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Mashed-up in Between: The Delicate Balance of Artists' Interests Lost amidst the War on Copyright

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INTRODUCTION

From the head-bobbing, house-rocking beats and serpentine rhymes of the Roots to the syncopated rhythms and melancholy melodic phrasing of the illustrious Dave Matthews, music is a fundamental and necessary component of popular culture. And, Gregg Gillis is acutely aware of that fact. As an advocate for and creator of a form of recycled art, Gillis utilizes samples of musical works, such as those of the Roots and Dave Matthews, potentially combining the two, in an attempt to create a new work of art called an audio mashup.[1] But, because audio mashups generally consist of copyrighted works and the mashup remixers[2] who create them rarely obtain permission to use those works, public and legal controversy has surrounded the art form since it first gained popularity.

1. An audio mashup is a work created, generally, by combining the vocal track of one musical work with the instrumental track of another musical work. People use various terms to identify such a process, including mashup, remix, and bootleg. This Comment, however, refers to the process as a mashup since bootleg and remix fail to appropriately characterize the process. The term "bootleg" refers to the general sale or distribution of an illegal product (e.g., alcohol or tapes of a live musical performance) and thus presumes that the practice of combining various preexisting works into a new work is illegal, which, as this Comment attempts to demonstrate, is not necessarily the case. The term "remix" is widely used in the music industry to identify derivative works of *one* particular musical work which have been, quite literally, remixed in the recording studio with new song elements, often to create a dance version of a song for dance clubs. Since mashups do not provide a new studio mix of one particular song but rather use the *original* mix of a song and combine it—or mash it—with another song or songs, the term mashup seems the most appropriate. Moreover, a mashup may refer to the combination of various preexisting materials generally, such as music, film, or television clips; thus, this Comment uses the term *audio* mashup to distinguish mashups created with musical works or various recorded sounds from other sorts of mashups.

2. The artists who create mashups refer to themselves as remixers. *See, e.g.*, mtfloyd, *Remixing for the Masses: The Good, the Bad, the Possibly Illegal: Transforming and Rearranging Existing Music to Create New Art*, RECORDING, Sept. 2006, at 22, 22 (describing the process of creating audio mashups). For lack of a better term, this Comment only qualifies the concept slightly, refering to such artists as mashup remixers.

In 2004, audio mashups entered the public spotlight as another mashup remixer, DJ Danger Mouse, released a limited-production, noncommercial mashup album, *The Grey Album*,[3] which combined Jay-Z's *The Black Album*[4] with the Beatles' *The White Album*.[5] Yet, public interest in the album did not arise until after the release of the album, when EMI, the copyright holder of the Beatles' works, sent Danger Mouse a cease and desist letter to prevent further distribution of the album.[6] Because of this one event, *The Grey Album*, and, more importantly, audio mashups in general, were thrust into public controversy.[7] In one of the more notable public responses, Downhill Battle, a nonprofit music activism organization, launched the project "Grey Tuesday," during which over 170 Web sites offered the album for free download, distributing over 100,000 copies in one day, the largest one-day download in history.[8]

In the aftermath of "Grey Tuesday," many more mashup remixers, such as Gillis, have emerged, each joining the movement against copyright law and becoming increasingly more audacious in the unauthorized use of the works they sample. Gillis almost exclusively uses pop music and in the past few months began to charge for his mashup albums due to his increased popularity.[9] Gillis's popularity and commercial success may usher many mashup remixers to follow, each pushing the bounds of copyright law and the limits of copyright holders' patience even further.[10] What is now barely a trickle of cease and desist letters may soon become a flood of copyright litigation.

Since the advent of the Internet, the music industry has been obsessed with locking up content from Internet users, pushing for changes to copyright law that restrict the public's ability to use and

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3. DANGER MOUSE, THE GREY ALBUM (2004).

4. JAY-Z, THE BLACK ALBUM (A CAPPELLA) (Roc-A-Fella 2003).

5. THE BEATLES, THE BEATLES (Apple 1968). Though the Beatles' ninth official album is self-titled as *The Beatles*, it is commonly known as *The White Album* due to its plain white cover. *See* The Beatles: Albums, http://www.thebeatles.com/#/albums/The_Beatles (last visited Nov. 8, 2009).

6. *See* Andy Baio, *Danger Mouse's The Grey Album MP3s*, WAXY, Feb. 11, 2004, http://waxy.org/2004/02/danger_mouses_t/.

7. Bill Werde, *Defiant Downloads Rise from Underground*, N.Y. TIMES, Feb. 25, 2004, at E3.

8. 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, 580 (2005).

9. Daniel Kreps, *Girl Talk Unleashes Pay What You Want Album "Feed the Animals,"* ROLLING STONE, June 19, 2008, http://www.rollingstone.com/rockdaily/index.php/2008/06/19/girl-talk-unleashes-feed-the-animals-in-rainbows-style/.

10. *Quit Your Day Job: Girl Talk*, STEREOGUM.COM, http://stereogum.com/archives/quit-your-day-job/quit-your-day-job-girl-talk_004530.html (last visited Jan. 3, 2010).

access works.[11] In response, much of the public has resisted, questioning the veracity of the current U.S. copyright system.[12] Mashups are just one battleground in this war. Nevertheless, while the public and the industry battle, the artists whose works are at issue are forgotten. And, further complicating the issue is the fact that this war uniquely pits these forgotten artists against one another. Thus, the conflict with mashups is not only between the public and the music industry but also between current artists and future artists.[13] On the one hand, the current artists, whose preexisting works mashup remixers use, have an interest in the works they have created. On the other hand, mashup remixers, as future artists, have an interest in using those preexisting works in order to create new works. Copyright law, accordingly, must achieve a balance between these interests. This Comment focuses on the attempt of copyright law to balance the interests of current artists and the interests of future artists, specifically mashup remixers.

Part I of this Comment provides a brief background of the practice of sampling in music and the subsequent emergence of audio mashups. Part II then examines the Copyright Clause of the U.S. Constitution and concludes that, as a necessary mechanism for fulfilling its foundational purpose, copyright law must balance the interests of current artists and the interests of future artists, and that mashup remixers seem to qualify as future artists under the Copyright Act.[14] In that context, Part III outlines the attempt of the current copyright laws of the United States to balance these interests, as applicable to audio mashups, through a discussion of the exclusive rights granted to artists and the limitations placed upon those rights, which are reserved to the public and to future artists.[15] Part IV subsequently demonstrates the implementation of that balance, presenting the many established and developing uses of original works legally available for the creation of mashups under current U.S. copyright law. It then presents the few uses that are not legally available. In summary, this Comment argues that, in fulfilling the

11. *See* JESSICA LITMAN, DIGITAL COPYRIGHT 89–96 (2006) (discussing the legislation surrounding the adoption of the Digital Millennium Copyright Act ("DMCA") and proposals for legislation to protect databases). The DMCA does not directly concern the tension between artists' rights and future artists' rights and is therefore beyond the scope of this Comment.

12. *See id.*

13. This Comment uses the term "future artists" to describe artists who will create works at any point in the future—generally as inspired by preexisting works.

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

15. *See* 17 U.S.C.A. §§ 101–1332 (West 2005).

fundamental purpose of copyright law as asserted in the U.S. Constitution, the current copyright laws of the United States appropriately balance the interests of current artists and future artists by granting exclusive rights to artists in their works in order to incentivize them to create works while implementing limitations on those exclusive rights to enable future artists to use those works to create new works and thus facilitate progress in the arts.

I. THE DEVELOPMENT OF AUDIO MASHUPS THROUGH BREAKBEATS AND SAMPLING TECHNOLOGIES

A. *From Deejays to Samplers: A History of Sampling*

Though sampling technology first began to develop nearly a century ago, shortly after the advent of recording technology, the vast potential of sampling as a tool for both musical production and musical creation was not realized until the increased prevalence of digital technologies in the 1970s.[16] Since this time, the term "sampling" has generally referred to "the method by which special musical instruments or apparatus digitally 'record' external sounds" for later playback.[17] Playback usually consists of either simply

16. Joel Chadabe, *The Electronic Century, Part IV: The Seeds of the Future*, ELECTRONIC MUSICIAN, May 2000, at 36, 40. Recording technology first emerged in 1887 with the invention of the phonograph. "[Thomas] Edison's cylinder phonograph was the first system ever devised for both storing and replaying any chosen sound or sequence of sounds. It involved a special storage medium on which the recording could be permanently retained." Hugh Davies, *A History of Sampling*, 1 ORGANISED SOUND 3, 3 (1996). A decade later, Emile Berliner enhanced the concept, developing the gramophone record, or simply record, and shortly thereafter, Valdemar Poulsen conceived the first magnetic tape recorder. *Id.* at 5. Several subsequent inventions beginning in the early twentieth century attempted to develop musical instruments based on such sound recording systems, incorporating sounds on multiple prerecorded discs or tapes. *Id.* at 5–6. Nevertheless, the first commercially marketed sample-based musical instrument, the Mellotron, did not appear until 1964. *Id.* at 6. Digital technologies in the 1970s finally facilitated the development of sampling devices that allowed users to record their own sounds rather than merely play back previously recorded sounds. *See* Chadabe, *supra*, at 40. Fairlight Instruments marketed the first of such devices, the Fairlight CMI, commercially in 1979 for around $25,000. *Id.*

17. Davies, *supra* note 16, at 3.

> Sampling is like magnetic tape recording in that both technologies involve the capturing, storing, and recreating of audio (sound) waves. In fact, many of the standard terms associated with this technique (e.g., loop, splice, crossfade) have been borrowed directly from the world of magnetic tape recording. Sampling is the digital equivalent of music concrete, wherein common sounds are manipulated (and sometimes integrated with traditional instruments) to produce musical compositions. Sampling allows the musician to record sounds from other instruments, nature, or even non-musical sources, and transpose and play them

pressing a button, or key, to recall a recorded sample or programming a music sequencer to trigger a sample automatically within a predetermined arrangement of samples.[18] Though the first samplers were far too expensive for most consumers, the advancement of digital technologies, and thus sampling technologies, quickly made samplers widely accessible.[19] Today, the market is flooded with various digital devices, from synthesizers priced at several thousand dollars to outboard devices costing several hundred dollars to sampling and sequencing software running under one hundred dollars, which allow users to create samples and produce music that incorporates those samples.[20]

The practice of integrating samples into new musical compositions developed with the emergence of hip-hop deejays in the 1970s, and the popularity of the hip-hop genre eventually brought sampling to the mainstream.[21] Hip-hop deejays essentially evolved from party deejays, whose role was merely to play popular music for dance parties.[22] As they became more conscious of audience reactions, these deejays focused on playing particular sections of songs, called the break, where "the band breaks down" and "the rhythm section is isolated;" essentially, the break is "where the bass guitar and drummer take solos."[23] And, though the break may only be a few bars long, deejays could play "the one section over and over" by isolating it "using two copies of the record on twin turntables" and "flipping the needle back to the start on one while the other played through."[24] Thus, deejays could create high-energy, better dance

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chromatically on a standard piano or organ keyboard. This new and emerging technology greatly expands the creative horizons of the modern composer.

JOSEPH GLENN SCHLOSS, MAKING BEATS: THE ART OF SAMPLE-BASED HIP-HOP 34–35 (2004) (citing Tim Tully, *Choosing the Right Sampler*, ELECTRONIC MUSICIAN, Dec. 1986, at 26, 27–30).

18. Chadabe, *supra* note 16, at 44. A sequencer is merely a digital device that allows the manipulation and arrangement of digital musical information (i.e., editing digital samples and ordering the automatic playback of digital samples). DAVID MILES HUBER & ROBERT E. RUNSTEIN, MODERN RECORDING TECHNIQUES 258 (2001).

19. Chadabe, *supra* note 16, at 40–44. As stated above, the Fairlight CMI cost about $25,000. *Id.* By the early 1980s, E-mu Systems had developed the Emulator for a substantially reduced price of $10,000. *Id.* And, in 1984, Ensoniq introduced the Mirage for under $1,300. *Id.* By the early 1990s, the market contained numerous sampling devices starting at prices under $1,000. *Id.*

20. *See generally* Guitar Center, http://www.guitarcenter.com (last visited Jan. 3, 2010) (selling outboard samplers, sampling synthesizers, and sampler sequencing software).

21. *See* SCHLOSS, *supra* note 17, at 30–43; Davies, *supra* note 16, at 9.

22. SCHLOSS, *supra* note 17, at 31.

23. *Id.*

24. *Id.*

songs by "repeating breaks until they formed a musical cycle of their own."[25] This concentration on the breakbeat and other new turntable techniques, such as "scratching," as well as advances in emceeing, brought about the genre of hip-hop.[26]

In the mid-1980s, as samplers became more affordable and thus more accessible, hip-hop artists began to incorporate samplers into their setups.[27] Samplers provided an easier method of isolating and replaying breakbeats while enabling artists to make and manipulate beats in much more sophisticated ways than were available through previous deejay techniques.[28] Moreover, samplers allowed hip-hop artists to create their own samples, such as samples of drums, and construct beats and songs with numerous original samples.[29] The entire genre of hip-hop is essentially built on sampling, and as the popularity of the hip-hop genre increased, the prevalence of sampling in music increased.[30] And, whether creating a beat from sampled individual performances of drum or percussion components or building an entire song around a sampled piano phrase, sampling remains ever prevalent in many genres of music today.[31] Many recent popular songs, such as Kanye West's "Gold Digger"[32] or Beck's "Walls"[33] or Tricky's "Counsel Estate,"[34] utilize samples from other

25. *Id.* at 36.

26. *Id.* at 32, 39.

27. *Id.* at 34.

28. *Id.* at 39. Rather than identifying the exact location of the break on each actual record and physically positioning the needles of each turntable in those precise locations and then switching between those locations as they alternate in playback, artists could simply sample the break with the sampler and sequence the sample to repeat over and over. Moreover, artists could use the ability of samplers

> to play numerous samples at the same time (a technique which would have required multiple deejays and turntables), to take very short samples (which would have required very fast deejays), and to assemble these samples in any order, with or without repetition as desired (which could not be done by deejays at all).

Id.

29. *Id.* at 35.

30. *Id.* Though hip-hop artists used live instrumentation for a short period, the introduction of the sampler into hip-hop music is considered the end of such a practice. Though, some hip-hop artists continue to use live instrumentation (e.g., the Roots).

31. *See* Who Sampled, http://www.whosampled.com/ (last visited Jan. 3, 2010) (displaying works over the past several decades that have sampled other works and the works that those works have sampled).

32. KANYE WEST FEATURING JAMIE FOXX, *Gold Digger*, *on* LATE REGISTRATION (Roc-A-Fella 2005).

33. BECK, *Walls*, *on* MODERN GUILT (Interscope Records 2008).

34. TRICKY, *Counsel Estate*, *on* KNOWLE WEST BOY (Domino 2008).

popular songs while adding original lyrics and other elements to create new songs.

B. *The Emergence of Audio Mashups*

Audio mashups take the practice of sampling to the extreme. While hip-hop tracks may sample a breakbeat of a preexisting work and loop it while layering vocals and other original musical elements on top, mashups are comprised entirely of preexisting works. They contain *no* original material. Moreover, whereas Kanye, Beck, and Tricky presumably obtained licenses to use the samples that they incorporated into their respective songs, mashup remixers rarely obtain permission to use the samples they use, and they use many samples.[35]

Audio mashups are, more or less, a recent phenomenon, and only began to take off in the past few years, presumably because of the advances in sampling technologies and the increased acceptance of sampling in popular music through the popularity of hip-hop music.[36] Though practiced by select underground deejays for years, audio mashups entered mainstream culture with Danger Mouse's release of *The Grey Album*,[37] which combined the vocal tracks from an a cappella version of Jay-Z's *The Black Album*[38] with music from the Beatles' *The White Album*.[39] Jay-Z had released an a cappella version of *The Black Album*[40] to reportedly encourage mashups and remixes.[41] Even before receiving EMI's cease and desist letter,[42] Danger Mouse never sold the album and only produced a limited run of the album, claiming that he knew he "could never release the album commercially" and stating that "stealing music is wrong."[43]

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35. *See* mtfloyd, *supra* note 2, at 22. Though many hip-hop artists now obtain licenses, use cleared samples, or create original samples, the hip-hop deejays of the 1970s did not have the capability to do so; however, at the time, hip-hop music was not recorded and distributed; it was played live at shows. SCHLOSS, *supra* note 17, at 34. Thus, the copyright implications, if there are any at all, for unauthorized use are far less significant.

36. Davies, *supra* note 16, at 10. Select individuals combined preexisting works to create "new" art nearly a century ago; the first sound collage was created as early as the late 1920s in Germany using recordings of various instruments and voices. *Id.*

37. DANGER MOUSE, *supra* note 3.

38. JAY-Z, *supra* note 4.

39. THE BEATLES, *supra* note 5.

40. JAY-Z, *supra* note 4.

41. Power, *supra* note 8, at 583.

42. Baio, *supra* note 6.

43. Michael Paoletta, *Danger Mouse Speaks Out on 'Grey Album,'* BILLBOARD, Mar. 8, 2004, http://www.billboard.com/news#/news/danger-mouse-speaks-out-on-grey-album-1000455930.story.

In the aftermath of *The Grey Album*[44] controversy, many other mashup remixers have emerged,[45] one of the most controversial of whom is Gillis, who has crossed the line from amateur to professional, performing and distributing his creations under the moniker Girl Talk.[46] Gillis has adamantly opposed the music industry, using hundreds of samples on each of his albums, all of which are unauthorized.[47] Furthermore, Gillis generally samples from popular songs, a practice he argues is legal since popular works are part of pop culture.[48] Gillis's argument, however, disregards the fact that popular songs are also the best targets for commercial exploitation, which would seem not only unfair to the artists he is exploiting, in a general sense, but also illegal under the copyright laws of the United States.

II. COPYRIGHT LAW AND THE CONFLICT OF RIGHTS IT CREATES

A. The Fundamental Purpose of Copyright Law

In granting Congress the power "[t]o Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," the Copyright Clause of the U.S. Constitution establishes the basis for all U.S. copyright laws.[49] From the Clause, courts derive the fundamental purpose of copyright law—the promotion of the progress of the arts—and they strive to maintain that purpose in interpreting the copyright laws of the United States.[50] In interpreting this language, the United States primarily takes an economic approach to copyright law, basing the law on the principle

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44. DANGER MOUSE, *supra* note 3.

45. *See, e.g.*, Mashuptown, http://www.mashuptown.com/ (last visited Jan. 3, 2010) (displaying mashups of numerous mashup remixers through an online mashup community Web site).

46. Rob Walker, *Consumed: Mash-up Model*, N.Y. TIMES, July 20, 2008, (Magazine), at 15, *available at* http://www.nytimes.com/2008/07/20/magazine/20wwln-consumed-t.html?_r=1&partner=rssnyt&emc=rss&oref=slogin; Ryan Dombal, *Interview: Girl Talk*, PITCHFORK, Aug. 30, 2006, http://www.pitchforkmedia.com/article/feature/37785-interview-girl-talk.

47. Dombal, *supra* note 46.

48. *Id.* The basis for Gillis's belief in the legality of sampling works in pop culture may be derived from a feeling that the public has some sort of property interest in pop culture, yet the law recognizes no such right, and it is not clear why it should. For a discussion of Gillis's sampling practices under copyright law, see *infra* Part III.

49. U.S. CONST. art. I, § 8, cl. 8.

50. *See, e.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) ("The primary objective of copyright is ... '[t]o promote the Progress of Science and useful Arts.' " (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 8)).

that by "granting authors the exclusive rights to reproduce their works, they are given an incentive to create, and that 'encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors.' "[51] This "monopoly" granted

51. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 477 (1984) (quoting Mazer v. Stein, 347 U.S. 201, 219 (1954)). The economic approach is not the only approach to copyright law. As discussed briefly above, one possible approach to copyright law is to reward authors for the fruits of their labors; the United States has flatly rejected such an approach. *See infra* note 103 and accompanying text. Moreover, many countries around the world recognize moral rights, which acknowledge that artists have a unique relationship to their works, and thus respect an artist's "natural" rights in her work beyond any economic reward for her creativity and labor. *See* John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1025–28 (1976). The doctrine of moral rights is generally considered to have originated in France, where such rights are described as *le droit moral*, though many other countries, particularly civil law countries, recognize some sort of moral rights for authors. *See id.* at 1025 (stating that the moral rights doctrine originally developed in France but has since become a component of "the law of most European and some Latin American nations"). The fundamental principle in the recognition of moral rights is derived from respect for a personality right in authorship in addition to a property right. *Id.* Thus, in addition to an economic interest in the work, the author has a natural or "moral" interest in the work. *Id.* Most common law nations, such as the United States, generally only afford a property right to authors. *See* Robert C. Bird & Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities Under The U.K.'s New Performances Regulations*, 24 B.U. INT'L L.J. 213, 214 (2006). The basis of the personality right is the idea that an author's work is essentially an "extension of herself," and by sharing her work, an artist renders herself personally vulnerable because others are able to "glimpse into her individual human consciousness" and experience her "emotional, intellectual, or spiritual" view of the world. Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 43 (1998). As derived from the author's personality, the moral rights in a work generally belong to the author of the work, whether or not the author is the copyright owner. *See* Sarah C. Anderson, Note, *Decontextualization of Musical Works: Should the Doctrine of Moral Rights Be Extended?*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 869, 871–72 (2006). *But see* Merryman, *supra*, at 1041 (discussing collective social interests in an artist's work in "seeing ... the work as the author intended it, undistorted," and preserving art because as "an aspect of our present culture and ... history," it explains "who we are and where we came from"). The French doctrine *le droit moral* includes five primary moral rights, which are encompassed to varying degrees in different jurisdictions around the world: the right of attribution, the right of integrity, the right of disclosure, the right of withdrawal, and resale royalty rights. Liemer, *supra*, at 41–42, 45–46. The most commonly recognized moral rights are the right of attribution and the right of integrity because the Berne Convention, to which the United States is a party, mandates that all Berne members recognize these two moral rights. Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, *opened for signature* Sept. 9, 1886, S. TREATY DOC. NO. 99-27, *available at* http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf. The right of attribution, which is often also referred to as the right of paternity, is the right of the author to have her name associated with her work; the right of integrity protects the actual work of the author, not merely the author herself, by preventing the work from being distorted or mutilated by others without the author's permission. *See* Liemer, *supra*, at 47–52. Though the copyright system in the United States historically has been thought to be based on economic incentives and property interests, in signing as a party to the Berne Convention and implementing it into domestic law, the

to authors is thus the driving force behind copyright law, providing an "economic incentive" for authors "to create and disseminate ideas,"[52] essentially rewarding "the individual author in order to benefit the public."[53] But, at the same time, the duration of the monopoly is limited by the Constitution; thus, the Copyright Clause "serves the dual purpose of ensuring that the work will enter the public domain," so that the public is guaranteed eventual access to the work, "and ensuring that the author has received 'a fair return for [her] labors' " by enabling the author to capitalize on the work while it is valuable.[54] Though courts consider authors' individual rights in their works, the primary purpose for rewarding authors through copyright protection is to benefit the public, which is achieved by copyright law "in two ways: the grant of a copyright encourages authors to create new works . . . , and the limitation ensures that the works will eventually enter the public domain, which protects the public's right of access and use" of works.[55] In summary, copyright law aims to benefit the public by advancing the arts through providing incentives to artists to produce art.

United States purported to recognize de facto moral rights, even though U.S. copyright laws did not expressly recognize moral rights, partly through various provisions of the Copyright Act. *See* William Patry, *The United States and International Copyright Law: From Berne to Eldred*, 40 HOUS. L. REV. 749, 751 (2003). Indeed, the adaptation right under § 106(2) of the Copyright Act achieves nearly the same result as the right of integrity. *See* 17 U.S.C. § 106(2) (2006). For a discussion of the adaptation right, see *infra* Part III.A.2. Under § 115, the Copyright Act grants a person the ability to obtain a license to use an artist's song in order to "cover" that song, *provided that the licensee does not "change the basic melody or fundamental character of the work,"* which again seems to consider an artist's right of integrity. 17 U.S.C. § 115(a)(2) (2006) (emphasis added). The public distribution right under § 106(3) is essentially a right of disclosure. 17 U.S.C. § 106(3) (2006); *see infra* Part III.A.3. And, the right of withdrawal is recognized to some extent under § 203, which allows a copyright holder to terminate a previous transfer of ownership or terminate a license in certain situations. 17 U.S.C. § 203(a)(3) (2006). In 1990, the United States enacted the first federal legislation expressly granting protection of moral rights, the Visual Artists Rights Act, which grants certain visual artists an explicit right of attribution and right of integrity in their works. *See* Pub. L. No. 101-650, § 603, 104 Stat. 5089, 5128 (codified as amended at 17 U.S.C. § 106A(a) (2006)). Notwithstanding the fact that some of the de facto and expressly recognized moral rights in the United States came from fulfilling international obligations such as the Berne Convention, recognition of moral rights seems to further the purposes of copyright law as defined by the Constitution. If granted moral rights in their works, artists are further incentivized to create works and disseminate them to the public. Such an incentive may be particularly important in the United States now that so many other countries, even common law countries such as the United Kingdom, recognize moral rights. *See* Bird & Ponte, *supra*, at 215–16.

52. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

53. *Sony Corp. of Am.*, 464 U.S. at 477.

54. Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1262 (11th Cir. 2001) (alteration in original) (quoting *Harper & Row*, 471 U.S. at 546).

55. *Id.*

B. *Conflicts in Copyright: The Mashup Battleground*

In the past two decades, as the accessibility of digital technologies and the Internet have allowed virtually zero-cost, widespread distribution of information and copyrighted works,[56] tensions have arisen regarding the ability of U.S. copyright law to fulfill the purposes asserted in the Constitution. The music industry has pushed for greater control of works, claiming that the increased potential for the public to illegally copy and distribute requires a greater ability to restrict the public's access to those works.[57] The argument is that without such control, the incentives to create and disseminate works will be reduced for fear that the public will be able to exploit the content owners' works, given the distributional power of the Internet.[58]

Too much control, however, while protecting incentives, may ultimately contravene the purpose of copyright law (to promote the progress of the arts) by restricting the public's access to and use of works of art.[59] Though providing a monopoly to content owners attempts to facilitate the promotion of the arts by incentivizing artists to create works of art, and thus presumably increasing the likelihood that artists will in fact produce works, the ultimate objective in encouraging the creation and dissemination of works of art is for the public to benefit from those works by having access to them and being able to use them.[60] Thus, while giving greater control to content owners may result in more works available to the public, the public would have less access to those works. Greater control, then, may not benefit the public at all.

On the other side of the issue, sects of the public, and many mashup remixers, have opposed the greater control of content owners, pushing for increased access to and free use of copyrighted works.[61] Many proponents of mashups argue that the current copyright laws of the United States are antiquated and stifle creativity, and thus the progress of the arts,[62] by not allowing mashup remixers to essentially use any sample that they want when making

56. *See generally* LITMAN, *supra* note 11, at 151–63 (describing the proliferation of copyrighted works available for free on the Internet).

57. *Id.* at 104–06.

58. *Id.*

59. *See id.* at 174–76.

60. *Suntrust Bank*, 268 F.3d at 1262.

61. *See* LITMAN, *supra* note 11, at 151–63.

62. Noah Balch, Comment, *The Grey Note*, 24 REV. LITIG. 581, 581 (2005) (stating that, regarding the creation of mashups, the "time and exclusivity" rights granted to copyright holders in the U.S. Constitution "stifle progress").

mashups, whether they are authorized to use them or not.[63] The concept of stifling creativity, however, actually originated in the courts as a rationale for the fair use defense[64] to allow certain creative uses of works which copyright law did not technically permit, which suggests that the laws currently account for the very issue that mashup defenders have with the copyright laws.[65]

For copyright laws to *inhibit* the creation of works of art and the advancement of works of art *at all* would seem directly contrary to the fundamental purpose of copyright law, which is to *promote* the progress of the arts.[66] Yet, refraining from stifling creativity cannot be the only concern of copyright law since the Copyright Clause itself stifles creativity to some degree.[67] The grant of exclusive rights restricts access to and use of artists' works, which in turn inhibits the ability of the public to create new works through the use of those works.[68]

If the forefathers of the United States intended for creativity to never be stifled, copyright laws would not exist at all since a copyright *is* the exclusive right. In that case, authors would be free to create if they choose and to take from other authors what they choose. Students could freely download music, and mashup remixers could freely create mashups. But, famous artists like Jay-Z could also exploit artists on MySpace or at local clubs, taking their entire songs and releasing what these unknown artists do not have the market power or resources to capitalize upon.[69] Movie producers could make millions on Harry Potter movies without paying J.K. Rowling a dime. Disregarding this potential for exploitation of lesser known artists, unequivocal free access to all works may indeed allow the progress of

63. *See generally* LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 253–57 (2008) (suggesting, in part, that copyright laws should be changed in order to enable mashup remixers creating noncommercial works to freely use copyrighted materials for the creation of mashups without the burdens of having to request permission to use such materials from copyright holders and having to compensate those copyright holders for the use of such materials).

64. See discussion of fair use *infra* Part III.B.3.

65. Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos., 621 F.2d 57, 60 (2d Cir. 1980) ("The doctrine of fair use, originally created and articulated in case law, permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.").

66. *See* Balch, *supra* note 62, at 603.

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

68. *See* Balch, *supra* note 62, at 581 (discussing how copyright law inhibits an artist's ability to create a work using another artist's prior musical recording).

69. Though this may occur to some degree under the present copyright system, such a practice is illegal.

the arts;[70] so long as artists would still create works without the incentives provided by copyright law, the arts would progress.[71] Indeed, some argue that due to the affordable distributional power of the Internet, the incentives created by copyright protection are no longer really necessary.[72]

Notwithstanding that the Constitution in fact mandates an incentive for artists through the grant of exclusive rights for a limited time, the justification for such a mandate is legitimate—to increase the *likelihood* of the production of art.[73] Artists may continue to create art without the incentive of copyright protection,[74] but the limited monopoly granted by copyright law certainly makes it more likely that artists will produce art and thus more likely that the public will receive art—the more art that is produced, the greater the potential for the arts to progress. Accordingly, an incentive, and thus some degree of stifling of creativity, is not only built into the U.S. Constitution,[75] but it is appropriately helpful for the promotion of the progress of the arts.

C. Reserving an Interest for Future Artists to Advance the Arts

Up to now, it is clear that copyright law's fundamental purpose is to benefit the public by facilitating the progress of the arts.[76] To do this, artists must create art, and to make sure that artists do so, they must be incentivized, to some degree. But, in order for art to advance, artists must be able to build off of previous works, to some extent. Copyright law must, therefore, create mechanisms whereby future artists are afforded some measure of access to and use of preexisting works. Yet, such mechanisms directly conflict with original artists' exclusive rights in their works. This presents a fundamental dilemma in copyright law: the greater the access and use that these mechanisms grant to future artists, the less the rights of (and thus incentive for) present artists. Conversely, the greater the rights of (and thus incentive for) present artists, the less the access and use afforded to future artists by such mechanisms.

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70. *See* LITMAN, *supra* note 11, at 105.
71. *See id.*
72. *Id.* at 101–05.
73. *See* U.S. CONST. art. I, § 8, cl. 8.
74. *See* LITMAN, *supra* note 11, at 101–05 (explaining that because people may simply possess the desire to express themselves through artistic expression, people will continue to create art whether or not copyright provides any sort of incentive).
75. *See* U.S. CONST. art. I, § 8, cl. 8.
76. *Id.*

Copyright law, thus, attempts to strike a balance between incentivizing artists to produce art and facilitating the advancement of art by letting future artists build off of previous artists' works. It strives to achieve a necessary balance between the rights of artists and the rights of future artists so that the public benefits. In upholding the purposes of copyright protection as stated in the U.S. Constitution, the concern regarding mashups is not merely whether U.S. copyright law stifles creativity, but whether the law stifles creativity to such a degree that it is beyond the purposes of copyright protection—beyond the scope of the "traditional contours of copyright"—thereby disrupting the balance between the rights of current artists and those of future artists.[77] More specifically, the question is whether the copyright laws of the United States appropriately incentivize artists to create original works by providing the artists a limited monopoly while still advancing the arts by allowing the use of those original works, to some extent, to create new works.

D. Mashup Remixers as Future Artists

Whether or not mashups are a new form of art capable of advancing the arts, and thus whether or not mashups' remixers qualify as future artists, has driven serious debate.[78] Proponents of mashups argue that mashups are equally as artistic as any subject matter of copyright protection, and thus copyright law should expressly accommodate audio mashups as original works, while opponents criticize the artistic value of audio mashups.[79] Opponents stress that given the derivative nature of mashups, the practice is "underselling the talents that young people have," by enabling them to use "what's available off the streets to them" rather than "creating out of their own souls and their own talents."[80] They view the process as "a fundamental failure of imagination," the product as "just crap," and the entire practice to be "killing our culture."[81]

The simplicity of creating audio mashups would seem to support this conclusion since an "average bedroom producer" can achieve

77. Eldred v. Ashcroft, 537 U.S. 186, 221 (2003).

78. *See* LESSIG, *supra* note 63, at 90–97 (outlining the debate over whether mashup remixers are genuine artists or imitators).

79. *Id.*

80. *Id.* at 91–92 (quoting Audio recording: Symposium on the Comedies of Fair U$e, held by the New York Institute for the Humanities at New York University, in association with the New York University Humanities Council (Apr. 28–30, 2006), http://www.archive.org/details/NYIH_Comedies_of_Fair_Use).

81. *Id.* at 90–92.

similar results to Gillis and Danger Mouse.[82] The resulting audio mashup may sound complex, but much of the complexity is generated from the existing songs from which the samples have been taken. A basic mashup consists of two main components, the vocal track of one song and a track comprised from the instrumental track of another.[83] Some mashups may use more than one song for each of the two components.[84] For example, Danger Mouse only used Jay-Z's vocal track for each song but spliced together pieces of a couple of Beatles songs for his instrument tracks, while Gillis uses several songs for both his vocal and instrument tracks.

To begin, a mashup remixer first has to select the songs to sample.[85] A cappella albums are available for many hip-hop and R&B singles, which eliminates the most difficult part of the creation process for the vocal track; the mashup remixer merely has to select the desired portions of the a cappella album or use the entire track.[86] But, regarding the instrumental tracks, since instrumental versions of albums are not commonly available, if at all, the mashup remixer generally selects parts of a song where the vocals drop out.[87] Thus, the

82. mtfloyd, *supra* note 2, at 22.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* If an a cappella album is not available, a mashup remixer would have to listen for parts of the song where the instrumental accompaniment is sparse, such as in an intro or in a break in the music. If no such sparse moment is available, several simple techniques can reduce the salience of the instrumental accompaniment, such as cutting the low frequencies to take out the bass guitar and kick drum or using a gate, a device that cuts the volume of the track when it drops below a particular level. *Id.* The gate could essentially drop the volume while the vocal is not present and come back in when the vocal resumes. *Id.* This may sound somewhat technical and complicated, but the gate does all of this automatically. All the mashup remixer would have to do is set the threshold level for the gate to cut in, which simply entails turning a knob—much like cutting the low frequencies. If the instrumental accompaniment is still present, the mashup remixer will have to account for the tempo and pitch of the track when combining it with other tracks; otherwise, the final product will sound cacophonous. *Id.*

87. *Id.* If the vocals are never really absent or if the mashup remixer wants to use a part of a song that contains a vocal track and needs to eliminate the vocal, simple techniques can eliminate it. *Id.* For instance, the vocal is generally placed in the center of the mix (i.e., not panned to either the left or right speaker) while the other instruments are generally panned, to some degree, to either the left or right speaker or both speakers. By inverting the phase of the sound wave and then panning the left and right channels of the song to the center, the unpanned instruments (e.g., the vocal) become inaudible. *Id.* This again may sound somewhat complicated but really just requires clicking two buttons, to invert the phase, and turning two knobs, to pan the left and right channels to the center.

instrumental track usually just consists of a breakbeat or a melodic phrase, much like songs in hip-hop music.[88]

After selecting the tracks to sample, the remixer has to actually sample the parts of the songs and edit and splice them together. In order to do so, all that is required is a computer and some basic sequencing software, which generally costs around one hundred dollars—some rather sophisticated programs sell for only a few hundred dollars.[89] Thus, the entire process of sampling songs to mashup involves merely a modest investment and a few minutes, or less, to extract the desired samples from the selected sound recordings.[90]

From there, essentially all that is required to create the mashup is the ability to count and the ability to listen. The mashup remixer counts the number of beats of each sample and edits each sample, matching the tempo to the others.[91] The samples may also require some pitch adjustment, which most people, even without the ability to actually hear whether two samples are in tune with each other, can achieve by simply listening to determine if the samples sound "good" together.[92] All that remains is to arrange the samples with a sequencer in the preferred order.[93] The end result is an audio mashup. Thus, the creation of a mashup seemingly requires less skill than is necessary to

88. *Id.* Many mashup remixers did begin as party deejays, after all. As such, whether isolating the break on a record from which to cut back and forth or isolating the break for a sample to playback on a sampler, it makes sense that the instrumental tracks of mashups would consist mostly of breakbeats.

89. *See generally* Guitar Center, *supra* note 20 (providing descriptions and product reviews of sequencing software). Several very basic sequencers are available as freeware, and even a simple .wav file editor can create basic mashups, but programs available for purchase, such as those from Ableton, Sony, Propellerhead, and Cakewalk, are much easier to use and are much more powerful. *Id.*

90. *See* mtfloyd, *supra* note 2, at 24.

91. *Id.* Sequencing software enables users to easily adjust tempo. The program cuts the samples into tiny slices and stretches the samples out over the time of the track, leaving some space in between, or compresses them together, decreasing the spacing between them.

92. *Id.* Basic sequencing software enables the adjustment of pitch similarly to the way it enables the adjustment of tempo. With magnetic tape, when the tempo is increased, the pitch is simultaneously increased and vice versa because increasing the tempo shortens the wavelength of the sound waves; a shorter wavelength yields a higher frequency, or higher pitch. Digital sampling, and particularly sampling software, offers far superior editing functions. Since the sampler can cut the audio sample into thousands of tiny slices, it can change the frequency higher or lower for individual slices independently to change the pitch and move them closer together or farther apart to change the tempo without affecting the pitch.

93. *Id.* at 26.

deejay a club with records and twin turntables and little more creativity than is required to create a mix tape.

Nevertheless, mashups would seem to qualify as copyrightable subject matter under the current copyright laws in the United States. Works do not have to be entirely original to qualify for copyright protection. Under § 103 of the Copyright Act, the subject matter of copyright protection includes "compilations" and "derivative works" as special "works of authorship."[94] And, the only additional requirement that § 102 imposes for a "work of authorship" to qualify as the subject matter of copyright protection is that it be an "*original* work of authorship."[95] According to the U.S. Supreme Court, "the requisite level of creativity" in order to meet the originality requirement of § 102 "is extremely low; even a slight amount will suffice."[96] It would be difficult to argue that mashups require *no* level of creativity, not even a slight amount. Even if the amount of creativity involved in their creation is only that which is involved in creating a mix tape, courts have held that the selection and arrangement involved in creating compilations of works can afford copyright protection if the result "display[s] some minimal degree of creativity."[97] That said, only the newly added elements are copyrightable; the compilation copyright holder does not own any part of the preexisting works incorporated into the compilation, just the manner in which they were selected and arranged.[98]

However, mashups are probably not compilations, but instead are more likely to be derivative works, thereby qualifying as "works of authorship."[99] Courts require a slightly higher threshold of creativity for the new elements in derivative works to sustain copyright protection.[100] Mashups may very well meet that threshold

94. 17 U.S.C. § 103 (2006). "A 'compilation' is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term 'compilation' includes collective works." 17 U.S.C.A. § 101 (West 2005). "A 'derivative work' is a work based upon one or more preexisting works, such as a ... musical arrangement, ... sound recording, ... or any other form in which a work may be recast, transformed, or adapted." *Id.*

95. 17 U.S.C. § 102 (2006) (emphasis added).

96. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

97. *Id.* at 358.

98. *See id.* Compilations refer mostly to works such as literary anthologies and greatest hits albums or CDs with such titles as "Best of the 80s." A mix tape is a compilation.

99. *See* 17 U.S.C.A. § 101 (West 2005).

100. Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 909 (2d Cir. 1980).

since they take the selection and arrangement process from creating mix tapes a small step further, *pairing* samples together by layering the vocal and instrument tracks.[101]

A final requirement under § 103 for compilations and derivative works to qualify as copyrightable subject matter is that the preexisting materials that are incorporated into the work must have been used lawfully.[102] Since most mashup remixers do not obtain permission to use the portions of the songs that they sample, this would mean that their works do not technically qualify for copyright protection, but mashups probably otherwise fulfill the originality requirement.

The current copyright laws of the United States also do not penalize mashup remixers for the low level of skill and minimal degree of effort required to create their art. United States courts have rejected the notion that artists should be rewarded for their *labor* in creating works of authorship.[103] Courts, furthermore, have refused to make determinations as to whether a work holds enough aesthetic value to be considered "art" and thus subject matter that is worthy of copyright protection.[104] Accordingly, even if mashups are "just

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> First, to support a copyright the original aspects of a derivative work must be more than trivial. Second, the scope of protection afforded a derivative work must reflect the degree to which it relies on preexisting material and must not in any way affect the scope of any copyright protection in that preexisting material.

Id.

101. The threshold is whether the level of creativity is more than trivial, but courts have provided little guidance as to the point at which the degree of creativity rises above that level.

102. 17 U.S.C. § 103(a) (2006). This is presumably why a mix tape would not be copyrightable.

103. *Feist Publ'ns*, 499 U.S. at 349 ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.' " (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 8)).

104. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251–52 (1903). The Court held that plaintiff's circus poster advertisements, which were copied by the defendant, were worthy of copyright protection, stating that:

> [i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change.

crap,"[105] so long as "they command the interest of *any* public," they should qualify as works of authorship.[106] Other works of art are similarly not disqualified from copyright protection merely for being "crap."[107] Much of the music on the radio today is arguably "just crap," and given this potentially low baseline aesthetic value, it would seem difficult to kill the culture that is created by such music.[108] Thus, while opponents of mashups argue that mashups lack any artistic value, under the current copyright laws of the United States, courts seem likely to recognize audio mashups as valid subject matter of copyright protection. As a result, audio mashups could reasonably be considered to advance the arts, and mashup remixers could reasonably be considered artists—future artists.

If U.S. copyright laws were to change to expressly exclude authorized mashups from copyright protection, presumably other art forms should justifiably be excluded as well. Mashup remixers need not fight for a change in U.S. copyright law in order to recognize their new art form because it already does. And, so long as the samples they use are authorized, they can even receive copyrights in their works. But a change in copyright law permitting the use of unauthorized samples for creating mashups would not only be unfair to artists whose music is sampled, but it would also contravene the implementation of the purposes of copyright under the Copyright Clause of the U.S. Constitution,[109] thereby disrupting the balance created by copyright law between artists' rights in their original works and future artists' rights to use those original works to create new works and advance the arts.

III. THE BALANCING MECHANISMS IN THE COPYRIGHT ACT

Under the authority provided in the U.S. Constitution, the Copyright Act grants artists exclusive rights in their works, but in order to achieve a balance between current artists' rights and future artists' rights, the Copyright Act and copyright common law also

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> That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights. We are of opinion that there was evidence that the plaintiffs have rights entitled to the protection of the law.

Id. (citation omitted).

105. LESSIG, *supra* note 63, at 92.

106. *Bleistein*, 188 U.S at 252 (emphasis added).

107. LESSIG, *supra* note 63, at 92.

108. *See id.* at 90–96.

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

establish several limitations on the rights of current artists, which are reserved to the public and future artists. Due to the extensive borrowing and unauthorized nature of the sampling practices generally involved, audio mashups truly test the balance between these exclusive rights and limitations. While the unauthorized use of copyrighted samples clearly is a technical violation of many of the exclusive rights granted to artists under § 106 of the Copyright Act,[110] certain limitations created by the Copyright Act, such as de minimis use,[111] the idea/expression dichotomy,[112] copyright term limits,[113] and fair use,[114] provide mashup remixers with the ability to use copyrighted samples in certain situations to create new works of their own.

A. Section 106 Exclusive Rights Applicable to Audio Mashups

Section 106 of the Copyright Act defines the several exclusive rights reserved to U.S. copyright holders in their copyrighted works, including the reproduction right, the adaptation right, the public distribution right, the public performance right, and the public display right.[115] Barring the application of a limitation,[116] the creator of an audio mashup that consists of unauthorized samples will generally violate at least a few, if not most, of these exclusive rights reserved to copyright holders. Since the public display right only deals with visual works, it does not apply to audio mashups.[117] The discussion that follows addresses the other four exclusive rights that mashup remixers potentially violate when creating audio mashups.

1. The Reproduction Right

Copyright holders have "the exclusive rights to [reproduce] . . . and to authorize" the reproduction of "the copyrighted work in copies or phonorecords" under § 106(1).[118] The reproduction of a

110. *See* 17 U.S.C. § 106 (2006).

111. *See* West Publ'g Co. v. Edward Thompson Co., 169 F. 833, 861 (C.C.E.D.N.Y. 1909), *modified*, 176 F. 833 (2d Cir. 1910).

112. 17 U.S.C. § 102(b) (2006).

113. 17 U.S.C. §§ 302–05 (2006).

114. 17 U.S.C. § 107 (2006).

115. *See* 17 U.S.C. § 106 (2006).

116. *See infra* Part III.B.

117. *See* 17 U.S.C. § 106(5) (2006).

118. 17 U.S.C. § 106(1) (2006). Under § 101, the term "copies" refers to "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device;" whereas, the term "phonorecords" refers to "material objects in which *sounds*, other than those

copyrighted work is a violation even if the copy is "used solely for the private purposes of the reproducer."[119] Thus, the mere act of sampling a copyrighted sound recording technically violates the reproduction right, and sampling multiple works, as is often the case with mashups, may mean multiple violations.

2. The Adaptation Right

Under § 106(2), a copyright holder has the exclusive right "to [prepare] ... and to authorize" the preparation of derivative works "based upon the copyrighted work."[120] The Act defines a "derivative work" as a "work based upon one or more preexisting works, such as a ... musical arrangement, ... sound recording, ... or any other form in which a work may be recast, transformed, or adapted."[121] Audio mashups seem to closely fit the definition under the Act for derivative works because they recast or transform "one or more preexisting ... sound recording[s]" into a sort of "new" work.[122] Such is the case with music remixes, where an artist or producer restructures a preexisting popular song, using many of the song's identifiable elements, for example certain melodic phrases, basic chord progressions, and other elements, in combination with new beats and rhythmic patterns to transform a song into a "new" song in a different musical genre.[123]

Additionally, copyright holders of a sound recording will license the ability to prepare a remix of their copyrighted sound recording, thereby securing a right to royalty in the resulting work.[124] Without a

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accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C.A. § 101 (West 2005) (emphasis added). Audio mashups deal exclusively with sampling *sounds* from other recordings rather than, for instance, music notation, and thus concern the reproduction of "phonorecords."

119. Walt Disney Prods. v. Filmation Assocs., 628 F. Supp. 871, 876 (C.D. Cal. 1986) (quoting 2 Melville B. Nimmer & David Nimmer, Nimmer on Copyright (MB) § 8.02[C], 8-34 (2006)).

120. 17 U.S.C. § 106(2) (2006).

121. 17 U.S.C.A. § 101 (West 2005).

122. *See id.*

123. *See* M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, THIS BUSINESS OF MUSIC 137–38 (Robert Nirkind & Sylvia Warren eds., 10th ed. 2007). The process is substantially similar for audio mashups, except rather than focusing on one particular preexisting song, audio mashups generally combine two or more preexisting songs, and audio mashups do not add newly created elements to the end result and may not change genre. For instance, all of the songs utilized by Girl Talk are generally classified in the pop genre, and Gillis intends that the resulting work remain in the pop genre. *See* Girl Talk MySpace page, http://www.myspace.com/girltalk (last visited Nov. 20, 2009).

124. KRASILOVSKY & SHEMEL, *supra* note 123, at 137–38.

license, audio mashups created from preexisting copyrighted sound recordings violate copyright holders' exclusive right to prepare or authorize the preparation of derivative works based on their copyrighted sound recordings, which denies copyright holders the ability to control the use of their copyrighted works and the ability to profit from their creative labors.

3. The Public Distribution and Public Performance Rights

The public distribution right secures authors the exclusive right "to distribute . . . phonorecords of the copyrighted work to the public by sale or other transfer of ownership . . . ."[125] Mashups sold or otherwise distributed, whether on physical CDs or through digital download of mp3s, would technically violate the public distribution right of each copyright holder whose sound recording is incorporated into the mashup.[126]

Under § 106(4), a copyright holder reserves the exclusive right "to [perform] . . . and to authorize" the performance of "the copyrighted work publicly."[127] Performance under the Act "means to recite, render, play, dance, or act" the work, "either directly or by means of any device or process."[128] Thus, to "play" a sample of a sound recording, as incorporated in an audio mashup, whether by computer audio file player, outboard sampler, or any other audio reproduction device, would constitute a performance of that sound recording under the Act.[129] Furthermore, the public performance right, like the public distribution right, contains a "public" component. The Act defines public performance as:

125. 17 U.S.C. § 106(3) (2006).

126. Section 109 limits the scope of the public distribution right to the *first* sale or distribution. *See* 17 U.S.C.A. § 109(a) (West 2005). Under this limitation, copyright holders can claim no rights to the *physical* phonorecords after sale or other transfer of ownership, and consumers are free to resell, transfer, or even destroy the particular phonorecord purchased. *See id.* Since mashups involve the digital reproduction of particular phonorecords, whether obtained legitimately or not, and the redistribution of those reproductions rather than the original physical phonorecords, § 109 is inapplicable to mashups.

127. 17 U.S.C. § 106(4) (2006). Under § 106(5), copyright holders have the exclusive right "to [display] . . . and to authorize" the display of "the copyrighted work publicly." 17 U.S.C. § 106(5) (2006). For musical works, the public display of sheet music for a musical composition would technically violate the public display right. Since music mashups only involve the incorporation of preexisting sound recordings, a mashup could not violate the public display right; thus, the present discussion only concerns the violations of the public performance right.

128. 17 U.S.C.A. § 101 (West 2005).

129. *See* KRASILOVSKY & SHEMEL, *supra* note 123, at 207.

> To perform . . . a work "publicly" means—(1) to perform . . . it at a place . . . where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance . . . of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.[130]

Thus, so long as the performance of an audio mashup is not merely among family and close friends, such a performance will violate the public performance right. Performance as part of a show at a club, which is the general practice of mashup remixer Gregg Gillis,[131] would obviously constitute a public performance under the Act. Moreover, under the second clause above, public performance includes transmission of a performance; thus, posting a performance on a Web site, such as YouTube or MySpace, or merely posting an audio track to play at users' requests would presumably violate the public performance right.

B. Limitations on Exclusive Rights Applicable to Audio Mashups

Though audio mashups technically violate some, if not most, of the exclusive rights granted to artists under § 106, mashup remixers may avoid liability for copyright infringement as certain limitations to the exclusive rights may apply. In fact, many mundane actions, such as making a backup copy of a CD, creating a mix tape (or CD), or humming in line at the grocery store, may constitute copyright infringement save for the limitations to a copyright holder's exclusive rights enumerated in § 107 through § 122. The limitations, in part, prevent such ridiculous rigidity of the Copyright Act, while providing a balancing mechanism between current artists' rights and future artists' rights. The limitations built into the Copyright Act provide necessary balancing mechanisms so that, while artists are properly incentivized through the grant of exclusive rights, future artists are able to use artists' works, to some extent, in order to create new works and facilitate the progression of the arts.[132] Moreover, though not a limitation of exclusive rights expressly carved out in the Copyright Act, the common law doctrine of de minimis use provides a

130. 17 U.S.C.A. § 101 (West 2005).
131. Walker, *supra* note 46, at 15.
132. *See* Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

limitation to copyrights and permits mashup remixers to make de minimis uses of preexisting works, use the ideas from previous artists' works,[133] and make use of any work which is fair under § 107.[134] The following discussion addresses the de minimis use doctrine, the idea/expression dichotomy, and the fair use doctrine.

1. The De Minimis Use Doctrine

Notwithstanding the fact that the use of a copyrighted work is unauthorized, "to be actionable, the use must be significant enough to constitute infringement;" thus, "even where the fact of copying is conceded, no legal consequences will follow from that fact unless the copying is substantial."[135] The practice for courts in the United States to disregard minimal copying as copyright infringement is generally derived from the de minimis principle of the law,[136] which has been a part of copyright law in the United States at least since the inception of statutory copyright law in the United States.[137] Specifically, the same year of the adoption of the first Copyright Act in 1909, in *West Publishing Co. v. Edward Thompson Co.*,[138] the Second Circuit Court of Appeals stated, in evaluating the question of what constitutes copyright infringement, that "[e]ven where there is some copying, that fact is not conclusive of infringement. Some copying is permitted. In addition to copying, it must be shown that this has been done to an unfair extent."[139] Thus, the use of samples of preexisting, copyrighted sound recordings is obviously direct copying, but so long as the use of samples is not substantial, the use will not constitute copyright infringement.[140]

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133. 17 U.S.C. § 102(b) (2006). The essence of the idea/expression dichotomy is that ideas are not copyrightable, whereas expression is. *See* discussion *infra* Part III.B.2.

134. 17 U.S.C. § 107 (2006); *see* discussion *infra* Part III.B.3.

135. Newton v. Diamond, 388 F.3d 1189, 1192–93 (9th Cir. 2004) (first citing Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74–75 (2d Cir. 1997), then citing Laureyssens v. Idea Group, Inc., 964 F.2d 131, 140 (2d Cir. 1992); 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright (MB) § 13.03[A], 13-34 (2008)). Courts have not expressly defined "substantial," but from the *Newton* case it is clear that a three note, few second sample is not substantial. *See infra* notes 155–58 and accompanying text.

136. The de minimis principle or *de minimis non curat lex* literally translates to "the law does not concern itself with trifles." Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74–75 (2d Cir. 1997).

137. *See* West Publ'g Co. v. Edward Thompson Co., 169 F. 833, 861 (C.C.E.D.N.Y. 1909), *modified*, 176 F. 833 (2d Cir. 1910).

138. 169 F. 833 (C.C.E.D.N.Y. 1909), *modified*, 176 F. 833 (2d Cir. 1910).

139. *Id.* at 861.

140. *See id.*

Recently, however, in *Bridgeport Music, Inc. v. Dimension Films*,[141] the Sixth Circuit Court of Appeals held that under a literal reading of § 114(b) of the Copyright Act, a de minimis use is not a valid defense for digital sampling of sound recordings; thus, digital sampling amounts to a per se violation of copyright law.[142] Section 114 of the Copyright Act describes the scope of a copyright holder's exclusive rights in *sound recordings*.[143] Under § 114(b), a copyright holder's rights in a sound recording are limited to the actual fixation of aggregate sounds that constitute the sound recording and do not include a new recording of a reproduction of those sounds, even if those sounds obviously imitate the sounds in the original sound recording.[144] Specifically, § 114(b) states that "[t]he exclusive rights of the owner of copyright in a sound recording . . . do not extend to the making or duplication of another sound recording that consists *entirely* of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording."[145]

The court in *Bridgeport* determined that Congress's use of the word "entirely" suggests that if a recording contains *any* part of a preexisting sound recording, it is within the scope of exclusive rights possessed by whomever holds the preexisting sound recording's copyright; the new recording must consist of independently recorded sounds only and, presumably, must not contain samples at all in order to fall outside the scope of the sound recording copyright holder's exclusive rights.[146]

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141. 2005 FED App. 0243A, 410 F.3d 792 (6th Cir.).

142. *See id.* ¶ 12, 410 F.3d at 798. The case concerned the hip-hop song, "100 Miles and Runnin'," in which the artists had sampled a three-note, four-second solo guitar riff from the beginning of "Get Off Your Ass and Jam" by George Clinton. *Id.* ¶¶ 5–6, 410 F.3d at 796.

143. 17 U.S.C.A. § 114 (West 2005).

144. *Id.* § 114(b).

145. *Id.* (emphasis added).

146. *See Bridgeport*, 2005 FED App. ¶ 16, 410 F.3d at 800–01. Moreover, a possible reading of this subsection would make the creator of the new recording liable to a copyright owner of a sound recording for infringement even when the person has not even sampled the copyright owner's sound recording. For example, if the creator of the new work recreated the copyright owner's sound recording in an independent recording by imitating the sounds in the sound recording without sampling the actual sound recording, but instead used samples of other sound recordings, the new recording would not consist entirely of independent fixations; thus, the new recording may be within the scope of the rights of the copyright owner of the imitated sound recording under § 114(b). *See* 17 U.S.C.A. § 114(b) (West 2005). While courts surely would not impose liability in such a ridiculous situation, the drafting of § 114(b) is nonetheless questionable.

Following its interpretation of § 114(b), the court in *Bridgeport* essentially held that unauthorized digital sampling is per se copyright infringement; if the use of a digital sample is unauthorized, then infringement is established.[147] In support of its holding, the court reasoned that a bright-line rule of per se infringement for digital sampling also is easy to enforce, instructing sampling artists to "[g]et a license or do not sample."[148] Nonetheless, since § 114 specifically states that recreating an independent fixation of a sound recording does not infringe the sound recording copyright, sampling artists are free to recreate samples of sound recordings in the studio.[149] Sampling artists, therefore, have the option to either obtain a license for the samples they use or recreate those samples in the studio, whichever is more efficient considering the convenience and cost of each.[150] The options for mashup remixers, as a subset of sampling artists, are the same.

Though sampling artists are free, under § 114(b), to recreate a sound recording without infringing a sound recording copyright holder's exclusive rights, such a recreation may nevertheless violate the exclusive rights of the copyright holder of the musical composition.[151] The Copyright Act grants protection to "original works of authorship," which includes both "musical works, including any accompanying words" and "sound recordings."[152] A sound recording of a song has a copyright independent from the copyright in the musical composition.[153] Thus, sampling a sound recording potentially violates both the copyright in the sound recording and the

147. *See Bridgeport*, 2005 FED App. ¶ 12, 410 F.3d at 798.

148. *Id.* ¶ 17, 410 F.3d at 801.

149. *Id.* The costs of recreation may be substantial, but such costs are most likely rather minimal compared to the recording costs incurred by the copyright holder in creating the original sound recording. Thus, on balance, the rule seems rather reasonable.

150. With sampling so prevalent in music today, a potentially large market for licensing sound recordings exists. Some copyright holders, however, may refuse to license their music, and if there are individual differences in the types of copyright holders who refuse to license, music incorporating samples may become more homogenized, essentially recycling the same samples over and over. Also, requiring licensing or recreation may create a kind of tiered system where only sampling artists with financial resources are able to create music with samples, though they can always create their own music or create their own samples. Moreover, artists who do create their own music have to incur studio costs in order to fix their music in a sound recording. Thus, here, allowing completely free sampling would seem to offset the balance of rights.

151. *See* 17 U.S.C. § 102 (2006).

152. *Id.*

153. *See Bridgeport*, 2005 FED App. ¶ 6 n.3, 410 F.3d at 796 n.3 (citing 17 U.S.C. §§ 102(a)(2), (7) (2000); Bridgeport Music, Inc. v. Still N the Water Publ'g, 2003 FED App. 0130P, ¶ 2 n.3, 327 F.3d 472, 475 n.3 (6th Cir.)).

copyright in the musical composition. While the copyright in the musical composition protects the musical notes and words of a song, the arrangement of those notes and words, and the stylistic instructions for performing those notes and words, the copyright in a sound recording protects the particular version of a song as captured at the particular instance when it is recorded, including the performances by the musicians and the mixing and production of the recording by the recording engineer and producer.[154] The musical composition copyright holder and sound recording copyright holder may be, and often are, different.

Such was the case in *Newton v. Diamond*.[155] The Beastie Boys obtained a license to sample a sound recording from a music publisher, but the original artist retained the rights in the musical composition.[156] The original artist objected to the Beastie Boys' use of the sample, but since the Beastie Boys licensed the use of the sound recording, the only potential violation concerned the musical composition.[157] The Ninth Circuit Court of Appeals ruled that the use of the sample was de minimis and thus was not actionable, as the sample was only a few seconds long and only consisted of a mere three notes.[158]

Comparing the holdings from *Bridgeport* and *Newton*, a de minimis use of a copyrighted musical composition seems to not constitute copyright infringement, which is consistent with the traditional use of the de minimis doctrine in copyright law over the past decade. With the advent of recording technologies—particularly digital recording technologies which can create exact copies of copyrighted works at little to no cost—the application of the doctrine seems to make less sense as applied to copyrighted sound recordings. Allowing future artists to freely copy, at essentially no cost, current artists' works may not cause direct harm to those artists—although it may result in some lost licensing revenue—but it certainly seems unfair, in a general sense, for current artists to bear the burden and cost of producing music only to allow future artists to exploit those efforts and resources for free. As such, the Sixth Circuit Court of

154. *See* Bridgeport Music, Inc. v. Still N The Water Publ'g., 2003 FED App. 0130P, ¶ 2 n.3, 327 F.3d 472, 475 n.3 (6th Cir.).

155. 388 F.3d 1189, 1190 (9th Cir. 2004) (involving a sample of a jazz sound recording that consisted of a three-note phrase of the original artist, James Newton, playing the flute).

156. *Id.*

157. *See id.* at 1196.

158. *Id.*

Appeals in *Bridgeport* specifically rejected the application of a de minimis rule for digital sampling.[159]

Thus, while sampling artists may seemingly not be able to use unauthorized samples of copyrighted sound recordings, barring some other applicable limitation of exclusive rights, they are free to license such samples and are probably free to recreate a small portion of a copyrighted sound recording and use it.[160] Such a use would not violate § 114(b) and would potentially be a de minimis use of a portion of the musical composition.[161] The upholding of the de minimis rule for musical compositions is probably of little use for most audio mashups, however, since audio mashups, by definition, consist entirely of digital samples of preexisting sound recordings. If those sound recordings are copyrighted and the use of the samples of those sound recordings is unauthorized, under *Bridgeport*, the digital sampling involved in creating the mashup would constitute per se infringement of copyright law. Furthermore, many samples used in mashups are not merely three-note samples lasting a few seconds like the samples at issue in both *Bridgeport* and *Newton*.[162] However, mashup remixers can consider the de minimis rule in creating mashups to make use of previous works to a certain extent. For shorter samples, possibly even slightly longer than a few seconds or three notes, mashup remixers could recreate the sounds on a sound recording, and the use of such samples would most likely not constitute copyright infringement as de minimis use under *Newton*.

2. The Idea/Expression Dichotomy

Under § 102(b), ideas are not copyrightable subject matter.[163] Such is the basis of the idea/expression dichotomy in U.S. copyright law, which in essence, affords copyright protection only to the specific expressive work in which the ideas of the author are realized.[164] The ideas themselves are outside the scope of the protection and thus fall directly to the use of the public and future artists.[165] Professor James Boyle argues that music has a long history of borrowing from previous musical works and the distinction between ideas and

159. Bridgeport Music, Inc. v. Dimension Films, 2005 FED App. 0243A, ¶ 12, 410 F.3d 792, 798 (6th Cir.).
160. *See Newton*, 388 F.3d at 1196.
161. *See* 17 U.S.C.A. § 114(b) (West 2005).
162. *Bridgeport*, 2005 FED App. ¶ 6, 410 F.3d at 796; *Newton*, 388 F.3d at 1196.
163. 17 U.S.C. § 102(b) (2006).
164. *See id.*
165. *See id.*

expression in music is often blurred; thus, the sampling involved in creating mashups should fall within the limitations to exclusive rights in the Copyright Act.[166] But, the distinction is rather clear if one analyzes the components of a musical composition and the components of a sound recording, respectively.

In a musical composition, the ideas may consist of rather basic elements of a song, such as arranging a song to end on a chorus, using a guitar, or singing. Or, the ideas may be much more complex, such as using a double-thumbing technique for guitar.[167] The actual expression of a musical composition would include, for example, the specific arrangement of notes that comprise the melody, the specific words used to constitute the lyrics, and the combinations of all of the instruments that create the rhythm and harmony of the song during a specific portion. The distinction for sound recordings is much clearer since the expression is essentially the fixation of sounds. Thus, a digital sample, or really any sample, would copy the exact expression. The ideas of the sound recording include such elements as the selection of reverb on the vocal or instruments, the spatial placement of the instruments in the mix, the style of compression applied to the overall mix, and so on.

Moreover, music, like all art forms, has a long history of borrowing from previous works, as Boyle suggests.[168] Borrowing is necessary to advance the arts in the fulfillment of the purposes of copyright law. Unfortunately, however, Boyle fails to recognize that the extent of the borrowing is limited to the *ideas* of the works since more extensive borrowing, such as borrowing the actual *expression*, would disrupt the incentive provided to artists. In music, artists regularly borrow ideas from the works of other artists; otherwise, the progress of the arts would be inhibited. Though some songs sound similar because they are the same style of music,[169] and certain singers have similar voices or sing about similar things, the songs do not

166. James Boyle, Professor of Law, Duke Univ. Sch. of Law, The Information Ecology Fall 2008 Lecture: A Song's Tale; Mashups, Borrowing, and the Law (Nov. 24, 2008), *available at* http://www.law.duke.edu/cspd/lectures/.

167. Double-thumbing entails pushing the thumb down through the string, then pulling it back up through the string, then pushing it down through the string again and so on. The result is a doubled note. Alternatively, pushing through the string, then pulling through the string and plucking the string with the index finger results in a triplet. Adding the middle finger results in a quadruplet, and so on.

168. *See supra* note 166 and accompanying text.

169. Particularly, if people are unfamiliar with a genre of music, much of the music in that genre may sound the same. For example, for someone who does not listen to classical music or does not listen to hip-hop, all of this music may sound the same.

necessarily borrow expression from one another.[170] Mashup remixers, however, take exact expressions since they digitally sample the works they use, which necessitates a careful consideration of such use.

3. Fair Use

Though the court in *Bridgeport* rejected the de minimis rule for digital sampling, essentially suggesting that unauthorized sampling is per se copyright infringement, the court expressed no opinion regarding the ruling as it relates to a fair use analysis under § 107.[171] Thus, even though digitally sampling a sound recording is technically per se infringement, the use of the sample may be "fair" under the § 107 limitations to copyright holders' exclusive rights.[172] The purpose of the fair use doctrine is to prevent technical violations of copyright infringement where the rigidity of copyright law would "stifle the very creativity which that law is designed to foster."[173] Thus, the fair use doctrine is particularly important in balancing the rights of current artists and the rights of future artists. For instance, future artists are able to use the works of previous artists when such use is for certain purposes that would facilitate the progress of the arts. Alternatively, where a use does not necessarily contribute to the advancement of the arts, the fair use doctrine nonetheless limits a copyright holder's exclusive rights when certain uses are minimal—but more extensive than trivial—and would not seem to harm the copyright holder's constitutional rights.[174] In evaluating whether a particular use is fair under § 107, a court will weigh several factors:

> (1) the purpose and character of the use, including whether such use is of 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.[175]

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170. Nonetheless, some songs may in fact take expression from other works. This is generally called copyright infringement.

171. Bridgeport Music, Inc. v. Dimension Films, 2005 FED App. 0243A, ¶ 25, 410 F.3d 792, 805 (6th Cir.) ("Since the district judge found no infringement, there was no necessity to consider the affirmative defense of 'fair use.' On remand, the trial judge is free to consider this defense and we express no opinion on its applicability to these facts.").

172. *Id.*

173. Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos., 621 F.2d 57, 60 (2d Cir. 1980).

174. *See* 17 U.S.C. § 107 (2006).

175. *Id.*

A court will weigh all of these factors together "in light of the purposes of copyright."[176] Furthermore, a finding of fair use is made on a case-by-case basis;[177] thus, offering a general analysis for audio mashups is not determinative. Nevertheless, audio mashups do share some general characteristics that can be helpful for future mashup remixers in determining whether or not the use of previous works would fit within the balance of artists' interests.

a. Purpose and Character of the Use

The first factor in the fair use analysis concerns the "purpose and character" of the new artist's use of the preexisting work.[178] In determining the purpose and character, courts essentially weigh the degree to which a new work advances the arts by transforming the original work and the degree to which the new work commercially exploits the original work.[179] Thus, the two determinations involved in the analysis for the purpose and character of the work are: (1) whether the use of the original work is transformative and (2) whether the secondary work has a commercial or nonprofit, educational purpose.[180]

i. Transformative Use

The quintessential question in determining the purpose and nature of the work involves an inquiry into whether the use of the new work is transformative, meaning that the secondary work does not merely "supersede the objects"[181] of the original but "instead adds something new, with further purpose or different character, altering the first with new expression, meaning, or message."[182] This is effectively a consideration of the advancement of the arts. In the preamble to § 107, Congress enumerates several purposes that are illustrative of transformative use, namely, "criticism, comment, news reporting, teaching, ... scholarship, ... [and] research."[183] Under a general sense of transformative use, all audio mashups seem to fail to transform the use of the original works, since the *use* of the original works seemingly is merely for entertainment or aesthetic purposes

176. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).
177. *Id.* at 577.
178. 17 U.S.C. § 107 (2006).
179. *See Campbell*, 510 U.S. at 579.
180. *See id.* at 578–79.
181. Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901).
182. *Campbell*, 510 U.S. at 579.
183. 17 U.S.C. § 107 (2006).

and the resulting mashups could only be the same—for entertainment or aesthetic purposes. Moreover, under the illustrative list of transformative purposes in the preamble, audio mashups, such as those created by Danger Mouse or Gregg Gillis, certainly would not fall under news reporting, teaching, scholarship, or research. They may, however, fall under either criticism or comment.[184]

In the principal case concerning fair use in copyright law, *Campbell v. Acuff-Rose Music, Inc.*,[185] the U.S. Supreme Court determined that 2 Live Crew's use of the song "Oh, Pretty Woman" by Roy Orbison to create a new song, "Pretty Woman," was fair because the latter parodied the former.[186] The Court reasoned that "parody, like other comment or criticism, may claim fair use under § 107" and that such a work "needs to mimic an original to make its point, and so has some claim to use the creation of its victim's . . . imagination."[187] The Court, however, distinguished a parodical work from a satirical work—a work in which "prevalent follies or vices are assailed with ridicule."[188] As satirical works are not transformative, and thus are generally not fair use, the distinction between the two is critical: a satire makes a general comment or criticism on society whereas a parody comments on or criticizes a *specific* work.[189] In his concurrence, Justice Kennedy reiterated this point: "parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole."[190] Furthermore, Justice Kennedy warned of overuse of the fair use defense in which merely a "commercial takeoff is rationalized *post hoc*" as a criticism or comment on a work.[191] The warning attempted to minimize the degree to which the commercial exploitation of artists' works is allowed under the guise of progression of the arts when in fact a new work does not advance the arts, which would disrupt the balance between the rights of artists and future artists.

Justice Kennedy's later point is particularly relevant to audio mashups. For example, when Danger Mouse released *The Grey*

184. *See* Nicholas B. Lewis, Comment, *Shades of Grey: Can the Copyright Fair Use Defense Adapt to New Re-Contextualized Forms of Music and Art?*, 55 AM. U. L. REV. 267, 274–75 (2005).

185. 510 U.S. 569 (1994).

186. *Id.* at 572–74.

187. *Id.* at 579–81.

188. *Id.* at 581 n.15; *see also* Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1400 (9th Cir. 1997) (distinguishing satirical works from parodical works).

189. *See Dr. Seuss*, 109 F.3d at 1400.

190. *Campbell*, 510 U.S. at 597 (Kennedy, J., concurring).

191. *Id.* at 600.

Album,[192] he stated that his reasoning for its creation was merely to see if it could be done; that is, to see if it would be possible to create a new album out of the music from the Beatles' *The White Album*[193] and the vocal tracks from Jay-Z's *The Black Album*.[194] Nonetheless, fans and supporters of *The Grey Album* have lauded its critical brilliance. Michael Paoletta, in his 2004 interview with Danger Mouse, "interprets 'The Grey Album' as a criticism of the sacrosanct position The Beatles hold in our cultural history," suggesting that "the album's creation implies that Jay-Z is equally as important as The Beatles in the eyes of twenty-first century American youth."[195] Yet, though Paoletta's interpretation of *The Grey Album* may appear to bring the *The Grey Album* within the meaning of a transformative use, such an interpretation seems to be the very "post hoc" justification of which Justice Kennedy warned, considering Danger Mouse's own characterization of the album, to see if it could be done.[196] As such, the album seems more to exploit the original works of Jay-Z and the Beatles rather than to advance them. Nevertheless, Danger Mouse presumably could have avoided this by merely refraining from characterizing the nature of his work until someone else, like Paoletta, thought up a valid connection between the works used which could classify the use of the original works as transformative.

The distinctions between parody and satire and Justice Kennedy's assertion that the secondary work must target the original work are also potentially problematic for many audio mashups.[197] Specifically, in order for a court to consider a use of a work transformative, the mashup must criticize or comment on the *specific* work used.[198] Thus, even a post hoc justification, such as Michael Paoletta's, that *The Grey Album* criticizes the sacred nature of the Beatles, would not constitute a transformative use since the criticism is directed toward the Beatles in general or, more specifically, toward society's adoration of the Beatles rather than any one of the particular works of the Beatles used in *The Grey Album*. In this sense, the works are essentially used as a vehicle or mechanism in order to

192. DANGER MOUSE, *supra* note 3.

193. THE BEATLES, *supra* note 5.

194. Corey Moss, *Grey Album Producer Danger Mouse Explains How He Did It*, MTV, Mar. 11, 2004, http://www.mtv.com/news/articles/1485693/20040311/danger_mouse.jhtml; JAY-Z, *supra* note 4.

195. Power, *supra* note 8, at 580 n.16.

196. *See Campbell*, 510 U.S. at 600 (Kennedy, J., concurring).

197. *See id.* at 599–600.

198. *Id.* at 597.

comment on or criticize society, which is essentially a satire,[199] and under the ruling in *Campbell*, a satire does not qualify as a transformative use under § 107.[200]

Whereas mashup remixers such as Danger Mouse would likely have difficulty establishing that their words are meant to *criticize* the original works, an argument could be made that they make a *comment* on the original. Take, for example, Danger Mouse's song "Encore,"[201] which combines the lyrics of Jay-Z's song "Encore"[202] with the riffs, phrases, and beats from the Beatles' "Glass Onion"[203] and "Savoy Truffle."[204] Since Jay-Z's song "Encore"[205] is essentially a boast of himself and his rap ability, it would seem difficult to view the pairing of these lyrics with the samples of music from the Beatles' "Glass Onion"[206] and "Savoy Truffle"[207] as commenting on either of the works. Though, as Danger Mouse admits, he is a fanatic of both Jay-Z and the Beatles,[208] so Danger Mouse's comment on the works could simply be, "I like these things, so let's put them together." If a court finds that such a comment is, in fact, transformative, such a finding would most likely not weigh too heavily in favor of fair use, if at all, since such a minimal degree of transformation would offer little to the progression of the arts.

In addition to the above issues, Gregg Gillis, and similar mashup remixers, may face difficulty establishing transformative use due to the sheer number of samples involved in each of his mashups. For example, in "Smash Your Head"[209] it is hard to imagine what the drum beat from Nirvana's "Scentless Apprentice"[210] could possibly say about the chorus from Elton John's "Tiny Dancer"[211] and vice versa. When adding Biggy's "Juicy"[212] verse, as well as samples from Young Jeezy, Public Enemy, and Beyonce to name a few, this

199. *See* Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1400 (9th Cir. 1997).
200. *Campbell*, 510 U.S. at 594.
201. DANGER MOUSE, *Encore*, *on* THE GREY ALBUM (2004).
202. JAY-Z, *Encore*, *on* THE BLACK ALBUM (A CAPPELLA) (Roc-A-Fella 2003).
203. THE BEATLES, *Glass Onion*, *on* THE BEATLES (Apple 1968).
204. THE BEATLES, *Savoy Truffle*, *on* THE BEATLES (Apple 1968).
205. JAY-Z, *supra* note 202.
206. THE BEATLES, *supra* note 203.
207. THE BEATLES, *supra* note 204.
208. Moss, *supra* note 194.
209. GIRL TALK, *Smash Your Head*, *on* NIGHT RIPPER (Illegal Art 2006).
210. NIRVANA, *Scentless Apprentice*, *on* IN UTERO (DGC 1993).
211. ELTON JOHN, *Tiny Dancer*, *on* MADMAN ACROSS THE WATER (UNI 1971).
212. THE NOTORIOUS B.I.G., *Juicy*, *on* READY TO DIE (Bad Boy 1994).

association becomes increasingly more difficult. Even a legitimate post hoc rationalization seems difficult.

As an opponent of artists' rights in copyright law, Gillis may justify the combination of certain songs as a comment on the artists who oppose unauthorized sampling and support artists' rights.[213] Once again, however, such use would target the artists rather than the works and thus would fail to meet the standard of criticism under the Court's holding in *Campbell*.[214] Furthermore, a justification of transformation through commenting on an artist's opposition to unauthorized sampling seems difficult to rationalize. For example, suppose Nirvana opposes unlicensed sampling and Gillis uses unlicensed samples of Nirvana songs in order to make a statement, comment, or criticism, about Nirvana's opposition to unlicensed sampling. Suppose Gillis then argues that he thus engaged in a transformative use. The determination of legality would thus hinge on Gillis's comment about the legality. Such a rule would tie artists' hands as to the sampling of their work: if artists oppose unlicensed sampling, a mashup remixer would be more able to use an artist's work since the use would be commenting on the fact that the artist opposes unlicensed sampling and would thus be transformative. Such a dilemma would seem to encourage artists to support unlicensed sampling; however, such support could be viewed as an implied license to use their work. Or, if artists publicly supported unauthorized sampling but enforced their copyrights against unlicensed samples of their works, they could be viewed to actually oppose unauthorized sampling; thus, sampling their works would again be commenting on or criticizing the fact that the artist opposes unlicensed sampling or even the hypocrisy of their actions and would be transformative. Either way, artists would completely lose the ability to control the sampling of their works. Moreover, artists are afforded these exclusive rights in their works by the U.S. Constitution;[215] discouraging or penalizing them for enforcing these constitutionally mandated rights makes little sense, as does effectively requiring artists to relinquish their constitutional rights.

Even where a use is only mildly transformative, such as combining samples of songs as an ode to those songs or to make cultural references, courts may find in favor of fair use if the

213. LESSIG, *supra* note 63, at 13.

214. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580–81, 594 (1994) (holding that in order to be considered a parody, and thus criticism under fair use, the "new" work must target the original).

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

secondary work has a substantial benefit to the public.[216] In *Perfect 10, Inc. v. Amazon.com, Inc.*,[217] the Ninth Circuit Court of Appeals found that Google's use of the plaintiff's copyrighted images as thumbnails for the purposes of an Internet search tool was "highly transformative" and consequently fair use.[218] The court determined that the search engine provided even more benefit to the public than the original works that were encompassed in the image search engine as thumbnails.[219] Audio mashups certainly do not offer nearly the benefit to the public that an Internet search tool provides, as they are essentially meant to entertain, though they may offer some benefit to some certain sects of the public. And, it is doubtful that they could offer more benefit to the public than the original works of which they consist, even if they offer equal benefit to the public. The public benefit of mashups is thus unlikely to contribute very much, if anything, to a finding of fair use.

Courts have generally rejected the notion that fair use should be used to supplement the market where a copyright holder is unlikely to license a work or grant permission, such as in critical review or parody.[220] This is presumably because the purpose of fair use is not fulfilled merely where artists grant permission for future artists to use their works but where that permission would result in the progression of the arts.

In summary, while many of the mashups created by Danger Mouse and Gillis do not seem to transform the original works they use, future mashup remixers can focus on targeting specific works in order to actually transform those works. Mere general comments or criticisms on society or artists will not transform a work under § 107, and paying homage to artists and their works may do little to transform a work. However, if future mashup remixers take the time and have the skill and creativity to actually generate combinations of works that comment on and criticize those specific works, such effort and creativity could truly transform the original works, thereby facilitating the progression of the arts. Without transformation, the new work most likely does little to advance the arts and thus likely will not fall within the fair use limitation of the exclusive rights granted to the original artists. Nonetheless, the use of a work may still

216. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165 (9th Cir. 2007).
217. 508 F.3d 1146 (9th Cir. 2007).
218. *Id.* at 1165.
219. *Id.*
220. *See* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 357–58 (1989).

constitute fair use, even without transforming a work, if the other factors that follow weigh in favor of fair use.[221]

ii. Commercial Purpose

The second determination in the purpose and character of the use of a work is whether that use is for commercial or nonprofit, educational uses.[222] The commercial nature of the use of audio mashups can be significant. The concern here is similar to the *Bridgeport* court's consideration of the exploitation of artists regarding the de minimis use of digital samples.[223] Essentially, if anyone is to profit from an artist's creativity and labor, it should be the artist, or whomever the artist deems should profit. Quite clearly, since a subsequent educational, nonprofit use does not generate a profit, such use generally does not weigh in favor of infringement.[224] However, in analyzing a specific inquiry for fair use, "the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness;" rather, a finding of a commercial nature will merely weigh against fair use and a finding of nonprofit, educational use will not.[225] Courts have generally found, nonetheless, that private uses will constitute fair use even where the other factors greatly weigh against fair use.[226]

In the past, mashup remixers, such as Danger Mouse, have not released their creations commercially, which would seem to not qualify as commercial use; however, often the use is not entirely nonprofit and is certainly not educational. In Danger Mouse's case, though he has not sold any of the albums since receiving the cease and desist letter from EMI,[227] he still has received an indirect commercial benefit from *The Grey Album*.[228] The album has been

221. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576–77 (1994) (recognizing that the terms "including" and "such as" in the § 107 preamble indicate that the § 107 factors are " 'illustrative and not limitative' " (quoting 17 U.S.C. § 101 (1988))); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985) (noting that the factors for evaluating fair use set out in § 107 were not meant to be exclusive).

222. 17 U.S.C. § 107 (2006).

223. Bridgeport Music, Inc. v. Dimension Films, 2005 FED App. 0243A, ¶¶ 18–19, 410 F.3d 792, 801–02 (6th Cir.).

224. *See Harper & Row*, 471 U.S. at 562.

225. *Campbell*, 510 U.S. at 584.

226. *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 468–70 (1984) (finding the copying of VCR cassettes to be a private use).

227. Baio, *supra* note 6.

228. DANGER MOUSE, *supra* note 3.

immensely popular because of the publicity that it has received.[229] Danger Mouse even stated in an interview with MTV that if the artists whose works he used were not Jay-Z and the Beatles, he would not be having that interview or the success.[230] This publicity has catapulted Danger Mouse into fame and commercial success, exemplified by his current band, Gnarls Barkley, which has had several hits over the last three years.[231] He can attribute his discovery in the music business to his arguable exploitation of Jay-Z and the Beatles.

Gillis has also achieved recent popularity through his alias Girl Talk, but he has also received direct financial benefit from the audio mashups he creates.[232] As a deejay at clubs in the Pittsburgh area, Gillis has played mashups of other artists' works that he has combined; additionally, since gaining global popularity, he has begun touring and playing regularly at clubs around the world.[233] The profits from the performances have even risen to a level permitting Gillis to quit his research job and to play his mashups full time.[234]

Moreover, Gillis offers his most recent album on a pay-what-you-like basis,[235] which may have less of a commercial connotation than selling the album for a fixed industry standard rate; however, "the crux of the profit/nonprofit distinction" is merely "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[236] All sound recordings require creativity, labor, and resources from the original artists who created them, yet Gillis profits both from performance revenues as well as CD and download sales by cutting up these creative works and combining them, without compensating the original artists for the samples he uses with the customary licensing fee. And, only if his works truly transform the original works, advancing them and thus advancing the arts, would this not seem to be the very definition of commercial exploitation of the original artists' talents and efforts.

Furthermore, the songs that Gillis samples and incorporates into audio mashups are generally popular and thus would seem to be

229. Power, *supra* note 8, at 580–81.
230. Moss, *supra* note 194.
231. *See* Gnarls Barkley, http://www.gnarlsbarkley.com/ (last visited Jan. 3, 2010).
232. Walker, *supra* note 46, at 15.
233. *Id.* For touring dates, see Girl Talk MySpace page, *supra* note 123.
234. Walker, *supra* note 46, at 15.
235. *Id.*
236. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985) (citing Roy Export Co. Establishment v. Columbia Broad. Sys., Inc., 503 F. Supp. 1137, 1144 (S.D.N.Y. 1980)).

instantly recognizable. Such songs appeal immediately to an audience's sense of nostalgia and are presumably "good," marketable songs anyway since they are already popular. As part of the remix team Transdub Massiv, mtfloyd explains the significance of using popular works in mashups, "[B]ecause the public will embrace a good remix on the strength of the original track's popularity ... the [mashup] remixer can be a total unknown and still hit it big!"[237] He continues, "[A] tune could already be a huge hit;" thus, "lacing the vocal over a fast breakbeat and throbbing bass line can be all it takes to capitalize on the familiarity of the song."[238] Given mtfloyd's statements, the concern here seems to be more about using songs that will bring popularity and success to the mashup remixer rather than using songs that will enable the mashup remixer to advance the ideas in the songs.

Thus, while creating mashups for private use, merely for the personal enjoyment of the process and result, may generally be fair,[239] even widespread noncommercial use could unfairly disrupt the balance of rights between artists. Particularly, if a mashup does little to transform the original works, it is difficult to justify the widespread distribution of the mashup even if the mashup remixer receives no profit at all. Moreover, the lines between nonprofit and commercial use seem to blur to some extent regarding mashups. Whereas merely posting a mashup for download on a Web site may favor a finding of fair use, playing mashups as part of a show at a club where the mashup remixer is paid to perform may favor a finding against fair use. Nevertheless, if the work is sufficiently transformed, potentially even its commercial release should be justified; since the work would facilitate the progress of the arts, the mashup remixer should profit from its creation.

b. Nature of the Copyrighted Work

The second factor in the analysis for fair use is "the nature of the copyrighted work."[240] The primary distinction made in evaluating this factor is whether the copyrighted work is creative or factual.[241] Creative works are considered "closer to the core of intended

237. mtfloyd, *supra* note 2, at 27.

238. *Id.* at 22.

239. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 468–70 (1984). This is probably true even if the mashup does not transform the works and the other fair use factors weigh against fair use.

240. 17 U.S.C. § 107(2) (2006).

241. *See Harper & Row*, 471 U.S. at 563.

copyright protection" whereas factual works are not protected by copyright.[242] Thus, the appropriation of a factual work is more likely to constitute fair use since it does not conflict with the rights granted to artists. Because audio mashups contain samples of sound recordings that are creative works, the nature of the copyrighted work for a determination of fair use for any mashup would favor a finding against fair use. In addition, whether an original work is published can factor into the analysis; specifically, "the unpublished nature of a work" may tend to "negate a defense of fair use."[243] The sound recordings incorporated into music mashups are always published, and generally widely published,[244] so this fact would not negate a defense of fair use for mashup remixers. Thus, since the original works incorporated into mashups are published creative works, as the Court in *Campbell* held, this factor would not favor a finding for or against fair use.[245]

c. Amount and Substantiality of the Portions Used

The third factor in a fair use analysis is "the amount and substantiality of the portion [of the copyrighted work] used."[246] Such a determination considers both the quality and quantity of the portions sampled.[247] A quantitatively greater portion of the original that is used will rule against fair use,[248] and where the "heart of the [original]" is taken, a court will tend to find against fair use.[249] The third factor is highly fact dependent, and where a defendant establishes transformative use, courts will allow a greater taking, both qualitatively and quantitatively.[250] For instance, in *Campbell*, the Court stated that a greater taking is allowed for comment and criticism in order to "conjure up" the original in the imagination of the audience.[251] Thus, unless an audio mashup truly transforms the original works, which as noted above may be difficult to achieve,[252]

242. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994).
243. *Harper & Row*, 471 U.S. at 554.
244. Presumably, if a work were unpublished, a mashup remixer would not know of the work. Regardless, mashup remixers seem to target popular works which, of course, have been widely published. *See* mtfloyd, *supra* note 2, at 22. Otherwise, the ability to "capitalize" on the popularity of the recording would be diminished. *Id.*
245. *See Campbell*, 510 U.S. at 586.
246. 17 U.S.C. § 107(3) (2006).
247. *Campbell*, 510 U.S. at 586.
248. *Harper & Row*, 471 U.S. at 565.
249. *Id.*
250. *See Campbell*, 510 U.S. at 587–88.
251. *Id.* at 588.
252. *See* discussion *supra* Part III.B.3.a.i.

taking a significant amount of a work or taking an important part of a work may tip the balance against a finding of fair use and influence a court to find infringement.

Potentially, without establishing transformative use, Gillis's use of Biggy's entire verse from "Juicy"[253] could end up constituting infringement because it is such a substantial taking. Moreover, the chorus of Elton John's "Tiny Dancer"[254] may constitute the "heart" of the song since it is such a recognizable and lasting melody. "Smash Your Head"[255] may also infringe Elton John's copyright. But overall, the amount and substantiality of the portion of a specific song that Gillis uses depends greatly on the particular mashup and even on the specific sample of the original song used in the mashup. Some of the samples are one or two seconds long, whereas others, like the sample derived from Biggy's "Juicy," are a few minutes. But without a transformative use and with other factors against fair use, even a small one-time use may not be fair use. That said, as noted above, many mashup remixers, like Gillis, often take the "heart" of the song, the part that really makes the song identifiable, and where they loop the sample over and over, even a short sample may still not be fair use.

Moreover, with Danger Mouse's *The Grey Album*, in the song "Encore,"[256] the amount and substantiality would be difficult to determine without dissecting the mashup extensively, but since Danger Mouse mostly used small phrases from the Beatles' songs that did not have vocals, the amount and substantiality are potentially not that great. However, lyrics and vocals of the Jay-Z songs were taken almost in their entirety, though Jay-Z reportedly released the a cappella version of his album specifically to encourage the creation of mashups using the album, which may mean that he has implicitly given permission to use the album for mashups and remixes—or, at least, that he is unlikely to sue for infringement.[257]

In sum, the determination of the amount and substantiality of the portions used depends greatly on the specific mashup and the specific samples used in that mashup. Nonetheless, so long as the samples are short and do not take the "heart" of the original works, the likelihood of a finding of fair use is much greater. But, if the mashup sufficiently

253. THE NOTORIOUS B.I.G., *supra* note 212.

254. ELTON JOHN, *supra* note 211.

255. GIRL TALK, *supra* note 209.

256. DANGER MOUSE, *supra* note 201.

257. *See* Power, *supra* note 8, at 582–83. For a discussion of implied permission as it relates to audio mashups, see *infra* Part IV.A.2.

transforms the original works, taking greater portions and more significant portions is presumably fair. The commercial nature of the work may also weigh into the determination of the amount that can be taken. Taking nearly entire songs may be fair for private uses, but even short insignificant samples may be unfair for commercial uses. Accordingly, this balance of factors makes sense "in light of the purposes of copyright."[258] Since a transformed use advances the arts, the fair use doctrine allows the future artist to use a greater portion of the original artists' works, and because a commercial use exploits the original artist, thereby diminishing the incentive of the original artist to create art, the fair use doctrine restricts the amount of the original artist's work that the future artist can use.

d. Effect on the Market and Potential Markets

The fourth and final factor in the fair use analysis considers the effect of the secondary work on the original work's market and on any potential derivative markets for the original work, including potential licensing markets. The justification for evaluating the effect on the market derives from the purpose of copyright law to promote the progress of the arts by incentivizing artists.[259] If the works of future artists are more able to affect the market for the original works, artists will be less likely to create new works, which would contravene the purpose of copyright law. Moreover, similar to the consideration of exploitation in the determination of commercial nature and the justification for digital sampling constituting per se infringement, the fourth factor of fair use seems to evoke the principal that, of anyone, the original artists should be the ones to profit from their own works.

The question of direct market harm tends to hinge on whether the secondary work "usurps or substitutes for the market of the original."[260] Generally, for audio mashups, fans of the original work will not purchase the mashup instead of the original work because the mashup likely appeals to a different audience altogether.[261] Consumers, furthermore, seem unlikely to confuse the mashup with the original. However, in certain instances, an audio mashup may serve as a direct substitute for the original work and potentially

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

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

260. Castle Rock Entm't., Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 145 (2d Cir. 1998) (citing *Campbell*, 510 U.S. at 593).

261. *See generally* LESSIG, *supra* note 63, at 13 (presenting Gillis's opinion as to consumers' likelihood of buying the mashup song over the original).

compete for sales directly with the original work. Using the example of Danger Mouse's version of "Encore"[262] versus Jay-Z's original version, the songs are identical regarding lyrical and vocal substance and differ only in the musical accompaniment. Consumers can choose to purchase one or the other, or both, but Jay-Z only reaps the rewards of his creativity and labors if consumers pick his original version. Of course, in this particular situation, Jay-Z seems to have deliberately encouraged such a conflict by releasing the a cappella version of his album.[263]

A determination of market harm to potential derivative markets involves evaluating the effect of the secondary work on any derivative market that is likely to occur.[264] Since mashups are derivative works of the original works that they incorporate, the artists of the original works potentially lose licensing revenue from the mashup remixer's use of the works without license. And since sampled music is becoming more popular today, that potential market is indeed real and is becoming large; thus, the harm from a mashup remixer's unauthorized use could be more significant.

Thus, while mashups may often not directly affect the market of the original works they sample, the likelihood of harm for lost licensing revenues exists. In considering the purposes of copyright law, the other factors of fair use become important in the evaluation of the market harm for mashups. The more a mashup transforms the original works, is for noncommercial purposes, and uses small, insignificant portions of the original works, the greater the ability of the mashup to affect the market of the original and still be fair; but the less the work is transformed, the more commercial its purpose, and the greater and more significant the portions used, the less the ability of the mashup to affect the market of the original and still be fair.[265]

In sum, while mashup remixers technically violate several of the exclusive rights granted to copyright holders in creating mashups, the

262. DANGER MOUSE, *supra* note 201.

263. *See* Power, *supra* note 8, at 582–83.

264. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994).

265. Courts do not consider the positive effect that a derivative may have on the market for the original. *See, e.g.*, *Castle Rock*, 150 F.3d at 142. For instance, if Danger Mouse's album sparked interest in the Beatles for a new generation, the Beatles' album sales could increase significantly. While this may benefit the Beatles, it is not a consideration because it has little to do with promoting the progress of the arts. As such, it cannot reasonably be a limitation on the rights of artists. Nevertheless, the potential for the positive effect on the market may influence the original artist to allow the use of the original work or prevent him from bringing suit to stop such use.

limitations to these rights provide a means for mashup remixers, as future artists, to create mashups legally. Though Danger Mouse and Gillis, and mashup remixers with similar sampling practices, may make uses of works that seem to far exceed the scope of these limitations, the limitations could nonetheless be quite useful to future mashup remixers. Thus, keeping all the above in mind, the next issue becomes how future mashup remixers can avoid copyright infringement.

IV. MASHUP REMIXERS' GUIDE TO LEGALITY

As evidenced by the grant of exclusive rights to artists, which incentivize them to create art, and the limitations placed upon those rights, which reserve the use of that art to future artists, the current copyright system in the United States strikes an appropriate balance between the rights of current artists and the rights of future artists. In doing so, the current system furthers the purpose of copyright law as asserted in the U.S. Constitution. It seems that the use of many of the samples in the mashups of Danger Mouse and Gillis would not fall into one of the limitations on exclusive rights under the Copyright Act since the mashups generally seem to fail to advance the original works—and thus the progress of the arts—to a point that would justify such substantial use of the original artists' works.[266] Nonetheless, the creation of audio mashups, like any form of art, requires some degree of borrowing from previous artists' works. And, mashup remixers may do so legally. Under the purposes of copyright law, mashups are no different from any other art; copyright law permits borrowing to the extent necessary to advance the arts but limits that ability to borrow in order to maintain the incentive to create.

Numerous established uses of musical works are legally available to mashup remixers to create mashups, and other uses are developing. Mashup remixers can avoid liability for copyright infringement by adhering to such uses and avoiding uses that almost surely would expose them to liability. Moreover, in respecting the rights of the artists whose works they borrow, other future artists may in turn respect mashup remixers' rights the same way. The legal uses of copyrighted works that should prove particularly useful to mashup remixers are (1) uses that are authorized by copyright owners and (2) uses that are authorized by the limitations of exclusive rights in the

266. Very small samples may still qualify as fair use. *See* discussion *supra* Part III.B.3.c.

Copyright Act.[267] As a rule of thumb, uses not authorized by either the copyright owner or the Copyright Act would not be legal; furthermore, the use of foreign works may produce additional concerns for mashup remixers, including potential moral rights violations.[268]

A. Uses Under the Authority of the Copyright Holder

1. Licensing: You Get What You Pay For

The most direct method of obtaining the authority to use a preexisting work is to secure the express permission of the copyright holder.[269] The grant of such permission generally takes the form of a license, which is a contractual agreement between a licensor, the copyright holder, and a licensee, the mashup remixer, allowing a specified use of the work during a specified time for a specified price.[270] The parties to the licensing agreement are free to negotiate the details of the license.[271] Sampling remains prevalent in music popular today.[272] And in order to avoid liability for copyright infringement,[273] popular artists obtain licenses for the works they sample.[274]

Some proponents of mashups argue that requiring licensing for audio mashups would be prohibitively expensive.[275] Specifically, if distributed noncommercially, nearly any licensing fee would completely bar a mashup's creation, and if distributed commercially, because mashups tend to sample well-known works, little profit would remain for the mashup remixer after all of the licensing fees.[276] Fortunately for noncommercial mashup remixers, one of the primary uses authorized by the Copyright Act—fair use—places substantial

267. For a full discussion of the actual limitations themselves, see *supra* Part III.B.

268. *See supra* note 51.

269. Some mashup remixers, like 2manydjs, do in fact obtain permission to use all of the samples that they use in their mashups. mtfloyd, *supra* note 2, at 22, 27.

270. *See* RICHARD SCHULENBERG, LEGAL ASPECTS OF THE MUSIC INDUSTRY 405 (1999).

271. *See id.*

272. *See generally* Who Sampled, *supra* note 31 (displaying the works over the past few decades that have used samples).

273. Some artists may also license samples to respect the rights of other artists.

274. *See, e.g., Kanye West Snaps up 'Cola Bottle Baby' Sample for Hot New Single 'Stronger,' Written By Edwin Birdsong*, HIP-HOP PRESS, Oct. 8, 2007, http://www.hiphoppress.com/2007/10/kanye-west-snap.html (reporting Kanye West's acquisition of a license to sample a song for a new single).

275. Power, *supra* note 8, at 586.

276. *Id.*

weight on the commercial nature of the use.[277] Thus, while licensing may not be as appropriate of an option for noncommercial mashups, some other options, like the fair use limitation, suit noncommercial uses well; similarly, licensing may be better suited for commercial mashups since other options like fair use are less available in those situations.

Moreover, well-known artists command higher prices for licensing samples of their works because of the value of their celebrity and the quality of their music, not to make it difficult for lesser-known artists to sample their works. Part of the benefit that the mashup remixer receives from sampling well-known works is that the public is more likely to embrace their resulting mashup.[278] Thus, although the licensing fee may be higher for more well-known works, those works presumably contribute to the success of the mashup. If the sampled works are essentially the motivating factor in the audiences' enjoyment of the work, then much of the profits of the resulting work *should* inure to the original artists who provided that force. Additionally, because the artists who created the original works incurred costs in creating those works,[279] licensing fees essentially could be thought of as the recording and production costs incurred by mashup remixers. Mashup remixers who cannot afford the fees associated with licensing samples from well-known artists may consider licensing samples from lesser-known artists. Such artists would not be able to command the fees of more well-known artists. But, as mashup remixers gain popularity and become successful, they may be able to afford licenses from more well-known artists.[280]

277. 17 U.S.C. § 107 (2006).

278. *See* mtfloyd, *supra* note 2, at 27 ("And because the public will embrace a good remix on the strength of the original track's popularity . . . the [mashup] remixer can be a total unknown and still hit it big!").

279. Recording costs for popular artists can be substantial. *See* KRASILOVSKY & SHEMEL, *supra* note 123, at 22–23. In fact, few albums funded by record companies turn a profit. *Id.* at 22. Such is the nature of the entertainment business; sometimes songs are hits, and sometimes they are not. Independent artists may be more likely to profit than artists under record contracts; even so, independent artists incur costs in trying to record and distribute their music, which range from the cost of their instruments and equipment to the cost of recording studio time and the cost of the recording engineer to the costs of CD production and distribution. *Id.* at 21–22. Furthermore, even if artists utilize the advancements in recording technologies and the distributional capabilities of the Internet to record and distribute their music themselves, they do not do so for free. They have to pay for musical equipment, recording equipment, and CD production equipment.

280. Like a maturing band, which may start out with budget equipment and a homemade demo tape but eventually attain enough success to be able to afford state-of-the-art equipment and make a professional album, mashup remixers could upgrade.

2. Permission, Otherwise

Mashup remixers can essentially receive implied permission from artists, like Jay-Z, who release a cappella albums to encourage mashups and remixes of their works. While these artists retain the right to exclude future artists from the use of their works, they choose to more or less grant future artists the right to use them for the mere cost of the a cappella album. Not all artists support the creation of derivatives of their works;[281] however, some artists release a cappella albums, which suggests that these artists may be somewhat receptive to the use of their works in mashups and remixes.[282] Indeed, Elektra Records elicited the remixing expertise of John Oswald to create a CD based on the records of its own artists to celebrate forty years of operation, and the Grateful Dead gave Oswald access to their personal archives to create an album based on more than fifty of their live performances.[283] Additionally, David Bowie, in 2004, ran a contest in which fans could remix some of his works to make mashups.[284] Thus, while works that mashup remixers can use through the implied or express permission of the artists may currently only encompass a limited number of a cappella albums and grants to select individuals, some artists are embracing the concept of mashups and are encouraging the art form. In the near future, many more artists may freely offer their works for such use.

3. Creative Commons Communities

The Creative Commons is a nonprofit organization, founded by Stanford law professor Lawrence Lessig, aimed at promoting the creation of works and the sharing of those works.[285] A Creative Commons license essentially allows authors to distribute their works with "some rights reserved" rather than "all rights reserved."[286] This

281. *See, e.g.*, Lloyd de Vries, *Apple Sued over Use of Eminem Song*, CBSNEWS, Feb. 24, 2004, http://www.cbsnews.com/stories/2004/05/18/entertainment/main618071.shtml (reporting that Eminem's music publisher sued Apple for the use of an unauthorized derivative of one of Eminem's works in an advertisement).

282. *See* mtfloyd, *supra* note 2, at 22.

283. Davies, *supra* note 16, at 10. Oswald has been remixing and mashing up albums since the mid-1970s.

284. LESSIG, *supra* note 63, at 244. The contest rules required the creators of the mashups to assign all rights in their mashups over to Bowie. Though the users would not have been able to copyright the elements of the song, which belonged to Bowie, they would have been able to copyright the additional elements, such as the arrangements and selections of songs, as derivative works because they would have had Bowie's permission to "lawfully" use his works. *See* 17 U.S.C. § 103 (2006).

285. LITMAN, *supra* note 11, at 200.

286. *Id.* at 200–01.

license allows authors to communicate which rights they reserve and which they do not, thus permitting subsequent users greater access to and use of the works.[287] Many Creative Commons licenses grant the use of the works for noncommercial purposes but will generally require that the licensee obtain permission before using the works for commercial purposes.[288]

Online communities of musicians, who share in the creation of music, are developed on the basis of Creative Commons licensing. Creative Commons runs such a site, ccMixter.com, which is essentially a social networking Web site for musicians all around the world.[289] Users can upload and download samples, a cappella tracks, and mashups.[290] Mashup remixers can utilize such resources to either create entire audio mashups or supplement other samples in the creation of audio mashups; moreover, they can even create mashups of other audio mashups. As more communities like ccMixter develop, mashup remixers could have a vast wealth of material to draw upon.[291]

B. Use Under the Authority of the Copyright Act

In addition to the various uses of preexisting works that are available to mashup remixers through grants of authority from copyright holders, the Copyright Act provides limitations on the exclusive rights of artists to facilitate the progress of the arts, some of which deserve reemphasis here.[292]

1. What's Fair Is Fair

The limitations provided by the fair use doctrine allow future artists to use preexisting works where such use facilitates the progression of the arts and is not harmful to the artists of the preexisting works; thus, the fair use doctrine can be one of the most useful mechanisms for mashup remixers in legally using samples for audio mashups.[293] At the most basic level of use, if the mashup remixer does not intend to distribute mashups but merely creates

287. LESSIG, *supra* note 63, at 226.
288. *Id.*
289. *Id.* at 16.
290. *Id.*
291. Artists who create art from significant borrowing of other artists' expression seem generally more receptive to future artists subsequently using their works. *See* Boyle, *supra* note 166. Though, it would be rather hypocritical if they were not.
292. *See supra* Part III.B.
293. *See* 17 U.S.C. § 107 (2006).

them for the pleasure of the process and subsequent result, such a private use would potentially constitute fair use no matter the degree to which the original works are sampled or whether the resulting mashup transforms the originals.[294] In this case, a mashup remixer is presumably free to sample any work to any degree, so long as the mashup is never distributed.

At the next level, mashup remixers may never intend to sell a work or even play the work for an audience, but they may want to post the mashup online so that people can hear the work. Presumably, much less of the original works could be used for such a purpose than could be used for a private use. However, though it may be difficult to actually achieve,[295] if the mashup transforms the original works by truly criticizing or commenting on them, then much more of the works could be used. Regardless, short samples are probably fair for noncommercial uses whether or not the mashup transforms the original work. For mashup remixers like Danger Mouse, who may not distribute mashups commercially but nonetheless disseminates them widely, fair uses would need to be even shorter or sufficiently transformed.

If a mashup remixer can transform the original works through the mashup, then the ability to borrow from the original works increases greatly.[296] For highly transformed works, large amounts of copying may be fair, and even commercial uses presumably would be fair; since the new work would have advanced the original works and thus the arts, the mashup remixer should be able to profit from the work. Otherwise, depending on the level of the commercial purpose, even short samples may not be fair, especially if the sample consists of the heart of the original.[297]

2. Free for All in the Public Domain

The public domain consists of all works of art that are no longer protected by copyright law and all parts of works of art that are not granted copyright protection.[298] Once the copyright of a work expires, that work passes directly to the public domain for free use by the

294. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 468–70 (1984).

295. *See supra* Part III.B.3.a.i.

296. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 588 (1994).

297. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565 (1985).

298. An established rule of thumb adopted by folk musicians, though certainly not the rule under the Copyright Act, is that "a song is in the public domain if its author is unlikely to sue you." MICHAEL CHANAN, REPEATED TAKES: A SHORT HISTORY OF RECORDING AND ITS EFFECTS ON MUSIC 162 (1995).

public and future artists.[299] Moreover, certain elements of a work, such as the ideas encompassed in it, pass directly into the public domain upon the creation of the work.[300] Mashup remixers are free to use any work or part of any work in the public domain in the creation of audio mashups. Generally, the complete works that are currently in the public domain are very old works, and most sound recordings would not be in the public domain since most either have been recorded in the past thirty years or subsequently remastered.

The ideas encompassed in all works, however, pass directly into the public domain, and though a mashup remixer cannot *sample* the ideas of a work, ideas may nonetheless prove useful for creating mashups. For instance, without having first conceived the idea of combining preexisting works to create mashups, the art form would not exist. Mashup remixers can listen to other mashups for ideas about combining different genres that they have not tried and for particular arrangements. Original musical compositions and sound recordings contain numerous ideas that mashup remixers can utilize as well. Ideas for novel combinations of instrument tracks or ideas for various intros, endings, or bridges may come from original works. Innovative methods of extracting samples or putting them together and particular ways to modify and distort them may come from sound recordings and the recording engineers who created them.

3. Jumping Hoops Through De Minimis Loopholes

The Copyright Act, to some degree, allows the recreation of preexisting works and the subsequent sampling of that material. Under § 114(b), recreating a sound recording is not a violation of the sound recording copyright.[301] And, if the recreation only consists of a few notes and is only a few seconds long, the use of the musical composition is most likely de minimis.[302] However, a recreation could presumably be even longer than that. Considering fair use, if the use of the sampled recreation transforms the original or if the purpose of the use is noncommercial, much longer recreations may be fair. A recreation of a work may also reduce the likelihood that the resulting recreation is substantially similar to the musical composition of the original work.[303]

299. 17 U.S.C. §§ 302–05 (2006).

300. *See supra* Part III.B.2.

301. *See supra* Part III.B.1.

302. *See* Newton v. Diamond, 388 F.3d 1189, 1196 (9th Cir. 2004).

303. In order to establish copyright infringement, the plaintiff has to prove that the defendant's work is substantially similar to the plaintiff's work. Arnstein v. Porter, 154

The "quoting" of other works often involved in jazz music is similar to recreation,[304] since the quote would not infringe the sound recording but could potentially infringe the musical composition. But, quoting another work in the course of performing an original work would most likely be a fair use. Though the transformative value is likely low, because the artist is probably just paying homage to influences, and the use is presumably commercial, the quotes are generally very small—just a few bars, if that, and played in a single instance—and the effect on the market would not be significant because the performance could not serve as a substitute for the original and the licensing market for quoting in jazz is nonexistent.[305] In addition, since the quote is a recreation, the quote may differ to some degree from the original and thus the level of similarity may not even be substantial.[306]

4. Borrowing from Yourself

Mashup remixers are, of course, free to create original works, then sample those original works and mash those up. Sampling provides a certain degree of "edginess" to a work, and as performance tools, samplers can achieve certain results that are not possible with live instruments. In addition, the juxtaposition of

F.2d 464, 468–69 (2d Cir. 1946). Substantial similarity is not really an issue with digital sampling because the misappropriated sample is not just substantially similar to the original sound recording but is exactly the same as the original work. A defendant would probably concede copying and rely on a defense; alternatively, he could argue that the portions used from the original work are not protected or that the original is not copyrighted.

304. Jazz quoting differs significantly from audio mashups, however, since entire songs are not created out of quotes in jazz music. Rather, a quote may be used during the course of a solo in an original jazz composition. *See, e.g.*, WEATHER REPORT, *Havona*, *on* HEAVY WEATHER (Columbia Records 1977). During the fifth and sixth bars of his solo, which begins two minutes and thirty-five seconds into "Havona," Jaco Pastorius briefly quotes the introduction of Igor Stravinsky's *Rite of Spring*. *Id.*

305. As in most fair use cases concerning musical works, the second factor—the nature of the copyrighted work—is not determinative either way. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576–77 (1994).

306. Sampling sound recordings that were recorded before February 15, 1972, is not per se infringement of the sound recording copyright under the holding of *Bridgeport* because federal copyright protection did not extend to sound recordings before that time. *See* Bridgeport Music, Inc. v. Dimension Films, 2005 FED App. 0243A, ¶ 21 n.20, 410 F.3d 792, 804 n.20 (6th Cir.) (citing 17 U.S.C. § 301(c) (2000)). Some works, however, which were originally released before 1972 have subsequently been remastered and distributed on CD. Since the remaster is technically a new sound recording, sampling the remastered CD *would* constitute per se infringement of the sound recording. *See id.* ¶ 12, 410 F.3d at 798. Mashup remixers could sample the original records, but they would still need to consider whether or not the use infringes the musical composition copyright.

drastically different styles can add substance to a work. Thus, by creating original samples, mashup remixers can produce the desirable results of mashups without the worry of liability for copyright infringement.

C. *Do What Remixers Do and (Re)Mix*

Each of the authorized uses of original works for sampling in creating mashups does not have to be used exclusively and independently from the others. Rather, mashup remixers can combine the various authorized uses in order to more efficiently and more cost effectively produce mashups. For instance, a mashup remixer distributing commercially may save costs by only licensing one or two well-known works that will make everyone want to buy the work then add some short samples of other works, short recreations, and original samples to supplement those well-known works. Furthermore, while it may be extremely difficult to criticize all of the works used in a sample when numerous works are used,[307] focusing the criticism on one particular work and then licensing, recreating, and creating the other samples may make the ability to transform the use of that criticized work possible.[308] In all, there are many options available for mashup remixers to create mashups, whether or not their work actually advances the arts and thus justifies the use of artists' original works.

D. *Unauthorized Use Under Domestic Law and Potential International Liability*

Under U.S. copyright law, the only uses of artists' original works that are unavailable to future artists are uses of copyrighted works that do not fall into one of the limitations of artists' exclusive rights.[309] In other words, mashup remixers cannot violate an artist's exclusive rights. Thus, to save themselves from exposure to liability, mashup remixers should avoid such uses. Moreover, if mashup remixers use works that are copyrighted under the laws of a foreign country and do not have permission, such use may impose liability under the laws of that country. In particular, many countries recognize moral rights.[310] For instance, in the European Union, whether using unauthorized

307. *See supra* Part III.B.3.a.i.

308. *See, e.g.*, *Campbell*, 510 U.S. at 594 (finding that the defendant's work sufficiently criticized the plaintiff's work).

309. *See supra* Part III.B.

310. For a discussion of moral rights, see *supra* note 51.

samples of European Union works under the assumption of fair use or licensing samples from European Union artists, U.S. mashup remixers may find themselves in European Union courts for violation of the right of integrity of these artists for distorting and modifying these artists' works or for violation of the right of attribution for not accrediting the authors to the samples of their respective works.[311]

CONCLUSION

While the public and the music industry battle over the requisite access to and control over the works that artists create, the artists themselves are forgotten, and their interests are completely disregarded. And with audio mashups—where the actual tension created is between artists and mashup remixers, as future artists—such disregard is particularly unfortunate. Whether or not the public and the industry will recognize it, the fundamental purpose of copyright law—to promote the progress of the arts—necessitates *both* that artists be incentivized to create works of art and that future artists be able to use those works in order to advance the arts.[312] Thus, copyright law must strike a balance between the interests of current artists and the interests of future artists.

The Copyright Act accomplishes this balance of interests through the grant of exclusive rights[313] to current artists in order to incentivize them and through the implementation of limitations upon those rights so that future artists are able to use those works, to some extent, in order to produce new works and advance the arts. While digital sampling is per se infringement of copyright law,[314] the de minimis doctrine limits an artist's exclusive rights to protect only copying that is substantial.[315] And, under § 102(b), future artists may freely use the ideas of a preexisting work.[316] The purpose of the fair use doctrine is to prevent the copyright statute from becoming rigid to the point where "it would stifle the very creativity which that law is designed to foster;"[317] thus, a use is likely to be fair if the degree to which the use

311. *See* Bird & Ponte, *supra* note 51, at 273.

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

313. 17 U.S.C. § 106 (2006).

314. Bridgeport Music, Inc. v. Dimension Films, 2005 FED App. 0243A, ¶ 12, 410 F.3d 792, 798 (6th Cir.).

315. West Publ'g Co. v. Edward Thompson Co., 169 F. 833, 861 (C.C.E.D.N.Y. 1909), *modified*, 176 F. 833 (2d Cir. 1910).

316. 17 U.S.C. § 102(b) (2006).

317. Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos., 621 F.2d 57, 60 (2d Cir. 1980).

advances the arts exceeds the degree to which the artist requires incentive to create.

Since audio mashups exclusively contain digital samples, the de minimis doctrine generally does not apply to mashups.[318] Under § 114(b), however, the recreation of a sound recording does not violate the sound recording copyright, though it may violate the musical composition copyright.[319] In which case, if the samples in a mashup were recreations, the use could qualify as de minimis so long as the copying is not substantial.[320] The fair use doctrine can be particularly helpful for mashup remixers. While it may be difficult to actually transform a mashup, due to the inability to criticize or comment on the works used, if the purpose of the use is private or noncommercial, the likelihood that the use is fair is much greater.[321] Commercial use of samples as part of a mashup, however, would only permit the use of shorter samples.[322]

Because of the balance of interests created by the Copyright Act, mashup remixers can utilize combinations of several sources of authorized uses in order to create mashups, including uses authorized by copyright holders and uses authorized under the limitations of exclusive rights. By obtaining sampling licenses—whether licensing agreements, implied licenses, or Creative Commons licenses—and using original samples, recreated samples, ideas, and utilizing fair uses of works, mashup remixers are able to appropriately use the works of artists to advance the arts while not unfairly impeding the rights of artists to be incentivized. Thus, if the public and industry could get past their distorted interpretations of the purposes of copyright law, they would recognize that the current copyright laws of the United States provide an effective balance between interests and accordingly the best compromise between the public, the industry, and the artists in between.

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318. *See Bridgeport*, 2005 FED App. ¶ 15, 410 F.3d at 800.
319. *Id.*
320. *West Publ'g Co.*, 169 F. at 861.
321. *See* 17 U.S.C.A. § 101 (West 2005).
322. *See supra* Part III.B.3.c.