying, and computers.[78] The new law established in the 1976 Act, however, did more than extend to these new forms of communication; it made "a number of fundamental changes in the American copyright system, including some so profound that they . . . mark[ed] a shift in direction for the very philosophy of copyright itself."[79]

71. H.R. REP. NO. 60-2222, at 7 (1909).

72. *Id.*

73. Although the Act made many important changes relevant to the body of copyright law, this Note only discusses the major changes relevant to the future genre of mashup music. *See* Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075.

74. *Id.*; PATTERSON & LINDBERG, *supra* note 55, at 80.

75. § 1(a), 35 Stat. at 1075 (emphasis added).

76. Ernest Miller & Joan Feigenbaum, *Taking the Copy Out of Copyright*, YALE L. SCH. (2002), http://cs-www.cs.yale.edu/homes/jf/MF.pdf.

77. PATTERSON & LINDBERG, *supra* note 55, at 91.

78. *Id.* at 90.

79. Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 477, 479 (1977).

a. Protection of "Original Work[s] of Authorship"

The Copyright Act of 1976 made two fundamental changes relevant to this Note. First, under the 1976 Act, copyright attaches when the work is fixed in a tangible medium and protects the "original work of authorship," where previously federal copyright law only provided protection for works published in a material object and attached to that material object.[80] Thus, before 1976 when an author wrote a piece, it was not protected by copyright until it was published in a tangible form with the proper copyright notices, and the copyright protected that "copy" of the work. For example, a copyright holder might have a copyright on a book itself, and infringement would occur if someone tried to copy the information in the book and print it as another book without permission. The Copyright Act of 1976 attached copyright protection to works of authorship, meaning that the copyright attached when the work was created, not when it was published, and the copyright attached to the work rather than the copy. For example, after the Copyright Act of 1976, an author's piece of writing would be protected by copyright, no matter what "copy" it was found in, so the work of authorship would be protected if printed in a book, and the same copyright would protect the work if printed in a periodical.

b. Codification of Fair Use

The second fundamental change is that the Copyright Act of 1976 codified the fair use doctrine.[81] Congress decided to codify the fair use doctrine after it realized that granting a copyright holder protection for all "original works of authorship" seriously threatened the main policy and constitutional purpose of copyright: the promotion of learning.[82] Copyright law gives the holder of a copyright the exclusive right to reproduce the work, create derivative works from the material, distribute the work to the public or another owner, and perform the work publicly or through audio transmission.[83]

There are, however, limits on the "exclusive rights" provided within copyright. Copyright law provides that "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright."[84] Thus, if an artist uses the work of another in one of the above-mentioned ways, the artist can use the defense of fair use in a copyright infringement

80. *See* 17 U.S.C. § 102(a) (2006) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . ."); PATTERSON & LINDBERG, *supra* note 55, at 96–97.

81. 17 U.S.C. § 107.

82. *See id.* §§ 102, 107.

83. *Id.* § 106 (establishing the copyright holder's "[e]xclusive rights in copyrighted works").

84. *Id.* § 107.

suit to potentially avoid liability. The Copyright Act also provides that to determine whether the use of another's work is a fair use, courts should consider:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[85]

The courts offer guidance on the meaning and scope of each of these factors.

i. Purpose and Character of the Use

In evaluating the first factor, which explores the purpose and character of the use, courts look at the degree to which the new work is a transformation of the old and the degree to which the new work has a commercial value versus a nonprofit/educational value.[86]

When examining the transformative nature of the work, courts ask whether the secondary work adds something new to, furthers the purpose or character of, or alters the first work.[87] The more transformative the use is, the less likely it is to interfere with the market for the original work, and thus, the more protection it deserves under the fair use doctrine.[88] Section 107 of the Copyright Act includes a list of specific transformative uses, including "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research," however, this list is illustrative rather than exclusive.[89]

Historically, courts have considered parodies transformative.[90] In creating a parody, the artist is allowed to use the prior work of another if the new, parodic work comments, at least in part, on the original work.[91] Previous courts have considered the use of one song to create another that comments on the original to be a "quasi-parody" protected by the fair use exception due to the transformative nature of the work.[92]

85. *Id.*

86. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578–79 (1994) (stating that the first factor requires an inquiry into the character of the use, including, "whether such use is of a commercial nature or is for nonprofit educational purposes" and "whether the new work merely supersedes . . . the original creation, . . . or instead adds something new, with a further purpose or different character . . . ." (alterations and internal quotation marks omitted)).

87. *Id.* at 579.

88. Abilene Music, Inc. v. Sony Music Entm't, Inc., 320 F. Supp. 2d. 84, 93 (S.D.N.Y. 2003).

89. 17 U.S.C. § 107.

90. *See e.g.*, *Campbell*, 510 U.S. at 579–80; Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986); Elsmere Music, Inc. v. Nat'l Broad. Co., 482 F. Supp. 741 (S.D.N.Y. 1980).

91. *See, e.g.*, *Fisher*, 794 F.2d at 437; MCA, Inc. v. Wilson, 677 F.2d 180, 185 (2d Cir. 1981).

92. *Campbell*, 510 U.S. at 582–83 (stating that 2 Live Crew's song *Pretty Woman* is a parodic use of Roy Orbison and William Dees's *Oh, Pretty Woman*).

Courts also analyze whether a work is used for a commercial purpose when determining the purpose and character of the use.[93] It is a misinterpretation of the language of the Copyright Act to say that every commercial use is a copyright infringement, as this is just one factor that needs to be weighed.[94] Nevertheless, finding that a use is commercial tends to weigh against protection by the fair use doctrine.[95] Courts tend to interpret "commercial" broadly to include a wide range of acts that may fall short of a traditional "sale" of a work.[96]

ii. Nature of the Copyrighted Work

The second factor the courts consider is the "nature of the copyrighted work."[97] Courts analyze the "value of the material used" and whether the work that was used was one that was meant to be protected by the core of copyright law.[98] Generally, expressive works are given more protection under copyright law than factual works.[99]

iii. Substantiality and Amount Used in Comparison to Copyrighted Work

The third factor looks at "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[100] Courts look at whether the amount of the original work used is reasonable in relation to the purpose for the use.[101] This factor requires examination not only of the quantity of the material used but also of the quality and importance of the material.[102]

93. *Id.* at 579.

94. *Id.* at 584 ("If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107 . . . .").

95. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561–62 (1985).

96. Katz, *supra* note 38, at 26; *see* Sanneh, *supra* note 37 ("As mixtapes have grown more popular, they have also grown easier to purchase, despite that official-sounding declaration—"For Promotional Use Only"—printed on every one. Sites . . . specialize in selling them, and big record shops and online stores have followed suit. . . . DJ Drama was sitting in jail, but dozens of his unlicensed compilations were still available at the iTunes shop.").

97. 17 U.S.C. § 107(2) (2006).

98. Folsom v. Marsh, 9 F.Cas. 342, 348 (C.C. D. Mass. 1841) (No. 4901).

99. *Campbell*, 510 U.S. at 586.

100. 17 U.S.C. § 107(3).

101. *Campbell*, 510 U.S. at 586–87 ("[A]ttention turns to the persuasiveness of [the] . . . justification for the particular copying done, and the enquiry will harken back to the first of the statutory factors, for, . . . we recognize that the extent of permissible copying varies with the purpose and character of the use.").

102. *Id.* at 587.

iv. Effect on Copyrighted Work's Market and Value

The final factor weighed in determining fair use is "the effect of the use upon the potential market for or value of the copyrighted work."[103] Courts consider the extent of the harm to the primary artist's market caused by the secondary artist's use, the potential harm on the market if this secondary use becomes widespread, and potential harm to the market for derivative works.[104] The law recognizes no market for derivative works that are critical in nature, such as parodies.[105] When the work has more than just critical, parodic aspects, courts will look at the other elements of the work and their harm to the market for derivative works.[106]

III. DISCUSSION: MASHUPS AND CURRENT COPYRIGHT LAWS

This Part analyzes the current state of copyright law as it pertains to mashups and explains the strengths and weaknesses of the arguments for different treatments of mashup music under copyright law. Section A evaluates the interests of primary and secondary artists and discusses how secondary artists' interests tend to be ignored under the current, unbalanced system. Section B examines how mashups fit within current copyright laws, including whether mashups fall under the fair use exception and the common-law exception of de minimis use. Section C considers the current use of licensing by mashup artists, the concept of creative commons licensing, and the suggestion that a compulsory sampling license system be enacted.

A. Balancing of Interests: Primary and Secondary Artists

As discussed above, "the whole concept of copyright is built around the use of the work."[107] The purpose of copyright law is to promote creativity, and the most recent changes in copyright reflect the desire to balance the interests of primary artists and secondary artists and to consider advances in technology.[108] For the purposes of this Note, primary artists are those that create music that does not sample or use previous work and which is a purely original creation. Primary artists' interests and rea-

103. 17 U.S.C. § 107(4).

104. *Campbell*, 510 U.S. at 590 (explaining the fourth factor "requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original" (citations omitted)).

105. *Id.* at 592.

106. *Id.* at 592–93.

107. PATTERSON & LINDBERG, *supra* note 55, at 191.

108. *See* Digital Millennium Copyright Act, Pub. L. No. 105–304, 112 Stat 2860 (1998) (codified as amended in scattered sections of 17 U.S.C).

sons for creating their music include advancement of the arts and personal economic incentives.[109]

Many primary artists, however, feel that changes in technology and art forms threaten their interests.[110] Advancements in technology increase the ability of the public to access and use copyrighted material without permission.[111] Many primary artists seek greater protection of their work under copyright laws, arguing that increasing illegal use of copyrighted material has lowered the incentive for creativity and progression of the arts because artistic expressions can and will be exploited.[112] Primary artists also argue there is no economic incentive to create art if it can be accessed illegally and used by others to make profit, and copyright needs to provide more protection to incentivize artists to progress creatively.[113]

Because copyright law was created to promote creativity and progression of the arts,[114] it must also take into consideration the interest of secondary artists. For the purpose of this Note, secondary artists are those that use part of the work of another in creating a new, transformative piece of art, including artists that use multiple works from multiple artists (such as mashup musicians).

Secondary artists are also concerned with the progression of the arts. They argue, however, that copyright law as it currently stands and any increased protection for primary artists under the law disincentivizes progression, because it limits use and access and stunts artists' creativity.[115] Secondary artists also argue that the fact that most secondary artists (in the mashup music genre specifically) have not been taken to court, and that some primary artists even request their work be used as part of the secondary art, shows the creative value of this art. This also suggests that such secondary art should not be considered a copyright violation because it furthers the goal of the copyright laws.[116] Finally, secondary artists argue that primary artists only need "protection against the piracy of their works by competitors in the marketplace" and that secondary artists are not competitors because they are creating a new kind of art.[117]

109. *See generally* Michael Allyn Pote, *Mashed-Up in Between: The Delicate Balance of Artists' Interests Lost Amidst the War on Copyright*, 88 N.C. L. REV. 639, 650 (2010) (stating that artists will be less likely to create if the public can exploit their work and freely disseminate it over the Internet).

110. *See id.*

111. *See generally* JESSICA LITMAN, DIGITAL COPYRIGHT 89–96 (2006).

112. Pote, *supra* note 109, at 650.

113. *See* LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 60–61 (2004).

114. *See* U.S. CONST. art. I, § 8, cl. 8 (containing the Copyright Clause which vests power in Congress "[t]o promote the Progress of Science and useful Arts").

115. *See* Noah Balch, Comment, *The Grey Note*, 24 REV. LITIG. 581, 581 (2005).

116. *See* Ferris, *supra* note 11; *Girl Talk As Fair Use Martyr*, *supra* note 14 ("Thus far, the labels have [laid] down and done nothing—an unusual move for an industry that never met a lawsuit it didn't like.").

117. PATTERSON & LINDBERG, *supra* note 55, at 192.

Currently, the interests of the parties are highly unbalanced. Today, "[t]he five recording labels of Universal Music Group, BMG, Sony Music Entertainment, Warner Music Group, and EMI control 84.8 percent of the U.S. music market."[118] These companies hold many media copyrights and have the money and power to threaten secondary artists with copyright infringement claims, be they valid or invalid.[119] Similarly, with the DMCA, these companies can control not only who can make derivative works but who can distribute them as well.[120] The strong control by the music industry might be viewed as a current flaw in the system because under the current statutes, a balance between primary and secondary artist is not present.[121] In order to strike a better balance that promotes the goal of progress of the arts and creativity, a limit on the power of companies is needed, as is protection for secondary artists who truly create new forms of art that provide progress and knowledge to society.

B. Do Mashups Fit Under Current Copyright Law?

With limited relevant amendments to copyright law since the Copyright Act of 1976, it is often difficult for artists, lawyers, and judges to determine how emerging art forms are to be treated under the current copyright law regime.[122]

1. Are Mashups Protected by the Fair Use Exception As "Quasi-Parodies" or Transformative Use?

As discussed, there are exceptions to the exclusive rights provided by copyright law.[123] Courts balance four factors in determining whether the use of copyrighted material by another is a fair use exception to the copyright holder's exclusive rights: (1) purpose and character of the use, (2) nature of the copyrighted work, (3) amount and substantiality of the copyrighted work used, and (4) effect on the market.[124] All four factors are considered, but the purpose and character of the use tends to be most important.[125]

The Copyright Act of 1976 provides an illustrative list of transformative uses that might be considered fair use, including "criticism" and

118. LESSIG, *supra* note 113, at 162.

119. *See generally id*.

120. Katie Simpson-Jones, *Unlawful Infringement or Just Creative Expression? Why DJ Girl Talk May Inspire Congress to "Recast, Transform, or Adapt" Copyright*, 43 J. MARSHALL L. REV. 1067, 1088 (2010) (citing LESSIG, *supra* note 113, at 162).

121. *Id.* at 1087–88.

122. *See* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 107–1332 (2006)) (displaying limited amendments relevant to the treatment of mashups under copyright law).

123. *See supra* notes 81–83 and accompanying text.

124. 17 U.S.C. § 107.

125. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578–80 (1994).

"comment."[126] Courts have interpreted that a parody is a form of criticism and comment protected by the fair use exception, and have extended parodies beyond their common written form to include other production styles, such as television programs.[127] Many mashup proponents argue that mashups should be considered "quasi-parodies" and be protected by the fair use exception as an art form that provides "criticism" and "comment."[128] The discussion below addresses the strength of the "quasi-parody" argument as it applies to each factor, as well as how each factor relates generally to mashup music as an art form.

a. Purpose and Character of Mashup Music

The first factor considers the purpose and character of the use.[129] In evaluating the first factor, the court examines two elements: the transformative nature of the use and the commercial nature of the use.[130]

Under the "quasi-parody" analysis, mashup music is argued to be transformative because the secondary musician comments on and criticizes the original song.[131] In *Campbell v. Acuff-Rose Music, Inc.*, for example, the Supreme Court held the use of one song to create another was determined to be fair use because it was a parody.[132] In *Campbell*, Acuff-Rose Music, Inc. owned the copyright to the Rob Orbison rock song *Oh, Pretty Woman*, and filed suit against the members of the band 2 Live Crew, claiming they infringed on the copyright when they used music and lyrics from *Oh, Pretty Woman* in the creation of their rap song *Pretty Woman*.[133] In considering whether 2 Live Crew's song fell under the fair use exception, the Court held the song was transformative in nature because 2 Live Crew used similar lyrics to those in *Oh, Pretty Woman* in a sarcastic, degrading way to criticize and comment on the naiveté in Orbison's original song.[134]

Some argue that like 2 Live Crew's rap song, mashups (including Gregg Gillis's mashups of Top 40 pop songs with other genres of music) are parodies because they are criticisms on the original songs.[135] Proponents of the parody argument assert that:

> [M]ash-ups sound ironic. . . . These are not just a collection of other people's hooks; Girl Talk has created a new kind of hook that en-

126. *See supra* note 84 and accompanying text.

127. Kane v. Comedy Partners, No. 00 Civ. 158(GBD), 2003 WL 22383387, at *7 (S.D.N.Y. Oct. 16, 2003); Aaron Power, *15 Megabytes of Fame: A Fair Use Defense for Mash-Ups As DJ Culture Reaches Its Postmodern Limit*, 35 SW. U. L. REV. 577, 591 (2007).

128. *See* 17 U.S.C. § 107; Power, *supra* note 127, at 591.

129. 17 U.S.C. § 107.

130. *Campbell*, 510 U.S. at 578–79; *see supra* notes 86–96 and accompanying text.

131. *See* Power, *supra* note 127, at 591.

132. *Campbell*, 510 U.S. at 571–72.

133. *Id.* at 572–73.

134. *Id.* at 583.

135. *See* Dombal, *supra* note 6.

> compasses 50 years of the revolving trends of pop music. Sometimes cynicism is a hook, sometimes the hook is humor, angst, irony, aggression, sex or sincerity. Girl Talk's music asserts all these things at once.[136]

Mashup supporters and promoters of this argument claim Gillis's secondary use is transformative because it takes original songs and combines them together with other sounds to create parodic music that comments on the old through cynicism, humor, irony, aggression, or sincerity.[137] Gillis explains that there is generally prejudice in the underground stream for liking music that is mainstream, but the fact that this crowd has embraced his music suggests it comments on Top 40 and mainstream music.[138]

Even if mashups are not considered "quasi-parodies," they may still be considered transformative. Although they may not fall specifically into one of the transformative uses listed in § 107 of the Copyright Act, this list is simply illustrative of possible transformative uses.[139] A work is considered transformative when it "adds something new, with a further purpose or different character, altering the first with new expression, meaning or message."[140] Mashup proponents argue that mashup artists combine original works with a different purpose than the primary artists and create a new expression, which is evident from the fact that the music industry and fans view mashup songs differently from the original songs they sample.[141] Thus, both the "quasi-parody" analysis and the transformative use analysis seem to weigh in favor of protection under the fair use exception.

The second element considered under purpose and character of use is commercial use. Most mashups are used commercially; however, not every commercial use by a secondary artist is copyright infringement, and this is just one factor that needs to be weighed.[142] Many mashup artists release their music for free on the Internet and do not sell for profit.[143] For example, Greg Gillis's most recent album, "All Day," was released over the Internet for free download.[144] Most of the artists that release their albums for free online, however, are profiting off their music through tours and events.[145] Gillis has a sold out tour that travels the

136. Lazar, *supra* note 9, at 41.
137. *Id.*
138. Dombal, *supra* note 6.
139. 17 U.S.C. § 107 (2006); Power, *supra* note 127, at 590–91.
140. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).
141. *See generally* Victoria Elman & Alex Middleton, Note, *Girl Talk on Trial: Could Fair Use Prevail?*, 2009 CARDOZO L. REV. DE NOVO 149, 153–54 (suggesting that transformative use should be determined by how the artist, music industry, and fans perceive the mashup work in contrast with the original).
142. *Campbell*, 510 U.S. at 584.
143. *See, e.g.*, *Girl Talk All Day*, ILLEGAL ART, http://illegal-art.net/allday/ (last visited Feb. 22, 2013).
144. *See id*.
145. *See* Ferris, *supra* note 11.

world with a crew of ten people, a set, and a light designer, off which he makes a living.[146] Mashup artists who do not commercially release their CDs are still finding ways to gain from their art by performing at some of the largest sold out music festivals in return for profit and exposure.[147] Even though secondary artists' music is not always commercially sold, the artists still commercially use the primary artists' works when they earn money for performing their music at concerts and events. The commercial use by secondary artists weighs against protection for mashups under the fair use exception (under both the parody and transformative use analyses).

b. Nature of the Primary Artist's Work

The second factor the court considers in determining fair use is the "nature of the copyrighted work."[148] Under the "quasi-parody" analysis, this factor seems to have little relevance. Although copyright law seeks to protect expressive works more than factual works, the Supreme Court has held that in the context of parody, the second feature is irrelevant because "parodies almost invariably copy publicly known, expressive works."[149]

Evaluating a mashup as a transformative use, but not specifically a parody, follows a slightly different analysis. In creating mashups, the copyrighted work used by the secondary artist is a song.[150] A song is a piece of art meant to be protected by the core of copyright law.[151] This creates a dilemma because the primary and secondary works involve the exact same kind of expression; both works of art are in the same form and fulfill copyright law's goals of creativity and progression of the arts. For this reason, many courts discount this factor. A few courts, however, consider "creativity, imagination and originality" in the original work used by the secondary artist to tilt the scale against fair use protection, even when the art forms being compared are the same and both within the core of copyright law's protection.[152] Thus, this factor, at best, weighs slightly against fair use protection and toward treating mashups as copyright infringement.[153]

146. *Id.*

147. *See* Elman & Middleton, *supra* note 141, at 156 (explaining that, although Gillis's music is available free of charge on the Internet, he profits substantially from concerts and performances).

148. 17 U.S.C. § 107(2) (2006); *see supra* notes 97–99 and accompanying text.

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

150. *See* Power, *supra* note 127, at 579.

151. *See* 17 U.S.C. § 102(a)(2); John W. Gregory, *A Necessary Global Discussion for Improvements to U.S. Copyright Law on Music Sampling*, 15 GONZ. J. INT'L L. 72, 74 (2011).

152. *See* Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1402 (9th Cir. 1997) ("While this factor typically has not been terribly significant in the overall fair use balancing, the creativity, imagination and originality embodied in *The Cat in the Hat* and its central character tilts the scale against fair use.").

153. *See Campbell*, 510 U.S. at 586 (stating that the second factor should be completely irrelevant to the analysis of a parodic work when determining if the fair use doctrine applies). *But see* Mattel,

c. Amount and Substantiality of the Mashup's Use in Comparison to the Primary Work

The third factor the court considers is the amount and substantiality of the use.[154] Many mashup artists use very small clips of songs.[155] Gillis usually includes a small clip of either the lyrics or the background of each song. In his latest mashup, Gillis combined over 373 song clips in a single album, suggesting the clips were relatively short.[156] In considering mashups as "quasi-parodies," the mashup must adequately comment on the original work, which often cannot be done without using a substantial part or large amount of the content.[157] Courts have recognized that for a song to adequately criticize and comment on the original, the portion used must "conjure up" the original work in the listener's mind.[158] For this reason, courts give sufficient leeway to mashup artists under this factor, allowing mashup artists to use substantial portions of original works.[159] Thus under the "quasi-parody" analysis where mashup artists receive leniency, the third factor generally weighs in favor of protection for mashups under the fair use exception.

Mashups such as Gillis's, however, often include well-known and substantial pieces from a primary artist's song. In analyzing mashups as transformative uses (as opposed to "quasi-parodies"), the courts do not necessarily evaluate this factor with leniency. The substantiality of the works used tends to be high because mashup artists often use well-known samples in their songs, while the amount of the original work used is often low, with hundreds of songs being sampled on one album. Although the analysis under this factor will differ among secondary artists and songs, for mashup artists whose work is similar to those of Gillis, under the transformative use analysis, this factor tends to weigh against fair use protection.

d. Effect of Mashup on the Market and Value of the Primary Work

The fourth factor the courts consider is the effect of the secondary use on the market for the primary use.[160] Mashup proponents argue that mashups have little effect on the market for the primary work because

Inc. v. Walking Mt. Prods., 353 F.3d 792, 803 (9th Cir. 2003) (acknowledging that courts traditionally do not consider the second factor in analyzing parodies, but finding the factor weighed slightly in favor of the defendant regardless).

154. 17 U.S.C. § 107(3).

155. *See* Lazar, *supra* note 9.

156. *Id.*

157. Simpson-Jones, *supra* note 120, at 1080 (citing Power, *supra* note 127, at 588–89).

158. *Campbell*, 510 U.S. at 588.

159. *See id.* at 573; Shervin Rezaie, *Play Your Part: Girl Talk's Indefinite Role in the Digital Sampling Saga*, 26 TOURO L. REV. 175, 200–02 (2010).

160. 17 U.S.C. § 107(4) (2006).

the mashup is a different kind of music with a different appeal and audience.[161] Likewise, proponents argue that the primary artist can still create his own mashups of the music because of the amount of creativity and differentiation available in this kind of music.[162]

There is an argument, however, that the secondary work interferes with the market for licensing samples of the primary work and mashups approved by the primary artist.[163] Although this is a valid argument, the loss of some royalty income is inherent in the fair use doctrine.[164] Only offering fair use protection where the secondary use has no monetary effect on the copyright holder whatsoever is circular reasoning because "fair use will always, by definition, diminish a copyright holder's royalty income."[165] Not all market impairments should be denied protection from the fair use doctrine.[166] "The key is to ascertain whether the market impairment was the result of the substitution effect."[167] For example, in *New Era Publications v. Carol Publishing Group*, Jonathan Caven-Atack wrote and Carol Publishing Group published a biography of L. Ron Hubbard, which included unflattering and negative comments and quotations in the text and at the beginning of many of the chapters from Hubbard's own copyrighted works.[168] The Second Circuit held that although the biography negatively affected the sales of Hubbard's work, the biography did not act as a substitute for the original works; rather, it is a criticism protected by fair use.[169]

Thus, for the fourth factor to have meaning and not be circular in reasoning, courts should consider the factor to mean that "[t]he absolute amount of market harm caused by a secondary user is not important; only market harm that is caused by economic substitution matters."[170] Applying this understanding, under both the "quasi-parody" and transformative use analyses, this factor weighs slightly in favor of protection of mashups under the fair use exception because mashups create a new song different from the original that will not likely cause economic substitution.

161. *See* Dombal, *supra* note 6 (suggesting that underground audience members that usually stand against mainstream music embrace Girl Talk's music).

162. Simpson-Jones, *supra* note 120, at 1081.

163. Power, *supra* note 127, at 599.

164. *See* Michael G. Anderson & Paul F. Brown, *The Economics Behind Copyright Fair Use: A Principled and Predictable Body of Law*, 24 LOY. U. CHI. L.J. 143, 153 (1993).

165. *Id.* at 153–54.

166. *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1125 (1990).

167. Anderson & Brown, *supra* note 164, at 174.

168. New Era Publ'ns Int'l, ApS v. Carol Publ'g Grp., 904 F.2d 152, 154 (2d Cir. 1990); *see* Anderson & Brown, *supra* note 164, at 177.

169. *New Era Publ'ns Int'l*, 904 F.2d at 160–61.

170. Anderson & Brown, *supra* note 164, at 176.

e. Fundamental Flaw: How Do Mashups Criticize and Comment?

After weighing the four factors under the parody analysis, it would seem that all weigh in favor of protection of mashups under the fair use exception, with the exception of the commercial use element of the purpose and use factor.[171] There is, however, a fundamental flaw in this argument. Generally from a mashup, one cannot determine that the secondary artist was trying to provide comment or criticism of the original work, and thus, most mashups are not a form of "quasi-parody" under its standard definition.[172] Therefore, both the transformative use and commercial use elements of the purpose and use factor weigh against fair use. Because the other factors do not strongly favor fair use either, mashups would not likely not be considered fair use under the "quasi-parody" analysis.[173]

Likewise, under the transformative use analysis, the purpose and use factor and the effect on the market factor weigh slightly in favor of protection. We cannot, however, just depend on the courts to interpret the fair use exception or one of the suggested transformative uses of "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research"[174] broadly enough to cover mashups. This is a fundamental flaw of the codification of the fair use doctrine.[175] "Of the . . . changes the 1976 act made, the codification of the fair-use doctrine is perhaps the least successful . . . because its wording lacks the specificity generally present throughout the rest of the statute."[176] Relying on broad wording and court interpretation leaves too much risk and unpredictability, putting mashup artists in a no-win situation. Likewise, even if the broad transformative use approach was taken and the court found that mashups are transformative in nature, the other factors weigh against mashup protection under the fair use exception.[177] It seems that artists are left with the option to either attempt to obtain licenses, which would be difficult for artists like Girl Talk, or create the music without licenses but risk liability for copyright infringement.[178]

2. Mashups As De Minimis Use?

Mashup proponents also argue that mashups are not a violation of copyright law because they fall under a common-law exception to the ex-

171. *See supra* Part III.B.1.a–d.
172. Simpson-Jones, *supra* note 120, at 1081.
173. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994).
174. 17 U.S.C. § 107 (2006).
175. *See* PATTERSON & LINDBERG, *supra* note 55, at 102.
176. *Id.*
177. *See supra* Part III.B.1.a–d.
178. Katz, *supra* note 38, at 25.

clusive rights provided by copyright law of de minimis use.[179] Copyright law requires that to bring an action for the unauthorized use of copyrighted material "the use must be significant enough to constitute infringement" and "even where the fact of copying is conceded, no legal consequences will follow from that fact unless the copying is substantial."[180] De minimis use has been used as a defense to copyright infringement and includes the argument that when an artist takes only a small section of notes or beats from a song it is not substantial enough to constitute infringement.[181]

a. De Minimis Use Under *Bridgeport Music Inc. v. Dimension Films*

Recently, however, the Sixth Circuit in *Bridgeport Music Inc. v. Dimension Films* held that under a literal reading of § 114 of the Copyright Act, de minimis use is not a valid defense to copyright infringement.[182] In this case, a two-second sample from the song *Get Off* was used in the creation of the song *100 Miles*.[183] The specific two-second portion was copied from *Get Off*, looped, and repeated five times in the song *100 Miles*.[184] The *Bridgeport* court found the use of the sample to be a violation of the sound recording copyright, and it justified the decision under a new rule that sampling of a sound recording without consideration or permission is per se infringement.[185] Under § 114(b), the "exclusive right of the owner of copyright in a sound recording . . . do not extend to the making or duplication of another sound recording that consists *entirely* of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording."[186] The court reasoned that the use of the word "entirely" means that *any* direct use of copyrighted sound material at all that was not independently created or recreated constitutes copyright infringement,[187]

179. Steven Hetcher, *The Kids Are Alright: Applying A Fault Liability Standard to Amateur Digital Remix*, 62 FLA. L. REV. 1275, 1327 (2010) (suggesting that some digital remixes are likely de minimis use).

180. Newton v. Diamond, 388 F.3d 1189, 1192–93 (9th Cir. 2004) (citing Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74–75 (2d Cir. 1997), and Laureyssens v. Idea Grp., Inc., 964 F.2d 131, 140 (2d Cir. 1992)).

181. *Id.* ("For an unauthorized use of a copyrighted work to be actionable, the use must be significant enough to constitute infringement.").

182. *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801–802, 805 (6th Cir. 2005) (explaining that the court has taken a "'literal reading' approach" to interpreting the statute, and thus "even when a small part of a sound recording is sampled, the part taken is something of value").

183. *Id.* at 796.

184. *Id.*

185. *See id.* at 801; Tonya M. Evans, *Sampling, Looping, and Mashing . . . Oh My!: How Hip Hop Music Is Scratching More Than the Surface of Copyright Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 843, 873 (2011) (explaining the court's adoption of per se infringement for use of sound recordings).

186. 17 U.S.C. § 114(b) (2006) (emphasis added).

187. *See Bridgeport Music, Inc.*, 410 F.3d at 801 (explaining that under the statute at issue "there is ease of enforcement. Get a license or do not sample.").

and the duplication of even a small segment of a piece must be composed of independently recorded sounds only.[188] Under this theory, most mashups are infringing works because the samples used by most secondary mashup artists are not rerecorded duplications.

The Sixth Circuit's holding in *Bridgeport*, however, is an application and explanation of § 114(b) of the Copyright Act of 1976, which governs copyrights of sound recordings.[189] Sound recordings are "works that result from the fixation of a series of musical, spoken, or other sounds"[190] or the fixation of a musical composition.[191] This differs from the copyright laws governing musical compositions, which are the song's lyrics and musical arrangements.[192] Thus, a given song might have two copyrights: a copyright on the song's performance as it appears on a CD (sound recording copyright) and a copyright on the song's music and lyrics (musical composition copyright), each governed separately under the Copyright Act of 1976.[193] *Bridgeport* suggests that the de minimis use defense is not applicable to sound recording copyright infringement given the text of § 114(b).

Under the *Bridgeport* theory, mashup artists could potentially avoid copyright infringement by rerecording small portions of the songs they are sampling. This would not be a violation of the sound recording copyright since the secondary artists would recreate the sounds of the primary artist.[194] The secondary artist would only be using the primary artist's music composition in small part,[195] and, therefore, the de minimis use defense might still be applicable.

b. De Minimis Use Under *Saregama v. Mosley*

None of the other circuits have followed the Sixth Circuit's distinction between copyrights for sound recordings and copyrights for musical compositions.[196] An Eleventh Circuit District Court specifically declined to follow *Bridgeport*, and rather than use a per se rule for sound recordings only, the court stated it would use a "substantially similar" test for all infringement cases.[197] In *Saregama v. Mosley*, Saregama India Limited

188. *Id.* at 800–01.
189. 17 U.S.C. § 114.
190. *Id.* § 101.
191. Rezaie, *supra* note 159, at 184.
192. 17 U.S.C. § 102(a); *id.* at 183.
193. Evans, *supra* note 185, at 873.
194. *See* 17 U.S.C. § 114.
195. Pote, *supra* note 109, at 667.
196. *See, e.g.*, Johnson v. Gordon, 409 F.3d 12, 18 (1st Cir. 2005) (applying the substantially similar test in sound context); Currin v. Arista Records, Inc., 724 F. Supp. 2d 286, 292–94 (D. Conn. 2010) (applying the substantially similar test in the context of sound recordings); Saregama India Ltd. v. Mosley, 687 F. Supp. 2d 1325, 1338–39 (S.D. Fla. 2009) (specifically declining to follow *Bridgeport*).
197. *Saregama India Ltd.*, 687 F. Supp. 2d at 1338–39 ("[T]he Eleventh Circuit imposes a 'substantial similarity' requirement as a constituent element of *all* infringement claims . . . . Therefore, alt-

argued that it had a copyright in the Indian song *Bagor Mein Bahar Hai*, which was sampled in Jayceon Taylor's song *Put You on the Game*.[198] Among its arguments, Saregama claimed that a sound recording copyright must be treated differently from other forms for copyrightable work and cited *Bridgeport*.[199] The court, however, dismissed this argument and declined to follow the *Bridgeport* per se standard for sound recording copyrights.[200]

The District Court justified its continued use of the "substantially similar test" for all infringement, and discussed the Sixth Circuit's flawed reading of § 114(b) of the Copyright Act of 1976 and flawed reasoning for expanding protection for sound recording copyright holders.[201] The court explained that § 114(b), which the *Bridgeport* court used in justifying its decision, discusses the protections of derivative works, not original works as the court suggests, and there is no indication that Congress meant to expand protection of original works in this section.[202] The *Bridgeport* court seems to suggest that a court can find a song to be "a derivative work of" and an infringement of an original work when it only contains one second from the original song, and that sound recording copyrights protect every sound in the song, and any use of a sound can be infringement.[203] The *Saregama* court, however, correctly recognizes that the legislative history and text of § 114(b) do not support the Sixth Circuit's reading that any use of a sound recording is infringement.[204] Instead, the District Court suggests that infringement occurs when a secondary artist both samples a sound from a primary artist and imitates or simulates the artist.[205] The District Court's holding is correct and directly supported by the legislative history of § 114(b), which explains that

> Subsection (b) of Section 114[ ] makes clear that statutory protection for sound recordings extends only to the particular sounds of which the recording consists, and would not prevent a separate recording of another performance in which those sounds are imitated. Thus, infringement takes place whenever all or any substantial portion of the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords by repressing, transcribing, recapturing off the air, or any other method, or by reproducing them in the soundtrack or audio portion of a motion picture or other audiovisual work. Mere imitation of a recorded performance would not constitute a copyright infringement even where one per-

hough factually similar, the *Bridgeport* court's exception for sound recordings presents a departure from Eleventh Circuit precedent.").

198. *Id.* at 1326.
199. *Id.* at 1338.
200. *Id.* at 1339–41.
201. *Id.* at 1338–39.
202. *Id.*; *see* 17 U.S.C. § 114(b) (2006).
203. *See Saregama India Ltd.*, 687 F. Supp. 2d at 1338–39.
204. *Id.* at 1340.
205. *See id.*

former deliberately sets out to simulate another's performance as exactly as possible.[206]

Under the "substantially similar" standard as applied to both the sound recording and musical composition copyrights, two works are substantially similar when "an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work."[207] The Eleventh Circuit recognizes that in music sampling cases, such as those that might arise from mashups, substantial similarities occur because the nature of the music leads to verbatim copying and paraphrasing.[208] Even when a small amount of literal similarity occurs, this can still be substantial if that small amount is important to the primary artist's work.[209] Thus under the *Saregama* standard, a musical composition or sound recording copyright holder cannot recover for copyright infringement and a secondary artist's use is considered to be de minimis unless this substantially similar standard is met.

Mashups take "songs and mash them together to make an even richer explosion of musical expression."[210] Mashup artists use lyrics and instrumentals from songs and combine them with their own original beats. Therefore, it is not clear when a mashup would qualify as "substantially similar" because the standard depends on the length, recognizability, and importance of the sampled song. Although mashup artists can take the "substantially similar" standard used in the de minimis use analysis into account when creating music to attempt to prevent future liability, this could lead to unnecessary limitation on artistic expression because the definition of "substantially similar" that takes an artist out from de minimis use protection has not yet been established.

c. Further Interpretive Concerns

Though the "substantially similar" standard is more consistent with the legislative intent and understanding of the Copyright Act of 1976, the "substantially similar" standard and de minimis use defense create uncertainty because they rely on judicial interpretation of the word "substantial."[211] This common-law creation does not offer full protection to the secondary artist because each court might interpret "substantially simi-

206. *See id.* at 1341 (citing 17 U.S.C. § 114, H.R. REP. NO. 94–1476, p. 106 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5721).

207. *Id.* at 1337 (internal quotation marks omitted) (quoting Leigh v. Warner Bros., Inc., 212 F.3d 1210, 1214 (11th Cir. 2000)).

208. *Id.* (citing Palmer v. Braun, 287 F.3d 1325, 1330 (11th Cir. 2002)).

209. *Id.* at 1337–38 ("Where only a small amount of literal similarity exists, also known as 'fragmented literal similarity,' a substantial similarity may be found if the 'fragmented copy is important to the copyrighted work, and of sufficient quantity . . . .'" (quoting *Palmer*, 287 F.3d at 1130)).

210. *Glee*, *supra* note 5.

211. Newton v. Diamond, 388 F.3d 1189, 1192–93 (9th Cir. 2004) (citing Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74–75 (2d Cir. 1997), and Laureyssens v. Idea Grp., Inc., 964 F.2d 131, 140 (2d Cir. 1992)).

lar" in a different way. In *Currin v. Arista Records Inc.*, a Second Circuit District Court determined that the plaintiff's claims that the use of the word "Frontin," a similar storyline about the relationship between a man and a woman, similar tempo and meter, and similar overall concept and feel were not enough to establish substantial similarity.[212] This displays the great uncertainty as to what amounts to substantial similarity and when the de minimis use defense is no longer applicable. There is also a general uncertainty as to judicial interpretation of statutory language. Previous courts' interpretations of "substantially similar" and the de minimis use standard do not fully protect artists because they can be changed, as in *Bridgeport*.

Thus, given the uncertainty surrounding the de minimis use defense as applied to music compositions, sound recordings, and the length and nature of the song clips used in mashups, mashup artists cannot rely on the defense. Mashup artists, such as Gillis, use recognizable lyrics and beats from pop songs. These mashups might be substantially similar to the primary works because courts determine substantial similarity from the perspective of an "ordinary observer" from the "intended audience."[213] Mashup artists are at risk because their ordinary observers may have been exposed to a particular piece of pop music before and will find similarity between the original well-known beats and lyrics they tend to use in their mashups.[214]

C. Mashup Artists Seek Licenses

Copyright law grants exclusive rights to primary artists, but secondary artists can legally use these works if they obtain a license from the copyright holder.[215] A license is typically granted through a contract, and each of the rights granted to a copyright owner through the Copyright Act may be transferred separately and may be further subdivided and transferred.[216]

1. Mashup Artists Obtaining Individual Licenses for Each Primary Work Sampled

Primary artists argue that secondary artists should license all the music they sample in their mashups. In most instances, to sample a primary artist's music legally using licenses, secondary artists would need to

212. Currin v. Arista Records, Inc., 724 F. Supp. 2d 286, 292–94 (D. Conn. 2010).

213. Dawson v. Hinshaw Music Inc., 905 F.2d 731, 737 (4th Cir. 1990).

214. *Id.*

215. 17 U.S.C. § 201(d)(1) (2006) ("The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.").

216. *Id.*; Lydia Pallas Loren, *Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*, 14 GEO. MASON L. REV. 271, 282 (2007).

obtain two licenses: master use and synchronization licenses.[217] A master use license allows the secondary artist to use the sound recording and is usually granted by the primary artist or record label of the song.[218] A synchronization license, on the other hand, provides that the secondary artist can use the underlying musical composition in the song and is usually granted by the songwriter or publisher.[219]

This argument, however, seems contrary to the goal of copyright law for two reasons. First, to license a sample can cost millions of dollars.[220] For small portions of primary works that are not well known, the secondary artist can usually negotiate a price between one and five thousand dollars.[221] For well-known songs and artists, who are often featured in mashup music, the cost can be several times this amount.[222] Secondary artists would have to pay this fee for each song used in their secondary work and might have to obtain two different licenses for each song: one for the musical composition and one for the sound recording.[223] In addition, many copyright holders enforce rollover rates for additional payment once the primary artist sells a certain number of albums or payment of royalty fees on a percentage of profit.[224] For artists like Gillis, who used over 370 songs on his last album,[225] the cost of creating a mashup would be millions or billions of dollars.[226] This expense would disincentivize Gillis, and other mashup artists, from creating their music and, therefore, stunt artistic progression.[227]

Similarly, the time it takes to obtain a license can be inhibiting. For instance, it would take an extremely long time for Gillis and other mashup artists to obtain licenses for each primary song used.[228] Gillis has considered the option of licensing samples, saying "[i]n a theoretical world if I could clear every sample on there, and I had a million dollars or a billion dollars or whatever to do it it would still take me probably. . . 50 years to go through . . . the legal hassle figuring all of that out and

217. 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, 270 (2009).

218. *Id.* (citing Amanda Webber, Note, *Digital Sampling and the Legal Implications of Its Use After* Bridgeport, 22 ST. JOHN'S J. LEGAL COMMENT. 373, 393 (2007)).

219. *Id.*

220. GOOD COPY BAD COPY, http://www.goodcopybadcopy.net/about (last visited Feb. 22, 2013).

221. Lauren Fontein Brandes, *From Mozart to Hip-Hop: The Impact of* Bridgeport v. Dimension Films *on Musical Creativity*, 14 UCLA ENT. L. REV. 93, 124 (2007).

222. *Id.*

223. Don E. Tomlinson, *Digital Sound Sampling: Sampling the Options*, in MEDIA ETHICS: ISSUES AND CASES 264, 264 (Philip Patterson & Lee Wilkins eds., 3d ed. 1998).

224. Brandes, *supra* note 221, at 124 (citing Kembrew McLeod, *How Copyright Law Changed Hip Hop: An Interview with Public Enemy's Chuck D and Hank Shocklee*, STAY FREE!, Fall 2002, *available at* http://www.stayfreemagazine.org/archives/20/public_enemy.html).

225. Lazar, *supra* note 9.

226. GOOD COPY BAD COPY, *supra* note 220.

227. *See id.* (explaining that artists such as Greg Gillis could not afford to pay millions or billions of dollars to purchase licenses for all their music samples).

228. *Id.*

that's just absurd."[229] Sampling licenses, in particular, can sometimes take longer than anticipated.[230] Delays in obtaining licenses can push back a release date and create additional problems when artists are simultaneously planning marketing campaigns, video shoots, and promotions for the album.[231] Additionally, Gillis and other mashup artists would be disincentivized from creating their music because by the time the licenses were granted and the music was lawfully released, the songs would be outdated and less popular.[232] This might lead to economic and reputational declines, and artists would be less motivated to continue production of music in the future.

Although some large music companies have standard license granting procedures and fees that are not overly burdensome or time consuming, as part of the nature of mashup music, mashup artists do not know exactly which songs will be incorporated in their album and what licenses are needed until late in the production stage.[233] Thus, the combination of the volume of licenses needed for many mashups and the time at which the final songs to be incorporated into the album becomes known might create timing and album release date issues, despite the quicker procedures of large music companies.

Finally, not all artists are willing to grant licenses for derivative or secondary uses.[234] When deciding whether or not to grant a license, there are three main things the primary artist tends to consider: (1) sharing in the economic success of the secondary work in which the primary work is going to be used, (2) maximizing and maintaining the long term value of the primary work, and (3) maintaining an ongoing relationship between the primary work and the audience.[235] Therefore, the possibility of earning money from a secondary artist is not the primary artist's only consideration. If a primary artist does not think that licensing his work will result in the most optimal balance of these elements, the artist can refuse to issue a license. Nothing in the law requires that a copyright holder grant a license to a secondary artist to sample the music, giving the holder unlimited rights in denying/granting licenses.[236] This again would stunt the progression of music and interfere with the goal of copyright law.

229. *See id.*

230. *See* Josh Norek, *"You Can't Sing Without the Bling": The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System*, 11 UCLA ENT. L. REV. 83, 91 (2004) (citing Telephone Interview with Tom Sarig, Vice President of A & R, MCA Records (Feb. 18, 2003)).

231. *Id.*

232. *See Girl Talk and the Sample License Clearance Process*, FUTURE OF MUSIC COAL. (Aug. 28, 2008, 3:21 PM) (discussing the difficulties and complexities of getting a license to sample music).

233. *See generally* Lazar, *supra* note 9 (stating that Girl Talk used 373 song samples in one album).

234. *See* Brandes, *supra* note 221, at 124.

235. AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 581 (4th ed. 2010).

236. *See Copyright Tutorial for Musicians*, PUBLIC KNOWLEDGE, http://www.publicknowledge.org/tutorial/copyright-for-musicians (last visited Feb. 22, 2013).

2. Creative Commons Licenses

The Creative Commons licenses were created "to build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules."[237] Artists can choose to use Creative Commons licenses and to permit a broader range of authorized uses than copyright law allows.[238] These licenses create a "some rights reserved" copyright because the license states which rights the copyright holder reserves and which rights the holder waives for the benefit of the public, recipients, and other creators.[239] Artists using Creative Commons licenses are given a notice to accompany their work, a link to a "Commons Deed," which explains in common-language words and in symbols which rights the artist is granting to the public, and a copyright license that specifies which rights are being given to the public using legal, standard copyright license language.[240]

In determining which rights to grant to the public, Creative Commons license users answer two threshold questions: (1) Is commercial use permitted in addition to noncommercial use of the primary work? (2) Can secondary, derivative works be created from the primary work?[241] Creative Commons license holders have flexibility in deciding whether to allow derivative works and can either forbid them, permit them, or permit them with the requirement that if the derivate work is released under a license the license be similar to a Creative Commons license that allows the continued creation of new derivative works.[242]

In describing Creative Commons licenses in the context of music, Creative Commons founder Lawrence Lessig described the license as one "that says I as a musician give you the right to sample my work, take, and build, create, remix."[243] Creative Commons licenses reduce the costs of negotiations in the music industry because they reduce or eliminate the need for licensing on an individual basis, which is required for traditional "all rights reserved" copyrights.

Creative Commons licenses are gaining presence in the industry. At the end of 2003, after their first year, Creative Commons had over one million links to Creative Commons licenses.[244] Since then, Creative Commons experienced exponential growth, with 4.7 million links in

237. Loren, *supra* note 216, at 273 (quoting *History*, CREATIVE COMMONS, http://creativecommons.org/about/history (last visited Feb. 22, 2013)).

238. *Id.* at 27.

239. *About*, CREATIVE COMMONS, http://creativecommons.org/about (last visited Jan. 3, 2013).

240. *About the Licenses*, CREATIVE COMMONS, http://creativecommons.org/licenses (last visited Feb. 22, 2013).

241. Loren, *supra* note 216, at 289.

242. *See About the Licenses*, *supra* note 240.

243. Gaylor, *supra* note 24.

244. Lawrence Lessig, *A Report on the Commons*, CREATIVE COMMONS (Oct. 18, 2006), http://creativecommons.org/weblog/entry/6106.

2004,[245] 45 million in 2005, and over 140 million by the end of 2006.[246] Although not all of these Creative Commons license holders are musicians, the increasing number of Creative Commons licenses means more primary artists are permitting the creation of derivative works by secondary artists. This gives secondary artists a library of music that can be used without fear of liability, but this library is relatively limited and still leaves the majority of music under the Copyright Act.

3. Compulsory Sampling License

Another suggested solution to the time and money issues associated with getting licenses to sample music is to create a compulsory sampling licensing system similar to the one used for obtaining licenses for covers.[247] Covers are new versions of a song, recorded by a different musician, and therefore, require the licensing from the musical composition copyright holder.[248] Under the current cover compulsory licensing system governed by § 115 of the Copyright Act, once a nondramatic musical work has been distributed to the public, a compulsory license to cover this music is available.[249] An artist can obtain a mechanical license permitting rerecording of the song by paying to the primary artist either 9.1 cents for each track sold or 1.75 cents per minute of playing time (or a fraction thereof), whichever is greatest.[250] Sampling differs from covering in that it incorporates sound recordings from primary artists into the secondary artist's work.[251] Some argue that the general similarity between covering and sampling suggests a similar compulsory licensing system should be used for sampling because the system and sampling stands to benefit both parties economically and reputationally.[252] Secondary artists cannot use the compulsory licensing system in place for covers to rerecord the songs to be used in a mashup and avoid liability.[253] This is because § 115 prohibits secondary artists who obtain compulsory licenses from "chang[ing] the basic melody or the fundamental character" of the

245. Neeru Paharia, *Searching for Creative Commons on Yahoo!*, CREATIVE COMMONS (Sept. 17, 2004), http://creativecommons.org/weblog/entry/4405.

246. Lessig, *supra* note 244.

247. Norek, *supra* note 230, at 93.

248. *Id.* at 84.

249. 17 U.S.C. § 115(a)(1) (2006) ("In the case of nondramatic musical works, the exclusive rights . . . to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified, [including] . . . [w]hen phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person . . . may . . . obtain a compulsory license to make and distribute phonorecords of the work.").

250. *Mechanical License Royalty Rates*, U.S. COPYRIGHT OFFICE (last modified Oct. 18, 2010), http://www.copyright.gov/carp/m200a.html.

251. Norek, *supra* note 230, at 85.

252. *Id.*

253. Gregory, *supra* note 151, at 92.

musical composition "except with the express consent of the copyright owner," which in mashups defeats the purpose for sampling the music.[254]

Thus, supporters advocate that a separate but similar compulsory sampling license system be created.[255] One proposed Sampling Compulsory License system would require no licenses for "qualitatively insignificant samples" and single-use qualitative significant samples under three seconds.[256] Loops of qualitatively significant samples three seconds or less would pay two cents per track, and qualitatively significant use greater than three seconds would require licensing negotiation and not fall within the compulsory license.[257] This system would do little for mashup artists who tend to use qualitatively significant samples in more than three-second intervals. A more lenient standard, which would actually provide real benefits to mashup artists, is not likely to pass through Congress because, as mentioned, a significant portion of music copyrights are in the hands of five large music companies who have money and power to fight against the statutory implementation of a liberal compulsory licensing system.[258]

D. Summary

In sum, mashups do not fit well under current copyright law. Mashups do not likely qualify as "quasi-parodies" because of their lack of obvious criticism and comment, and even under the transformative use analysis, the factors seem to weigh against the protection of mashups under the fair use exception. Similarly, there is uncertainty and instability in the case law surrounding the de minimis use defense and the "substantially similar" test for applying this defense, which make it unclear when and if mashups would be protected under the defense. Finally, given the current state of music licensing, it does not seem economically and artistically feasible for mashup artists to license all the songs in their work. Although there are options available, such as Creative Commons licenses and a compulsory licensing system similar to covers, these do not seem feasible in the near future. Therefore, in order to establish more certainty in copyright law as it applies to mashups and to increase protection for the valuable works of secondary artists, there needs to be a change in copyright law.

254. *Id.* (alteration in original) (quoting 17 U.S.C. § 115(a)(2)).
255. Norek, *supra* note 230, at 93 (suggesting a compulsory licensing system).
256. *Id.*
257. *Id.*
258. *See supra* notes 117–18 and accompanying text.

IV. RECOMMENDATION: WHAT NEXT?

Because the goal of the Copyright Clause is to promote the progression of the arts and to incentivize creativity, copyright laws should be amended to allow for more creativity in modern music by permitting artists to use prior works of another to create a new expression of music. The change in the law should still grant exclusive rights to the original artist but should modernize and extend the fair use exception. The fair use exception has, over time, become a doctrine of inequitable reasoning because the focus shifted from public interest to the rights of individual copyright owners.[259] This proposed change, however, will revert some of the focus back to public interest and begin to shift fair use back to a doctrine of equitable reason.

Rather than attempt to fit mashup music into the current fair use exception which states that protected fair use purposes include "criticism, comment, news reporting, teaching . . . scholarship, or research,"[260] and rather than relying on stretching the current common law to make mashups fit, the fair use exception should be updated and broadened. The fair use exception should be expanded to include "recontextualization" and "redesign" as purposes protected under fair use, with mashups falling under these additional purposes.

Including these additional purposes as part of the fair use exception will protect (most) mashups and incorporate the test that many courts have properly used in determining whether a secondary art form falls within one of the stated purposes.[261] The purposes of "recontextualization" and "redesign" will look at the piece of art from the perspective of the intended audience to determine if audience members see the secondary work of art as a new idea, design, or arrangement. Importantly, the purposes of "recontextualization" and "redesign" will leave out secondary works that attempt to copy, quantitatively or qualitatively, large parts of a primary work without significant change or simply add one new element to a primary work and call it their own. From the view of an ordinary observer from the intended audience, such works would not "recontextualize" or "redesign" the original work, and thus would not fall within the protected purposes. The two new purposes under fair use will only protect those works that are recognized by the audience as and created with the intention of being something new.

The legislative history surrounding the statutory change and the amendment's purpose should suggest that the prefix re- was used to mean afresh or anew in this context[262] and that the statutory change was made with mashup music in mind. This will help later courts interpret

259. PATTERSON & LINDBERG, *supra* note 55, at 199.
260. 17 U.S.C. § 107 (2006).
261. *See supra* notes 204, 210 and accompanying text.
262. OXFORD DICTIONARY OF ENGLISH 1463 (2d ed. 2003).

these new purposes of "recontextualization" and "redesign" and to determine when and how art forms beyond mashup music fit within the purposes.

Expanding the purposes protection by the fair use exception will modernize the statute to accommodate recent changes in technology and the arts. As discussed, the policies behind the Copyright Clause in their order of priority are the promotion of learning, the preservation of the public domain, and the protection of the author.[263] Adding to the fair use exception and expanding its protection will promote learning and help preserve the public domain because it will allow for more artistic expression without worry of copyright infringement liability, while still protecting the author by keeping the exclusive right in place subject to broadened exceptions. Therefore, the expansion of the exception will help move copyright law back toward its originally stated main purpose while still considering its other goals.[264]

On the other hand, this expansion will not solve all the problems inherent in the current "fair use" exceptions. There will still be much uncertainty as to what will be protected under the fair use exception because of the generality in the illustrative list of protected fair use purposes which require interpretation. Expansion of the protected fair use purposes, however, is preferable to a more strict, defined fair use statute that specifically lists the art forms that are protected under the exceptions. This kind of fair use exception would focus on the end form of the art, rather than the purpose of the art and the elements it contains, creating a per se rule that will be overprotective in many cases. For example, consider a statute that stated mashups were protected under the fair use exception and defined mashups as taking lyrics and beats from primary artists' songs, combining these with their own original sounds, and creating a new song. This statutory definition could be interpreted to protect the secondary artist who takes a primary artist's lyrics in full and puts them over his or her own, original beat to create a new song. Instead, protection should expand only to those artists who genuinely change the original work. In expanding the list of protection purposes to include "recontextualization" and "redesign," the statute is more likely to provide coverage to mashup artists who truly do create new music, ideas, and experiences and leave those that simply make minor changes subject to liability. Additionally, expanding the purposes rather than listing art forms is more likely to allow future new art forms to fall within the statute without amendment.

Finally, expanding the list of protected purposes is preferable to relying on licensing. As mentioned above, the music industry is heavily concentrated with a great amount of power held by a small number of

263. *See* U.S. CONST. art. I, § 8, cl. 8; PATTERSON & LINDBERG, *supra* note 55, at 49.
264. *See* PATTERSON & LINDBERG, *supra* note 55, at 49.

companies.[265] Rather than put more money and power in the hands of these companies by paying them for licenses, the mashup dilemma can be better solved by putting more power in the hands of secondary artists, who are often independent or represented by small companies. Similarly, copyright holders control the ability to gain a license to a particular song, the process and time frame for obtaining a license, and the price, and these might be prohibitive for the secondary artists, particularly mashup artists. Finally, these companies have strong influence in Congress and will actively attempt to halt legislation that requires a Creative Commons system or compulsory licensing similar to covers. Protecting mashups through statutory expansion attempts to solve or eliminate some of the money, time, expression, or corporate power struggles in the music industry that occur between primary artists and their copyright holders and secondary artists.

V. CONCLUSION

As discussed, the fair use exception codified in § 107 of the Copyright Act should be expanded to include "recontextualization" and "redesign" so that mashups fit among the fair use exception's protected purposes. Fans find this type of creative expression to be valuable, as evident through the increasing popularity of mashup music, festivals, and tours. Likewise, primary artists recognize the value of this art form, and this is evident when primary artists request that their songs be used by well-known mashup artists and from primary artists' failure to pursue copyright infringement claims against mashup artists in the courtroom. Finally, mashup artists are creating a new form of art with different ideas and expressions in the eyes of the intended audience, which is valuable in the public domain.

Expanding the fair use exception to include the additional purposes of "recontextualization" and "redesign" will help balance the interests of primary and secondary artists by granting more protection to secondary artists when they truly create their own, new art while still protecting primary artists from those who try to copy with no true alteration. Likewise, this expansion will help move copyright law back toward its primary purpose of learning through the progression of the arts and creativity by giving protection to additional art forms and allowing more artists to create without the worry of copyright infringement liability.

265. *See supra* note 117 and accompanying text.