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Renaming that Tune: Aural Collage, Parody and Fair Use

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COMMENTS

RENAMING THAT TUNE: AURAL COLLAGE, PARODY AND FAIR USE

> Recording has always been a means of social control, a stake in politics, regardless of the available technologies. Power is no longer content to enact its legitimacy; it records and reproduces the societies it rules. Stockpiling memory, retaining history or time, distributing speech, and manipulating information has always been an attribute of civil and priestly power, beginning with the Tables of the Law. But before the industrial age, this attribute did not occupy center stage: Moses stuttered and it was Aaron who spoke. But there was already no mistaking: the reality of power belonged to he who was able to reproduce the divine word, not to he who gave it voice...on a daily basis. Possessing the means of recording allows one to monitor noises, to maintain them, and to control their repetition within a determined code. In the final analysis, it allows one to impose one's own noise and to silence others.[1]

I. INTRODUCTION:

Throughout history, changes in information technology have altered how individuals within society perceive, and in turn, represent the world around them.[2] One important example is Edison's invention of the phonograph, patented in 1877. Edison's invention allowed for the recording of any sound that could be made, marking a qualitative advance over earlier

1. J. ATTALI, NOISE: THE POLITICAL ECONOMY OF MUSIC 87 (1985)

2. *See* M. MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1964) for analysis into how changes in communications technology have correspondingly shaped our social and cultural relations.

methods of stenographic and musical notation.[3] In the century following Edison's invention, advances in analog and digital recording continued to refine the quality of sound reproduction, further transforming the way sound is composed, recorded and consumed by its audience.[4] Today, almost all popular music is recorded in multi-track recording studios, using state-of-the-art computer technology to shape and reshape discrete "bits" of musical information. In addition, sophisticated methods of manipulating sound in the recording studio have led to an increased "plasticity"[5] of sound, enabling musicians to produce works which seemingly resemble those of other 20th century visual artists. Nowhere is this resemblance more evident than in the art of musical collage.

Like musicians, visual artists have historically (re)presented the world around them, quoting past works and other artists in the process. In addition, musicians and visual artists commonly experiment with new technologies to more effectively interpret the world around them. Finally, both musicians and visual artists frequently quote one another by way of homage, allusion and parody; a practice extending from the early quodlibet[6] to more recent disco medleys of Beethoven "hits." While copyright law has traditionally distinguished between homage, parody and outright plagiarism, today the line distinguishing these practices is less clear. Moreover, recent advances in digital sound reproduction threaten to push these tensions within copyright law to their limit, in some circumstances even challenging traditional notions of what constitutes originality in music.[7]

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3. C. CUTLER, FILE UNDER POPULAR: THEORETICAL AND CRITICAL WRITINGS ON MUSIC 141 (1985).

4. For an overview of recording technology's effect on the production and appreciation of music since the introduction of Edison's phonogram, *see* E. EISENBERG, THE RECORDING ANGEL (1987).

5. Music recording as a form of culture production also results from *plasticity,* the ability to manipulate sound physically. The process of music recording - the technology of plasticity - is the site of the musician's interaction with the administrators of the mass culture industries who desire replicability.

Tankel, *The Practice of Recording Music: Remixing as Recoding,* J. COMM., Summer 1990, at 36.

6. Quodlibet is a humorous form of composition from the 15th- and 16th-century constructed entirely of borrowed melody. A well-known example of quodlibet is found in the last variation of Bach's *Goldberg Variations*, which integrates two popular melodies from his day, *Long Have I Been Away From Thee* and *Cabbage and Turnips* within the composition's theme. HARVARD DICTIONARY OF MUSIC 713 (2d ed. 1969).

7. Pareles, *Digital Technology Changing Music,* N.Y. Times, Oct. 16, 1986, Sec. C, at 23, col. 4.

A. JOHN OSWALD AND "PLUNDERPHONIC"

The controversy greeting the Canadian composer John Oswald's 1989 CD release, PLUNDERPHONIC, reveals just how uncertain the borders between originality and plagiarism have become. Oswald's PLUNDERPHONIC was based on the electronic manipulation of 24 pre-existing compositions in a variety of unconventional ways.[8] Oswald pressed 1,000 copies of his PLUNDERPHONIC CD in October 1989 and distributed these to libraries, radio stations and the artists who had been quoted.[9] At no time were any copies of PLUNDERPHONIC offered for sale. Nevertheless, the distribution of PLUNDERPHONIC was disrupted when the Canadian Recording Industry Association (CRIA) voiced their objections to Oswald's treatment of the Michael Jackson composition *Bad* (retitled *Dab*). CRIA charged that PLUNDERPHONIC unlawfully infringed upon this Michael Jackson recording.[10] Subsequent negotiations with CRIA and their attorneys led to a settlement, with Oswald and CRIA agreeing to destroy the master tapes and remaining undistributed copies.[11] The ensuing settlement created substantial publicity for Oswald, due in part to the challenging nature of his work and its non-commercial status. Ultimately the controversy surrounding the official destruction of PLUNDERPHONIC generated widespread discussion in the music press on the moral and ethical limits of digital sampling[12] and the commensurate threat of artistic self-censorship.

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8. Artists "sampled" on PLUNDERPHONIC include Michael Jackson, Metallica, Dolly Parton, 101 Strings Orchestra, Igor Stravinsky, Count Basie, The Beatles, George Martin, Captain Beefheart, Bing Crosby, George Harrison, James Brown, Public Enemy, Dick Hyman, Cecil Taylor, Franz Liszt, Bix Biederbeck, Ludwig Van Beethoven, Glenn Gould, Verdi and Anton Webern.

9. Richardson, *The Plunder King,* S.F. BAY GUARDIAN MUSIC QUARTERLY, Sept. 12, 1990, at 15, col. 1. Significantly, fewer copies of the CD were in existence than a single record store would sell of a major hit record in a week. Igma, *Taking Sampling fifty times beyond the expected: An interview with John Oswald*, Apr. 1990, at 5. (Photocopy provided by John Oswald during lecture at S.F. Co-Lab, 1990).

10. Igma, *supra,* note 9, at 3.

11. About 300 undistributed copies of the PLUNDERPHONIC CD were eventually destroyed by CRIA. Gann, *Plundering for Art,* VILLAGE VOICE, May 1, 1990, at 102, col. 3. Oswald opted to destroy all remaining copies of the PLUNDERPHONIC CD to avoid the risk of costly litigation, and because of the destruction of his work carried a strong symbolic message. Igma, *supra*, note 9, at 5.

12. Digital sampling is a method whereby sound is recorded by a synthesizer which translates these sounds into their binary equivalents. These sounds can then be electronically manipulated, stored or copied onto computer disks, and later played back on a modified keyboard instrument.

Ironically, several major record labels became interested in Oswald's work following the destruction of PLUNDERPHONIC.[13] This belated interest in Oswald's work underscores the music industry's ambivalence with regard to compositions incorporating the "text" of other artists. On the one hand, the recording industry benefits from the commercial success of many collage-based rap and hip hop[14] compositions. Yet many within the music industry view these recordings with deep suspicion. Critics of this music have charged that digital sampling constitutes plagiarism, unfair competition, and even "old-fashioned piracy dressed up in sleek new technology."[15] However, while the use of sophisticated digital sampling equipment in the recording studio does warrant some concern, many commentators fail to recognize sampling as a legitimate artform with historical roots in other artistic movements which similarly challenged conventional notions of cultural representation.

B. PURPOSE OF COMMENT:

Although the unauthorized use of sound recordings in derivative[16] collage compositions may in some instances infringe on the copyright of a given composition or sound recording, such use may be protected under a fair use analysis typically accorded works of parody. Therefore this Comment will first provide some historical context for understanding aural

13. The executive producer of a major U.S. new music label later called Oswald to say they would put the PLUNDERPHONIC CD out in a minute if they thought it was possible. Igma, *supra*, note 9, at 5. In July 1990, Oswald was subsequently hired by Elektra records to create a special PLUNDERPHONIC recording in conjunction with that label's 40th anniversary celebration. Richardson, *supra*, note 9, at 15, col. 2.

14. "Hip Hop" is a phrase describing many of the stylistic innovations located within contemporary African-American culture. While hip hop embraces graffiti art, breakdancing, and rap music, hip hop music is a distinct, rhythmic, urban sound commonly incorporating a variety of collage techniques. For a history of the New York hip hop and rap music scene, *see* S. COSGROVE, THE Rap ATTACK - AFRICAN JIVE TO NEW YORK HIP HOP (1984).

15. *See, e.g.* Comment, *Digital Sampling: Old-Fashioned Piracy Dressed up in Sleek New Technology*, 8 LOY. ENT. L.J. 297 (1988). *See also*: Note, *You Can't Always Get What You Want But Digital Sampling Can Get What You Need*, 22 AKRON L. REV 691 (1989) (Digital sampling poses a threat to the recording industry and the livelihood of musicians); Comment, *Digital Sound Sampling, Copyright and Publicity: Protecting Against Electronic Appropriation of Sounds*, 87 COLUM. L. REV. 1723 (1987) (Digital sampling represents a threat to the livelihoods of increasing numbers of acoustic musicians); E.S. JOHNSON, *Protecting Distinctive Sounds: The Challenge of Digital Sampling*, 1988 ENT., PUB. AND THE ARTS HANDBOOK (1988) (Digital sampling creates new types of theft, from outright infringement of the underlying composition and sound recording to unauthorized commercial exploitation of the performer's distinctive sounds).

16. A derivative work is defined under the Copyright Act as "...a work based upon one or more preexisting works...." 17 U.S.C. § 101 (1991).

appropriation as an evolving 20th century artform with parallels and antecedents in the visual arts. Next comes a discussion of how certain collage-based compositions may violate applicable copyright laws under the 1976 Copyright Act. This Comment will then explore whether the appropriation of pre-existing sound recordings may be justified under existing interpretations of fair use as defined in § 107 of the 1976 Act. In particular, I will focus on the defense of fair use as it has historically been applied to works of parody, with an emphasis on two recent cases (*Eveready Battery Co. v. Adolph Coors Co. amd Acuff-Rose Music, Inc. v. Campbell)* which appear to extend the parameters of the parody defense. After evaluating existing limitations in applying a fair use analysis to works of aural collage, this Comment will present some final observations, including suggestions offered by various commentators to protect the interests of copyright owners while simultaneously affording protection to collage composers.

II. AUDIO COLLAGE - A HISTORY:

> If the word "music" is sacred and reserved for eighteenth- and nineteenth-century instruments, we can substitute a more meaningful term: organization of sound.[17]
>
> (With recording) (t)he actuality of performance is not lost, but is freed from time. It can be taken apart. Assembly and shaping of music on tape includes manipulation of the tape itself and of the mediating electronic equipment. Since the development of multitrack recording, the ease of overdubbing, selective addition, erasure and electronic alteration of sound - both before and after registration - has encouraged the use of the studio as an *instrument* rather than merely a documentary device. Music can be assembled both vertically and horizontally over time, moulded and remoulded. Tape runs forwards, backwards, and at many and variable speeds. It can be cut up and glued together. Moreover, recording is also a medium in which improvisation can be incorporated - or transformed through subsequent work - into composition.[18]

17. J. CAGE, SILENCE 3 (1961).
18. CUTLER, *supra*, note 3, at 142-43.

Edison's phonograph was initially designed as an instrument for preservation of sound rather than for its mass replication.[19] The phonograph was intended primarily for stenographic purposes, much as audiocassettes are now used.[20] However, the Victor Company's introduction of the Victrola in 1906 altered the way phonograph equipment would later be utilized. For the first time, the Victrola phonograph enabled sound recordings by popular artists to be enjoyed at home on a repeated basis. As consumer interest in commercial recordings took shape, artists too developed an interest in sound recordings as objects; by 1922 Laszlo Moholy-Nagy advocated the manual manipulation of audio phonorecords to produce (as well as reproduce) original and mimetic sounds.[21] Kurt Schwitters was another early 20th Century artist to approach the phonograph in terms of musical production, as well as reproduction. At a time when recordings were still made on wax

19. ATTALI, *supra,* note 1, at 91. In 1890, Edison wrote:

> In my article of 12 years ago I enumerated among the uses to which the phonograph would be applied: 1. Letter-writing and all kinds of dictation, without the aid of a stenographer. 2. Phonographic books, which would speak to the blind people without effort on their part. 3. The teaching of elocution. 4. Reproduction of music. 5. The "Family Record," a registry of sayings, reminiscences, etc., by members of a family, in their own voices: and of the last words of dying persons. 6. Music boxes and toys. 7. Clocks that should announce, in articulate speech, the time for going home, going to meals, etc. 8. The preservation of languages, by exact reproduction of the manner of pronouncing. 9. Educational purposes: such as preserving the explanations made by a teacher, so that the pupil can refer to them at any moment; and spelling or other lessons placed upon the phonograph for convenience in committing to memory. 10. Connection with the telephone, so as to make that invention an auxiliary in the transmission of permanent and invaluable records, instead of being the recipient of momentary and fleeting communications. Every one of these uses the perfected phonograph is now ready to carry out. I may add that, through the facility with which it stores up and reproduces music of all sorts, or whistling and recitations, it can be employed to furnish constant amusements to invalids, or to social assemblies, at receptions, dinners, etc.... Music by a band - in fact, whole operas - can be stored up on the cylinders, and the voice of Patti singing in England can thus be heard again on this side of the ocean, or preserved for future generations.

T.A. EDISON, THE PHONOGRAM, 1-3 (1891-93) (cited in ATTALI, *supra*, note 1, at 93-94).

20. In fact, it was not technically feasible to record sounds other than speech prior to 1910. Only a few operas were recorded at that time, and the first symphony was not recorded until 1914 (Beethoven's Fifth, directed by Artur Nikish). ATTALI, *supra* note 1, at 92.

21. Concannon, *Cut and Paste: Collage and the Art of Sound,* SOUND BY ARTISTS 178 (1990).

cylinders, Schwitters dubbed these recordings onto film, later editing the film into audio collage pieces.[22] Early audio collage experiments by members of the Italian Futurist[23] movement also prefigured later composition techniques resulting from the introduction and mass distribution of audio tape recorders and later, digital sampling devices.[24]

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22. *Id.* at 167.

23. The Futurists, led by Filippo Tommaso Marinetti, were an early 20th Century art movement, whose "sound poetry" was similar to the nonsense poetry advanced by the Dada movement. *Id.* at 163-64. Luigi Russolo's Futurist tract entitled ART OF NOISES (1913) is an important document in the development of musical collage. Significantly, The Art of Noise was also the name of a popular recording group from the early 1980s which utilized digital sampling and other collage techniques.

24. *Id.* at 163.

The development of early audio collage pieces followed innovations in the visual arts, particularly the photomontage developed by George Grosz and John Heartfield in 1916. The term photomontage was coined by the Berlin Dadaists to describe a collage technique involving the use of photographs, advertisements, newsprint and drawings to form original works of art. Cutting out and reassembling photographic images was previously a popular technique found on comic postcards, photograph albums and military mementos. D. ADES, PHOTOMONTAGE 7 (1976). Photomontage techniques also resembled the Dada poetry developed by Hans Arp, Tristan Tzara and Kurt Schwitters. Dada poetry was constructed from random sentences taken from newspapers, scraps of paper and cliches taken out of context in order to wrench words from their usual meanings. *Id.* at 8. The Dadaist technique of appropriation was later perfected by Marcel Duchamp's in L.H.O.O.Q. (1919), wherein Duchamp superimposed a mustache on a reproduction of Da Vinci's Mona Lisa. This metaphorical act of vandalism, involving the juxtaposition of familiar images, re-inscribed the portrait with a new meaning in conformance with the Dadaist attack on the reification of art.

Appropriation of the imagery of popular culture within the visual arts became commonplace following the Pop Art explosion of the 1960s. Andy Warhol, the most celebrated of these artists, drew from his own experiences of daily life within a mass consumer society. Warhol's preoccupation with the products of American mass culture, from soup cans to celebrities, found a corresponding affirmation in the works of Rauschenberg, Jasper Johns, Claus Oldenberg, Roy Lichtenstein and others. The appropriation of mass cultural imagery continues through the present day, and is found in sculptural works by Jeff Koons, paintings by Kenny Scharf and David Salle, and the photography of John Baldessari, Sherrie Levine and Richard Prince.

The appropriation of pre-existing material for artistic uses is also commonplace within other artistic disciplines. T.S. Eliot, William Burroughs, Bryan Gysin and Kathy Acker have utilized appropriated text in their literary works. Video works by Dana Birnbaum utilize network programming to dissect the conventions and ideological functions of specific television genres, while the Paper Tiger Television broadcasting collective uses appropriated news footage to critique the ideological underpinnings of American network television. The use of appropriated material has long played an important role in the new cinema, including the wake of work of Jean Luc Godard, Bruce Conner and Craig Baldwin. Comic artists Art Spiegelman and Bill Griffith also incorporate appropriated imagery into their drawings to create visually stimulating and innovative works.

For a detailed legal analysis into appropriation, the visual arts, and assorted copyright and trademark concerns, *see* J. Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law,* 13 COLUM. J.L. & ARTS 103 (1989). *See also* Note, *Copyright, Free Speech and the Visual Arts,* 93 YALE L.J. 1565 (1984).

Audio fidelity of phonograph records was greatly enhanced following the introduction of electronic recording equipment into the recording studio. Analog magnetic tape recorders,[25] microphones and console boards gave the audio producer greater discretion in recording and balancing sound, and the role of production gradually took on greater importance.[26] The manipulation of audio tape and the use of increasingly sophisticated mixing and sound processing equipment freed composition and performance from their temporal restraints.[27] Multi-track recording equipment allowed producers to add to, erase and electronically alter sound during the recording process, enabling composers to use the recording studio as another *instrument* rather than as a method of strict documentation.[28] As a result, the recording studio gradually took shape as the primary locus of compositional activity.[29] In addition to shaping

25. Analog tape recorders use audiotape to store information transmitted via a continuous series of magnetic impulses.

26. *See* EISENBERG, *supra,* note 4, at 124. Eisenberg credits Thomas Edison as the first popular producer for initially convincing popular artists to stand in front of a horn and reproduce a single performance hundreds of times while fussing with the equipment. *Id.* Eisenberg acknowledges that Edison was half-deaf, had delicate ears, and fiercely bad taste, once admonishing Rachmaninoff "Who told you you're a piano player?" *Id.*

27. CUTLER, *supra,* note 3, at 142-43.

> Current sound processing technologies also allows the recordist to vary the basic elements of sound: volume (potentiometer), dynamic range (compressor/limiter), pitch (harmonizer), timbre and balance (equalizer), duration (technological variation of delay, reverberation, echo, speed), and spatial imaging (including the selection of monaural, binaural, stereophonic, quadriphonic, surround- sound). Microphone selection and placement and the use of the studio's acoustic space also influence the sound as recorded. The recordist edits the performances - deleting, adding, combing, rearranging, or reversing the direction of the sound - by reordering pieces of tape with razors and splicing tape (physical editing) or using multiple recorders (multimachine rolldown); in digital recording these functions are performed electronically.

Tankel, *supra*, note 5, at 37.

28. CUTLER, *supra*, note 3, at 142-43. The vocal echo on Elvis Presley's early Sun recordings is cited by composer Brian Eno as an early instance of studio technology reshaping the sound and texture of popular music. Lecture by Brian Eno, University of California at Santa Cruz, 1980.

29. The Beatles, whose *Revolution #9* introduced audio collage techniques to a vast audience, eventually abandoned live performance for the recording studio after admitting the impossibility of reproducing their unique sound in live performances.

The recording studio was also the birthplace of a popular genre of reggae called "dub," based entirely on the electronic manipulation of previously recorded rhythm tracks. This music was popularized by famous Jamaican producers like Lee Perry and King Tubby.

the production of music, improvements in analog and digital recording were crucial in reshaping the relationship between music and its audience.[30]

After World War II composers began exploring new types of music based on the manipulation of magnetic audiotape. This music became known as *musique concrete.*[31] Pierre Schaeffer of France is often credited as the father of *musique concrete* although the genre was influenced by artists in America, Europe and Japan. While the first *musique concrete* works were produced on phonographic disc cutting equipment,[32] analog tape recorders provided composers with greater expressive freedom.[33] As Schaeffer himself put it, "From the moment you

> (King Tubby) used eight-track tapes to produce the initial dub effects, but because of its lack of technical precision, he soon gave it up. Echo units and reverb were subsequently used - these would add echo to a singer's voice, for example. Certain words uttered by the singer would reverberate as though he were speaking in a hollow cave.
>
> The 'dub' would entail adding tape echo fed into the mixing board by a revox two-track machine at a speed (usually) of three and three-quarter i.p.s. The engineer would then move the dub button from its upward position downwards, and this sudden cutting effect of the guitar from the tape would create a spiralling, reverberating effect. The engineer could also feed the tape echo into a phaser, which was then fed into the mixing board to create other effects. The phaser could be tuned to a desired effect and the snare drum, for example, could produce an eerie or weird - but highly danceable effect.

S. CLARKE, JAH MUSIC 130-31 (1980).

30. For instance, where musicians previously used the recording medium to fix their musical performances for posterity, performance increasingly is valued only as a simulacrum of the record. ATTALI, *supra*, note 1, at 85. Especially in the 1980s, lip-synched performances (both live and videotaped) began to displace live musical production as a form of popular entertainment. This phenomenon has been celebrated (on MTV or broadcast television programs like *Putting on the Hits*) and reviled (most recently during the Milli Vanilli scandal of 1990) by consumers and the music industry alike.

31. *Musique concrete* is an electronic music consisting of a collage of real, or "concrete" sounds; in other words, of sounds recorded and then manipulated and juxtaposed in various ways.

J. ROCKWELL, ALL AMERICAN MUSIC: COMPOSITION IN THE LATE TWENTIETH CENTURY 154 (1984).

32. Kahn, *Audio Art in the Deaf Century,* SOUND BY ARTISTS 303 (1990).

33. American composer John Cage suggests that with a minimum of two tape recorders and a disk recorder, the following processes are possible:

> 1) a single recording of any sound may be made; 2) a recording may be made, in the course of which, by means of filters and circuits, any or all of the physical characteristics of a given recorded sound may be altered; 3) electronic mixing (combining on a third machine sounds issuing from two others) permits the presentation of any number of sounds in combination; 4) ordinary splicing permits the juxtaposition

accumulate sounds and noises, deprived of their dramatic connotations, you cannot help but make music."[34]

With the development of *musique concrete*, compositions incorporating audio collage techniques soon filtered into American popular music. These popular recordings frequently used collage techniques as novelty or parody. Slapstick novelty recordings by Spike Jones later gave way to edited gags such as Buchanon and Goodman's *Flying Saucer* recordings from the 1950s.[35] The orchestral compositions of Carl Stallings for Warner Brothers' animated cartoons during the 1940s and 1950s also utilized cut and paste studio techniques to create densely layered works of pastiche and parody.[36]

Audio collage techniques continued to integrate elements of mainstream culture throughout the 1960s and 1970s. Minimalism, Pop Art and pop music merged in James Tenney's *Collage 1* (1961), constructed from razor blades and an audio tape of Elvis Presley singing the Carl Perkins hit *Blue Suede Shoes*.[37] The Beatles' *Revolution #9* (1968) also contained

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> of any sounds, and when it includes unconventional cuts, it, like rerecording, brings about alterations of any or all of the original physical characteristics. The situation made available by these means is essentially a total sound-space, the limits of which are ear- determined only, the position of a particular sound in this space being the result of five determinants: frequency or pitch, amplitude or loudness, overtone structure or timbre, duration, and morphology (how the sound begins, goes on, and dies away). By the alteration of any one of these determinants, the position of the sound in sound-space changes. Any sound at any point in this total sound-space can move to become a sound at any other point. But advantage can be taken of these possibilities only if one is willing to change one's musical habits radically.

CAGE, *supra*, note 17, at 8-9.

34. Diliberto, *Interview: Pierre Schaeffer & Pierre Henry: Pioneers in Sampling,* ELECTRONIC MUSICIAN, Dec. 1986, at 56.

35. These narrative recordings consisted of a fictional newscaster interviewing "alien" platters from outer space, typically snippets of hit recordings of the period, such as *I Hear You Knockin* and *Earth Angel*. Unamused copyright owners soon forced Buchanon and Goodman to arrange royalty agreements for use of these tunes. In his later parody recordings Goodman regularly obtained licenses to satisfy his record company's concerns. Gordon & Sanders, *When Parodies Use Musical Allusion to Copyrighted Works,* N.Y.L.J., Feb. 8, 1991, at 7, col. 1.

36. Stallings' work had a profound impact on key figures in the New York "downtown" music scene of the late 1970s and early 1980s (including artists such as John Zorn, Christian Marclay, Lauri Anderson and others).

37. Oswald cites Tenney's use of *Blue Suede Shoes* as fulfilling Milton's stipulation that piracy or plagiarism of a work occurs only if it is not bettered by the borrower. Oswald, *Bettered by the Borrower: Copyrights and Music Composition*, WHOLE EARTH REVIEW, Dec. 22, 1987, at 104.

dozens of unauthorized fragments taken from radio and television broadcasts.[38] In the 1970s and 1980s, popular recordings by Holgar Czukay, Brian Eno and David Byrne incorporated "found" fragments from shortwave radio broadcasts.[39] Similarly, in the 1980s works such as Douglas Kahn's *Reagan Speaks for Himself* (1981), Bonzo Goes to Washington's *Five Minutes* (1985) and Double Dee and Steinski's *Motorcade Sped On* (1987) manipulated audio newscasts into incisive works of social commentary, the audio equivalent of John Heartfield's 1930s anti-Nazi photocollage assemblages.[40]

III. MODERN COLLAGE FORMS: DANCE, RAP AND HIP HOP

Copyright concerns over audiocollage techniques have most recently arisen pursuant to the commercial success of dance and hip hop recordings fashioned out of snippets of pre-existing recordings. These compositions descend from the New York street scene of the mid- to late-1970s during which African-American youth developed new forms of cultural expression, including break dancing, rap music and graffiti art. On the streets and in the clubs, disk jockeys from the Bronx in New York kept dance rhythms going by "cutting" back and forth repeatedly between the instrumental breaks of the same record on two separate turntables.[41]

38. *Id.*

39. Holgar Czukay studied under the electronic composer Stockhausen and was a member of the progressive rock group Can. Brian Eno, a founding member of the 1970s band Roxy Music and an influential producer and solo recording artist, teamed up with David Byrne of the band Talking Heads to produce a popular LP entitled MY LIFE IN THE BUSH OF GHOSTS (Sire, 1981) which prominently featured found radio text.

40. These artists seemingly took to heart Frankfurt School theorist Walter Benjamin's observation that "Fifty years ago, a slip of the tongue passed more or less unnoticed. Only exceptionally may such a slip have revealed dimensions of depth in a conversation which had seemed to be taking its course on the surface." W. BENJAMIN, *The Work of Art in the Age of Mechanical Reproduction,* ILLUMINATIONS 235 (1968).

41. Disk jockeys such as Cool D.J. Herc, Eddie Cheeba and Starski became celebrities by assembling and reassembling improvised sonic collage pieces for dance crowds. Their techniques are described as follows:

> A disk jockey uses two turntables, amplified through a public-address system. The Technics SL1200 model is preferred for its direct-drive mechanism, which allows the record to begin spinning at normal speed after the D.J. releases it.
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> Copies of the same record are often placed on both turntables and played simultaneously. The D.J. uses a mixing console to blend the signals from each through the sound system. By slowing one record slightly, both are thrown out of sync, producing a phasing effect. "Cutting," the popular technique of manually manipulating a disk on one turntable while the same record plays normally on the other, makes the

The first commercial success of a disk jockey "mastermix"[42] was Grandmaster Flash's *The Adventures of Grandmaster Flash on the Wheels of Steel* (1981). *Adventures...* was a pioneering work that incorporated snippets of contemporary sound recordings by Blondie (*Rapture*), Queen (*Another One Bites the Dust*) and Chic (*Good Times*).[43] While *Adventures...* remains one of the few mastermix recordings commercially released,[44] techniques pioneered by Grandmaster Flash and other DJs continue to have enormous impact on American popular music. Disk jockeys are increasingly viewed as primary instrumentalists, each possessing a distinctive style and technique within the genres of rap and hip hop. English and European pop groups have responded to these American

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> music stammer. Placing a different record on the second turntable allows the D.J. to add such ingredients as saxophone honks, James Brown whoops or sound effects.
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> Using the mixer, the D.J. can switch between turntables and an unused silent channel. Using this technique, called transforming, he chops legato sounds, such as swooning strings or purring synthesizers, into Morse code-like dashes of noise.

Dery, *Now Turning the Tables...the D.J. as Star,* N.Y. Times, Apr. 14, 1991, Sec. 2, at 28, col. 4.

42. A mastermix is a new version of a dance record created by intermixing new sounds and audio fragments from other records.

43. Although different in effect, the manipulation of turntables on *Adventures...* is similar in approach to John Cage's piece for two phonographs entitled *Imaginary Landscape #1* (1939). Cage's composition however relied on sounds made for test purposes by the Victor Company. Like many latter day hip hop artists, Cage's played these records in conjunction with other instruments. *See* Cage, *John Cage on Radio and Audio Tapes,* SOUND BY ARTISTS 289-90 (1990).

The closest contemporary analog to Cage's early phonograph pieces is the work of media artist Christian Marclay. While Marclay's work involving visual and audio media is commonly shown in gallery installations he has also released a number of sound recordings. In his commercially released recording entitled MORE ENCORES (No Man's Land, 1989), Marclay utilizes several phonograph turntables to create compositions resembling both Oswald's PLUNDERPHONIC and Grandmaster Flash's *Adventures....* Like Oswald, Marclay's pieces focus on one particular artist at a time. Similarly, Marclay makes no attempt at hiding the constituent elements of his compositions. Individual cuts are entitled: Johann Strauss, John Zorn, Martin Denny, Frederic Chopin, Fred Frith, Louis Armstrong, Ferrante & Teicher, Maria Callas, Jimi Hendrix, Jane Birkin & Serge Gainsbourg, John Cage and even Christian Marclay. However, Marclay's layering technique makes it extremely difficult for anyone to mistake his work for that of the artists quoted. Like Oswald, Marclay's work also manipulates the shared memories and recollections of his audience, critiquing the cultural signifiers of each artist cited.

44. *See* Christgau, *Down by Law: Great Dance Records You Can't Buy,* VILLAGE VOICE, Mar. 28, 1986, at 39, col. 4. (Describing the history of Double Dee and Steinski's *The Payoff Mix,* an critically acclaimed audio collage never officially released due to administrative problems in securing releases from appropriated artists). *See also* Prevost, *Copyright Problems in Mastermixes,* 9 COMM. & LAW 3 (1987) (Focusing on substantial similarity issues and possible fair use defense of mastermixes).

innovations by also incorporating disk jockeys into their own recorded and live performances.[45]

Widespread use of the digital sampling equipment in the 1980s also enabled avant garde collage techniques to enter the musical mainstream. While the digital sampler is not a new instrument per se (historical antecedent's included Frederick Sammis' 1936 photoelectric "Singing Keyboard,"[46] the Optigan[47] and the Mellotron[48]), it's influence on popular music recalls the impact of the electric guitar on the popular music of an earlier generation. Ease of use, improved audio fidelity and low cost allowed digital samplers to become a primary contemporary music.[49] Digital sampling permits musicians, producers and engineers to replicate desired sounds more efficiently.[50] However, while digital sampling devices have expanded the horizons of musical possibility, they are in many ways merely a technical refinement of Edison's phonograph; a mechanical device that more effectively enables the user to record and reproduce the sounds and noises of everyday life. Ultimately, it is this mimetic function of phonographic and digital sampling equipment which created a popular groundswell of interest in multilayered compositions, particularly in dance, rap and hip hop recordings.

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45. For instance, recent live performances by the English Group BAD II incorporated guitar-based rock music performed over dance rhythms, all integrated between snatches of recent records spun by an on-stage DJ. Goodwin, *Let the DJ Play*, S.F. BAY GUARDIAN, Oct. 30, 1991, at 50, col. 2.

46. The "Singing Keyboard" produced unique sounds by activating loops of optical sound film, and was used in Hollywood for commercial purposes. Kahn, *supra*, note 32, at 308. Sammis suggested:

> The instrument will probably have ten or more sound tracks recorded side by side upon the strip of film, and featuring such words as quack for a duck, meow for a dog, the hum of a human voice at the proper pitch, or the twaddle indulged in by some of our tin pan alley song writers.

Id. (citing Rhea, *Photo-electric Instruments*, THE ART OF ELECTRONIC MUSIC 15 (1984)).

47. The Optigan is a keyboard instrument that optically reads a large polyvinyl disc containing different musical "voices."

48. The Mellotron is a keyboard instrument that operated analog tape loops of recorded instruments, orchestras and choirs.

49. Casio's SK-1 digital keyboard featured a built-in microphone and sells for as little as $100.

50. Minimalist composer Steve Reich abandoned his experiments in tape and speech manipulation in the 1960s because of the labor intensive nature of editing audiotape. However, in the 1980s he returned to this form of composition because digital sampling equipment "was physically easier to work with and more musical." Kendall, *Steve Reich: One of Three Profiles of Composers Who Use Computers in Their Work*, PC-COMPUTING, January 1990, at 98.

Concern over possible copyright infringement has grown as composers with roots in the avant garde, dance, rock and hip hop music cultures continue to refine the promise of these early 20th Century tape collages. Although digital sampling equipment can accurately reproduce the sounds of acoustic instruments, choirs and even entire orchestras, the instrument's ability to reproduce the identifiable sonic characteristics of popular recordings and recording artists is perhaps most worrisome to copyright attorneys. Litigation over digital sampling has focused primarily on the use of pre-existing sound recordings in derivative collage compositions,[51] so it is useful here to examine applicable copyright laws governing the artistic practice of audio collage.[52]

IV. COPYRIGHT OWNERSHIP IN MUSICAL COMPOSITIONS AND SOUND RECORDINGS:

The power to regulate copyright rights in the United States derives from the U.S. Constitution. Among the enumerated

51. Recording artist Jimmy Castor brought suit against rap artists the Beastie Boys, arguing the band took the words *Yo Leroy* and various drum beats from his *The Return of Leroy (Part 1)*, a follow-up to Castor's 1967 hit *Hey Leroy, You're Mama's Callin' You*. Aaron, *Gettin' Paid: Is Sampling Higher Education or Grand Theft Auto?*, VILLAGE VOICE ROCK & ROLL QUARTERLY, Fall 1989, at 22. Similarly, 1960s recording artists the Turtles brought suit against rap band De La Soul for $1 million over the unauthorized use of an organ and string line from their tune *You Showed Me*, which De La Soul slowed down and layered with other material. Pareles, *In Pop, Whose Song is it, Anyway?*, N.Y. Times, Aug. 27, 1989, Sec. 2, at 26, col. 5.

In September 1991, Island Records and Warner/Chappel music publishers brought suit against Negativland, a San Francisco-based collage ensemble, over that band's parody of the 1987 U2 hit *I Still Haven't Found What I'm Looking For*. In October 1991, the parties reached settlement with terms similar to those in the PLUNDERPHONIC case. In addition to paying $25,000 and half their wholesale proceeds to settle the claim, Negativland and their small independent record label were required to forward all remaining copies, artwork and mechanical parts to Island Records. Richardson, *Negative Thinking*, S.F. BAY GUARDIAN MUSIC SUPPLEMENT, Dec. 1991, at 8, col. 1. Ultimately, Negativland expects to lose $70,000 in lost sales, damages and legal fees, more money than the band has made in their 11 years of existence. Richardson, *Money for Nothing*, EAST BAY GUARDIAN, Nov. 1, 1991, at 42, col. 1.

In December 1991, a Federal Judge in Manhattan issued an injunction preventing the sale of an album by rap singer Biz Markie which contained eight bars of a popular 1972 ballad by Gilbert O'Sullivan entitled *Alone Again (Naturally)*. Sullivan, *Judge in 'Sampling' Case Rules Against Rapper*, N.Y. Times, Dec. 17 1991, Sec. B, at 3, col. 5. The judge ruled that Biz Markie's "only aim...was to sell thousands upon thousands of records" and sent the case to the U.S. Attorney for the Southern District of New York for possible criminal prosecution. *Id.* Biz Markie and other defendants subsequently settled their action with Gilbert O'Sullivan.

52. Use of an underlying sound recording in an audio collage may give rise to several causes of action. In addition to recovery for infringement of copyrights in an underlying musical composition and sound recording, plaintiff may seek to recover for unfair competition, unjust enrichment, misappropriation of personality and tape piracy. Any analysis of these latter issues is unfortunately beyond the scope of this Comment.

powers of Congress is the power "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries."[53] This grant of limited monopoly rights to authors was premised on the belief that the public will benefit from the creative works of authors, and that a copyright monopoly provides incentive for the full realization of such creative activities.[54] Copyright law therefore strives to encourage creativity for the public benefit by providing artists and other authors of copyrightable works with financial motivation.[55]

In accordance with these principles, the 1976 Copyright Act provides copyright protection to "original works of authorship fixed in any tangible medium of expression."[56] Exclusive rights granted to the copyright owner include the right to reproduce the copyrighted work in copies or phonorecords,[57] the right to prepare derivative works based upon the copyrighted work,[58] the right to distribute copies or phonorecords of the copyrighted work to the public, and the right to perform[59] and display[60] the work publicly.

The 1976 Act provides several remedies to the copyright owner in the event of infringement. The copyright holder may impound infringing articles,[61] enjoin manufacture and distribution of a work,[62] and obtain actual damages,[63] statutory damages,[64] and costs and attorneys fees.[65] In some cases criminal penalties may also apply.[66] These remedies provide strong incentives for copyright holders to pursue copyright infringement litigation.

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53. U.S. CONST. art. I, § 8, cl. 8.

54. 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 1.03(A) at 1- 32 (1991). (Hereafter, "M. NIMMER & D. NIMMER")

55. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

56. 17 U.S.C. § 102 (1991). This section accords copyright protection to musical works, including any accompanying words *Id.* § 102(a)(2). Sound recordings are also protected. *Id.* § 102(a)(7).

57. 17 U.S.C. § 106(1) (1991).

58. *Id.* § 106(2).

59. *Id.* § 106(4).

60. *Id.* § 106(5).

61. *Id.* § 503(a).

62. *Id.* § 502.

63. *Id.* § 504(b).

64. *Id.* § 504(c). Statutory damages up to $20,000 may be awarded upon a finding of infringement. *Id.* § 504(c)(1). In addition, upon a finding of willful infringement a court may award statutory damages to a sum of not more than $100,000. *Id.* § 504(c)(2).

65. *Id.* § 505.

66. *Id.* § 506.

Copyright protection extends to sound recordings as well as underlying musical compositions (including their lyrical accompaniment).[67] Congress first extended federal copyright protection to original musical compositions in 1831, when the copyright owner of a composition was granted the exclusive right to sell copies of the musical score.[68] At this time the author of a musical composition had no control over subsequent performances of the composition. By the late 19th century, the demand for sheet music was lessened following the introduction of player pianos and other devices permitting the mechanical reproduction of compositions, thereby diminishing the value of musical copyrights. In 1908 the Supreme Court addressed this concern in *White-Smith Music Publishing Co. v. Apollo Co.*[69] Here, the Court held that piano rolls were not copies within the meaning of the Copyright Act.[70] Instead, the court ruled that piano rolls and other phonorecords were merely mechanical parts of a machine "which, when duly applied and properly operated in connection with the mechanism to which they are adapted, produce musical tones in harmonious combination."[71]

Congress adapted the Copyright Act of 1909 partly in response to the Supreme Court's decision in *White-Smith Music*. The 1909 Act granted copyright protection to composers of original musical works and defined records and piano rolls as "copies" of the original composition.[72] Under the 1909 Act, reproduction of these copies required that payment be

67. *Id.* at § 102(a). The Copyright Act defines sound recordings as:

> [w]orks that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords in which they are embodied.

Id. § 101.

Sound recordings are distinguished from phonorecords under the Act. The Act defines phonorecords as:

> [m]aterial objects in which sounds, other than those 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. The term "phonorecords" includes the material object in which the sounds are first fixed.

Id.

68. Goldstein v. California, 412 U.S. 546, 564 (1973).
69. 209 U.S. 1 (1908).
70. *Id.* at 18.
71. *Id.*
72. 17 U.S.C. § 1(e) (1909 Act).

made to the copyright owner of the song.[73] While the 1909 Act provided enhanced protection for musical compositions, it was not until the 1971 Sound Recording Amendment that sound recordings were also granted copyright protection.

The primary purpose of the 1971 Sound Recording Amendment was to combat the unauthorized duplication and distribution of popular recordings by record and tape pirates.[74] As incorporated in § 114 of the 1976 Copyright Act, the owner of a copyrighted sound recording has the exclusive right to (1) reproduce the copyrighted work in copies and phonorecords; (2) prepare derivative works based on the copyrighted work, and (3) distribute copies or phonorecords of the copyrighted work to the public.[75] However, copyright protection for sound recordings extends only to the particular sounds which comprise the recording, and does not apply to recordings which effectively simulate those sounds.[76] Mere imitation of a recorded performance will therefore not infringe upon a sound recording, even where the simulation is nearly identical to the original recording.[77] In addition, only those sound recordings fixed in a tangible medium of expression on or after February 15, 1972 are covered by § 114 the 1976 Copyright Act. Nevertheless, recordings published before this date may still be protected under State statute and common law under § 301(c).[78]

Significantly, a phonorecord contains two copyright interests: a copyright in the sound recording itself, and a copyright in the underlying composition.[79] While copyright owners of compositions may control the public performance of those compositions, copyright owners cannot control the public performance of sound recordings.[80] In addition, the 1976 Copyright Act established a compulsory licensing system allowing other artists to legally record and distribute previously published musical compositions if they follow established licensing

73. *Id.*

74. H.R. REP. No. 92-487, 92nd Cong., 1st Sess., at 6. (Hereafter, HOUSE REPORT). The 1971 Sound Recording Act was also passed in part to address the issue of federal preemption which commonly arose in attempts to combat record and tape piracy at the state court level. *Id.* at 2-3. The 1971 amendment was later codified under § 114 of the 1976 Act.

75. 17 U.S.C. § 114(a) (1991).

76. *Id.*

77. *Id.*

78. *Id.* § 301(c).

79. *Id.* § 102(a)(2) and § 102(a)(7).

80. *Id.* § 114(a).

procedures and pay the copyright owner the statutory royalty rate.[81] However, a compulsory license is not available for any arrangement changing the basic melody or fundamental character of a work.[82] These latter derivative works are not subject to protection under the compulsory licensing statute without the express consent of the owner.[83] If the copyright owner denies the request for a mechanical recording license, any subsequent use of that composition must comport with § 107 guidelines regarding fair use to remain non-infringing. In addition to securing compulsory licenses for the underlying composition, composers of collage recordings must also secure permission to use the sound recording of that composition from the proper copyright owners. Currently there exists no compulsory licensing scheme encompassing sound recordings.[84]

V. COLLAGE COMPOSITIONS AS DERIVATIVE WORKS:

As noted above, the Copyright Act protects derivative works, defined 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."[85] Therefore, an aural collage will typically be protected as a derivative work, inasmuch as it is comprised of pre-existing public domain and/or copyrighted works coupled with original acts of authorship.[86] However, the copyright in a derivative composition, as in any other derivative work, extends only to the new elements contributed by the author, and not to those pre-existing elements which comprise the work.[87]

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81. *Id.* § 115(a). The current mechanical rate is 5.7 cents (or 1.1 cent per minute, whichever is larger) per song for each copy manufactured and sold. 37 C.F.R. § 307.3 (1990).

82. 17 U.S.C. § 115(a)(2) (1991).

83. *Id.*

84. Congress has periodically considered a compulsory licensing scheme covering the public performance of copyrighted sound recordings. However, no such legislation has ever been passed. A history of these legislative attempts is provided in: SUBCOMM. ON COURTS, CIVIL LIBERTIES AND THE ADMIN. OF JUSTICE, COMM. ON THE JUDICIARY, H.R. REP. 95th Cong., 2d Sess., PERFORMANCE RIGHTS IN SOUND RECORDING (Comm. Print 1978).

85. 17 U.S.C. § 101 (1991).

86. *Id.*

87. *Id.* § 103(b).

VI. MUSICAL INFRINGEMENT AND THE SUBSTANTIAL SIMILARITY REQUIREMENT:

Anyone who violates one of the exclusive rights of a copyright owner is an infringer of that copyright.[88] To prove infringement, a copyright owner must establish both proof of ownership and proof of copying.[89] Proof of copying may be established either by direct evidence such as an admission of copying, or by indirect evidence showing both access and substantial similarity.[90] Because access to a copyrighted work is easily established in collage recordings incorporating elements of that work, a determination of whether that use is infringing will necessarily focus on questions of substantial similarity.

A. SUBSTANTIAL SIMILARITY AND THE UNDERLYING COMPOSITION:

The determination of whether a song is substantially similar is a question of fact.[91] In 1841, Justice Story observed that infringement may occur if an author's labors are substantially appropriated or so much is taken that the value of the original is diminished.[92] Generally, the use of copyrighted material without the consent of the owner is considered unreasonable if it extensively copies or paraphrases the original.[93] Infringement occurs with respect to music "if that portion which is the whole meritorious part of the song is incorporated in another song, without any material alteration in the sequence of bars."[94] Although the "whole meritorious" or most memorable part of a song may be quite brief, it is commonly that part of the song which is appropriated. As a result, cases involving infringement of songs have found substantial similarity where quantitatively very little of the song has been copied. One court has found copyright infringement based on the substantial similarity of four bars of defendant's composition to that of plaintiff.[95] In another case, infringement was also found based upon the substantial similarity of four bars

88. *Id.* § 501(a).

89. M. NIMMER & D. NIMMER, *supra*, note 54, § 13.01[A], 13-4. *See* 17 U.S.C. § 411 (Action for infringement requiring copyright registration).

90. Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).

91. Northern Music Corp. v. King Record Dist., 105 F. Supp. 393, 397 (S.D.N.Y. 1952).

92. Folsom v. Marsh, 9 F. Cas. 342, 348 (CC Mass. 1841) (No. 4,901).

93. MCA v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981).

94. Northern Music Corp. at 397.

95. *Id.* at 399.

upon which the song's popular appeal and commercial success depended.[96] Similarly, a charge of piracy and infringement was upheld in the use of a single phrase ("I hear you calling me") which contained nearly identical accompaniment.[97]

Because the determination of substantial similarity is necessarily made on a case-by-case basis, the outcome of any suit involving an audio collage will depend on the use made of the pre-existing work by the composer. If a composer prominently incorporates the "heart" of plaintiff's composition within a collage piece, the taking is capable of constituting infringement of the copyrighted work.[98] However, under certain circumstances a *de minimis* infringement of a copyrighted composition may be permitted. As a general rule, "a taking is considered *de minimis* only if it is so meager and fragmentary that the average audience would not recognize the appropriation."[99] Thus, in one case plaintiff's musical copyright was found not to have been infringed although the first 16 measures of both songs were substantially alike.[100] However, in another case the court held that a parodist's copying of four notes in a 100-measure composition was not merely a *de minimis* taking where the musical phrase was the heart of the composition.[101] Similarly, another parody using the first six bars of a song's 38 bars was found not to be a *de minimis* taking.[102] Here the court observed that charges of substantial similarity will seldom be rebutted in cases of musical parody, because parodies typically require more than a *de minimis* taking to identify the object of parody.[103]

B. Difficulties with a Substantial Similarity Analysis of Popular Music:

As Professor Nimmer noted, one problem with copyright infringement analysis in popular music is that almost all popular compositions bear some similarity to prior works.[104]

96. Robertson v. Batten, Barton, Durstine & Osborn, Inc. 146 F. Supp. 795, 798 (S.D. Cal. 1956).

97. Boosey v. Empire Music Co., 224 F. 646, 647 (S.D.N.Y. 1915).

98. Elsmere Music, Inc. v. NBC Inc., 482 F. Supp. 741, 744 (S.D.N.Y. 1980), aff'd per curiam, 623 F.2d 252 (2d Cir. 1980).

99. Fisher v. Dees, 794 F.2d 432, 435 (9th Cir. 1986).

100. Arnstein v. Edward B. Marks Music Corp., 82 F.2d 275, 277 (2d Cir. 1936).

101. Elsmere, 482 F. Supp. at 744.

102. Fisher v. Dees at 434.

103. *Id.* at 439.

104. M. Nimmer & D. Nimmer, *supra*, note 54, § 2.05[D] at 2-58.

Distinguishing originality from quotation when analyzing popular music is especially difficult. A successful pop song typically balances elements of familiarity and novelty within strict formulaic parameters, whether these parameters are defined as "classic" three-chord rock music, the popular ballad, "Album-Oriented Rock," "Urban Contemporary" music or the 12-bar blues. Frequently, pop songwriters pay tribute to their predecessors via allusion, pastiche and mimicry, making it especially difficult to determine exactly which elements in any given pop song are original.[105] Furthermore, most popular music derives from a variety of musical traditions. Rock and roll borrows extensively from black music, country music, folk and Tin Pan Alley.[106] Rap music too borrows heavily from funk, soul, dissonant jazz and the avant garde.[107] In addition, there is a strong tradition of "answer" songs and parodies in the popular charts, where artists commonly develop specific themes, ideas and melody patterns taken from earlier hit recordings.[108]

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105. Pareles, *A Zillion-Dollar Question: Who Did What in a Song,* N.Y. Times, Apr. 28, 1988, Sec. C, at 21, col. 5.

106. The Beach Boys based many of their instrumental arrangements on entire Chuck Berry songs. In the case of *Surfin' U.S.A.* by the Beach Boys, composer Brian Wilson later arranged a deal with the owners of Chuck Berry's *Sweet Little Sixteen* in which Wilson shared in certain royalties generated by the new version. Gordon & Sanders, *How the Copyright Law Applies to Musical Parody,* N.Y.L.J., Jan. 25, 1991, Sec. 1, at 7, col. 4. *But See*: Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F.Supp. 177 (S.D.N.Y. 1976) (ex-Beatle George Harrison found to have unconsciously infringed upon the early 1960s Chiffon's song *He's So Fine* in his popular recording *My Sweet Lord*).

107. Rap also borrows heavily from the icons and symbols of our electronically mediated environment, more often resembling the fragmented nature of network television than any one musical antecedent. *See, e.g.*, Pareles, *How Rap Moves to Television's Beat*, N.Y. Times, Jan. 14, 1990, Sec. 2, at 1, col. 1. The structure of this music most closely resembles the notion of television "flow" (a set of alternative sequences of different "events" available within a single dimension and operation) developed by theorist Raymond Williams. R. WILLIAMS, TELEVISION: TECHNOLOGY AND CULTURAL FORM 86 (1975).

108. *See* Cooper, *Response Recordings as Creative Repetition: Answer Songs and Pop Parodies in Contemporary American Music*, ONE, TWO, THREE, FOUR, Winter 1987, at 79 (identifying recurrent themes in answer songs, including: 1) answer to a direct question; 2) response to a statement or command; 3) challenge to a stated position or ideology; 4) continuation of a storyline or theme; 5) follow-up ideas and themes; 6) parody songs; and 7) instrumental encores). *Id.* at 79-87.

Answer songs are permissible under copyright law to the extent that copyright protection for an original work does not extend to an idea or concept, but only to the expression of that idea. One example is the Johnny Cash song *A Boy Named Sue*, which anticipated several follow-up songs, including *A Girl Named Harry, My Name is Sue (But I'm a Girl), A Girl Named Sue*, and *A Girl Named Johnny Cash*. *Id.* at 82. These answer songs would not infringe upon the original Johnny Cash recording assuming they focus upon the "idea" of gender misdescription, and not upon Cash's unique "expression" of this idea.

Parody, mimicry and quotation in music existed long before contemporary forms of popular music. Throughout history, classical composers drew liberally from folk music, popular music and even directly from their peers.[109] However, while musical language has an extensive repertoire of punctuation devices, there is nothing equivalent to literature's use of quotation marks.[110] Listeners historically have had to rely upon their past associative experiences in order to extricate the meaning and historical context from any given composition.

Artistic and technical advances in sound reproduction, coupled with the accelerating pace of musical cross-fertilization within an ever-shrinking global village, have rendered earlier formulas defining substantial similarity especially unsuited for modern forms of musical pastiche. Because digital samplers can appropriate infinitesimally small "bits" of information, determining what constitutes an infringing use under these circumstances can be extremely difficult.[111] Modern studio equipment is capable of electronically manipulating source material beyond recognition. Furthermore, collage artists may recombine discrete elements from various pre-recorded and original sources to create new mosaic-like compositions that while derived from many other works may not be considered a derivative work under the Copyright Act. Ultimately, if a composer samples fragments of another recording with the intent of fashioning a new and original composition, it would appear less likely that enough musical similarity would exist between the two works for the derivative piece to fulfill the market demand of the original.[112]

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109. *See*: Comment, *An Improved Framework for Music Plagiarism Litigation*, 76 CALIF. L. REV. 421, 423 (1988) (Traditional notions of music plagiarism inadequate at addressing fundamental nature of composition process and music itself).

110. Oswald, *supra*, note 37, at 104.

> Jazz musicians do no wiggle two fingers of each hand in the air, as lecturers sometimes do, when cross-referencing during their extemporizations, as on most instruments this would present some technical difficulties.

Id.

111. Since a composer may alter the speed, change the pitch or put a delay on any given sample, it is not always easy to detect which recording is used. Although computer analysis of the original composition and derivative collage is possible, the addition of other sounds can make it difficult or impossible to isolate the original work. Assuming that it is possible to detect copying, a substantial similarity analysis will focus upon the quantitative amount and qualitative importance of the material taken from plaintiff's work. M. NIMMER & D. NIMMER, *supra*, note 54, § 13.03[A][2] at 13-42.1 - 13-43. Significantly, less similarity is required to prove infringement where proof of access is shown. Sid and Marty Kroft Television Prods. Inc. v. McDonald's Corp., 562 F.2d 1157, 1172 (9th Cir. 1977).

112. Johnson, *supra*, note 15, at 168.

VII. AURAL APPROPRIATION AND PARODY:

Musical parody resembles modern collage techniques in the applied arts in that both rely on pre-existing work to fulfill their satiric and communicative function. Musical parody extends back to the 15th Century "parody mass,"[113] and can be traced through the work of Mozart, Gilbert and Sullivan, Allan Sherman, Stan Freberg and Weird Al Yankovic.[114] Musical parodies are commonly directed at specific targets, but in recent years the courts have reaffirmed that "a permissible parody need not be directed solely to the copyrighted song, but may also reflect on life in general."[115]

While collage recordings frequently comment on, critique and poke fun at the appropriated author or text, they may also comment upon our sonic environment; the background hum of our daily existence.[116] Works of parody and musical collage both manipulate cultural signifiers,[117] shifting context and

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113. The parody mass is a mass composition dating back to the 15th- and 16th-century, incorporating extensive borrowed material from various voice parts or entire sections of a polyphonic composition. HARVARD DICTIONARY OF MUSIC 643 (2d ed. 1969).

114. Gordon & Sanders, *Strangers in Parodies: Law of Musical Satire*, N.Y.L.J., Jan. 18, 1991, at 5, col. 1.

115. MCA v. Wilson, 677 F.2d at 185.

116. Negativland is one collage-based group whose work emphasizes humorous commentary about American consumer society. According to the band, Negativland:

> occupies itself with recontextualizing captured fragments to create something entirely new. A psychological impact based on a new juxtaposition of diverse elements ripped from their usual context chewed up and spit out as a new form of hearing the world around us. One of Negativland's artistic obsessions involves the media itself as source and subject for much of our work. We respond, as artists always have, to our environment. Our environment, increasingly filled with artificial ideas, images and sounds. Television, billboards, newspapers, advertisements and music/muzak being blasted at us everywhere we go. And that background hum of everyday life certainly includes top 40 bands like U2.

Negativland, Excerpt from KPFA's *Over the Edge*, Broadcast Oct. 10, 1991 (mimeographed statement released by the band Negativland). *See supra*, note 51 concerning litigation involving Negativland and Island Records/Warner-Chappel Music.

117. In Semiology/Semiotics, the sign is the basic unit in the process of signification, the process of articulating and conveying meaning. The sign has two aspects, the "signifier" (the material shape - sound, image - which carries meaning) and the "signified" (the concept signified, which in turn may refer to a potentially infinite number of "referents").

E.A. KAPLAN, ROCKING AROUND THE CLOCK: MUSIC TELEVISION, POSTMODERNISM AND CONSUMER CULTURE 189 (1987).

meaning in an attempt to juxtapose contrasting realities; "the humorous effect achieved when a familiar line is interposed in a totally incongruous setting, [is] traditionally a tool of parodists...."[118] However, in addition to overt works of parody, collage artists frequently practice a more subtle kind of juxtaposition. A collage recording may subvert traditional notions of world music by juxtaposing a two-note James Brown horn riff above a Tex-Mex Conjunto rhythm, accompanied by yodelling and a Hawaiian lap steel guitar. Or a composer such as John Oswald may attempt to manipulate familiar material into a unique composition virtually unrecognizable due to extensive electronic manipulation of the source material. While these collage pieces may not achieve a solely comic effect, they nevertheless communicate meaning in a manner similar to that of parody. As reflections of our "postmodern" condition, collage works function as a response to the forest of signs, images and texts bombarding our everyday experience. In his essay "Postmodernism and Consumer Society," Frederic Jameson underscores this difference by noting that:

> Pastiche is, like parody, the imitation of a peculiar or unique style, the wearing of a stylistic mask, speech in a dead language: but it is a neutral practice of such mimicry, without parody's ulterior motive, without the satirical impulse, without laughter, without that still latent feeling that there exists something normal compared to which what

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118. Berlin v. E.C. Publications, Inc., 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).

A concern with symbolic representation and the production of meaning underlies the majority of significant 20th Century art movements. Since John Heartfield's early experiments in photomontage, visual artists have been preoccupied with the shifting meaning of cultural signifiers in their works. The Situationist group of the 1950s and 1960s, a loosely knit group of free-spirited artists and intellectuals, were perhaps most obsessed with the practice of subverting meaning, particularly through the practice of "detournement." According to the Situationists, one's artistic function was to "detourne" pre-existing aesthetic elements, integrating these present or past artistic products into a new form serving a propagandistic function. SITUATIONIST INTERNATIONAL ANTHOLOGY, 45-46 (K. Knabb ed. 1981). However, while the Situationists developed a strong political rationale for their juxtaposition and recontextualization of mass cultural signifiers, they were certainly not the first to actualize this propagandistic technique. Early practitioners of photomontage and collage were equally aware that they were manipulating linguistic and representational functions in a powerfully propagandistic manner. Buchloh, *Allegorical Procedures: Appropriation and Montage in Contemporary Art*, ART FORUM, September 1982, at 43.

> is being imitated is rather comic. Pastiche is blank parody, parody that has lost its sense of humor....[119]

Because parody necessarily requires the copying or imitation of another pre-existing work, a body of case law has developed concerning the precise amount of copyrighted work a parody may recall. Since the 9th Circuit's initial decision in *Loew's Inc. v. Columbia Broadcasting System*,[120] works of parody have become increasingly protected as a fair use of copyrighted material. Today, courts commonly view works of parody as "deserving of substantial freedom - both as entertainment and as a form of social and literary criticism."[121] In addition, courts have held that authors of parodies are entitled to a more extensive use of another's copyrighted work than authors who create other fictional or dramatic works.[122] As noted above, collage recordings are analogous to works of parody in that they manipulate the signifiers of pre-existing works, distorting and critiquing the meaning contained within. As a result, it is appropriate to analyze collage recordings in light of recent decisions concerning the permissible boundaries accorded works of parody within a market economy.

VIII. FAIR USE:

Fair use is commonly defined as "a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner."[123] The doctrine of fair use was enunciated by Justice Story in *Folsom v. Marsh*, a case involving a biography of George Washington which quoted extensively from the former President's previously published letters. Justice Story recognized in *Folsom* that:

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119. Jameson, *Postmodernism and Consumer Society*, THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE 114 (1983).

120. 131 F. Supp. 165 (S.D. Cal. 1955).

121. Berlin at 545. For further analysis on the fair use defense as applied to parody, *see* Note, *The Parody Defense To Copyright Infringement: Productive Fair Use After Betamax*, 97 HARV. L. REV. 1395 (1984). *See also*, Comment, *Parody or Piracy: The Protective Scope of the Fair Use Defense to Copyright Infringement Actions Regarding Parodies*, 12 COLUM. J.L. & ARTS 229 (1988); Goetsch, *Parody as Free Speech: The Replacement of the Fair Use Doctrine by First Amendment Protection*, 3 W. NEW ENG. L. REV. 39 (1980).

122. Elsmere at 745.

123. Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 306 (2nd Cir. 1966) quoting H. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY, 260 (1944).

> [A] reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticise [sic], but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy. A wide interval might, of course, exist between these two extremes, calling for great caution and involving great difficulty, where the court is approaching the dividing middle line which separates the one from the other.[124]

Fair use is one exception to the exclusive right of authors to control their works. The policy behind this doctrine is that courts should "occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry."[125] The common law fair use doctrine was eventually codified by Congress in the 1976 Copyright Act at § 107. The purpose of this statute is to allow:

> [t]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research....[126]

This statute requires that at least four factors be taken into account within any fair use analysis: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;[127] (2) the nature of the copyrighted work;[128] (3) the amount and substantiality of the portion used in relation to the copyrighted work as a

124. Folsom v. Marsh at 344-45.
125. Berlin at 544.
126. 17 U.S.C. § 107 (1991).
127. *Id.* § 107(1).
128. *Id.* § 107(2).

whole;[129] and (4) the effect of the use upon the potential market for or value of the copyrighted work.[130]

Courts may also look at additional factors in determining whether a particular infringing use constitutes a fair use.[131] Congress noted that the 1976 Copyright Act "endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change."[132] Nevertheless, although courts are left free to adapt the fair use doctrine to particular situations on a case-by-case basis,[133] judicial analysis is typically restricted to the four enumerated fair use factors of § 107.

Congress did allow that pre-existing content used in a work of parody may fall within the scope of a fair use analysis.[134] However, because Congress did not classify parody as a presumptive fair use, each assertion of the parody defense must be considered individually, taking into account various "statutory factors, reason, experience, and, of course, general principles developed in past cases."[135] Similarly, audio collages must also be evaluated on an ad hoc basis, taking into account the various fair use criteria of § 107 to determine whether each composition deserves the protection accorded certain works of parody.

A. PURPOSE AND CHARACTER OF USE:

A § 107 analysis initially focuses upon the purpose and character of defendant's use, including whether such use is of a

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129. *Id.* § 107(3).

130. *Id.* § 107(4).

131. Section 107 of the Copyright Act states that a fair use analysis "shall include" the above four criteria; According to §101 of the 1976 Act the term "including" is defined as "illustrative and not limitative." *Id.* § 101.

132. HOUSE REPORT, *supra*, note 74, at 66.

133. *Id.*

134. *Id.* at 65. According to the House Report:

> The examples enumerated...while by no means exhaustive, give some idea to the sort of activities the courts might regard as a fair use under the circumstances: "quotations of excerpts in a review or criticism for purposes of illustration or comment; quotations of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; *use in a parody of some of the content of the work parodied;* summary of an address or article, with brief quotations, in a news report....

Id. (Emphasis added).

135. Fisher v. Dees at 435.

commercial nature or is for nonprofit educational purposes.[136] A finding of fair use will typically apply to criticism, comment, news reporting, teaching (including multiple copies for classroom use) scholarship or research.[137] However, as Justice Brennan observed in his dissenting opinion of *Harper & Row Publishers Inc. v. Nation Enterprises*,[138] many of these examples are generally conducted for profit in this country.[139] Parody is an act of criticism and social commentary, and like criticism and commentary it frequently operates within a commercial context, especially as it functions within the commercial boundaries of popular and "new" music where distinctions between culture and commodity tend to be blurred.[140]

In *Sony Corp. of America v. Universal City Studios, Inc.*[141] (hereafter "*Betamax*") the Supreme Court affirmed that every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege belonging to the copyright owner.[142] In *Betamax*, the court held that Sony's sale of Betamax videotape recorders did not "contributorily" infringe defendant's programs broadcast on network television. In finding home taping protected under a fair use analysis, the Court observed that videotape recorders are used primarily by consumers for time-shifting network programming for more convenient home viewing. The court noted that time-shifting constitutes a non-profit, rather than commercial, use of the recorded programs inasmuch as these recordings are typically erased, rather than sold, after later viewing.

While the above dicta in *Betamax* works against a finding of fair use for commercially released audio collage recordings, the commercial context of a work is in fact not wholly determinative. In enacting the 1976 Copyright Act, Congress noted that the fair use criteria codified in § 107 were:

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136. 17 U.S.C. § 107(1) (1991).

137. *Id.* at § 107.

138. 471 U.S. 539 (1985).

139. *Id.* at 592 (Brennan, dissenting).

140. Distinctions between culture and the marketplace continue to evaporate as the arts, commerce and technology interact to create new hybrid cultural forms. Music videos provide one example: While viewed primarily as cable programming and commercial marketing tools, these same videos are increasingly displayed in museum installations and video retrospectives.

141. 464 U.S. 417 (1984).

142. *Id.* at 451. (Also quoted in Harper & Row at 562).

> [n]ot intended to be interpreted as any sort of a not-for-profit limitation on educational uses of copyrighted works. It is an express recognition that, as under the present laws, the commercial and non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions.[143]

More recently, an increasing body of cases has found a fair use even where the purpose and character of defendant's use was commercial in nature. The court in *Triangle Publications v. Knight-Ridder Newspapers*[144] reversed a district court finding that commercial motive was conclusive on the issue of fair use.[145] In *Triangle*, the court ruled that defendant's use of a TV Guide magazine cover in a comparative advertisement for defendant's own TV supplement was not an infringing use under applicable fair use guidelines.[146] Here, the court noted that defendant's comparative advertisement was done in a manner generally accepted in the industry.[147] In addition, the court found that the commercial nature of plaintiff's TV Guide publication neither supported nor hurt defendant's claim that a fair use defense was appropriate.[148] The court asserted that defendant's use was not substantial since only the cover of TV Guide was reproduced and not "the essence of TV Guide - the television schedules and articles."[149] In addition, the court observed that the effect on the TV Guide market was at most *de minimis,* with no deleterious or value reducing effect on plaintiff's copyrighted magazine cover.[150] By determining that defendant's use of TV guide in a commercial advertisement constituted a fair use, the court concluded it was unnecessary to determine whether defendant's use was protected under the First Amendment.[151]

With respect to parody, the court in *Tin Pan Apple, Inc. v. Miller Brewing Co.*[152] observed that appropriation of copy-

143. HOUSE REPORT, *supra,* note 74, at 66.
144. 626 F.2d 1171 (5th Cir. 1980).
145. *Id.* at 1178.
146. *Id.* at 1177-78.
147. *Id.* at 1176.
148. *Id.*
149. *Id.* at 1177.
150. *Id.*
151. *Id.* at 1178.
152. 737 F. Supp. 826 (S.D.N.Y. 1990).

righted material "solely for personal profit," and without any creative purpose, cannot constitute parody as a matter of law.[153] In *Tin Pan Apple*, a popular rap group (The Fat Boys) brought suit against defendant brewing company for using three look-alikes and sound-alikes in a beer commercial the band had previously rejected. In denying defendant's motion to dismiss, the court in *Tin Pan Apple* took issue with defendant's assertion that their commercial operated as parody. The court concluded that a work must be a *valid* parody in order to qualify for fair use protection.[154] Here, defendant's beer commercial was found not to constitute a valid parody because the commercial was used entirely for profit by promoting the sale of beer.[155]

However, more recently the court in *Eveready Battery Co. v. Adolph Coors Co.*[156] determined that defendant's commercial parody of plaintiff's successful "Energizer Bunny" campaign would likely be found to be non-infringing under a fair use analysis, despite defendant's commercial purpose.[157] In rejecting plaintiff's motion for preliminary injunction, the court observed that although the purpose and character of defendant's use weighed in favor of plaintiff, none of the remaining three factors favored plaintiff.[158] In particular, the *Eveready* court's decision disagreed with the holding in *Tin Pan Apple* that appropriation of copyrighted material "solely for personal profit," and without any creative purpose, cannot constitute parody as a matter of law.[159] The *Eveready* court observed that the phrase "solely for personal profit" was contrary to § 107's focus on whether the use is of a commercial nature.[160] In rejecting *Tin Pan Apple*'s exclusive focus on the commercial context of defendant's work, the *Eveready* court observed that:

> Although the primary purpose of most television commercials (like other works of a "commercial nature") may be to increase product sales and thereby increase income, it is not readily apparent that they are therefore devoid of any artistic merit or

153. *Id.* at 831.
154. *Id.* at 830.
155. *Id.* at 832.
156. 765 F. Supp. 440 (N.D. Ill. 1991).
157. *Id.* at 446-48.
158. *Id.* at 447.
159. Tin Pan Apple at 831.
160. Eveready Battery Co. at 446.

> entertainment value. Notably, not all viewers who laugh at a commercial will buy the advertised product.[161]

As a result, the court in *Eveready* ultimately recognized that works parodying American consumer culture must, of necessity, operate within the commercial confines of that culture.[162]

B. NATURE OF THE COPYRIGHTED WORK:

The second focus of any § 107 fair use analysis concerns the nature of the copyrighted work. In determining the nature of a copyrighted work, the court may consider "among other things whether the work was creative, imaginative and original,...and whether it represented a substantial investment of time and labor made in anticipation of a financial return."[163] In addition, the court in *Harper & Row* observed that a work's unpublished status is a critical element of its "nature."[164] In *Harper & Row,* defendant's news article excerpted between 300 to 400 words from an unpublished manuscript of ex-President Gerald Ford, comprising some 13% of the entire article.[165] In refusing to uphold defendant's fair use argument, the court emphasized the unpublished nature of Gerald Ford's presidential memoirs at the time of appropriation.[166] The court focused on the copyright holder's interests in confidentiality and creative control, arguing that interference with these interests could hardly be construed as fair.[167]

For our purposes it is sufficient merely to note that use of unpublished material will not in itself preclude an artist from asserting a fair use defense. However, if an audiocollage artist

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161. *Id.* at 446-47. In addition to finding that the commercial context of defendant's commercial was not dispositive, the court in *Eveready Battery Co.* observed that there was no indication defendant's commercial would supplant that of plaintiff. *Id.* at 448. Although both commercials shared the same audience and television medium, the court observed that viewers would not stop watching plaintiff's commercial to watch defendant's commercial on another channel. *Id.*

162. In response to their recent litigation, Negativland argue that:

> For the law to claim that this (economic) motive is the sole criterion for legal deliberation is to admit that music itself is not to be taken seriously.

Negativland, *supra*, note 116.

163. MCA v. Wilson at 182.

164. Harper & Row at 564.

165. *Id.* at 548.

166. Harper & Row at 549.

167. *Id.* at 564.

does use unauthorized "bootleg" live recordings or other unreleased sounds as source material, the unpublished nature of plaintiff's work will be a significant factor weighing against any finding of fair use.[168]

Another relevant factor in a § 107(2) analysis is the factual or fictitious nature of the work being infringed. Factually based works are typically accorded more permissive use. Nevertheless, the Court in *Harper & Row* refused to find a fair use of President Ford's memoirs despite the factual and newsworthy nature of this material.[169] The Court distinguished between those factual elements which fell within the public domain, and Gerald Ford's particular "expression" of these facts, which defendant reproduced.[170] The decision in *Harper & Row* therefore suggests that more permissive use may be allowed of factual works, but only if these same works contain little subjective expression.

The Court's decision in *Harper & Row* suggests that artists who create audio collages face significant legal trouble when incorporating brief excerpts of broadcast news material into their work, despite the factual nature of that material. Copyright owners of broadcast news material may likely succeed in arguing that this information is the copyrightable "expression" of the announcer, typically hired precisely because of a unique delivery or style of expression.[171] While an artist could assert a First Amendment defense, First Amendment concerns are not traditionally encompassed within a fair use analysis, and courts are extremely reluctant to merge the two.[172]

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168. The unauthorized digital sampling of musician's unreleased work has been an issue in recent years. Most notable is the case involving percussionist David Earl Johnson, whose performance was sampled by keyboardist Jan Hammer and later incorporated into the score for the television program *Miami Vice* without Johnson's knowledge or consent. *See* DeCurtis, *Who Owns a Sound?*, ROLLING STONE, Dec. 4, 1986, at 13.

169. Harper & Row at 569.

170. Harper & Row at 563-64.

171. This principle is reflected in *Columbia Broadcasting Systems, Inc. v. Documentaries Unlimited, Inc.* 42 Misc. 2d 723 (1964) wherein defendants were found to have infringed on CBS's common-law copyright by reproducing in their commercially released LP JFK, THE MAN, THE PRESIDENT one minute of reporter Allan Jackson's off-the-air news announcement concerning the assassination of President Kennedy. The court opined that "(i)t is clear also that Jackson did not merely repeat the news releases handed to him but added to them matter of his own composition." *Id.* at 725.

172. This is evident in *Triangle*, which invalidated a district court's finding that a suit for copyright infringement could be defeated by a First Amendment defense. Triangle at 1172. The *Triangle* court observed that no court had ever made such a ruling previously. *Id.*

C. AMOUNT AND SUBSTANTIALITY OF THE PORTION USED:

The third factor of any fair use analysis, the amount and substantiality of the portion used, is significantly intertwined with the question of substantial similarity.[173] In both, an examination is made into the qualitative and quantitative aspects of substantiality.[174]

As noted earlier, courts have generally recognized that parody and satire deserve substantial freedom as both entertainment and a form of social criticism.[175] In general, courts are more willing to allow a substantial use of copyrighted material in works which parody that material. Under the "conjure up" doctrine developed in *Walt Disney Productions v. Air Pirates*,[176] courts examine whether the parodist has appropriated a greater amount of the original work than is necessary to recall or conjure up the object of satire.[177] The court in *Air Pirates* initially noted that a balance must be struck between the desire to make the best parody and the need to protect the copyright owner by allowing only as much use as necessary to conjure upthe original.[178] Using this test, the court in *Air Pirates* held defendant conjured up more than was necessary when defendant's underground comic book "placed several well-known Disney cartoon characters in incongruous settings where they engaged in activities clearly antithetical to the accepted Mickey Mouse world of scrubbed faces, bright smiles and happy endings."[179] Here, the court emphasized the widespread recognizability of the parodied Disney characters required little substantive copying to place these characters in the minds of readers.[180]

However, one problem with the conjure up theory with respect to works of musical parody lies in the brevity of most popular songs. In 1986, the Ninth Circuit addressed the problem of how much copying should be permitted in works of musical parody in *Fisher v. Dees.*[181] In *Dees,* plaintiffs alleged

173. M. NIMMER & D. NIMMER, *supra,* note 54, § 13.05[A] at 13- 88.10.
174. *Id.*
175. Berlin at 545.
176. 581 F.2d 751 (9th Cir. 1978).
177. *Id.* at 757.
178. *Id.* at 758.
179. *Id.* at 753.
180. *Id.* at 757-58.
181. 794 F.2d 432 (9th Cir. 1986).

that defendant's parody, a 29-second tune entitled *When Sunny Sniffs Glue*, improperly infringed upon their popular recording from the 1950s, *When Sunny Gets Blue*. The court in *Dees* rejected defendant's assertion that this was a *de minimis* taking, noting that a parody is only successful if the work incorporates enough to make a connection between the original and the comic version and evoke recognition.[182]

However, the court in *Dees* rejected the rigid view in *Air Pirates* that defendant could only incorporate as much as necessary of a copyrighted work to conjure it up, and no more.[183] The Ninth Circuit acknowledged that a song is difficult to parody effectively without exact or near exact copying, since any variation in the music or meter would render the composition unrecognizable.[184] The court recognized this special need for accuracy provides some license for closer parody.[185] Therefore the court in *Dees* upheld a finding of fair use as a matter of law, despite defendant's substantive taking. Accordingly, *Dees* indicates that works of musical parody may be entitled to substantially more copying than is commonly accorded other works of parody within a traditional fair use analysis.

Similarly, in *Elsmere Music Inc. v. National Broadcasting Co.*,[186] the Second Circuit held that the concept of conjuring up an original is based on the recognition that a parody frequently requires more than a "fleeting evocation" of an original in order to make its point.[187] The Second Circuit reaffirmed a ruling of summary judgment for defendants based on defendant's parody of plaintiff's advertising jingle on the popular television program *Saturday Night Live*. In upholding the district court's finding of fair use, The Second Circuit noted that:

> A parody is entitled at least to "conjure up" the original. Even more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary.[188]

182. *Id.* at 435 n.2.
183. *Id.* at 438.
184. *Id.* at 439.
185. *Id.*
186. 482 F. Supp. 741 (S.D.N.Y. 1980), *aff'd per curiam*, 623 F.2d 252 (2d Cir. 1980).
187. Elsmere, 623 F.2d at 253 n.1.
188. *Id.*

Significantly, the district court in *Elsmere* understood that defendant's song *I Love Sodom* was meant to symbolize the use of a catchy and upbeat tune (plaintiff's *I Love New York*) to divert a potential tourist's attention from the town's reputation for "gambling, gluttony, idol worshipping and, of course, sodomy."[189] Here, defendants altered the song's symbolic identification with the "glamorous" side of New York City, while simultaneously using this parody to humorously comment on the cynical uses of media advertising. In fact, defendant's parody resembled the Situationist's practice of Detournement, whereby "'any sign' - any street, advertisement, painting, text, any representation of a society's idea of happiness - 'is susceptible to conversion into something else, even its opposite.'"[190]

The recent case of *Acuff-Rose Music, Inc. v. Campbell*[191] is perhaps most helpful in extending a fair use analysis to audio collage techniques. In *Acuff-Rose Music*, the Tennessee District Court ruled that a comic parody of the Roy Orbison tune *Oh, Pretty Woman* by the rap band 2 Live Crew constituted a fair use of plaintiff's work, despite the commercial nature of the rap band's recording.[192] The court in *Acuff-Rose Music* here invoked *Elsmere*, noting that a parody must be more than "a fleeting evocation of an original in order to make its humorous point."[193]

Significantly, the court in *Acuff-Rose Music* focused on defendant's recording techniques which "exaggerated" the original recording for comic effect. Like Roy Orbison's original recording, 2 Live Crew's version uses the same drum beat and bass line to begin the song.[194] However, defendant's lyrics

189. Elsmere, 482 F. Supp. at 746.

190. G. MARCUS, LIPSTICK TRACES 179 (1989) (citing G. Debord and G.J. Wolman, principle actors within the French Situationist group.)

191. 754 F. Supp. 1150 (M.D. Tenn, 1991).

192. *Id.* at 1159.

The court in *Acuff-Rose Music* noted that 2 Live Crew's primary goal in releasing the LP containing *Oh, Pretty Woman* was to sell their music, but held that this did not necessarily negate a determination of fair use. *Id.* at 1154. The court reiterated that the crux of the profit/non-profit issue was "not whether the sole motive of the use is monetary gain, but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Id.* at 1154, citing Harper & Row at 562. The court also reiterated the finding in *Fisher v. Dees* that the presumption of commercial use may be rebutted by convincing the court that the parody doesn't unfairly diminish the economic value of the original. *Id.* at 1154. After determining that defendant's song qualified as a work of parody, the court concluded that a finding of fair use was warranted pursuant to § 107, despite the commercial nature of defendant's recording. *Id.* at 1158-59.

193. *Id.* at 1156, citing Elsmere, 623 F.2d at 253.

194. *Id.* at 1155.

shortly degenerate to laughter before describing a woman with physical attributes far less appealing than Roy Orbison's ideal pretty woman. As the court explained it:

> The purpose of the laughter is soon explained as the ensuing choruses respectively depict a big, hairy woman, a bald-headed woman and a "two-timin'" woman. Roy Orbison's pretty woman becomes akin to "Cousin It," the ugly, bit character featured on the TV series *The Addams Family*.[195]

Citing the parody's misogynist lyrics, the district court observed that 2 Live Crew is an anti-establishment rap group and concluded the their song "derisively demonstrates how bland and banal the Orbison song seems to them."[196]

In addressing the taking of quantitative and qualitative elements of plaintiff's work, the court in *Acuff-Rose Music* noted that questions of substantial similarity cannot be divorced from the purpose for which defendant's work is to be used.[197] Concluding that this was not a case of virtually complete or verbatim copying, the court found that defendant's composition ultimately took no more "than is necessary to accomplish reasonably its parodic purpose."[198] A fair use was found despite the commercial character of defendant's work, and even though the copied song, *Oh, Pretty Woman*, was a published work with creative roots, an element also weighing in plaintiff's favor.[199]

Plaintiffs in *Acuff-Rose Music* also argued that defendant's parody prevented them from marketing future derivative works, including their own rap or burlesque version of the song. However, the court observed that if only copyright owners were allowed to produce parodies of their own work, parodies would seldom exist since "(t)he parody defense to copyright infringement exists precisely to make possible a use that generally cannot be bought."[200] In addition, plaintiffs in *Acuff-Rose Music* argued their song was now tarnished by association with defendants, alluding perhaps to obscenity

195. *Id.*
196. *Id.*
197. *Id.* at 1156.
198. *Id.* at 1157.
199. *Id.* at 1155-56.
200. *Id.* at 1158, quoting Fisher v. Dees at 437.

charges pending against defendants in several states while this litigation was pending. Here, the court merely reaffirmed that in assessing the economic effect of parody, the parody's impact as a work of criticism must be excluded.[201] The court concluded that plaintiffs failed to show convincing evidence that any harm to an existing or potential market had occurred.[202]

D. Effect on Plaintiff's Potential Market:

The impact of defendant's use on the value of or potential market for plaintiff's work is the fourth factor of any fair use inquiry.[203] The Supreme Court in *Harper & Row* observed that this last factor is the single most important element of any fair use analysis.[204] In *Betamax*, the Supreme Court noted that the protection of an author's incentive to create does not require the prohibition of works that have no demonstrable effect on the potential market for, or value of, plaintiff's copyrighted work.[205] Furthermore, while interference with plaintiff's potential market typically prevents a defense of fair use, criticism of the original work that reduces the value of that work will not result in a finding of infringement.[206] In fact, the critical function of parody "may quite legitimately aim at garroting the original, destroying it commercially as well as artistically."[207] As a result, courts are concerned only with those parodies which fulfill the demand for the original work, rather than the suppression of demand which results from effective parody.[208]

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201. Acuff-Rose Music at 1158.

202. *Id.*

203. 17 U.S.C. § 107(4) (1991).

204. Harper & Row at 566.

205. Betamax at 450.

206. Loew's Inc. v. Columbia Broadcasting System, 131 F. Supp. 165, 184 (S.D. Cal. 1955).

207. Fisher v. Dees at 437, quoting B. Kaplan, An Unhurried View of Copyright 69 (1967)).

208. Fisher v. Dees at 438. Thus, in *Leo Feist, Inc. v. Song Parodies, Inc.*, 146 F.2d 400 (2d Cir. 1944) the trial court found that defendant's song-lyric magazines contained parodies which met "the same demand on the same market...thereby impairing the value and prejudicing the sale of said songs." *Id.* at 401 (citing Record on Appeal). Conversely, in *Berlin v. E.C. Publications, Inc.* the court held defendant's publication of lyrics parodying popular songs was permissible. Berlin at 545. Although the *Berlin* court did not directly touch upon the economic impact of these parodies, the court's finding impliedly acknowledged that little impact would result inasmuch as "(t)he disparity in theme, content and style between the original lyrics and the alleged infringements could hardly be greater." *Id.*

Both the Second Circuit's decision in *MCA v. Wilson*[209] and the Ninth Circuit's decision in *Air Pirates* help define the limits of permissible parody. In *MCA v. Wilson*, the Second Circuit affirmed the district court's finding that defendant's song *Cunnilingus Champion of Company C* did not constitute a fair use of plaintiff's tune *Boogie Woogie Bugle Boy of Company B*. Here, the Second Circuit observed that the two songs were competing works because both tunes were available on phonograph record and the sale of these records was a traditional means of exploiting musical works.[210] However, the decision in *MCA v. Wilson* has been criticized for finding infringement without a closer examination into the challenged work's effect on economic incentives and for failure to show economic harm.[211] While both compositions were performed on stage and sold as recordings, the court's observation ignores the possibility that both industries attract a variety of non-competing audiences. In particular, defendant's production, entitled *Let My People Come,* was described by columnists and the court as an "erotic nude show" with "sexual content raunchy enough to satisfy the most jaded porno palate."[212] While factual inquiry and expert testimony may have been necessary to determine whether defendant's use caused harm to plaintiff's work or to their market, it is certainly possible that the market for defendant's pornographic parody differed markedly from the market for plaintiff's Top 40 composition. Similarly, in *Air Pirates* no evidence was presented showing defendant's comic book affected the value of Disney's work in any way or had any impact on Disney's market. Indeed, it is unlikely that the audience for Disney's products would overlap the audience for defendant's underground comic, particularly since the sale of defendant's underground comic was in all likelihood restricted to adult consumers over the age of 18.

Nevertheless, the above cases indicate that parodies in "poor taste" are less likely to acquire fair use protection. Although a work containing pornographic references does not necessarily preclude a finding of fair use,[213] courts appear

209. 677 F.2d 180 (2d Cir. 1981).

210. *Id.* at 183.

211. Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax,* 97 HARV. L. REV. 1395, 1405 (1984).

212. MCA v. Wilson at 181.

213. *See* Pillsbury Co. v. Milky Way Productions Inc., 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981) (Defendant magazine's parody of plaintiff's "Poppin' Fresh Dough Boy" in a sexual context found to constitute a fair use).

more willing to uphold parodies that meet certain accepted standards of "taste" and "decency."[214]

E. IMPACT ON THE MARKETPLACE OF AUDIO COLLAGE RECORDINGS:

While the commercial success of rap and hip hop recordings has popularized audiocollage techniques on a large scale, many experimental composers create sound collages which are seldom heard on commercial radio or found in mainstream record stores. These latter collage recordings may have little or no effect on sales of the original works precisely because of their poor distribution, as well as differences in theme, content and style. For example, John Oswald's disjunctive manipulation of a Dolly Parton hit may have little impact on the value or marketability of that country singer's work. Furthermore, experimental collage recordings are typically released in limited quantities and are typically unavailable even in well-stocked record stores. These records are commonly sought by new music fans or by adventurous consumers who learn of these recordings through word of mouth. Assuming they are available in record stores, these recordings will typically be filed under categories such as "new" or "independent" music. Absent any misleading cover art, a consumer would be unlikely to confuse such a derivative recording with the source material comprising the derivative work.

Nevertheless, it is somewhat more plausible to argue that commercially viable rap, dance and hip hop recordings have some effect on marketplace demand for the original compositions. Dance oriented recordings like Grandmaster Flash's *Adventures of Grandmaster Flash on the Wheels of Steel* typically incorporate fragments of pre-existing dance, soul and pop records over a recurring drum pattern and bass line. Because of their widespread commercial availability, these collage recordings require closer scrutiny into the potential effects on the value and marketability of the underlying source material.

214. While the court in *Acuff-Rose Music* reaffirmed that a work containing pornographic elements does not always preclude a finding of fair use, the court noted the 2 Live Crew version of plaintiff's song was neither obscene nor pornographic. Significantly, defendants' parody came from the album AS CLEAN AS THEY WANT TO BE, a non-pornographic version to the band's more notorious AS NASTY AS THEY WANNA BE.

The court in *Acuff-Rose Music* tangentially addressed the issue of whether musical collage works infringe upon the market of pre-existing recordings. Here the court compared and contrasted the theme, style and content between plaintiff's "classic" rock recording, Roy Orbison's *Oh, Pretty Woman*, and the 2 Live Crew rap parody of the same name. Both songs shared virtually the same title, key lyrics, guitar refrain, introductory drum pattern, melody and chorus.[215] However, by focusing on distinctive stylistic differences, the court in *Acuff-Rose Music* determined that plaintiff's potential market for their copyrighted song was not affected by defendant's satiric version.[216] The court in *Acuff-Rose Music* noted:

> Defendant's parody also employs a number of musical devices that exaggerate the original and help to create a comic effect. 2 Live Crew uses the same drum beat and bass riff to start its song. But unlike the original, only 5 seconds into the song and immediately following the bass riff, 2 Live Crew inserts a heavily distorted "scraper,"[217] indicating a significant disparity in style. The same scraper is used four seconds later to reiterate that message and subsequently at the end of the song as well. Also at the beginning of the parody, the first soloist sings in a different key than the chorus. In addition, four times during the parody, 2 Live Crew repeats Orbison's bass riff over and over again, double the number of times on the original, until the riff begins to sound like annoying (sic) scratch on a record.[218]

In addition, the court found that defendant's copying included the name of the song, key lyrics, the same guitar refrain, melody and chorus.[219]

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215. Acuff-Rose Music at 1156.

216. *Id.* at 1158.

217. Here it is assumed the court is referring to the musical practice of "scratching." Scratching involves the physical back-and-forth manipulation of a record album on a turntable, creating the unique scraping sounds found on many rap and hip hop recordings.

218. *Id.* at 1155.

219. *Id.* at 1156.

Both the technique of scratching and that of repeating discrete instrumental elements are familiar to fans of turntable mastermixes, rap and hip hop music. While there is no indication in *Acuff-Rose Music* that defendants directly sampled instrumental lines from Orbison's original recording, popular rap songs which sample pre-existing sound recordings also commonly repeat specific rhythmic patterns until the repeated pattern assumes a different sonic identity. In addition, pitch changes may be used as a self-conscious "distancing" device, communicating to the listener that something is awry. Similarly, a back-up vocal chorus may be transposed from one song to another, acting as an integral call-and-response figure within the derivative collage. This transposition may work as a detached, ironic critique of the composition, or as a self-conscious reference to the act of appropriation itself. Each of these techniques allows the audio collage artist to fashion and (re)construct musical meaning in the tradition of the quodlibet,[220] answer song and the common musical parody.

Critics of digital sampling argue that unauthorized sampling uses public recognition of the earlier recording to sell records without compensating the original artist. Proponents argue that these new derivative compositions pay homage to the artist and rejuvenate sales of the original recordings.[221] Whether a derivative composition enhances or diminishes the value of an underlying original composition depends on the nature of the use in each instance.[222]

As public familiarity with these stylistic conventions increases, it appears less likely that a consumer will confuse

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220. See *supra*, note 6.

221. Gordon & Sanders, *The Rap on Sampling: Theft or Innovation*, N.Y.L.J., Apr. 28, 1989, at 5-6, col. 1.

Some critics argue that the sampling of rhythm and blues pioneer James Brown played a significant role in rejuvenating his career. Brown has allegedly been sampled on as many as 3,000 hip hop tracks since the early- to mid-1980s. Santoro, *James Brown*, NATION, Jun. 3, 1991, at 749. Despite (or because of) the heavy sampling of his work, Brown's recordings continue to sell in significant numbers. Arguably, the enhanced popularity and critical recognition of James Brown as a rhythmic innovator within American popular music is in part due to his influence on a new generation of listeners familiar with his work only through the collage compositions of others. *See* Christgau, *Ulysses No. 1*, VILLAGE VOICE ROCK & ROLL QUARTERLY, July 1991, at 26.

222. Thus, the district court in *Time, Inc. v. Bernard Geis Assoc.*, 293 F. Supp 130 (S.D.N.Y. 1968) observed that defendant's book on the Kennedy assassination, incorporating sketches based on stills from plaintiff's Zapruder films, was unlikely to result in any reduction in value to plaintiff's film. If anything, the court noted, such use was likely to enhance the value of the underlying copyrighted work. *Id.* at 146.

a collage piece with an underlying recording sampled within it, unless the sample is substantive enough to constitute a significant portion of the derivative song. While both works may be available on the same radio programs and in the same record stores, under *Acuff-Rose Music* this may not be conclusive proof that a derivative work constructed entirely of fragmentary quotes will have an adverse economic impact on the original composition. In fact, quoting out-of-print recordings within a collage work may generate renewed interest in these songs, thereby providing incentive to the copyright owner to reissue these recordings on the market. While the original copyright holder should be compensated if significant similarity exists, a recording quoting an earlier work does not automatically fulfill the market demand for the other. In fact, a synergistic effect may occur, creating a demand for both recordings.[223]

IX. FAIR USE AND THE FUNCTIONAL TEST:

According to Professor Nimmer's functional test, a comparison must be made not only of the media in which two contested works appear, but also of the function of each work regardless of the medium.[224] In other words, a defense of fair use may be invoked if defendant's work is similar, but performs a different function than plaintiff's work.[225] In applying the functional test to works of parody, Nimmer observed that the disparity of function between a serious work and a satire based upon it may sometimes justify the defense of fair use despite substantial similarity. Nimmer also noted there may be instances where virtually complete copying of a work for a different function or purpose will constitute a fair use.[226]

Nimmer's paradigmatic example is a news photo of the My Lai massacre. Nimmer believed such a photograph should be exempted from full copyright protection because its repro-

223. One music industry publisher has commented that medleys in fact act as a positive force on the marketplace: "They act as good demos. There's not enough on a medley to stop anyone from recording the whole song again. It's found money." Christgau, *supra*, note 44, at 40. (quoting Jay Lowy of Motown's Jobete Music). While the subject concerned commercially authorized *Stars on 45* recordings that were popular in the early 1980s, audio collage compositions commonly evoke significantly less of the original composition than these medleys.

224. M. NIMMER & D. NIMMER, *supra*, note 54, § 13.05[B] at 13- 88.17.

225. *Id.* at 13-88.19.

226. *Id.* at 13-90.14.

duction will promote democratic dialogue about significant current events, whereas a sketch or mere description will lack the photograph's visceral impact.[227] Nevertheless, Nimmer specifically excludes other graphic works such as paintings and sculptures, and presumably musical compositions, precisely because the public interest in these works is due to the creative contribution of the artist rather than the factual content conveyed.[228]

One case applying Nimmer's functional test is *New Line Cinema Corp. v. Bertlesman Music Group, Inc.*[229] In this case, the district court enjoined the distribution and marketing of defendant's rap video after concluding this video would likely impair the derivative use of plaintiff's film on the rap video market.[230] Defendant's rap video, based around the song *Nightmare On My Street,* utilized many of the themes and characters of plaintiff's popular movie, *Nightmare on Elm Street.*[231] Plaintiffs had previously licensed a rap video by another rap group as part of that movie's promotional campaign.[232] Evidence in *New Line Cinema* revealed that the defendant's video would supplant or at least compete with plaintiff's derivative video in the music video market.[233] The court therefore granted plaintiff's motion for preliminary injunction to prevent distribution of defendant's rap video.

Application of this functional test to collage recordings produces mixed results. Composers such as Oswald, Marclay and Tenney create works of original artistic expression by reassembling elements from singular compositions. However, audio collage artists seldom reproduce an entire recording verbatim. While collage recordings may not represent as great a public interest as Nimmer's My Lai photo example, these compositions do reflect a considerable First Amendment interest. While not all audio collages promote vital political discussion, many of these works do invoke overt political themes

227. *Id.* § 1.10[C] at 1-84.

228. *Id. But see* Note, *Copyright, Free Speech, and the Visual Arts,* 93 YALE L.J. 1565 (1984) (Courts should extend First Amendment protection to visual works of art incorporating copyrighted news photographs, where those works further the goals of political discussion).

229. 693 F. Supp. 1517 (S.D.N.Y. 1988).

230. *Id.* at 1528.

231. *Id.* at 1522-23.

232. *Id.* at 1519.

233. *Id.* at 1520.

ranging from the incompetence of our political leaders to the increasing commodification of political discourse. To that extent, collage recordings using materials from broadcast television and radio should be granted a more encompassing First Amendment defense, protecting those works offering some critical or communicative stance with respect to the larger social and political apparatus.

X. INTENT AND THE FAIR USE ANALYSIS:

Although not specifically enumerated in § 107, courts will also periodically inquire into defendant's intent when conducting a fair use analysis. One court has noted that fair use analysis is confined to a narrower scope where the taking of copyrighted material is solely for commercial gain.[234] Similarly, the court in *MCA v. Wilson* considered "whether the paraphrasing and copying was done in good faith or with evasive motive."[235]

Another factor going to the intent behind a derivative work concerns whether that work makes a productive use of, or original contribution to, the copied material. The Ninth Circuit in *Universal City Studios, Inc. v. Sony Corp. of America*[236] initially ruled that a finding of fair use would not be made unless a productive use was shown on the part of the videotape copier.[237] However, the Supreme Court in *Betamax* reversed, holding that a consideration of productive use was helpful in "calibrating the balance" of the assorted fair use criteria, but was not wholly determinative.[238]

At least with respect to unfair competition and the tort of misappropriation of personality, the Ninth Circuit in *Midler v.*

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234. Loew's at 176.

235. MCA v. Wilson, 677 F.2d at 183.

In *MCA v. Wilson*, defendants admitted that they had not intended to make any statement about Bugle Boys or to parody the song when the composition was written, but rather to invoke a copyrighted tune "immediately identifiable as something happy and joyous." MCA v. Wilson at 184. Although the Second Circuit Court of Appeals in *MCA v. Wilson* observed that a permissible parody need not be directed solely to the copyrighted song, but may also reflect on life in general, the Second Circuit nevertheless reversed the District Court's finding of fair use precisely because the parties stipulated that *Cunnilingus Champion...* was not intended to make any statement about plaintiff's song, or to parody plaintiff's song in the sense of taking it out of context and holding it up to ridicule. *Id.* at 184-85.

236. 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).

237. *Id.* at 971-72.

238. Betamax at 455 n.40.

Ford Motor Co.[239] has observed that the purpose behind the media's use of a personal identity is crucial; if the purpose is informative or cultural the use is immune, whereas a use that commercially exploits the individual is not.[240] In *Midler,* the court found defendant's use of recording artist Bette Midler's voice in a television advertisement exploitative. The court's focus on the purpose behind the appropriative act is echoed in Cal. Civ. Code § 990(n)(1), which allows the use of a deceased personality's name, voice or likeness in musical compositions, film or television programming other than an advertisement or commercial announcement.[241] *Midler*'s emphasis on the commercial intent behind the imitative or appropriative act is also found in several earlier cases involving the misappropriation of a personality's voice or likeness for advertising purposes.[242]

A focus on the composer's productive use of copied material is also useful in examining collage compositions for potential infringement. Here, an inquiry is made into whether defendant's use adds to or somehow transforms the nature of the underlying work. An examination into how an underlying work fits into the overall structure of the collage piece, and the extent to which it is an integral component of that piece, is helpful in distinguishing those works entitled to greater fair use protection from those which utilize plaintiff's work primarily for commercial advantage. To the extent that audio collage recordings of significant artistic value are not covered by analogy to parody, a focus on the artistic intent of the author, and the artistic function of the copied text within the derivative composition, may provide greater protection for those recordings lacking adequate protection under more traditional fair use standards.

XI. COMPULSORY LICENSING OF SOUND RECORDINGS:

In *Harper & Row,* the Supreme Court noted that the essence of the commercial/non-profit distinction is "not whether the sole

239. 849 F.2d 460 (9th Cir. 1988).

240. *Id.* at 462.

241. Cal. Civ. Code § 990(n)(1) (West, 1982).

242. *See* Lahr v. Adell Chemical Co., 300 F.2d 256 (1st Cir. 1962) (Dismissing complaint for unfair competition, invasion of privacy and defamation based on imitation of actor Bert Lahr's voice in television commercial advertisement); Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711 (9th Cir. 1970), *cert. denied,* 402 U.S. 906 (1971) (Dismissing complaint for unfair competition due to female singers imitating voice and style of Nancy Sinatra while singing *These Boots Are Made for Walking* in advertising campaign); and Booth v. Colgate-Palmolive Co., 362 F. Supp. 343 (S.D.N.Y. 1973) (Dismissing unfair competition suit based on imitation of actress Shirley Booth's voice in commercial advertisement).

motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[243] Although customary industry standards govern the licensing of sound recordings, there remains no standardized, formulaic fee structure that accounts for the *de minimis* use of sound recordings in derivative collage compositions.

Copyright owners are sometimes willing to negotiate a reduced mechanical royalty rate for medley recordings, but these negotiations are usually conducted on a most favored nations basis (e.g. that no other copyright owner receive a more favorable rate in connection with the medley).[244] These negotiations offer the collage composer protection from copyright owners who may dispute a claim of fair use, but it is not always possible for composers to obtain reduced fee licenses from all copyright owners cited in a given recording. Furthermore, the preliminary costs of negotiating reduced mechanical fees with numerous copyright owners may escalate the costs in issuing collage recordings, thereby limiting access to collage works by recording artists on small struggling independent record labels.

Some composers have observed that many older artists ask ridiculous prices for use of their compositions, perhaps out of greed, unfamiliarity with the practice of audio collage, or fear that their work will be subject to parody.[245] In other cases, copyright owners cannot be located at all, particularly when "found" broadcast material is utilized. Finally, because many collage artists attempt to secure permission only after a composition is satisfactorily completed, copyright owners possess a disproportionate advantage in negotiating licensing fees, even though their work may constitute a small, though perhaps integral, segment of an overall collage piece. As a result, many artists simply follow their own personal code of ethics when it comes to seeking authorized use of underlying sound recordings. Lack of any compulsory licensing standards with regard to the peculiar requirements of audio collage has left composers without guidance. This current regulatory vacuum

243. Harper & Row at 562.

244. Gordon & Sanders, *Copyright Law Applications in Musical Parody Instances,* N.Y.L.J., Feb. 1, 1991, Sec. 1, at 7, col. 2.

245. Aaron, *supra*, note 51, at 22, col. 2. Works of parody are granted special status under fair use guidelines precisely because copyright owners will seldom willingly grant permission to have their work held up to public ridicule.

works to promote over-extensive borrowing in some instances and artistic self-censorship in others. Confusion and mutual mistrust are typically the end result.

The most practical solution for dealing with copyright issues raised by digital sampling and other collage-based forms of musical composition is the institution of some modified compulsory licensing system. As one court observed: "The provision for compulsory licensing of copyrighted musical compositions promotes the arts by permitting numerous artistic interpretations of a single written composition."[246] Companies such as the Harry Fox Agency currently assist musicians who seek to record popular tunes by finding copyright holders of these compositions. However, no agency exists for locating copyright holders of sound recordings.[247]

Because no compulsory licensing scheme is now available to audio collage artists, the recording industry has also been forced to rely on a self-imposed set of ethics. Frequently record labels tolerate the sampling of their own sound recordings inasmuch as many of their own best-selling recordings also feature the unauthorized samples from other recordings. Solutions ranging from "needle-drop" schemes used by stock music libraries,[248] to licensing schemes similar to the "shrink-wrap" license currently used for computer software,[249] have been suggested.[250] However, the limited effectiveness of shrink-wrap licenses in combatting software piracy would certainly make this option unattractive to copyright owners.

Another proposal by composer John Oswald would have artists voluntarily acknowledge their sources in a manner reminiscent of more traditional forms of scholarship.[251] While voluntary acknowledgement poses the risk of encouraging litigation, this method nevertheless does provide copyright

246. Schaab v. Kleindienst, 345 F. Supp. 589, 590 (D.C.D.C. 1972).

247. Aaron, *supra*, note 51, at 23, col. 2.

248. These needle-drop services provide for the licensing of sound effects and music on a time-used basis.

249. A shrink-wrap license is a contract of adhesion, printed and covered in shrink wrap on the outer wrapper of a software package. Such a license indicates that opening the package constitutes an acceptance of the license terms. *See* Maher, *The Shrink-Wrap License: Old Problems in a New Wrapper,* 34 J. COPYRIGHT SOC'Y U.S.A. 292 (1987).

250. See: Johnson, *supra*, note 15, at 159.

251. Oswald, *supra*, note 37, at 104.

owners some credit and provides incentive to consumers to purchase original recordings used in collage works. Nevertheless, acknowledging the source of copied material will not itself make a fair use of what may be construed as a substantial taking.[252] Other proposals have also been suggested,[253] each offering varied effectiveness in balancing the rights of the copyright owner against those of the public. While some of these proposals are more speculative than others, each nevertheless provides some improvement over the existing state of uncertainty governing the licensing of sampled recordings.

XII. CONCLUSION:

Composer Igor Stravinsky once commented that, "A good composer does not imitate; he steals."[254] However, sound collage artists need not always go to such lengths to construct unique and challenging works. While those collages which displace plaintiff's existing or potential market will infringe upon the underlying copyrighted work, collages serving a more critical function may in fact be protected by fair use standards adopted to deal with works of parody.

The recent decision in *Acuff-Rose Music* provides some support for a fair use defense of collage compositions, particularly where those compositions satirize another artist or song. However, while Congress has upheld parody as a legitimate fair use exemption, not all audio collages meet the strict definitional criteria of parody, despite their artistic or critical function. A fair use analysis of these latter compositions should therefore include an emphasis on the function and purpose behind the composer's appropriative act. Any examination into a composer's intent must also necessarily take into account the cultural and commercial context within which all musical works function. The law must not protect only starving composers or those artists whose anti-commercial stance eliminates them from effectively competing on the open market. At the same time, the law should not penalize those artists fortunate enough to enjoy commercial success, or those lucky enough to enjoy effective promotion and commercial distribution.

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252. M. NIMMER & D. NIMMER, *supra*, note 54, § 13.05 at 13-80.

253. *See* Gordon & Sanders, *Roadblocks to Legal Protections in Sampling*, N.Y.L.J., May 19, 1989, at 6, col. 3. *See also* Aaron, *supra*, note 51, at 23, col. 1.

254. P. YATES, TWENTIETH CENTURY MUSIC 41 (1967).

Many dance-oriented collage works use pre-existing musical elements to evoke new responses from the listener. By generating new meaning out of old texts, these collages may evoke the pleasure of recognition, implicate critical social issues, or create challenging, dense textual structures impenetrable to all but the most adventuresome listener. While these audio collages may be somewhat analogous to parody, they do not always resort to ridicule or comic effect. Certainly, at audio collage need not resort to parody to be considered challenging or important. John Lennon's *Revolution #9* includes moments of levity, but operates primarily as a powerful audio corollary to the many social and cultural upheavals occurring throughout the 1960s.

Furthermore, social and critical barriers separating "high" art from the popular arts have eroded significantly in the last century, particularly in the area of modern music and especially within that genre of composition based on previously existing works - the audio collage. Sophisticated audio and visual technologies currently allow greater access to the ideas and artistic practices of Filippo Tommaso Marinetti, Luigi and Antonio Russolo and Kurt Schwitters, controversial artists who pioneered new theories of sound at the beginning of the century. As Justice Holmes once observed in deciding whether certain works of visual art deserve copyright protection:

> It would be a dangerous undertaking for persons trained only in law to constitute themselves final judges of the worth of pictorial illustrations, outside 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 authors spoke.[255]

More recently, the collage group Negativland rephrased Justice Holmes' concerns, stating:

> The question that must arise to the surface of legal consciousness now is: at what point in the process of found sound incorporation does the new creation possess its own unique

255. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

> identity which supersedes the sum of its parts, thus gaining artistic license?[256]

As shown above, issues of artistic license and artistic licensing are at the core of the debate surrounding this music. While some commentators have suggested some form of compulsory licensing to resolve the copyright concerns surrounding digital sampling, such a scheme should not make audio collage prohibitively expensive. Rather, any licensing system must be based on the understanding that collage artists can painstakingly create collage-based works out of potentially hundreds of sound recordings. Unfortunately, as Woody Allen once noted with respect to the colorization of movies, "The problem is that the solutions in the United States always come down so heavily for the side where the money is."[257] Hopefully, some legislative solution will one day be adopted to deal with the copyright concerns arising from the increased popularity of audio collage recordings, with collage artists having some voice in the drafting of such a solution. Until any solution does emerge, however, it will be left to the courts to decide exactly how much appropriation of a pre-existing sound recording constitutes a fair use, and under what circumstances. In reaching their decision, it is hoped that these courts will take into account the cultural and historical legitimacy of collage techniques, techniques which have bridged the gap between popular and experimental composition, and created some of this century's most vital and expressive music.

*Alan Korn**

256. Negativland, *supra*, note 116.

257. Miller, *Creativity Furor: High-Tech Alteration of Sights and Sounds Divides the Arts World,* Wall St. J., Sept. 1, 1987, at 1, col. 1.

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