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Satia Famili

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Mashed Up In Between

Satia Famili

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I. INTRODUCTION

A look into the not-so-distant past of music reveals what was once a clear-cut line – artists would produce and perform their music while their audiences only absorbed it. Today, the music created by established artists produces yet another platform for future artists, a canvas that they can add their own colors to. Advancement in technology and music software, coupled with the accessibility of the Internet and online distribution, has given rise to a new age of creators: the mashup artists.¹ Though these relatively new artists could be seen as taking musical creativity to another level through their intricate sound collages, there is a lot of controversy surrounding mashups and possible copyright in-

1. See Peter S. Menell, *Adapting Copyright for the Mashup Generation*, U. PA. L. REV. 5 (forthcoming March 2015).

fringement. Unlike music and technology, which are ever-evolving, copyright laws are outdated and are in need of a remix. The current copyright system leaves room for legal uncertainty surrounding the mashup genre, which if not addressed could potentially stunt its development, contrary to the law's constitutional purpose.² This paper provides a brief history of mashups, their status within the current copyright regime, and an analysis of copyright law and its shortcomings in relation to this newer art form. It concludes with possible recommendations that could help resolve the legal uncertainty associated with the genre and protect mashup artists from copyright liability.

II. HISTORY OF MASHUPS

Mashups combine elements of various artists' songs with other sounds to create new music.³ Using computer software to extract vocals and instruments from other artists' work and adding their own musical touches, mashup artists create songs that are at once recognizable and original.⁴ Some mashups follow a simple A vs. B structure where two songs juxtapose each other, while others present an elaborate quilt made of dozen or more songs overlaying each other.⁵ The genre typifies the basic human desire to personalize, engage with, and reshape art in conjunction with advances in configurable technology.⁶ Of course, the practice of assembling new songs from elements of existing songs is not an entirely new concept; it dates back to the beginning of recorded music like jazz and folk.⁷ *The New York Times*, in an interactive feature piece on the history of mashups, lists "Central Park in the Dark" by Charles Ives as what is considered to be the first sound collage dating back to 1906.⁸

Yet the intricate sound collages and remixes popular today are a relatively different phenomenon. Following the advancement of tape recording technology, the 1960s and 1970s saw a rise in musical creativity through the development of karaoke and mix tapes. This increased in the 1980s through the emergence of digital technologies that enabled copying, pasting, and manipulating "samples", which fueled the rap and hip-hop genres.⁹ These genres in turn paved the way for today's mashup genre, which relies heavily on the use of

2. *Id.* at 6.

3. See Kerri Eble, *This is a Remix: Remixing Music Copyright to Better Protect Mashup Artists*, 2 U. ILL. L. REV. 661, 664 (2013).

4. Lauren Barbagallo, *New York: Making Musical History with Mashups*, UMASS AMHERST, Fall 2007, available at http://www.umassmag.com/2007/Fall2007/alumni_news/almanac/brown.html.

5. See Anna Shapell, "Give Me a Beat:" *Mixing and Mashing Copyright Law to Encompass Sample-Based Music*, 12 J. HIGH TECH. L. 519, 520 (2012).

6. See Menell, *supra* note 1, at 13.

7. Eble, *supra* note 3, at 664.

8. Wm. Ferguson, Miki Meek, Jon Huang & Joanna Milter, *The Recombinant DNA of the Mash-Up*, N.Y. TIMES, Jan. 6, 2011, available at <http://www.nytimes.com/interactive/2011/01/09/magazine/mashup-timeline.html>.

9. See Menell, *supra* note 1, at 14.

sampled sources to construct musical collages.¹⁰ The exponential growth and popularity of mashups has allowed it to emerge as a defining genre for today's youth, playing a critical formative role in their values, self-identity, autonomy, and creative development.¹¹ However, the uncertainty surrounding mashups and copyright law has pushed the mashup genre significantly underground, rendering artists dependent on streaming services and word-of-mouth to distribute their work.¹²

One example of an early mashup artist that heavily influenced the genre is Gregg Gillis, better known to the public as Girl Talk.¹³ Gillis started his Girl Talk project in 2000, working as a biomedical engineer in Pittsburgh, Pennsylvania by day and travelling and performing gigs at night.¹⁴ He creates electronic music using samples of other artists' work. Gillis has released five albums under his record label, Illegal Art.¹⁵ His last album, "All Day", which was released in November 2010, sampled and combined 373 songs.¹⁶ The artist's underground popularity became apparent when thousands of fans caused Internet servers to crash in their attempt to download his album.¹⁷ Consequently, the city of Pittsburgh named a day after him, celebrating December 7, 2010 as "Gregg Gillis Day."¹⁸

Despite Girl Talk's obvious popularity, there is a lot of controversy regarding the music Gillis creates. He does not obtain licenses or permission to sample the songs he uses in his work.¹⁹ Gillis estimates that actually securing permission for all the samples used on "All Day" would cost him millions of dollars and take years to negotiate.²⁰ Many mashup artists struggle with this paradox. Still, despite his open and abundant sampling of various artists' work, Gillis has yet to be sued. Some try to justify the lack of infringement lawsuits against Gillis by offering the view that some record labels and music industry members recognize and appreciate the value of mashups.²¹ They claim that artists even send Gillis a cappella CDs in the mail and request that it be incorporated into his live shows or albums.²² Other possible reasons why Gillis and fel-

10. *Id.*

11. *Id.* at 5.

12. *See id.* at 7.

13. Eble, *supra* note 3, at 662.

14. *See id.*

15. Zachary Lazar, *The 373-Hit Wonder*, N.Y. TIMES, Jan. 6, 2011, available at <http://www.nytimes.com/2011/01/09/magazine/09GirlTalk-t.html?pagewanted=all>.

16. *Id.*

17. *See* Eble, *supra* note 3, at 663.

18. Ryan Dombal, *Girl Talk Gets His Own Holiday in Pittsburgh*, PITCHFORK (Dec. 7, 2010) <http://pitchfork.com/news/40931-girl-talk-gets-his-own-holiday-in-pittsburgh/>.

19. *See* Lazar, *supra* note 15.

20. *Id.*

21. *See* Eble, *supra* note 3, at 662.

22. *See* D.X. Ferris, *Gregg Gillis Talks About the Continuing Popularity of his Mashup Project, Girl Talk*, RIVERFRONT TIMES, Jan. 13, 2011, available at <http://www.riverfronttimes.com/2011-01-13/music/girl-talk-interview-2011-gregg-gillis-tour-dates-st-louis-pageant/>.

low mashups artists have not yet been bombarded with lawsuits will be explored later in this paper.

Another noteworthy moment in mashup history was when the genre went viral with the release of DJ Danger Mouse's "The Grey Album" in 2004.²³ The album combines vocals from rapper Jay-Z's "The Black Album" with a musical collage of samples from the Beatles' "The White Album."²⁴ With no intention to release the album commercially, DJ Danger Mouse only released 3,000 promotional copies. Nevertheless, the album became an overnight sensation leading people to sell copies on eBay for \$81.²⁵ "The Grey Album" garnered favorable reviews from numerous music critics and *Rolling Stone* called it "the ultimate remix record."²⁶ Even though EMI, the owner of the Beatles' sound recordings, and Sony who owns the rights to the Beatles' musical compositions, issued cease and desist letters to file-sharing websites that hosted "The Grey Album", the album can still be found online.²⁷ Further, though the album can no longer be distributed in record stores, both EMI and Sony dropped their cases, leaving its legality in question and the uncertainty surrounding non-commercially distributed mashup albums unaddressed.²⁸

This uncertainty and the ever-looming threat of copyright liability contributed to pushing the mashup genre into viral marketing and distribution primarily through file-sharing platforms such as SoundCloud.²⁹ But while SoundCloud is the leading mashup distribution hub with more than 40 million registered users, it does not have licensing deals that would insulate it from takedown notices.³⁰ Under the Digital Millennium Copyright Act, copyright holders can send completed takedown notices to hosts who digitally post copyrighted material, and the hosts are required to take down the copyrighted material or disable access.³¹ As a result, users are left vulnerable to takedown notices and inevitable account probations or removals. While artists do not charge audiences for downloads or streaming on such file-sharing websites, they use these sites to promote and establish their brand. Their reputation then generates a following and draws crowds to their live performances, which is often their main source of revenue as DJ's.³² Consequently, even though live mashup artists do not distribute their remixes commercially, they can indirectly appropriate income from their projects.³³ This profit further contributes to concerns.

23. Menell, *supra* note 1, at 14.

24. See *The Mouse That Remixed*, THE NEW YORKER, Feb. 9, 2004, available at <http://www.newyorker.com/magazine/2004/02/09/the-mouse-that-remixed>.

25. See Eble, *supra* note 3, at 664.

26. *Id.*

27. See Menell, *supra* note 1, at 15.

28. See Eble, *supra* note 3, at 665.

29. Menell, *supra* note 1, at 18.

30. See *id.* at 19.

31. Eble, *supra* note 3, at 665.

32. See Menell, *supra* note 1, at 23.

33. See *id.*

III. ANALYSIS OF CURRENT COPYRIGHT LAW AS PERTAINING TO MASHUPS

Before addressing questions regarding the legality of mashups, one must first look at the law and its objective purpose. The Copyright Clause of the U.S. Constitution empowers Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³⁴ Here, the term “Science” should be understood as pertaining to “knowledge or learning.”³⁵ This language sets forth three underlying policies for copyright: the promotion of learning, the preservation of the public domain, and the protection of the author, more specifically his exclusive right to publish.³⁶ Put in context, the idea behind the Copyright Clause is that “art creates public good, and copyright ensures that art will enter the public domain by establishing a temporary exclusive right, which provides an economic incentive for artists to create art.”³⁷ Following this, copyright law’s main objective is not to reward the artist, but rather to ensure the public benefits from the creations of artists.³⁸ Moreover, the Copyright Clause provides for an implied right of individuals to have access to copyrighted materials because such access is necessary to facilitate knowledge and learning.³⁹ Unfortunately, modern copyright law as applied to music seems to have strayed from this purpose by excessively favoring the protection of primary artists’ exclusive rights, thereby losing focus of the Copyright Clause’s emphasis on the preservation of the public domain.⁴⁰

A. *Exclusive Rights and Limitations*

Since the Framers’ inclusion of the Copyright Clause in the Constitution, copyright law has evolved significantly through the enactments of the Copyright Act of 1909 and the Copyright Act of 1976. Section 106 of the 1976 Copyright Act provides artists the exclusive rights to reproduce, adapt, distribute and publicly perform their copyrighted works.⁴¹ In addition, with regard to musical creativity, the law provides two separate copyrights for each recording of a song.⁴² The musical composition (the lyrics and musical arrangement) receives a separate copyright from the sound recording or the fixation of a performance of the musical composition.⁴³ This division of rights is necessary in

34. U.S. CONST. art. I, § 8, cl. 8.

35. L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS’ RIGHTS* 48 (1991).

36. *Id.* at 49.

37. Eble, *supra* note 3, at 667.

38. *See id.*

39. PATTERSON & LINDBERG, *supra* note 35, at 52.

40. *See id.* at 661.

41. 17 U.S.C. § 106 (2012).

42. *See* Menell, *supra* note 1, at 25.

43. *See* Shervin Rezaie, *Play Your Part: Girl Talk’s Indefinite Role in the Digital Sampling Saga*, 26 *TOURO L. REV.* 175, 183 (2010).

order to protect the performances that bring the musical composition to life.⁴⁴ Nevertheless, this unique treatment of musical works has further contributed to many legal complications as technological developments paved the way for new forms of music that were not initially foreseeable by the authors of the Copyright Act of 1976.⁴⁵

Advancements in technology and the internet gave rise to questions regarding the ability of copyright law to fulfill its original purpose. Consequently, the music industry has pushed for greater control and protection of current artists' exclusive rights in order to preserve their incentives to create art.⁴⁶ Though increased control would protect such incentives, it would also necessarily diminish the purpose of promoting the progress of the arts by preventing public access and use of the works of art.⁴⁷ In addition, the mere creation of art does not ensure its advancement. To facilitate the advancement of art, future artists to some extent should be able to build off of previous artists' work.⁴⁸ This follows the culture of musical borrowing which shows that many genres inherently build on one another.⁴⁹ As a result, the law faces the dilemma of creating a balance between the interests of current artists and that of future artists to fulfill its purpose of benefiting the public. To achieve this, copyright law aims to incentivize current artists through exclusive rights, but limits these rights to facilitate the advancement of art by granting future artists access to use previous works to some extent to create new works.⁵⁰

Yet, there is much debate on whether or not mashups are capable of advancing the arts and whether or not mashup artists even qualify as future artists under copyright law.⁵¹ Opponents of mashups claim that due to their derivative nature, mashups do not require any skill or talent to create and are, in fact, "a fundamental failure of imagination."⁵² They insist that while the final mashup may sound complex, much of that complexity originated from the original songs that are sampled.⁵³ In contrast, supporters of mashups argue for their equal treatment under copyright law. They point to the practice of musical borrowing and the emergence of new genres from previous genres by making references to hip-hop, rock and roll, and jazz.⁵⁴ These proponents state that denying mashups the right of recognition as a musical genre would lead to a chilling

44. *Id.* at 184.

45. *See* Shappell, *supra* note 5, at 526, 531.

46. Michael Allyn Pote, *Mashed-Up in Between: The Delicate Balance of Artists' Interests Lost Amidst the War on Copyright*, 88 N.C. L. REV. 639, 650 (2010).

47. *See id.*

48. *Id.* at 653.

49. *See* Shappell, *supra* note 5, at 548.

50. *See* Pote, *supra* note 46, at 653.

51. *Id.*

52. *Id.*

53. *See id.* at 654.

54. *See* Shappell, *supra* note 5, at 548.

effect on musical development as a whole.⁵⁵ Copyright laws have a low threshold of originality and do not penalize mashup artists for the alleged minimal effort required to create the art.⁵⁶ Further, courts refuse to make determinations as to what constitutes “art” based on aesthetic value and instead accept anything that commands the interest of any public as works of authorship, thereby granting it copyright protection.⁵⁷ As a result, mashup artists can reasonably be considered future artists and able to advance the arts with their creations.⁵⁸

This of course only pertains to mashup artists who have licenses or otherwise permission or authorization for the samples used in their work. Section 103 of the Copyright Act imposes that in order for compilations or derivative works such as mashups to qualify as copyrightable subject matter, the preexisting incorporated material must be used lawfully.⁵⁹ The importance of lawfully obtained licenses to sample copyrighted recordings was confirmed by the first ever sample-based music lawsuit to be tried at trial in *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*⁶⁰ There, the court held that rapper Biz Markie’s sampling of Gilbert O’Sullivan’s 1972 song “Alone Again (Naturally)” for use in his own song “Alone Again” constituted copyright infringement.⁶¹ At that time, the defendant’s main argument was that such sampling should be allowed because of the widespread practice in the rap industry.⁶² Nevertheless, the court’s response signified the beginning of the mandatory licensing trend and reconfirmed the need for caution when sampling.⁶³ Unfortunately for mashup artists, taking into account the dual copyrights for musical creations, obtaining licenses for every single sample used in mashups would be a very expensive and time consuming process. For example, Gillis could potentially face over 600 copyright infringement claims for the 373 samples used in his last album.⁶⁴ Luckily, while the excuse that “everyone else is doing it” might not render favorable results in court in a copyright infringement suit, there are certain limitations to the Copyright Act that allow for the balancing of the interests of current artists with that of future artists in order to benefit the public and advance the arts. In particular, two of the most common affirmative defenses in copyright litigation that limit the copyright holders’ exclusive rights, are the de minimis defense and the fair use defense.⁶⁵

55. *Id.*

56. Pote, *supra* note 46, at 657.

57. *Id.* at 657-58.

58. *See id.* at 658.

59. 17 U.S.C. § 103(a) (2012).

60. 780 F. Supp. 182 (S.D.N.Y. 1991).

61. *Id.* at 183.

62. *See* Shapell, *supra* note 5, at 535.

63. *See id.* at 534-535.

64. *See* Rezaie, *supra* note 43, at 184.

65. Emily Harper, *Music Mashups: Testing the Limits of Copyright Law as Remix Culture Takes Society by Storm*, 39 HOFSTRA L. REV. 405, 413 (2010).

1. *De Minimis Use*

In music copyright infringement cases, the issue usually hinges on the question of whether the defendant copied the plaintiff's work and whether this copying was sufficiently substantial.⁶⁶ The latter is determined by considering whether the copying is qualitatively as well as quantitatively significant.⁶⁷ This inquiry parallels the common law exception of de minimis use. Under this exception, bringing legal action for the unauthorized use of copyrighted material requires that the use be "significant enough to constitute infringement."⁶⁸ If the use is insubstantial, the courts may excuse it as de minimis, thereby relieving the defendant from liability.⁶⁹

In *Newton v. Diamond*, a federal court recognized for the first time that there may be situations where unlicensed song sampling is acceptable, thereby setting a new precedent in song-sampling case law.⁷⁰ There, the Ninth Circuit held that the Beastie Boys' unauthorized use of an unconnected three-note sequence, which was not the "heart" of the original artist's song, was insufficient to constitute copyright infringement.⁷¹ As a result, if the use of samples in a mashup is de minimis, mashup artists may not be liable for copyright infringement. However, this only applies to the musical composition copyright, as the Beastie boys had obtained a license to sample the sound recording from the music publisher.⁷²

Despite the Ninth Circuit's leniency in *Newton*, the Sixth Circuit later struck down the de minimis defense as invalid when it comes to sampling sound recordings in *Bridgeport*.⁷³ There, the court performed a literal reading of section 114 of the Copyright Act and concluded that a two-second sample from the song "Get Off", which was looped and used in the creation of the song "100 Miles", was in violation of the sound recording copyright and thereby constituted infringement.⁷⁴ Under section 114(b), the "exclusive rights of the owner of copyright in a sound recording. . .do not extend to the making or duplication of another sound recording that consists *entirely* of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording."⁷⁵ Creating the bright-line-rule, "[g]et a license or do not sample", the court reasoned that the legislature's use of the word "entirely" meant that any direct use of copyrighted sound material that was not independently created or recreated constitutes copyright infringe-

66. See Elina M. Lae, *Mashups – A Protected Form of Appropriation Art or a Blatant Copyright Infringement?* 4 (December 2011), available at <http://ssrn.com/abstract=2003854>.

67. *Id.* at 5.

68. *Newton v. Diamond*, 388 F.3d 1189, 1195 (9th Cir. 2004).

69. See Harper, *supra* note 65, at 420.

70. Shapell, *supra* note 5, at 537.

71. *Newton*, 388 F.3d at 1196-97.

72. See Pote, *supra* note 46, at 666.

73. See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801-02 (6th Cir. 2005).

74. *Id.* at 796.

75. 17 U.S.C. § 114(b) (2012) (emphasis added).

ment.⁷⁶ Thus, to successfully use the de minimis defense in the Sixth Circuit, artists must either obtain a license to sample the sound recording or recreate it independently and use only a small insignificant portion of a musical composition when sampling without a license.⁷⁷

Though the *Bridgeport* decision is not strictly followed by other circuits, even in circuits where the de minimis defense applies more broadly, it may not be very favorable to mashup artists as it pertains to digital samples.⁷⁸ The circuit split with regard to the *Bridgeport* rule leaves the de minimis exception relatively intact outside of the Sixth Circuit, but even there the de minimis exception as pertaining to mashups is generally impractical and unlikely to apply since mashups artists typically incorporate more than mere three notes in their projects to ensure that listeners will be able to recognize the original songs in the musical collages.⁷⁹

2. Fair Use Doctrine

The other affirmative defense mashup artists may be able to invoke is the fair use doctrine. In the Copyright Act of 1976, Congress decided to codify the fair use doctrine as a limitation to the copyright holders' exclusive rights. It became apparent that granting a copyright holder unlimited protection for all "original works of authorship" posed a serious threat to the promotion of learning, which is the constitutional purpose of copyright.⁸⁰ As a result, copyright law bestows on the holder of a copyright the exclusive right to reproduce, distribute, and create derivative works from the material along with the right to perform the work publicly or through audio transmission.⁸¹ However, this right is limited to the extent that "fair use of a copyrighted work. . .for purposes such as criticism, comment, news reporting, teaching. . .scholarship, or research, is not an infringement of copyright."⁸² The doctrine is particularly important in balancing the rights of current artists and the rights of future artists.⁸³ Thus, if mashup artists use the samples of other artists' work in one of the above-mentioned ways, they could use the fair use defense to potentially avoid liability in a copyright infringement suit. In determining whether an artist's work constitutes fair use, the Copyright Act provides that courts should consider the following factors:

- 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit purposes;
- 2) the nature of the copyrighted work;

76. *Bridgeport Music, Inc.*, 410 F.3d at 801.

77. *See Pote, supra* note 46, at 667.

78. *See Harper, supra* note 65, at 420.

79. *See id.*; *see Lae, supra* note 66, at 8;

80. *See Eble, supra* note 3, at 670.

81. 17 U.S.C. § 106.

82. 17 U.S.C. § 107.

83. *See Pote, supra* note 46, at 669.

- 3) the amount and substantiality of the portion used in relation to the copyrighted works as a whole; and
- 4) the effect of the use upon the potential market for or value of the copyrighted work.⁸⁴

i. Purpose and Character of the Use

The Supreme Court has implied that this first factor, the purpose and character of the use, is the most important determination in the fair use analysis.⁸⁵ Ironically, the first factor is also the most difficult inquiry in the case of mashups because the purpose and character of such use is unclear.⁸⁶

In determining the purpose and character of use, courts consider the degree to which the new work is a transformation of the old work and the degree to which the new work has a commercial value versus its nonprofit or educational value.⁸⁷

Historically, courts have considered parodies to be transformative.⁸⁸ One argument for the transformative use of mashups is that they could be considered to be parodies of the original songs. This was the case in *Campbell v. Acuff-Rose Music Inc.*, where the Supreme Court held that the use of one song to create another that at least in part commented on the original work was determined to be a parody and therefore constituted fair use.⁸⁹ In that case, the band 2 Live Crew was sued for copyright infringement by Acuff-Rose Music Inc., which owned the copyright to Rob Orbison's rock song "Oh, Pretty Woman", for their rap song rendition that used some of Orbison's music and lyrics and was similarly titled "Pretty Woman."⁹⁰ However, the Court found that the band's use of Orbison's lyrics was a sarcastic critique of the naiveté of the original song, making it transformative in nature.⁹¹ Significantly though, the Court distinguished between parodies and satirical work, concluding that unlike parodies which comment on the original, satirical works that provide general commentary or criticism on society were not transformative.⁹² This is generally unfavorable towards mashups since in order for a court to consider a use of a work transformative under *Campbell*, the mashup must criticize or comment on the specific work used.⁹³ Thus, while some mashups may well be considered transformative because of their creation of parodic music that criticizes and comments on the original, most mashup artists do not intend their works to do

84. *Id.*

85. Harper, *supra* note 65, at 422.

86. *Id.*

87. See Eble, *supra* note 3, at 671.

88. See, e.g., *id.*; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579-80 (1994).

89. *Campbell*, 510 U.S. at 580.

90. *Id.* at 572-73.

91. *Id.* at 583.

92. See Pote, *supra* note 46, at 671.

93. *Id.* at 672.

so.⁹⁴

In *Campbell*, the Supreme Court defined transformative as adding “something new, with further purpose or different character, altering the first with new expression, meaning or message.”⁹⁵ This is effectively a consideration of copyright law’s purpose of the advancement of the arts.⁹⁶ As a result, even if mashups do not qualify as parodies, they could still arguably be transformative to the extent that mashup artists sample and combine the original works with a different purpose than the primary artists.⁹⁷ For example, Gillis’s proponents argue that his work is transformative because he re-contextualizes original songs, layering them with others to elicit original sounds, rhythms, instrumentals, and lyrical combinations through looping and blending techniques.⁹⁸ Further, it can be argued that mashups create new expression, which is demonstrated by how fans and the music industry distinguish between mashup songs and the original songs sampled.⁹⁹ With that being said, the determination of this element hinges on the courts’ interpretation of transformative uses.

The next element considered under the purpose and character factor is whether the work is being promulgated for commercial use, which cuts against fair use. As discussed earlier, many mashup artists release their music on the Internet for free and do not sell for profit.¹⁰⁰ However, these artists including Girl Talk can make their living primarily through touring.¹⁰¹ This economic gain then weighs against protection for mashups under the fair use exception, since mashup artists arguably still commercially use and benefit from the primary artists’ works when they earn money for performing their music at concerts and music festivals.¹⁰² Furthermore, even if artists release their music for free such as DJ Danger Mouse did with his release of “The Grey Album”, the potential reputation they gain certainly catapults them into eventual economic gain if their mashups become successful. For example, DJ Danger Mouse – better now known by his current band Gnarls Barkley – can attribute his success in the music business in part to his “arguable exploitation of Jay-Z and the Beatles.”¹⁰³ Still, even though there is a market for professional mashup artists such as Girl Talk and DJ Danger Mouse, not all amateur artists profit from what they consider to be just a hobby.¹⁰⁴ Those artists who do not profit from their works may create mashups for noneconomic reasons including paying tribute to their

94. See Harper, *supra* note 65, at 423.

95. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

96. Pote, *supra* note 46, at 670.

97. See Eble, *supra* note 3, at 677.

98. Shapell, *supra* note 5, at 559.

99. See Eble, *supra* note 3, at 677.

100. See *id.*

101. See Ferris, *supra* note 22.

102. See Eble, *supra* note 3, at 678.

103. Pote, *supra* note 46, at 677.

104. See Harper, *supra* note 65, at 426.

favorite artists or educating and introducing listeners to new music.¹⁰⁵ As a result, there are arguments both for and against fair use when considering the commercial use element. Determination of this element usually proceeds on a case-by-case inquiry.

ii. Nature of the Copyrighted Work

Under the second factor, courts analyze the “value of the material used” and whether copyright law truly meant to protect the copyrighted work that was used.¹⁰⁶ Here, the copyrighted materials used by artists to create mashups are songs, which are pieces of art protected by the core of copyright law.¹⁰⁷ This creates a dilemma because both the copyrighted material used and the resulting mashup are songs that potentially satisfy copyright law’s goals of creativity and progression of the arts.¹⁰⁸ However, usually the originality and imagination of the copyrighted material featured in mashups weighs against a finding of fair use.¹⁰⁹ Nevertheless, the fact that mashups are comprised of already published songs supports a finding of fair use.¹¹⁰ This follows from the courts’ acknowledgement of the value of the right of first publication.¹¹¹ Mashup artists do not interfere with the original artists’ right of first publication since most mashups feature popular, published songs.¹¹² Hence, the nature of the copyrighted work factor will likely have a neutral effect on the determination of fair use for mashups.

iii. Amount and Substantiality

When considering the third factor, courts consider whether the amount of the copyrighted work used is reasonable in relation to the purpose of the use.¹¹³ This inquiry takes into account the quantity as well as the quality and importance of the material used.¹¹⁴ Because of the varying complexities of mashups, the length of samples used can vary depending on the type of mashup. Many mashup artists tend to use only short clips of multiple original songs.¹¹⁵ Yet, these samples usually tend to be more popular and distinct portions of original songs, which would weigh against fair use protection because they sample the “heart” of the work.¹¹⁶ However, if the work is determined to be transformative in nature, courts are likely to allow greater taking, both quali-

105. *Id.* at 427.

106. *See* Eble, *supra* note 3, at 672.

107. *Id.*

108. *Id.*

109. *See* Harper, *supra* note 65, at 432.

110. *See id.*

111. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 553 (1984).

112. *See* Harper, *supra* note 65, at 431-32.

113. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579-80 (1994).

114. *Id.* at 587.

115. *See* Eble, *supra* note 3, at 679.

116. *See id.*

tatively and quantitatively.¹¹⁷ With that said, courts would have to consider this factor on a case-by-case basis, as the amount and substantiality of copyrighted works differs in each mashup.

iv. Effect of the Use on the Market and Value of the Primary Work

The final factor considered when determining fair use is the effect of the secondary work on the market of the primary work.¹¹⁸ To preserve the incentive to create art, courts disfavor secondary uses that negatively affect the marketability of the copyrighted work.¹¹⁹ Here, mashup proponents argue that mashups have little effect on the sale of original songs since it is highly unlikely that they will serve as substitutes for the preexisting songs.¹²⁰ This claim is further supported by the fact that most mashups are not for commercial sale and may be seen as even promoting the original songs and their sales by introducing audiences to different kinds of music they would otherwise never be exposed to.¹²¹ Even though mashups do not seem to directly harm the existing market, they nevertheless could be deemed as a threat to the primary works' potential market.¹²² Since copyright holders possess the exclusive right to create derivative works, they are the only ones allowed to create derivative works without prior authorization.¹²³ As a result, if copyright holders one day decide to create their own mashups, the unauthorized use of copyrighted material in other mashups could harm their future potential derivative market.¹²⁴ This effect then would weigh against a finding of fair use.

Thus, when balancing the above-mentioned factors, the scale seems to weigh slightly against the finding of fair use for mashups. Though the balancing test may differ on a case-by-case basis, the fair use exception at best remains unpredictable in its application to mashups. This is mainly because its determination primarily hinges on the judicial interpretation of transformative use under the first factor.

B. Current Status of Mashups

As the above analysis suggests, despite many arguments for and against the use of the de minimis exception and fair use doctrine with regards to mashups, there is no determinative ruling or set of guidelines in place to help alleviate the uncertainty of what would happen if artists such as Gillis were to be sued for copyright infringement. Some argue that this is precisely the reason behind the lack of lawsuits – no one wants to be the one to get it wrong. If he

117. See *Campbell*, 510 U.S. at 587-88.

118. See *Lae*, *supra* note 66, at 16.

119. *Harper & Row*, 471 U.S. at 566-67.

120. See *Harper*, *supra* note 65, at 434.

121. See *Lae*, *supra* note 66, at 16.

122. See *Harper*, *supra* note 65, at 435.

123. See 17 U.S.C. § 106.

124. See *Harper*, *supra* note 65, at 435.

were to be sued, Gillis intends to use the fair use defense because he considers his work to be protected due to its transformative nature.¹²⁵ Whether the courts would agree with him remains to be seen. However, even the slight possibility that the court may agree with the transformative nature of Gillis's work has kept record labels that own most of the sound recording rights at bay in fear of setting a damning precedent for lawsuits against future mashup artists.¹²⁶ In the alternative, a finding against the applicability of fair use could mean a de facto death sentence for Gillis and fellow mashup artists since requiring them to obtain mandatory licenses to sample would severely inhibit their productivity.¹²⁷ Hence, while some are confident, including the copyright activist group Electronic Frontier Foundation who has expressed its desire to litigate to establish sampling's clear cut protection under fair use, other artists feel vulnerable that available defenses may not protect them from copyright infringement were they to be sued.¹²⁸

IV. MUSIC COPYRIGHT LAW REMIX

Under current circumstances, mashups do not mix well with current copyright law. Uncertainties surrounding the legality of mashups and copyright liability for artists if not addressed correctly may stunt the development of the genre, which would go against the core purpose of copyright law. Additionally, leaving the issue unaddressed could breed contempt for the copyright system:¹²⁹ "A copyright system that fails to understand, accept, and embrace these formative and social processes sacrifices relevancy among a key demographic, which over time will make the system progressively less acceptable to a growing proportion of society."¹³⁰ Thus, it is time that copyright law undergoes a little remix of its own to better adapt to today's progressive music industry. While there are many ideas and suggestions floating around regarding this topic, a combination of the propositions discussed below addresses both the concerns of copyright holders and that of emerging mashup artists.

A. Legalize Amateur Remix Culture

This reform would restore copyright law to leave "amateur creativity" free from regulation.¹³¹ Legalizing amateur remix culture would allow amateur mashup artists to use copyrighted material without having to deal with expensive licensing agreements. In addition, their use could create positive economic effects on copyright holders; in order to use copyrighted material, mashup art-

125. Shapell, *supra* note 5, at 541.

126. See Lae, *supra* note 66, at 3.

127. Shapell, *supra* note 5, at 541.

128. See Lae, *supra* note 66, at 3.

129. See Menell, *supra* note 1, at 6.

130. *Id.* at 5.

131. LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 254 (2008).

ists could be required to purchase a copy of the original songs they intend to use, increasing the original songs' sales.¹³² By legalizing the practice, underground artists will no longer be wary of copyright infringement and therefore could release their creations to the public, contributing to copyright's goal of making art accessible to the public. By making their creations openly available, they would introduce greater audiences to new music, which could also lead to more sales for original artists as they gain more fans.¹³³ Since amateur artists do not negatively affect the primary artists' market, they would not disrupt the professional artists' financial incentive to create, which is what the music industry is mainly concerned about.¹³⁴ Hence, there is no reason for courts to penalize amateur artists for experimenting with music since the primary goal of copyright law would remain intact. Clearly, this would only apply to amateur and noncommercial uses of copyrighted material.¹³⁵ Once an amateur artist begins to profit from his creations, then he would be deemed a professional and should be required to obtain authorization before using copyrighted material in his creations.¹³⁶

B. Compulsory Licensing System

Once amateur artists cross the threshold and their use of copyrighted material no longer qualifies as noncommercial, Congress could use a compulsory licensing system to regulate professional mashup artists. This system would be similar to the current cover compulsory licensing system codified under section 115 of the Copyright Act, which provides that a compulsory license to cover music becomes available once the nondramatic musical work has been distributed to the public.¹³⁷ Similarly, Congress could grant professional mashup artists the right to sample copyrighted material in return for payment of a certain percentage of royalties to copyright holders.¹³⁸ There are certain challenges in developing a compulsory licensing system for mashups, which include addressing the dual copyright for sound recordings and musical composition, as well as the use of numerous songs in one single creation. One of the many issues that would need to be addressed in such a scheme would be the question of revenue sharing and the method for its calculation.¹³⁹ The success of the current cover license system lies mainly in its simplicity, efficiency and fairness.¹⁴⁰ Adapting the system to suit the creative mashup process would be much more complex and would need to take into account a multi-stakeholder

132. See Harper, *supra* note 65, at 441.

133. See *id.*

134. See *id.*

135. See Lessig, *supra* note 131, at 254.

136. See Harper, *supra* note 65, at 441.

137. 17 U.S.C. § 115(a)(1) (2012)

138. See Harper, *supra* note 65, at 442.

139. See Menell, *supra* note 1, at 54.

140. See *id.* at 52.

process.¹⁴¹ However, if designed and implemented correctly, such a system would reduce the overhead costs of remix art, expand compensation for all stakeholders, and promote freedom of expression.¹⁴²

C. *Creative Commons*

The Creative Commons is a nonprofit organization which aims to promote the creation and sharing of works. A Creative Commons license basically allows authors to distribute their works with “some rights reserved” in contrast to the “all rights reserved” nature of the copyright system.¹⁴³ Generally, Creative Commons licenses grant the use of a work for noncommercial purposes, but require permission before the work is used for commercial purposes.¹⁴⁴ The Creative Commons allows for the formation of communities where artists can share, use, and build upon each other’s works. Further promotion and expansion of the Creative Commons would create a vast wealth of material that mashup artists could potentially draw upon without the fear of copyright liability.¹⁴⁵

D. *Statutory Damages*

Furthermore, in an effort to help mitigate the uncertainty and fear of copyright liability, addressing statutory damages would not only be beneficial for mashup artists, but could also potentially help support the purpose of copyright law. Current statutory damages provide a substantial risk for artists that use unauthorized sampling in their work.¹⁴⁶ Given that there are at least some factors that favor a finding of transformative quality within mashups as a genre, it would be reasonable to at least cap the level of statutory damages available against mashup artists.¹⁴⁷ This would help reduce some fear of these artists with regard to copyright liability, which could if left unaddressed, consequently have a stifling effect on their creativity—contrary to the promotion of the arts.

V. CONCLUSION

Copyright law was implemented in the Constitution as a mechanism to ensure the progress of science and the arts by creating incentives for authors and artists to create works that would benefit the public. However, current music copyright law leaves the new genre of mashup music hanging in uncertainty, thereby stifling its development and pushing its proponents underground—far from the public domain. The mashup genre is a paragon of the progression of technology and the arts in modern culture, but artists do not know where they

141. *See id.* at 52-57 (proposing and analyzing the design of a remix compulsory license).

142. *See id.* at 58.

143. Pote, *supra* note 46, at 686.

144. *Id.*

145. *See* Eble, *supra* note 3, at 690.

146. *See* Menell, *supra* note 1, at 57.

147. *See id.*

stand with the law. They must speculate whether copyright law would render them liable or protected under its de minimis or fair use exceptions. Consequently, music copyright law should be reformed to address the legal uncertainties that surround the mashup culture in order to effectively embrace and regulate this new art form. In particular, legalizing amateur remix culture along with establishing a compulsory licensing system for professional remixes would go a long way in reducing the uncertainty surrounding mashup music. If implemented correctly, such a system would promote freedom of expression and provide just compensation to everyone involved. Other suggestions include the expansion of Creative Commons communities and potentially capping statutory damages faced by mashup artists in case of copyright liability. While there is no simple solution and reform is fraught with its own complications, it is necessary in order to restore copyright law to its original purpose.