

## THE ODD COUPLE: POSTMODERN CULTURE AND COPYRIGHT LAW<sup>†</sup>

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### I. INTRODUCTION

The term "postmodern" refers to the time period dating from the end of the Second World War to the present.<sup>1</sup> This era is distinguished by several factors, including: the rapid growth of global capitalism;<sup>2</sup> the relocation of labor and production markets from urban to rural settings;<sup>3</sup> the consolidation of mass media in large conglomerates;<sup>4</sup> and the rise of corporate authorship of creative works.<sup>5</sup>

As during any time of great social and economic change, culture in the postmodern era reflects the dramatic shifts in the world. One important representation of postmodern culture is the use of appropriation in artistic

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<sup>1</sup> *New Grove Dictionary of Music: Postmodernism*, available at <http://www.newgrove.com> (last visited Mar. 22, 2002).

<sup>2</sup> See Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 U.C.L.A. ENT. L. REV. 271, 280-281 n.37 (1996) (discussing Frederic Jameson, *Postmodernism and Consumer Society*, in *THE ANTI-AESTHETIC* 111-19 (Hal Foster ed., 1983)).

<sup>3</sup> See ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 50-52 (Duke University Press 1998).

<sup>4</sup> See *id.*

<sup>5</sup> See generally LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001).

works.<sup>6</sup> Appropriation is a process by which an artist incorporates a pre-existing work, in part or whole, into a new work of expression.<sup>7</sup> For example, commenting upon what he viewed as a loss of individualism in an age of mass marketing, the artist Andy Warhol incorporated the images of thirty-two Campbell's soup cans in his 1962 silkscreen (aptly-named) "32 Campbell's Soup Cans."<sup>8</sup> For Warhol, and many postmodern artists, pre-existing artistic works serve as signifiers of information. They symbolize thoughts and ideas about the world in which we live.<sup>9</sup> Accordingly, postmodern artists appropriate pre-existing artistic works to exploit their communicative properties.<sup>10</sup> The specific nature of the appropriation varies with the artist. Some artists, like Warhol, appropriate to transform a prior work of art, thereby giving it new meaning.<sup>11</sup> Others borrow to critique or comment on a prior work.<sup>12</sup> Still others borrow to enhance their own work with the inherent meaning of the former.<sup>13</sup>

Another important feature of postmodern culture is the embracing of fictional works as reality.<sup>14</sup> In postmodern society, the sights and sounds of

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<sup>6</sup> See Roxana Badin, Comment, *An Appropriate(d) Place in Transformative Value: Appropriation Art's Exclusion from Campbell v. Acuff-Rose Music, Inc.*, 60 BROOK. L. REV. 1653, 1660 (1995). Unless otherwise noted, for the purposes of this article, the term "artistic work" shall mean all artistic creations including, but not limited to, musical compositions, plays, books, paintings, sculptures and dances. Further, unless otherwise noted, the term "artist" shall mean all creators of artistic works including, but not limited to musicians, painters, sculptors, choreographers and writers.

<sup>7</sup> John Carlin, *Culture Vultures: Artistic Appropriation in Intellectual Property Law*, 13 COLUM.-V.L.A. J. L. & ARTS 103, 107 (1993).

<sup>8</sup> See *id.* at 110; *Index: SOUP IN ART*, available at <http://www.soupsong.com/iart.html> (last visited Apr. 20, 2002).

<sup>9</sup> See COOMBE, *supra* note 3, at 265; Carlin, *supra* note 7 at 110, 265; Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1221 (1997).

<sup>10</sup> See Carlin, *supra* note 7, at 109; *id.* at 106; *New Grove Dictionary of Music: Postmodernism*, *supra* note 1.

<sup>11</sup> See Badin, *supra* note 6, at 1660.

<sup>12</sup> See Daniel J. Gifford, *Innovation and Creativity in the Fine Arts: The Relevance and Irrelevance of Copyright*, 18 CARDOZO ARTS & ENT L. J. 569, 606 (2000).

<sup>13</sup> See Voegtli, *supra* note 9, at 1221.

<sup>14</sup> See Elisa Vitanza, *Popular Culture Derivatives: Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, 14 BERKELEY TECH. L. J. 43, 54 (1999).

popular culture thoroughly pervade our lives. “[L]arge increments of our daily perceptions are not supplied by the physical reality around us but by the media that saturates it.”<sup>15</sup> In this constantly expanding simulated world, the distinction between fact and fiction often is blurred.<sup>16</sup> Consequently, characters depicted in fictional works frequently become tangible to their audience.<sup>17</sup> Moreover, these audiences eagerly and openly discuss the experiences and underlying traits of fictional characters as if they were real.<sup>18</sup>

While the social and economic shifts of the late twentieth century have had a tremendous effect on postmodern culture, courts have been reluctant to understand and accept these changes. As a result, there exists a great conflict between postmodern culture and copyright law - a conflict that severely limits the postmodern artist from freely creating and disseminating works of art. For example, appropriation by postmodern artists of copyright protected pre-existing works without first obtaining permission from the copyright holder of the pre-existing work almost inevitably constitutes copyright infringement.<sup>19</sup> Further, while postmodern society readily views fictional characters as real, the courts do not. Specifically, they have decided that, unlike facts about real people, the experiences and underlying traits of fictional characters are creative works of expression protected under copyright law.<sup>20</sup>

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<sup>15</sup> Keith Akoi, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain, Part I*, 18 COLUM.-V.L.A. J. L. & ARTS 1, 1 (1993)(quoting Crosley Bendix)(“We are surrounded with canned ideas, images, and sounds ....”).

<sup>16</sup> See COOMBE, *supra* note 3, at 44 (noting that the realities we recognize are shaped by the cultural contexts that enable our very cognizance of the world itself); Badin, *supra* note 6, at 1657.

<sup>17</sup> See COOMBE, *supra* note 3, at 50.

<sup>18</sup> See Irene Segal Ayers, Comment, *The “Facts” of Cultural Reality: Redrawing the Line Between Fact and Expression in Copyright Law*, 67 U. CINN. L. REV. 563, 573 (1999).

<sup>19</sup> See, e.g., *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991)(holding unlicensed digital sampling in rap music constituted copyright infringement of both the sound recording and the recording’s underlying musical composition); *Rogers v. Koons*, 751 F. Supp. 474 (S.D.N.Y. 1990), *aff’d* 960 F. 2d 301, 310 (2d Cir. 1992)(holding that a sculpture derived from a postcard of puppies, which the artist claimed was a parody of modern society, constituted copyright infringement).

<sup>20</sup> See, e.g., *Castle Rock Entertainment v. Carol Publishing Group, Inc.*, 955 F. Supp. 260, 266 (S.D.N.Y. 1997), *aff’d*, 150 F. 3d 132 (2d Cir. 1998) (holding that “facts” about the fictional characters of the television situation comedy *Seinfeld* were works of original expression and could

Despite their differences, postmodern culture and the copyright law are compatible. By examining the decisions in two recent cases, *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*<sup>21</sup> and *Castle Rock Entertainment v. Carol Publishing Group, Inc.*,<sup>22</sup> this article will demonstrate how courts could have easily tailored existing copyright provisions to accommodate postmodern philosophy.<sup>23</sup>

First, in *Grand Upright*, the court held that unauthorized sampling, the incorporation of a pre-existing sound recording in a new work of art, violates the rights of the copyright holders of a pre-existing sound recording and its underlying musical composition.<sup>24</sup> This decision placed strict limitations on rap musicians who frequently rely upon sampling as a composition technique. However, unauthorized sampling in rap music need not always constitute copyright infringement. Had the court in *Grand Upright* understood that many rap artists appropriate pre-existing works in order to exploit their communicative properties, they conceivably would have reached the conclusion that such borrowing constitutes permissive fair use<sup>25</sup> under copyright law.

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not be appropriated without permission); *Paramount Pictures Corp. v. Carol Publishing Group*, 11 F. Supp. 329, 333-34 (S.D.N.Y. 1998), *aff'd* 181 F. 3d 83 (2d Cir. 1999)(holding that "facts" about the fictional characters of the popular television franchise *Star Trek* were works of original expression and could not be appropriated without permission).

<sup>21</sup> *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991)(hereinafter sometimes referred to as "Grand Upright").

<sup>22</sup> *Castle Rock Entertainment v. Carol Publishing Group, Inc.*, 955 F. Supp. 260 (S.D.N.Y. 1997), *aff'd*, 150 F. 3d. 132 (2d Cir. 1998)(hereinafter sometimes referred to as "Castle Rock").

<sup>23</sup> The view that postmodern theory has a proper place in legal analysis is not universally accepted. As one scholar has proffered, "The use of postmodern theory in contemporary legal scholarship has accomplished very little. At best, postmodern ideology has served as sort of a fetish to engage the creative energies of a relatively small group of scholars in the legal academy. At worst, scholarship in this area has been a pollutant at many levels, creating a mass of confusion and contributing to the erosion of reasoned principles among today's generation of law students." Jay P. Moran, *Postmodernism's Misguided Place in Legal Scholarship: Chaos Theory, Deconstruction, and Some Insights from Thomas Pynchon's Fiction*, 6 S. CAL INTERDIS. L. J. 155, 157 (1997).

<sup>24</sup> *Grand Upright*, 780 F. Supp. at 183.

<sup>25</sup> See *infra* text accompanying notes 141-94.

Second, in *Castle Rock*, the court held that, under the doctrine known as the fact/expression dichotomy,<sup>26</sup> facts about real people are “true” facts and, as such, are not protected by copyright.<sup>27</sup> Moreover, the court held that the experiences and underlying traits of fictional characters depicted in television shows are not true facts but, rather, are copyright protected works of expression.<sup>28</sup> This decision restricted the ability of a postmodern author to write about and disseminate information he views as fact. However, the voice of the postmodern author need not be muzzled. Had the court in *Castle Rock* fully understood that postmodern audiences view fictional characters as real, facts about the fictional characters, like facts about real people, conceivably would have been construed as unprotected true facts.

## II. GRAND UPRIGHT AND POSTMODERN ARTISTIC APPROPRIATION

### A. Copyright Protection

#### 1. Musical Compositions and Sound Recordings

The Copyright Act of 1976<sup>29</sup> protects “original works of authorship” that are “fixed in a tangible medium of expression.”<sup>30</sup> These terms easily are defined by examining musical compositions. To qualify as original, a musical composition must be independently created and possess a minimal degree of creativity.<sup>31</sup> In fact, even if a musical composition is similar to one already in existence, it will be protected under copyright provided the composer did not directly or subconsciously copy a pre-existing work.<sup>32</sup> To meet the fixation

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<sup>26</sup> See *infra* text accompanying notes 195-210.

<sup>27</sup> *Castle Rock*, 955 F. Supp. at 266.

<sup>28</sup> *Id.*

<sup>29</sup> Hereinafter sometimes referred to as “the Copyright Act.”

<sup>30</sup> 17 U.S.C. § 102(a) (2000).

<sup>31</sup> EDWARD SAMUELS, *THE ILLUSTRATED STORY OF COPYRIGHT* 128-29 (2000).

<sup>32</sup> *Id.* at 128. To establish copying, the plaintiff must demonstrate that his work is protected by copyright, that the defendant had access to his copyrighted work, and the defendant’s work is “substantially similar” to the plaintiff’s work. The substantial similarity test requires that the

requirement, a musical composition must either be notated on sheet music or recorded on a device capable of embodying sound, such as an audiotape, phonorecord or digital recorder.<sup>33</sup>

Once a musical composition fulfills the originality and fixation requirements, the composer of that work automatically is granted, under copyright law, a number of exclusive rights in his creation. These rights include: the right of the composer to reproduce<sup>34</sup> and distribute<sup>35</sup> his music in both sheet music and sound recordings;<sup>36</sup> the right to publicly perform his music;<sup>37</sup> and the right to make derivative versions of his music,<sup>38</sup> such as arrangements.<sup>39</sup> Furthermore, if a composer licenses his musical composition to a record or production company for the purpose of making and distributing sound recordings of the composition, the creator of that sound recording will have a separate copyright in the recording itself.<sup>40</sup> With limited exceptions that mainly restrict certain rights in public performances and digital transmissions,<sup>41</sup> the creator of a

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ordinary lay listener, comparing the two works could recognize the defendant's work as coming from the plaintiff's work. *See* Szymanski, *supra* note 2, at 299-301.

<sup>33</sup> SAMUELS, *supra* note 31, at 127.

<sup>34</sup> 17 U.S.C. § 106(1) (2000).

<sup>35</sup> 17 U.S.C. § 106(3) (2000).

<sup>36</sup> However, the exclusive right of a composer to make sound recordings of his music is limited by compulsory licensing. While a composer has the exclusive right to make the first sound recording of his music, once the music is embodied in a sound recording and distributed to the public, anyone can make a recording of the underlying music without permission of the copyright holder of such music, provided he or she pays the copyright holder a statutory fee. *See* 17 U.S.C. § 115 (2000).

<sup>37</sup> 17 U.S.C. § 106(4) (2000).

<sup>38</sup> 17 U.S.C. § 106(2) (2000). "A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture (version), sound recording, art production ... or any other form in which a work may be recast, transformed, or adapted." 17 U.S.C. § 101 (2000).

<sup>39</sup> 17 U.S.C. § 101 (2000).

<sup>40</sup> 17 U.S.C. § 102(a) (2000); *See also* SAMUELS, *supra* note 31, at 44-45. However, absent an outright transfer of the copyright by the composer, the maker of the sound recording will not own the copyright in the underlying musical composition itself.

<sup>41</sup> *See generally* 17 U.S.C. § 114 (2000).

sound recording has the exclusive right to duplicate and distribute that specific sound recording.<sup>42</sup>

## 2. Fair Use

Copyright's purpose is to stimulate creativity. To fulfill this purpose, copyright law grants artists limited monopolies over their works. This monopoly allows them to reap the financial benefits of their labor, thus providing incentive to create again. However, copyright law specifically limits this monopoly so that artistic works may be disseminated quickly into the public domain and recycled to inspire and create new works of art.<sup>43</sup> This latter notion, that "creativity is impossible without a rich public domain,"<sup>44</sup> is the philosophy behind what is known as the "fair use" doctrine.<sup>45</sup>

Under the fair use doctrine, the Copyright Act permits an artist, in limited circumstances, to lawfully copy portions of a copyrighted work if the copying is in furtherance of valuable social policies, such as for the purpose of comment, criticism, news reporting, teaching or scholarship.<sup>46</sup> As the Court noted in *Campbell v. Acuff-Rose Music, Inc.*,<sup>47</sup> the fair use doctrine "[requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster."<sup>48</sup> Because copying

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<sup>42</sup> See SAMUELS, *supra* note 31, at 45.

<sup>43</sup> See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to serve a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good"); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ("[Copyright law] is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and allow the public access to the products of their genius after the limited period of exclusive control had expired"); *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 157 (1985) ("Copyright law requires providing incentives both to the creation of works of art and to their dissemination").

<sup>44</sup> *White v. Samsung Electronics Am., Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting).

<sup>45</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

<sup>46</sup> 17 U.S.C. § 107 (2000). This list, however, is not exhaustive. *Campbell*, 510 U.S. at 577-78.

<sup>47</sup> *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994).

<sup>48</sup> *Id.* at 577 (citing *Stewart v. Abend*, 495 U.S. 207 (1990)).

which qualifies as fair use will diminish a copyright holder's exclusive rights in his work, courts apply this doctrine with careful consideration on a case-by-case basis.<sup>49</sup> The fair use doctrine and its application are discussed in greater detail in section II.G.<sup>50</sup>

## B. Appropriation in the Postmodern Arts

Artistic works are signifiers of information. They assume meaning by those who incorporate them into their daily lives.<sup>51</sup> The simplest example of this concept is the symbol “☠.” When confronted with the skull and crossbones, people know that danger potentially exists. No words are necessary to convey that warning - just a picture. Another basic example is found in digital communications. In e-mail and “instant messaging,” where tone and motivation often are difficult to ascertain, a simple “☺” tells a reader whether or not an author's typed message is genuine or sarcastic.

Other examples of artistic works with communicative properties are corporate logos. These are typically protected by intellectual property law, but are sometimes used as metaphors. For example,

[w]ith phrases like the Coca-Cola-ization of the Third World, the Cadillac® (or the Edsel®) of stereo systems, meeting with the Birkenstock® contingent (or the Geritol® generation), we convey messages easily and economically.<sup>52</sup>

Further, in postmodern society, the names of fictional characters from television, film and literature incorporated in phrases often are used to describe real people who share the fictional character's underlying traits. For example, “Don't be such a *Cassandra*” suggests to a listener not to be like the worrisome and fatalistic soothsayer of Greek mythology.<sup>53</sup> The phrase “She's gone *Sybil*”

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<sup>49</sup> 17 U.S.C. § 107 (2000).

<sup>50</sup> See *infra* text accompanying notes 141-94.

<sup>51</sup> See COOMBE, *supra* note 3, at 265; Voegtli, *supra* note 9, at 1221; Carlin, *supra* note 7, at 110.

<sup>52</sup> COOMBE, *supra* note 3, at 57.

<sup>53</sup> See *The Cassandra Project*, available at <http://www.cassandraproject.net/whiscass.htm> (last visited Apr. 19, 2002).



indicates that someone is insane or schizophrenic, like the title character portrayed by actress Sally Field in the 1976 television film.<sup>54</sup> Also, "he came in all *Rambo-like*" describes someone who entered a room exhibiting tough or violent qualities, similar to Sylvester Stallone's character in the 1982 film *First Blood*.<sup>55</sup>

Additionally, copyright and trademark protected advertising slogans and jingles have been adopted by ordinary people as forms of communication. For example, after the release of a recent Budweiser beer television advertising campaign, many young men greeted others with an emphatic "wassup," signifying not just the speaker's desire to say hello, but a reflection of his personality.<sup>56</sup> By merely speaking the phrase "wassup," a young man told the world:

[I'm] an 18-24-year-old male. [I] work hard so [I] can play with [my] mates, drink beer (Bud), play [football] and talk (if not have) sex ... [I'm] into looking good and having something funny to say ... [I] could possibly be on the A-list ... [I] don't take life too seriously ....<sup>57</sup>

In fact, Budweiser's goal was for the slogan to acquire communicative status that, "provided [its target audience] with a [] piece of tribal code or catchphrase

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<sup>54</sup> *Sybil* (NBC television broadcast, Nov. 14, 1976).

<sup>55</sup> FIRST BLOOD (Orion Pictures Corp. 1982).

<sup>56</sup> The original Budweiser television advertisement was described by British journalist Belinda Archer as follows:

A cool American bloke is lying on his sofa in a funky US-style apartment, watching a game of baseball on the TV. His phone goes. 'Wassup?' he says nonchalantly. 'What are you doing?' Other mates begin to intercept the call, either via his flat's intercom or call-waiting on his phone, until they're all trading their gormless catchphrase across the room and down the line. The ad reaches a ridiculously laddy 'Wassup' crescendo, then comes back down to earth with the first guy who just coolly says 'Watchin' the game, havin' a Bud ....'

Belinda Archer, *Who Are You? What the Bud Light Ad Says About You*, THE GUARDIAN (LONDON), Oct. 13, 2000, at 22.

<sup>57</sup> *Id.*

they [could] adopt.”<sup>58</sup>

The above examples demonstrate that artistic works in postmodern society function, as letters, numbers and sounds, and building blocks of language. They are tools necessary to describe experiences and help others communicate.<sup>59</sup> Through the communicative function of pre-existing artistic works, many postmodern artists have incorporated these works, in part or whole, into new creative works.<sup>60</sup> This process, commonly referred to as artistic appropriation, has become an essential element of postmodern expression and is evidenced in the works of some of the twentieth century’s leading artists. For example, in the visual arts,

[a]ppropriation of the imagery of popular culture ... 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.<sup>61</sup>

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<sup>58</sup> *Id.*

<sup>59</sup> See COOMBE, *supra* note 3, at 7,269; Voegtli, *supra* note 9, at 1221 (noting that in postmodernism, there are no more works, only text); Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L. J. 1533, 1556 (1993)(noting that communication depends on a common language and common experience); Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PENN. L. REV. 1597, 1604-05 (1991)(book/essay review)(stating that the essence of a postmodern artist is to resourcefully and opportunistically borrow whatever tools might be available to solve a problem at hand; what justifies the tool is its usefulness); Dan Thu Thi Phan, Note, *Will Fair Use Function on the Internet?*, 98 COLUM. L. REV. 169, 209 (1998)(describing how symbols from mass media and pop culture represent fundamental ideas about identity and community).

<sup>60</sup> See Carlin, *supra* note 7, at 106, 109; *New Grove Dictionary of Music: Postmodernism*, *supra* note 1.

<sup>61</sup> Alan Korn, Comment, *Renaming That Tune: Aural Collage, Parody and Fair Use*, 22 GOLDEN GATE U. L. REV. 321, 327 n.24 (1992). For other examples of appropriation in the postmodern

Postmodern appropriation also has flourished in the musical arts. Musical borrowing readily is evidenced in “sampling,” a process by which a composer takes bits and pieces (sometimes more) of pre-existing sounds (sometimes altering them) and combines them with each other and/or with original music to form the basis of a new musical composition.<sup>62</sup> For example, composers such as Luciano Berio and Alfred Schnittke have created musical compositions by juxtaposing materials from dissimilar sources.<sup>63</sup> Both John Cage and John Zorn composed collage pieces—the former incorporated in his works such common sounds as babies crying and clocks ticking, and the latter merged the distinct styles of jazz, swing, pop, reggae, film, television and Japanese dialogue into a single composition.<sup>64</sup> Aaron Copland, a leading orchestral composer of the twentieth century, symbolizing a former time of simplicity in the United States used the traditional Shaker Hymn “Simple Gifts” as the main theme in his piece *Appalachian Spring*.<sup>65</sup>

Postmodern appropriation also is found in the works of current popular musicians. For example, the Beatles, commenting upon the pervasive nature of the mass media, integrated dozens of fragments from radio and television broadcasts into their piece “Revolution #9.”<sup>66</sup> Similarly, both Brian Eno and David Byrne have incorporated bits of sounds appropriated from short-wave radio broadcasts into their works.<sup>67</sup> Reflecting on the styles of past music, some postmodern artists have incorporated pre-existing classical compositions into their artistic renderings. For example, Barry Manilow’s “Could It Be Magic,” popularized by disco diva Donna Summer, was based on Chopin’s “C minor

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arts see Lynne A. Greenberg, *The Art of Appropriation: Puppies, Piracy, and Post-Modernism*, 11 CARDOZO ARTS & ENT. L. J. 1, 5 n.23 (1992); Carlin, *supra* note 7, at 109-11; Gifford, *supra* note 12, at 605.

<sup>62</sup> See Szymanski, *supra* note 2, at 275.

<sup>63</sup> *New Grove Dictionary of Music: Postmodernism*, *supra* note 1 (citing Berio’s *Sinfonia* and Schnittke’s *Third String Quartet* as examples of postmodern appropriation musical compositions).

<sup>64</sup> *Id.*

<sup>65</sup> Paul J. Heald, *Reviving the Rhetoric of Public Interest: Choir Directors, Copy Machines, and New Arrangements of Public Domain Music*, 46 DUKE L. J. 241, 250 (1996).

<sup>66</sup> See Korn, *supra* note 61, at 330-31.

<sup>67</sup> See *id.*

Prelude.”<sup>68</sup> Paul Simon’s “American Tune” was built upon a melody from Bach’s *St. Matthew Passion*.<sup>69</sup> Blues Traveler’s “Hook” incorporated the bass line of Pachelbel’s “Canon in D.”<sup>70</sup> Procol Harem’s “Whiter Shade of Pale” used Bach’s “Air on a G String” as its foundation.<sup>71</sup> ELO’s “Roll Over Beethoven” was derived from Beethoven’s *Fifth Symphony*.<sup>72</sup>

Perhaps the most widespread use of postmodern music appropriation is seen in rap musicians who sample.<sup>73</sup> Composed mainly by African-American urban youth,<sup>74</sup> rap is “a form of popular music marked by spoken or chanted rhyming lyrics with a rhythmic accompaniment.”<sup>75</sup> As one journalist reflected, “[R]appers have been coppin’ - using word phrases or music bits for a new recording for years. They [] borrow samples off breakbeat records and mix, match and mess up the parts to create new sounds.”<sup>76</sup> Rappers, like many other postmodern artists, appropriate pre-existing sounds for the purpose of exploiting their communicative properties. Often, a sample is immediately recognizable, thereby compelling the listener “to consider the [music] in a new context.”<sup>77</sup>

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<sup>68</sup> *New Grove Dictionary of Music: Borrowing*, available at <http://www.newgrove.com> (last visited Mar. 22, 2002).

<sup>69</sup> Heald, *supra* note 65, at 250 n.48.

<sup>70</sup> Bob Piorum, *Picking on the Classics*, available at <http://www.cnymusic.com/bopiorum/cds/pc.html> (last visited Apr. 13, 2002).

<sup>71</sup> *Id.*

<sup>72</sup> Heald, *supra* note 65, at 250.

<sup>73</sup> See SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 134 (2001); Korn, *supra* note 61, at 341 n.107 (“[Rap music] borrows heavily from the icons and symbols of our electronically mediated environment”). See also Scott R. Hutson, *Technoshamanism: Spiritual Healing in the Rave Subculture*, POPULAR MUSIC AND SOCIETY, Sept. 22, 1999, at 53; David Zimmerman, *Rap’s Crazy Quilt of “Sampled” Hits*, U.S.A. TODAY, Aug. 31, 1989, at 4D (quoting Producer/Rapper Daddy-O, who believes that sampling is legitimate collage, comparable to postmodern appropriation art).

<sup>74</sup> See VAIDHYANATHAN, *supra* note 73, at 132.

<sup>75</sup> AMERICAN HERITAGE DICTIONARY 683 (3d ed. 1994).

<sup>76</sup> Anita M. Samuels, *Freeze-Dried Music: Just Add Artists*, N.Y. TIMES, Sept. 4, 1995, at A35.

<sup>77</sup> Szymanski, *supra* note 2, at 278.

Sometimes, a rap artist paying homage to those who have come before them, samples music of older African-American artists.<sup>78</sup> These are just some of the uses of sampling in rap music. Other examples and a detailed explanation of the communicative function of sampling in rap music are discussed in section II.G.1.<sup>79</sup>

### C. The History of Rap Music

Rap music has its roots in many musical styles, including: antebellum African-American work songs; bebop music of Charlie Parker and Dizzy Gillespie; scat singing of Jazz greats such as Ella Fitzgerald and Louis Armstrong; street corner doo-wop vocal harmonies; urban jump rope rhymes and the distinct style of R&B<sup>80</sup> singers such as Isaac Hayes and James Brown.<sup>81</sup>

While rap music has had many influences, its major development can be traced directly to Jamaica.<sup>82</sup> During the 1960s, Jamaican DJs traveled around the island nation with portable sound systems, entertaining local communities in temporary makeshift discos.<sup>83</sup> As the popularity of these discos grew, so did competition among the various DJs.<sup>84</sup> In an effort to attract larger audiences, DJs began modifying the music they played by chanting words over the instrumental tracks.<sup>85</sup> This musical style, sometimes referred to as “dub,”<sup>86</sup> came to America in the late 1960s, via Kool Herc, a popular Jamaican DJ who had emigrated to

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<sup>78</sup> Szymanski, *supra* note 2, at 287 n.48 (citing the sampling of artists such as Bob Marley, Jimi Hendrix and George Clinton).

<sup>79</sup> See *infra* text accompanying notes 148-70.

<sup>80</sup> Rhythm and Blues.

<sup>81</sup> See David Sanjek, *Don't Have to DJ No More: Sampling and the "Autonomous" Creator*, 10 CARDOZO ARTS & ENT. L.J. 607, 610 (1992). Unlike most R&B singers, Hayes and Brown had distinct styles where speaking (or random shouts in the case of the latter) took precedence over traditional soul singing.

<sup>82</sup> See Szymanski, *supra* note 2, at 277.

<sup>83</sup> See Sanjek, *supra* note 81, at 610.

<sup>84</sup> See Sanjek, *supra* note 82, at 610.

<sup>85</sup> See Sanjek, *supra* note 82, at 611.

<sup>86</sup> See Szymanski, *supra* note 2, at 277.

the Bronx.<sup>87</sup> By 1973, Herc was a neighborhood sensation and entertained at house and block parties by playing Caribbean music such as reggae and ska, while chanting over the instrumentals.<sup>88</sup> By the mid-1970s, however, Herc discovered that his audiences quickly were growing tired of the underlying Caribbean music.<sup>89</sup> Accordingly, he bought popular albums, many with Latin beats, and used manual turntables to sample the music that the audiences liked most.<sup>90</sup>

Word of Herc's unique style spread quickly. Soon other New York DJs began to follow his lead.<sup>91</sup> Cashing in on the popularity of R&B and disco music of the 1970s, DJs sampled tracks from well-known albums and "rapped"<sup>92</sup> over the music in American street slang, making the music more accessible to urban populations.<sup>93</sup> In fact, many early freeform rap hits, were built around pre-existing popular songs. For example, the first mainstream rap song, Sugar Hill Gang's 1979 hit "Rapper's Delight," was built around the bass line of the popular disco song "Good Times" by the group Chic.<sup>94</sup>

As it did in Jamaica, competition among American DJs became fierce. Each would try to outshine the other by manipulating the records in a variety of new ways.<sup>95</sup> Because all early sampling was done live by manipulation of stereo

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<sup>87</sup> See VAIDHYANATHAN, *supra* note 73, at 136.

<sup>88</sup> *See id.*

<sup>89</sup> *See id.*

<sup>90</sup> *See id.*

<sup>91</sup> See VAIDHYANATHAN, *supra* note 74, at 136. Sampling turned several 1970s DJs, including Afrika Bambaataa, Grandmaster Flash, and Jellybean Benitez, into songwriters and producers overnight. See Jon Pareles, *In Pop, Whose Song Is It, Anyway?*, N.Y. TIMES, July 27, 1989 at B1.

<sup>92</sup> It is unclear exactly who coined the term "rap." However, the term's first widespread use can be traced back to two 1979 records: Fatback Band's "King Tim III (Personality Jock)" and Sugar Hill Gang's "Rapper's Delight." See *Davey D's Hip-Hop Corner*, available at <http://www.daveyd.com/whatisrapdav.html> (last visited Mar. 27, 2002).

<sup>93</sup> See VAIDHYANATHAN, *supra* note 74, at 136.

<sup>94</sup> See Don Snowden, *Sampling: A Creative Tool or License to Steal? The Controversy*, L.A. TIMES, July 6, 1989, at 61.

<sup>95</sup> See Sanjek, *supra* note 81, at 611.

turntables,<sup>96</sup> DJs quickly realized that they were limited in what they could create by their own manual dexterity.<sup>97</sup> Consequently, they looked to digital technology to fulfill their needs.<sup>98</sup>

#### D. Digital Sampling

Digital sampling, “the process of digitally analyzing and recording sound,”<sup>99</sup> became widely available in the 1970s.<sup>100</sup> Prior to that time, music was stored in analog form, whereby vibrations of sound were captured either on etchings in phonorecords or magnetic signals on audiotapes.<sup>101</sup> Digital technology, however, converts sound vibrations into number sequences that can be stored in and reproduced by a computer.<sup>102</sup> When copied or played back, a digital copy, unlike an analog copy, is an exact duplicate of the original, avoiding generational degradation in sound quality from one duplication to the next.<sup>103</sup>

Digital technology also allows an artist to manipulate a sampled sound through the use of special software and musical sequencing devices.<sup>104</sup> For example, once a sound is digitally recorded, an artist can alter its speed, pitch and timbre.<sup>105</sup> He also can take a short fragment of the sound and loop (repeat) it over and over again to form the structural basis of another composition.<sup>106</sup>

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<sup>96</sup> See Sanjek, *supra* note 81, at 612.

<sup>97</sup> See *id.*

<sup>98</sup> See *id.*

<sup>99</sup> E. Scott Johnson, *Protecting Distinctive Sounds: The Challenge of Digital Sampling*, 2 J. L. & TECH 273, 273 (1992).

<sup>100</sup> SAMUELS, *supra* note 31, at 45.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 46.

<sup>103</sup> See Rebecca Morris, Note, *When is a CD Factory Not Like a Dance Hall? The Difficulty of Establishing Third-Party Liability for Infringing Digital Music Samples*, 18 CARDOZO ARTS & ENT. L. J. 257, 262 (2000).

<sup>104</sup> See *id.* at 263.

<sup>105</sup> See *id.*

<sup>106</sup> See *id.*

Furthermore, he can isolate one voice or instrument from a larger ensemble and accompany it with other music, thereby completely changing its context.<sup>107</sup> Recording artist Moby elaborated upon this process:

You can take a source vocal that's very neutral and by changing the chord progression underneath it make it take on a whole other character. You know the song on 'Play' 'Why Does My Heart Feel So Bad?' The song I took the woman's vocal from actually goes 'glad,' not 'bad' - it's an upbeat, happy song. But being me, I guess, I put these minor chords underneath it and manipulated the vocal, and it became something else.<sup>108</sup>

Initially, digital sampling was expensive,<sup>109</sup> but as the technology became cheaper<sup>110</sup> and easier to use,<sup>111</sup> more and more rap artists began to utilize it.<sup>112</sup>

### E. Early Uses of Digital Sampling in Rap Music

By the 1980s, rappers who sampled music were confident that the digital technology they were using was becoming cheaper and easier to use. However, they had few assurances about the legal implications of their appropriation of the product.<sup>113</sup> The Copyright Act did not speak directly to the issue of digital sampling and, before the early 1990s, no major copyright case involving

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<sup>107</sup> See Szymanski, *supra* note 2, at 276.

<sup>108</sup> See Gerald Marzorati, *All by Himself*, N.Y. TIMES, Mar. 17, 2002, § 6 (Magazine), at F35 (quoting recording artist Moby).

<sup>109</sup> In the 1970s, sampling technology cost anywhere from \$50,000 to \$300,000. See Snowden, *supra* note 94, at 61.

<sup>110</sup> See David Goldberg & Robert J. Bernstein, *Reflections on Sampling*, N.Y.L.J., Jan. 15, 1993, at 3 ("Sampling has developed into a popular and inexpensive way to create a new musical composition ... Digital samplers, [] are now available for about \$100").

<sup>111</sup> See Morris, *supra* note 103, at 262-63 ("[A] song can be downloaded ..., sampled and remixed, and re-recorded ... onto a CD - all in a single afternoon").

<sup>112</sup> See *id.* at 262; Snowden, *supra* note 94, at 61; Samuels, *supra* note 76, at A35 ("Digital sampling ... was primarily used by rappers").

<sup>113</sup> See VAIDHYANATHAN, *supra* note 73, at 140.



sampling had been decided by the courts.<sup>114</sup>

To protect themselves against potential copyright infringement suits,<sup>115</sup> some composers of rap music licensed and paid for their use of samples.<sup>116</sup> For example, after sampling Rick James' 1981 song "Super Freak" in his 1990 single "U Can't Touch This," rapper M.C. Hammer said, "Hey, I gotta pay Rick for this. I [don't] need a lawyer to tell me that ... I'm borrowing enough of his song that he deserves to be compensated."<sup>117</sup> Others in the music industry took the same position. As entertainment attorney Bruce Gold stated:

I don't deny the creativity of the people putting it together any more than I deny the creativity of the collage artist ... [but] they don't have a right to take the underlying works and use them for free.<sup>118</sup>

Other attorneys agreed, referring to sampling as "a euphemism for what anybody else would call pick pocketing"<sup>119</sup> and "nothing but old fashioned piracy dressed in sleek new technology."<sup>120</sup>

In contrast, many in the music industry did not believe that unauthorized sampling constituted copyright infringement. Accordingly, they freely appropriated music without asking permission from copyright holders or providing them with compensation.<sup>121</sup> For example, in 1987, the Beastie Boys'

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<sup>114</sup> See Szymanski, *supra* note 2, at 273.

<sup>115</sup> There were potential violations in both the sound recording as well as the underlying musical composition. See *supra* text accompanying notes 29-42.

<sup>116</sup> See Snowden, *supra* note 94, at 61 (reporting that the hip-hop group Stetsasonic obtained a license to sample Liston Smith's 1975 song "Expansions" on their 1988 single "Talkin' All That Jazz").

<sup>117</sup> Peter Castro, *Chatter*, PEOPLE WEEKLY, July 30, 1990, at 86 (quoting rapper M.C. Hammer).

<sup>118</sup> Snowden, *supra* note 94, at 61 (quoting entertainment attorney Bruce Gold).

<sup>119</sup> Szymanski, *supra* note 2, at 272 (quoting Joseph Pope, attorney for singer/songwriter Gilbert O'Sullivan).

<sup>120</sup> VAIDHYANATHAN, *supra* note 73, at 134 (quoting Juan Carlos Thom, a Los Angeles attorney, musician, playwright and actor).

<sup>121</sup> See Samuels, *supra* note 76, at A35.

single “Hold It Now, Hit It” sampled without permission portions of Jimmy Castor’s song “Yo, Leroy.”<sup>122</sup> Also, in 1989, De La Soul used an unlicensed sample of the Turtles’ song “You Showed Me” in their single “Transmitting Live from Mars.”<sup>123</sup>

The above uses of sampling prompted immediate law suits by the copyright holders of the pre-existing works.<sup>124</sup> As Ken Anderson, attorney for the Beastie Boys and De la Soul, explained:

Sampling gets a knee jerk reaction because of the ways it’s done. [People think that] there’s something that smacks of thievery in pushing a button rather than moving your fingers on an instrument. I think that’s simply culture shock.<sup>125</sup>

Neither the Beastie Boys nor De La Soul ever testified at trial. Both lawsuits were settled out of court.<sup>126</sup> In the case of the latter, De La Soul eventually paid \$1,700,000 for their use of the Turtles’ song - approximately \$141,000 per second of music borrowed.<sup>127</sup>

#### **F. Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.**

Without any legal precedent, early uses of digital sampling in rap music revealed that copyright law was inadequate to deal with the new art form.<sup>128</sup> In 1991, all uncertainties were resolved with the court’s decision in *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*<sup>129</sup> Earlier that year, rapper Biz Markie released a record called “I Need a Haircut” that embodied an unlicensed sample

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<sup>122</sup> See Snowden, *supra* note 94, at 61.

<sup>123</sup> See VAIDHYANATHAN, *supra* note 73, at 141.

<sup>124</sup> See Snowden, *supra* note 94, at 61; VAIDHYANATHAN, *supra* note 73, at 141.

<sup>125</sup> Snowden, *supra* note 94, at 61 (quoting Ken Anderson, attorney for the Beastie Boys and De La Soul).

<sup>126</sup> See *id.*; VAIDHYANATHAN, *supra* note 73, at 141.

<sup>127</sup> See *id.* at 133 (2001).

<sup>128</sup> See *id.*

<sup>129</sup> *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991).

of music from Gilbert O'Sullivan's song "Alone Again (Naturally)."<sup>130</sup> Grand Upright, the copyright holders of both the original recording of O'Sullivan's song and its underlying musical composition, sued Biz Markie and his record label for copyright infringement.<sup>131</sup> Writing for the Federal District Court for the Southern District of New York, Judge Kevin Duffy held that digital sampling of copyright protected pre-existing music without permission constituted copyright infringement of both the sound recording and the recording's underlying musical composition.<sup>132</sup> Moreover, Judge Duffy was so outraged by the practice of sampling without permission that he admonished the defendants by opening his opinion with the 8th commandment, "thou shalt not steal."<sup>133</sup> He also threatened to refer the matter to the U.S. Attorney's office for criminal prosecution.<sup>134</sup> Consequently, after *Grand Upright*, digital sampling of copyright protected works without permission all but ended.<sup>135</sup>

*Grand Upright* may have provided certainty about the legal implications of digital sampling in rap music, but the reaction to the decision within the music industry was less than consistent. For example, the music industry's current licensing scheme for samples is ad hoc and there are no immediate plans to establish uniform systems for clearances and royalties.<sup>136</sup> Also, many songwriters, viewing rap music as a lower art form, refuse to license their songs for use by rap artists.<sup>137</sup> Moreover, several lesser-known artists who would otherwise incorporate digital samples into their pieces are unable to do so because, without the financial backing of a large record label, they cannot afford

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<sup>130</sup> *Id.* at 183.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* However, Judge Duffy mistakenly referred to the commandment as the seventh.

<sup>134</sup> *Id.* at 185.

<sup>135</sup> See VAIDHYANATHAN, *supra* note 73, at 15. *But see* Williams v. Broadus, 60 U.S.P.Q. 2d 1051 (S.D.N.Y. 2001)(where Rapper Marley Marl sued Rapper Snoop Dogg for sampling without permission Marl's piece "The Symphony," which itself contained samples of another pre-existing work, Otis Redding's "Hard to Handle").

<sup>136</sup> See VAIDHYANATHAN, *supra* note 73, at 134.

<sup>137</sup> *See id.*

the cost of a license.<sup>138</sup> These trends have led to an overall decline in the amount of rap music that utilizes digital sampling,<sup>139</sup> thereby curtailing what some have referred to “as the most definitive and influential music form of the last twenty years.”<sup>140</sup>

### G. Fair Use Analysis

Judge Duffy’s opinion in *Grand Upright* has been criticized by legal scholars as flawed and incomplete.<sup>141</sup> As one entertainment attorney reflected, “[*Grand Upright* was not] the seminal case everyone wanted.”<sup>142</sup> Specifically, the holding failed to consider that digital sampling in rap music may be shielded from infringement liability under the “fair use” doctrine.<sup>143</sup> It is unclear from the court’s record whether the defendants in *Grand Upright* failed to raise fair use as a defense or whether Judge Duffy decided that because the purpose of Biz Markie’s copying was “to sell thousands upon thousands of records,”<sup>144</sup> such a commercial use was presumptively unfair.<sup>145</sup> Nevertheless, Judge Duffy’s opinion is vague and leaves open the possibility that certain uses of digital sampling in rap music could qualify as fair use.

When determining whether appropriation of copyrighted works is permissive fair use, the Copyright Act provides four factors that courts should examine. These factors are:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational

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<sup>138</sup> *See id.*

<sup>139</sup> *See id.*

<sup>140</sup> Cheo Hodari Coker, *Rap’s Heart Beats as Strong as Ever*, L.A. TIMES, Dec. 7, 1997, at 72.

<sup>141</sup> *See Morris, supra* note 103, at 270.

<sup>142</sup> Randy Kravis, Comment, *Does a Song by Any Other Name Still Sound As Sweet? Digital Sampling and Its Copyright Implications*, 43 AM. U. L. REV. 231, 265 (1993)(quoting Stewart Levy, attorney for music producer Jellybean Benitez).

<sup>143</sup> *See supra* text accompanying notes 43-50.

<sup>144</sup> *Grand Upright*, 780 F. Supp. at 185 (1991).

<sup>145</sup> *See Goldberg & Bernstein, supra* note 110, at 3.

purposes;

- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>146</sup>

Moreover, when examining these four factors, none should be treated in isolation. “[A]ll are to be explored, and the results weighed together.”<sup>147</sup>

### 1. The Purpose and Character of the Use

The first factor of the fair use analysis focuses on the purpose and character of the new work’s use of the copied material, including whether the use was for commercial purposes.<sup>148</sup> Historically, a commercial use was presumptively unfair.<sup>149</sup> However, in *Campbell v. Acuff-Rose Music, Inc.*,<sup>150</sup> the Supreme Court ruled that commercial use is just one factor in determining fair use and commercial use should be downplayed if the use is also “transformative.”<sup>151</sup> A use is transformative if a new work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>152</sup> However, if the new work merely supersedes the purpose of the original creation, the use is not transformative.<sup>153</sup> Moreover, “the more transformative the new work, the less will be the significance of other factors [such as commercial purpose] that may weigh against a finding of fair use.”<sup>154</sup>

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<sup>146</sup> 17 U.S.C. § 107 (2000).

<sup>147</sup> *Campbell*, 510 U.S. at 578 (1994).

<sup>148</sup> 17 U.S.C. § 107 (2000).

<sup>149</sup> *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

<sup>150</sup> *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994).

<sup>151</sup> *Id.* at 578-79.

<sup>152</sup> *Id.* at 579.

<sup>153</sup> *Id.* at 578-79.

<sup>154</sup> *Id.* at 579.

Analyzed under the first factor of fair use, many instances of digital sampling in rap music should qualify as transformative. Many rap musicians, like several other postmodern artists, appropriate existing music as a form of commentary and criticism.<sup>155</sup> As one legal scholar noted:

Appropriation is one of the most pervasive modes of contemporary artistic expression in large part because it is so effective as a form of communication. Appropriation acts as a kind of enhanced language in which the artist makes the audience aware of the significance of otherwise commonplace and increasingly obscured objects. Everyday images such as soup cans, flags, cigarette packages, money, movie stars, comic strips and even shopping bags - the representations of which ordinarily serve as cultural symbols - are transformed into a language through which these artists communicate their message.<sup>156</sup>

The transformative nature of postmodern appropriation works is exemplified by the use of digital sampling in rapper Jay-Z's 1998 single "Hard Knock Life (Ghetto Anthem),"<sup>157</sup> which incorporated a sample of a song by the same name from the original Broadway cast recording of the musical *Annie*.<sup>158</sup> Although the *Annie* sample was properly licensed, "Hard Knock Life" is a good hypothetical to demonstrate the transformative nature of many rap songs that utilize digital samples. The *Annie* song from which the sample was taken originally conveyed the difficulties of life in a New York City orphanage during the Depression.<sup>159</sup> However, by using the sample as the chorus of his song,

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<sup>155</sup> See *supra* text accompanying notes 77-78.

<sup>156</sup> Badin, *supra* note 6, at 1656.

<sup>157</sup> Jay-Z's 1998 album *Volume 2: Hard Knock Life* (produced by Def Jam Records) remained at the top of the Billboard 200 Albums Chart for five weeks and the top of the Billboard R&B Albums Charts for six weeks. The album also was certified triple platinum and won a Grammy Award for Best Rap Album in 1999. The single "Hard Knock Life (Ghetto Anthem)" was nominated for a Grammy in the category of Best Solo Rap Performance but did not win. The song, however, was certified gold in March 1999. See *Rock on the Net: Jay-Z*, available at [http://www.rockonthenet.com/artists-j/jayz\\_main.htm](http://www.rockonthenet.com/artists-j/jayz_main.htm) (last visited Mar. 28, 2002).

<sup>158</sup> CHARLES STROUSE & MARTIN CHARNIN, *Hard Knock Life, on ANNIE (ORIGINAL BROADWAY CAST RECORDING)*(Columbia Records 1977).

<sup>159</sup> *Id.*

surrounded by his own original rap about life in the “ghetto,” Jay-Z altered the meaning of the pre-existing work, thereby commenting on a different type of urban struggle.<sup>160</sup> As Jay-Z reflected on the *Annie* sample:

I believe it's a real ghetto song, you know what I'm saying? ... I mean, that's like anybody that ever went through any hardships

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<sup>160</sup> The following is an excerpt from Jay-Z's “Hard Knock Life (Ghetto Anthem):”

Jay-Z:

From standing on the corner poppin  
To driving some of the hottest cars New York has ever seen  
To dropping some of the hottest verses rap has ever heard  
From the dope spot, where the smoke lock  
Fleeing the murder scene, you know me well  
From nightmares of a lonely cell, my only hell ...

I'm from the school of the hard knocks, we must not  
Let outsiders violate our blocks, and my plot ...

Annie Sample:

It's the hard knock life for us  
It's the hard knock life for us  
Steady treated, we get tricked  
Steady kisses, we get kicked  
It's the hard knock life!!

Jay-Z:

I flow for those droned out  
All my niggas locked in the 10 by 4 controlling the house  
We live in hard knocks we don't take over we bomb blocks  
Burn 'em down and you can have 'em back daddy ...

I've seen pies let the thing between my eyes analyze life's ills  
Then I put it down tight grill  
I'm tight grill with the phony rappers you might feel we homeys  
I'm like still you don't know me, shit  
I'm tight grill when my situation ain't improving  
I'm trying to murder everything moving, Feel Me!!

Annie Sample:

It's the hard knock life for us ....

*Jay-Z - It's a Hard knock Life*, available at <http://home.t-online.de/home/junkee/knock.htm> (last visited Apr. 12, 2002).

or anything coming up can really relate to that song. And the way they sing that song, they're not singing that song as if they're sad about it, it's as if they're like, 'OK, this is our situation. We're gonna make the best of it. Amidst all what's going on, we're still playing jump rope and playing the johnny pump, you know. I got my quarter waters and eating pumpkin seeds and it's all good.'<sup>161</sup>

Jay-Z did not merely use the *Annie* sample for its original purpose. Instead, he added new meaning to the pre-existing work. Thus, if analyzed under the first factor of fair use, Jay-Z's use of digital sampling in "Hard Knock Life" would conceivably qualify as transformative. Accordingly, its commercial nature would not weigh significantly against a finding of fair use.

Another example of transformative copying in rap music appears in Schoolly-D's 1987 song "Signifying Rapper,"<sup>162</sup> which incorporated an unlicensed sample of rock group Led Zeppelin's song "Kashmir."<sup>163</sup> To understand the transformative nature of "Signifying Rapper," it is necessary to go back to 1969, when the rock group Led Zeppelin released their album *Led Zeppelin II*. The first track on the Led Zeppelin album, "Whole Lotta Love,"<sup>164</sup> sounded very similar to the song "You Need Love," which was written in 1962 by the African-American blues composer Willie Dixon.<sup>165</sup> The two songs sounded so much alike that Willie Dixon filed suit against Led Zeppelin for copyright infringement.<sup>166</sup> While most people viewed this case as an isolated instance of copyright infringement, rapper Schoolly-D saw it as an example of a

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<sup>161</sup> *JayzFanz.com - transcripts*, available at [http://www.jayzfan.com/transcripts/interviews/mtv\\_zone\\_2.shtml](http://www.jayzfan.com/transcripts/interviews/mtv_zone_2.shtml) (last visited Mar. 21, 2002)(quoting rapper Jay-Z).

<sup>162</sup> "Signifying Rapper" is featured in the soundtrack of the 1992 film *Bad Lieutenant*. See *Internet Movie Data Base*, available at <http://us.imdb.com/Soundtracks?0103759> (last visited Apr. 18, 2002).

<sup>163</sup> LED ZEPPELIN, *Kashmir*, on PHYSICAL GRAFFITI (Swan Song 1975).

<sup>164</sup> LED ZEPPELIN, *Whole Lotta Love*, on LED ZEPPELIN II (Atlantic 1969).

<sup>165</sup> See VAIDHYANATHAN, *supra* note 73, at 117.

<sup>166</sup> The parties later settled out of court. See VAIDHYANATHAN, *supra* note 73, at 117.



long tradition of white people exploiting African-American musicians.<sup>167</sup> In 1987, angered by what he viewed as a history of misappropriation and abuse, in 1987, Schoolly-D sampled an instrumental guitar section of Led Zeppelin's "Kashmir" and looped it over and over again as the foundation for his song "Signifying Rapper."<sup>168</sup> The lyrics of the song were based on the traditional African poem "Signifying Monkey," in which a wily monkey uses his "wits and his command of diction to outsmart a more powerful adversary."<sup>169</sup> In "Signifying Rapper," Schoolly-D was taking on the white musician, whom he viewed as his oppressive adversary. "Repeating and reusing the guitar riff from 'Kashmir' was a transgressive and disrespectful act - a 'dis' of Led Zeppelin and the culture that produced, rewarded, and honored Led Zeppelin."<sup>170</sup>

Similar to Jay-Z's use of the *Annie* sample in "Hard Knock Life," Schoolly-D's use of the Led Zeppelin song conceivably is transformative. Both instances of appropriation added meaning to a pre-existing work by incorporating it into a new composition. Accordingly, despite the songs' commercial nature, this factor will weigh heavily toward a finding of fair use. However, unlike the above examples, if the use of a sample is not transformative, then a finding of fair use is unlikely, especially if used for commercial purposes.

## 2. The Nature of the Pre-Existing Work

The second factor of the fair use analysis examines the "nature" of the pre-existing copyrighted work.<sup>171</sup> If the existing work is factual in nature, the more likely there will be a finding of fair use; the more expressive a work, the less likely there will be a finding of fair use.<sup>172</sup> However, the Court in *Campbell* noted that this factor essentially is irrelevant in cases where the new work is transformative.<sup>173</sup> This is because transformative works "almost invariably copy

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<sup>167</sup> For more a more detailed discussion of the exploitation of African-American musicians by white people see VAIDHYANATHAN, *supra* 73, at 117.

<sup>168</sup> See VAIDHYANATHAN, *supra* note 73, at 117.

<sup>169</sup> See *id.*

<sup>170</sup> See *id.*

<sup>171</sup> 117 U.S.C. § 107 (2000); *Campbell*, 510 U.S. at 586.

<sup>172</sup> See Szymanski, *supra* note 2, at 316.

<sup>173</sup> *Campbell*, 510 U.S. at 586 (1994).

publicly known expressive works.”<sup>174</sup> Accordingly, this factor would not weigh against a finding of fair use if a rap song’s incorporation of a sample were transformative in nature.

### 3. The Amount of the Pre-Existing Work Borrowed

The third factor inquires into the amount and substance of the pre-existing work that was appropriated.<sup>175</sup> Generally, the more of the copyrighted work that is borrowed, whether in quantity or quality, the less likely it is that a court will find fair use.<sup>176</sup> However, where the use is transformative in nature, copyright law allows an artist to borrow as much of the original work as is necessary to “conjure up” the original work.<sup>177</sup> The law permits this amount of appropriation because, in order to comment upon or transform the pre-existing work, it is necessary that the pre-existing work is recognizable to the audience.<sup>178</sup> Accordingly, when a rap musician uses a sample to create an association between his song and the original, he should be permitted to use as much of the original composition as is necessary to make others aware of the relationship. Provided he borrows no more than is necessary to create this correlation, his appropriation should not weigh against a finding of fair use.

### 4. The Impact on the Value of the Pre-Existing Work

The fourth and final factor, the impact on the value or the potential or actual market for of the pre-existing work,<sup>179</sup> was long considered the most important factor in the fair use analysis.<sup>180</sup> Moreover, if a work was made for commercial purposes, it was presumed to diminish the value of the pre-existing

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<sup>174</sup> *Id.* at 586.

<sup>175</sup> 117 U.S.C. § 107 (2000).

<sup>176</sup> *Campbell*, 510 U.S. at 587-88 (1994).

<sup>177</sup> *Id.* at 588.

<sup>178</sup> *Id.*

<sup>179</sup> 117 U.S.C. § 107 (2000).

<sup>180</sup> See Carl Hampel, Note, *Are Samplers Getting A Bum Rap? Copyright Infringement or Technological Creativity?*, 1992 U. ILL. L REV. 559, 570 (1992).

work.<sup>181</sup> The Court in *Campbell*, however, overruled this presumption when a new work, intended for commercial use, was transformative in nature.<sup>182</sup> In fact, the Court noted that in the case of transformative uses, harmful economic impact on the pre-existing work was unlikely.<sup>183</sup> Nevertheless, the Court said that tribunals still should examine both the impact on the market for the original work and the impact on potential markets for derivative works based upon the original work.<sup>184</sup>

Regarding a pre-existing work's original market, digital sampling arguably will have a positive, not negative, financial impact. As Mark Twain said, "imitation acts as an advertisement for the original and whets the public's curiosity."<sup>185</sup> Similarly, digital sampling in rap music is essentially free publicity for the sampled song, which can increase interest in and sales of the song in traditional markets.<sup>186</sup> For example, singer/songwriter Bobby Byrd's<sup>187</sup> career was revived when Eric B. & Rakim featured his 1960s hit single "I Know You Got Soul" in their 1987 rap song of the same title.<sup>188</sup> Because of the popularity of Eric B. & Rakim's song in Europe, Byrd was able to take advantage of the free publicity and complete three successful British tours, a feat he would not have accomplished had his song not been sampled.<sup>189</sup> As Byrd said, "I want to be the first to stand and say that if it hadn't been for the rappers [this tour] would

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<sup>181</sup> See *Campbell*, 510 U.S. at 591 (1994).

<sup>182</sup> See *id.*

<sup>183</sup> See *id.*

<sup>184</sup> See *id.* at 590.

<sup>185</sup> Carlin, *supra* note 7, at 119 (quoting Mark Twain).

<sup>186</sup> Accord Peter J. Burkholder, *The Uses of Existing Music: Musical Borrowing as a Field*, NOTES, Mar. 1994, at 859 ("By referring to other music, all types of borrowing force us to think of another piece of music while we encounter the one in front of us, giving works that use existing music a special place in musical tradition that esteems the distinctive contributions of each composer....").

<sup>187</sup> Bobby Byrd was an R&B singer who was popular in the 1960s. He performed with the group the Famous Flames and often collaborated with artists such as James Brown. See Snowden, *supra* note 94, at 61.

<sup>188</sup> See *id.*

<sup>189</sup> See *id.*

not have happened ....”<sup>190</sup>

Furthermore, transformative rap compositions will not have a severe impact upon potential derivative markets for the pre-existing work - i.e. those markets where the composer may have an expectation of disseminating variations of his work. To determine a composer’s expectation in derivative markets, Professor Paul Goldstein of Stanford Law School has proposed a simple test. Courts should ask, “Would the original author abandon his project if [he knew that his rights would not] be protected in certain derivative works?”<sup>191</sup> If the answer is no, the pre-existing material should not be protected for that derivative use.<sup>192</sup> It is arguable that most artists have little or no expectation of compensation from non-traditional derivative markets.<sup>193</sup> Indeed, it is inconceivable that Martin Charnin and Charles Strouse, the composers of *Annie*, would have abandoned their musical if they had thought that twenty-five years later they would not receive royalty payments from Jay-Z’s record company for sampling a song from their show.<sup>194</sup> Accordingly, it is doubtful that digital sampling in rap music will deprive the copyright holder of pre-existing works any substantial profits from unanticipated derivative markets.

Thus, weighing all four fair use factors, it is clear that transformative uses in postmodern appropriation musical works, such as rap music, conceivably would fall under the fair use exception to copyright infringement.

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<sup>190</sup> See *id.* (quoting singer/songwriter Bobby Byrd).

<sup>191</sup> Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPR. SOC’Y 209, 230 (1983).

<sup>192</sup> See *id.*

<sup>193</sup> See BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 53 (1967) (“Keeping in mind ... the unlikelihood that borrowing diverts profit from the original composer - the law can afford to take a permissive attitude about music borrowing”).

<sup>194</sup> However, as discussed above, the *Annie* sample in Jay-Z’s song was properly licensed.

### III. CASTLE ROCK AND POSTMODERN FACTS

#### A. The Fact/Expression Dichotomy

While the Copyright Act protects original works of authorship,<sup>195</sup> it also provides that “in no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such a work.”<sup>196</sup> This doctrine is commonly referred to as the idea/expression or fact/expression dichotomy.<sup>197</sup> This dichotomy provides that copyright may be claimed in the expression of an idea or fact, but not in the idea or fact itself.<sup>198</sup> For example, “if I write, ‘in 1970, the population of Princeton, New Jersey, was 12,331,’ others may reproduce that fact, even if the population is known only because I walked the streets of Princeton, knocking on doors and counting every inhabitant.”<sup>199</sup> However, the line between an unprotected idea and the idea’s protected expression sometimes is blurred. Moreover, the terms, “idea” and “fact” are not defined anywhere in the Copyright Act.<sup>200</sup> Accordingly, courts have struggled to develop a uniform standard to guide them when deciding whether an appropriated work constitutes unprotected fact or protected expression.

Judge Learned Hand of the United States Court of Appeals for the Second Circuit readily acknowledged the difficulty of separating an idea from its expression in his opinion in *Nichols v. Universal Pictures Corp.*<sup>201</sup> In *Nichols*,

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<sup>195</sup> See *supra* text accompanying notes 2930-42.

<sup>196</sup> 17 U.S.C. § 102(b) (2000).

<sup>197</sup> Some authors have attempted to differentiate between the two dichotomies. See, e.g., Alan L. Durham, *Speaking of the World: Fact, Opinion and the Originality Standard of Copyright*, 32 ARIZ. ST. L.J. 791 (2001). However, the terms “fact” and “idea” are indistinguishable for the purposes of this article and frequently will be interchanged.

<sup>198</sup> See M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 2.03[D], available at LEXIS (noting that when merely one’s idea has been appropriated, no protection will be found under copyright law).

<sup>199</sup> Durham, *supra* note 197, at 791-92.

<sup>200</sup> 17 U.S.C. § 101 (2000).

<sup>201</sup> *Nichols v. Universal Pictures Corp.*, 45 F. 2d 119 (2d Cir. 1930).

Judge Hand recognized that the line dividing permissive borrowing of facts from non-permissive infringement of original expression often could not be fixed.<sup>202</sup> Instead, such a line is found on a “continuum of abstractions” the more concretely an idea is realized, the more likely it is protected expression.<sup>203</sup> What subsequently was referred to as Hand’s “abstractions test,” however, provided courts with little help in adjudicating cases involving the distinction between idea and expression. As Judge Frank H. Easterbrook, speaking for the United States Court of Appeals for the Seventh Circuit in *Nash v. CBS*,<sup>204</sup> pointed out:

Hand’s insight is not a ‘test’ at all. It is a clever way to pose the difficulties that require courts to avoid either extreme of the continuum of generality. It does little to help resolve a given case.<sup>205</sup>

In an effort to clarify these difficulties, the Supreme Court addressed the fact/expression dichotomy in *Feist Publications, Inc. v. Rural Telephone Service Co.*<sup>206</sup> In *Feist*, the Court held that a white pages telephone book containing factual information of addresses and telephone numbers that were assembled alphabetically by name was not protected as original expression because it did not possess a “minimum degree of creativity.”<sup>207</sup> Despite *Feist*’s effort to establish a clear standard, lower courts continue to struggle with differentiating between ideas and expression.<sup>208</sup> Without clear judicial guidance, courts have characterized the borrowing of ideas as they wish.<sup>209</sup> Moreover, in a recent trend, they have found more and more protection for what arguably are

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<sup>202</sup> *Id.* at 121.

<sup>203</sup> *Id.*

<sup>204</sup> *Nash v. CBS*, 899 F. 2d 1537 (7th Cir. 1990).

<sup>205</sup> *Id.* at 1540.

<sup>206</sup> *Feist Publications, Inc. v. Rural Telephone Service*, 499 U.S. 340 (1991).

<sup>207</sup> *Id.* at 348-51.

<sup>208</sup> See Ayers, *supra* note 18, at 573-81 (discussing *Kregos v. Associated Press*, 937 F. 2d 700 (2d Cir. 1991) and *CCC Information Servs., Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F. 3d. 61 (2d Cir. 1994)).

<sup>209</sup> See *id.*

unprotected facts.<sup>210</sup>

## B. Fact and Fiction in Postmodern Society

In postmodern society, the line between fact and fiction often is unclear.<sup>211</sup> As Professor Rosemary J. Coombe of the University of Toronto Law School stated:

[M]edia images have dominated our visual language and landscape, infiltrating our conscious thoughts and unconscious desires. [We have] seen the intrusion of saturation advertising, glossy magazines, movie spectaculars, and television, [and] our collective sense of reality owes as much to the media as it does to the observation of events and natural phenomena.<sup>212</sup>

Because the sights and sounds of our popular culture thoroughly pervade our natural environment, we have come to think of these sights and sounds as real.<sup>213</sup> As entertainment attorney and art historian John Carlin observed:

Our social environment is increasingly determined by simulated signs ... [T]he realm of the 'imaginary' has supplanted that of the 'real' in determining our sense of self and nature ... [A] closed system of fabricated signs make up our environment.<sup>214</sup>

The blurring between what is natural and what is manufactured is evidenced in many facets of contemporary society. For example, devout fans of the popular television, film and book franchise *Star Trek*, known as "Trekkies," are so engaged with *Star Trek* that they often view its characters and their

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<sup>210</sup> See *id.*

<sup>211</sup> See Vitanza, *supra* note 14, at 54.

<sup>212</sup> COOMBE, *supra* note 3, at 50.

<sup>213</sup> See COOMBE, *supra* note 3, at 44; Akoi, *supra* note 15, at 1; see also Badin, *supra* note 6, at 1657.

<sup>214</sup> Carlin, *supra* note 7, at 110-11.

fictional adventures as real.<sup>215</sup> Trekkies range from Dr. Denis Bolurguignon, a Florida dentist who calls his office, decorated with *Star Trek* paraphernalia, “Starbase Dental,” to people who have translated the *Bible* into Klingon, the language of a warrior-like alien species on *Star Trek*.<sup>216</sup>

Perhaps the most famous Trekkie is Barbara Adams, an alternate juror during the 1996 Whitewater trial.<sup>217</sup> Ms. Adams, president of her local chapter of the “Federation Alliance,” a *Star Trek* fan group, arrived at court each day clad in a red and black “Starfleet” uniform, complete with replicas of a “communication badge,” “tricorder,” and “phaser,” as worn by the characters in the television series.<sup>218</sup> At court, Adams asked that court officials and other jurors address her by her “official Starfleet rank” of Commander.<sup>219</sup> When asked why she chose to wear the uniform to the Whitewater proceedings, she replied that the outfit represented the “ideals, messages and good solid values” of *Star Trek* and thus was appropriate in a court of law.<sup>220</sup>

The inability to distinguish between fact and fiction is not solely relegated to fans of science fiction. Even our nation’s leaders have embraced fictional television characters as real. In a 1992 speech, then Vice President Daniel Quayle openly attacked the fictional television character Murphy Brown,<sup>221</sup> portrayed by actress Candice Bergen.<sup>222</sup> Quayle claimed that Brown’s character, a career-oriented single woman who decided to bear and raise a child

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<sup>215</sup> “Trekkies have become such a part of the cultural lexicon that they are the only fans listed by name in the Oxford English Dictionary.” Renee Graham, “*Trekkies*” *Charts a Phenomenon’s Course*, BOSTON GLOBE, May 21, 1999, at D6 (film review). Furthermore, there is a *Star Trek* convention held somewhere in the world every weekend of the year. *See id.*

<sup>216</sup> *See id.*

<sup>217</sup> Ms. Adams was later dismissed from the jury for communicating with the press, violating a strict order of the judge. *See CNN - “Trekkie” Juror Mar. 14, 1996, available at <http://www.cnn.com/US/fringe/9603/03-14/trek.html>* (last visited Mar. 28, 2002).

<sup>218</sup> *See* Ronald Smothers, *Major and Minor Players in Place, Historic Whitewater Trial Underwhelms Little Rock*, N.Y. TIMES, Mar 15, 1996, at A10.

<sup>219</sup> *See* TREKKIES (Neo Motion Pictures 1997).

<sup>220</sup> *See* Smothers, *supra* note 218, at A10 (quoting Barbara Adams).

<sup>221</sup> *Murphy Brown* (CBS television broadcast, 1988-98).

<sup>222</sup> *See* Bill Carter, *Riding Murphy Brown’s Coattails*, N.Y. TIMES, Sept. 21, 1992, at D1.



in her mid-forties, was a negative influence on American “family values.”<sup>223</sup> During the television episodes following Quayle’s speech, Brown’s character responded with several comments rebuking Quayle, thereby prompting an actual debate between the fictional Murphy Brown and the “real” Vice President.<sup>224</sup>

The embracing of fictional characters as real also is seen in more subtle examples. For instance, gay men sometimes address each other by the code words “Friend of Dorothy.”<sup>225</sup> The term is used to signify the large gay following of entertainer Judy Garland by referencing Dorothy Gale, the fictional character that Garland portrayed in the film *The Wizard of Oz*.<sup>226</sup> Reflecting the slang of American youth, the lead characters in the 1995 film *Clueless*<sup>227</sup> refer to attractive members of the opposite sex as “Bettys” and “Baldwins” the former term referring to Betty Rubble, the shapely cartoon character on *The Flintstones*,<sup>228</sup> the latter to the popular actor Alec Baldwin and his brothers.<sup>229</sup>

Ask a non-musician about Wolfgang Amadeus Mozart and his “historical” knowledge might come from viewing Tom Hulce’s portrayal of the classical composer in the 1984 film *Amadeus*.<sup>230</sup> In fact, several students’ initial and perhaps final impressions of various historical figures are derived from viewing films similar to *Amadeus*, including *Elizabeth*,<sup>231</sup> *Evita*,<sup>232</sup> *JFK*<sup>233</sup> and

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<sup>223</sup> See *id.*

<sup>224</sup> See *id.*

<sup>225</sup> See Sam Todes, *Injustice for Some: Randy Shilts Indicts the U.S. Military’s Treatment of Gays and Lesbians*, CHI. TRIB., May 30, 1993, at C5 (book review) (“Undercover agents at the Great Lakes Naval Station discovered that homosexuals there called themselves ‘[F]riends of Dorothy,’ a code term long used in referring to Judy Garland’s character in the film *The Wizard of Oz*”).

<sup>226</sup> THE WIZARD OF OZ (MGM 1939).

<sup>227</sup> CLUELESS (Paramount Pictures 1995).

<sup>228</sup> *The Flintstones* (CBS television broadcast 1960-66).

<sup>229</sup> In 1995, Alec Baldwin was voted by *Esquire* magazine as one of 100 sexiest stars in film history. See *Internet Movie Data Base*, available at <http://us.imdb.com/Title?Baldwin,+Alec> (last visited Mar. 28, 2002).

<sup>230</sup> AMADEUS (Orion Pictures Corporation 1984).

<sup>231</sup> Cate Blanchett’s portrayal of Queen Elizabeth I of England. ELIZABETH (Channel Four Films 1998).

*Nixon*.<sup>234</sup> These fictional representations of history commonly are shown in high school classrooms across America, and sometimes are promoted as true accounts of history.

The above examples clearly demonstrate how the products of popular culture “serve as the pieces that comprise our modern sense of reality.”<sup>235</sup>

### C. Castle Rock Entertainment v. Carol Publishing Group, Inc.

While many people in postmodern society have embraced fictional characters as real people, the courts have not.<sup>236</sup> Specifically, in *Castle Rock Entertainment v. Carol Publishing Group, Inc.*,<sup>237</sup> the court held that underlying facts about fictional characters are not “true” facts, but rather are original works of expression protected by copyright.<sup>238</sup>

In *Castle Rock*, the defendants were the author and publisher of the *Seinfeld Aptitude Test* (“SAT”), a book that included over six hundred trivia questions about the characters and events in the popular television comedy *Seinfeld*.<sup>239</sup> Examples of the book’s trivia questions include:

1. To impress a woman, George passes himself off as
  - a) a gynecologist
  - b) a geologist
  - c) a marine biologist

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<sup>232</sup> Madonna’s portrayal of Eva “Evita” Peron. *EVITA* (Cinergi Pictures 1996).

<sup>233</sup> *JFK* (Warner Bros. Pictures 1991).

<sup>234</sup> Anthony Hopkins’ portrayal of Richard M. Nixon. *NIXON* (Cinergi Pictures 1995).

<sup>235</sup> Badin, *supra* note 6, at 1657.

<sup>236</sup> *See, Castle Rock*, 955 F. Supp. at 266 (1997); *Paramount Pictures*, 11 F. Supp. at 333-34 (1998).

<sup>237</sup> *Castle Rock Entertainment v. Carol Publishing Group, Inc.*, 955 F. Supp. 260 (S.D.N.Y. 1997).

<sup>238</sup> *Id.* at 266.

<sup>239</sup> *Id.* at 262; *see also* *SEINFELD* (NBC television broadcast 1990-98).

- d) a meteorologist ...
11. What candy does Kramer snack on while observing a surgical procedure from an operating room balcony?
12. Who said, 'I don't go for those nonrefundable deals ... I can't commit to a woman ... I'm not committing to an airline'?
- a) Jerry  
b) George  
c) Kramer.<sup>240</sup>

Castle Rock Entertainment, owners of the copyrights in each of the *Seinfeld* episodes, brought an infringement suit against the defendants to enjoin publication of the *SAT*.<sup>241</sup> In response, the defendants argued that their book merely used the underlying facts and ideas of the plaintiff's works and such copying was permissible under the fact/expression dichotomy.<sup>242</sup> The court, however, rejected that argument, holding that because such facts "[sprung] from the imagination of *Seinfeld's* authors," they were protected by copyright as creative works of expression.<sup>243</sup>

On appeal, the Second Circuit affirmed the lower court's decision and distinguished between facts that are and are not protected. The court noted that "true" facts, such as "the identity of the actors in *Seinfeld*, the number of days it takes to shoot an episode, [and] the biographies of the actors," are not protected under copyright law.<sup>244</sup> However, the court ruled that the *SAT* did not quiz true facts. Rather, they stated:

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<sup>240</sup> *Castle Rock*, 150 F. 3d. at 135 (1998).

<sup>241</sup> *Castle Rock*, 955 F. Supp. at 261 (1997).

<sup>242</sup> *Id.* at 262-265.

<sup>243</sup> *Id.* at 266 ("*Seinfeld* is fiction; both the 'facts' in the various *Seinfeld* episodes, and the expression of those facts, are [an author's] creation").

<sup>244</sup> *Castle Rock*, 150 F. 3d. at 139 (1998).

[T]he *SAT* tests whether the reader knows that the character Jerry places a Pez dispenser on Elaine's leg during a piano recital, that Kramer enjoys going to the airport because he's hypnotized by the baggage carousels, and that Jerry, opining on how to identify a virgin, said 'It's not like spotting a toupee.'<sup>245</sup>

The court held that these types of facts constituted protected expression and, accordingly, found that the *SAT* infringed upon Castle Rock's copyrights.<sup>246</sup>

By not accepting the view that fictional characters in postmodern society are real to their audience, the court in *Castle Rock* failed to understand the magnitude of cultural changes in postmodern society. As one legal scholar has commented:

What Seinfeld said to his neighbor Kramer may be a fiction spun from the imagination of the show's writers and thus 'expression,' but, as any television-watcher would attest, it is also a 'fact' that Seinfeld said it.<sup>247</sup>

Had the court embraced the postmodern attitude that audiences view the experiences and underlying traits of characters depicted in fictional works as real, under the idea/expression dichotomy, the *SAT* would have been found to appropriate nothing more than unprotected facts about people.

The court in *Castle Rock* did, however, recognize that in postmodern society, "the distinction between fiction and fact is of declining consequence, and [] people are as concerned with the details of the former as the latter."<sup>248</sup> Moreover, commenting upon former Vice President Dan Quayle's remarks about Murphy Brown,<sup>249</sup> on appeal, the Second Circuit acknowledged:

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<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> Ayers, *supra* note 18, at 573.

<sup>248</sup> *Castle Rock*, 955 F. Supp. at 268 (1997).

<sup>249</sup> See *supra* text accompanying notes 221-24.

[The] line between unprotected fact and protective creative expression may in some instances be less clear. Where a ‘fictional’ single mother in a popular television series engages in real political discourse with a real vice-president of the United States, for example, it is less clear whether the television script is fiction - in a sense that it is only a television script, or fact in the sense that it is a real dialogue with a real political figure about contemporary issues.<sup>250</sup>

Despite its admission that underlying facts about fictional characters could be unprotected in certain circumstances, the court was unwilling to completely accept that the “[e]lements of popular culture [have] become so entrenched in our everyday lives that we [have] come to think of them as our own.”<sup>251</sup>

#### IV. CONCLUSION

The courts’ unwillingness to entertain postmodern perspectives about artistic appropriation and cultural reality has placed great limitations on a postmodern artist’s ability to create as he desires. By failing to consider the transformative nature of postmodern appropriation works, the court in *Grand Upright* may have unwittingly muffled the voice of the rap musician. Similarly, in *Castle Rock*, the court’s refusal to accept the view that citizens in postmodern society create their “own reality” has constricted an artist’s ability to write about and disseminate what he views as facts.

However, as discussed above, the differences between postmodern philosophy and copyright law are not irreconcilable. By applying postmodern principles to the fair use exception and the idea/expression dichotomy in copyright law, many postmodern works would not infringe upon the rights of others. Such a system would benefit society by expanding the public domain, thereby granting artists greater flexibility in what they choose to create. If the courts refuse to embrace these ideals, however, they inadvertently may impede

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<sup>250</sup> *Castle Rock*, 130 F.3d at 139, n.4 (1998).

<sup>251</sup> Vitanza, *supra* note 14, at 44.

the creative arts that copyright law was established to encourage and protect.<sup>252</sup>

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<sup>252</sup> *Accord generally* LESSIG, *supra* note 5.