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Katie Simpson-Jones

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UNLAWFUL INFRINGEMENT OR JUST CREATIVE EXPRESSION? WHY DJ GIRL TALK MAY INSPIRE CONGRESS TO “RECAST, TRANSFORM, OR ADAPT” COPYRIGHT

KATIE SIMPSON-JONES*

I. THE MISH-MASH OF MASHUPS IN COPYRIGHT LAW

“A mashup is when you take two songs, and mash them together to make an even richer explosion of musical expression.”¹

“Mashups” are artistic works that sample from other songs without the permission of the original artist, and invariably engage in copyright infringement.² In the famous words of the court in *Bridgeport Music, Inc. v. Dimension Films*, either “get a license or do not sample.”³ These words made it clear that music mashups would have no legal home in copyright law.⁴ So how is it that mashup artist “DJ Girl Talk” (Gregg Gillis), who uses over 400 music samples in his mashups, remains liability free?⁵ In an

* I would like to give special thanks to Professor Doris E. Long of The John Marshall Law School for helping me throughout the writing process and always encouraging creativity.

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

2. See *infra* notes 50-57 and accompanying text (explaining the statutory and case law pertaining to infringing acts and describing how creating mashups requires the infringing conduct).

3. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 781 (6th Cir. 2005).

4. *Id.* at 801. The court held that “sampling is never accidental [W]hen you sample a sound recording you know you are taking another’s work product.” *Id.*

5. See Copycense Editorial, *Girl Talk As Fair Use Martyr*, COPYCENSE, Mar. 12, 2009, http://www.copycense.com/2009/03/girl_talk_as_fair_use_martyr.html (posing the question of why Gregg Gillis, after compiling a considerable sample list, has not yet been sued by record labels, in light of recent FBI raids of mixtapes in DJ Drama’s studio and cases such as *Grand Upright Music v. Warner Bros. Records*, 780 F. Supp. 182 (S.D.N.Y. 1991) and *Bridgeport Music*, 410 F.3d at 792); David Fuchs, *Piracy, Fair Use, and the Mashup Entitlement in the Age of Computers*, ASSOCIATED CONTENT, Sept. 2, 2009, http://associatedcontent.com/article/2119853/piracy_rair_use_and_the_mashup_entitlement_pg4.html?cat=17 (identifying Gregg Gillis as “one guy with a computer who splices and remixes copyrighted songs and then sells them as his own.”); Ted Hamilton, *Girl Talk and Rock: An Interview with Girl Talk*,

effort to find a legal home for mashups, many commentators, including Gillis,⁶ have attempted to shield mashups by applying a “quasi-parody” analysis⁷ under the affirmative defense of fair use, so that mashups can legitimately exist in the legal world.⁸

Analyzing music mashups as quasi-parodies and relying on the courts to save them under fair use as parodies is flawed.⁹

THE CORNELL DAILY SUN, Apr. 7, 2009, available at <http://cornellson.com/section/arts/content/2009/04/07/> (stating that Girl Talk goes through 400 samples in a performance which he lifts from purchased CDs and never alters to reach his ultimate goal of making his own “stuff” out of samples).

6. See Fuchs, *supra* note 5 (stating that Greg Gillis believes that “sampling the songs falls under fair use” When in actuality his music likely does not qualify as fair use); Michael Masnick, *Why Hasn't The Recording Industry Sued Girl Talk?*, TECHDIRT, July 8, 2009, <http://techdirt.com/articles/20090707/023720546.htm> (commenting on a blog post by Peter Friedman, a law professor at the University of Detroit Mercy Law School, suggesting that the reason Gregg Gillis has not yet been sued is because the recording industry is afraid the courts will rule in Gillis's favor due to a strong argument for the fair use defense (citing Posting of Peter Friedman, *Why is Music the Main Battleground in the Copyright Wars*, RULING IMAGINATION: LAW AND CREATIVITY BLOG (July 6, 2009), <http://blogs.geniocity.com/friedman/2009/07/why-is-the-music-the-mainbattleGround-in-the-copyright-wars/>; Roy York, *Music mash-up DJ Girl Talk creates art amid controversy*, KENTUCKY KERNEL, Aug. 26, 2009, available at <http://kykernal.com/2009/08/26/music-mash-up-dj-girl-talk-creates-art-amid-controversy/> (claiming that Gillis's argument, that his work is sufficiently transformative to constitute fair use, is too good, and the RIAA should not sue).

7. Andrew S. Long, Comment, *Mashed Up Videos and Broken Down Copyright: Changing Copyright to Promote the First Amendment Values of Transformative Video*, 60 OKLA. L. REV. 317, 361 (2007). This Comment suggests that the test set forth by the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.* should better accommodate works that are transformative by nature. *Id.* (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)). If the courts presumed all works, except the ones making only nominal changes, as transformative, almost all mashups would be afforded protection under the affirmative defense of fair use. Michael Katz, *Recycling Copyright: Survival & Growth in the Remix Age*, 13 INTEL. PROP. L. BULL. 21, 56-58 (2008) (suggesting that if Congress fails to change the copyright law, courts “can interpret fair use as a broad, expansive doctrine, as they have done in several recent decisions.”). “Although mashups would not fit into the traditional definition of a parody, the justification for having different rules for parodies applies equally to mashups.” Aaron Power, Comment, *15 Megabytes of Fame: A Fair Use Defense for Mash-Ups as DJ Culture Reaches Its Postmodern Limit*, 35 SW. U. L. REV. 577, 591 (2007). This commentary also indicates that mashups are similar to parodies in that they need to use the preexisting work in order to comment on that work, they are transformative, and they engage in new expression; and thus, mashups should be analyzed under a “quasi-parody” analysis. *Id.*

8. See Power, *supra* note 7, at 590 (explaining that because music mashups likely infringe on the original authors' exclusive rights, their only defense is fair use. Power also states that mashups should be analyzed the same way as sound recordings, which found protection under the fair use defense).

9. See discussion *infra* Parts III.B-C (explaining how mashups do not

Others propose that requiring “mashers” to acquire a compulsory license can solve this problem.¹⁰ But this approach is also flawed. Mashups cannot be defended as parodies under fair use because they provide no comment on, or criticism of, the original works,¹¹ barring mashups from invoking the fair use doctrine.¹²

This Comment will discuss the real dilemma facing mashups: their illegality exists because copyright law gives too much control over musical works to copyright holders and leaves our culture with little room for legal creativity. Part II will lay out how the current copyright law affects music. Part III will discuss how copyright law’s defenses, in their current form, fail to allow this innovative trend in music to exist legally. Part IV will explain why a change in the law is needed, give examples of other instances of change in copyright law, and formulate proposed legislation. Part V will briefly summarize why mashups should be able to remain in the copyright world. Fortunately, the popularity of DJ Girl Talk’s works may rouse lawmakers to create a much needed exception for mashups.

II. THE PAST OF MASHERS, MUSIC, TECHNOLOGY, AND COPYRIGHTS

A. *A History of Music Mashups: Danger, Drama & Girl Talk*

Initially created by DJs, music mashups are songs created by digitally laying the lyrics of one song over the instrumentals of another, so that both songs are readily identifiable to the average listener.¹³ Mashups are made by consumers through the use of

qualify as parodies and analyzing how they ultimately fail the test for a fair use defense).

10. See discussion *infra* Part III.D (distinguishing compulsory licensing systems, which worked for other new profit making technologies, from mashups, which typically do not make profits).

11. See discussion *infra* Part III.B (demonstrating what it means to “comment” or “criticize” an original work, and how mashups fail to do so).

12. See *infra* notes 94, 100-101 and accompanying text (stating that because mashups do not provide comment or criticism the fairness in borrowing from the original works is almost nonexistent).

13. See Power, *supra* note 7, at 579 (stating that mashups consist of vocal tracks superimposed over the instrumentals of another track and create songs that are “at once familiar yet often startlingly different” (quoting Peter Rojas, *Bootleg Culture*, SALON.COM, Aug. 1, 2002, <http://dir.salon.com/tech/feature/2002/08/01/bootlegs/index.html>)); Eduardo Navas, *Regressive and Reflexive Mashups in Sampling Culture*, REMIXTHEORY.NET, Aug. 22, 2007, <http://remixtheory.net/?p=235> (explaining that “[t]he music mashups of today . . . do not remix one particular composition but at least two or more sources . . . [T]heir effectiveness depends on the recognition of pre-existing recordings.”); Roberta Cruger, *The Mash-up Revolution*, SALON.COM, Aug. 9, 2003, http://dir.salon.com/story/ent/music/feature/2003/08/09mashups_cruger/index.html (explaining that music mashups involve “blending samples from two songs—generally, one song’s vocals atop another’s instrumental or rhythm track”); Shaheem Reid, *Mixtapes: The Other Music Industry*, MTV.COM, (Jan. 31, 2010)

free, downloadable software, and not by music producers or record companies.¹⁴ The authors of music mashups, called “mashers,” do not seek permission from the copyright owners to use the protected songs.¹⁵ One distinct factor of mashups that is not shared by DJ Girl Talk’s work is that “true” music mashups are offered to the public for free.¹⁶

As a new form of expression, mashups have become increasingly popular in our culture.¹⁷ Over time, many websites have emerged that allow mashers to post their works and have them rated by peer listeners and mashers.¹⁸ Mashers even hold formal competitions, known as “camps.”¹⁹ Even though this art

http://www.mtv.com/bands/m/mixtape/news_feature_021003/ (explaining that mixtapes may be comprised of blends of two different songs together).

14. Rojas, *supra* note 13.

The recent explosion in the number of tracks being created and disseminated is a direct result of the dramatic increase in the power of the average home computer and the widespread use on these computers of new software programs like Acid and ProTools. Home remixing is technically incredibly easy to do, in effect turning the vast world of pop culture into source material for an endless amount of slicing and dicing by desktop producers.

Id. See also Cruger, *supra* note 13 (explaining that Mashups are easy to create on home computers with software any competent downloader can find for free). Here is a list of a few websites where free mashup software can be found: MUSIC OASIS, <http://www.Music-Oasis.com/download/audio/digital-DJ-Pro> (last visited Dec. 3, 2010); INDABA MUSIC, <http://www.IndabaMusic.com>; <http://www.nch.com.au/mixpad> (last visited Dec. 3, 2010); SUPER SHAREWARE, <http://www.supershareware.com/get/music-mashup.html> (last visited Dec. 3, 2010); MIX MEISTER, <http://www.MixMeister.com> (last visited Dec. 3, 2010).

15. Cruger, *supra* note 13. “But because the necessary artistic clearances are tough to obtain at best, mash-up devotees are bootleggers almost by definition.” *Id.*

16. Power, *supra* note 7, at 579-80.

17. See Jonathan Melber, *A Remix Manifesto for Our New Copyright Czar*, THE HUFFINGTON POST, Oct. 1, 2009, http://www.huffingtonpost.com/jonathan-melber/a-remix-manifesto-for-our_b_305064.html (discussing the remix culture today, Melber states that we live in a period when digital technology allows anyone to make a film or cut an album. He compares using a quote in literature to digitally sampling music and finds that the current copyright law suppresses this new form of cultural expression which *an enormous segment of the population* participates in) (emphasis added).

18. The following are a few websites where mashers can post their mashups for peer listening and rating: MASHUPTOWN.COM, <http://www.mashuptown.com/> (last visited Dec. 3, 2010); EAWORM MASHUPS, <http://www.djearworm.com> (last visited Dec. 3, 2010); MASHSTIX, <http://www.mashstix.com> (last visited Dec. 3, 2010); MASHUP CHARTS, <http://www.mashup-charts.com> (last visited Dec. 3, 2010); MASHUP CITI+, <http://www.mashupciti.com> (last visited Dec. 3, 2010); CCMIXTER, <http://www.ccmixter.org> (last visited Dec. 3, 2010); BEATMIXED, <http://www.beatmixed.com> (last visited Dec. 3, 2010); SMASH@MASH-UPS.CO.UK, <http://www.mash-ups.co.uk> (last visited Dec. 3, 2010); NEMOZOB, <http://www.nemozob.com> (last visited Dec. 3, 2010).

19. For example, here are some of the sites hosting so called “mashup

form was relatively new to the world outside of underground DJs until about 2004 and many thought it would not be favored by mainstream society, mashups have made their mark on the world.²⁰ Today mashups thrive in our culture, and stopping their creation is nearly impossible.²¹

For instance, the infamous “Grey Album,”²² created by DJ Danger Mouse, is a quintessential example of music mashups receiving widespread popularity in mainstream society.²³ The Grey Album, which laid the lyrics of Jay-Z’s “The Black Album”²⁴ over the instrumentals of the Beatles’ “White Album,”²⁵ created quite a stir. On February 21, 2004, DJ Danger Mouse offered The Grey Album for free on over 170 websites.²⁶ Reports showed that within a single day, users had downloaded over 100 million of the album’s tracks.²⁷ Danger Mouse offered the album for free in response to a cease and desist notice he received from EMI, the company that holds some of the copyrights to The Beatles’ works.²⁸

Another popular artist who incorporates music mashups in his works is the “Mixtape King,” also known as DJ Drama. In 2003, he became very popular for releasing albums containing

camps.” MASHUP CAMP, <http://www.mashupcamp.com> (last visited Dec. 3, 2010); REMIX FIGHT, <http://www.remixfight.org> (last visited Dec. 3, 2010); BOOT CAMP MASHING FOR BEGINNERS, <http://www.paintingbynumbers.com/bootcamp> (last visited Dec. 3, 2010).

20. See Daniel Terdiman, *Mashup Artists Face the Music*, WIRED, May 4, 2004, <http://www.wired.com/entertainment/music/news/2004/05/633> (claiming that no matter how much attention is brought to mashups, because this also calls attention to the illegal use of copyrighted music, this art form will “probably not go anywhere”); Cruger, *supra* note 13 (stating that “[m]ash-ups might be the ultimate expression of remix culture, which has grown out of a confluence of influences: widespread sampling, DJs as performers, and the proliferation of digital technology, as well as a tangle of diverse musical styles from jungle to house to garage and techno.”).

21. See Melber, *supra* note 17 (describing how so much of our culture today participates in creating mashups); see also DJ HERO, <http://www.djhero.com/en-us/home/index> (last visited Dec. 3, 2010) (noting that recently, Activision Publishing Inc. released video game “DJ Hero,” where players can create their own mashups using popular songs).

22. See *infra* notes 23-27 and accompanying text (detailing the authorship and creation of the album).

23. Terdiman, *supra* note 20. “Earlier this year, many people encountered the concept of mashups for the first time when DJ Danger Mouse released the *Grey Album*, a melding of hip-hop artist Jay-Z’s *Black Album* and the Beatles’ *White Album*.” *Id.*

24. JAY-Z, *THE BLACK ALBUM*, (Roc-A-Fella Records 2003).

25. THE BEATLES, *THE WHITE ALBUM*, (EMI 1968). The album contains no graphics or text, other than the band’s name and the album serial number, and is commonly referred to as “The White Album.”

26. Power, *supra* note 7, at 580-81.

27. *Id.*

28. *Id.* at 580.

mashups of a single artist's work and other artists' works.²⁹ Artists like Lil' Wayne and T.I. appeared on DJ Drama's albums, gaining momentum for their own upcoming works through these mixtapes.³⁰ In 2007, because the recordings were created without copyright permission, the Recording Industry Association of America raided DJ Drama's office in Atlanta, Georgia, taking over 50,000 recordings.³¹

The most recent big-name masher to appear on the scene is DJ Girl Talk (Gregg Gillis). Since coming onto the mashup scene, he has released four CDs³² and performed at various venues.³³ His latest album, "Feed the Animals,"³⁴ released in 2008, earned the number four spot on Time Magazine's top ten albums of the year.³⁵ "Feed the Animals," which contains over 400 samples, may be downloaded for free or bought on a "pay what you will" basis on sites like Amazon.com.³⁶ His rise to fame only strengthens the notion that mashups are becoming too popular to be eradicated.³⁷

29. Katz, *supra* note 7, at 21-22 (stating that mixtapes are compilations including some combination of unreleased remixes and unlicensed mashups, and can include sneak previews of upcoming albums to be released. These mashups include the works of two or more artist and can include new or original content. Mixtapes often provide a way for listeners to keep up with the rap and hip-hop genre).

30. *Id.* at 22. Most of DJ Drama's mixtapes start out with endorsements from the featured artists and these mixtapes often serve the function of bolstering these artists' sales. *Id.* at 21-22. Mixtapes are the best way to talk to hip-hop consumers. *Id.* at 23.

31. *Id.* at 23-24 (citing Tim Lee, *SWAT Teams Enforcing Copyright*, THE TECHNOLOGY LIBERATION FRONT, Jan. 17, 2007, <http://techliberation.com/2007/01117/swat-teams-enforcing-copyright/>). The Morrow County Sheriff's department and the Recording Industry Association of America raided the office. Katz, *supra* note 7, at 23-24. They took computers, recording equipment, and over 81,000 mixtape CDs for immediate destruction. *Id.*

32. Masnick, *supra* note 6. Gregg Gillis is "Girl Talk," the popular mashup musician who uses samples from hundreds of songs to create his CDs. Copycense Editorial, *supra* note 5. He has also appeared in two documentaries: RIP! A REMIX MANIFESTO, (Brett Gaylor documentary 2008) [hereinafter RIP!] and GOOD COPY, BAD COPY, (Rosforth documentary 2007), both of which discuss copyright law and the remix culture.

33. See Hamilton, *supra* note 5 (interviewing Gillis after his show at Cornell University's Barton Hall, Apr. 6, 2009); GREG KOT, RIPPED: HOW THE WIRED GENERATION REVOLUTIONIZED MUSIC 167-68 (Scribner 2009) (recapping Gillis' performances at Emo's bar in Austin, Texas, 2007, the 21st annual South by Southwest music conference, and at a Pittsburg club in 2006).

34. "Feed the Animals" is Girl Talk's third mashup album. GIRL TALK, FEED THE ANIMALS (Illegal Art 2008).

35. Josh Tyrangiel, *The Top 10 Everything of 2008*, TIME, Jan. 23, 2009, available at http://www.time.com/time/specials/packages/articles/0,28804,1855948_1864324_1864335,00.html.

36. Hamilton, *supra* note 5.

37. See *infra* notes 166-67 (listing a few examples of how people participate in the mashup culture).

After releasing this album, commentators questioned why Gillis, who clearly uses unauthorized samples of other artists' music, has not been sued for copyright infringement.³⁸ Before this discussion can begin, it is important to understand what copyrights protect.

B. An Overview of a Copyright Owner's Rights in Music

Copyright protects original works of authorship fixed in any tangible medium of expression that can be communicated either directly, or indirectly, with the help of some device.³⁹ This includes musical works and sound recordings.⁴⁰ A copyright attaches from the date of creation, lasts for the life of the author plus an additional seventy years,⁴¹ and need not be registered to trigger its protection.⁴² Works that are unprotected because the copyright has expired or the work does not qualify for protection fall into the "public domain."⁴³ Reproducing or making derivatives from works that have fallen into the public domain is not illegal. Carrying out the same acts with copyrighted works, however, is illegal because copyright owners have specific, exclusive rights.⁴⁴

Sound recording rights are limited to making copies of the sound recording and preparing derivative works by rearranging, remixing, or otherwise altering the sequence or quality of the actual sounds fixed in the recording.⁴⁵ A derivative work is a work

38. Copycense Editorial, *supra* note 5; see also Masnick, *supra* note 6 (discussing a post by Peter Friedman, which stated that the RIAA should not sue Girl Talk because Gillis's argument that his work constitutes fair use "is just too good" (citing Posting of Peter Friedman, *supra* note 6)).

39. 17 U.S.C. § 102(a) (2006).

40. *Id.* §§ 102(a)(2),(7). Sound recordings are works "that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." *Id.* § 101.

41. *Id.* § 302(a). For works created on or after January 1, 1978, the copyright will endure for the life of the creator plus an additional seventy years after the author's death. *Id.*

42. *Id.* § 104(a).

43. BLACK'S LAW DICTIONARY 579 (3rd Pocket ed. 2006). "The universe of inventions and creative works that are not protected by intellectual-property rights and are therefore available for anyone to use without charge." *Id.*

44. 17 U.S.C § 106(1)–(2).

45. *Id.*

The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.

Id. § 114(b).

created by someone other than the author of the preexisting work by somehow changing or altering the original work.⁴⁶ Derivative works may be protected by copyright, but only if the new work used the preexisting works lawfully.⁴⁷

"Compulsory licenses," by which the original author grants limited permission to others for making and distributing phonorecords, may be obtained in two ways.⁴⁸ First, a compulsory license may be granted to make copies of the work with the author's permission. This is how musical artists get permission to lawfully sample another artist's songs. Second, a compulsory license may be granted to make musical arrangements without changing the character of the work.⁴⁹ For instance, if the Chicago Symphony Orchestra wanted to perform its own arrangement of a work by composer Philip Glass, it would be able to obtain this second kind of compulsory license.

A person commits copyright infringement by violating any of the copyright holder's exclusive rights.⁵⁰ 17 U.S.C. § 114 includes the rights of making reproductions and derivative works among

46. Derivative works are those "based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." *Id.* § 101. Derivative works are also those "consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship . . ." *Id.*

47. *Id.* § 103(a) (stating that "the subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.").

48. *Id.* §§ 115(a)(1),(2). This section of the Code explains that when phonorecords or digital phonorecords, not made for the accompaniment in a film, are distributed to the public, a person can obtain a compulsory license under certain conditions. *Id.* A compulsory license is only given if the primary purpose for making the phonorecords is to distribute them to the public for a private use. *Id.* This includes distribution by digital copy. This license is not available to those "duplicating a sound recording fixed by another, unless: (i) such sound recording was fixed lawfully; and (ii) the making of the phonorecord was authorized by the owner of the copyright in the sound recording . . ." *Id.* § 115(a)(1). A compulsory license allows a person to change the musical arrangement as needed to conform it to the performance involved, but the arrangement cannot "change the basic melody or fundamental character of the work" and will not be given protection as a derivative work unless the copyright owner gives consent. *Id.* § 115(a)(2).

49. *Id.* § 115(a)(1)(ii).

50. *Id.* § 501(a).

Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be.

those exclusively held by the copyright holder. Mashups infringe upon both of these rights.⁵¹

C. *The Conflict of Music Mashups in Copyright Law*

Bridgeport illustrates how mashups violate copyrighted works.⁵² The court in *Bridgeport* stated that almost any amount of a sound protected by copyright used to create another work without the permission of the author will be deemed an infringement.⁵³ The court held that digital sampling of a copyrighted sound recording infringes the copyright owner's § 114(b) rights unless the user has a license.⁵⁴ Lastly, the court held that the amount sampled does not matter,⁵⁵ eliminating the *de minimis* standard used in other cases to determine if there had been copyright infringement.⁵⁶ Under *Bridgeport*, mashups definitively constitute copyright infringement because mashers sample songs or pieces of songs without the original author's permission. Mashups also infringe on the original author's right to create derivative works because they recast, transform, or adapt

51. *Id.* § 114. See also Power, *supra* note 7, at 590 (stating that the rights in a sound recordings are limited by § 114(b), to the right to "prepare derivative works in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality." A mashup violates both of these rights because it reproduces an underlying work in phonorecords."); Long, *supra* note 7, at 329 (stating that "[t]he creation of most mashups constitutes a violation of copyright law . . . because most mashups are created either partially or entirely from copyrighted works."); Katz, *supra* note 7, at 25 (stating that mashups are within the copyright holder's right to create under the right to reproduce the copyrighted work and to prepare derivative works based upon that copyrighted work. Also, because mashups are fixed works made up of unlicensed portions of protected creations of other artists, they clearly violate the original artists' exclusive rights). A work is "fixed" when it is expressed or embodied in a copy or a phonorecord, and is stable enough so that it can be perceived, reproduced, or otherwise communicated for a period longer than that of the transitory duration. 17 U.S.C. § 101. Sound works are considered fixed if the fixation of the work is made at the same time it is transmitted. *Id.*

52. See *infra* notes 53-54 (establishing through case law that any amount of music sampling without the author's permission is copyright infringement, and that sampling musical works in particular violates the original author's right to create derivative works).

53. See *Bridgeport*, 410 F.3d at 800 (finding that 17 U.S.C. § 114(b) states that not only are you prohibited from pirating the entire sound recording, you also cannot "lift" or "sample" something less than the whole.").

54. See *id.* at 801-02 (finding that taking three notes from a song by way of sampling from a sound recording is infringement because it is not the songs, but the sounds that are fixed in the medium). "Even when a small part of a sound recording is sampled, the part taken is something of value." *Id.* at 802.

55. See *id.* (finding that when evaluating the sampling of sound recordings, a court should not have to engage in the mental, technological, or musical gymnastics, that the *de minimis* test or substantial similarity require).

56. *Id.*

the lyrics or sound in phonorecords.⁵⁷

Without a change in copyright law, mashers are left with scarce means of protecting themselves from copyright infringement liability. Compulsory licenses are unavailable to mashers because mashups change the character of the songs sampled (which is basically the purpose of music mashups).⁵⁸ It is undisputed among legal commentators that music mashups infringe on copyright holders' rights.⁵⁹ As such, mashers resort to the ineffective defense of fair use to escape liability.⁶⁰

D. Parodies: A Category of the Fair Use Defense

Fair use is the only affirmative defense available to those who have infringed upon a copyright holder's exclusive rights.⁶¹ But

57. 17 U.S.C. § 101. "The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed or otherwise altered in sequence or quality." *Id.* § 114(b). Since the elements of a protected work have been taken out and combined with elements of another work, a mash-up is also considered as a derivative work. A mashup violates the rights in § 114(b) because it reproduces an underlying work in phonorecords and alters or remixes the sounds. Power, *supra* note 7, at 590.

58. 17 U.S.C. § 115(a)(1). "A person may not obtain a compulsory license for use of the work in the making of phonorecords duplicating a sound recording fixed by another, unless: (i) such sound recording was fixed lawfully; and (ii) the making of the phonorecords was authorized by the owner of copyright in the sound recording . . ." *Id.*

59. See Power, *supra* note 7, at 590 (stating that because mashups are invariably infringing, the only available defense would fair use); Long, *supra* note 7, at 329-30 (stating that mashups do violate reproduction rights and that when mashers use copyrighted material, he or she has more than likely violated the original author's exclusive right to create derivative works); Katz, *supra* note 7, at 25 (finding that because mashups are unlicensed, fixed creations, made from pieces of other artists' creations, "they clearly violate the copyright holder's exclusive rights.").

60. 17 U.S.C. § 107. "[T]he fair use of a copyrighted work, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." *Id.*; see also Long, *supra* note 7, at 330 (stating that because mashup artists probably violate the original author's rights, the mashup creator is "left with only one defense for the appropriation of copyrighted material in their creations: fair use"); Power, *supra* note 7, at 589 (stating that "[a]fter the plaintiff proves infringement, the burden is on the defendant to establish that the use was 'fair' under the factors listed in § 107"). In *Harper Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 561 (1985), the court found that the framers of § 107 "structured the provision as an affirmative defense requiring a case-by-case analysis . . ." *Id.*

61. See Power, *supra* note 7, at 589 (stating fair use can only be raised as an affirmative defense after infringement has been established); Long, *supra* note 7, at 330 (stating that a mashup artist's only defense is fair use because he or she unlawfully appropriated copyrighted material); Katz, *supra*, note 7, at 25 (stating fair use is an affirmative defense, and it can only be put forth

this defense is only available if the infringer uses copyrighted material in a way that conveys criticism, comment, news reporting, teaching, scholarship, or research of the original work.⁶² Although the term “parody” does not appear in the statute, courts nonetheless recognize parodies as a form of criticism.⁶³ Despite suggestions that mashers could protect their works under fair use, this defense cannot apply to mashups because they do not fit in any of the categories that trigger this defense.⁶⁴ To determine if the use of an original work is fair, courts analyze the work under a four-part test.⁶⁵

The fair use doctrine balances four factors in determining whether a work should be protected: (1) the purpose and character of the use;⁶⁶ (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.⁶⁷ Although this is a balancing test, courts typically give great weight to the first factor.⁶⁸ In cases involving music, the Supreme Court has found that a song that samples lyrics qualifies as a protected parody if it is of a sufficiently transformative nature and

after the plaintiff claims infringement).

62. 17 U.S.C. § 107. “Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship or research, is not an infringement of copyright.” *Id.*

63. See Power, *supra* note 7, at 590-91 (stating that the list in § 107 is not exhaustive, and parody is a type of commentary or criticism requiring a liberal analysis); *Campbell*, 510 U.S. at 579 (1994) (stating that it recognizes, as other courts have, that a parody is another form of comment or criticism and may have a claim for fair use under § 107).

64. See discussion *infra* Part III.B (explaining that although courts have found other infringing musical works qualify as parodies, mashups are not parodies because they do not provide comment or criticism on the original work, which is needed to qualify as a parody).

65. 17 U.S.C. § 107 states that a court “shall” include the following four factors: (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. *Id.*

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

67. *Id.*

68. See, e.g., *id.* at 578-79 (stating that the reason to investigate the purpose and character of the use is to find out if the work adds something new, and furthers the purpose or character by altering the original work with new expression, in other words, to discover to what extent the new work is “transformative”). The Court also found that “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.” *Id.* at 579.

comments on or criticizes the original work.⁶⁹

In *Campbell v. Acuff-Rose*, the Supreme Court held that for a parody to properly effectuate a criticism, the creator of the parody must necessarily be allowed to adequately mimic the original, giving it “some claim to use the creation of its victim’s . . . imagination”⁷⁰ A satire, which comments not on the work itself but uses the work as a vehicle to make a statement about a larger social issue, is not criticism and does not fall under the fair use protection.⁷¹ In contrast, sampling even three notes of a song is considered copyright infringement⁷² and not a fair use.

Up until now, legal scholars have attempted to defend mashups by relying on the parody fair use analysis established in *Campbell*. This solution claims that a mashup is similar to the lyrical sampling in *Campbell* and should therefore be analyzed as a “quasi-parody.”⁷³ But mashups do not fit into the realm of parody under fair use. The flaws in this solution can be pointed out by applying this analysis to Girl Talk’s work.

III. MASHUPS ARE PULVERIZED AS PARODIES, GIRL TALK IS WITHOUT COMMENT, AND CONGRESS HAS SAID TOO MUCH

A. *Quasi-Parody: How Fair Use Is Forced on Mashups*

The “quasi-parody” analysis proposed by some legal commentators does not create a legal home for mashups. In applying the four-part balancing test to mashups, legal commentators argue that under the first factor of fair use,

69. *Id.* at 578-80. The Court came to this conclusion balancing the other required factors under § 107. *Id.* Under the second factor, the Court found that parodies almost always copy publicly known works, and this factor does not help much in the analysis. *Id.* at 586, 598. The Court stated that a parody must be able to take enough of the original work to make the object of its critical wit recognizable under the third factor. *Id.* at 598. Also, there was no evidence that a potential rap market was harmed in any way by 2 Live Crew’s song when considering the fourth factor. *Id.* at 593. In balancing these factors, the court found that Campbell’s use of the original song constituted fair use as a parody. *Id.* at 594.

70. *Id.* at 580-81.

71. *Id.* at 581. The Court stated “satire can stand on its own two feet and so requires justification for the very act of borrowing.” *Id.*

72. *Bridgeport*, 410 F.3d at 800-01.

73. See Power, *supra* note 7, at 590-91 (labeling the fair use argument “Mash-Ups Are a Type of Comment or Criticism That Should Be Analyzed as ‘Quasi-Parody’” and stating that mashups should receive the same analysis as 2 Live Crew did in *Campbell* because mashups share the need to use preexisting works to comment on the work); Katz, *supra* note 7, at 57 (citing *Campbell* as an example of how there is a need to use a substantial portion of unlicensed copyrighted material when the copying is done for transformative purposes, as long as the new work comments on the original work).

mashups are the same as traditional parodies.⁷⁴ This quasi-parody approach includes three additional sub-factors, all of which fall within the first prong of the four-part balancing test. These sub-factors examine the nature and character of the use of the work⁷⁵ and rely heavily on the Supreme Court's language in *Campbell*.⁷⁶ These sub-factors are: (1) whether the use was transformative or supersedes the market for the original work; (2) whether the use is commercial in nature; and (3) the propriety of the infringer's conduct.⁷⁷

Proponents of the quasi-parody analysis contend that mashups would meet each sub-factor.⁷⁸ Under the first sub-factor,⁷⁹ the quasi-parody analysis compares mashups to other parodies and argues that mashups are similar to other parodies⁸⁰ because they transform the original work. While traditional parodies alter lyrics, mashups transform the work during the assembly process of creating the mashup.⁸¹ Under the "commercial nature" sub-factor, the quasi-parody analysis finds that mashups are not commercial in the sense that they are not sold.⁸²

74. See Power, *supra* note 7, at 591 (stating that although mashups do not fit into the traditional parody definition, mashups should be analyzed as a "quasi-parody" form of expression because they share the need of using preexisting works so that they may comment on that work); Long, *supra* note 7, at 360 (stating that the Court should recognize mashups as a form of transformative expression and alter *Campbell's* test to encompass mashups so that they would receive fair use protection); Katz, *supra* note 7, at 56-57 (suggesting that if Congress does not change copyright law, the Courts should interpret the fair use defense as a broad and expansive doctrine, and listing the parody doctrine set forth in *Campbell* as an example).

75. Power, *supra* note 7, at 593 (citing *Campbell*, 510 U.S. at 579) (explaining that the Court found the more transformative a work is, the less likely it will be to supersede the original work). Power also cites *Harper Row Publishers, Inc.*, where the Court found that "the propriety of the defendant's conduct" is also relevant to the character factor of fair use, and that fair use inherently assumes there is "good faith." *Harper Row Publishers, Inc.*, 471 U.S. at 562; Power, *supra* note 7, at 592.

76. See Power, *supra* note 7, at 590-99 (using the holding and analysis in *Campbell* as the basis for the quasi-parody reasoning under the first, second, and fourth factors of parodies as fair use).

77. Power, *supra* note 7, at 592-97.

78. *Id.*

79. *Abilene Music, Inc. v. Sony Music Entm't*, 320 F. Supp. 2d 84, 89 (S.D.N.Y. 2003).

80. Power, *supra* note 7, at 593. Mashups have an equal claim for transformative use as parodies, even though they do not alter the lyrics like normal musical parodies.

81. *Id.* The transformation of the music in mashups is done only through the production of the mashup, and although they do not alter the lyrics or the melody, this should be no reason to differentiate this type of transformation from the normal parody transformation method.

82. *Id.* at 594. Mashups are not sold on any market and are only offered for free on the internet, therefore, mashups have a strong argument that they are a non-commercial use of the original works. See, e.g., *Sega Enter. Ltd. v.*

As for the propriety of the infringer, the quasi-parody analysis asserts that quasi-parodies always have difficulty obtaining permission because the original authors will generally not favor criticism of their works. Therefore, mashers do not act in bad faith when they use portions of protected works without permission.⁸³ Collectively, quasi-parody proponents argue that the first fair use factor weighs in favor of mashups as fair use.⁸⁴

The quasi-parody analysis places little relevance on the second factor of the fair use doctrine, which examines the nature of the copyrighted work. Quasi-parody proponents argue that the second factor should be virtually irrelevant because parodies almost invariably copy publicly known, expressive works,⁸⁵ and when applied to mashups, this factor only slightly weighs against finding mashups fair.⁸⁶

Under the third fair use factor, the amount and substantiality of the portion of the original work used, the quasi-parody analysis argues that mashups need to “adequately mimic” the original work through appropriation⁸⁷ because mashups cannot exist without using a large amount of the original content.⁸⁸

MAPHIA, 857 F. Supp. 679, 685, 687 (N.D. Cal. 1994) (explaining that the use was commercial because users were able to, and did, download games to avoid purchasing licensed copies); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1015 (9th Cir. 2001) (holding that “repeated and exploitative copying of copyrighted works, even if the copies are not offered for sale, may constitute a commercial use.”); UMG Recordings v. MP3.com, Inc., 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) (stating that because the defendant sought to attract visitors in hopes of selling advertisements, the use was commercial even though customers were not charged a fee).

83. Power, *supra* note 7, at 596-97. Artists are reluctant to grant a license to works that will criticize their work, or transform it in way that the artist would find offensive. *Id.* See *Grand Upright Music*, 780 F. Supp. at 185 (explaining how Biz Markie released his song “Alone Again” after Gilbert O’Sullivan refused to grant him clearance to use O’Sullivan’s song “Alone Again, Naturally”). Fisher v. Dees, 794 F.2d 432, 434 (9th Cir. 1986) explains how Fisher refused Dee’s request to create a parody of the original composition; see also Power, *supra* note 7, at 597 (stating that the time and financial costs associated with clearing samples could bar the creation of certain genres of works). See also Fisher, 794 F.2d at 437 (finding that releasing a parody after being denied permission is not bad faith, and should not be held against the infringer).

84. Power, *supra* note 7, at 600.

85. *Campbell*, 510 U.S. at 586. The Court found that although the expression in the preexisting work was intended to be protected by copyright, parodies will almost always copy publicly known, expressive works, and therefore the second factor of fair use is virtually irrelevant in the parody context. *Id.*

86. Power, *supra* note 7, at 597.

87. *Id.* at 599. Mashups must be allowed, like parodies, to “conjure up” the original material by appropriating both quantitative and qualitative aspects of the original work in order to survive as a parody. *Id.* at 598-99.

88. *Id.* “The only way to minimize the amount of acceptable taking under

Lastly, under the fourth fair use factor, which considers the effect of the new work on the potential market-value of the copyrighted work, the quasi-parody analysis holds that mashups do not affect the potential market value of the original work.⁸⁹ This is because mashups do not supersede or replace the original work.⁹⁰ They also do not interfere with the original artist's ability to create mashups themselves because there are a myriad of options for mashing any particular song.⁹¹ Though the quasi-parody analysis seems to have merit, it fails to protect mashups for one simple reason, especially when applied to DJ Girl Talk's works.

B. Mashups Provide No Comment or Criticism to Qualify as Parodies or Quasi-Parodies

Though mashups (including those created by Girl Talk) do not alter the lyrics or instrumentals of the songs themselves,⁹² they are combined in a way that gives new meaning or expression to prior works.⁹³ This effect, however, is not achieved through parody. Parody is "literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule."⁹⁴ One cannot tell if mashers are making fun of, criticizing, or praising the artists from whom they borrow to make these creations. Because it is hard to extract any commentary from mashups, much less commentary that evokes a comic effect or ridicule, they are not parodies.⁹⁵ For this reason, mashups fail the quasi-parody analysis.

In *Campbell*, the Court found that 2 Live Crew's song, "Pretty

the 'conjure up' test would be to limit the quantity of the song used." *Id.* at 599. Having a mashup that lasts only thirty seconds, rather than the whole length of the song, would not decrease the impact of any potential damage. *Id.*

89. *Id.* at 600.

90. *Id.* at 599.

91. *Id.* The Court in *Campbell* also considered the market for licensing samples as one of the potential markets that could potentially be affected under the fourth factor. *Id.* (citing *Campbell*, 510 U.S. at 571). Bootleg mashups will not detract from artists making mashups out of their own works. Any song can be combined with another song in a variety of different ways. *Id.* One example would be the "Collision Course" Album released by Jay-Z and Lincoln Park in 2004.

92. *Id.* at 593. Mashups do not alter the lyrics or melody themselves, but they keep all the lyrics of one song and transpose it over the entire melody of another song. *Id.*

93. See *Glee: Vitamin D*, *supra* note 1 and accompanying text (describing the expressive effect of a mashup).

94. *Campbell*, 510 U.S. at 580. The Court relied on modern dictionaries for the correct definition of a parody. *Id.*

95. See Fuchs, *supra* note 5 (stating Girl Talk's mashups likely do not fall under fair use because the music is for entertainment purposes and does not provide any critical commentary on the original work).

Woman,”⁹⁶ imitated outdated language to draw a comic effect.⁹⁷ The Court in *Campbell* supported this finding by stating that for purposes of copyright law, a parodist will claim he needs to quote or “use some elements of a prior author’s composition to create a new one that at least in part, comments on that author’s work.”⁹⁸ Legal commentators who rely on this language to mold a fair use defense for mashups ignore the very next sentence of the Court’s opinion in *Campbell*:⁹⁹

“If . . . the commentary has no critical bearing on the substance or style of the original composition which the alleged infringer merely uses to get attention . . . the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish)”¹⁰⁰ Unfortunately, mashups fit squarely within this latter part of the holding in *Campbell* rather than the “transformative parody” portion because mashups are easily identifiable and provide no commentary on the original songs.¹⁰¹ Because the parody analysis fails to save mashups, the legal system must look elsewhere to find a home for them.

C. Mashups Are Mashed Out of the Quasi-Parody Analysis

Mashups cannot invoke any innate claim to transformativeness afforded to traditional parodies through *Campbell*¹⁰² because they are not parodies.¹⁰³ Typical mashers put their works on the web, which makes the works commercial.¹⁰⁴ The commercial aspect would be especially difficult for Gillis, who sells his mashups, receives direct profit from them,¹⁰⁵ and

96. 2 LIVE CREW, PRETTY WOMAN (Luke Skywalker Records 1989); ROY ORBISON, OH, PRETTY WOMAN (Monument Records 1964).

97. *Campbell*, 510 U.S. at 582.

98. *Id.* at 580.

99. *Id.*

100. *Id.*

101. Fuchs, *supra* note 5. “The music is for entertainment purposes, not providing critical commentary on the original work.” *Id.* Mashups do not likely qualify as fair use. *Id.* Also, in the case of mashers, these alleged infringers use the substance of the works (the lyric and the melody) in a way which makes them immediately recognizable to the average listener. Power, *supra* note 7, at 579.

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

103. See *supra* Part III.B-C (showing why mashups are not parodies as other suggest, and furthermore, how mashups ultimately fail under the fair use defense).

104. See sources cited *supra* note 82 (listing cases and other commentary which expands on the idea of what constitutes “commercial” for fair use purposes).

105. See Fuchs, *supra* note 5 (noting that Girl Talk makes money by selling his albums online, letting consumers pay what they want). Girl Talk’s shows are also not free. See ONLINE SEATS, <http://www.onlineseats.com/girl-talk-tickets/buy.asp> (last visited Dec. 3, 2010) (listing the minimum ticket prices for the Dec. 31, 2009 show at The Congress Theater in Chicago, IL at seventy-

performs all over the U.S.¹⁰⁶ Although, the time and money it would take to obtain permission from the authors to use samples of their works would severely prohibit creating mashups,¹⁰⁷ ignoring the bad propriety of the infringer only applies if the work is a parody, which a mashup is not. Therefore, the first factor under a quasi-parody analysis actually weighs against protecting mashups.

The Court in *Campbell* stated that the “nature of the work” factor should be virtually irrelevant because parodies copy only well known, expressive works, but mashups are still not afforded this leniency because they are not parodies.¹⁰⁸ The Court in *Campbell* found that the original work’s creative expression fell within the core of the copyright’s protective purpose.¹⁰⁹ Without the leniency afforded to parodies, the second factor weighs against protecting mashups under the fair use doctrine because they appropriate the original work’s creative expression.

DJ Girl Talk’s works also rebut the contention that mashups must use a high level of appropriation to “conjure up” the image of the original work.¹¹⁰ Many of his cuts use snippets of songs that are just long enough to barely be identified.¹¹¹ But because Girl

seven dollars).

106. See *supra* note 33 (listing a few of Gillis’s performances).

107. KOT, *supra* note 33, at 167-68. Gillis comments that he never really thought of trying to clear any of the samples and states “[i]t would have taken ten years to work out all the clearances, and I didn’t think anything I was doing was going to hurt anyone’s sales.” *Id.* at 167. Philo T. Farnsworth, the founder of “Illegal Art” the record label which releases Girl Talk’s albums, states that he is not against compensating artists for using samples of their works, but the compensation situation for sampling now is impossible. *Id.* at 168. “People can ask whatever they want for every sample, and that has turned sampling into a prohibitive art that even the biggest artists can’t afford.” *Id.* at 169.

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

109. *Id.*

110. Power, *supra* note 7, at 598.

111. See Doris E. Long, Professor and Chair, Intellectual Property, Information Technology and Privacy Group, Class Lecture on Direct Copyright Infringement for the Trademark and Copyright Course, The John Marshall Law School, Chicago, IL (Oct. 12, 2009) (showing an example of how DJ Girl Talk uses extremely short, but easily identifiable samples of popular songs in his mashups). For example, track two of the album, “Sources for Girl Talk Mash Up: Night Ripper Album,” contains the following list of songs: “That’s My DJ” - 2:08, includes: 0:01 (2:41) - “Breezin” GEORGE BENSON, BREEZIN’ (Warner Bros. Records 1976); 0:10 (2:50) - “3 Kings” SLIM THUG, ALREADY PLATINUM (Boss Hogg Outlawz/Star Trak, 2005); 0:32 (3:12) - “Player’s Anthem” JUNIOR MAFIA, CONSPIRACY (Undeas/Big Beat Records, 1995); 0:38 (3:18) - “Bring Em Out” T.I., URBAN LEGEND (Grand Hustle/Atlantic, 2004); 0:39 (3:19) - “What More Can I Say” JAY-Z, THE BLACK ALBUM (Roc-A-Fella Records, 2003); 0:43 (3:23) - “Go DJ” LIL’ WAYNE, THA CARTER (Cash Money/Universal, 2004); 0:43 (3:23) - “25 or 6 to 4” CHICAGO, CHICAGO (Columbia Records, 1970); 0:54 (3:34) - “Knuck If You Buck” CRIME MOB,

Talk does not use these snippets to conjure up the original work for the purpose of comment or parody, mashups do not “need” to borrow any of the original work for this purpose, and this factor weighs against protecting mashups. The courts have also split as to “how much you can sample and not infringe,”¹¹² thereby leaving this issue unsettled at best, rather than supporting a quasi-parody argument.

Mashups do not detract sales or revenue from the original works and do not supersede them. Courts look to this factor to determine if the work is so much like the original that it replaces the original in the market place, thereby causing the original author economic harm. In fact, many listeners state that hearing mashups sparks their desire to hear the original songs again, actually boosting the sales market of the original works.¹¹³ Therefore, this factor favors protection for mashups. Mashups also do not interfere with the original artist’s ability to create mashups because there are a myriad of ways to mash any song. But this factor would weigh against a profiting masher like DJ Girl Talk, who offers his mashups on a “pay what you want” basis.¹¹⁴

CRIME MOB (G\$ Up/Crunk Inc./Warner Bros./Reprise Records/BME Recordings, 2004); 1:14 (3:54) - “Stay Fly” THREE SIX MAFIA, MOST KNOWN UNKNOWN (Sony BMG, 2006); 1:36 (4:16) - “Blinded by the Light” MANFRED MANN, GREETINGS FROM ASBURY PARK, N.J. (Columbia Records, 1973); 1:36 (4:16) - “My Hero” FOO FIGHTERS, THE COLOUR AND THE SHAPE (Roswell/Capitol, 1998); 1:37 (4:17) - “Like You” BOW WOW (FT. CIARA), WANTED (Columbia, 2005); 2:03 (4:43) - “Holidae Inn” CHINGY (FT. LUDACRIS & SNOOP DOGG), (Capitol Records, 2003); 2:06 (4:46) - “Straight Up” PAULA ABDUL, FOREVER YOUR GIRL (Virgin Records, 1988).

112. See, e.g., *Bridgeport*, 410 F.3d at 802 (finding in the Sixth Circuit that infringement should be found if any portion of another’s copyrighted sound recording has been physically copied, brushing aside the need for the use of the “substantial similarity” test other courts use to determine if there has been infringement, and upholding the decision that three copied notes is infringement). But see *Harper Row Publishers, Inc.*, 471 U.S. at 540-41 (finding in the Supreme Court that a magazine’s unauthorized publication of verbatim quotes from President Ford’s memoirs was an insubstantial portion of the memoirs, but nonetheless decided that they “qualitatively embodied Mr. Ford’s distinctive expression.”).

113. Greg Kot, Music Critic, *The Chicago Tribune*, Continuing Legal Education Seminar: Ripped—The Future of Music and Copyright (Oct. 8, 2009) [hereinafter CLE Seminar]. When commenting on the Grey Album, Kot stated that DJ Danger Mouse worked the songs together in ways that were inventive, so that the more you listen to it the more appreciation you have not only of the original works, but what Burton (Danger Mouse) did. *Id.* “It made me want to go back and listen to both original albums again because I saw parts of those albums or heard parts of those alums that I hadn’t heard.” *Id.* Kot stated that The Grey Album is an example of how great mashups can be. *Id.* “I know Beatles’ fans who found out about Jay-Z because of that, and Jay-Z fans said ‘hey the Beatles are cooler than I thought.’ Suddenly you have this whole conversation happening that wasn’t there before.” *Id.*

114. Fuchs, *supra* note 5.

In balancing these factors, the first being the most important, mashups do not survive a fair use analysis. Though the result of a mashup adds new expression to the first work, it provides no commentary on or criticism of the original work, thereby greatly diminishing, if not extinguishing, the chance that a mashup could be called a parody under fair use.¹¹⁵

D. Other Proposals Are Equally as Mashed

Some legal scholars advocate a congressional statutory payment system or compulsory license statute.¹¹⁶ Under this system, mashers would be able to create their works by paying a fee.¹¹⁷ Compulsory licensing has worked well in other situations where legislation addressed new technology, such as the phonograph, the radio, and television broadcasting systems.¹¹⁸ But in those specific instances, the new technology changed the way media was distributed, and newcomers were given the right to use the works as long as they paid a nominal fee.¹¹⁹ Paying this fee was not an issue because the new technologies profited from their use. But here, a statutory licensing system is impractical because it deters mashers from creating these works.

It is inconsistent for the government to expect mashers to pay authors for creating mashups when they in fact make no money from using the original authors' works.¹²⁰ It is also unlikely that mashers will adhere to such a statute considering they do not adhere to copyright licensing warnings or sampling requirements

115. *Campbell*, 510 U.S. at 580. The Court in *Campbell* found that when the commentary of the new work has no critical bearing on the original work, the ability to claim fair use in borrowing from another's work diminishes accordingly, if it does not vanish. Also, the other factors, like the extent of commerciality, carry more weight. *Id.*

116. Long, *supra* note 7, at 357. This system would allow those who wanted to use such copyrighted materials in their own works to do so by paying a fee to the copyright holder. *Id.*

117. *Id.* at 358. A compulsory licensing system would definitely decrease the transactions costs of negotiating with the original authors for their permission to transform their works. *Id.*

118. LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 56-57 (The Penguin Press 2004). Congress came up with the compulsory license model to make sure the copyright holders would be compensated for allowing others to use their works. Congress set the price.

119. *Id.* at 57. So long as the composer is paid, that person is free to record the song. *Id.* There was a similar statutory license set by Congress for cable television. *Id.* at 61.

120. See Power, *supra* note 7, at 579-80 (stating mashups are not offered for sale); Long, *supra* note 7, at 358. Mashers do not pay to create their mashups, so they suffer no transactional costs, and any compulsory licensing system increases the production cost, although it may be a small fee. In situations where mashups are created from many copyrighted materials, the cost of licensing could deter the masher from making the mashup. *Id.*

in the first place.¹²¹ The ability of original artists to opt-out of granting permission is a problem because it could make the system ineffective.¹²² Opt-out loopholes were not present in the compulsory license schemes that have worked well for other technologies.¹²³

Moreover, the United States has recognized that artists in general do not like authorizing others to make derivatives of their works, demonstrated by the reluctance to award artists "moral rights," which allow an artist to preserve his or her work after it has been sold for purposes of honor and integrity.¹²⁴ Absent moral rights, artists grant licenses blindly, without knowing exactly what the user will do with the work.¹²⁵ If artists are afforded moral rights, they can sue the licensee for derivative works they feel offend the integrity of the original work, and thus, their reputation as artists.¹²⁶ Even in creating moral rights for visual works, Congress created many exceptions to this provision.¹²⁷ As a result, many artists lose their moral rights claims against infringers.¹²⁸ Overall, statutory licensing presents problems

121. Long, *supra* note 7, at 358. Mashup creators already do not adhere to the law necessitating authorization to use the preexisting works. *Id.* at 355-58.

122. *Id.* at 359. Some compulsory license suggestions include a provision for copyright holders to "opt out" of the statute. Therefore, this system would be highly ineffective. Because only a few companies control most of the media content in the United States, and these companies push for greater control over copyrights, it is likely they will opt out a significant portion of the content that mashers want to use. *Id.* at 360.

123. See LESSIG, *supra* note 118, at 61 (explaining that although cable companies had to pay for the content they displayed, the price was set by Congress and not the copyright owner). This is so the copyright holders could not exercise veto power over newly emerging cable technologies. *Id.*

124. Scott v. Dixon, 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004); *see also* 17 U.S.C. § 106(A) (listing the requirements a work must meet to be afforded moral rights in the United States).

125. See Christopher Madden, *Hold On Tighter/Let Go Sooner: A Review of Free Culture and an Argument for the Synthesis of Public Domain Preservation and Moral Rights Adoption*, 15 DEPAUL-LCA J. ART & ENT. L. & POL'Y 99, 137 (2004) (stating that if the artist has no protection under moral rights, they are granting a derivative works license without a clear idea of what the licensee will do with the expression in the work).

126. *Id.* at 138. With the power of moral rights, an author can be assured that they will not find the derivative works they license to be offensive.

127. Rebecca Stuart, Comment, *A Work of Heart: A Proposal for a Revision of the Visual Artists Rights Act of 1990 To Bring the United States Closer to International Standards*, 47 SANTA CLARA L. REV. 645, 654-58 (2007). To make a claim under the Visual Artists Rights Act of 1990 (VARA), the artist must establish that his or her work is included in one of the categories protected by the statute and also that the work is of recognized stature. *Id.* It is easy for a work to fall outside the protections of VARA because the statute has so many restrictions. *Id.* at 660.

128. *Id.* at 659. There are many cases that assert VARA claims, but few artists actually succeed. *Id.* As of the date of the article (2007) there was only one published opinion in which the artist was awarded damages. *Id.*

because it is expensive and sometimes ineffective.

E. The Source of the Digital Derivative Work Problem: The Digital Millennium Copyright Act Deletes Fair Use

In 1990, Congress enacted the Digital Millennium Copyright Act (DMCA) to control the spread of information out of fear for copyright protection in the advent of the internet.¹²⁹ Along with this Act, technology emerged to prevent the replication and distribution of copyrighted material on the Internet.¹³⁰ The DMCA protects copyrighted material on the Internet and bans the creation or use of devices that circumvent the Act's software.¹³¹ The DMCA is problematic because it assumes all circumventing software is used for infringement, ignores the possibility of fair use, and punishes those who try to get around the DMCA's code through other technology.¹³² This impedes the creation of new technology and erases the possibility that fair use would protect works created through the software.¹³³

This power is especially frightening in the hands of the few corporations that own the copyrights to our culture's media. 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."¹³⁴ In this era, the few that control the majority of our culture's media hold on tight to copyright law, stifling what is available and what may be done with it.¹³⁵ This is the reason mashups have no legal home in

129. See LESSIG, *supra* note 118, at 157 (stating that the DMCA was enacted out of the copyright owners' first fears about cyberspace and made the spread of information an offense).

130. *Id.* This law found technologies that would protect copyright by controlling and replicating copyrighted material. *Id.* They designed code to reestablish protection for copyright owners on the internet. *Id.*

131. *Id.* The DMCA does more than protect copyrighted works on the internet, as it banned devices designed to get around the copyright protection code. *Id.*

132. *Id.* at 159. The DMCA's ban on circumventing types of technology did not consider the fact that there may be legal uses for the technology. Lessig compares the VCR to a gun, stating that they both can be used for good and bad ends. A bad end of the VCR would be that you can engage in massive levels of pirating. *Id.* A good end would include using copyrighted material in a way that is considered fair use. *Id.*

133. "Yet fair use is not a defense to the DMCA." *Id.* at 157-58. The DMCA is not concerned with whether or not there has been an infringement, but whether a copyright protection system was circumvented. *Id.* Now for the first time, people are no longer to create and share culture as they are accustomed to doing and our culture is less free. *Id.* at 8.

134. *Id.* at 162.

135. *Id.* at 169. The concept of "property" has changed to mean something different. *Id.* Considering the power of technology to assist the law's control, and the power of the concentrated market, we must redraw the balance to ensure that our culture has the freedom to build upon the past. *Id.*

copyright law. Building a home for mashups requires restoration of the balance between the amount of works protected by copyright and the amount available to freely use in the public domain.¹³⁶

IV. GETTING BACK TO THE BASICS: RESTORING THE BALANCE BETWEEN COPYRIGHT AND CREATIVITY WITH NEW TECHNOLOGY

The purpose of copyright law is to provide incentive to create.¹³⁷ This is why the law gives musicians and composers rights to control the copying and performance of their works.¹³⁸ Copyright law was initially only concerned with publishing or copying protected works, and only regulated businesses.¹³⁹ But the law today inhibits creativity for musical works.¹⁴⁰ It now regulates the commercial and non-commercial activity of consumers,¹⁴¹ placing too much of our culture's music solely in the hands of copyright holders.

Another factor that unevenly distributes power to the copyright holders is the fact that five major corporations have gained control over musical works by latching on tightly to the DMCA. These companies control who may distribute or make derivative works, including mashups, thereby exercising control over most of the music to which the public is exposed.¹⁴² Copyright

136. *Id.* This shift of power means we need to restore the balance that has been redrawn time and again throughout history by weakening the strong regulation to strengthen creativity.

137. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1932). (stating that "[t]he immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.").

138. LESSIG, *supra* note 118, at 8. In the beginning the law gave the incentives to creators by granting them exclusive rights to their creative works so they would have something to sell in a commercial marketplace. But this is just a small part of the law, and the law did not interfere with the traditional ways people shared and transformed their culture. *Id.*

139. *Id.* at 169.

140. *Id.* at 184-85. There could be a vast amount of creative work on the internet, including mashups, but these works will be presumed illegal under the current law. This presumption along with extreme penalties, such as suing individuals for billions of dollars for illegal downloads, chills creativity. "Overregulation stifles creativity. It smothers innovation." *Id.* at 199.

141. *Id.* at 170-71. From the year 1790 to 1909 copyright changed from regulating only publishing rights for commercial activities, to publishing and transformative rights for commercial activities. *Id.* Then from 1909 to the present, the law went from regulating commercial and noncommercial copying rights along with commercial transformative rights to regulate commercial and noncommercial copying and transformative rights. *Id.*

142. *Id.* at 162. The fact that there has been this change in concentration an integration of the media is the single most important factor because this is what has expanded the government's control over innovation and creativity. These large concentrated networks has an effect on what is produced—only

has never accorded the copyright owner complete control over all possible uses of his work, but this seems to be the future of sound recordings.¹⁴³

A third factor inhibiting the creation of musical works is the difficulty in clearing rights to create derivative works.¹⁴⁴ But in our new remix-based musical culture, the physical act of creating a mashup is extremely easy.¹⁴⁵ The solution to finding a legal home for mashups requires re-shifting the balance between the current strong protection of copyright in music and the limited number of works available in the public domain for mashers to build upon.¹⁴⁶ This shift can be easily achieved by creating an exception for mashups as a protected class of derivative works.

what they want conveyed gets out there. *Id.* at 166. *See also* CLE Seminar, *supra* note 113 (explaining that when the technology of peer-to-peer file trading came along, allowing quick accessibility to a massive amount of music that was free, people flocked to it). Kot went on to further explain that the music industry was reluctant to change their business model that was working incredibly well (selling music in a tangible form in stores) because they didn't understand the technology. *Id.* Technology is always going to be a step ahead. *Id.* Napster was a great idea and a great business model. *Id.* But after it was shut down, consumers continued downloading music on illegal sites like Grokster because the industry's version of peer-to-peer trading sites were poorly put together. *Id.*

143. LESSIG, *supra* note 118, at 78. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984). The Court made it clear that copyright protection has never accorded the owner of the copyright complete control over all uses of the work.

144. LESSIG, *supra* note 118, at 101-02. Lessig describes the difficulty a lawyer at a digital entertainment company had in attempting to clear the rights to make a showcase of all Clint Eastwood's works by putting together clips from his films and interviews. *Id.* It took a year for that lawyer to be comfortably uncertain that he had gotten all the rights cleared. *Id.* He commented that very few would have the time and resources to do what he did to create this exceptional piece of work. *Id.*

145. *Id.* at 106. Technology gives people the ability to do these sorts of things easily. *Id.* We live in a cut and paste culture where everyone knows how to look up an image and instantly place it in your presentation. *Id.*

146. *Id.* at 77-78. In each case of new technology throughout history, someone got a "free ride" off of somebody else's work, and in each of these cases Congress allowed the technology to benefit from the works made before its existence. *Id.* So there needs to be a change in the law which balances the protection of the law against the public interest. One suggestion is limiting the scope of derivative rights. *Id.* at 295. If derivative rights were more sharply restricted we would see the creation of more transformative works. Copyright law has historically been a balance between the need to protect authors' works so they have incentive to create and assuring access to creative work. *Id.* at 172; *see also* RIP!, *supra* note 32 (stating that in 1998 copyright law was re-written to extend copyright protection to the life of author plus seventy, more than quadrupling the original fourteen-year term). Everything that was supposed to be free to remix was locked up. Today, if you want to make works from the public domain, you must use things that were made before 1923.

A. *Curtailing Derivative Rights of Original Authors Inspires Others to Create Tech Savvy Business Models*

A copyright holder's exclusive right to create derivative works should be limited with regard to sound recordings. Though there are some instances in which the exclusive right to create derivative works is important, keeping sound recordings out of the public domain for so long seriously inhibits musical creativity while at the same time providing no benefit to the copyright owner.¹⁴⁷ Copyright law, as it currently exists, leaves the public with little in the public domain, where individuals are free to build upon others' expressions and creativity is supposed to flourish.¹⁴⁸ For example, Michael Jackson's song "Thriller,"¹⁴⁹ will not be in the public domain until 2079! Mashups are creative, derivative works of sound recordings, regardless of their illegal nature.¹⁵⁰ And according to the legal history of new technologies, mashups should be encouraged, not stifled.¹⁵¹

The best way to protect mashups is through an act of Congress because courts typically defer to Congress when technology affects the copyright market,¹⁵² and they are otherwise unable to protect mashups through the fair use doctrine.¹⁵³ A model for this legislation could state as follows: "The creation of derivative works as defined by § 101 of the 1976 Copyright Act, by those who are not artists, composers, authors, or otherwise copyright holders of sound recordings protected by the recording industry, will not be an infringement of the original author's right to create derivative works."¹⁵⁴

The exception should also employ a reverse-statutory licensing scheme, with language such as:

147. LESSIG, *supra* note 118, at 295. Though the author's right to create derivatives is important to induce creativity, this right is not important long after the creative work is finished. Limiting the author's right to create derivatives would enable consumers to make more creative works with digital technology.

148. On one side of the copyright fight are people who want to share ideas, and believe that the public domain must be protected to ensure the free exchange of ideas for the future of art and culture. RIP!, *supra* note 32.

149. MICHAEL JACKSON, *Thriller*, on THRILLER (Epic 1982).

150. See *supra* notes 59-60 and accompanying text (describing how mashups violate copyright law).

151. See *infra* Part IV.A.2 (examining the history of copyright law as affected by new technologies and how the law has always attempted to retain the benefits of new technology while minimizing their potential harm).

152. LESSIG, *supra* note 118, at 77. "Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials." *Id.*

153. See *supra* Parts III.B-C (demonstrating that mashups do not qualify as parodies as other commentators suggest, and ultimately fail the test for the fair use defense).

154. See 17 U.S.C. § 101 (defining "derivative works").

“For the creation of such derivative works, there shall be no requirement that the user obtain prior permission from original authors, and the revenue generated from the creation of these works shall be subject to a low, flat-percentage tax set by Congress.”¹⁵⁵

This solution is justified for three reasons: 1) in balancing the effects of such a law, the benefit of creating a derivative works exception outweighs the burden of limiting this right for the copyright holders;¹⁵⁶ 2) this proposal is analogous to past successful legislation regulating new technologies;¹⁵⁷ and 3) this solution is not subject to the defects of other compulsory license schemes.¹⁵⁸

1. Society Says Do Not Talk Down to Mashups, and the Recording Industry Says a Whole Lot of Nothing

When balancing the interest of the public against those of copyright holders and organizations such as the U.S. Recording Industry, businesses have typically brought attention to the monetary losses they would incur if their copyrights were limited.¹⁵⁹ But the benefits that new forms of technology bring to society severely outweigh these claimed losses.¹⁶⁰ To use Girl Talk as an example, it is estimated that it would cost him over four million dollars in clearance fees for him to legally make even one

155. See LESSIG, *supra* note 118, at 106 (suggesting an easy way for creators to compensate copyright owners could be to implement a rule stating “the royalty owed the copyright owner of an unregistered work for the derivative reuse of his work will be a flat one percent of net revenues, to be held in escrow for the copyright owner.”).

156. See *infra* Part IV.A.1 (finding that the creative and expressive value that mashups have in today’s culture outweighs restricting a copyright holder’s right to create these derivatives).

157. See *infra* Part IV.A.2 (comparing the acceptance of other infringing technologies, specifically the VCR, when it appears there is a benefit to society and insubstantial harm to big business copyright holders).

158. See *infra* Part IV.A.3 (discussing the advantages of having a flat-tax profit system for these works which typically make no money, as opposed to a clearance-fee system which renders the cost of creation exponentially higher than any profit).

159. LESSIG *supra*, note 118, at 70-71. The Recording Industry Association of America reported that in 2002, CD sales fell eight point nine percent. *Id.* at 70. Though the RIAA attributed this loss to illegal file sharing, there were other significant factors that contributed to this drop, including a twenty percent drop in the number of CDs released, the rising prices of CDs, and competition from other media forms. *Id.* at 71. Thus, the economic harm the Recording Industry claims they will endure if their rights are limited are not easily proven. *Id.* at 71.

160. See *infra* notes 163-68 and accompanying text (comparing sampling music for composing mashups to quoting written material for writing literary works, demonstrating the popularity of mashups as our culture’s expressive voice, and pointing out the little harm that the recording industry suffers).

of his albums!¹⁶¹ But lawmakers must consider the benefit mashups could give our culture through a derivative works exception.¹⁶²

"The importance of this remix . . . is that this technique has been democratized. This remix gives anyone with access to a fifteen-hundred dollar computer the power to say something differently."¹⁶³ In one of his speeches, Professor Laurence Lessig compared the ability to remix as this century's form of writing, as the literacy for a new generation.¹⁶⁴ But we do not need clearance, or permission from book publishing companies or literary authors, to take quotes from books and incorporate them into our own works. Furthermore, our culture, where people participate in the creation and re-creation of the world around us, has existed for a long time.¹⁶⁵

Considering the popularity of mashups, including the works of DJ Danger Mouse,¹⁶⁶ mashup video games,¹⁶⁷ and famous socialites such as Paris Hilton attending Girl Talk's concerts,¹⁶⁸ society has clearly expressed its desire for mashups to have a home. Although mashups may detract revenue from the recording industry because mashers do not pay clearance fees, mashups do not detract revenue from the market for the original artists' works.¹⁶⁹ Thus society's demand for mashups outweighs appeasing the recording industry and granting it the exclusive right to create these works.

161. RIP!, *supra* note 32. One song by Girl Talk, "Friday Night," compiles twenty-one songs into three minutes. *Id.* Each of the twenty-one titles is owned by an average of four corporations, every one wanting twenty-five hundred dollars up front per sample. *Id.* So far it costs \$210,000 to pay the publishers. *Id.* It also costs \$52,000 to obtain clearance from the recording labels. *Id.* With the cost per song coming to \$262,000, it would cost \$4,192,000 to make a Girl Talk album with sixteen tracks on it. *Id.*

162. LESSIG, *supra* note 118, at 73. The Recording Industry will always state how much they lose when fighting to keep control over copyrights, but it is important to look at what society gains if such industries have less control over copyrights. *Id.*

163. RIP!, *supra* note 32.

164. *Id.*

165. *Id.* See also LESSIG, *supra* note 118, at 61 (opining that every industry that is affected by copyright is the product and beneficiary of piracy, including films, records, radio, and cable TV).

166. See *supra* notes 23-27 and accompanying text (recapping the unprecedented popularity of DJ Danger Mouse's "Grey Album").

167. DJ HERO (Activision Publishing Inc. 2009) (indicating a video game, which is similar to guitar hero, but with songs that are mashups).

168. RIP!, *supra* note 32. Paris Hilton appears in the audience of Gillis's performance at the Coachella Valley Music Festival and stays to later take pictures with Gillis. *Id.*

169. See *supra* notes 89-91, 118-20 (describing how mashups do not interfere with the original artist's market place, and realizing that mashers do not pay compulsory licensing fees).

2. *The Legal History of New Technology Supports a Derivative Works Exception for Mashups*

If the law follows the model that radio, the recording industry, and cable TV have set, lawmakers should be trying to figure out how to best preserve the benefits of technology while attempting to minimize the harm it causes.¹⁷⁰ In *Sony Corp. of America v. Universal City Studios, Inc.*,¹⁷¹ at issue was the VCR. The device infringed upon the reproduction rights of copyrighted works by allowing consumers to record television shows and movies without permission from the copyright holders.¹⁷² The Supreme Court recognized the impact this technology had on our culture, decided that Sony was not liable for contributory infringement, and deferred to Congress so it could “accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.”¹⁷³

With respect to the VCR, Congress did nothing. Congress felt that this “taking” was insubstantial as compared to the gross profits of the American Film Industry.¹⁷⁴ The infringing technology remained. The VCR, like mashups, was very popular in society and allowed consumers to violate the rights of the copyright holders. And like the American Film Industry, the Recording Industry makes more than substantial profits.¹⁷⁵ In both

170. LESSIG *supra*, note 118, at 78. Traditionally, when the lawmakers regulate a particular use, they try and keep the benefit that comes from limiting the right to that use while minimizing the harm the limitation may cause. *Id.* Copyright holders complained that radio and television broadcasters took their property and paid nothing for it. *Id.* at 79. But, this is not a situation where the copyright holder is fighting for protection; in this situation, the copyright holders are fighting for *more* protection. *Id.* at 60-61. The question then becomes whether copyright holders who already have a monopoly and have been compensated should be allowed “to extend that monopoly.” *Id.*

171. *Sony Corp. of America*, 464 U.S. at 417.

172. LESSIG, *supra* note 118, at 75. Sony produced the VCR which had a recording function, thereby making it capable of copying protected shows and movies. Universal did not go after the consumers, but they went after the manufacturer of the device instead and hoped that the court would find them contributorily liable for copyright infringement. *Id.*

173. *Sony Corp. of America*, 464 U.S. at 431; LESSIG, *supra* note 118, at 76-77. After losing in the Ninth Circuit, Sony appealed. *Sony Corp. of America*, 464 U.S. at 420-21. The Supreme Court stated that Congress should be the one to decide copyright issues arising from major technical innovations. *Id.* at 431.

174. LESSIG, *supra* note 118, at 77.

175. The Recording Industry made \$10.4 billion dollars in revenue. Sam Gustin, *Music Sales Grown, Music Industry Shrinks*, PORFOLIO.COM, April 28, 2008, <http://www.portfolio.com/views/blogs/dailybrief/2008/04/28/music-sales-grown-music-industry-shrinks>. See also CLE Seminar, *supra* note 113 (stating that by the 1990's the music industry was a fifteen billion dollar industry, run by about only five or six major multinational corporations that produced an

situations, it is not the market place for the works that is harmed,¹⁷⁶ it is the big business. Thus, history dictates that Congress allow mashups to remain. Even though allowing mashups to persist would take away the copyright owner's exclusive right to create derivatives, the past has shown that there are ways to compensate copyright owners.

3. *Purging the Prior Clearance Requirement Rids Mashups of Compulsory License Issues*

Eliminating the need for prior clearance means mashers will no longer have to worry about being able to obtain clearances or being sued because they did not. Without requiring mashers to pay for clearances, it makes sense for Congress to compensate copyright holders by implementing a flat percentage of the revenue made, if any, from mashups.

This solution works not only for the typical masher, but also those like DJ Girl Talk, because mashers who make no revenue will not have to pay for the original use of the copyrighted work, and those who do will be subject to a small tax on that revenue rather than sacrificing the hundreds of thousands of dollars it may have taken to create the works in the first place.¹⁷⁷ Artists are still able to create mashups themselves, and as discussed earlier, mashups do not harm the original author's market.¹⁷⁸ And from a business perspective, the recording industry could easily sign mashers to a recording label, as EMI did by signing DJ Danger Mouse.¹⁷⁹

Moreover, copyright owners will still be protected from other artists with whom they directly compete because the proposed statutory derivative works exception only applies to "those who are not artists, composers, authors, or otherwise copyright holders of sound recordings protected by the recording industry"¹⁸⁰ It does not apply to artists signed in the recording industry.

B. *But How Will the Law Be Implemented? Promising Business Models Are Coming into Existence*

Within the mashup culture, business models do exist that aim

incredibly narrow pipeline of music).

176. See *supra* notes 89-91 and accompanying text (describing, from a fair use defense perspective, how mashups do not detract from the market place of the original artist).

177. See *supra* note 158 (totaling the price Gillis would have to pay to create one of his mashups under a statutory licensing scheme).

178. See *supra* notes 89-91 and accompanying text (explaining why mashups do not harm the original artists' market place for their works).

179. Power, *supra* note 7, at 581.

180. See *supra* Part IV.A (proposing legislation that would allow mashups to be created legally while still providing a fair return to the copyright holders).

to put more works in the public domain and promote creativity.¹⁸¹ One example is the non-profit corporation called Creative Commons.¹⁸² On its website, Creative Commons has developed a free set of licenses that anyone can attach to the content they post on the site.¹⁸³ The content is tagged and then linked to versions of the licenses that can be easily identified by computers, so it can be shared.¹⁸⁴

The creators of the posted content can attach any combination of licenses they wish for others to use, including any use at all. This model, allowing the implementation of more works for creative use, embodies the idea that certain freedoms need to be granted under the current stringent copyright law.¹⁸⁵ Although Creative Commons exists through the voluntary choice of individuals to allow others to build upon their works, this model would serve the derivative works proposal well.

V. WRAPPING UP MASHUPS AND LAYING DOWN THE LAW

Mashups are creative, socially important works that have a place in our culture. Until now mashups have not had a home in the law because they are victims of overregulating copyright law. But history demonstrates that popular intellectual property should be allowed to remain, and that it is acceptable to limit the rights of powerful industries that would not be severely harmed by the limitation. To solve this problem Congress must create a derivative works exception for mashups. And hopefully, as DJ Girl Talk begins to appear on lawmakers' iPods, lawmakers will recognize this need and create an exception for these creative works.¹⁸⁶

181. LESSIG, *supra* note 118, at 283. Individuals who are involved in the remix culture have made works available for others to use, helping to rebuild the public domain. *Id.*

182. *Id.* at 282. Creative Commons is a non-profit organization based in Massachusetts. *Id.*

183. *Id.* at 283. The Creative Commons licenses range from permitting any use as long as attribution is given, permitting only noncommercial use, and permitting any use as long as the same freedoms are given to others. *Id.* These are unique types of licenses that are outside the typical licenses granted under copyright law. *Id.*

184. *Id.* at 282. The uploaded content is marked with the designated Creative Commons licenses, and then the marks are linked to machine-readable versions of the licenses. *Id.* This enables the computers to automatically identify the content that is ready to be shared. *Id.*

185. *Id.* at 283-84. The people involved in this project believe in copyright protection falling between the extremes of all or nothing. *Id.* at 283. In addition to getting legislators to rebuild the public domain, they want to show that the public domain is important to creativity. *Id.* at 284.

186. See RIP!, *supra* note 32 (revealing that Congressman Mike Doyle from Pittsburgh, PA says he has Girl Talk on his iPod).

