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Play Your Part: Girl Talk's Indefinite Role in the Digital Sampling Saga

Cover Page Footnote

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PLAY YOUR PART: GIRL TALK'S INDEFINITE ROLE IN THE DIGITAL SAMPLING SAGA

*Shervin Rezaie**

INTRODUCTION

In 2006, Greg Gillis was a twenty-four year old leading a double-life. During the day he was a biomedical engineer,¹ but by night he was slowly becoming an infamous mash-up artist. His albums mixed “Top 40” radio hits into a unique postmodern audio pastiche.² Under the moniker Girl Talk, Greg made his entrance into the limelight with the release of *Night Ripper*, his third album.³ *Night Ripper* began gaining attention as audiences became intrigued and excited by Greg’s ability to blend numerous artists, old and new, into one seamless track. To illustrate, the first track on *Night Ripper*, “Once Again,” digitally samples nearly twenty songs, ranging from classic artists such as Boston and Genesis to contemporary rap and pop artists like Ludacris and Oasis.⁴ Each digital sample is usually

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¹ Ryan Dombal, *Interviews: Girl Talk*, PITCHFORK, Aug. 30, 2006, <http://pitchfork.com/features/interviews/6415-girl-talk/>.

² *Id.*

³ Stewart Mason, *Biography: Girl Talk*, ALLMUSIC, <http://allmusic.com/cg/amg.dll?p=amg&sql=11:0xftxql0ld0e~T1>.

⁴ Michael D. Ayers, *White Noise: Girl Talk Has Built a Thriving Indie Following for His Sample-Centric Music in a Copyright Grey Area. Will His Next Album Push the Legal Envelope Even Further?*, BILLBOARD, June 14, 2008, at 27, 30. The identifiable digital samples include:

- * 0:00 Ciara featuring Petey Pablo - “Goodies”
- * 0:09 Boston - “Foreplay/Long Time”
- * 0:10 Ludacris featuring Bobby Valentino - “Pimpin’ All Over the World”
- * 0:32 Fabolous - “Breathe”
- * 1:21 Ying Yang Twins - “Wait (The Whisper Song)”
- * 1:21 The Verve - “Bittersweet Symphony”
- * 1:44 Outkast - “Intro” from *Speakerboxxx*

only a few seconds long and represents a mere fragment of the original song. The nineteen digital samples were then mixed together to create one innovative track with a time span of two minutes and forty seconds.⁵

By the end of 2006, *Night Ripper* made both *Rolling Stone's*⁶ and *Pitchfork's*⁷ top albums of the year list, even though iTunes and CD distributors refused to sell Greg's albums due to their use of unlicensed digital samples.⁸ Despite Greg's handicap in distributing his album, his live show reputation led to bookings across the country, allowing him to quit his day job as a biomedical engineer, and ending his double life.⁹ The show's party atmosphere usually included toilet paper shooters, large balloons, and Greg barely clothed by the end. By early 2008, Greg began to receive national press from *Newsweek*¹⁰ and *The New York Times*.¹¹ However, the attention was not purely due to his music ingénue, but focused more on the fact that Greg's albums contain over 300 samples, which he neither licensed nor received permission to use.¹² In spite of this, Greg has yet to see

- * 1:47 M.I.A. - "Pull Up the People"
- * 1:48 Webbie - "Give Me That"
- * 1:57 Oasis - "Wonderwall"
- * 1:57 Slim Thug - "I Ain't Heard of That"
- * 2:06 Arrested Development - "Tennessee"
- * 2:08 Webbie - "Give Me That"
- * 2:08 Young Jeezy featuring Mannie Fresh - "And Then What"
- * 2:19 Genesis - "Follow You, Follow Me"
- * 2:19 Boredoms - "Acid Police"
- * 2:22 Positive K - "I Got a Man"
- * 2:30 The Five Stairsteps - "O-o-h Child"
- * 2:38 Eminem - "Ass Like That"

Id.

⁵ *Id.*

⁶ Robert Christgau et al., *The Top 50*, ROLLING STONE, Dec. 28, 2006, at 102, 106.

⁷ Pitchfork Staff, *Top 50 Albums of 2006*, PITCHFORK, Dec. 19, 2006, <http://www.pitchforkmedia.com/article/feature/40007-top-50-albums-of-2006/2/>.

⁸ Robert Levine, *Steal This Hook? D.J. Skirts Copyright Law*, N.Y. TIMES, Aug. 7, 2008, at E1.

⁹ Chris Bodenner, *Girl Talk, Interrupted*, CAMPUS PROGRESS, Dec. 10, 2007, <http://www.campusprogress.org/fieldreport/2290/girl-talk-interrupted>.

¹⁰ Steven Levy, *Politics and Hip-Hop Are Doing a Mash-Up*, NEWSWEEK, June 25, 2007, at 20.

¹¹ Levine, *supra* note 8.

¹² Madeleine Brand, *Girl Talk Chops Pop Music to Pieces*, NPR, Oct. 10, 2008, <http://www.npr.org/templates/story/story.php?storyId=95596414>.

a courtroom for his alleged infringement.¹³

In June 2008, *Feed the Animals*, Greg's much-anticipated follow up to *Night Ripper*, was released.¹⁴ The release was made by Illegal Art under a "pay-what-you-want" model, which was first utilized by Radiohead for their *In Rainbows* release.¹⁵ Under this model, the consumers pay whatever amount they deem appropriate, including nothing, to download *Feed the Animals*.¹⁶ *Feed the Animals* garnered attention not just from Greg's fans, but also from the artists that Greg sampled.¹⁷ Some artists, like Mike Patton of Faith No More, are pleased with Greg's use of their work, while others, like The Guess Who, claim they will chase down anyone whom infringes of their catalogue.¹⁸ With artists and the press taking increasing note of Greg's work, legal ramifications seemed inevitable. In fact, Greg's scheduled interview for this Comment was canceled a week before it was scheduled to occur. The reason for the cancellation was that Greg would no longer grant interviews that dealt with any legal issue pertaining to his work and would only grant an interview if it would promote his albums or shows. This suggests that the threat of legal action had become more of a reality. Both Greg and Illegal Art have been well aware of such a threat materializing and have stated that Greg's use of digital samples is protected under the fair use doctrine.¹⁹ The samples are claimed to be transformative—they are short in duration, cut up, and put into a completely new context—making his use analogous to the copying done with parodies.²⁰

This Comment will examine Greg's potential to prevail against a claim of copyright infringement under current law. Part I will describe digital sampling and provide a brief history of its use. Part II will discuss copyright protection for both musical compositions and sound recordings, and the availability of the *de minimis* defense when either a musical composition or sound recording's copy-

¹³ *Id.*

¹⁴ Levine, *supra* note 8.

¹⁵ Rob Walker, *Mash-Up Model*, N.Y. TIMES, July 20, 2008, at MM15.

¹⁶ *Id.*

¹⁷ John Jurgensen, *Musician Makes Tunes By Borrowing Others*, WALL ST. J., June 27, 2008, at B7.

¹⁸ *Id.*

¹⁹ Levine, *supra* note 8; Mark Richardson, *Interviews: Girl Talk*, PITCHFORK, Oct. 6, 2008, <http://www.pitchfork.com/features/interviews/7522-girl-talk/>.

²⁰ Levine, *supra* note 8; *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

right is infringed upon. Part III will examine the fair use doctrine and Greg's ability to argue that defense if a copyright infringement claim is brought against him.

I. DIGITAL SAMPLING AND ITS HISTORY

Digital sampling takes a portion from an existing recorded work and makes use of that portion in a new musical work.²¹ The process usually begins with an artist who wishes to use a beat or instrumentation from an existing work in her own work.²² Today, the portion desired is taken from the sound recording by the use of a computer that captures the desired segment and creates a digital sample.²³ Then, the digital samples are usually modified in some fashion by either speeding up, slowing down, or distorting the sample.²⁴ The modified digital sample is then incorporated into a new musical work, completing the sampling process.²⁵ Sampling made its first significant impact through the world of hip-hop.²⁶ Mash-ups then became, the subsequent genre to exploit the use of digital samples in new compositions.²⁷ Greg's unique form of mash-ups is the prospective next chapter in the digital sampling saga.

Today, hip-hop is an empire of the music industry, familiar to American households all over the country.²⁸ While most people are familiar with the flashy and edgy world of hip-hop today, few are familiar with its origins.²⁹ The origins of hip-hop and sampling's role in it are necessary to understand the context of the copyright issues involved with sampling.

Hip-hop was born from block parties in the New York City

²¹ Jeffrey H. Brown, Comment, "*They Don't Make Music the Way They Used to*": *The Legal Implications of "Sampling" in Contemporary Music*, 1992 WIS. L. REV. 1941, 1942 (1992).

²² Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271, 276 (1996).

²³ *Id.* at 275.

²⁴ *Id.* at 276.

²⁵ *Id.* at 277.

²⁶ *Id.*

²⁷ 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, 580-81 (2007).

²⁸ Horace E. Anderson, Jr., "*Criminal Minded?*": *Mixtape DJs, the Piracy Paradox, and Lessons for the Recording Industry*, 76 TENN. L. REV. 111, 126 (2008).

²⁹ See DJ Kool Herc, *Introduction to JEFF CHANG, CAN'T STOP WON'T STOP: A HISTORY OF THE HIP-HOP GENERATION*, at xi, xi-xii (St. Martin's Press 2005).

boroughs, where DJs would spin records while MCs would hype-up a dancing crowd.³⁰ The exercise of sampling to create new musical works would stem from these neighborhood block parties in the early 1970s.³¹ At these parties, DJs would mix records creating seamless transitions between songs to ensure that there was never a dull moment in the party.³² Initially, the breaks—the part of a song where the percussion section takes over and jams for thirty to fifty seconds—were a favorite of break-dancers who preformed dance moves in syncopation with the break.³³ DJs recognized the draw and the appeal break-dancers brought to the parties, but breaks were often too short for every dancer to have an opportunity to show off their moves.³⁴ Thus, the DJ began looping the breaks.³⁵ Looping was achieved by playing a break on one turntable, while on the other turntable the DJ cued the same break, which was brought in as the originally played break came to an end.³⁶ This created a continuous and potentially endless break-beat for the break-dancers and helped increase the popularity of block parties. The natural progression from there was to add a microphone.

Kool Herc, one of three “God Fathers” of hip-hop, helped pioneer the development of the endless break-beat and brought the evolution of hip-hop to the next level by rhyming over the break-beats at block parties.³⁷ Eventually, people came to Kool Herc’s parties just to hear him rhyme and were soon demanding tapes of his performances.³⁸ Recognizing an opportunity, Kool Herc and other MCs began to make tapes and sell them in their respective New York City boroughs.³⁹ These tapes sampled breaks that usually came from funk records and other copyrighted material, with the MCs rhyming original lyrical verses over the looped break-beats.⁴⁰ Thus, sampling

³⁰ CHANG, *supra* note 29, at 78.

³¹ *Id.* at 79.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 79-80.

³⁵ CHANG, *supra* note 29, at 79.

³⁶ *Id.*

³⁷ *Id.* at 79, 89-90.

³⁸ Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983, 989-90 (2004).

³⁹ Anderson, Jr., *supra* note 28, at 140-41.

⁴⁰ Andre L. Smith, *Other People’s Property: Hip-Hop’s Inherent Clashes with Property Laws and Its Ascendance as Global Counter Culture*, 7 VA. SPORTS & ENT. L.J. 59, 63 (2007).

first started in the form of an analog sample. As technology progressed, so did sampling, which has now evolved into digital sampling.⁴¹ The use of computers simplified the sampling process and allowed digital sampling to become a common practice in the creation of new musical works.⁴²

At first, little attention was paid to the rappers' tapes, and this was largely because there was not much to gain from a block party DJ/rapper in those days.⁴³ While the record companies failed to recognize what was going on in the New York City boroughs, hip-hop was beginning to gain momentum and in 1979, "Rapper's Delight" by the Sugarhill Gang became an iconic step up for hip-hop.⁴⁴ "Rapper's Delight" was not the first mainstream single or hit for hip-hop, but it is usually regarded as the song that made rap music popular to the mainstream.⁴⁵ "Rapper's Delight" sampled the break from Chic's "Good Times," and the Sugarhill Gang rhymed over a loop of that break.⁴⁶ The two members of Chic, who performed the break, then threatened legal action.⁴⁷ The Sugarhill Gang responded by giving both Chic members credit as co-writers of "Rapper's Delight" to avoid the threatened legal action.⁴⁸

While legal action was merely a threat early on, *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*⁴⁹ is commonly regarded as the first major case to address the issue of digital sampling in the courts.⁵⁰ In that case, rapper Biz Markie's musical work "Alone Again" sampled Raymond O'Sullivan's "Alone Again Naturally," using only three words and a small portion of the music from O'Sullivan's original.⁵¹ The court found that O'Sullivan was the copyright owner and found in his favor for copyright infringement

⁴¹ Matthew G. Passmore, Note, *A Brief Return to the Digital Sampling Debate*, 20 HASTINGS COMM. & ENT. L.J. 833, 838-39 (1998).

⁴² *Id.*

⁴³ See Smith, *supra* note 40, at 64-65.

⁴⁴ Brown, *supra* note 21, at 1948-49.

⁴⁵ *Id.*

⁴⁶ Larry Flick, *Billboard Tribute: Nile Rodgers*, BILLBOARD, Feb. 5, 2000, <http://www.billboard.com/#/news/billboard-artist-of-the-day-nile-rodgers-1314877.story>.

⁴⁷ See *id.*

⁴⁸ Blender Staff, *The 50 Most Awesomely Dead Rock Stars*, BLENDER, Feb. 7, 2006, <http://www.blender.com/guide/68198/50-most-awesomely-dead-rock-stars.html>.

⁴⁹ 780 F. Supp. 182 (S.D.N.Y. 1991).

⁵⁰ Power, *supra* note 27, at 583.

⁵¹ *Id.*

against Biz Markie.⁵² Interestingly, Biz Markie failed to bring any copyright infringement defenses such as fair use or *de minimis* copying.⁵³ Instead, Biz Markie argued that such copying was common practice in hip-hop music and should, therefore, excuse a claim of infringement.⁵⁴ The court was not persuaded by this argument and would cite to the Seventh Commandment, “Thou Shall Not Steal,” as legal precedent to find that Biz Markie had infringed on O’Sullivan’s copyright to “Alone Again (Naturally).”⁵⁵ The court’s decision would foreshadow future courts’ reasoning in cases involving digital sampling and an unwillingness to recognize any value in new works that make use of digital sampling.

The next stage in the evolution of digital sampling came from the mash-ups genre. Mash-ups differ from hip-hop sampling in that mash-ups contain no original material in the new musical work.⁵⁶ This is significant because the addition of original material in hip-hop may favor a finding of transformative use in a fair use analysis.⁵⁷ Typically, a mash-up will consist of an acappella version of a copyrighted recording over an instrumental version of another copyrighted recording.⁵⁸ The novelty is that the two previously unrelated songs have now become one. This type of copying has long been recognized in the art world as postmodern art.⁵⁹ Andy Warhol’s “Campbell Soup Can” is just one example of copyrighted material used to create postmodern art.⁶⁰ The principle of postmodern art is to use already existing work and re-contextualizing it to either comment, criticize, or praise the original.⁶¹ Unfortunately, there is little legal history regarding postmodern art copyright infringement, because artists like Warhol generally settle claims outside of court.⁶² The same is true with postmodern mash-ups.⁶³

⁵² *Id.* at 183-84.

⁵³ *See generally id.* at 182.

⁵⁴ *Id.* at 184.

⁵⁵ *Grand Upright Music Ltd.*, 780 F. Supp. at 183.

⁵⁶ Power, *supra* note 27, at 579.

⁵⁷ *See infra* Part III.

⁵⁸ Philip Meehan, *Boot Camp: Mashing for Beginners*, BOOT CAMP, 2004 <http://www.paintingbynumbers.com/bootcamp/>.

⁵⁹ Brad Osborn, *Listening to Girl Talk as Postmodern Pastiche*, THE DAILY, Mar. 25, 2009, <http://dailyuw.com/blog/2009/03/25/listening-girl-talk-postmodern-pastiche/>.

⁶⁰ Power, *supra* note 27, at 586.

⁶¹ *Id.* at 586-88; Szymanski, *supra* note 22, at 315.

⁶² Power, *supra* note 27, at 586-87.

⁶³ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 802 (6th Cir. 2005).

One of the most famous mash-ups to date is the *Grey Album* by Danger Mouse. The *Grey Album* combined acappella samples from the *Black Album* by Jay-Z with newly arranged instrumental samples taken from the *White Album* by The Beatles.⁶⁴ Jay-Z had authorized the use of his acappella tracks for remixes, however, The Beatles had not.⁶⁵ The Beatles' record label, EMI, halted sales of the *Grey Album*, and it seemed likely that Danger Mouse would face a claim of copyright infringement.⁶⁶ While sales of the *Grey Album* ceased, it was still available for free online.⁶⁷ In the end, Danger Mouse never faced a claim of copyright infringement and was actually signed by EMI to produce the Gorillaz platinum album *Demon Days*, which ironically utilized sampling.⁶⁸ This indicates that the music industry recognizes the talent and value involved in digital sampling. Rather than subjecting themselves to legal proceedings where a stigma against EMI would have likely resulted for going after a common man's art project, EMI exercised self-help and signed Danger Mouse to exploit his talents for their profit.⁶⁹

Greg represents the next stage of how digital sampling is used in the music industry today. He samples over 300 songs per album that are usually first mixed together as one free flowing mix, which, once completed, is then separated into tracks.⁷⁰ Whereas mash-ups usually join together just two separate songs, Greg's new work samples a plethora of different songs making his compositions far more complex, while at the same time pushing the boundaries of the genre.⁷¹ The samples vary in length, with some samples consisting of mere seconds of the original work, while other samples include an entire verse of the original work.⁷² Thus, Greg's risk and the implications of copyright infringement claims against him are far greater

⁶⁴ Power, *supra* note 27, at 580.

⁶⁵ *Id.* at 580, 582-83.

⁶⁶ *Id.* at 580.

⁶⁷ *Id.*

⁶⁸ Marris Brown, Biography: Danger Mouse, Allmusic, <http://www.allmusic.com/cg/amg.dll?p=amg&sql+11:wzfexqe0ldhe~T1>.

⁶⁹ Daniel Kreps, *Danger Mouse's Dark Night Of the Soul Album Threatened By Lawsuit*, ROLLING STONE, May 15, 2009, <http://www.rollingstone.com/rockdaily/index.php/2009/05/15/danger-mouses-dark-night-of-the-soul-album-threatened-by-lawsuit/>.

⁷⁰ Levine, *supra* note 8.

⁷¹ *Id.*

⁷² Mike Barthel, *Girl Talk Is Not Fair Use*, IDOLATOR, Nov. 10, 2008, <http://idolator.com/5081637/girl-talk-is-not-fair-use>.

than other artists who have utilized digital sampling because of the sheer volume of songs and artists he has sampled.

II. COPYRIGHT PROTECTION AND INFRINGEMENT

Copyright law gives an owner certain exclusive rights to the expression of their idea.⁷³ The authority creating such rights comes from Article I, § 8 of the Constitution, which provides, “The Congress shall have Power To Promote the Progress of Science and useful Art, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writing and Discoveries.”⁷⁴ The result is the 1976 Copyright Act, which is intended to provide incentive for individuals to create with a special reward of a limited monopoly on their work and to allow the public to benefit from that work after their limited period expires.⁷⁵ Section 106 of the 1976 Copyright Act provides six separate and exclusive rights: the exclusive right to reproduce the copyrighted work in copies; to prepare derivative works based on the original material; to distribute copies of their work; to perform their work publicly; to display their work publicly; and to perform their work publicly by means of a digital audio transmission.⁷⁶

A claim of copyright infringement arises when another has violated one of the owner’s exclusive rights.⁷⁷ To establish a claim of infringement the copyright holders must prove ownership of a valid copyright and that the defendant copied the protected material without permission.⁷⁸ With musical works, two separate copyrights exist for every recording of a song.⁷⁹ First, the musical composition of the work—the lyrics and musical arrangement—receives a copyright.⁸⁰ Second, the sound recording of the work—the fixation of a performance of the musical composition—receives a copyright.⁸¹ The reason for the separate copyrights is because the sound recording of a musical composition, even when performed by the same artist,

⁷³ 17 U.S.C.A. § 106 (West 2009).

⁷⁴ U.S. CONST. art. I, § 8.

⁷⁵ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

⁷⁶ 17 U.S.C.A. § 106.

⁷⁷ *Rogers v. Koons*, 960 F.2d 301, 306 (2d Cir. 1992).

⁷⁸ *Id.*

⁷⁹ 17 U.S.C.A. § 102(a) (West 2009).

⁸⁰ *Id.* § 102(a)(2).

⁸¹ *Id.* § 102(a)(7).

may change from performance to performance and, therefore, the sound recording of each performance will need its own separate copyright protection.⁸² Thus, there is a copyright for the fixation of the music composition in sheet music and a copyright for the fixation of the performance of the composition embodied in a sound recording. This is not like a book or other copyrighted material because only a book's substance receives copyright protection, not the pages and binding the substance is printed on.⁸³ However, an author reading the book aloud could copyright a sound recording of that performance because it would be a fixation of how the author delivered and presented the copyrighted content at that time, which could affect the overall interpretation of the content.⁸⁴ Thus, for example, the sampling of a book on tape would implicate two copyrights. One copyright for the book itself and another for the performance fixed in the recording. Therefore, a sound recording copyright in music is necessary to protect the performances that brought the musical composition to life.

The significance of the two different copyrights is twofold. First, having two different copyrights means potentially two parties may have claims of copyright infringement against an artist utilizing digital sampling.⁸⁵ Generally, the first party is the artist who created the musical composition and the second party is the record label that provided the means for making a sound recording.⁸⁶ Even though a digital sample is physically taken from a sound recording, that copying will still implicate both copyrights.⁸⁷ For Greg, this means he could potentially face 600 copyright infringement claims for the use of 300 samples. Second, courts have recognized the *de minimis* defense in claims of copyright infringement based on an infringement of one's musical composition right,⁸⁸ but have not recognized the defense when it pertains to an infringement of one's sound recording rights.⁸⁹

⁸² *Bridgeport*, 410 F.3d at 800.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Don E. Tomlinson, Texas A&M University, *Digital Sound Sampling: Sampling the Options*, http://higherred.mcgraw-hill.com/sites/dl/free/007288259x/30711/Digital_sampling.doc (last visited Aug. 24, 2009).

⁸⁷ *Id.*

⁸⁸ *Newton v. Diamond*, 388 F.3d 1189, 1192 (9th Cir. 2004).

⁸⁹ *Bridgeport*, 410 F.3d at 801.

The first element in a copyright infringement claim of either a musical composition or sound recording is rarely a difficult issue because ownership is easy to establish, and the use of a digital sampling always violates either the owners' right to reproduce the work, the right to produce derivative works, or the right to distribute the work.⁹⁰ The second element requires the owner to prove that the copying of the original was done without permission.⁹¹ This element requires the owner to demonstrate that the defendant had both access to the copyrighted material and that the works of the defendant and plaintiff have substantial similarity.⁹² Access is easily satisfied because the process of sampling implicitly establishes access.⁹³ Without access a digital sample simply cannot exist.⁹⁴ Thus, the key to a copyright infringement claim lies in whether a digital sample shares substantial similarity to the original work.

Generally, substantial similarity is measured by the test of "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work."⁹⁵ The *de minimis* defense, a derivation of substantial similarity, comes into play with this analysis.⁹⁶ The *de minimis* defense provides that despite the admission of an unauthorized use of a copyrighted work the use must be significant in order to constitute infringement.⁹⁷ Copying alone is not conclusive of infringement; some copying is permitted and the law will not concern itself with minute or trivial copying.⁹⁸ The courts will use the "fragmented literal similarity" analysis to determine if the copying is *de minimis* in cases where only a small portion of the original work is copied.⁹⁹ "Fragmented literal similarity" still recognizes that if the quantitative amount copied is a substantial portion of the copyrighted work, the copying may be found to

⁹⁰ *Koons*, 960 F.2d at 306.

⁹¹ *Id.*

⁹² *Bridgeport Music, Inc. v. Dimension Films L.L.C.*, 230 F. Supp. 2d 830, 840 (M.D. Tenn. 2002).

⁹³ *Szymanski*, *supra* note 22, at 299 n.103.

⁹⁴ *Id.*

⁹⁵ *Bridgeport Music*, 230 F. Supp. 2d at 840 (quoting Tuff 'N' Rumble Mgmt., Inc. v. Profile Records, Inc., No. 95 Civ. 0246 (SHS), 1997 WL 158364 (S.D.N.Y. Apr. 2, 1997)).

⁹⁶ *Id.* at 841 (citing *Warner Bros. Inc. v. Am. Broadcasting Cos.*, 720 F.2d 231, 242 (2d Cir. 1983)).

⁹⁷ *Newton*, 388 F.3d at 1192.

⁹⁸ *Id.* at 1193.

⁹⁹ *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1257 (C.D. Cal. 2002).

have substantial similarity.¹⁰⁰ Additionally, in cases where the quantity copied is small, but the qualitative importance of the portion copied is great, a finding of substantial similarity will be just under the “fragmented literal similarity” analysis.¹⁰¹ However, if the similarity is only to nonessential matters, a finding of substantial similarity will not be appropriate because the copying is *de minimis* and, thus, there is no copyright infringement.¹⁰²

In *Newton v. Diamond*,¹⁰³ this test was used to determine whether a three-note, six-second digital sample of plaintiff’s musical composition had any qualitative importance.¹⁰⁴ The digital sample represented only two percent of plaintiff’s song.¹⁰⁵ The defendant had already obtained a license from plaintiff for the sound recording.¹⁰⁶ Therefore, the analysis did not focus on any performance aspects of the sample, but was isolated to the musical arrangement of the six-second portion of the musical composition sampled.¹⁰⁷ Recognizing that the defendant admitted to copying a small portion of the musical composition, the court needed to determine whether the copying was of qualitative importance to the musical composition.¹⁰⁸ The court relied on an expert’s testimony that stated the sampling of three notes separated by a half step was “simple, minimal and insignificant.”¹⁰⁹ Thus, the court held that such a copying of “nonessential matters” of the musical composition was *de minimis*, and dismissed the copyright infringement claim.¹¹⁰

While the *de minimis* defense was recognized for musical compositions, just one year later a sister court would find, in *Bridgeport Music, Inc. v. Dimension Films*,¹¹¹ that when dealing with a copying of sound recordings, the *de minimis* defense was no longer applicable.¹¹² Interestingly, the facts of *Bridgeport* do not vary much

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 1256.

¹⁰³ *Newton*, 388 F.3d at 1189.

¹⁰⁴ *Id.* at 1196.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1194.

¹⁰⁷ *Id.* at 1194-96.

¹⁰⁸ *Newton*, 388 F.3d at 1194-95.

¹⁰⁹ *Id.* at 1196.

¹¹⁰ *Id.* at 1195-96.

¹¹¹ *Bridgeport*, 410 F.3d 792.

¹¹² *Id.* at 801-02.

from the facts of *Newton*. In *Bridgeport*, the plaintiff brought a claim of copyright infringement against the defendant for its use of a four-second digital sample of a three-note guitar solo taken from *Get Off Your Ass and Jam* (“*Get Off*”) by George Clinton, Jr. and the Funkadelics.¹¹³ The four-second sample made up three percent of *Get Off*.¹¹⁴ Compared to the sample taken in *Newton*, which was six-seconds long and represented two percent of plaintiff’s original work,¹¹⁵ the fact patterns of both cases are nearly identical except for one distinction: *Newton* was based on copyright infringement of a musical composition,¹¹⁶ and *Bridgeport* was based on copyright infringement of a sound recording.¹¹⁷

In *Bridgeport*, the United States Court of Appeals for Sixth Circuit reasoned that any sampling of a sound recording constituted copyright infringement, and thereby, eliminated the substantial similarity element when determining whether an unauthorized copying occurred.¹¹⁸ The court relied on a literal statutory interpretation and balanced the two interests of copyright law in coming to its conclusion to eliminate the substantial similarity analysis.¹¹⁹ One interest of copyright law is to adequately protect the original works and the other interest is to foster further creativity.¹²⁰ Prior to 1971, sound recordings were not a separate copyright from musical composition copyright.¹²¹ The reason why sound recordings were eventually given a separate copyright was due to advances in technology that facilitated the piracy of copyrighted work.¹²² Thus, it became necessary to provide a copyright holder with the exclusive right to “duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording[.]” under § 114(b) of the 1976 Copyright Act.¹²³ The court also reasoned that creativity was not adversely affected because the world could still imitate original works, but could not copy from a sound

¹¹³ *Id.* at 796.

¹¹⁴ *Bridgeport*, 230 F. Supp. 2d at 841.

¹¹⁵ *Newton*, 388 F.3d at 1196.

¹¹⁶ *Id.* at 1192.

¹¹⁷ *Bridgeport*, 410 F.3d at 796.

¹¹⁸ *Id.* at 801-02.

¹¹⁹ *Id.* at 800, 805.

¹²⁰ *Id.* at 800.

¹²¹ *Id.*

¹²² *Bridgeport*, 410 F.3d at 800.

¹²³ *Id.* (quoting 17 U.S.C.A. § 114(b) (West 2009)).

recording.¹²⁴ Thus, the two purposes of copyright law were still in balance. The court continued in its line of reasoning by finding that if one may not pirate a whole sound recording, it would not be just to allow sampling of a portion of the whole.¹²⁵ Support, again, was found in § 114(b), which provides that, “the exclusive right of the owner of copyright in a sound recording under clause (2) of *section 106* is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.”¹²⁶ Thus, the owner of a copyright in a sound recording was found to have the exclusive right to sample his or her own work, which meant there would no longer be a need to analyze substantial similarity to determine whether there was an unauthorized copying.

The court explicitly held, “[g]et a license or do not sample.”¹²⁷ In creating this bright-line rule, the court provided an additional three points to justify their elimination of the substantial similarity element with respect to sound recording versus musical compositions.¹²⁸ The first was ease of enforcement.¹²⁹ This was largely based on the reasons for creating a separate sound recording copyright and § 114(b), which clarified what exclusive rights a sound recording held.¹³⁰ The court was also persuaded by law journals, which interpreted § 114(b) to mean that digital sampling of a sound recording requires a license—otherwise it is an infringement of an owner’s copyright.¹³¹ Additionally, the court relied on the difficulties involved in navigating through a case when the *de minimis* defense is brought, despite its own admission that the lower court properly analyzed the case.¹³² Thus, the need of a bright-line rule seemed purely to increase judicial economy, contrary to the court’s assertion.¹³³ Second, the balance between creativity and protection would be met

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* (quoting 17 U.S.C.A. § 114(b)).

¹²⁷ *Bridgeport*, 410 F.3d at 801.

¹²⁸ *Id.* at 801-03.

¹²⁹ *Id.* at 801.

¹³⁰ *Id.*

¹³¹ *Id.* at 803 (citing Susan J. Latham, *Newton v. Diamond: Measuring the Legitimacy of Unauthorized Compositional Sampling—A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J. 119, 125 (2003)).

¹³² *Bridgeport*, 410 F.3d at 802.

¹³³ *Id.* at 802.

because the market would control the price of samples, and one would not pay more than it would cost to recreate the desired sample, which they are free to do.¹³⁴ Lastly, the court found that sampling is always an intentional taking of another's work product that should not be allowed, citing *Grand Upright Music* for support of this conclusion.¹³⁵ Regardless of the size of the digital sample, it was taken because it has something of value, and it was a physical taking from the sound recording, not an intellectual taking.¹³⁶ The very reason there was a taking was because it cuts cost or adds a desired element to the new recording, or both.¹³⁷ Therefore, the court in *Bridgeport* found that exclusive protection of the original work's sound recording was necessary to ensure the creator could enjoy the fruits of her labor.¹³⁸ Taken together, the three justifications and a strict statutory interpretation made the "fragmented literal similarity" analysis used in a *de minimis* defense no longer relevant and eliminated the substantial similarity element in sound recording copyright infringement cases.¹³⁹ Thus, the only way an artist may sample another's sound recording is by paying a licensing fee or by receiving permission from the copyright owner.

Greg's latest album, *Feed the Animals*, utilizes 300 samples.¹⁴⁰ Not a single sample is used with express permission or is licensed.¹⁴¹ While Greg has been able to avoid legal ramification thus far,¹⁴² artists like The Guess Who have vowed to hunt down those who infringe on its copyrighted work.¹⁴³ No longer granting interviews pertaining to the legal issue suggests that lawsuits have become more probable to Greg.¹⁴⁴

Both *Newton* and *Bridgeport* are relevant to the copyright infringement claims Greg may face. It has been established that when dealing with digital sampling cases the first of the two elements,

¹³⁴ *Id.* at 801.

¹³⁵ *Id.*

¹³⁶ *Id.* at 801-02.

¹³⁷ *Bridgeport*, 410 F.3d at 802.

¹³⁸ *Id.* at 800, 805.

¹³⁹ *Id.* at 798.

¹⁴⁰ Levine, *supra* note 8, at E1.

¹⁴¹ *See id.*

¹⁴² *Id.*

¹⁴³ Jurgensen, *supra* note 17, at B7.

¹⁴⁴ *See supra* Introduction.

ownership of a valid copyright, is rarely one of contest.¹⁴⁵ Hence, the two-part analysis falls on the second element: whether there is an unauthorized copying of the owner's work; and therefore, whether there is substantial similarity.¹⁴⁶ The defense of *de minimis* copying is still available against claims of musical composition copyright infringement.¹⁴⁷ However, when dealing with claims of sound recording copyright infringement, there is no longer an examination of substantial similarity.¹⁴⁸ With that in mind, the potential for Greg to defend against a claim of musical composition copyright infringement will be analyzed first, followed by an analysis of a sound recording copyright infringement claim.

Greg acknowledges his use of copyrighted material without permission in making mash-ups, but the fact that he only uses small portions of a track could allow him to establish the defense of *de minimis* copying against musical composition copyright infringement claims. The digital samples are so small that they tend to only represent fractions of the original work.¹⁴⁹ The "fragmented literal similarity" analysis would likely be employed to determine whether these small digital samples qualify as *de minimis* copying. Thus, the key is whether Greg's digital samples are of qualitative importance. This determination will vary on a case-by-case basis because certain digital samples used will be more unique than others or more important to the original work than others. Greg's digital sample choices are based on recognizable "Top 40" hits played on the radio.¹⁵⁰ This likely tilts the scales toward a finding that the digital samples are qualitatively important because he is purposely picking recognizable portion of songs. That is Greg's niche. Greg does not sample the obscure, unrecognizable portions of a song because he wants the audience to hear something familiar being expressed differently via a mash-up.¹⁵¹ By doing this, he will likely always be sampling the portion of the song that made it a hit, the chorus or verse that stuck out and made it popular in the first place. However, there may be some

¹⁴⁵ *Bridgeport*, 410 F.3d at 796.

¹⁴⁶ *See supra* Part II.

¹⁴⁷ *Bridgeport*, 410 F.3d at 801.

¹⁴⁸ *Id.* at 798 n.6 (citing Bradley C. Rosen, Esq., 22 CAUSES OF ACTION § 12 (2d Ed. 2003)).

¹⁴⁹ *See Levine, supra* note 8.

¹⁵⁰ *Dombal, supra* note 1.

¹⁵¹ *Id.*

digital samples that are so minute in duration that they could be considered the copying of “nonessential matters.” These instances would be analogous to *Newton*, where the minute sample was of limited significance to the original work,¹⁵² but Greg’s usage of these minute digital samples will be nominal relative to the digital samples that have great qualitative importance. The majority of Greg’s digital samples will likely be found to infringe on the musical composition copyright due to their high qualitative value to the original, thereby providing for a finding of substantial similarity. Only in limited circumstance may Greg be able to defend against musical composition copyright infringement, but even then, those same digital samples will be subject to a sound recording copyright infringement claim.

Bridgeport came down with the bright-line rule of “[g]et a license or do not sample.”¹⁵³ Under the bright-line rule Greg may not even argue *de minimis* usage.¹⁵⁴ Thus, despite how minimal and nonessential the digital sample used is, copyright infringement will be found. Additionally, this means that if an owner of a musical composition also owns the sound recording, she will still prevail on the sound recording infringement claim. In order for Greg to have a fighting chance, he would need to attack *Bridgeport*’s validity, proving that it fails to recognize any artistic value in the use of digital sampling and, therefore, should be overruled. The court’s analysis in *Bridgeport* seemed too focus on judicial economy.¹⁵⁵ First, the decision created a bright-line rule in cases of sound recording sampling for judicial ease, despite its own admission that the lower court was able to manage a case involving the difficulties in analyzing substantial similarity and the *de minimis* defense.¹⁵⁶ Second, the *Bridgeport* decision is not acclimated to today’s music industry and the value society places on different forms of art. Their decision relied heavily on law journals and strict statutory interpretation that fail to recognize any value in digital sampling as a form of art.¹⁵⁷ The value is clearly supported by the fact that Greg, with very limited record distribution, is able to survive as an artist because people come out in

¹⁵² *Newton*, 388 F.3d at 1196.

¹⁵³ *Bridgeport*, 410 F.3d. at 801.

¹⁵⁴ *Id.* at 801-02.

¹⁵⁵ *Id.* at 802.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 803-04.

droves, paying to see him perform live.¹⁵⁸ Furthermore, EMI hired Danger Mouse to utilize his talents with digital sampling to produce new musical works for its own artists.¹⁵⁹ The art world usually settles copyright infringement cases when they involve postmodern artists, and now the music industry is utilizing a self-help stances instead of relying on the courts.¹⁶⁰ Danger Mouse's journey represents the fact that there is a recognized value for his gift in digital sampling because EMI would rather exploit his talent than take him to court.

Greg's case is similar to Danger Mouse's and it can be argued that by allowing *Bridgeport* to stand, the courts leave postmodern artists, like Greg, with little choice when dealing with record labels—either work for the label or be sued. This conflicts with the purpose of copyright law because the court places a governor on the progress of art and science. The *Bridgeport* court attempted to reconcile this by stating that creativity is not stifled because the market will control the price of samples and one will not pay more than it would cost to recreate the desired sample.¹⁶¹ In reality, creativity is being stifled because most artists cannot afford to pay expensive licensing fees to recreate hundreds of samples, when their talents lie not in recreating, but in sampling and re-contextualizing.¹⁶² The art of digital sampling is only recognized when a record label signs and controls an artist. The court simply did not recognize the creative value in digital sampling and ignored the reality that both society and the music industry acknowledge and appreciate artists like Greg. The *Bridgeport* Court had a legitimate interest in protecting owners' rights¹⁶³ and this cannot be ignored. However, the creation of a bright-line rule to create judicial ease in analysis goes too far and fails to recognize the evolution of art forms being embraced today.

Although it is contended that the *Bridgeport* holding is overreaching,¹⁶⁴ it remains likely that Greg will be unable to successfully defend against a sound recording copyright infringement claim. It

¹⁵⁸ See Bodenner, *supra* note 9; see also Levy, *supra* note 10, at 20.

¹⁵⁹ Brown, *supra* note 68.

¹⁶⁰ Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 391-92 (2003).

¹⁶¹ *Bridgeport*, 410 F.3d at 801.

¹⁶² Nicholas B. Lewis, *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, 270-71 (2005).

¹⁶³ See 17 U.S.C.A. § 106.

¹⁶⁴ See Jeffrey F. Kersting, *Singing a Different Tune: Was the Sixth Circuit Justified in Changing the Protection of Sound Recordings in Bridgeport Music, Inc. v. Dimension Films?*, 74 U. CIN. L. REV. 663, 685-87 (2005).

also seems unlikely that Greg will be able to successfully defend against most musical composition copyright infringement claims. Even so, neither *Newton* nor *Bridgeport* prevents Greg from utilizing the doctrine of fair use as a defense.

III. FAIR USE DEFENSE

Fair use has always existed in copyright law as an essential part of achieving its goal “to promote the Progress of Science and useful Arts.”¹⁶⁵ There are few things in this world that are “strictly new and original throughout” and, as a result, there is a need to take, use, and borrow from those things that are well known.¹⁶⁶ Accordingly, pursuant to § 106, the fair use doctrine provides limitations on the exclusive rights granted to owners.¹⁶⁷ Under § 107, four non-exclusive factors should be considered when determining whether use of copyrighted material is for the purpose of “criticism, comment, news reporting, teaching . . . scholarship, or research,” and therefore should not be held as copyright infringement.¹⁶⁸ The four non-exclusive factors are:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- and (4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁶⁹

These factors are meant to be illustrative and do not create a bright-line rule.¹⁷⁰ The fair use doctrine should be applied on a case-by-case basis.¹⁷¹ Additionally, each factor is equally important and no one factor should be treated in isolation, but instead analyzed together with the goals of copyright law in mind.¹⁷² A finding of fair use will

¹⁶⁵ *Campbell*, 510 U.S. at 575 (quoting U.S. CONST. art. 1, § 8, cl. 8).

¹⁶⁶ *Id.* (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845)).

¹⁶⁷ 17 U.S.C.A. § 106.

¹⁶⁸ 17 U.S.C.A. § 107.

¹⁶⁹ *Id.*

¹⁷⁰ *Harper v. Row*, 471 U.S. 539, 561 (1985).

¹⁷¹ *Id.*

¹⁷² *Campbell*, 510 U.S. at 578.

defeat a copyright infringement claim against a defendant.¹⁷³

A. Purpose and Character of the Use

In investigating the purpose and character of use, two key issues must be scrutinized. The first issue is whether the new work supersedes the original or builds upon it by adding something new.¹⁷⁴ In other words, is the use of the original work in the new work sufficiently transformative?¹⁷⁵ Second, the commercial nature of the use should be examined to establish if the use is for profit.¹⁷⁶ Neither of these two issues are outcome determinative, but a finding of one way may tend to weigh in favor of fair use and vice-versa.¹⁷⁷

Transformative use was first recognized in *Campbell v. Acuff-Rose Music, Inc.*¹⁷⁸ wherein 2 Live Crew transformed Roy Orbison's "Pretty Woman" into a rap parody.¹⁷⁹ The United States Supreme Court found that copying was transformative because it altered the first work with a "new expression, meaning or message."¹⁸⁰ 2 Live Crew transformed the work when it replaced the original lyrics of "Pretty Woman" with new, shocking lyrics that were intended to mock and ridicule the original's "white-bread" lyrics and nature.¹⁸¹ The Court recognized that a parody is only a worthwhile commentary on the original when it mimics or copies parts of the original.¹⁸² This also furthers the goals of copyright law because society is benefited when it is free to comment on another's work.¹⁸³ The quality of the message should not be a relevant part of this analysis because quality may be evaluated differently from one person to the next, and, therefore, should have no significance on whether a work is transformative.¹⁸⁴ It would be improper to base the fair use defense on one's taste.¹⁸⁵ Therefore, 2 Live Crew's parody that turned a love song into

¹⁷³ 17 U.S.C.A. § 107.

¹⁷⁴ *Campbell*, 510 U.S. at 579.

¹⁷⁵ *Id.*

¹⁷⁶ *Sony*, 464 U.S. at 448-49.

¹⁷⁷ *Harper*, 471 U.S. at 562.

¹⁷⁸ *Campbell*, 510 U.S. at 579.

¹⁷⁹ *Id.* at 572.

¹⁸⁰ *Id.* at 579.

¹⁸¹ *Id.* at 582.

¹⁸² *Id.* at 580-81.

¹⁸³ *Campbell*, 510 U.S. at 579.

¹⁸⁴ *Id.* at 582.

¹⁸⁵ *Id.*

a song about sexual conquest created a new expression that was sufficiently transformative to defend against copyright infringement.¹⁸⁶

Since *Campbell*, few cases have provided guidance as to what other types of copying are sufficiently transformative to defend against a claim of copyright infringement. Unlike parody, satire does not enjoy the ability to copy from an original work.¹⁸⁷ In *Dr. Seuss Enterprises, L.P. v. Penguin Book U.S.A., Inc.*, the O.J. Simpson story was told in the form of a satire that copied the characteristic style and form of Dr. Seuss's books.¹⁸⁸ The court found that a satire, which used an original work's style and form to grab attention, rather than to comment on an original work, was not sufficiently transformative.¹⁸⁹ Parody allows for copying because it is necessary for the audience to know what the new expression is commenting on.¹⁹⁰ The difference between parody and satire originated from *Campbell*, where the Supreme Court made a distinction of the subject of the commentary.¹⁹¹ With parody, the original work used is the subject of the commentary and the use of the original work may be permissible.¹⁹² With regards to satire, something other than the original work is the subject of the commentary.¹⁹³ Satire is not sufficiently transformative because the original work is simply used as a vehicle to make miscellaneous commentary.¹⁹⁴ Thus, the use of Dr. Seuss's style and form to comment on the O.J. Simpson story was a satire and, as a result, not sufficiently transformative to be defensible under fair use.¹⁹⁵

Another focus in the determination of whether a work is sufficiently transformative is how much new material or value has been added to the original work.¹⁹⁶ In *Castle Rock Entertainment v. Carol Publishing Group*,¹⁹⁷ the defendant created a trivia book based on the

¹⁸⁶ *Id.* at 583.

¹⁸⁷ *Id.* at 580-81.

¹⁸⁸ *Dr. Seuss Enters., L.P. v. Penguin Books U.S.A., Inc.*, 109 F.3d 1394, 1396 (9th Cir. 1997).

¹⁸⁹ *Id.* at 1400.

¹⁹⁰ *Id.* at 1401.

¹⁹¹ *Campbell*, 510 U.S. at 580-81.

¹⁹² *Id.* at 580.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 580-81.

¹⁹⁵ *Dr. Seuss*, 109 F.3d at 1401.

¹⁹⁶ *Castle Rock Entm't, Inc. v. Carol Publ'n, Inc.*, 150 F.3d 132, 142 (2d Cir. 1998).

¹⁹⁷ *Id.* at 132.

TV show *Seinfeld*.¹⁹⁸ The book was comprised of quotes, stories, characters, and events taken from the show.¹⁹⁹ The defendant argued that the use of this material to create a trivia book was sufficiently transformative to defend against a claim of copyright infringement.²⁰⁰ The court found that the book failed to make any comments on the original material and only made minimal additions to the material.²⁰¹ The defendant simply utilized the original material without adding any interpretation, criticism, or praise, and merely repackaged it in the form of a trivia book.²⁰² Therefore, the court was not persuaded by the defendant's argument that the work was sufficiently transformative and fair use did not protect against the copyright infringement claim.²⁰³

The Court in *Campbell* stated that transformative use was less likely to supersede the original work and weighs in the favor of finding for the fair use defense.²⁰⁴ However, the cases after *Campbell* indicated that courts are unwilling to extend transformative use beyond the scope of parody.²⁰⁵ What can be drawn from those cases, however, is that for a use to be sufficiently transformative it must adequately add or build upon the original work, while also commenting on it.

The other issue to address under purpose and character of use is the commercial nature of the new work.²⁰⁶ A finding that the use "was commercial as opposed to nonprofit is a separate factor tending to weigh against a finding of fair use."²⁰⁷ This does not mean that if there was the slightest commercial nature in the use that it is presumptively unfair.²⁰⁸ If such were the case, the exceptions mentioned in the preamble of § 107, such as educational material, which may have also been created with the motive of commercial gain, would no longer be able to enjoy the defense of fair use.²⁰⁹ This was not Con-

¹⁹⁸ *Id.* at 135.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 142.

²⁰¹ *Castle Rock*, 150 F.3d at 145-46.

²⁰² *Id.*

²⁰³ *Id.* at 146.

²⁰⁴ *Campbell*, 510 U.S. at 579.

²⁰⁵ *See Castle Rock*, 150 F.3d at 145-46; *Dr. Seuss*, 109 F.3d at 1401.

²⁰⁶ *Campbell*, 510 U.S. at 583-84.

²⁰⁷ *Harper*, 471 U.S. at 540.

²⁰⁸ *Campbell*, 510 U.S. at 584.

²⁰⁹ *Id.*

gress' intention when it enacted § 107.²¹⁰ Furthermore, in this day and age it should be a fair assessment that there is relatively nothing created without the incentive of financial gain.²¹¹ Therefore, even when the commercial nature of a work is high it should still be considered against the other factors before any determination of the fairness of a use can be made.²¹²

Greg argues that his samples are minute and that the way he mixes them together re-contextualizes the samples and should be sufficiently transformative.²¹³ Essentially, this argument recognizes a form of postmodern art, which generally takes inspiration from an existing original work and uses it to make a new work as a form of commentary on that original work.²¹⁴ This postmodern art is analogous to parody because both comment on the original.²¹⁵ However, parody tends to mock or ridicule the original whereas postmodern art might, alternatively, praise or pay homage to the original.²¹⁶

Jeff Koons attempted such an argument in *Roger v. Koons*.²¹⁷ In this case, Koons copied an Art Rogers postcard by making a statue that was, effectively, an exact replica of the postcard.²¹⁸ Koons argued that this type of re-contextualization which, incorporated the existing original work was common in the American school of art.²¹⁹ The purpose of this postmodern art was to comment both on the original work, and the political and economic system that created the original.²²⁰ However, there was evidence that Koons wanted the sculpture to be an exact copy of the postcard without any indication that the work was meant to re-contextualize or comment on the postcard.²²¹ Additionally, the statue was made for considerable economic benefit and that, coupled with the blatant copying of the original work, led the court to rule against Koons's fair use defense.²²²

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 584-85.

²¹³ Richardson, *supra* note 19.

²¹⁴ *Koons*, 960 F.2d at 309-10.

²¹⁵ *Id.*

²¹⁶ Power, *supra* note 27, at 586-88; Szymanski, *supra* note 22, at 283.

²¹⁷ *See generally Koons*, 960 F.2d at 301.

²¹⁸ *Id.* at 304-05.

²¹⁹ *Id.* at 309.

²²⁰ *Id.*

²²¹ *Id.* at 310.

²²² *Koons*, 960 F.2d at 310.

However, the fact that Koons was trying to profit by copying another's work without adding or building on it does not mean Greg's postmodern pastiche argument should be dismissed. Under *Campbell*, the Supreme Court required that there be a creation of a new, altered expression, meaning, or message of the original material copied.²²³ It should not be denied that an ability to mix twenty or more different songs from various genres into one singular body of work creates a new altered expression.

First, Greg's use can be distinguished from the Seinfeld trivia book, thereby distinguishing his use from that of the use in *Castle Rock*. The Seinfeld trivia book took significant amounts from one TV show and made minimal addition to the material used, which was essentially the repackaging of another's work.²²⁴ In contrast, Greg takes a modest sample from a single song and mixes it with twenty or more other modest samples from different songs to form one innovative track, adding considerably more to each original work than he takes.²²⁵ Therefore, by taking only miniscule portions, making ample additions and building upon the original work, Greg makes his use sufficiently transformative.

Second, Greg is not using others' music as a vehicle to tell a separate story. The music he samples is purposefully "Top 40" because it is recognizable,²²⁶ and it is *how* Greg mixes these recognizable, yet distinct, songs together that makes his work more like parody than satire. Thus, like parody, Greg's mixes are intended to "conjure up" the original and comment on it by giving it a new meaning and presenting it in a way that is only possible today because of improvements in technology.

This new meaning is achieved by having portions of songs mixed with songs from entirely different genres and time periods. No one would ever believe, let alone think, of hearing The Notorious B.I.G. and Elton John on the same song; but with the aid of technology, Greg is able to create such a concoction, which, in turn pushes the boundaries of music to areas previously unexplored. While parody is intended to comment through comedy or ridicule,²²⁷ there is no rea-

²²³ *Campbell*, 510 U.S. at 579.

²²⁴ *Castle Rock*, 150 F.3d at 135.

²²⁵ Dombal, *supra* note 1.

²²⁶ *Id.*

²²⁷ *Koons*, 960 F.2d at 309-10.

son to believe that the goals of copyright law would not be served by a pastiche that creates something innovative based on mere pieces of existing work. Therefore, Greg's use should be found to be sufficiently transformative.

With respect to the commercial nature of the new work, unlike Koons, Greg's purpose in using another's work is not purely based on commercial gain.²²⁸ Greg's album is available under a "pay-what-you-want" model, which means the album may be downloaded for free.²²⁹ Additionally, if threatened with legal action, Greg has stated that he will simply offer his future albums for free on the Internet.²³⁰ This lack of commercial incentive should also weigh in favor of Greg's fair use defense.

B. The Nature of the Copyrighted Work

This factor is based on a determination of the value of the material used.²³¹ It triages created works and places those closer to the core of works intended to have copyright protection ahead of works further from the core and, ultimately, exists to provide that protection.²³² Creative works, as opposed to purely informational works, tend to be closer to the core of copyright law.²³³ For example, creative works include such things as fictional novels as opposed to informative works, which would include encyclopedias and reference material.²³⁴ In *Campbell*, Roy Orbison's original expression was within the core group of works intended to have copyright protection because, in the realm of music there are few things more core and therefore due more protection than an artist's creative expression.²³⁵ The Court also reasoned that deciding whether there has been fair use becomes more difficult when dealing with works close to the core.²³⁶ This reasoning is based on the premise that it is unlikely for one to distinguish between those copies that are infringing versus those that

²²⁸ *Id.* at 312.

²²⁹ Walker, *supra* note 16.

²³⁰ See generally Richardson, *supra* note 19.

²³¹ *Campbell*, 510 U.S. at 586.

²³² *Id.*

²³³ *Koons*, 960 F.2d. at 310 (quoting *MCA v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981)).

²³⁴ See *Harper*, 471 U.S. at 563.

²³⁵ *Campbell*, 510 U.S. at 586.

²³⁶ *Id.*

are fair.²³⁷ Thus, when dealing with creative works, the other factors become significant in a determination of whether a use is fair. Similarly, Greg's use of artists' original creative expression will fall into the core of works intended to have copyright protection and Greg's fair use defense will depend more on the other factors.

C. The Amount and Substantiality of the Portion Used in Relationship to the Copyrighted Work as a Whole

This factor determines whether the quantity and value of the material copied from the original work was reasonable for the purpose of the new work.²³⁸ This is a quantitative and qualitative analysis based on what was taken by the defendant from the original work.²³⁹ The extent of permissible copying relates back to the purpose and character of the use.²⁴⁰ In *Campbell*, the purpose and character of the use was parody.²⁴¹ There, the Court focused on the purpose of the new work and determined that 2 Live Crew could use as much from the original work as needed to "conjure up" the original work.²⁴² The "conjure up" test limits a taking to "no more than necessary" to ensure that the original work is brought into the minds of the audience.²⁴³ However, the use would be more than necessary when the new work substitutes the original.²⁴⁴ This does not mean that the "heart" of the original work cannot be used.²⁴⁵ The Court reasoned that the "heart" of the original could be the very portion necessary to "conjure up" the original in the audience's mind.²⁴⁶ Thus, in *Campbell*, it was found that even if the use of the first line and the base riff was the "heart" of "Pretty Woman," it was also the most readily available portion to "conjure up" the original in the audience's mind.²⁴⁷ Allowing a taking of the "heart" of the original

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 586-87.

²⁴⁰ *Sony*, 464 U.S. at 450 n.30; *Campbell*, 510 U.S. at 586-87.

²⁴¹ *Campbell*, 510 U.S. at 579.

²⁴² *Id.* at 588.

²⁴³ *Id.* at 573.

²⁴⁴ *Id.* at 589.

²⁴⁵ *Id.* at 587.

²⁴⁶ *Campbell*, 510 U.S. at 588.

²⁴⁷ *Id.* at 588-89.

work and substantial portions of the original work indicated that the Court was willing to give parody great leniency when determining if “no more than necessary” was taken of the original work.²⁴⁸

The *Bridgeport* decision may also be influential on this point because it stated, “[g]et a license or do not sample[,]” which eliminated the qualitative and quantitative analysis used when dealing with substantial similarity.²⁴⁹ The qualitative and quantitative analysis here is similar to those used with substantial similarity and might mislead the courts to follow the bright-line rule articulated in *Bridgeport*. If the decision in *Bridgeport* is given any influence, it would seriously damage any hope for Greg’s fair use defense because, regardless of the size of any digital sample used, such sampling would not be tolerated. However, *Bridgeport* focused on a strict statutory interpretation and stressed judicial economy.²⁵⁰ There was little to no value given to the artistic and creative value in digital sampling that is recognized by both the music industry and society today.²⁵¹ *Bridgeport* also failed to appropriately recognize both competing interests and left artists at the mercy of record labels, preventing the public from enjoying the benefits of their talent.²⁵² By refusing to recognize any value in digital sampling, *Bridgeport* was, in effect, evaluating the quality of this form of expression. The goal of copyright law should not be to evaluate taste, but rather to balance the competing interests involved in copyright law in a manner that also promotes the progress of arts and science.²⁵³ Thus, *Bridgeport* should not influence the courts in a fair use analysis. Instead, the “conjure up” test as applied by *Campbell* should be followed.

In order for Greg to benefit from the “conjure up” test he would have to prove that mash-ups are analogous to parody because both necessitate a substantial taking from the original and, sometimes, the “heart” of the original in order to be effective and meaningful. As mentioned, this analysis relates back to whether there is sufficient transformation under the purpose and character of the use. Greg’s purpose is sufficiently transformative because he uses recognizable “Top 40” songs and mixes them together in a unique way that

²⁴⁸ *Id.* at 573.

²⁴⁹ *Bridgeport*, 410 F.3d at 801.

²⁵⁰ *Id.* at 802.

²⁵¹ *Id.*

²⁵² *Id.* at 800.

²⁵³ *Campbell*, 510 U.S. at 582-83.

is both enjoyable and nostalgic to the audience. “Conjuring up” the original work is vital for Greg to have an effective track because if only ambiguous and obscure digital samples are used the purpose and artistic value of Greg’s work would be lost. Furthermore, Greg is only taking samples that represent a small portion of the original work, as opposed to the typical mash-up formula that uses the entire lyrical portion of one song and the entire musical portion of another. As such, Greg’s taking is already limited to “no more than necessary” to “conjure up” the original in the audience’s mind because he samples too many songs in one track to take more than is necessary. Greg’s mash-ups must enjoy the same leniency as parody does under the “conjure up” test due to their shared need to appropriate in order to be effective and, in the end, should weigh the third factor in Greg’s favor.

D. The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work

This factor is generally given great weight and has been regarded as the single most important factor of fair use.²⁵⁴ The courts are required to consider whether the infringing conduct, if left unimpeded, would result in a detrimental effect on the direct market and the derivative market for the original work.²⁵⁵ The first part of this factor coincides with the purpose and character of the use because when the use is sufficiently transformative it is less likely to become a market substitute of the original and, instead, will serve a “different market function.”²⁵⁶ Such was the case in *Campbell* where the Court found that 2 Live Crew’s parody was sufficiently transformative under the purpose and character factor and that the parody was not likely to substitute the original because it served a “different market function” of critiquing the original.²⁵⁷ Therefore, there was no detriment to the direct market.²⁵⁸

Additionally, when dealing with digital samples, there is little threat of detriment to the direct market because the music made by a sampler is usually made in a different genre and for a different au-

²⁵⁴ *Harper*, 471 U.S. at 566.

²⁵⁵ *Id.* at 568.

²⁵⁶ *Campbell*, 510 U.S. at 591.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 592.

dience.²⁵⁹ Samples also only tend to be minute portions of the original work²⁶⁰ and such miniscule use seems unlikely to substitute demand for the original work. The same would be true for Greg because his digital samples are sufficiently transformative as established under the purpose and character factor. The digital samples are so minute that there is no way they could substitute for the original.

Furthermore, the mash-up genre is separate from the array of genres Greg samples from. The mash-up genre caters to an audience that focuses on an ability to bring different works together into one new work, which serves a “different market function.” Lastly, what is more likely than substitution is a renewed interest in the original material that would likely increase the sales of the original work.²⁶¹ Thus, Greg’s digital sampling is not a detriment to the direct market of the original, but instead a benefit and artists should appreciate Greg’s free promotion of their work.

With respect to the potential harm on derivative markets, Greg has little working in his favor. In *Campbell*, the Court limited the possible derivative markets to “those that the creators of original works would in general develop or license others to develop.”²⁶² Parody is a rare derivative market because a creator would not be prone to license his or her work to be criticized or ridiculed by other artists and is, therefore, not a derivative market the copyright law intended to protect.²⁶³ However, the derivative market of mash-ups is one that an owner could consider via licensing. With increased exposure and interest in the mash-up genre, artists will have more opportunities to license their work, thereby taking advantage of the potential for greater royalties and exposure.²⁶⁴

Greg’s failure to obtain licensing or permission for the samples in *Feed the Animals* leaves him vulnerable. He may have an argument that the album is available via a “pay-what-you-want” model, which is pragmatically more of a donation than it is a fee for his album. By releasing under this model, Greg may be attempting to deter any lawsuits by making clear that his profits are not close to the

²⁵⁹ *Id.*; Szymanski, *supra* note 22, at 320-21.

²⁶⁰ Szymanski, *supra* note 22, at 319.

²⁶¹ *Id.* at 320-21.

²⁶² *Campbell*, 510 U.S. at 592.

²⁶³ *Id.* at 592-93.

²⁶⁴ *See generally* Szymanski, *supra* note 22, at 300-01.

profits of a nationally distributed album. However, Greg's lack of revenue does not negate the fact that his use may still be detrimental to the derivative licensing market of the samples he used because those who sample legally will be less likely to pay for the same sample Greg has already made popular.²⁶⁵ Thus, it is unlikely for a court to find that the original works' derivative market is not harmed by Greg's sampling.

CONCLUSION

Ultimately, Greg's fair use defense is questionable. It requires the courts to take considerable steps in accepting a new form of expression, one that has previously gone unrecognized. Greg's ability to take twenty small digital samples and bring them together into one audio pastiche is sufficiently transformative and the fact that such an album can be obtained for free supports a finding for fair use under the purpose and character factor. Under the nature of the copyrighted work, the songs Greg used are at the core of works intended to have copyright protection and this weighs slightly against Greg's use. Digital sampling to create a mash-up, like parody, should enjoy a lenient "conjure up" test because in order to be effective it must be allowed to take a substantial portion of the original. This should allow for a finding in favor of fair use under the amount and substantiality factor. The last factor, effect upon the potential market for the copyrighted work, is in Greg's favor when analyzing the impact on the direct market, but is not favorable when analyzing the residual effect on derivative markets. Thus, taken together as a whole, it is unclear as to whether a court would find for Greg under the defense of fair use. The ultimate decision will likely come down to whether the court will find Greg's audio pastiche to be sufficiently transformative. Given the courts' unwillingness to expand what it recognizes as sufficiently transformative use, Greg is left with little hope, regardless of his earnest belief that his use is fair.

Despite the potential legal claims against Greg and his limited likelihood of prevailing, record labels and the original artists should consider the intangibles that may make pursuing a copyright infringement claim unwise. First, Greg's work revitalizes older records by helping to promote them, thus, making them more relevant in today's

²⁶⁵ *Id.*

market.²⁶⁶ Additionally, his work benefits up and coming artist by increasing their exposure. Greg is also popular among the youth, who represent a large demographic of people with disposable income.²⁶⁷ In challenging Greg, his opponents may create backlash by alienating these young people who may have only come to know the older songs as a result of Greg's use. Record labels should consider the steps taken by EMI and hire Greg rather than subjecting him to legal action. This would allow a record label to exploit Greg's talent, which has been proven to be profitable by Danger Mouse's journey. Considering all the facts, record labels and original artists should understand that if they allow Greg to promote them, rather than taking him to court, their pocket books and reputations will be best served.

²⁶⁶ Szymanski, *supra* note 22, at 320-21.

²⁶⁷ See generally Walker, *supra* note 15.

