Of Girl Talk and Dangerous Mice: Exploring the Clash between Music Sampling, Mashups, and Copyright Law in the Digital Age

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> *We're living in this remix culture … [e]very single Top 40 hit that comes on the radio, so many young kids are just grabbing it and doing a remix of it. The software is going to become more and more easy to use … [e]very single P. Diddy song that comes out, there's going to be [10]-year old kids doing remixes and then putting them on the Internet.*[1]
>
> — Gregg Gillis, a.k.a. DJ Girl Talk[2]

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1. LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 14 (2008 ed.).
2. *Id.*

I. INTRODUCTION

It has been said time and time again — the digital age has transformed the way we live. Conventional notions of ownership, authorship, and creativity are being challenged in an environment involving persons who no longer wish to remain "passive recipients of content."[3] Armed with a laptop, a 4G broadband connection, and a network of Facebook friends, the listener clamors for a much broader right[4] — not merely to hear, sing, and dance to a beat, but to splice and dice it into new forms of expression which he or she could upload for the world to like and comment on. This right to "cut, paste, sample[,] or jam with content"[5] is at the heart of the mashup revolution.

Log on to Youtube and one easily finds a clip featuring a popular Adele song meshed with a heavy metal recording.[6] Another click and one can browse through a channel of a Disk Jockey (DJ), featuring his unique blend of classical, deep soul, or jazz music.[7] The question is: did the creators of these recordings actually seek permission from the original creators before releasing them on the web? Most likely, no.

Mashups, a form of appropriation art,[8] have "always been looked at as a grey area in music, but more recently, their legitimacy as an art form has been called into question."[9] The legal debate centers on whether mashups can be a protected form of artistic expression or whether they constitute copyright infringement.[10] On the one hand, proponents of the art call them a "new way to listen to the same songs[.]"[11] On the other hand, mashups are

3. *See* Damien O'Brien & Brian Fitzgerald, Mashups, Remixes and Copyright Law 1, *available at* http://eprints.qut.edu.au/4239/1/4239.pdf (last accessed Feb. 28, 2013).

4. *Id.*

5. *Id.*

6. *See* Adele vs. Guns N' Roses — Someone Likes Knockin' on Heaven's Door (MASH UP BY @daftbeatles), *available at* http://www.youtube.com/watch?v=O9BkVAlIYr4 (last accessed Feb. 28, 2013).

7. *See* 8 Hour Deep House Mix by JaBig (Studying, Beach, Lounge, Restaurant, Bar DJ Music Playlist Set), *available at* http://www.youtube.com/watch?v=nnIoiojhJuI (last accessed Feb. 28, 2013).

8. *See* Elina Lae, *Mashups — A Protected Form of Appropriation Art or a Blatant Copyright Infringement?*, 12 VA. SPORTS. & ENT. L.J. 31, 31 (2012).

9. Zach Gambill, Mashup Controversy: Cross Promotion or Copyright Infringement?, *available at* http://soundisstyle.com/2012/09/mashup-controversy-cross-promotion-or-copyright-infringement.html (last accessed Feb. 28, 2013).

10. *See* Gambill, *supra* note 9.

11. Gambill, *supra* note 9.

seen as "stealing sounds from other artists" — a way for others to use another's music to gain recognition as an artist.[12]

This Note explores the tip of the controversy surrounding this rising genre of music. Part II discusses the history of sample-based music and the eventual blossoming of the mashup. Part III brings to fore the clash between conventional notions of copyright and the interests of mashup artists. It highlights four key rulings in United States (U.S.) sample-based music litigation and highlights the problems associated by mashup artists in seeking to obtain licenses for every song they wish to sample. Part IV explores the unique case of Gregg Gillis, a.k.a. DJ Girl Talk, an American mashup artist spearheading this movement. Part V brings together some arguments for and against the genre, and Part VI concludes that copyright law should be re-examined to accommodate this emerging form of musical expression.

II. SAMPLING AND MASHUPS

What exactly are mashups and how do they fit within the framework of copyright law? In order to arrive at an understanding of this rising genre of music, we must first trace its roots. In doing so, one understands that the rise of new genres of music comes as a counter-response to prevailing notions of what music is, in what forms it can be made, and what expressions are acceptable in society.

A. A Rich Tradition of Borrowing

All change and counterculture in popular music are initially met with resistance.[13] Just as much as rock and roll in the 1950s and the 1960s was initially labeled as "devil's music,"[14] as much as punk music was called "rebellious and anarchistic,"[15] and much as hip-hop and rap music were put off as having little or no artistic value at the start,[16] mashups composed of

12. *Id.*

13. *See generally* Jed Skinner, The Beats & Sixties Counterculture, *available at* http://www.beatdom.com/?p=672 (last accessed Feb. 28, 2013).

14. *See generally* John Bulmer, Devil Music: Race, Class, and Rock and Roll, *available at* https://www.google.com.ph/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCsQFjAA&url=http%3A%2F%2Fwww.hotsprings.k12.wy.us%2Fpages%2Fuploaded_files%2FDevil%2520Music%2520article.doc&ei=e30dUdPEAsiZiQeY74HICQ&usg=AFQjCNGHNy1CMohEeCT1mf71HV8vqRHiMA&bvm=bv.42553238,d.aGc&cad=rja (last accessed Feb. 28, 2013).

15. *See* Punk Rock Music, *available at* http://rockmusic.mu/punk-rock-music.html (last accessed Feb. 28, 2013).

16. *See* Author Comes to Hip-Hop Music's Defense, *available at* http://www.npr.org/templates/story/story.php?storyId=11829316 (last accessed Feb. 28, 2013).

portions of sound recordings taken from existing songs are being criticized for being "lazy" and having no originality.[17] But in all cases, one can sense a rich tradition of borrowing from the past — "transformative imitation, quotation, allusion, homage, recomposition, and reinvention of existing forms"[18] — to create an entirely new form of expression.[19]

In the mid-20th century, musical artists started not only to borrow sounds and compositions from other artists, they also started to "manually alter those sounds themselves."[20] For instance, the members of the musique concrete movement of the 1950s in Paris "cut, looped, and manipulated existing recordings."[21] The recording work on the Beatles' 1968 "White Album" involved extensive musical experimentation, which John Lennon described as a process involving "[10] machines with people holding pencils on the loops[.]"[22] In fact, the process was so complex that, at the time of recording the album, several studios were running simultaneously, each Beatle immersed in his own project.[23]

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17. *See* Ethan Hein, Originality in Digital Music, *available at* http://www.ethanhein.com/wp/2012/originality-in-digital-music/ (last accessed Feb. 28, 2013).

18. *Not in Court Cause I Stole a Beat: The Digital Music Sampling Debate's Discoure on Race and Culture, and the Need for Test Case Litigation*, 2012 U. ILL. J.L. TECH. & POL'Y 141, 145 (2012) [hereinafter UIJLTP].

19. *See* UIJLTP, *supra* note 18, at 145.

20. *Id.* at 146. The tradition of borrowing from the past was prevalent even during the medieval and Renaissance periods:

> Medieval religious music referenced existing songs to pay tribute to, or compete with, prior works. Borrowing was an integral part of the classical cannon, where composers such as Handel, Bach, Haydn, and Mozart reshaped existing compositions and were 'sampled' themselves by other artists. In another case, Igor Stravinsky's 1920 ballet Pulcinella was composed entirely of reworked phrases of 18th century composer Pergolesi.

UIJLTP, *supra* note 18, at 146 (citing Lauren Fontein Brandes, *From Mozart to Hip-Hop: The Impact of Bridgeport v. Dimension Films on Musical Creativity*, 14 UCLA ENT. L. REV. 93, 100 (2007) & Olufunmilayo B. Arewa, *From J.C. Bach to Hip-Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C.L. REV. 547, 550-51 (2006)).

21. *Id.*

22. *Id.* (citing FRANICS PREVE, POWER TOOLS: SOFTWARE FOR LOOP MUSIC: ESSENTIAL DESKTOP PRODUCTION TECHNIQUES 1-2 (2004)).

23. *See* Chris Gill, Guide to The Beatles' White Album: the Recording Equipment, the Songs, the Conflicts, *available at* http://www.guitarworld.com/guide-beatles-white-album-recording-equipment-songs-conflicts (last accessed Feb. 28, 2013).

While other artists would eventually engage in the same process of dabbling into various influences to create songs, the practice of sampling arose out of the "dub" movement in Jamaica in the 1960s.[24] DJs "used portable sound systems" to mix reggae albums with other forms of music, "rapping over them in live concerts and challenging each other with improvised lyrics."[25]

Soon enough, the practice found a following in the African-American communities of South Bronx in New York City, where DJs mixed records "using two turntables and a stereo mixer to sample records while a Master of Ceremonies (MC) rapped over the beat."[26]

Sampling eventually became the foundation of modern-day hip-hop music, and even became more prevalent with the rise of Musical Instrument Digital Interface (MIDI) technology.[27] Suddenly, artists were no longer limited to "scratching vinyl records" and "cutting" back and forth between different sound recordings.[28] With a MIDI synthesizer, artists could convert analog sound into digital code, allowing artists to enhance pitch, echo, and volume in a myriad of ways.[29] With ease and efficiency, artists could "slow down, speed up, combine, and otherwise alter the samples."[30] Today, it is not uncommon for hip-hop artists to release a song containing several verses of rap combined with a melodic refrain or chorus. From being a counterculture, hip-hop became the culture, together with sports jerseys, baggy jeans, rotating rims,[31] wild after-parties, "pimped-up"[32] rides, and plush "cribs."[33]

B. Digital Music, the Internet, and the Mashup

Not surprisingly, as technology became faster, lighter, and more powerful, music became easier to produce, distribute, and alter. The days where musicians had to rent expensive studio equipment and engage in costly

24. *See* UIJLTP, *supra* note 18, at 146.

25. *Id. See also* Newton v. Diamond, 349 F.3d 591, 591 (9th Cir. 2003) (U.S.).

26. UIJLTP, *supra* note 18, at 146.

27. *Id.* at 147. *See also Newton*, 349 F.3d at 591.

28. *See Newton*, 349 F.3d at 591.

29. *See* UIJLTP, *supra* note 18, at 147.

30. *Newton*, 349 F.3d at 593.

31. *See* DANIEL WHITE HODGE, THE SOUL OF HIP-HOP: RIMS, TIMBS AND A CULTURAL IDEOLOGY 40-43 (2010 ed.).

32. *See* Pimp My Ride, *available at* http://www.mtv.com/shows/pimp_my_ride/season_5/series.jhtml (last accessed Feb. 28, 2013).

33. *See* MTV Cribs, *available at* http://www.mtv.com/shows/cribs/series.jhtml (last accessed Feb. 28, 2013).

production are fast fading, as recording and mixing software can now be done at home, and on one's laptop.[34] Thanks to innovations such as the iPod[35] and the global reach of the iTunes music store[36] and Youtube,[37] with ease of production comes ease of distribution. A cool, catchy idea could easily transform a local musician into a global icon, and the clearest example would be how "Gangnam Style" catapulted seemingly obscure Korean rapper Psy onto the global stage in a matter of weeks.[38] And then came the fans — dozens of internet users uploading their own "covers" or "versions" of the song, several remixes, and of course, the inevitable mashups.[39]

While it is hard to arrive at a settled definition of what a mashup is, scholars have made several efforts to define and characterize them as a unique genre of music separate from traditional hip-hop, RnB, and electronica. Lae, citing Tough, defines a mashup as "a song or composition created from the master track of instrumental music of one song and the a capella vocal master track from another."[40] Shapell sees it as a "compilation of pre-existing songs blended and spliced together to create an entirely new song."[41] The genre, according to Harper, is dedicated to "borrowing and mixing others' works."[42] Take two songs, and "mash them together to create an even richer

34. *See* Mark Weldenbaum, Serial Port: A Brief History of Laptop Music, *available at* http://www.newmusicbox.org/articles/Serial-Port-A-Brief-History-of-Laptop-Music/ (last accessed Feb. 28, 2013).

35. iPod, *available at* http://www.apple.com/ipod/ (last accessed Feb. 28, 2013).

36. *See* Saul Austerlitz, The iTunes music store dramatically changed the way recordings are sold, *available at* http://www.thenational.ae/arts-culture/music/the-itunes-music-store-dramatically-changed-the-way-recordings-are-sold (last accessed Feb. 28, 2013).

37. *See* Lev Grossman, You — Yes, You — Are TIME'S Person of the Year, *available at* http://www.time.com/time/magazine/article/0,9171,1570810,00.html (last accessed Feb. 28, 2013).

38. As of the writing of this Note, "Gangnam Style" has surpassed Justin Bieber's "Baby" as the most-viewed video clip on Youtube, garnering over a billion views. *See* Gangnam Style becomes YouTube's most-viewed video, *available at* http://www.bbc.co.uk/news/technology-20483087 (last accessed Feb. 28, 2013).

39. *See* PSY vs. LMFAO — Sexy Style (Mash-up), *available at* http://www.youtube.com/watch?v=_E6J9LNe6LI (last accessed Feb. 28, 2013).

40. Lae, *supra* note 8, at 31 (citing David Tough, *The Mashup Mindset: Will Pop Eat Itself?*, *in* PLAY IT AGAIN: COVER SONGS IN POPULAR MUSIC 205 (2010)).

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

42. Emily Harper, *Music Mashups: Testing the Limits of Copyright Law as Remix Culture Takes Society by Storm*, 39 HOFSTRA L. REV. 405, 405-06 (2010).

explosion of musical expression."[43] Ultimately, even the most complex mashup will be a hodgepodge of various samples put together to create a singular piece of work. Be that as it may, most mashups freely available or downloadable over the Internet possess a legal infirmity — they have been produced without obtaining the permission of the original artist.[44]

The most common form of mashup is called "A vs. B," where "the vocal track of one song is superimposed over the musical composition of another song."[45] A few examples: Freelance Hellraiser's "A Stroke of Genie-Us," which mashes Christina Aguilera's vocals on "Genie in a Bottle" over the instrumental track of "Hard to Explain," a song by the popular indie rock band The Strokes.[46] Another example would be Soulwax's "Smells Like Teen Booty," which merges the instrumental track of Nirvana's "Smells Like Teen Spirit" with Destiny's Child's vocals on "Bootylicious,"[47] an odd combination of teenage rage and sexual prowess. The objective is to put two seemingly incompatible songs from different genres together, in the hope of creating something harmonious.

Another form, the "audio collage," combines not just two songs together, but various songs, and in fact, even entire albums.[48] The most critically acclaimed piece of "audio collage" could be DJ Danger Mouse's masterful mixing of The Beatles' "White Album" and rapper Jay-Z's "Black Album" into what is now known as the infamous "Grey Album."[49] The "collage" was a critical success, and was included in Rolling Stone Magazine's 100 Best Albums of the 2000s.[50] The catch — Danger Mouse obtained no licenses from either artist. But no matter how "illegal" the work seemed to be, he was so bent on letting people hear it, that he made a few thousand copies of the work and mailed them out.[51]

43. TV Quotes Database, What is a Mash-up?, *available at* http://www.tvquotedb.com /shows/glee/quote_26822.html (last accessed Feb. 28, 2013).

44. *See* Shapell, *supra* note 41, at 530.

45. Harper, *supra* note 42, at 409.

46. Lae, *supra* note 8, at 31.

47. *Id.*

48. Harper, *supra* note 42, at 409.

49. *See* Jon Healey & Richard Cromelin, *When copyright law meets the 'mashup,'* L.A. TIMES, Mar. 21, 2004, *available at* http://articles.latimes.com/2004/mar/21/entertainment/ca-healey21 (last accessed Feb. 28, 2013).

50. *See* Rolling Stone Magazine, 100 Best Albums of the 2000s, *available at* http://www.rollingstone.com/music/lists/100-best-albums-of-the-2000s-20110718/danger-mouse-the-grey-album-20110718 (last accessed Feb. 28, 2013).

51. Healey & Cromelin, *supra* note 49.

The release of the album provoked retaliation from EMI Music, holders of the copyrights to the Beatles' songs.[52] While EMI successfully procured an injunction against the further distribution of the album, the action "triggered an online revolt that led tens of thousands of people to download digital copies of the CD, generating enough buzz to draw reviews from such mainstream outlets as CNN."[53] At that time, the album could have been "the most widely downloaded, underground indie record, without radio or TV coverage[.]"[54] The backlash against EMI sent out a clear message: technology had made it easier to transform music even without requiring permission from the copyright holders. The Internet made it possible for mashups to proliferate across the world as recording companies and artists lost grip of how they could control access to and use of their compositions and recordings.[55] As music enthusiasts were exposed to free, downloadable music, the strength of copyright seemed to flail in the digital age.

The success of mashups and their prevalence now present the essential digital age dilemma: can a balance be achieved between the need to protect copyright holders and the public's desire to create and distribute music where they want, whenever they want?

III. THE COPYRIGHT CLASH

A. The Copyright Clash

Copyright law, from its inception, was designed to cater to the public benefit.[56] As early as the Statute of Anne,[57] legislators granted authors the exclusive right to publish their creative work and the right to allow others to use it for a specified period of time.[58] In fine, copyright "is often treated as a policy tool that gives creators incentives to create new works."[59] Works are protected "by the sole fact of their creation, irrespective of their mode or form of expression, as well as of their content, quality[,] and purpose."[60]

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52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. Reuven Ashtar, *Theft, Transformation, and the Need of the Immaterial: A Proposal for a Fair Use Digital Sampling Regime*, 19 ALB. L.J. SCI. & TECH. 261, 281 (2009).

57. Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

58. Ashtar, *supra* note 56, at 281.

59. Olunfunmilayo B. Arewa, *Creativity, Improvisation, and Risk: Copyright and Musical Innovation*, 86 NOTRE DAME L. REV. 1829, 1829 (2011).

60. An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for its Powers and Functions, and for

To be entitled to copyright, the thing being copyrighted must "be original, created by the author through his own skill, labor[,] and judgment, without directly copying or evasively imitating the work of another."[61] Musical compositions, with or without words, are among those protected as literary or artistic works.[62] Derivative works, referring to "dramatizations, translations, adaptations, abridgements, arrangements, and other alterations of literary or artistic works"[63] are also protected as new works, provided that they "shall not affect the force of any subsisting copyright upon the original works employed or any part thereof, or be construed to imply any right to such use of the original works, or to secure or extend copyright in such original works."[64]

Copyright holders such as performers[65] and producers of sound recordings[66] possess certain economic rights — the right to carry out, authorize, or prevent acts such as reproduction,[67] abridgment,[68] arrangement,[69] or other transformation[70] of the work, rental of the original or copy of a work embodied in a sound recording,[71] public display or public performance of the work,[72] and other communication to the public of the work.[73] Independently of economic rights, performers are also entitled to moral rights — the right to "claim to be identified as the performer of his

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Other Purposes [INTELLECTUAL PROPERTY CODE], Republic Act No. 8293, § 172.2 (1997).

61. Sambar v. Levi Strauss & Co., 378 SCRA 364, 374 (2002).

62. INTELLECTUAL PROPERTY CODE, § 172.1 (f).

63. *Id.* § 173.1 (a).

64. *Id.* § 173.2.

65. *Id.* § 202.1. Performers are "actors, singers, musicians, dancers, and other persons who act, sing, declaim, play in, interpret, or otherwise perform literary and artistic work." *Id.*

66. *Id.* § 202.5. A producer of sound recordings is a "person, or legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representation of sounds[.]"INTELLECTUAL PROPERTY CODE, § 202.5. A sound recording refers to a "fixation of the sounds of a performance or of other sounds, or representation of sound, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work[.] *Id.* § 202.2.

67. *Id.* § 177.1.

68. *Id.* § 177.2.

69. *Id.*

70. *Id.*

71. INTELLECTUAL PROPERTY CODE, § 177.4.

72. *Id.* § 177.6.

73. *Id.* § 177.7.

performances [ ] and to object to any distortion, mutilation[,] or other modification of his performances that would be prejudicial to his reputation.[74] Copyright infringement occurs "when someone violates one of the exclusive rights reserved to a copyright holder, provided there is a valid copyright in the original work."[75] Upon a *prima facie* showing of infringement, the burden shifts to the defendant to show that he is entitled to the defense of *de minimis*[76] use or fair use.[77]

One of the key limits to the invocation of economic and moral rights is the fair use of a copyrighted work for "criticism, comment, news reporting, teaching[,] [ ] scholarship, research, and similar purposes[.]"[78] In determining whether the use of a copyrighted work falls within the concept of fair use, the following factors are to be considered:

(a) The purpose and character of use, including whether such use is of a commercial nature or is for non-profit educational purposes;

(b) The nature of the copyrighted work;

(c) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(d) The effect of the use upon the potential market for or value of the copyrighted work.[79]

If it is already difficult to describe what constitutes "originality," for purposes of copyright, much more is it harder to accurately map out the metes and bounds of fair use. Ultimately, much of the originality-fair use analysis in copyright infringement boils down to the facts. On the one hand, a copyright holder will claim that his work is original, created entirely of his own labor and skill, while on the other hand, the alleged infringer will have to demonstrate that his work falls within the bounds of fair use. As Arewa notes:

> Creativity [and originality] is one potential metric by which to measure artistic innovation. However, conceptions of creativity in the law remain nebulous and in many instances incompatible with actual creative practices

74. *Id.* § 204.1.

75. Harper, *supra* note 42, at 417.

76. *See* Ashtar, *supra* note 56, at 287. The latin maxim *de minimis non curat lex* means "the law does not concern itself with trifles." In the artistic context, this means that "copying that does not amount to substantial similarity is non-actional by virtue of the doctrine." *Id.*

77. Harper, *supra* note 42, at 418.

78. INTELLECTUAL PROPERTY CODE, § 185.1.

79. *Id.*

> in varied contexts. What constitutes creativity may also be quite subjective and depend to a significant degree on the eye of the beholder.[80]

Were genres of music to evolve steadily over time, it would be easier to map out the metes and bounds of "originality" and innovation. Artists would simply require other artists seeking to sample their work to pay the requisite license and all would be well. If the Internet did not evolve into its present state, it would have been easier to track how copyrighted works are used by different persons. But as things stand, digital technology has constantly created an influx of challenges to artists' intellectual property rights. Artists are now confronted with an audience who wishes not only to listen to their recordings, but is interested in slicing and dicing[81] them for free.

The problem is not just borne by the artists and record producers. Ultimately, mashup artists will want to be recognized for their creations and will also be interested in how their rights will be protected by the law. Eventually, courts will have to tackle whether a work derived entirely from borrowing other people's works can be sustained as a creative, original work — whether it would be legally permissible to use another's musical compositions and recordings for free as "raw material" for song creation. The following cases from American sample-based music litigation would show that copyright law has struggled to balance these two competing interests.

B. Grand Upright Music v. Warner Bros. Records, Inc.

Grand Upright Music v. Warner Bros. Records, Inc.[82] was the first of four sample-based music lawsuits that was resolved at trial.[83] Prior to *Grand Upright*, "unregulated and unlicensed sampling characterized an entire segment of the music industry[.]"[84] *Grand Upright* marks the beginning of the

80. Arewa, *supra* note 59, at 1832 (citing R. KEITH SAWYER, EXPLAINING CREATIVITY 311 (2006)).

81. Slicing and dicing is the "process of breaking something down (e.g.[,] information) into smaller parts to examine and understand it, possibly to assemble a new whole; also, the presentation of information in a variety of new and useful ways." Dictionary.com, slice-and-dice, *available at* http://dictionary.reference.com/browse/slice-and-dice (last accessed Feb. 28, 2013).

82. Grand Upright Music Limited v. Warner Brothers Records, Inc., 780 F.Supp. 182 (S.D. N.Y. 1991) (U.S.).

83. Shapell, *supra* note 41, at 534.

84. *Id.* (citing Susan J. Latham, *Newton v. Diamond: Measuring the Legitimacy of Unauthorized Compositional Sampling — A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L. J. 119, 124 (2003)).

mandatory licensing trend in the music industry,[85] where artists and record producers began requiring artists to obtain licenses and pay fees to sample a song.[86]

In this case, the defendant Cold Chillin' Records released an album by the rapper Biz Markie entitled "I Need a Haircut."[87] One of the album's recordings, "Alone Again," incorporated three words and a portion of the sound recording from "Alone Again (Naturally)," a song composed by Gilbert O'Sullivan.[88] Prior to the release of the album, the various defendants "apparently discussed among themselves the need to obtain a license" to sample the song.[89] They were well aware that obtaining a license or a "'clearance' from the holder of a valid copyright before using the copyrighted work in another piece" was necessary.[90] They then decided to contact O'Sullivan and to send a copy of the recording to his brother/agent.[91] Despite this, Cold Chillin' Records released Biz Markie's material "prior to the appropriate consents being secured in connection with such samples."[92] Hence, the plaintiffs sought an injunction to restrain the release.

At the trial, Biz Markie offered the sole argument that since "others in the 'rap music' business are also engaged in illegal activity[,]" he should also be excused.[93] As other rappers were taking bits and pieces of other people's original recordings and incorporating them into their songs without obtaining the necessary clearances, it was perfectly fine for him to do so. The court branded his argument as specious, a "callous disregard for the law."[94] The verdict sent out a clear message: sampling any portion of a song without obtaining permission from the copyright holder amounts to stealing.[95]

After *Grand Upright*, labels "became more conservative, with stricter requirements that any songs containing sampled material be fully licensed

85. *Id.* (citing Chris Johnstone, *Underground Appeal: A Sample of the Chronic Questions in Copyright Law Pertaining to the Transformative Use of Digital Music in a Civil Society*, 77 S. CAL. L. REV. 397, 402 (2004)).

86. *Id.*

87. *Grand Upright*, 780 F.Supp. at 183.

88. *Id.*

89. *Id.* at 184.

90. *Id.* at 184–85.

91. *Id.* at 184.

92. *Id.* at 185.

93. *Grand Upright*, 780 F.Supp. at 185.

94. *Id.*

95. *Id.*

before distribution."[96] Licensing requirements and the cost to obtain them cast an ominous shadow on the future of sampling, as several critically acclaimed albums released by artists like the Beastie Boys, Public Enemy, and De La Soul "were created [by] using large numbers of unlicensed samples."[97] Had *Grand Upright* come sooner than the release of these albums, they probably would not have (legally) seen the light of day.[98]

But what should have been deemed as a major setback for sampling and hip-hop artists only seemed to fuel the fire. As pop culture embraced break dancing, turntables, and rap music, sampling continued to rise.[99] Though licensing became standard practice, "many artists still sought to find a way around the licensing requirement in order to keep costs down."[100] Soon, artists would invoke the fair use doctrine and the doctrine of transformative works to protect themselves from being branded as copyright infringers.

C. Campbell v. Acuff-Rose Music, Inc.

Campbell v. Acuff-Rose Music, Inc.[101] set out to explore the possibility of a fair use defense in sampling a musical recording without obtaining the necessary licences from the copyright holder. The case involved the infamous rap group "2 Live Crew," and their use of Roy Orbison's 1964 rock ballad "Oh, Pretty Woman" — a classic that left an even more indelible impression in pop music culture when it became the theme of the similarly–titled 1990 film that launched Julia Roberts to stardom.[102]

In 1989, 2 Live Crew wrote a parody of "Oh, Pretty Woman," which the group "intended, through comical lyrics ... to satirize the original work."[103] On the original song, Orbison croons about his amazement and awe at seeing a pretty woman walking down the street: "Pretty Woman, walking down the street / Pretty Woman, the kind I like to meet / Pretty Woman, I don't believe you, you're not the truth / No one could look as

96. David Mongillo, *The Girl Talk Dilemma: Can Copyright Law Accommodate New Forms of Sample-Based Music?*, 9 U. PITT. J. TECH. L. & POL'Y. 3, 5 (2009) (citing DAVID J. MOSER, MUSIC COPYRIGHT FOR THE NEW MILLENIUM 63 (2002)).

97. *Id.*

98. *Id.* at 5–6.

99. Shapell, *supra* note 41, at 532.

100. *Id.* at 534 (citing Latham, *supra* note 84, at 124).

101. Campbell, a.k.a. Luke Skyywalker, et al. v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

102. *Id.* at 571–73.

103. *Id.* at 572.

good as you / Mercy."[104] In sharp contrast to Orbison's imagery, 2 Live Crew adopted a completely different lyrical scheme poking fun at a "big, hairy woman" — "Big hairy woman, you need to shave that stuff / Big hairy woman, you know I bet it's tough / Big hairy woman, all that hair ain't legit / 'Cause you look like Cousin it. / Big hairy woman."[105] In successive stanzas, the group raps about a "bald headed woman" and about a "two timin' woman."[106] 2 Live Crew's manager sent a copy of the lyrics and the recording to Acuff-Rose Music, Inc., who held the copyright to the original "Pretty Woman." They expressed their intent to credit the use of the original "Pretty Woman" song to Acuff-Rose and Orbison, and they also expressed their intent to pay the necessary fees for its use.[107] However, Acuff-Rose refused permission.[108]

Despite the refusal, 2 Live Crew released the parody in an album entitled "As Clean as They Wanna Be."[109] The album was released on cassette tapes, compact discs, and vinyl records; it identified Orbison and William Dees as original authors of the song and cited Acuff-Rose as its publisher.[110] As to be expected, Acuff-Rose sued 2 Live Crew and Luke Skywalker Records for copyright infringement a year after the release.[111] The District Court held in favor of 2 Live Crew, saying that the song "quickly degenerates into a play on words, substituting predictable lyrics with shocking ones" to show "how bland and banal the Orbison song is."[112] Furthermore, the District Court held that it would be highly unlikely that the parody would "adversely affect the market for the original."[113]

The Sixth Circuit of the Court of Appeals reversed, saying that while 2 Live Crew's Song was indeed, a parody, the lower court "put too little emphasis on the fact that "every commercial use ... is presumptively ... unfair." It was of the opinion that 2 Live Crew "[took] the heart of the original and [made it] the heart of a new work," thus, from a qualitative

104. *Id. See also* Pretty Woman, 2 Live Crew Lyrics, *available at* http://www.lyricsfreak.com/2/2+live+crew/pretty+woman_20000615.html (last accessed Feb. 28, 2013).

105. *Campbell*, 510 U.S. at 595-96.

106. *Id. See also* Pretty Woman, 2 Live Crew Lyrics, *supra* note 104.

107. *Campbell*, 510 U.S. at 572.

108. *Id.*

109. *Id.* at 573.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Campbell*, 510 U.S. at 573.

analysis, it had taken too much.[114] As the parody was released for a "blatantly commercial purpose," the Court of Appeals precluded a finding of fair use.[115]

On *certiorari* to the U.S. Supreme Court, the Court of Appeals' findings were reversed. The Supreme Court found the song to be a parody protected by the doctrine of fair use, noting that

> [i]n truth, in literature, in science[,] and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science[,] and art, borrows, and must necessarily borrow, and use much which was well-known and used before.[116]

As such, the fair use doctrine "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[117] As to "purpose and character of the use," the Court held the song to be perceivable as a comment on the original or a criticism of it to some degree.[118] It "juxtapose[d] the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility."[119] As to whether "the amount and substantiality of the portion used in relation to the copyrighted work as a whole" constituted fair use, the Court found that the Court of Appeals was "insufficiently appreciative of parody's need for the recognizable sight or sound" when it deemed 2 Live Crew's use as unreasonable. While 2 Live Crew indeed, used the opening bass riff of the original song, and while it also used the first stanza of Orbison's lyrics, such was necessary because it set up the listener to the parody.[120] Without using the "heart" of the original work, it would have been difficult "to see how its parodic character would have come through."[121]

Campbell affirms that fair use analysis may be employed when the alleged infringing work actually amounts to a parody. But as one can observe, hip-hop and rap artists sample various songs not only to make their songs catchy; they are also used to introduce various layers and emotions that strengthen the emotions expressed in them. In short, artists incorporate samples not

114. *Id.* at 574.

115. *Id.*

116. *Id.* at 575.

117. *Id.* at 577.

118. *Id.*

119. *Campbell*, 510 U.S. at 583.

120. *Id.* at 589.

121. *Id.* at 588–89.

simply to poke fun at original works. And while *Campbell* may have advanced fair use analysis in this context, the Court gave no clear standards when music sampling amounts to a parody.[122]

D. Newton v. Diamond

Newton v. Diamond,[123] a case held by the Ninth Circuit of the U.S. Court of Appeals, is the third case that takes on this complex issue — "whether the incorporation of a short segment of a musical recording into a new musical recording, i.e., the practice of 'sampling,' requires a license to use both the performance and the composition of the original recording."[124] As a song recording is made up of two copyrightable elements,[125] the case highlights the problems caused by requiring to obtain separate licenses to sample parts of a sound recording and another to sample the musical composition therein.

In 1978, James W. Newton, an avant-garde jazz musician, composed the song "Choir" — "a piece for flute and voice intended to incorporate elements of African-American gospel music, Japanese ceremonial court music, traditional African music, and classical music, among others."[126] Newton licensed all rights to the sound recording to ECM records. However, he retained rights to the musical composition of the song.[127] For a one-time fee of $1000.00, rap icons Beastie Boys obtained a license to sample a three-second portion of "Choir," which they used in what would be one of their classic hits, "Pass the Mic."[128] But while they obtained a license from ECM, they did not obtain the license to sample the musical composition. The three-second portion which they sampled consisted of three notes (C, D flat, and C), which was "sung over a background C note played on the flute."[129] In their song, the Beastie Boys looped the sample repeatedly, so that it appeared over 40 times across the various renditions of "Pass the Mic," appearing also in two remixes ("Dub the Mic" and "Pass the Mic" (Pt. 2, Skills to Pay the Bills)).[130] The song was released on the group's 1992

122. Shapell, *supra* note 41, at 538.

123. Newton, 349 F.3d at 591.

124. *Id.* at 592.

125. *See Newton*, 349 F.3d at 592-93. Sound recordings and their underlying compositions are deemed as separate works with their own distinct copyrights. It can be easily described as follows: A has a separate copyright for the lyrics of his song or the right to perform it live, and another one for the musical arrangement he used in recording it on a master track. *Id.*

126. *Newton*, 349 F.3d at 592.

127. *Id.*

128. *Id.* at 593.

129. *Id.*

130. *Id.*

Album "Check Your Head," and in 2000, Newton sued for copyright infringement. The District Court held that the sample could not be copyrighted "because, as a matter of law, it lacked the requisite originality."[131] Assuming that it was copyrightable, the use was *de minimis*.[132]

On appeal, the Court of Appeals also found Newton's case insufficient to sustain his claim.[133] Citing previous precedents,[134] the court held that "even where there is some copying, that fact is not conclusive of infringement[.] ... In addition to copying, it must be shown that this has been done to an unfair extent."[135] Use of a copyrighted work is but *de minimis* "if the average audience would not recognize the appropriation."[136] This was unlike *Fisher v. Dees*,[137] where the defendant therein appropriated the main theme and lyrics of the plaintiff's song, both of which were recognizable in the defendant's parody.[138] Granted that the Beastie Boys obtained a license to sample the sound recording only, the inquiry was left as to whether the unauthorized use of the musical composition was substantial enough to sustain an infringement claim.[139] If the similarity of the work used was only as to "nonessential matters," then there would be no finding of substantial similarity.[140] As such, the court held,

> When viewed in relation to Newton's composition as a whole, the sampled portion is neither quantitatively nor qualitatively significant. Quantitatively, the three-note sequence appears only once in Newton's composition. It is difficult to measure the precise relationship between this segment and the composition as a whole, because the score calls for between 180 and 270 seconds of improvisation. When played, however, the segment lasts six seconds and is roughly two percent of the four-and-a-half-minute 'Choir' sound recording licensed by Beastie Boys. Qualitatively, this section of the composition is no more significant than any other section.

131. *Id.* at 594.

132. *Newton*, 349 F.3d at 594.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986) (U.S.).

138. *See Fisher*, 794 F. 2d at 434. The defendant in this case copied the first six of the song's 38 bars to the 1950's standard "When Sunny Gets Blue," to make the parody "When Sonny Sniffs Glue," and only minor variations were made from the original's lyrics. But even if the work copied a substantial portion of the original, the court found that the work was non-infringing because it was a parody, thus protected by the fair use doctrine. *Id.*

139. *Newton*, 349 F.3d at 596.

140. *Id.*

...

> Although the sampled section may be representative of the scored portions of the composition, Newton has failed to offer any evidence as to this section's particular significance in the composition as a whole. Instead, his experts emphasize the significance of Newton's performance, the unique elements of which Beastie Boys properly licensed.[141]

As can be seen from the *Newton* ruling, a federal court had recognized that there could be situations where unlicensed song sampling could be allowed. Determining whether a sample amounts to a substantial portion of the original, however, is a matter to be determined from the circumstances of the case. The *Newton* court laid no hard and fast rule on what amounts to a substantial portion — whether a 30-second sample of a three-minute song would be a substantial portion or whether a five-second guitar riff could constitute the heart of a recording.

E. Bridgeport Music, Inc. v. Dimension Films

Despite the leeway provided by the *Campbell* and *Newton* rulings, the tide had seemingly shifted in favor of the copyright holders in *Bridgeport Music, Inc. v. Dimension Films*.[142] In this 2005 ruling by the Sixth Circuit of the U.S. Court of Appeals, a "bright-line" rule was handed down to sampling artists — "[g]et a license or do not sample."[143]

In this case, plaintiffs Bridgeport Music and Westbound Records claimed ownership of the musical compositions and sound recording copyrights to the song "Get Off Your Ass and Jam" by George Clinton and the Funkadelics.[144] They sued the defendants for using a sample on the song "100 Miles and Runnin," which was part of the Original Soundtrack (OST) to the movie "I Got the Hook Up."[145] Specifically, the song "Get Off" opens with a "three-note combination solo guitar 'riff' that lasts four seconds."[146] A portion of that riff was used in "100 Miles," "the pitch was lowered, and the copied piece was 'looped' and extended to 16 beats."[147] The sample appeared in the song in about five places, and lasted seven seconds.

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141. *Id.* at 597.

142. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005) (U.S.).

143. *Id.* at 801.

144. *Id.* at 796.

145. *Id.*

146. *Id.*

147. *Id.*

> The portion of the song at issue here is an arpeggiated chord — that is, three notes that, if struck together, comprise a chord but instead are played one at a time in very quick succession — that is repeated several times at the opening of 'Get Off.' The arpeggiated chord is played on an unaccompanied electric guitar. The rapidity of the notes and the way they are played produce a high-pitched, whirling sound that captures the listener's attention and creates anticipation of what is to follow.[148]

By applying the *de minimis* principle, the District Court found in favor of the defendants.[149] On appeal however, the Court of Appeals took notice of the advances in technology and the rise of hip-hop music, which "have made instances of digital sampling extremely common and have spawned a plethora of copyright disputes and litigation."[150] Given the intricacies and complexities that sampling has brought about, the court held in favor of a "bright-line" test to determine whether infringement is present:

> This case [ ] illustrates the kind of mental, musicological, and technological gymnastics that would have to be employed if one were to adopt a *de minimis* or substantial similarity analysis. The district judge did an excellent job of navigating these troubled waters, but not without dint of great effort. When one considers that he has hundreds of other cases all involving different samples from different songs, the value of a principled bright-line rule becomes apparent. We would want to emphasize, however, that considerations of judicial economy are not what drives this opinion. If any consideration of economy is involved it is that of the music industry. As this case and other companion cases make clear, it would appear to be cheaper to license than to litigate.[151]

Coming from this perspective, the court held that no matter how big or small a part of a sound recording is sampled, "the part taken is something of value."[152] The mere fact that a sound recording is sampled shows that the taking was intentional either to save costs or enhance the recording.[153] For the sound recording copyright holder, "it is not the 'song' but the sounds that are fixed in the medium of his choice."[154] It is the particular arrangement and the choice of instruments, sounds, tempo, and pitch that are protected. Hence, when a sound is sampled, the sound is "taken directly from that fixed medium."[155] Whether the sample taken is a significant or

148. *Bridgeport*, 410 F.3d at 796.

149. *Id.* at 797.

150. *Id.* at 799.

151. *Id.* at 802.

152. *Id.*

153. *Id.*

154. *Bridgeport*, 410 F.3d at 802.

155. *Id.*

insignificant portion of the song, there is still a taking which requires a license.

In laying out such a rule, the court was well-aware of the ensuing clash between copyright holders and sampling artists. On the one hand, sound recording copyright holders and studio musicians were entitled to the protection of their musical expressions; on the other hand, a bright-line rule would be viewed by the hip-hop community as stifling their creativity.[156] Nevertheless, the court conveniently handed the problem over to the music industry, which "has the ability and know-how to work out guidelines, including a fixed schedule of license fees, if they so choose."[157] Considering that the problem of music sampling was not present in the 1970s when the Copyright Statute was enacted,[158] Congress, and not the courts, had the best means to sort out the "complex technical and business overtones" associated with it.[159]

On that note, the *Bridgeport* court was clear and unambiguous in its message: save for compelling exceptions, unlicensed sampling amounts to copyright infringement.[160]

IV. THE CURIOUS CASE OF GIRL TALK

In the light of the *Bridgeport* ruling, it would appear that artists who conveniently "mix and mash" songs on their laptop have a very limited list of excuses to invoke whenever they take various parts of songs and combine them in a single recording without obtaining the proper licenses. Yet the combination of free and easy access to information, high-speed broadband connections, and easy-to-use multimedia software have spawned the growth of mashups, and the rise to prominence of DJs and mashup artists, most particularly, Gregg Gillis.

Gillis, or Girl Talk, as he is popularly known, is one of the most prominent artists headlining the mashup revolution.[161] By profession, he is a biomedical engineer from Pittsburgh.[162] However, his true engineering

156. *Id.* at 804.

157. *Id.*

158. *Id.* at 805.

159. *Id.*

160. *See Bridgeport*, 410 F.3d at 799-805.

161. *See* Joe Mullin, Why The Music Industry Isn't Suing Mashup Star 'Girl Talk,' *available at* http://paidcontent.org/2010/11/17/419-why-the-music-industry-isnt-suing-mashup-star-girl-talk/ (last accessed Feb. 28, 2013).

162. LESSIG, *supra* note 1, at 11.

opuses are the songs that he has released in albums like "Night Ripper,"[163] "Feed the Animals,"[164] and "All Day."[165] On these albums, Gillis employs hundreds of samples from Top 40 hits, to classical music, to 50s and 60s standards, to create entirely new songs.[166] However, he is keen to distinguish himself from being called merely a "DJ" or a "mash-up artist."[167] Rather, he would consider himself as a "musician whose instrument is the laptop."[168]

Perhaps there is a reason why the distinction is proper. His albums "contain more sampled material per song than even the most sample-heavy hip[-]hop albums."[169] While hip-hop artists would usually introduce their own vocals or rap verses over a looping sample, Gillis does none of that. And while hip-hop artists consider the samples as mere parts of their songs, for Gillis, the "samples are the songs."[170] Gillis keeps a large database of songs in his computer, painstakingly tests each song and sees which goes well with which, and sequences the samples to come up with a full song.[171] In fact, he has been quoted as having spent a whole day simply to come up with a minute's worth of music.

The end result is not only a club-ready mix of hip-hop, rock, and electronic music — it also becomes a puzzle for music enthusiasts to solve. The listener is "filled with a barrage of songs that are at once familiar, but at the same time completely new because they are re-contextualized."[172] In fact, one's knowledge of popular music can be tested by guessing where he obtained his samples from. On his 2010 album, "All Day," one can hear hip-hop hits such as Cali Swag District's "Teach Me How to Dougie"[173] layered

163. *See* Girl Talk Discography, *available at* http://illegal-art.net/girltalk/ (last accessed Feb. 28, 2013).

164. *Id.*

165. *Id.*

166. Shapell, *supra* note 41, at 519-20.

167. Mongillo, *supra* note 96, at 14.

168. *Id.*

169. *Id.*

170. *Id.*

171. *See* Julie Zeveloff, Girl Talk: How I Actually Create the Musical Mashups That Make Crowds Go Insane, *available at* http://www.businessinsider.com/how-girl-talk-makes-music-2011-7 (last accessed Feb. 28, 2013). *See also* Anthony Wing Kosner, Girl Talk's Gregg Gillis On Copyright, Curation and Making Mashups Rhyme, *available at* http://www.forbes.com/sites/anthonykosner/2012/10/07/girl-talks-gregg-gillis-on-copyright-curation-and-making-mashups-rhyme/ (last accessed Feb. 28, 2013).

172. Shapell, *supra* note 41, at 543.

173. CALI SWAG DISTRICT, *Teach Me How To Dougie*, *on* THE KICKBACK (Capitol Records 2010).

over Missy Elliot's "Get Ur Freak on,"[174] and Jay-Z's "Can I Get A"[175] layered over General Public's "Tenderness,"[176] a new wave standard. On another song, one can hear Bono's seminal wail in "With or without you"[177] over Lady Gaga's opening riff to "Bad Romance."[178] Call it an "audio collage," or a "multi-layered remix," or a "mashup," but one thing is clear — he has not obtained a single license for any of the songs he has sampled.

Yet the fans and critics could not care less — one of his albums, "Night Ripper," was named one of the year's best by no less than "Rolling Stone Magazine."[179] He even received recognition as a "local guy made good" by Michael Doyle, a Democrat Congressman who "invited his colleagues [in the House of Representatives to take a] look at this new form of art."[180] Surprisingly, Gillis has not received even a single cease and desist letter from a major recording label.[181] Nor have authorities prosecuted him, even if his work is clearly infringing.[182]

So, if Biz Markie cannot "steal," why can Girl Talk?[183] Probably it is because his status as a mash-up icon would make him a "ready-made hero for copyright reformers[.]"[184] If sued, Gillis intends to prove that his work is "transformative" within the meaning of the copyright law and employ a fair use defense. As Doyle notes, mashups probably "are a transformative new art that expands the consumer's experience and does not compete with what an artist has made available on iTunes or at the CD store."[185] The chance to get a court to lay down such a ruling would "have some of the best copyright lawyers in the [U.S.] knocking on his door asking to take his case for free."[186]

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174. MISSY "MISDEMEANOR" ELLIOT, *Get Ur Freak On*, *on* MISS E... SO ADDICTIVE (Elektra Records 2001).

175. JAY-Z, *Can I Get A...*, *on* VOL. 2... HARD KNOCK LIFE (Island Def Jam Records 1998).

176. GENERAL PUBLIC, *Tenderness*, *on* ALL THE RAGE (I.R.S. Records 1984).

177. U2, *With or Without You*, *on* THE JOSHUA TREE (Island Records 1987).

178. LADY GAGA, *Bad Romance on* THE FAME MONSTER (Interscope Records 2009).

179. LESSIG, *supra* note 1, at 11.

180. *Id.* at 11.

181. UIJLTP, *supra* note 18, at 159.

182. *Id.*

183. *Id.* at 160.

184. Mullin, *supra* note 161.

185. LESSIG, *supra* note 1, at 12.

186. Mullin, *supra* note 161.

And just like Danger Mouse, Gillis says he is not out there to steal revenue, recognition, and popularity from the artists whose songs he samples — he merely wants to be recognized as a musician and not just a plain DJ.[187] He seems to be determined in forcing lawmakers and copyright holders to accept a hard point, that "everyone is making this music and that most music is derived from previous ideas. And that almost all pop music is made from other people's source material. And that it [is not] a bad thing. It [does not] mean you [cannot] make original content."[188]

Whether Gillis may be the poster child for copyright reform, or whether copyright holders' interests are upheld against him in future litigation, it is clear that for everyone passionate about music, mashups and the rights of artists to use original sound recordings and musical compositions without obtaining licenses have become a key debate in this day and age.

VII. THE ARGUMENTS

A. Mashups Constitute Copyright Infringement

As earlier laid out, mashup artists rely on traditional fair use and *de minimis* principles to claim legitimacy for their works. Is such a defense tenable under the present state of copyright law? Harper argues that it is not. Whether viewed from the context of a compilation, a derivative work or a transformative work, mashups, in his view, are not entitled to protection.[189]

Under copyright law, a compilation may be entitled to copyright protection "if the artist selected, coordinated, or arranged [the material] in such a way that the resulting work as whole constitutes an original work of authorship."[190] Even if the statute requires a showing of originality, a person seeking protection "need only show that the work in question literally originated with that person."[191] But in order to create a compilation, an artist must seek authority to use the material that forms part of it. On this point, artists like Girl Talk fall far below the bar, simply because they have not sought authorization for any form of their samples.

187. *See* Robert Levine, *Steal This Hook? D.J. Skirts Copyright Law*, N.Y. TIMES, Aug. 6, 2008, *available at* http://www.nytimes.com/2008/08/07/arts/music/07girl.html?pagewanted=all (last accessed Feb. 28, 2013).

188. LESSIG, *supra* note 1, at 15.

189. *See* Harper, *supra* note 42, at 405.

190. Harper, *supra* note 42, at 414 (citing Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991)).

191. *Id.*

A derivative work is one that "recasts, transforms, or adapts the original" and presents it in a new way.[192] While mashups may be permissible under this definition, it appears clear that the right to produce a derivative work remains with the copyright holder, and absent this authorization, mashups would then again be infringing.[193] Even if the work be transformative (changing the original work's purpose), the artist transforming the work would still need to obtain authority from the copyright holder.[194] Therefore, mashups would not be entitled to copyright protection because they use copyrighted material without proper consent of the original creators.[195]

Could mashup artists therefore, validly invoke *de minimis* use and fair use? Apparently, they cannot. As mashup artists generally copy and paste segments of a sound recording onto their work, without alteration, or with minimal editing, the *de minimis* defense would not apply, as the *Newton* ruling applies only to the musical composition.[196] "While it may be acceptable for a band to recreate the musical composition of a song with its own instruments, it is never permissible to simply copy and paste a copyrighted sound recording into a new song without proper authorization[.]"[197]

Harper further argues that a fair use defense would not apply to artists like Girl Talk. For one, mashup artists would be hard pressed to defend that their works are purely a form of social commentary.[198] Mashup artists do not simply sample music to criticize or comment on them. In fact, they arrange samples in order to create a seamless melody that listeners will enjoy, and allow users to identify popular hits spawned over the radio.[199] The goal, as earlier discussed, is to try and blend oil and water together — combine rock with pop, jazz with heavy metal, or punk rock with rhythm and blues. In doing so, mashup artists will inevitably combine Top 40 hits requiring authorization from various copyright holders.[200]

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192. *Id.* at 416 (citing Castle Rock Entertainment v. Carol Publishing Group, Inc., 955 F. Supp. 260, 268 (S.D.N.Y. 1997) (U.S.)).

193. *Id.*

194. *Id.*

195. *Id.* at 417.

196. Harper, *supra* note 42, at 420.

197. *Id.* (citing 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, 646 (2010)).

198. *Id.* at 423.

199. *Id.*

200. *Id.*

What could probably save the day for mashups is the fact that most artists do not create them for profit.[201] Mashups are mostly the product of music hobbyists, who have other reasons other than economic interests — "paying tribute to one's favorite artists, educating, [ ] introducing listeners to new music, or simply responding to popular demand."[202] But as Harper suggests, this reasoning could be a stretch. Not all artists have these sole motivations. Artists like Girl Talk release their works through independent labels and gain future employment, like getting invited to music clubs and festivals to showcase their talent.[203] Should indirect economic benefits be realized by these artists, Harper argues that such could preclude a finding of fair use.[204]

B. Possible Defenses against Infringement

According to Lae, certain policy arguments may favor mashups as protected under the concept of fair use.[205] Lae recognizes the fact that most mashup artists simply do not have the financial and technical means to pay licensing fees to the copyright holders.[206] As many of these holders are multinational record labels such as EMI, Sony Music, and Universal MCA records, mashup artists will find it hard to communicate and negotiate with these companies to obtain the rights to use the songs they sample. Preclusion of fair use as an affirmative defense will mean that mashups will be in danger of withering into an underground musical activity. With the proverbial Damocles' sword hanging over their heads, mashup artists may find it difficult to seek legitimate commercial recognition because of the sheer costs associated with publishing them legally.

Interestingly, Arewa has highlighted advocacies for a *Newton*-based *de minimis* rule, where "a fixed amount of a sound recording, say, seven notes or less would count as a non-infringing use."[207] The problem however, is that a seven-note limit would mean artists could "be shut out of potentially creative copying, while others' use would result in rights holders getting

201. *Id.* at 426.

202. Harper, *supra* note 42, at 427 (citing Graham Reynolds, A Stroke of Genius or Copyright Infringement? Mashups Copyright and Moral Rights in Canada, *available at* http://www.law.ed.ac.uk/ahrc/script-ed/vol6-3/reynolds.asp (last accessed Feb. 28, 2013)).

203. *Id.*

204. *Id.* at 428.

205. Lae, *supra* note 8, at 52.

206. *Id.*

207. Ashtar, *supra* note 56, at 316 (citing Tim Wu, Jay-Z Versus the Sample Troll: The Shady One-Man Corporation That's Destroyin Hip-Hop, *available at* http://www.slate.com/articles/arts/culturebox/2006/11/jayz_versus_the_sample_troll.html (last accessed Feb. 28, 2013)).

nothing."[208] The result would be as dysfunctional as the *Bridgeport* bright-line rule.[209] Even if mashup artists like Girl Talk are capable of making wonders with even less than seven notes, artists would be hard pressed to maintain such uniform sampling in order to remain above the law. Mashup albums like Danger Mouse's "Grey Album" would not thrive under such a policy.

On the other hand, the original recording artist can miss out on his due — the recognition and attribution associated with intellectual creation. To the artist, every beat, note, or phrase is carefully constructed to compose the overall song, just as a weaver sees every thread as essential to creating a pattern. Naturally, an artist would seek recognition for the use of even a minute portion of his composition, just as an author would require attribution for even the simplest of phrases lifted from his manuscript.

Nevertheless, Lae is of the view that mashups could be perceived as a "continuation of the culture of musical borrowing" — a technique that Tough notes, "has been used by jazz composers for decades and composers of classical music for centuries[.]"[210] Citing Osteen, Lae observes that "many jazz classics have actually been created by composing a new melody to the pre-existing chord progression of a famous evergreen."[211] In fact, Arewa notes that even the most highly-regarded composers of classical music heavily improvised and borrowed from other composers.[212] In this light, mashups could be viewed as in line with the reality of musical composition — entitling them to protection.[213] As Maciak further notes,

> [c]reative process is less about originality, but about taking the existing building blocks and arranging them in interesting ways. Similarly, we judge art, music[,] and literature not on how original it is but rather whether it conveys a poignant message, provokes a reaction[,] or evokes an emotional response. No one really cares that the individual components are not original as long as the end product offers something more than merely the sum of [its] parts. Borrowing, referencing, adapting[,] and outright emulation are all fair game. They have always been.[214]

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208. *Id.*

209. *Id.*

210. Lae, *supra* note 8, at 54 (Tough, *supra* note 40, at 205.).

211. *Id.* (citing Mark Osteen, *Rhythm Changes: Contrafacts, Copyright and Jazz Modernism*, *in* MODERNISM AND COPYRIGHT 89 (Saint-Armour ed. 2011)).

212. *Id.*

213. *Id.*

214. Luke Maciak, Copyright law in the age of remix mashups, *available at* http://www.terminally-incoherent.com/blog/2009/11/03/copyright-law-in-the-age-of-remix-mashups/ (last accessed Feb. 28, 2013).

VIII. CONCLUSION

It has been said that law is "suspicious of innovation, discontinuities, 'paradigm shifts' and the energy and brashness of youth."[215] Such attitudes are "obstacles to anyone who wants to re-orient law in a more pragmatic direction."[216] This is most evident in the rise of digital music and user-generated content, where users, and not the composers, are now eagerly determining the terms for which they use, control and enjoy music. Digital technology and the boundary-breaking power of the Internet have challenged conventional notions of copyright, prompting the music industry to constantly reinvent itself and re-orient its stance on protecting the property rights of its artists and record labels.

In this dynamic environment, law must adapt to accommodate the rise of non-traditional genres such as mashups, which regard copyrightable songs as the key ingredient in the creation of new forms of musical expression. On the one hand, artists and labels should not drown in the clamor for free, editable, and transformative music, lest they lose their incentive to seek rewards in the form of royalties from the sale and authorized use of their work. But on the other hand, creativity and musical innovation should not be stifled by a regime that requires digital artists to keep coughing up money for expensive licensing fees to sample snippets of popular music, at pain of being branded as criminals, thieves and infringers.

This Note has explored the intricacies surrounding mashups and copyright law, and concludes that it is high time for law and policy makers to undertake the delicate task of achieving a balance between the two competing interests. Whether it be in the form of designing a licensing scheme that mashup artists will be able to easily cope with, or in the form of defining clear yet flexible standards for fair use of an artist's musical composition or sound recordings, copyright law must evolve to accommodate this emerging form of art.

Mashups are here to stay, and while they should not be subdued, neither should they be allowed to strangle creativity. For in doing so, we could come one step closer to achieving the goals of copyright — promoting the free exchange of ideas in an environment where artists are encouraged to conquer their creative limits.

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215. Cruz v. Secretary of Environment and Natural Resources, 347 SCRA 128, 162-63 (2000) (J. Puno, separate opinion) (citing Judge Richard Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 573 (2000)).

216. *Id.*